CLASSIFIED

MGID

[redacted]

SEMI ACTIVE

TITLE—TITRE:

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

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

[redacted]

Retention period-Période de retention:

20Y (5A-I5D/J)

DEPARTMENT OF EXTERNAL AFFAIRS

MINISTÈRE DES AFFAIRES EXTÉRIEURES

LUBICON LAKE BAND GRIEVANCES

ISSUE	BAND CLAIM	FULTON POSITION*	ALBERTA POSITION TO DATE	FEDERAL OFFE..
1. Entitlement to a reserve				
a) 1940 reserve	. 25.4 sq miles . Full mineral rights	. Supports claim	. Supports claim but: - Band must drop suit - 3rd party interests to be resolved . Land to be provided at no cost	. Supports claim - not conditional on dropping suit - 3rd party interests to be resolved
b) additional land	. 40-50 sq. miles . 128 a/person x current band population (350-400) . Mineral rights	. Supports band claim subject to verification of valid band pop. . Questions validity of band pop. claims . Mineral rights	. Admits no legal liability to provide further land . Additional land may be available at fair market value	. offer based on 196 Indians presently registered with the Band . Canada has some flexibility on quantum of land . Mineral rights
2. Wildlife and Environmental Protection	. Management authority over traditional area	. Supports Band involvement in management within a framework acknowledging the interests of other parties	. Does not accept Band authority as aboriginal right . Willing to discuss Band involvement as a policy matter	. Concurs with Alberta position . Area of prov. jurisdiction

* Mr. Fulton has not issued formal recommendations. The positions outlined here are based on material contained in the Discussion Paper written by Mr. Fulton as well as discussions with him.

ISSUE	BAND CLAIM	FULTON POSITION*	ALBERTA POSITION TO DATE	FEDERAL OFFER
3. Employment opportunities and job training	. Comprehensive program of job training and preferential hiring	. Supports provincial/federal action to promote Band employment & training	. Prepared to discuss application of existing programs to assist Band	. Primarily provincial responsibility . Appropriate federal programs to be coordinated with prov. programs
4. Compensation for past losses on 25.4 sq. miles				
(i) Oil & gas	. Compensation for all oil & gas revenues received by Alberta	. Supports claim . Suggest Canada should pay because of failure to estb. reserve	. Does not accept liability	. Supports compensation in principle . Responsibility for payment to be negotiated between Canada and Alberta
(ii) Treaty Benefits	. Compensation for lost benefits (e.g. agricultural implements & livestock	. Supports claim	. Federal responsibility	. Supports reasonable compensation consistent with similar past claims
(iii) Programs and Services	. Compensation for all programs and services lost since 1899	. Supports subject to verification of real net loss incurred	. Federal responsibility	. Possible compensation for net loss since 1948 . To be considered in conjunction with "catch-up" program
5. Compensation for past losses on "traditional area"				
(i) Trapping & Hunting	. Compensation for loss resulting from disruption of traditional pursuits	. Questions validity of title as a basis of claim	. Rejects aboriginal title as basis of claim	. Rejects aboriginal title
	. Claim based on unextinguished title	. Supports appropriate compensation as a remedial measure	. Will consider compensation to assist trappers	. Supports application of provincial programs.

ISSUE	BAND CLAIM	FULTON POSITION*	ALBERTA POSITION TO DATE	FEDERAL OF
(ii) Oil & Gas	. Claims all oil & gas revenue derived from traditional area based on unextinguished aboriginaal title	. Questions validity of title as a basis of claim	. Rejects aboriginal title claim . No compensation due	. Supports Alberta position
6. Compensation for future losses in the traditional area				
(i) Hunting & Fishing	. Compensation for future losses resulting from development . Based on title claim	. Questions validity of title argument	. No claim based on title . Existing compensation programs to be applied	. No claim based on title . And will control access to future reserve lands
.....	.....	.....	.....	.....
(ii) Oil & Gas revenues	. All future revenues from traditional area unextinguished based on title	. Questions validity of title argument	. No claim based on title	. No claim based on title
7. Compensation for Band costs to date	. All costs incurred in pursuing claim	. Supports reasonable compensation	. Assumes no liability	. $1.5M ex gratia payment (January 8, 1986) . Will consider other costs as part of negotiations
8. Catch-up program	. Comprehensive program to establish community programs and facilities comparable to other bands	. Supports in principle	. Federal responsibility	. Full services and infrastructural to be provided over reasonable period
9. Self-government & membership	. Right to self-government & control over membership	. Supports	. Federal responsibility	. Band eligible under existing policies & legislation

LUBICON LAKE INDIAN BAND - INQUIRY

DISCUSSION PAPER

Introduction

This Discussion Paper has been prepared in accordance with Item 10 of the agreed Schedule for this Inquiry.

Attached hereto immediately following this Introduction is an Index in the form of a chart showing how the subject matter has been organized under various Heads of Claim. These Heads reflect the "Points For Discussion" put forward by the Band for the purpose of a meeting with the Minister on November 26, 1984, although not necessarily in the order therein appearing. These points or claims have served as the agenda for discussions and meetings with the parties and their representatives to date.

As shown on the Index-Chart, each Head of Claim (or sub-head) is followed successively by sections which set out respectively the positions of the Band, of Canada, and of Alberta with respect to that claim; then by a section which endeavors to identify the interests of any Third Parties who may be involved or affected, with a brief statement of the positions of those Third Parties; and finally by a "Remarks" section. The contents of the "Position" sections contain a summary of the positions of the respective parties as I so far understand them to be on the basis of my discussions with them and their representatives to this date. The same is true with respect to the sections setting out the interests of Third Parties. In the "Remarks" sections I have endeavored to summarize the areas where there appears to be agreement or disagreement and, in the case of the latter, to suggest possible areas of accommodation or methods of reconciliation where discussions to date, or further reflection, have suggested such possibility.

The material which follows thereafter reflects this organization Index-Chart, which also shows the number of the page on which each of the sections commences.

INDEX CHART

	Claim	Band's Position	Position of Canada	Position of Alberta	Third Party Interests	Remarks - Including Areas of Possible Reconciliation or Accommodation
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8.	CATCH-UP DEVELOPMENT AND SOCIAL BENEFIT PROGRAMS					
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CONCLUSION (page 87)

Claim - 1. ENTITLEMENT TO RESERVE

Band's Position

The Band should receive a Reserve at the Western end of Lubicon Lake to include the site agreed on in 1940, to consist of a total area calculated on a basis which would render to the Band no less than the allotment calculated in accordance with Treat 8 based on a membership of at least 347 (as determined by joint Band-ONC Genealogical study). Historically, the basis of entitlement is numbers properly eligible for membership at the date of survey. On this basis the total number to be counted to establish actual entitlement according to today's criteria for eligibility is in excess of 400. This would entitle them to an area at least twice, and probably three times, as large as the 25.4 sq. mi. set aside in 1940; the Band claims that this extra area should adjoin the 25.4 sq. mi. at the south-west end of Lubicon Lake and extend thence easterly along the south shore of the lake. Also, two non-contiguous areas are sought as recognized Band lands. These lands are the site of residences of Band members and of cemeteries of Band forebears, and consist of areas of approximately one square mile each on the eastern shores of Bison and Haig Lakes.

As to the interests of others in the surface of the area claimed, or sought, as Reserve land, the position of the Band is that:

(a) they are prepared to recognize and confirm such small holdings as may be within the Reserve area, including the 160 acre homestead applied for by Mr. L'Hirondelle, and present Oil and Gas Company access and other surface holdings;

(b) the Sawan and Calihaisen leases are not within the area claimed or sought, and are not challenged; nor is the Little Buffalo Hamlet challenged;

(c) the area to the South and East of Lubicon Lake in which the Band is interested as the extra area to be included beyond the agreed 25.4 sq. mi., does not to their knowledge include any other surface holdings save possibly Oil and Gas Company rights as in category (a) above, which again are not challenged.

This leaves two known areas of contention. The first is the two large agricultural leases presently held by the Co-op, of which the present membership consists entirely of members of the L'Hirondelle family. The principal lease was issued in 1975 for a term of 25 years. The second matter is Grazing Lease 38048, which was renewed on April 1, 1985, and on which new developments have taken place since these matters were initially discussed. The Band's position is that this Lease should be dealt with in the same way as suggested below for the other Co-op leases.

Claim - 1. ENTITLEMENT TO RESERVE

Band's Position (cont'd.)

The Band's position is that these leases should be terminated on transfer of the land to Canada as its Reserve, as the area in question will be required for the Band's own intended agricultural undertakings. The Band takes no position on whether compensation should be paid to the L'Hirondelles for this termination, except that it should not be in any way at the Band's expense. In support of its position the Band emphasizes that when the leases were first entered into, and also when renewed, it was known to the L'Hirondelles that they were situated entirely within the 25.4 sq. mi. claimed by the Band as its Reserve. The Band is opposed to the idea of leaving the leases undisturbed and extending the boundaries of the Reserve by a corresponding acreage, as the lease areas lie at the heart of the Band's traditional homeland and are so substantial and are so centrally located as to be an impediment to the cohesive and efficient operation of the Band's intended agricultural activities.

Position of Canada

The Band is entitled to a Reserve, which is to include the area at the western end of Lubicon Lake agreed to in 1940. The membership figure to be used to calculate the total area is to be the figure at date of survey - i.e. the present number. The starting figure for this purpose is 182 (present registered membership) to be increased to a number between 250 - 300 if the criteria as to eligibility for membership in the Indian Act prior to the 1985 changes ("the old Act") are applied, or between 350 - 400 if the provisions of the new Act are applied. Canada will in due course put forward a firm number with the formal request for transfer of the land accordingly, and make available to Alberta the material on which this figure is based, although this material may not include the Joint Genealogical Study unless the Band consents. As to the location of the extra area involved, Canada supports the Band's position.

Canada has not as yet indicated any official position with regard to termination or otherwise of the agricultural leases, but neither has it specifically opposed the suggestion for termination and adequate compensation.

Claim - 1. ENTITLEMENT TO RESERVE

Position of Alberta

Subject to reservations as to protection of existing interests of third parties, Alberta raises no objection to location, or to entitlement in principle. Subject thereto, Alberta remains ready to honour the commitment of 1940, and to transfer the 25.4 sq. mi. at the western end of Lubicon Lake as agreed in 1940 - which was on the basis of a Band membership of 127. Alberta awaits receipt of a validated claim and request for transfer from Canada accordingly; but if the claim and request put forward is based on a figure of Band membership in excess of 127, Alberta reserves the right to challenge that figure and the entire basis of calculation, including the calculation of 127 in 1940. Alberta claims to have information which shows that the number entitled to be counted in 1940 was considerably less than 127, and that the numbers so entitled today are very much lower than the figures put forward by the Band and discussed by Canada.

Third Party Interests

The Metis Association, through its leader, Mr. Sam Sinclair, has stated that it supports the Band's claim to a Reserve in the area, provided that the rights of all Native people are acknowledged and protected. It appears that there will be no conflict in respect of the areas discussed, with the exception of the agricultural leases.

Chester L'Hirondelle, speaking for himself and the 10 members of his family who are the present and only members of the Co-op (which is the actual holder of the agricultural leases in question) is opposed to the idea of their receiving compensation and having to move elsewhere to carry on their livelihood. He said it would be more sensible for their leases to be left undisturbed, and for the boundaries of the Reserve to be adjusted to take in an equivalent additional acreage. He spoke of the active pursuit of the land claim as being a comparatively recent development, which would put it as a matter revived only after the agricultural leases were first taken out. His position is, in effect, that the agricultural leases were granted when the claim to a Reserve was entirely in abeyance, and that in fact the Band had knowledge of the existence of the leases when they revived this claim.

Claim - 1. ENTITLEMENT TO RESERVE

Third party Interests (cont'd.)

As to the suggestion that a possible solution might be for the leases to remain in the name of the Co-op, but membership in the Co-op be fully opened to members of the Band, so that the original position might be restored and the agricultural activities be pursued as a truly joint venture, Mr. L'Hirondelle was entirely non-committal. He said only that the present Board of Directors of the Co-op would have to decide on any application for membership.

The Oil and Gas Companies concerned expect to have their present interests, including the location of and rights of access to installations and works, protected in any arrangement made for the setting up of the Reserve, whatever may be its size or boundaries. This does not conflict with the Band's position.

Remarks - Including Areas of Possible Reconciliation or Accommodation

There appears to be general agreement that the Reserve should be located at the western end of Lubicon Lake. Alberta is prepared to agree to the setting aside of the 25.4 sq. mi. previously agreed, subject to its reservation as to disputing the actual area if other numbers are to be put forward. The Band and Canada are in agreement as to the location of any additional area, extending easterly along the south shore of Lubicon Lake; Alberta has not opposed this location if the Band is in fact found to be entitled to a larger area for its Reserve.

The question of the membership number to be used as the basis of calculation of the size of the Reserve remains, unfortunately, an area in which little progress towards reconciliation of the conflicting views has been made. The difficulty has been compounded by the refusal of the Band, at least up to this point, to allow the joint genealogical study (which it claims supports the figure of 347 members on the basis of the old Act) to be made available for study at a meeting at which the genealogical experts of the Band and the two Governments would have available both that report and the studies done by Alberta. It had been my hope that such a meeting, and the comparative analysis of the two sets

Claim - 1. ENTITLEMENT TO RESERVE

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

of studies by the experts of all concerned, would produce some common ground as to a starting figure.

The difficulty is not lessened by Alberta's insistence - at least until this point - that if any membership figure in excess of the 127 agreed to in 1940 is to be used in the request formally put forward by Canada, it will attack that figure even as a starting point for today's solution of the problem. It had been my hope that Alberta would find, in my suggestion that compensation be paid for any excess in area asked for in 1985 over that agreed on in 1940, a reasonable basis for agreeing on the figure of 127 as the minimum starting point for today's discussions, without the need of going with a fine-tooth comb over what could surely be regarded as an accepted historical fact.

It is still my earnest hope that accommodation - or reconciliation of conflicting views - can be found on this basis. I fully appreciate Alberta's concern at being asked today to agree to the transfer of a substantially larger area of land than that agreed to in 1940, which land has a value today far in excess of what was known in 1940, let alone contemplated in 1930 when the undertaking to re-convey lands to enable Canada to meet its treaty obligations to the Indians was first entered into. However there is no question in my mind that Canada's obligation to the Band exists, was recognized in 1940 and that it was then agreed by both Governments that a Reserve based on a membership of 127 would be created at the western end of Lubicon Lake. The matter would have been disposed of, and the Band would be settled thereon and enjoying all the benefits and revenues therefrom if that agreement had been carried out.

The fact that it was not is, on the basis of all the evidence I have seen, entirely the responsibility of Canada. Clearly Alberta remained ready for many years to carry out its obligation under that agreement and the Resources Transfer Agreement, and only changed its position after giving more than adequate notice, in light of Canada's apparent change of intent. In these circumstances, I see it as entirely the fault of Canada that the matter was not disposed of on the

Claim - 1. ENTITLEMENT TO RESERVE

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

basis of the agreement of 1940, and that Alberta is faced today with a request for land in excess of that agreed to then. Hence in my view it is only equitable that Canada should compensate Alberta for the difference, and I have suggested to the representatives of the two Governments that the matter be settled on this basis.

It appears to be equally clear, however, that Canada's obligation to the Band as of today is to provide a Reserve on the basis of today's Band membership. There is ample precedent that the entitlement is as of the time of survey, so that 1986 is the effective date. If this be accepted, it follows that Alberta's obligation under the Transfer Agreement is to re-convey (set aside) that amount of land which will enable Canada to discharge that obligation. If the suggestion I have made be accepted, then the inequity to Alberta occasioned by Canada's non-fulfillment of the earlier agreement will be compensated for. Such compensation should of course be on the basis of today's values. I very much hope that the representatives of the two Governments will find it possible to agree on this as a fundamental basis for the settlement of this particular case.

If this be accepted as a sound base, then it would seem that agreement on the population base should not be such a formidable obstacle. Certain fundamental considerations are suggested in the hope that they will be of help. First, it is traditionally Canada's exclusive responsibility to determine and maintain the register of Indian population, and Band membership lists. Second, it is certainly not in Canada's interest to inflate those figures, having in mind generally the costs of its on-going responsibility to Indian Bands, and particularly in this case if the suggestion be accepted that Canada compensate Alberta for the extra land based on the difference between today's figure and the 1940 figure. Hence it follows that there is a strong case that there should be no attempt to go behind the 1940 figure of 127 members - this particularly so since there is the evidence that Alberta for many years following 1940 accepted and acted on that figure as the basis for the area of land it would have been willing to set aside. Indeed, on the

Claim - 1. ENTITLEMENT TO RESERVE

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

basis of those two fundamental considerations there is a strong case that the figure of 182 members - the Band list of 1985 prior to the new Act - should be accepted as the starting point, and the efforts at reconciliation be confined to figures put forward beyond that. (It should be clear, however, that the figure of 127 would remain as the base for measuring compensation to Alberta for land in excess of that agreed to in 1940.)

There has also been discussion of the matter of the time frame which should be chosen to determine what are the rules to be applied in calculating the numbers eligible to be counted today as Band members for the purpose of fixing the entitlement. Should it be 1930, when the Resources Transfer Agreement was signed? Or 1940, when it was first agreed that the Band should have a Reserve and Alberta agreed to set aside the land for that purpose? Or the present, when Canada and Alberta are again agreed upon the obligation to provide a reserve for the Band but so far unable to agree upon the number or the criteria for determining it?

The problem is, of course, that the criteria for determining Indian status, which bears directly on eligibility and therefore on Band membership, have been changed several times since 1930. Again traditionally, however, it has been the current population figures at the time of survey which have been used to calculate reserve land entitlement. On this basis, it would be the Band membership list established in accordance with the new (1985) Indian Act which would be used to determine the size of the Reserve. My present understanding is that the criteria or rules for determining Indian status, and hence affecting eligibility for Band membership, are not substantially different as between those contained in this Act and those in force in 1940: that what has happened is that restrictive changes were introduced in 1951 but have now been effectively repealed. More precise information and analysis is needed - and is awaited from Canada - on this point. If this be correct, however, there would seem to be no basic inequity to Alberta in applying the 1985 criteria to determine actual membership as the basis of today's entitlement, having in mind in this regard

Claim - 1. ENTITLEMENT TO RESERVE
Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

the suggestion that Alberta be compensated for any increase in the validated numbers over the 1940 figure.

I feel I should record at this stage, however, my present feeling that there would be an inequity - almost an impropriety - if the number were to be inflated by the inclusion therein of persons who, while perhaps technically qualified for membership, have not demonstrated a desire to be, or of whom it cannot be demonstrated that in historical fact they ought to be, counted as members of this Band. Thus with respect to persons of whom it is now claimed by the Band that they should be counted, and who may in fact be found to be eligible for membership, but who are now registered as members of other bands or are not, by residence or otherwise, readily identifiable as members of the Lubicon Band community: it seems to me that before they should be included in a membership count for this purpose they should be required to indicate, by declaration or similar method, a definite desire and intention to live as part of the Lubicon Band on the Reserve to be established for them.

As to the method by which the number eligible to be counted for this purpose is to be determined, the Band still refuses authorization for the joint Band-ONC genealogical study and report to be made available for study by experts from Alberta who have carried out studies and made reports on the same matter. I had envisaged that each of those reports would be made available for study and analysis and discussion between both sets of experts, after which I would meet with both groups of experts together and hear and discuss their opinions and conclusions. On this basis, to the extent that I was not able to reconcile their remaining differences, I would have been in a position to reach an informed opinion as to the number to be counted for this purpose and make appropriate comments in this Discussion Paper, which might lead to a further reconciliation.

The Band's withholding of consent still represents a substantial obstacle to direct progress, necessitating a considerable detour. The best alternative route I have been able to lay out and follow so far has been a meeting of the two sets of

Claim - 1. ENTITLEMENT TO RESERVE

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

experts at which, lacking authority to refer to specifics in support of particular conclusions, virtually no progress with respect to conclusions or agreement on numbers was possible. We were however finally able to reach agreement resulting in the production of a paper by the two sets of experts, in which each sets forth a summary of the principles and criteria regarded as applicable, and applied, in reaching the conclusion which each believes to be correct. While there are appreciable areas of common approach thus established, there are significant areas of difference.

In the result I am left with the formidable task not only of deciding which principles and criteria are the most acceptable where there are differences, but of applying them myself to the material available in order to reach a conclusion as to the appropriate number to be counted for the purpose of my report - or of further discussion prior thereto. Lacking expertise in this field, this would be for me a very lengthy, and possibly unwise, undertaking. I therefore intend to recommend to the Minister that I be authorized to retain the services of an independent genealogical expert to assist me in this process. I propose that the joint Band-ONC study and the studies prepared by Alberta experts, together with the paper referred to above, and any other material considered relevant, be made available to this expert, and that he be authorized to discuss them with the experts for the parties, all on the same without prejudice and confidential basis that characterizes all submissions and discussions in this Inquiry, and that he then report to me with his analysis and recommendation as to the correct Band membership number to be used for the purpose of calculating the entitlement to reserve.

I must point out also that at this stage I am still awaiting the submission of a definite figure from the representatives of Canada which they consider is the one that should be used as the basis of calculating entitlement. In the absence of such a figure it has really not been possible to carry on very concrete discussions on this question. I should like to receive that figure at an early date, not only because it would be relevant for the discussion lastly referred to, but

Claim - 1. ENTITLEMENT TO RESERVE

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

because it would be essential to further the alternative settlement concept which I now put forward for consideration.

This concept constitutes an alternative approach to the matter of compensation to Alberta for extra land asked for beyond that agreed upon in 1940, which would provide a way around the present impasse created by conflicting views as to strict legal obligations and duties, while not doing any violence to those concepts.

This would be for the parties to agree now that the 1940 figure be accepted as a minimum starting point, but that on the basis of traditional practice that the Band list at time of survey be used as the figure for calculating entitlement, the current actual Band list of 182 be accepted as the actual basis for entitlement. Applying what I have suggested is the equitable principle discussed above, Alberta would then be entitled to compensation for the difference between the area based on 127 and that based on 182. Canada would then offer to purchase from Alberta, and Alberta would agree to sell to Canada, the further amount of land necessary to provide the Reserve for the full number which may be found, or agreed, to be the number entitled to be counted as members of the Band on the basis of the now current criteria for membership. The price per acre or square mile to be paid for this extra land would be the same as that fixed for compensation for the extra land involved in the differential between the area based on the membership figures of 127 and 182 referred to above.

This arrangement has the benefit to Canada and the Band that it provides the Reserve for the full community which the Band claims and which Canada accepts as its obligation to provide. At the same time it recognizes that it would be inequitable either that Alberta should be penalized for the delay in fulfilling the agreement of 1940 (for which Alberta was in no way responsible) or that Alberta should be called upon to bear the entire burden of providing extra land as a matter of legal obligation when the formula for determining the entitlement to that land, and hence the extent of the demand, has been unilaterally changed by Canada by legisla-

Claim - 1. ENTITLEMENT TO RESERVE

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

tion at the very time when these discussions were going forward. Neither, however, does it constitute a complete waiver by Canada of Alberta's obligation under the Resources Transfer Agreement to Canada's possible future prejudice, since that obligation would be recognized in Alberta's agreement to transfer the land to fulfill the request based on a present actual membership list of 182 - the traditional obligation - although with compensation based on the unique feature of this situation, the non-fulfillment by Canada of the Agreement of 1940.

For Alberta, the benefits are that it creates no precedent by way of recognition of a legal obligation beyond the traditional one of setting aside land under the Resources Transfer Agreement to the extent determined by current Band lists. And with respect to the possibility that Alberta might be said to have waived a right to require a validated claim, the answer would be that so far as land up to the total based on the figure of 182 is concerned, the figure of 127 was accepted as valid in 1940 and Alberta has been compensated for the difference because of Canada's delay: hence this affords no precedent for dealing with cases where a totally new request is made. Neither could this, nor the request to sell the further land based on the figure in excess of 182, be said to be a precedent for a waiver of the "counted once" rule: for the fact would be that the figure put forward and accepted as the basis for settlement would have been arrived at as the result of a special agreement arrived at on the basis of the particular circumstances of this special case.

Indeed it is difficult to see how a formula, or a method of procedure, for resolving this particular case could in any event be cited or regarded as a precedent in any other case. For the unique features of this case, crying as they do for the implementation of promises made 45 years ago on a basis that will do justice and equity to that community in this day 45 years later, create a unique problem, the solution of which cannot really form a precedent for the solution of any case which only arises for the first time in the future. The representatives of Alberta have in fact taken the position

Claim - 1. ENTITLEMENT TO RESERVE
Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

in discussion with me that Alberta is as concerned as anyone with the matter of social justice to this community: their understandable concern is that it should not be done, insofar as the actions required exceed Alberta's strictly provable legal obligation, at Alberta's sole cost and expense, especially if that may form a precedent for cases which may arise in future. My belief is that the approach suggested above contains the answer to these concerns.

And of course it is also a fact that the acceptance of this approach will have the advantage to all parties that it will lead to what I believe will be a just and equitable, and relatively speedy, solution to the problem of the Band's entitlement to a reserve which is basic to the whole area of the Band's claims before me in this Inquiry. It is my impression that if such a solution is reached, it will represent a long step towards acommodation and solution of other parts of the claims as well. It is my earnest hope that all concerned will consider this approach with all of the above factors in mind.

As to Third Party interests, the main problem is clearly the agricultural leases held by the Co-op. I can see little profit at this stage in rehearsing the history of membership in that entity, or the question of whether any subtle plot or intent underlay the changes in membership over the years. The historic fact is that the membership which initially included a number of Band members now consists entirely of members of the L'Hirondelle family. But it is also a fact that the L'Hirondelle family have roots in the area going back to at least 1913, and that of late years it has been the members of that family exclusively who have organized and carried on the farming and ranching operation of the Co-op, on which they are largely dependent for their livelihood.

There are thus two conflicting positions or interests - both of them legitimate - which are extremely difficult to reconcile. On the one hand is the position and interest of the Band, who have an unquestioned legitimate claim or right, fulfillment of which was promised to them 45 years ago -

Claim - 1. ENTITLEMENT TO RESERVE

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

that is, to have a Reserve at the western end of Lubicon Lake. This includes, of course, the right to carry on agricultural pursuits there, which are in fact of increased and increasing importance to them now that their traditional livelihood from hunting and trapping is so seriously diminished. The continuance in the hands of others of these agricultural leases, located so centrally and strategically as they are, would be a continuing serious and thorny obstacle to the fulfillment of this right.

On the other hand is the position of the L'Hirondelle family, who have been in the area for over 70 years, whose industry and ability in carrying on the operations based on those leases is not questioned, and who have a lawful and legitimate interest as members of the Co-op in maintaining those leases and the livelihood they derive therefrom. Discussions with Mr. Enns, reported to me, do not support the suggestion that the transformation of membership in the Co-op from a situation of full participation by Band members to one of exclusive membership of the L'Hirondelle family was entirely the result of plan or design by that family: rather that it was a combination of circumstances including both the Band's growing opposition to participation in anything which would recognize the right of Alberta to dispose of the land in question - as the granting and continuance of the Co-op leases might suggest - and the continuing activity and interest of Band members in hunting and trapping, which took them away from the scene of the Co-op's activities at crucial times.

The facts are that the positions and interests of both parties in this situation are legitimate but appear to be irreconcilable. In such circumstances the answer to the question of which should yield and which should prevail is generally regarded as depending on the answers to certain other questions or tests. Those are: where lies the precedence or priority in point of time between the conflicting claims or interests? and where lies the balance of convenience and necessity?

Claim - 1. ENTITLEMENT TO RESERVE

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

As to the first, the answer must be in favour of the Band. Its claim to a Reserve as of right was first put forward in 1933, and was recognized and accepted in 1940 as being the 25.4 sq. mi. at the western end of Lubicon Lake. This of course is an interest which is similar in many ways to a fee simple and, while affirmative action was withheld by Canada, neither Canada nor Alberta have ever denied the right, and the claim or interest has never been abandoned or withdrawn by the Band; whereas the interest of the L'Hirondelles is in the continuance of a leasehold interest only which was first granted to the Co-op in 1975, with knowledge of the subsisting claim and interest of the Band. As to convenience and necessity, the balance would again be seen to be in favour of the Band, not only in terms of the numbers of persons interested and affected, but also in terms of continuing hardship and inconvenience if the leases are not terminated.

For while it is true that the loss of physical area could be compensated for by an equivalent enlargement of the boundaries of the Reserve, the fact is that the actual lease areas are, by their size and location, strategically essential to the pursuit of a successful agricultural operation within the Reserve. Their continuance as an alien operation in the centre or heartland of the Reserve would be not only a continuing physical but also a psychological impediment of the sort for which really no compensation can be devised. Whereas the information I have received is that an equivalent area of unoccupied land of comparable quality can be found, and could be made available to the L'Hirondelles, in territory immediately adjacent to what would be the boundaries of the Reserve. Since the Band is prepared to agree to the grant of the 160 acre homestead applied for by the L'Hirondelles (although within the Reserve boundaries) this would mean that that family could carry on its agricultural operations from its home site in an area in reasonable proximity thereto. If this were done, then of course a reasonable time should be given to enable them to effect the transfer.

The question of compensation would also have to be addressed. There is no doubt that the effect of this arrangement would

Claim - 1. ENTITLEMENT TO RESERVE

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

be the equivalent of an expropriation, and although it accords with the principles of precedence and balance of convenience and necessity, the application of those principles also invokes the equitable principle of compensation to minimize, so far as possible, the hurt resulting to the party called upon to make the surrender of its interests. The measure of the damages includes not only the value of the interest thus surrendered, but also the cost of placing that party as nearly as possible in the equivalent position to that which he enjoyed before the taking. That would include, in this case, any actual cost of transfer plus the cost of breaking the soil, fencing, etc., to put the new holding in an equivalent position to that of the old, and also any loss of income received or extra expense incurred (purchase of feed, etc.) during such period as may be required to bring the new land into production. These last two items could perhaps be eliminated, or reduced, if the L'Hirondelles were allowed the continued use of the present lease areas during the time required to do that.

There might also be a question with regard to access. If the L'Hirondelles are to continue to live where they do now, or if the base of operation is the 160 acre homestead under application (which will be within the boundaries of the Reserve) then it is to be anticipated that access will be required for the movement of both equipment and cattle between that location and the new lease area. This should not be a major problem, but it is one which should be addressed in the course of discussions which may follow.

I recommend accordingly that Mr. L'Hirondelle or his representative and the representatives of Canada and Alberta meet with me to consider the acceptance in principle, and discuss the application, of a solution to this problem along the lines outlined above. If it be so accepted, I would suggest that Mr. L'Hirondelle and representatives of Alberta meet as soon as may be thereafter to agree on the area which Alberta would make available by way of lease or leases to replace the existing leases. While I recognize that it has not yet been settled that the area of the Reserve will exceed the 25.4 sq. mi. previously agreed on, I recommend most strongly that

Claim - 1. ENTITLEMENT TO RESERVE

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

the area considered for this purpose not include any area which would be within the boundaries of that Reserve as it would be if extended easterly along the south shore of Lubicon Lake. Thereafter there should be further meetings to be arranged to work out the details to be embodied in my Report recommending the arrangements thus arrived at as the agreed course of action to settle this aspect of the Band's claims.

As to whose is to be the responsibility for payment of compensation on the basis discussed above, it appears to me clear in principle that Canada should bear at least the major portion of the cost, since Canada's is the main responsibility for the fact that the problem exists. Had Canada carried out its part of the agreement of 1940 within a reasonable time, the Reserve would have been established and this situation could not have arisen. This subject, however, including any considerations put forward which may suggest modification of this approach, will be fully covered in that portion of this Discussion Paper dealing specifically with the claim for compensation in all its aspects. What is important now is to explore actively the prospect of acceptance in principle of this suggestion for an equitable disposition of the matter in which the positions of the two parties most concerned have so far been irreconcilably opposed.

The Band is prepared, with some reluctance, to accept existing interests of Oil and Gas companies, including existing rights of access thereto, as these can be accomodated within the occupancy and use the Band would make of its Reserve. They do not wish, however, to be taken as agreeing in advance to any expansion of actual surface holdings or installations, even if provided for in terms of existing leases: they feel these should be a matter for consultation at the least. It is of course also noted and expected that lease and royalty payments therefor will accrue to the government of Canada for the benefit of the Band after the Reserve is set up.

Claim - 2. SUBSURFACE RIGHTS WITH RESERVE LANDS

Band's Position

The transfer by Alberta of the lands constituting the Reserve should convey full subsurface rights, including oil and gas. This should apply not only to the 25.4 sq. mi. agreed on in 1940, but also to such additional area as is to be included in the Reserve. It is not to be contemplated that the area set aside for the use and occupancy of the Band as its Reserve should consist of two classes of land - land with full mineral rights including oil and gas, and land without such rights. The Band is prepared to accept that the transfer of lands for its Reserve should recognize and protect existing interests of oil and gas companies therein, provided however that such interests are thereafter to be subject to the relevant provisions of the Indian Act and the Indian Oil and Gas Act so that the royalties, etc., shall be paid to Canada for the benefit of the Band. The details, including such matters as the necessary surrender by the Band to bring the lands within the operation of the relevant provisions of those Acts, have not been discussed and will require to be settled prior to transfer.

Position of Canada

Canada supports the Band's position, and I am not aware of any differences between them on this subject.

Position of Alberta

Alberta appears ready to agree that the transfer of the 25.4 sq. mi. area should include full mineral rights (subject to protection of existing interests therein) but has not shown such readiness with respect to any area beyond that. In discussion of mineral rights with respect to the 25.4 sq. mi., the expression used was that Alberta agrees in principle, on the basis that what would take place insofar as mineral rights are concerned would be "simply a change in landlords, with the new landlord respecting existing rights." There is no conflict between this position and the positions of the Band and of Canada.

With respect to any additional area, however, the position is not so clear. At our second meeting, when the matter of a possible approach to agreement on setting aside an addi-

Claim - 2. SUBSURFACE RIGHTS WITH RESERVE LANDS

Position of Alberta (cont'd.)

tional area was under discussion, it appeared that Alberta might consider the possibility of agreeing to a Reserve area on the basis of a membership figure of 182 (with compensation for the difference between that and the area based on 127) but that while Alberta may also be prepared to consider setting aside an area in excess of that on grounds of social justice, etc., this would be by way of a "land purchase", and that additional area would not have the status of "a full Indian Reserve". This of course closely parallels the suggestion made above as to the approach to resolve the differences as to the surface area to be included in the Reserve, although that suggestion does not contemplate different types of holdings. The matter was not elaborated at the meeting in question, but there may well be an inference that what Alberta so far contemplates is that mineral rights not be included with any area in excess of that based on a membership of 182.

Third Party Interests

The oil and gas companies expect that their rights to oil and gas under whatever lands may finally constitute the Reserve, including their rights to extract the same, be fully recognized and protected and be continued after the transfer to the same extent as they presently exist. There is no conflict between this position and that of the Band or of either government.

Remarks - Including Areas of Possible Reconciliation or Accommodation

It appears that there is positive agreement on the inclusion of subsurface rights with respect to the area of 25.4 sq. mi., and probable agreement with respect to the whole area based on membership of 182, but that possibly Alberta does not yet agree to the inclusion of such rights in the transfer of any area beyond that.

As to reconciliation of this conflict - if there be one - I venture to suggest that the considerations in support of the position of the Band and of Canada outweigh those in support of the position of Alberta, and should be accepted. There

Claim - 2. SUBSURFACE RIGHTS WITH RESERVE LANDS

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

is of course the consideration based on precedent. I do not suggest that this is conclusive, for we are not discussing here a rigid or legalistic approach but rather one based on goodwill and a desire to resolve conflicts while doing what is equitable in the circumstances: but considerable weight must surely be attributed - even in this context - to the fact that historically the lands set aside as Reserves for the benefit of Indians in the Treaty areas have never excluded, but always included, full mineral rights. It would surely put the Lubicon Lake Band in an anomalous position if it were to be the only one which had that resource excluded from a portion of the Reserve set aside for its use and benefit.

In the area of justice and equity, from the point of view of the Band there is the consideration that the entire area of the Reserve will be their homeland. If full subsurface rights are included the Band will have, as is desirable, control over what further rights for oil and gas exploration and development will be allowed thereon, for although the title would be vested in Canada such rights could only be granted with the Band's consent through the surrender process. But if subsurface rights are not included in the portion under discussion then the Band will not have any control over those matters with respect to that portion of its homeland - and it will be an appreciable portion of the whole. Or, at the very least, even if it be accepted that some consultative process be established, there would be divided jurisdiction which would be both a continuing and cumbersome inconvenience and incompatible with the whole concept of control by the Band over what takes place on its homeland. Added to which, of course, would be the loss of the right to the benefit of royalty revenues derived from such development, which would belong to the party retaining title.

From the point of view of equity to Alberta, there would be nothing inconsistent or anomalous in Alberta's relinquishing jurisdiction over subsurface rights here as compared to the situation with respect to lands set apart for the use and occupancy of Indians as their Reserve in any other case. And although it is suggested that the portion of land in

Claim - 2. SUBSURFACE RIGHTS WITH RESERVE LANDS

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

question be purchased as a compromise solution to the conflict with respect to strict legal rights and obligations, it is still surely not to be regarded as anything other than part of the area necessary to provide a Reserve to meet the recognized and legitimate needs of the Band. There would appear, then, to be no inherent violation of propriety or precedent with respect to jurisdiction if this transfer is also accompanied by full subsurface rights.

As to the other equitable consideration from Alberta's point of view - the loss of lease and royalty revenue - this is taken care of by the proposal that there be compensation by way of an agreement to purchase that portion of the Reserve which exceeds the area based on a membership figure of 182. The value of the land, whether for the purpose of compensation or of purchase price, would of course be fixed having regard to its potential for oil and gas production, so that Alberta would not suffer economically from inclusion of subsurface rights in the transfer of this portion.

There is however one modification in Alberta's favour which might be considered and found acceptable: that is the suggestion that Alberta be paid a portion (50% was the figure mentioned) of any lease and royalty revenues actually derived from this excess portion after the date of transfer. (If this were agreed, presumably there would be a proportionate reduction in the purchase price to be paid). The rationale behind this compromise would be recognition of the special nature of the settlement of which it would be a part: that is, a formula to assist the parties in coming to overall agreement on how to deal with a situation with respect to parts of which it is difficult or impossible to reach agreement in detail. It is not unusual for parties to adopt such compromises which afford a route around what is otherwise an impasse. It is my hope that consideration of these various suggestions may provide a means of reaching mutual accommodation.

Claim - 3. WILDLIFE MANAGEMENT AND ENVIRONMENTAL PROTECTION PROGRAMS

Band's Position

The Band asks, with respect to its traditional hunting and trapping area, that there be set up a wildlife management and environmental protection program in which they would have active participation and an effective voice. The object would be to ensure that the development and operation of oil and gas extraction are carried on with due regard for the Band's interests and rights with respect to the maintenance of wildlife in the area from which traditionally they have derived their livelihood, and not in virtual disregard thereof which they feel has been the case to date.

The Band rests its claim with respect to wildlife and environmental management rights on the same basis as all other claims - i.e. unextinguished Native Title. Hence it claims the right to control these matters in its traditional lands. Thus the Band envisages a new program which would combine support for those members who continue to pursue the traditional means of livelihood but find their income reduced as a result of development, with the exercise by the Band of control of such activities in its traditional area - a Trappers Support Program, rather than a Trappers Compensation Program.

It is not the Band's position that oil and gas development and extraction must cease, for they believe that rehabilitation and maintenance of wildlife to support a considerable trapping and hunting livelihood, and continuance of oil and gas operations, are compatible provided that the latter are planned and carried out with due regard for the former. Nor is it their position that the continuance of their hunting and trapping activities as the exclusive or main source of their livelihood would be required in perpetuity, for they recognize that future generations may well come to follow other lifestyles and occupations as they become increasingly aware thereof and receive the education and training necessary to enable them to do so. Rather their position is that they are entitled to have the basis of their traditional lifestyle and livelihood maintained so that such of their members as presently know no other may continue to follow it, and so that future generations of members may have a choice as to whether to follow it, rather than being bulldozed, as it were, into another lifestyle.

The Band accordingly asks for a commitment that there will be established a management program which

(a) recognizes and is based on the principle that the resources of the area will be so managed that development of the oil and gas - or any other particular resource - will be allowed to proceed only in a manner consistent with the continued

Claim - 3. WILDLIFE MANAGEMENT AND ENVIRONMENTAL PROTECTION PROGRAMS

Band's Position (cont'd.)

existence of sufficient stocks of wildlife as required to support the continuing rights and needs of the Band in respect of that resource;

(b) gives effect thereto by providing for the setting up of a management authority to administer the program so constituted that the Band will have an effective voice in making decisions which will ensure that this objective is maintained, including decisions governing such matters as the setting of levels at which stocks are to be maintained, the setting of limits and determination of persons who are to be permitted to hunt and trap in the area, and the resolution of conflicts between the maintenance of the desired level of wildlife and the activities or proposed activities of those engaged in the development and exploitation of other resources in the area.

Spokesmen for the Band have stated that they accept the necessity for self-discipline and are ready to be bound by limits applicable to themselves as well as others in order to achieve and maintain the fair and continuing balance of interests envisaged in this program. Thus they envisage specifically the probable necessity, in light of the low levels to which development has presently reduced wildlife in the area, of cutting back the numbers of furbearing animals to be taken by trapping for some years, until stocks are restored. It is their stated desire that the program should be set up and operated not in such a way as to disregard or submerge the interests of developers entirely in favour of those of the Band but rather so that, a balance between them having been set out in principle, the voice of the Band will be heard and will prevail in the resolution of differences, after discussion, as to how that balance should be applied and maintained.

The Band wants also, however, specifically to have that effective voice in the determination of such matters as what game management programs are to be initiated. For instance, they doubt whether the moose population could in fact be rehabilitated and maintained at a substantial or meaningful

Claim - 3. WILDLIFE MANAGEMENT AND ENVIRONMENTAL PROTECTION PROGRAMS

Band's Position (cont'd.)

level in the face of continuing active development and operation of oil and gas installations in this formerly wilderness area, but they believe there is an alternative species of big game animal which is not so sensitive to such activities and which could be introduced and, if an appropriate game farm program were developed, could be brought up to and maintained at a sufficiently high population level to provide once again a substantial portion of their livelihood, both as food and as hides for sale, as the moose formerly did. They envisage that they would have an effective voice and part in the introduction and operation of such particular management programs.

As to the interests of others in hunting and trapping in that area, the Band does not claim exclusive rights or privileges. Although they claim that theirs has historically always been, and still is, the predominant use of the area for these purposes, they recognize that other native peoples have carried on the same activities, though to a lesser degree, in some parts of the area. They are prepared to accept the continued exercise of such rights, and to speak and act for their protection and continuance in their role as participants in the design and implementation of the management program.

With respect to administration insofar as trapping is concerned, the Band asks that it have authority to determine which Band members are to have trapline licences. They also want it to be clear that the program be administered on the basis that if there is conflict, in the matter of granting trapping and hunting permits, between the native and non-native people, the conflict be resolved in favour of native applicants. They put this on the basis of the priority which is due to their interests in hunting and trapping in their traditional area which, they say, is the same whether the claim be founded on native title or on the guarantee in the treaty.

Without prejudice to the question of jurisdiction, or to its assertion that it has the right to a program which gives it control of these matters on the basis of continuing Native Title (or in the alternative on the basis of the Treaty provision) the Band is prepared to discuss with Alberta the

Claim - 3. WILDLIFE MANAGEMENT AND ENVIRONMENTAL PROTECTION PROGRAMS

Band's Position (cont'd.)

setting up of a joint Band-provincial program which will reflect and give effect to these objectives. It is emphasized, however, that there would have to be incorporated, in a joint or any other program, provisions which reflect the fact that support for the continued existence of trapping and hunting as a way of life and not merely compensation for losses resulting from unrestricted development activity is the governing principle of the program, and that the right of the Band to an effective voice in the determination of specific policies and in the resolution of disputes thereunder is a key element in the administration of the program. The Band emphasizes that it does not conceive this as a welfare program applicable to its members generally, but as a program designed to support and make possible the continued activities of those who do engage in and rely on that lifestyle as their livelihood.

The Band's basic position remains, whatever be the precise course of discussion or vehicle chosen to implement its rights, that by virtue of its continuing aboriginal title or on the alternative basis of the rights guaranteed to Indians in the Treaty, supported in either case by the guarantee now found in the Constitution, it has the right to protect and manage the wildlife in its traditional area and to a program, whether solely based on these foundations or erected in co-operation with the Province, which gives it the control and protection of its way of life.

Position of Canada

Representatives of Canada have not yet taken any position in detail, but have stated that they would support the Band in consultations with Alberta to ensure protection of the Band's interests and rights in respect of hunting and trapping in its traditional area, with Band involvement in a management program which recognizes and safeguards those interests.

Position of Alberta

Alberta does not accept that it has any specific obligation to the Band in this connection beyond what it owes to all

Albertans with respect to the management of resources and the protection of wildlife. Nevertheless Alberta does not deny the historic interest of the Band in hunting and trapping in this area, and its special concern for the restoration and preservation of wildlife stocks. Accordingly, Alberta is prepared to consider and discuss the setting up of a model management program which would take account of these concerns, with Band participation therein, provided that the Band is prepared to accept the need for and exercise self-discipline in this field and to respect the legitimate interests of others.

Claim - 3. WILDLIFE MANAGEMENT AND ENVIRONMENTAL PROTECTION PROGRAMS

Position of Alberta (cont'd.)

In response to the observation that the Band has declared itself ready to do this, but wishes the program to be so shaped and managed that they will have an effective voice in the protection of their rights, the position of Alberta was somewhat guarded. Nevertheless, although paramountcy of the Band's interests was not conceded, Alberta's spokesman repeated that Alberta is prepared to consider the Band's suggestions and work actively towards the establishment of a model management program.

Alberta emphasized, however, that a necessary pre-requisite to success in this area is a climate for discussion based on evidence of goodwill and a desire to co-operate on both sides, and expressed the hope that such a climate will be created and prevail so that fruitful discussions may be carried on in this and other areas.

Third Party Interests

I have met with representatives of eight of the Oil and Gas companies operating in the area - believed to be a reasonably representative group of those concerned. With one exception, they indicated agreement in principle with the general concept of a management program as outlined, with the Band having an effective voice in its operation, but expressed a desire to take part in discussions of the details before committing themselves further. The one exception was to the effect that more information as to the content and actual method of operation of such a program would be required before any position could be indicated. Several of those taking part expressed concern, however, that care should be taken that such a program be so designed and implemented that it does not constitute just another bureaucracy increasing costs and delays in obtaining access.

In general, the outcome was a positive reaction to the concept and to Alberta's position regarding a "model management program", and a desire to take part in discussions giving them an "opportunity for input" in the formative stages.

Claim - 3. WILDLIFE MANAGEMENT AND ENVIRONMENTAL PROTECTION PROGRAMS

Remarks - Including Areas of Possible Reconciliation or Accommodation

Clearly there are grounds to believe that a mutually acceptable solution to this problem will be achieved. The basis is there in the readiness of the Band on the one hand to recognize the interests of others, to accept self-discipline in the attainment of the objective of rebuilding and maintenance of stocks of wildlife, to accept that there must be a balance between their rights in respect of that resource and the rights of others in respect of other resources and, in their role in the management of the program, to act as protector of other native interests in the wildlife resource as well as of their own interests therein. It is there in the readiness of Alberta - indeed the desire, as I appreciate it - not only to accept in principle the desirability of a model wildlife management and environmental protection program which recognizes the interests of the Band and accepts that there must be a balance between the preservation and exercise of those interests and the exercise of other interests, but also in the readiness to enter into active discussion of the establishment of such a program in a manner which will give the Band an effective voice in its implementation. It is also particularly encouraging to note that the representatives of the oil companies with whom the matter was discussed were prepared, with one exception, to indicate acceptance in principle of the concept of a management program which would recognize and protect the rights of the Band in maintaining the wildlife population, and expressed an interest in participating in discussions of the content and implementation of such a program. Their concern, however, to avoid adding appreciably to the burden of regulatory authority and time taken to deal therewith is understandable, and should surely be borne in mind in working out the details.

It would not be realistic, however, to disregard an issue which must be faced and worked out in the course of discussion. That is, what I will call the question of paramountcy: where there is conflict, whose interest, and whose voice, is to be given the paramount consideration? As I appreciate it, this problem arises not with respect to the general principle on which the program itself is to be based, and which it would reflect, but rather with respect to its application or administration.

Claim - 3. WILDLIFE MANAGEMENT AND ENVIRONMENTAL PROTECTION PROGRAMS

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

For basic to the concept of the program itself, as it has so far been developed in my discussions with the parties, is the principle that there be a fair balance between the interests of the Band in the continuance of wildlife including its right to take and use that resource, and the rights and interests of others, such as oil and gas companies, in developing and extracting other resources. It is anticipated that this principle would be contained or reflected in whatever legislation and/or regulations are enacted as the embodiment of the program itself. Thus far, this should not present any difficulty in principle - only in drafting. But it is in the implementation or administration of the program in accordance with that principle that the practical difficulties will arise.

Thus, if a conflict should arise between the proposed location of an access road as desired by an oil company which has, or seeks, authority to construct such a road, and the location of a trap line which a member of the Band has a permit to lay and operate: if one could be moved or altered without rendering the operation in question impossible or impractical, while to move or alter the other would have that result, then the implementation of the fair balance principle would indicate that the management authority should resolve the conflict in favour of the latter. Reasonable notice, and time to make the alteration, would, of course, be expected.

But if the conflict should appear to be irreconcilable or insoluble by the application of that principle, then the question of paramountcy arises. Thus if, for instance, a developer should wish to locate an installation in a certain area as vital to the effective operation of its overall development plans but it should happen that to locate it there would have the effect, perhaps by denying a breeding ground, of a massive reduction in the wildlife population: two vital interests are at stake and the problem cannot be resolved by the application of "fair balance", so the question is, whose interest is to be regarded as paramount? The Band asks that the program be so framed as to provide that the protection of its interest be the paramount consideration in the resolution of such conflicts, and that the management or

Claim- 3. WILDLIFE MANAGEMENT AND ENVIRONMENTAL PROTECTION PROGRAMS

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

other authority administering the program, in which it would have an effective voice, be directed to resolve the conflict on that basis.

On the face of it, it may appear that the Band is reaching too far in asking that the program incorporate this approach. But it is fair to ask: would the program have any real meaning or benefit for them on the basis of any other approach? The wildlife resource is the vulnerable one: if it is not protected, it ceases to exist, and with it goes the whole lifestyle and living which depend upon it. It is the continuation of wildlife which is threatened by development, not development which is threatened to the point of extinction by continuation of wildlife. There must be very few, if any, situations where development cannot be effectively continued notwithstanding the necessity of modification of a particular program or alteration of a particular location: plans for such can be made and modified, for they are under human control. But there will be cases where the implementation of such plans, if not altered, will disrupt and severely diminish, if not extinguish, the wildlife, or effectively drive it away, and that result - if that particular development is allowed - cannot be altered, for the pattern of wildlife reaction to such situations is not under human control.

Given the recognition of the Band's interest in the wildlife resource, then, it can be argued that it follows as a fact - certainly as a matter of logic - that where there is an irreconcilable conflict between that interest and the interest of developers which cannot be solved by the application of the fair balance principle, there must be acceptance of the paramountcy of the Band's interests as the guide to the outcome.

Another factor to be weighed in this connection is the Band's position that it is not necessarily asking for this in perpetuity: that there may well come a time when its members no longer wish to follow the lifestyle that depends on the maintenance and exploitation of the wildlife resource in the traditional area. But there is a large number of

Claim- 3. WILDLIFE MANAGEMENT AND ENVIRONMENTAL PROTECTION PROGRAMS

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

members who presently do not know, and have not the training and ability to follow, any other. What is asked for is a program that will ensure to the Band the ability to maintain that resource at least for so long as there is an appreciable number of its members who are dependent upon it for their way of life.

An appreciation of the Band's position also requires a reference to the Treaty. True, the Band does not rest its claims upon Treaty entitlement, but on a wider basis including unextinguished native title: but both governments deny the latter, and have so far maintained that the Band's claims must be measured on the basis of treaty entitlement alone. Accepting this for the purpose of this discussion, it must be observed that the Treaty which gives to the Indians concerned the right to continue their usual vocations of hunting, trapping and fishing throughout their traditional lands, provides that this right is subject to only two exceptions or limitations. The first is, that it must be exercised "subject to such regulations as may from time to time be made by the Government of the country...", now the Government of Alberta. The Band's contention here is that this does not confer the right on any government, including the Province, to adopt laws, regulations or policies which extinguish the right guaranteed by the Treaty - rather by necessary intendment the reference is to regulations which are consistent with the recognition and continued exercise of that right. In this context it is noted that the Treaty Commissioners themselves emphasized that the Indians raised the question of the coninuation of this right, and signed the Treaty only on receipt of "solemn assurances" that they would "be as free to hunt and fish as they would be if they never entered into it."

The other exception is that those rights may be pursued throughout the entire area "saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, ... or other purposes". The intent that Alberta should give effect to the rights thereby granted, and the limits of this restriction thereon, are reflected in s.12 of the Resource Transfer Agreement which provides that

"In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence" the game laws in force in the Province shall apply to Indians therein, and goes on specifically to provide "that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing for game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access".

Claim- 3. WILDLIFE MANAGEMENT AND ENVIRONMENTAL PROTECTION PROGRAMS

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

In the light of the clear intent and acceptance by both governments of the implications of that interest - that is, that the Indians should have the continuing right to hunt and trap in their traditional area - it would be difficult to conclude that by the mere granting of concessions to prospect for oil and gas in that area, and to develop those resources when they may be found, the Province has terminated or abrogated - or had the intent to do so - the rights of the Indians to pursue their usual vocations of hunting and trapping in this territory, vast spaces of which are not "occupied" in any meaningful sense of that word. It would surely take a very clear expression or indication of intent to do so. And if the Indians have a continuing right to hunt and trap there, then surely they have a continuing and pressing interest in the maintenance of the resource - the wildlife - without which that right becomes a mockery.

These facts and factors, including my conception of the problem area remaining to be resolved, are set out not so as to pre-empt discussion, but rather with the hope that they will provide a helpful background or climate for further discussion and resolution of the problem. I emphasize again that the positions and attitudes of all parties to this matter in discussions to date have been such as to encourage the hope that further discussions within the parameters outlined will enable me to report that there is in fact agreement that there should be such a program and on the basic principles which it should reflect and in accordance with which it should be administered.

Finally in this respect I can only concur in the feeling expressed by Alberta that a favourable climate for such discussion is essential. This can only be created by evidence of goodwill and readiness to co-operate, which includes a readiness on both sides to appreciate and understand the concerns and views of others. It also involves, and I urge equally upon both sides to accept, a readiness to exercise self-restraint and refrain from administrative acts and public statements which destroy the climate and diminish the likelihood of fruitful discussions in respect of this and all other issues.

Claim - 4. EMPLOYMENT OPPORTUNITIES AND JOB TRAINING

Band's Position

With respect to natural resources development activity carried on by various enterprises within the Band's traditional hunting and trapping area located generally north of Lubicon Lake, the Band proposes that such enterprises adhere to a program which would

(a) provide notification to the Band of employment opportunities available with those enterprises in order to allow Band members to apply for that employment; and

(b) give preference for such employment to Band applicants.

Such a program would include training programs conducted by the employer where practical in order that Band members could gain employment and experience in the natural resources development industry.

The Band intends by this program to develop alternatives to the traditional hunting and trapping economy of that community. Hitherto, the Lubicon Lake Band has received little, if any, timely notification regarding employment opportunities created by natural resources development within the Band's traditional hunting and trapping area. The Band seeks to rectify this situation and make provision for employment opportunities for those who have a close historical and social nexus to the area in which the development employment opportunities arise. The Band states that where its member applicants are not qualified for specific available employment, or are unavailable to offer their work services for positions of employment, development enterprises should then of course look to alternative sources for employees for those positions.

Position of Canada

Although this is seen as basically an area of provincial jurisdiction and responsibility, neverthless Canada generally encourages priority in employment where practical for native peoples. Canada would use its good offices to assist all concerned in working out and implementing a program of this nature.

Claim - 4. EMPLOYMENT OPPORTUNITIES AND JOB TRAINING

Position of Alberta

Alberta feels that this matter does not fall specifically within rights recognized as belonging to native peoples in the Treaty 8 area, but has indicated a readiness to work with the Band and with natural resources development entities towards meeting the Band's desires in this matter so far as reason and practicality will allow. In this context the view was expressed that "...the James Bay model is an excellent one".

Third Party Interests

Representatives of the eight Oil and Gas companies with whom I have met indicated that they are not averse to providing notice of employment opportunities to native peoples living in the area of development activity. Nor are they averse to employing those local individuals who are interested in obtaining and maintaining employment in their operations. Some of the representatives with whom I met indicated that they have to varying degrees in the past instituted training programs for, and have employed, native peoples residing in development activity areas, and that, indeed, it was cost-efficient to the employer to be able to find a willing and steady source of local workers.

The companies indicated, however, two concerns in this regard. The first is a concern that additional governmental and regulatory body control would entail more "red tape" in respect of their operations. The second concern arises out of some of the companies' experiences wherein local native workers have failed to retain interest in maintaining the employment which had been made available to them. It is acknowledged by the companies with which I have met, however, that there have been several examples of successful and effective employment liaisons with local native peoples and that the companies had not had specific contact with the members of the Lubicon Lake Band.

With respect to implementation of a program of notification to, and priority in hiring of, Band members and other local residents, it was pointed out that the majority of employee hirings for natural resources development is done by sub-contractors of the companies holding interests in the Band's traditional area, not directly by the companies themselves.

Claim - 4. EMPLOYMENT OPPORTUNITIES AND JOB TRAINING

Third Party Interests (cont'd.)

The representatives with whom I spoke indicated that a program such as is proposed would need the active involvement of those sub-contractors. Some of the companies do, however, stipulate in their contract-bid documents that such sub-contractors must endeavour to hire locally (although it was not specifically stated that such a stipulation is expressly directed to the hiring of Indian or native peoples). The companies themselves would wish to avoid any direct responsibility for the hiring practices of such sub-contractors.

A very real problem is said to exist in that the Alberta Individual Rights Protection Act has been so construed and applied, according to the information given to me, as to prevent a preference in employment being given to a particular group on grounds that this would be a discrimination against others. It was also stated, however, that the Government has power to designate areas in which the operation of this Act may be suspended.

In this respect, however, I have since been referred to recent case law including particularly the case of Athabaska Tribal Council v Amoco Canada Petroleum Company Ltd. et al (S.C.C.) [1981] 6 W.W.R. 342. It appears that this may well dispose of the concern with regard to the application or effect of that legislation in this context.

In general, the representatives of the companies with whom I met indicated agreement in principle to the introduction of a mechanism whereby timely notification of available job opportunitites would be given to the Band and, to the extent necessary and practicable, some training programs made available to qualify its members for employment in those positions. The matter of giving preference in employment to Band members with respect to available work in its traditional area for which they are qualified was not opposed in principle, but the extent to which this can and should be done would be dependent on discussions with Alberta for approval and for resolution of legal problems, if any, posed by the Individual Rights Protection Act. The company representatives expressed a willingness to meet with representatives of the Band and of Alberta to discuss the matter in an endeavour to work out practical and acceptable proposals.

Claim - 4. EMPLOYMENT OPPORTUNITIES AND JOB TRAINING

Remarks - Including Areas of Possible Reconciliation or Accommodation

The Band's proposals regarding this matter are directed at securing reasonable notification of and preference in filling employment opportunities within its traditional hunting and trapping area. It was made clear that the Band would not expect this to apply immediately to jobs requiring a high degree of technical skill or knowledge, but would expect that the program include provision for technical training so that Band members may qualify for at least reasonably skilled work. There are, however, many types of work such as clearing and developing sites, and maintenance work, for which Band members are qualified now or could be with a reasonable degree of on-the-job training and supervision. It is felt that the program could and should be implemented immediately with respect to this type of employment opportunity.

The Oil and Gas company interests with whose representatives I have met have indicated their general interest in hiring local residents who are interested in the employment offered. As employers they seek to maintain in the long term an efficient operation and welcome the opportunity to utilize workers who reside near, and have knowledge of, the area in which the natural resources development activity exists.

Alberta has shown an encouraging response and apparent readiness to consider practical measures to make such a program a reality.

Representatives of Canada have until now gone only so far as offering their good offices to promote the active working out of such a program, which they regard as primarily within Alberta's jurisdiction. It is to be hoped, however, that Canada would be prepared to consider some direct responsibility, or at least a supporting role, in the matter of technical or job training programs in the light of its jurisdiction in matters pertaining to the education of Indians.

On the basis of the foregoing positions and expectations I believe it is reasonable to anticipate the active collaboration of all concerned in working out a program which will provide for timely notification to the Band of opportunities for employment in resource development activities in the Band's traditional living and hunting area, establish training

Claim - 4. EMPLOYMENT OPPORTUNITIES AND JOB TRAINING

Remarks - Including Areas of Possible Reconciliation or Accommodation
(cont'd.)

programs to assist Band members in becoming qualified for positions within their potential, and give preference in employment to Band members in such positions as they are now or may by such training become qualified to fulfill.

The justification for the preference is of course based, in principle if not in law, on the Band's traditional identification with and interest in this area, and on the fact that as development takes place therein, it is bound to affect their traditional lifestyle and source of livelihood and that they are accordingly entitled to expect first consideration in employment in that new development which has diminished their ability to rely upon the old methods. Although there have been some reservations I have heard, in the course of my discussions, no objection in principle to this concept of reasonable preference. It must be recognized, of course, that there are legal and constitutional limits in the area of preference in employment, which will be for consideration by Alberta in respect to the application or modification of its Individual Rights Protection Act, but I have a strong feeling, on the basis of the positions taken in discussions to date, that there is ground for hope that the these problems will be resolved and that an acceptable program can be worked out.

Since there was reference in this context to the James Bay Agreement as being an excellent model for such a program (although the reservations expressed by Alberta to the applicability of that model in other contexts are noted) it may be appropriate to touch briefly on its provisions here. Sections 28.8 through 28.10 of that Agreement make provision for training programs for the Cree Indians concerned, and provide clearly for priority to be given to those Indians in notification of employment opportunities and fulfillment of positions throughout the territory in question. Although the emphasis is initially on employment in government services or government-initiated projects, the concluding portion of s.28.10 provides as follows:

> 28.10.4 Quebec and Canada shall take all reasonable measures, including but not limited to regulations, to establish priority to available and duly qualified local persons or entrepreneurs in respect to contracts and

Claim - 4. EMPLOYMENT OPPORTUNITIES AND JOB TRAINING

Remarks - Including Areas of Possible Reconciliation or Accommodation
(cont'd.)

employment created by development in the Territory.

There would seem to be no reason why the same approach should not be taken in working out and implementing a program to give priority to the Band with respect to opportunities created by development in its traditional area. The Band feels that once it is settled and organized on its Reserve, and the program is in place, it should be in a position not only to take advantage of employment opportunities for individuals, but to tender on some of the contracts for development as well. This objective should be kept in mind in the discussions which follow.

It is not inappropriate to emphasize here that not only the working out of such an employment opportunities program but also its implementation in practice will call for both mutual understanding and co-operation and for acceptance by both sides of the responsibilities which are peculiar to this situation. Thus, with respect to employment, the success of the program will rest upon both parties to see that the practical requirements of the employer are met by the employee and that the employing party recognize the lack of experience and exposure of Band members to the regimented demands of the daily work schedule. Three ingredients are necessary here: (1) a mechanism for notification to, and an application by, members of the Band regarding employment opportunities; (2) an organizational structure within the Band to marshall those Band members interested in such employment; and (3) the maintenance of interest on the part of Band members in an employment and training program which parallels the willingness shown by governments and developers in providing that program.

On the basis of all the foregoing, I anticipate being able to report, following the next round of discussions, that there is positive agreement on the matter of an Employment Opportunities and Job Training Program, and that representatives of the Band, the two governments, and the developers will be meeting to work out its provisions and implementation.

CLAIMS FOR COMPENSATION

General

The Band's claim for compensation as contained in the "Points For Discussion" document referred to at the outset of this Paper is very generally stated. As the matter has developed in my discussions to date, however, it appears that there are two main categories of claim under this head: compensation for damages or losses incurred to date, and compensation for anticipated future damage or loss. The claim in each category actually covers a variety of distinct areas or heads of claim. For convenience, and to ensure that all aspects of this claim are in fact considered, I have divided each category accordingly into separate sub-heads. This organizational approach is reflected in what follows.

The Band now emphasizes that its claims here, including the claim for lost oil and gas revenues from both the Reserve area and the traditional lands, are based on contiuing aboriginal right and title. On this basis it is stated that the claims would include not only lost lease and royalty revenues, but also the acutal value of the resources extracted from their lands without their consent. Unfortunately, this aspect of the claims was not made clear to me, or at any rate was not perceived by me in the various earlier meetings I had with the Band and its representatives, so that it was not raised by me in discussion with other parties. Nor of course is it reflected in the following portions of the Discussion Paper which deal with the claims with respect to Oil and Gas Revenues.

Since this aspect of the claims was not discussed earlier, it is not possible to do more now than to record the fact of the Band's position with regard thereto and to ask all concerned to note it for future discussion. I do not consider, however, that it alters the statement or discussion of the Band's claims with respect to the lease and royalty component of oil and gas revenues, and those portions of the Discussion Paper accordingly stand basically unaltered, although with textual amendments as noted immediately hereunder to reflect specific modifications which the Band feels should be made so as more accurately to set out its position in detail.

Claim - 5. COMPENSATION FOR PAST LOSS:

(a) With Respect to Lands Claimed as Reserve

(i) Oil and Gas Revenues

Band's Position

The Band claims compensation for lease and royalty revenues derived from the exploration for and development of oil and gas on the approximately 25.4 square miles proposed as its Reserve in 1940. Without prejudice to its claims based on native title, the Band points to the facts that in 1940 it was agreed that this area should be its Reserve, that both Canada and Alberta took certain steps to secure this Reserve pursuant to that agreement, and that had it not been for Canada's failure to carry out its further obligations under that agreement the Band would long since have been settled on that area and enjoyed the benefits and revenues derived therefrom.

On this basis, and as an additional or alternative ground to that based on Native Title, the Band claims compensation for the loss of all oil and gas rentals and royalties which have accrued with respect to those lands since the commencement of exploration and development. The quantum of this claim is submitted accordingly as the entire amount of such revenues as have in fact been received by Alberta with respect to these lands, together with interest thereon from the respective dates of receipt.

As to which government is liable to compensate it, the Band's claim is directed primarily against Canada, notwithstanding that Alberta has in fact received those revenues. This is on the basis first, that Alberta was ready for many years to implement the agreement of 1940 and transfer that land, including mineral rights, and that the responsibility for the fact that the agreement was not implemented is entirely that of Canada; and second, that it was known to Canada throughout that the Band attached great importance to the securing of the mineral rights with the land, so that the loss to the Band of the benefit of those revenues was a foreseeable consequence of Canada's failure to implement the agreement. It is of course a matter of indifference to the

Claim - 5. COMPENSATION FOR PAST LOSS:

(a) With Respect to Lands Claimed as Reserve

(i) Oil and Gas Revenues

Band's Position (cont'd.)

Band which government actually pays the compensation, but it regards Canada as having the direct liability to it therefor for the reasons stated.

Position of Canada

What will be the final position of the government of Canada is not known at the time of writing, but the Hon. Mr. Crombie has accepted my recommendation for the payment of an interim advance on account of compensation on the basis of the Band's claim which has been summarized above. He has prepared a submission accordingly which he has presently under advisement with his Cabinet colleagues.

Position of Alberta

Alberta does not accept any responsibility for non-fulfillment of the agreement of 1940, and does not accept liability to compensate the Band for revenues received from these lands, whether under the claim based on Native title or on any other basis.

Remarks - Including Areas of Possible Reconciliation or Accommodation

On the basis of all the evidence that the Band would have been settled on this area as its Reserve long ago and enjoyed the benefit of all revenues therefrom but for Canada's failure to fulfill its part of the agreement of 1940, and bearing in mind particularly that Canada today agrees that the Band should have this 25.4 square miles included in its Reserve, there is a very strong case that the Band is entitled to compensation for those revenues which it has not received. It can be equally strongly argued that the responsibility for payment of that compensation rests on Canada, where rests also the responsibility for non-fulfillment of the 1940 agreement, and all the consequences thereof.

In the light of the position of Canada summarized above it is hoped, and anticipated, that Canada will accept this claim accordingly.

Claim - 5. COMPENSATION FOR PAST LOSS:

(a) With Respect to Lands Claimed as Reserve

(ii) Treaty Benefits

Band's Position

This claim is put forward only as part of the alternative basis of the Band's position, and would be pressed only if it be held that the Band and its members no longer have aboriginal rights. In that case, runs the thrust here, the Band is entitled not only to compensation for the extinguishment of its title (which would encompass at least all, if not more than, the claims for damages or compensation discussed here) but also to damages or compensation for non-performance of the Treaty and non-receipt of the benefits which it was supposed to confer.

In this respect it is the Band's position that it was the obligation of Canada from the outset to locate and identify the various Bands and communities which lived in the Treaty area and to whom its provisions and benefits should apply, and that the existence and presence of the Lubicon Lake Indians as such a Band or community was a fact in 1899 and for generations prior to that time. Hence the claim for these benefits, and for compensation for the non-receipt thereof, commences from 1899, not just from the time when they were in fact identified and promised a Reserve in 1940.

The claim has not yet been developed in detail with respect to each of the various benefits. I will accordingly deal with the matter further in the "Remarks" Section hereunder, and make some suggestions as to what approach might be taken with respect to clarification and quantification of the claim with respect to these benefits.

Position of Canada

Canada has indicated a readiness to discuss the various sub-heads of this claim, although making as yet no formal admission of liability. Where individual members of the Lubicon Lake community have been denied social services or annuities as a result of unjustifiable removal from the Band List, Canada is in principle prepared to address the matter of recompense to those persons.

Claim - 5. COMPENSATION FOR PAST LOSS:

(a) With Respect to Lands Claimed as Reserve

(ii) Treaty Benefits (cont'd.)

Position of Alberta

Alberta is not involved in this area of claim.

Remarks - Including Areas of Possible Reconciliation or Accommodation

The benefits here are of two kinds: money payments; and provision of tools, livestock and farm implements, hunting and trapping equipment, and clothes. I have attached hereto as Appendix "A" two pages reproducing the relevant paragraphs of the Treaty providing for these benefits. For convenience I have marked them, and will refer to them in what follows, as Paragraphs A, B, C, D and E respectively.

It has been noted that the Band's position is that this claim (which again rests on Treaty entitlement only as an alternative to the claim(s) based on continuing Native Title) dates back to 1899. Without, however, for a moment presuming or intending to question the validity of that contention, it is a fact of which account should be taken that the Band was recognized as such in 1940 and was then promised a Reserve, which promise has not been fulfilled to this day. Even if it were to be held that there was no obligation until the Band was in fact formally identified and established, the year 1940 would stand as at least the minimum point from which the calculation should commence. The comments which follow are equally applicable whatever be the starting date.

As to the money payments, which are called for under Paragraphs A and B, apart from the matter of the starting date, the main problem would seem to be in establishing the numbers of those entitled to receive the payments. This applies particularly with respect to the annual payments to be made pursuant to Paragraph B on the basis of population. Such payments have been made, but deficiencies appear to exist on account of deletions such as were made following the McCrimmon Report and the application of the "counted once" (or counted elsewhere) rule. Controversy over the figures properly constituting Band membership continues to this day: I shall

Claim - 5. COMPENSATION FOR PAST LOSS:

(a) With Respect to Lands Claimed as Reserve

(ii) Treaty Benefits

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

have to reach a conclusion for the purpose of my final Report, but it has not been possible to do so by this time. From such information as I have presently received, however, I am reasonably satisfied that final resolution will indicate that there have been appreciable deficiencies in payment over the years and that when a final calculation can be made a considerable sum will be found to be due on account thereof.

As to the provision of tools called for in Paragraph D, there can be little doubt that, whatever the starting date, the qualification for eligibility for that benefit is met. The same applies to qualification for eligibility for the provision of farm implements, livestock and seeds in Paragraph E ("elects to take a reserve and cultivate the soil"). The Report of the Indian Agent (August 14, 1939) on his discussion with the Band as to their wishes in this regard shows not only that they wanted the Reserve, but that they wished "to learn agriculture" for the years ahead. There can surely be little question, on the basis of their attitude and on the basis of the experience with other bands, that this would have applied whenever this Band had been identified and recognized: they would have wanted then the things to which recognition and establishment as a band entitled them. They would accordingly have been eligible to receive the annual supplies enumerated in that Paragraph from that time forward. It would follow that the failure to receive them is due to the failure by Canada to discharge its obligations, whether arising generally in 1899 or specifically by the agreement of 1940. And since clearly some members would have wished to continue hunting they are entitled to compensation for supplies of ammunition and twine not received annually over the period in question.

The quantification of these claims is admittedly somewhat complicated, and I am clearly not in a position to do so at this time. There are however certain observations which can be made or principles suggested which, it seems to me should, subject to modifications suggested by such precedents as may exist, govern the calculation. The first is that the defici-

Claim - 5. COMPENSATION FOR PAST LOSS:

(a) With Respect to Lands Claimed as Reserve

(ii) Treaty Benefits

Remarks - Including areas of Possible Reconciliation or Accomodation (cont'd.)

encies in the annual payments have the character of debts owing to the Band from the time they occurred. A debt normally carries interest until the date it is paid; the fact that these are debts due by the Crown should not - especially in view of the fiduciary relationship between the parties and the very difficult situation which has been created for the Band as the result of Canada's long delay in carrying out its obligations - be taken as grounds for treating these debts differently. I consider therefore that interest should be added, and that the rate applicable should be that payable on Government of Canada Treasury Bills. The calculation, because of the fluctations in rates over the period in question, will be complicated. One method might be to apply the average of that rate over that period, but I have not had the opportunity of discussing this matter with representatives of the parties, and a conclusion on this point will have to await further discussion. Account should also be taken of the factor of inflation.

As to the tools, livestock and implements not received, the result of this failure is that the Band and its members have been deprived not only of the capital value of the items themselves, but also of the annual income to which their use on the Reserve would have given rise. Although this would be a foreseeable consequence of alleged breach of duty to locate and identify the Band after 1899, and certainly of the failure to carry out the agreement of 1940, its translation into an annual figure for each of the years in the period involved is again a formidable task, calling for detailed mathematical calculation and much expertise in such matters. Again, this is a matter which should be the subject of further discussion.

Band representatives have emphasized that this claim for compensation for lost Treaty benefits is secondary, and in the alternative, to the claims based on un-extinguished Native Title: the Band's basic and primary position is that its Native Title was not extinguished by the Treaty or subsequently. and that it is entitled to compensation for

the damage it has suffered as a consequence of acts done contrary to its rights and interests under that title. It is only if it should ever be held, or agreed, that it cannot or should not maintain its claim on that basis that the claim on the basis of Treaty entitlement would be pursued. It is not the Band's intention to claim both.

(iii) Programs and Services

Band's Position

The Band claims compensation for those programs and services which (apart from the specific Treaty Benefits dealt with above) are provided by Canada to Indian Bands generally, and which it has not received. It is the Band's position that the reason why it has not received the benefit of such programs is that it has not been settled on a Reserve and that the responsibility for this fact is again that of Canada. The Band claims that it is entitled to monetary compensation from Canada for the value of the programs and services not received.

Band spokesman have expressed the view that this claim is not inconsistent with the claim based on continuing Native Title: they are simply asking for what Canada has apparently always recognized as its responsibility to provide for recognized Indian communities, whether under Treaty or otherwise. To the extent, however, that it may be held or agreed that the claim is inconsistent with the claim based on Native Title, the Band would not press this claim, except as part of the alternative position if the decision on continuing Native Title should be adverse.

The claim embraces the cost or value of such items as Canada normally provides by way of assistance in the construction and maintenance of housing and community buildings and infrastructure such as water and sewage systems and roads, and social services including schooling and medical care.

The Band has not provided a detailed break down of the claim with respect to those various items, although I have received a Table showing the short-fall in terms of what would have been the total value of all such benefits had they in fact been provided. This is calculated annually on a per capita basis, first by dividing the total amount allocated by Canada each year for Indian programs by the total number of

Claim - 5. COMPENSATION FOR PAST LOSS:

(a) With Respect to Lands Claimed as Reserve

(iii) Programs and Services

Band's Position (cont'd.)

status Indians in the country for whom such programs were provided, and then multiplying the result by the figure of the Band population. Additional calculations are made to add interest at the effective rate for the year of (non) receipt, and to bring the annual totals into terms of current dollars by allowing for variations in the annual Consumer Price Index. Deductions are made for the value of such programs and services as are admitted to have been in fact received - which in this calculation is said to have begun only in the year 1974. I shall make further reference to this Table in the "Remarks" section hereunder.

Position of Canada

Canada has indicated by letter of the Minister dated December 14, 1983 to the Alberta Government that a "catch-up" program for the Band's housing, economic development and community infrastructure needs is, in Canada's view, something which should be provided, and in recent discussions with Canada's representatives I have been informed that such a "catch-up" program could be part of an ancillary agreement to settlement of the Reserve Lands.

Canada does not admit, however, that there has been any significant shortfall in its provision of social service benefits to Band members. Where individual members of the Lubicon Lake community have been denied social services or annuities as a result of unjustifiable removal from the Band list, Canada is in principle prepared to address the matter of recompense to those persons. Further, Canada would include as a heading for the negotiation of compensation, the matter of reimbursement to individuals for moving costs and loss of improvements during the transfer of residence to such Reserve lands as may be allotted.

Position of Alberta

As the provincial authority, Alberta of course does not stand responsible for such shortfall as may exist in respect of Treaty benefits or social service programs normally

Claim - 5. COMPENSATION FOR PAST LOSS:

(a) With Respect to Lands Claimed as Reserve

(iii) Programs and Services

Position of Alberta (cont'd.)

provided by Canada, or for costs of a comprehensive community development program. Alberta has, however - and this should be noted - incurred the expense of some housing assistance to Band members in recent years at Little Buffalo Lake.

Remarks - Including Areas of Possible Reconciliation or Accommodation

The Band dates its claims here from the year 1899 on the same basis as previously outlined: that it existed as an identifiable Indian Band or community at that time, and that Canada's obligation in these respects commenced no later than that year. Again, without pre-judging or denigrating that position it can be observed at the outset that if Canada had no earlier obligations to identify and deal with the Band, its obligations surely commenced no later than the year 1940, the year of the specific recognition and promise. Again, the observations which follow are applicable whatever year be determined as the starting point.

As to the numbers of people entitled to those benefits for the purpose of calculation of the claim, the Band has used the figure of 400 throughout. The recent discussions with Band representatives have clarified the basis on which this figure is submitted. In brief, this is that the genealogical studies referred to earlier support the conclusion that the membership in this community was a large and growing one, possibly as high as 2,500 - 3,000 by 1918, when it was decimated by the flu epidemic of 1918-19, which is known to have wiped out up to 90% of communities in that area; that the population has grown gradually since then to the figure of 450 identified by that genealogical study as the present population; and that accordingly the figure 400 represents a fair average of the population throughout the period.

This is understood, but it must be observed that the approach raises again the problem of whether the numbers thus found to be members of the "community" are acceptable as determining the membership of the Band for purposes of calculating entitlement in this context, as it does with respect to the

Claim - 5. COMPENSATION FOR PAST LOSS:

(a) With Respect to Lands Claimed as Reserve

(iii) Programs and Services

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

calculation of entitlement to Reserve land discussed earlier. It seems that the questions both of the starting date and the population figures to be used for the calculation of this claim are matters still to be discussed and settled between the Band and Canada.

Subject thereto, however, it seems that in principle the Band has a valid claim, to the extent that it can be documented that there was a shortfall between what they should have received by way of such programs and services had they been settled on their Reserve, and what they have in fact received since the time when they should have been so settled, whatever be agreed as the date when that should have taken place.

There are a number of other details which require to be discussed and settled. Thus with respect to housing and community infrastructure: although some houses were provided at Little Buffalo under a provincial housing scheme, this was protested by the Band, as was the case with the roads which were laid down by Alberta in that community. The Band maintains that the houses were in any event never properly finished, and that what was done by the Province was in contravention of, and as part of an effort to undermine, the Band's position that it had Native Title to this area, and that no credit should be given for the costs of such buildings or installations, certainly not at the expense of the Band's claims against Canada in this respect. And while Canada has provided some housing and community buildings, I understand that this was not done until 1980-81 and that the substantial majority of members of the community still require housing assistance. There is clearly a deficit here in what has been provided by Canada in the way of housing, community buildings and infrastructure as compared to what has normally been provided to Indian Bands, which support the Band's claim and calls for discussions in detail.

Similarly with respect to the non-material, or social services aspect, of this claim: Canada claims that for some years at

Claim - 5. COMPENSATION FOR PAST LOSS:

(a) With Respect to Lands Claimed as Reserve

(iii) Programs and Services

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

least Band members have received benefits under social service programs which are the equivalent of those being received by other Bands. It is alleged that the difference is mainly, if not entirely, in respect of those individuals (and their affected family members) who were unjustifiably removed from the Band list after 1940. Canada has indicated a readiness to make recompense in such cases. I have asked that Canada make a study to compare the levels and values of services and programs which would or should have been provided by Canada from the time when the Band should have been identified and commenced receipt of these benefits, with the levels and values of those actually received, but the results are not yet available. I would urge that this be expedited, and that the results be studied by representatives of both sides in the same spirit of readiness to make recompense as was indicated with respect to those improperly removed from the Band list.

Account should also be taken of the Band's contention that not only is there a substantial deficit in the receipt of social services by actual Band members in terms of the commencement date and the quantum of such programs as were received, but that a large proportion of members of the community have never been on the official Band list and have never received any such benefits. The problem to be addressed here seems in part at any rate to be of the same nature as that involved in determining the numbers of those to be counted for the purpose of establishing the area of Reserve entitlement.

Finally in this connection it has been suggested that this claim might be subsumed in, or at least modified to the extent that there is assurance of, an accelerated and meaningful catch-up program to settle the Band on its Reserve when that is established, including housing and community buildings, roads, sewage and water systems, and organization and delivery of full social service programs including schooling. That matter will be dealt with more fully later under the head of Claim 8.

It is hoped that these considerations and suggestions may afford the basis of further discussions between representatives of the Band and of Canada leading to a satisfactory resolution of this area of claim.

(b) With Respect to Lands Claimed as Traditional Area

(i) Loss of Livelihood from Trapping and Hunting

Band's Position

The Band rests its claim here primarily on the position that it has never surrendered its native title to this area, and that such title and the rights thereunder have never been extinguished; or alternatively that if they have been extinguished (by, e.g., assertions and acts of sovereignty by Alberta) - which is not admitted - it was without their consent and the Band is entitled to compensation and damages for the consequences. For the purpose of these discussions, and without prejudice to its claim based on native title, the Band points secondly to the assurance given in the

Claim - 5. COMPENSATION FOR PAST LOSS:

(b) With Respect to Lands Claimed as Traditional Area
(i) Loss of Livelihood from Trapping and Hunting

Band's Position (cont'd.)

Treaty, reflected in sec.12 of the Resources Transfer Agreement, that the Indians would have the right to carry on their usual vocations of hunting, trapping and fishing throughout the area.

With reference to this second basis of its claim, the Band recognizes that there are words of apparent limitation on the extent of the right, contained in both the relevant paragraph of the Treaty and in sec.12 of the Agreement, but takes the position, as I understand it, that it was not the intent and is not the effect of those words that the rights thus assured and recognized could be eliminated at will by the mere grant of limited exploration and development rights in the area in question. According to this position, these lands are not thereby rendered "occupied" lands in any meaningful sense of that word, hence their rights still subsist and they are entitled to compensation for the damage done to them - or again, that if the rights have been eliminated they are entitled to compensation for that loss.

The claim thus far is directed against Alberta; in the final alternative the Band says that if the effect of the Transfer Agreement was to give to Alberta the power to extinguish the rights in this area assured to the Indians by the Treaty, then Canada was negligent or in default of its trust obligations in failing to live up to and protect that assurance, and Canada is liable to the Band for the damages it has suffered as a result of that negligence or breach of trust.

As to quantum, the Band dates this claim from the start of development activity in the area in 1979-80. I have been provided with a copy of the Report dated September 15, 1982, by Kenneth R. Bodden, an expert in the matter of wildlife resources and harvesting, which was filed in support of the Band's claim in the Alberta Court of Queen's Bench. This report shows the amounts of wild animal meat of various species taken and consumed by the Band in each of the years 1980-81 and 1981-82 (Table 3) and the amounts and values of total Fur Harvest Revenue for the same years (Tables 4, 5

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(b) With Respect to Lands Claimed as Traditional Area
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Band's Position (cont'd.)

and 6). I have also been provided by a Band spokesman with a summary which takes the figures back to the year 1979-80, and summarizes some of the comparative results to show the decline or loss as between 1979-80 and the present.

That summary is stated as follows:

> Bodden calculates the value of fur taken in 1980-81 as $205,969, or about $4,000 per family. This amount was down from an average figure of slightly over $5,000 per family the year before. By 1981-82 the figure had dropped to a total of $163,573, or only about $3,200 per family. Last year average income from trapping was down to $800. This year's average is expected to be less than $400.
>
> Bodden calculates the value of production generated by subsistence activities in 1980-81 as $209,630, the largest percent of which was contributed by the value of moose killed for food. Over 200 moose were killed per year prior to 1979-80. By 1980-81 moose kill had dropped to 110. In 1981-82 moose kill was 101. In 1982-83 kill was 27. Last year moose kill was 19. This year moose kill has not been fully calculated but the total is expected to be less than 19.
>
> Thus income from trapping has dropped from over $5,000 per family to under $400 per family since the onset of development activity in 1979-80, or, from a total of about $255,000 in 1979-80 to only about $20,000 this last year.
>
> Similarly production generated by subsistence activities has dropped from a community total of approximately $400,000 in 1979-80 to less than $40,000 in 1984-85.

Position of Canada

Canada rejects any aspect of this claim based on continuing native title, its position being that native title was extinguished by Treaty 8 throughout the entire area covered by that Treaty. As for liability based on failure to ensure continuance of hunting and trapping rights assured under the Treaty (negligence or breach of trust), Canada does not accept this, pointing to the qualifying words or words of restriction in both the Treaty paragraph and in sec.12 of the Resources Transfer Agreement.

Claim - 5. COMPENSATION FOR PAST LOSS:

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Position of Canada (cont'd.)

In effect Canada is saying, as I appreciate it, that although the Treaty assures to the Indians the right to pursue their usual vocations of hunting and trapping throughout the area, there is nothing in the Treaty which assured them that the supplies of animals for that purpose would be maintained or remain at existing, or any, levels. And further that indeed the Treaty contemplated restriction on or diminution of the quantity, in that the same paragraph assuring the right expressly provides that it may be diminished by excepting therefrom such tracts as may from time to time be taken up "for settlement, ... or other purposes."

Canada's position is that there is thus no negligence or breach of trust on Canada's part in having transferred the land to Alberta on a basis which permits Alberta to open up this area for development purposes, even if that has the result of diminishing the stocks of wildlife available for the exercise of the right of hunting and trapping, so long as the right itself remains undiminished with respect to the tracts which are not in fact so occupied or taken up by that development. This position is, so far as I understand it, based on the view that it is the right which is protected or assured, not the maintenance of the level of harvest available as the result of exercising that right.

Position of Alberta

The position of Alberta appears in effect to be much the same as that of Canada. Alberta does not recognize any claim based on continuing native title. As to the continuing right to hunt and trap assured to Indians under the Treaty, Alberta's position is that it owes no obligation to the Band under Treaty, that any claim here must be addressed to Canada, and that in any event Alberta is not in breach of the only obligation or pledge in this area which it gave to Canada as protector of the Indians, namely, under sec.12 of the Resources Transfer Agreement, to allow the Indians the right of hunting and trapping for food at all seasons of the year on all unoccupied Crown lands.

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(i) Loss of Livelihood from Trapping and Hunting

Remarks - Including Areas of Possible Reconciliation or Accommodation

It appears from the foregoing that there are formidable obstacles in the way of even a common approach to, let alone an agreed solution of, the issues arising under this head of claim. Nevertheless, I consider I should make some analysis of the areas of difference and disagreement, in the hope that some suggestion for at least a common or shared view of the problem may emerge which would form the basis for further discussion.

The dimensions of the problem seem, as is so often the case, to fall into two areas or categories, which may be designated as the practical or factual area, and the legal area. In the former are such questions as, what loss has in fact been suffered by the Band, and is that loss in fact attributable to oil and gas development or are there other causes, including natural cycles? In the other category are of course the questions first, if there has been such loss due to other than natural causes, does there exist a legal basis for an assertion of liability and, if so, against whom? And secondly, if there can be no common ground as to the strict legal position, can there be any common approach based on what may be called the practical equities of the situation?

As to the factual question of what has been the loss, I have referred to the table in Mr. Bodden's Report, and the summary submitted by the Band on the basis thereof. In fact, no statistical research or other authority is quoted in that summary with respect to the information for years other than 1980-81 and 1981-82, and the conclusions are thus subject to verification. Also, no figures are given for similar summary comparison between 1979-80 and the present with respect to other areas surveyed by Mr. Bodden. It is a fact, however, that with respect to both hunting and trapping, the careful survey conducted by Mr. Bodden shows a substantial reduction in both quantities and values of animals taken as between 1980-81 and 1981-82. My own discussions with Band members, while being far from a scientific survey, indicate that the decline did start from 1979-80 and has gone on apace from then until the present.

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Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

I would suggest accordingly that it be accepted in principle - or for the purpose of further discussion, unless and until the contrary is proven - that there has been a substantial and damaging decline in the livelihood derived from the traditional area over this entire period. If agreement can be reached in principle, then of course it would be desirable that the Band take the steps necessary to establish the total amounts in detail in accordance with such method as may be agreed.

As to whether this decline is due to the impact of development, or is due to natural or other causes, there is not agreement. I have heard it suggested that it is due to natural cycles - some of the species of animals concerned are known to be subject to cyclical waves in population. Mr. Bodden himself remarks on this, and on the corresponding effect brought about in the population of predators by cyclical changes in the population of the animals which are their prey, such as rabbits and hares. And while Mr. Bodden outlines the decline as between the two years which he studied, he does not state that this is due to the impact of development. Others have suggested that the decline in take is due to the growing disinclination of Band members to follow the traditional but arduous pursuits of hunting and trapping for their livelihood. This is denied by the Band members to whom I have spoken who traditionally engage in these pursuits: they are firm in stating that they have continued - in some cases increased - their efforts in the face of development activity, but that in spite of their best efforts they have not been able to maintain their harvest from these activities. Concrete examples have been given of the disruption of traplines and the flight of, for instance, the moose population.

The hard fact is, of course, that the decline in the annual harvest commenced with, and has continued during, the period of active development - that is the evidence. On the other hand, while there has been reference to natural cyclical changes as an explanation, there has been no hard or scientific evidence that such a change was due or was in fact

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Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

taking place. I have been flown over the area and have seen what is involved by way of seismic grid lines driven through this previously wilderness area in a criss-cross pattern, and of installations dotting the previously unlittered landscape. It is a fact, of course, that construction and servicing of such installations involve the intrusion and movement of heavy mobile equipment into and through the area. I am no expert in this matter, but I do share the general knowledge of the adverse effects such a pattern of intrusion and development may be expected to have on shy wildlife species by way of the disruption of breeding cycles and changing of patterns of movement, rest and refuge.

I venture to suggest, then, that in the absence of proof that there is or was a natural cyclical change due at this period, the weight of the evidence is that the decline in harvesting from hunting and trapping is not attributable to the coincidence of a cyclical change, which is speculative, nor to a sudden disinclination on the part of Band members to pursue their traditional means of living, which is not proven, but is due to the impact of development which is an established fact which coincided with the onset and continuance of the decline, and which decline is consistent with the known fact that many of the species of wildlife population involved here are averse to such human intrusion and interference.

As to the questions of law and equity, it is hardly appropriate for me to make a pronouncement on the first. The question of whether there was subsisting native title to the traditional area when development began, or whether and when it was extinguished, and the legal consequences flowing therefrom, are before the Courts in the various actions commenced by the Band, prosecution of which has been held in abeyance during the currency of this Inquiry. No party has indicated any change, or likelihood of change, in its views on this legal matter during the course of my discussions. In these circumstances it is not to be expected that anyone at this stage will be prepared to entertain further

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Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

discussion shaped by a firm statement of opinion from me on this question - even if it were proper for a person in my position to make one at this point.

I shall accordingly confine my comment on this point to two observations which I believe are in order and are relevant. The first is that it is far from certain what would be the outcome of litigating the question: there are powerful arguments to be made on both sides. The other is that whatever might be the outcome, there is no doubt that the process of pursuing it through the Courts in the ordinary way in the various actions now outstanding would be very lengthy and exceedingly costly, with results equally crushing to the loser, whichever side that might be. I hope therefore that the parties will find it possible, and acceptable, to enter into serious and meaningful discussion of a solution of this claim - and others where the same question is involved - on a basis which will recognize and give effect to the equities and practicalities of the situation, leaving in abeyance the question of strict rectitude of either legal position, in order to produce an answer with which all can live.

This brings us logically to a consideration of what may be the rights and obligations created by the Treaty in the context of this situation. It is true that the Band does not rest its claim here on Treaty entitlement except as an alternative and last resort, stating rather that they have never adhered thereto, but Canada's position is that although native title was extinguished by the Treaty, there was substituted therefor, in the case of Indians such as this Band, the right to adhere to the Treaty and to claim and enjoy the benefits thereby conferred. And although Alberta takes the position that it has no direct obligation to the Band under the Treaty, it agrees that it does have those obligations to Canada contemplated in the Resources Transfer Agreement to enable Canada to discharge its Treaty obligations to the Indians. Thus far Alberta has stated this position

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Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

only in the context of the question of Reserve land entitlement under the Treaty and its own obligation under sec.12 of the Transfer Agreement, but I am hopeful that both Alberta and Canada may be prepared to consider the question of obligations in the context of hunting and trapping rights assured under the Treaty as well.

This approach in my view is suggested by the wording of sec.12 of the Transfer Agreement. It is admittedly difficult to assert and validate the concept I have outlined in terms of strict legal obligation or liability arising under the wording of the Treaty and the Agreement, but I consider that it can be demonstrated that something is owed in terms of what is equitable. Again I stress that law and equity are not strangers, and I suggest that the facts of the situation be examined on this basis.

This approach looks first at the words of that paragraph of the Treaty which assures to the Indians that they shall have "the right to pursue their usual vocations of hunting, trapping and fishing throughout "the area in question. True, this right is to be exercised subject to regulations - but this does not contemplate or intend the extinguishment of the right. Then follow the only words of limitation: "saving and excepting such tracts as may be required or taken up from time to time for settlement ... or other purposes." There is one view that says these words clearly contemplate that the right - or at any rate the assurance of a yield from its exercise - may be diminished or terminated by subsequent policies or acts of the sovereign. But that this was not the intention is, in the view under consideration here, established by what was agreed to between Alberta and Canada when the Crown lands were transferred to the Province. Section 12 of the Resources Transfer Agreement starts with the words: "In order to ensure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence ..." (emphasis added). Clearly this contemplates the very opposite of the termination of the supply: rather it contemplates the continuance of the

Claim - 5. COMPENSATION FOR PAST LOSS:

(b) With Respect to Lands Claimed as Traditional Area
(i) Loss of Livelihood from Trapping and Hunting

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

supply in fulfilment of the right assured to the Indians under the Treaty, at least for such time as the Indians must rely upon it "for their support and subsistence". And in order to ensure the continuance, "Canada agrees that the laws respecting game in force in the Province ... shall apply to the Indians ...": but this contemplates laws intending to ensure that continuance, such as bag limits and seasons, which is the object of game laws, not a system or a right to end that supply or its availability.

Then follow words which some argue indicate an intent - or at least confer an absolute right - to limit or end the benefit thus assured: "Provided however that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access." But if one considers these words in their full context, this provision is seen to be inconsistent with such an intent. The immediately preceding passage has as its intent the securing to the Indians of the continuance of the supply, and to this end has provided that the exercise by the Indians of their rights is subject generally to provincial game laws (which have as their object the preservation of stocks of game animals): that passage lastly quoted is a loosening of this restriction to make clear that the right of hunting and trapping for food (i.e. for subsistence, as distinguished from commercial purposes or support) may be exercised at all seasons of the year on unoccupied Crown lands and all other lands to which they may have access.

No one has suggested that the granting of development permits, or the seismic grid lines and installations placed in this area pursuant thereto, have removed the whole of the traditional lands generally from the category of "unoccupied Crown lands" so that the Indians have not the right to hunt and trap thereon. There is disagreement as to whether the Province has jurisdiction, and/or as to the extent of that jurisdiction, to diminish the rights secured by Treaty read

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Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

in conjunction with s.88 of the Indian Act, but it is noted that the Courts have recently tended to interpret this question in favour of the Indians. In any event, Provincial game laws do not prevent or restrict them from access to their traditional area for the purpose of hunting and trapping: the point is, that the availability of game upon which they rely for their support (fur and hides for commercial sale) and subsistence (meat for food) has been seriously diminished as a result of development, notwithstanding that the continuance of the supply was, by the agreement of both governments, to be secured to them.

As I appreciate it, it is not the position of the Band that development must stop or that the continued availability of supply be assured to them forever exactly as it used to be. Rather they recognize that as time passes their own people will probably turn more and more to other ways of living, and their continuing dependence on this supply for their livelihood will be increasingly diminshed. (This aspect of their position has been more fully set out under Claim 3 above.) But they claim compensation in full for the loss they have suffered to date, on the basis of unextinguished Native Title or alternatively that what was assured under the Treaty, the right to the continuance of which was recognized by both Governments in the Resources Transfer Agreement, and upon which they have depended for their livelihood, has been seriously diminished by the unrestricted development which has been allowed to take place without their consent and before they have had time to adjust. The equities of this situation, in the context of what has been discussed above, seem strongly to support their claim and I am hopeful that further discussion, in the light of the approach suggested, may result in the establishment of an acceptable basis for agreement and settlement.

While I am most anxious to avoid putting anyone off by appearing to "point the finger", as it were, there is one other point which I think cannot be avoided. That is the question of which government should pay, if it be accepted that there is a valid claim. While it cannot be denied that Canada has some obligation in that Canada gave the first

Claim - 5. COMPENSATION FOR PAST LOSS:

(b) With Respect to Lands Claimed as Traditional Area
(i) Loss of Livelihood from Trapping and Hunting

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

assurance, it seems to me that - again looking at the equities - the obligation to compensate should be that of Alberta. Alberta was a party to the Resources Transfer Agreement of 1930 which carried the assurance forward. Alberta has long administered these lands, and it was Alberta which permitted the development in question and has derived very substantial revenues therefrom - far beyond the amount of this claim. The position here is quite different from that with respect to the Reserve lands themselves: there, Alberta had been ready for many years to transfer the agreed area, and responsibility for the failure to secure the Reserve and the benefits therefrom to the Band was entirely that of Canada: whereas here, Alberta had agreed that the Indians should continue to enjoy the rights and benefits in question but authorized the development which destroyed or diminished the benefits of those rights, and took the revenues therefrom, without any notice to the Band or to Canada. The equities here seem clearly against Alberta.

Indeed, there is one aspect of Alberta's position in another context which supports the suggestion that Alberta may be ready to accept responsibility here. I refer to Alberta's indicated readiness, without prejudice to the general denial of liability or breach, to discuss the matter of the application, and possible modification, of the Trappers Compensation Program so as to bring the area of compensation to the Band for loss of revenue from trapping while stocks of wildlife are being re-built, within the ambit of that program. This was spoken of in the context of compensation for future loss, but it occurs to me that there might be some willingness to consider it in the context of past loss of trapping revenue as well.

(ii) Oil and Gas Revenues

Band's Position

The Band claims compensation in an amount equal to all lease and royalty revenues derived from exploration for and development of oil and natural gas throughout its traditional area.

Claim - 5. COMPENSATION FOR PAST LOSS:

(b) With Respect to Lands Claimed as Traditional Area
(ii) Oil and Gas Revenues

Band's Position (cont'd.)

The claim is based primarily on the Band's assertion that, since it did not adhere to the Treaty, it has unextinguished native title to this area and those revenues are its as of right, or that if title was extinguished by the fact of such exploration and development, the revenues are owed as compensation for that extinguishment. The Band claims these revenues as the measure of damages or compensation owing for the failure to protect its interests under that title.

The first branch of this claim is directed against Alberta, and the total of revenues received and claimed is understood to be in the area of $700,000,000.00-$1,000,000,000.00. The alternative branch of the claim would appear to be directed primarily against Canada, on the basis that Canada had the obligation to protect, and was negligent and in breach of its fiduciary duty in not protecting, the Band's Native Title to the area and its interests thereunder.

Reference should also be made here to the Band's further position, of which I have only recently been fully apprised, that by virtue of its continuing Native Title it has a claim to damages for the results of the intrusions it has suffered and the consequent disruption and destruction of its way of life. The claim might be in the nature of, or comprehend, an action in trespass, and would include as parties the governments which permitted or authorized that wrong, and one measure of the damages would be the revenues realized as a result. This claim, of which I have only recently become

aware, is more fully discussed in a new portion of this Discussion Paper to be inserted after page 67.

Position of Canada

Canada does not accept liability for payment under any aspect of the claim put forward as against it. Canada's position is that Native Title was extinguished by the Treaty, whether or not the Band adhered thereto, so that there was no negligence or breach of fiduciary duty in permitting Alberta to authorize development of the resources and retain the revenues. This same position would be put as the answer to any claim for these revenues based on trespass, or having authorized or permitted a trespass.

It should be noted, however, that Canada does appear ready to support the Band's claim to reasonable compensation for the actual loss of livelihood and to a program for rehabilitation and protection of wildlife to support that way of life in the future.

Claim - 5. COMPENSATION FOR PAST LOSS:

(b) With Respect to Lands Claimed as Traditional Area
(ii) Oil and Gas Revenues (cont'd)

Position of Alberta

Alberta does not recognize any claim based on continuing native title. In addition, Alberta's position generally is that its only obligations in the context of lands or mineral rights with respect thereto claimed by Indians are obligations to Canada which arise pursuant to the Resources Transfer Agreement and are triggered only by formal request from Canada pursuant thereto. Alberta therefore rejects any obligation to account for oil and gas revenues and royalties. Alberta would also reject any claim for damages based on trespass or permitting trespass and disruption, although Alberta also has indicated a readiness to discuss a "model management program" designed to rehabilitate and preserve stocks of wildlife and control the environment.

Remarks - Including Areas of Possible Reconciliation or Accommodation

In my initial discussions with Band representatives it was not clear to me (if indeed it was advanced at all) that the claim here included the value of the oil and gas extracted to date, as well as the lease and royalty revenues derived therefrom by government. I regret if this was a misunderstanding on my part, or a failure to appreciate that, since the Court actions include the Oil and Gas Companies as defendants, this aspect of the claim should have been addressed in my discussions. The result has been that I did not raise this aspect of the matter in my discussions with the Oil and Gas Companies (Third Party Interests) referred to in earlier portions of this Paper - or indeed with the representatives of either Government. As a result, I am not able to state with certainty what position they take in response.

On the basis of the facts, however, and what is known of their response to the Band's basic position that it has continuing Native Title, I would assume that all other parties concerned would deny liability to the Band with respect to that portion of this claim relating to the value of the oil and gas extracted from the traditional area, as they have done with respect to the lease and royalty revenues

Claim - 5. COMPENSATION FOR PAST LOSS:

(b) With Respect to Lands Claimed as Traditional Area
(ii) Oil and Gas Revenues

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

resulting from that development. That is, all concerned will deny any liability to the Band on the basis that it had continuing Native Title to this area, or that there is liability in trespass or otherwise for entry (or authorizing or allowing entry) for development with resultant disruption of the traditional way of life.

In searching for a route to possible adjustment or reconciliation of differences in this sub-head of Claim, it is difficult to find an alternative approach as was suggested with respect to the previous sub-head (Compensation for Loss of Livelihood from Trapping and Hunting). There, the continued right of Indian people to derive their livelihood from those pursuits was expressly recognized by both Governments, whatever may have been the situation with respect to Native Title, and a review of the relevant considerations seems to support the view that it would be equitable that Alberta, as the Government which derived the revenues from oil and gas development, should compensate the Band for the consequences thereof in the diminution of the livelihood derived from that right. These considerations do not apply, however, to the Band's claim to oil and gas rights in the traditional area, which were not so assured to them and on which they had not previously relied for their living. Nor is there here the same alternative foundation for the claim to compensation for oil and gas revenues not received as there is with respect to those derived from the Reserve area: in that case, the Band's case rests upon the alternative position that it should have been recognized and established on a Reserve shortly after 1899, and that in any event it had been specifically promised the area in question as a Reserve in 1940 and would have enjoyed those revenues but for the non-fulfillment of that promise.

I am, therefore, unable at this time to suggest any specific compromise or adjustment which might reconcile the differences between the parties in respect of this particular sub-head of Claim. Perhaps I may be permitted, however, to point out that if the considerations I have put forward in previous

Claim - 5. COMPENSATION FOR PAST LOSS:

(b) With Respect to Lands Claimed as Traditional Area
(ii) Oil and Gas Revenues

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd)

sections of this Paper in fact lead to acceptance of the accommodations there suggested with respect to the claims for past losses of oil and gas revenues on Reserve land, of Treaty benefits, programs and services, and of loss of revenues from hunting and trapping, then the Band will in fact receive substantial sums by way of compensation. It may be, then, that a generous recognition and satisfactory resolution of those claims, and of others such as Wildlife Management and Employment Opportunities where the problem seems more one of respect and accomodation for the interest concerned rather than payment of money, would conduce to some readiness to compromise with respect to the maintenance of this claim.

Claim - 6. COMPENSATION FOR FUTURE LOSSES:

(a) Hunting and Trapping Livelihood and Revenues

Band's Position

The Band believes - and I see no reason to doubt it - that the loss suffered in support and subsistence for its members from hunting and trapping in its traditional area will continue as the result of development at least until such time as there is instituted an effective Wildlife Management and Environmental Protection Program as discussed above under Claim 3, and that Program achieves its objective. The basis on which the Band rests its claim for compensation here is the same as that for the claim with respect to past loss in this category.

Claim - 6. COMPENSATION FOR FUTURE LOSSES:

(a) Hunting and Trapping Livelihood and Revenues

Band's Position (cont'd.)

As to the amount, the Band's position is that the loss should be measured by the deficiency in the value of each year's actual take as compared to the value in the year preceding the commencement of development (1979-80), and be paid annually as it occurs. Recognizing that there will over the years almost certainly be a diminishing number of members wishing to follow, and actually following, this method of obtaining their livelihood, the Band suggests that the loss be calculated and paid on a per capita basis - i.e., the total value in the base year divided by the number of persons then actually engaged in that activity, as compared with the yield on a similar per capita basis derived by those actually so engaged in each future year.

With regard to the possibility of bringing the trapping side of this loss within the ambit of the Provincial Trappers Compensation Program, the Band raises the question whether this presently provides a mechanism whereby individuals who trap for a living can be compensated for a shortfall in income due to the incursions of resource developers and other outside forces, as distinguished from natural cyclical changes. As it stands now, I am informed that the Provincial Program in place would reimburse the trapper with respect to loss due to development only for loss of equipment were his traplines to be damaged or lost through another's act.

The Band would be glad to discuss this matter with provincial authorities, although it believes that significant modifications to increase the scope and change the administration of any existing provincial program would have to be made to enable it fully to meet the needs and rights of its members. The Band asks, however, as a necessary preliminary to any such discussion, that its claims here, and with regard to hunting, be accepted in principle, and expects to receive the support of Canada in this matter.

Position of Canada

Again, Canada does not recognize any claim for compensation based on continuing native title. So far as the claim is

Claim - 6. COMPENSATION FOR FUTURE LOSSES:

(a) Hunting and Trapping Livelihood and Revenues

Position of Canada (cont'd.)

based on the assurance under the Treaty of the continued right to hunt and trap, Canada's position seems to be that any claim here should be directed against Alberta, which has authorized the development which diminishes the returns, and has received the revenues from that development. Canada would use its good offices to assist in the conclusion of an accommodation between the Band and Alberta through the medium of the Trappers Compensation Program or otherwise.

Position of Alberta

Alberta also rejects the claim based on native title, but has indicated a readiness to discuss with the Band the modifications necessary, if any, to the existing Trappers Compensation Program to enable that program to meet the legitimate needs of those dependent on that form of livelihood.

Remarks - Including Possible Areas of Agreement or Reconciliation

In light of the readiness of Alberta to discuss modifications of the Trappers Compensation Program, if necessary to meet the position and needs of Band members who will be dependent on this form of livelihood in the future, I am encouraged to believe that agreement can be reached in this area which would achieve the position desired by the Band if preliminary and basic agreement can be arrived at regarding the administration of such a program. To date, the information I have been given is that Band members for the most part have not participated in the current program. The reasons given to me are, essentially, that the program as it now exists is ineffective because of:

(a) restrictions on the causes and types of loss for which compensation will be available; and

(b) administrative difficulties caused by lack of communication with, and consequent failure to take advantage of even that coverage now available by,

Claim - 6. COMPENSATION FOR FUTURE LOSSES:

(a) Hunting and Trapping Livelihood and Revenues

Remarks - Including Possible Areas of Agreement or Reconciliation (cont'd.)

isolated communities such as the Band wherein the majority of trappers reside.

Essentially, I see here a lack of communication caused by the unfamiliarity with the administrative process by those sought to be assisted under the current Compensation Program, and if agreement can be reached between Alberta and the Band regarding modification of those provisions of the current legislation which provide for compensation so as to make it clear that loss resulting from development is covered, then a restructuring of communication channels between trapper and Program authorities should see a successful resolution of this matter.

This, of course, does not take care of the matter of future loss of livelihood from hunting, as distinct from trapping. It appears to me to be beyond question that the Band experiences a demonstrable financial loss here, in that moose meat, for instance, was a major subsistence item in its daily living, and has had to be replaced by commercial purchases of meat. This burden can be expected to continue in the future, at least until such time as the management program envisaged under Claim 3 is implemented and effective.

I would hope, accordingly, that Alberta, which derives the revenue from the development which produces this loss, will be prepared to entertain in principle a request for some compensation program here to help the Band meet the cost of this deficiency while it exists. It occurs to me that an approach similar in concept to the suggested program for compensation to trappers and co-ordinated also with the administration of the new or modified program set up for that purpose (perhaps under the overall Wildlife Management Program) might be an acceptable approach. I shall look forward to the prospect of assisting to bring about specific discussions between the parties on this subject.

Claim - 6. COMPENSATION FOR FUTURE LOSSES:

(b) Oil and Gas Revenues

Band's Position

Although the wording of the document "Points for Discussion" referred to at the outset of this Paper is sufficiently broad to include a claim for compensation to the Band for the value of oil and gas revenues and royalties to be derived from the traditional area in the future, Band representatives have now made clear the position that such a claim, based as it would be on continuing Native Title, would terminate with a satisfactory resolution of the other matters in dispute leading to overall settlement and particularly its settlement on its Reserve. (Oil and gas revenues from selected Reserve lands would of course accrue to the Band under the arrangements previously discussed.)

Remarks - Including Areas of Possible Reconciliation or Accomodation

In light of the above statement of the Band's position, it is not necessary to add anything further under this sub-head of Claim, except the comment that it emphasizes the desirability and importance of a satisfactory solution of the Band's claims generally, and the necessity of an approach on the part of all concerned to perceive and appreciate the deep-rooted and understandable apprehensions of the Band concerning its future unless it receives long-delayed and adequate adjustments and compensation for the neglect and injuries it has suffered, and on the part of the Band for the concern of Goverments for their overall constitutional and other responsibilities to all the citizens to whom they must account. I am sure that the the two Governments, and especially Alberta, will appreciate the significance of the possible termination of this substantial claim, and that there will be sincere efforts by all concerned to appreciate the positions and needs of the others and to explore every possibility of reconciliation and accommodation so as to bring about the all-embracing settlement desired.

Claim - 6.1 COMPENSATION FOR TRESPASS, WASTE, AND DESTRUCTION OF CULTURE AND LIFESTYLE

Band's Position

An avenue of claim advanced by the Band comprises damages for trespass and waste by others, under the auspices of the federal and provincial governments, of the Band's traditional lands and way of life. This claim includes compensation for damage to and loss of the aboriginal culture and lifestyle (as opposed or in addition to loss of income from the aboriginal means of livelihood such as hunting and fishing) consequent upon the entry and activities of non-aboriginal entities on the Band's traditional lands. Damages are claimed here to the extent that they can be quantified.

The Band holds that aboriginal rights include the right to maintain and carry on the traditional Indian way of life. Alternatively, that right is included among Treaty rights.

This claim is directly referrable to the invasion of the Band's traditional lands by non-native outsiders in the latters' endeavours to exploit and develop surface and sub-surface natural resources in that area. The compensation sought here can be described as "damages for negative effects on aboriginal people and destruction of aboriginal way of life, including interference with use of the [traditional] land[s], traditional activities, hunting and trapping, access to all of the traditional land, interference with burial sites, traditional practices and ties to the land, culture and traditions" of the Band community. The Band points to destruction of wildlife and the environment in its traditional lands as the waste which it says resulted from these outsiders' unwelcomed activities such as road building, cutting of lines, and construction of pipelines, wells and other projects in that area.

Alberta's Position

This particular claim topic was not discussed with Alberta, apart from the discussions referred to above in respect of compensation for Past, and for Future, Losses.

Claim - 6.1 COMPENSATION FOR TRESPASS, WASTE, AND DESTRUCTION OF CULTURE AND LIFESTYLE (cont'd)

Canada's Position

This claim was not addressed in my discussions with Canada's representatives, other than those noted above in the sections on Compensation for Past, and for Future, Losses and below, in Claims 7 and 8(a).

Remarks - Including Areas of Possible Reconciliation or Accomodation

This aspect of the Band's claim was not specifically noted in my earlier discussions with the Band. It has, however, been forwarded by Band representatives in our January, 1986 exchange, and accordingly draws my following observations.

Firstly, although this claim may be thought in some quarters as too theoretical or as a duplication of compensation claims set out elsewhere, the Band does recognize that money damages under this heading are possible only insofar as quantum can be determined - the Band's primary position is that interference with aboriginal rights, treaty rights, or independent hunting and trapping rights (under Section 12 of the Natural Resources Transfer Agreement) causes damages which are irreparable.

Secondly, that portion of the instant claim referring to damages for trespass and waste appears to be in reference to aboriginal title to the affected land as well as, by analogy, to the rights of hunting and lifestyle dependent upon the land. Aboriginal title has not been satisfactorily defined by the courts - rather it retains, to date, the judicial characterization of an "usufructuary right". Whether that characterization will be assisted by further court pronouncement and whether aboriginal title will be held in law to sustain an action for common law waste and trespass damages are not matters immediate to this Inquiry. At a minimum, however, description of this claim heading provides a fuller understanding of the Band's central concerns.

Further, the reference under this heading to the damages claim for loss of lifestyle/way of life/culture is also made without benefit of specific discussion by me with either government. This part of the claim is easily distinguished

Claim - 6.1 COMPENSATION FOR TRESPASS, WASTE, AND DESTRUCTION OF CULTURE AND LIFESTYLE

Remarks - Including Areas of Possible Reconciliation or Accomodation (cont'd.)

from the claim for compensation for loss of income or loss of production from hunting, fishing and gathering efforts.

However, I do not see in law precedent for compensation specifically addressing loss of lifestyle or culture due to technological change or social interaction between member groups of a political unit or, indeed, of the international human community. It appears that this aspect of claim is based on the premise that common law damages flow from what the common law would regard as normal and usual social and technological exchange and development. I do not know, without further discussion with the Band and the two governments, on what basis common ground can be had unless this claim heading is in effect identified with other measures which I hope it may be agreed will be taken to preserve the environment and natural resources of the Band's traditional lands on which the claimants and their forebears have so long depended.

In this context the following further comments may be relevant. It is unfortunate but nevertheless a fact that change in lifestyle has historically been the apparently inevitable consequence to a native culture of the arrival and advancement of the white man's civilization and economy, although I am not aware of any legal basis upon which monetary damages have been assessed and awarded for that consequence apart from the demonstrable economic losses flowing from the interference with native right and title. Indeed, Band representatives have themselves alluded to the possibility that future generations may well prefer - or at any rate decide - to follow that other lifestyle with its new economic opportunities. These facts seem to emphasize the desirability of generous attitudes towards acceptance of claims such as those for compensation for programs and services not received in the past (which might have eased the disruption), for employment opportunities and job training programs, and for a full and generous "catch-up" program to establish the Band upon its Reserve and bring it the benefits of educational and other services and programs which will assist the members of this community to recover from the severe dislocations and

Claim - 6.1 COMPENSATION FOR TRESPASS, WASTE, AND DESTRUCTION OF CULTURE AND LIFESTYLE

Remarks - Including Areas of Possible Reconciliation or Accomodation (cond't)

disadvantages to which they have undoubtedly been subjected and to adjust to the future problems which the continuance of development undoubtedly poses for them.

Claim - 7. COMPENSATION - BAND'S COSTS TO DATE:

Band's Position

The Band asks to be compensated for the costs and expenses incurred in pursuing its claims to date. Basic to this claim is the Band's position that it had been waiting since 1933 for action on its request to be given a Reserve and established thereon, and since 1940 for action to fulfill the promise then made to it; that renewed discussions and requests to protect its rights and interest threatened by the onset of oil and gas development produced no results so it had no alternative but to commence legal action to compel recognition and protection of those interests; and that the record establishes that had it not been for such action by it in the Courts and in other forums and the publicity and pressure thereby generated, it is doubtful whether even the progress towards a settlement represented by this current Inquiry would have been achieved.

The Band claims accordingly that it is entitled to compensation for the entire cost of the steps which it has been compelled to take in an effort to protect its position and way of life at a time when it had not even been given the basic requirement of a Reserve as its settled homeland and its very existence as a community was in jeopardy. A statement outlining these expenses, totalling $1,539,797.26 as at November 28, 1984, has been provided and is attached hereto as Appendix "B". This list was originally attached to a letter of the same date to the Hon. Mr. Crombie from Chief Ominayak.

A considerable portion of these costs is represented by interest on a Bank loan which the Band was compelled to take out to meet its need in this connection. Interest is calculated to September 30, 1984, and has continued since and will continue at the rate of approximately $9,500.00 per month until the Band is put in a position to repay the loan. The Band points out that it has also incurred further costs since November 30, 1984, including costs of research and representation in connection with this Inquiry. The Band acknowledges receipt of funds recently to apply on the loan and interest expense, and is prepared of course to provide details of all its costs and expenses to date in pursuing its claim, showing the balance owing after giving credit for such monies as it has received.

Claim - 7. COMPENSATION - BAND'S COSTS TO DATE:

Position of Canada

Canada's formal position to date has been to deny any obligation to pay costs incurred directly or incidentally in connection with litigation on the ground that these costs were incurred before negotiations were exhausted. Canada has however been providing some funding recently (under the Item of the Task Force on Treaty 8) on the basis that the Band is entitled to assistance in meeting its current costs of negotiation. Canada is also prepared to consider reimbursement for past expenses of organizing and carrying out field work, surveys and research and matters of a similar nature which are of the type which would have had to be done for, and can be used in the course of, the present Inquiry and negotiations arising therefrom, as distinct from counsel fees and other costs referable only to the litigation.

(It is important to note that Canada's position as summarized here should not be confused with the position in respect of the request for an interim advance on account of compensation to enable the Band to meet its pressing needs to make payment on account of the obligations referred to above. That advance will be made on a without prejudice basis: that is, as an advance against whatever compensation may finally be agreed to be due under all the various heads of claims for compensation including this one, without thereby constituting an admission of liability at this time in respect of any specific claim. I am advised that the submission for payment of such an advance, based on my Interim Report on that matter, is now before Cabinet, and that substantial progress has been made in moving it through the various stages required for final approval.)

Position of Alberta

Alberta is not involved in this head of claim.

Remarks - Including Possible Areas of Agreement or Reconciliation

It appears from the foregoing that there is the basis for agreement on a substantial portion of the Band's claim here - that portion not attributable solely to the preparation for and conduct of the litigation. But it is also apparent

Claim - 7. COMPENSATION - BAND'S COSTS TO DATE:

Remarks - Including Possible Areas of Agreement or Reconciliation (cont'd.)

that unless Canada is prepared to modify its position and include litigation costs as well, there will be a formidable task of segregating the amounts of legal fees and costs incurred which are to be accepted and paid as being of the type which would be incurred in the course of continued negotiation, including preparing the Band's claims for this Inquiry, from those which are to be rejected as having no relation to matters now being considered.

Thus with respect to fees charged for time spent in preparing pleadings and in preparation for appearances in Court: can it be said that these should be rejected as having no relevance to this Inquiry? For after all, the Band is surely entitled to have the assistance of legal experts in the preparation and submission of its position and in discussions thereof before me. The other parties have been assisted by their Counsel from time to time. And surely the time spent by Counsel in preparation of the material and of arguments for Court has been of value to them in their appearances before me. Perhaps Counsel fees for time actually spent in Court can be singled out for rejection, but where else is the line to be drawn, and how is it to be drawn with respect to other types of legal costs and costs associated with research, field work and surveys initially undertaken in preparation for the Court cases but undoubtedly of value, if not indeed essential, to the preparation of the full case in this Inquiry?

Not only is the idea of distinction between legal and other costs incurred as being of value in relation to this Inquiry on the one hand, and those of value only in terms of the litigation on the other, extremely difficult when it comes to its practical application, but I believe that there are, in the special circumstances of this case, reasons to question whether there is a sound basis for maintaining the position which necessitates the distinction.

I recognize that it is not normally the policy of the Government of Canada to reimburse persons or organizations for their costs in preparing and prosecuting a case against

Claim - 7. COMPENSATION - BAND'S COSTS TO DATE:

Remarks - Including Possible Areas of Agreement or Reconciliation (cont'd.)

Canada in Court, except to the extent that the Court may order in the outcome of the litigation. And here, according to the view expressed so far by Canada, the Band commenced its litigation before having exhausted the process of negotiation with respect to its claims. It is on these grounds that Canada has so far declined to entertain the claim for reimbursement of the Band's legal costs, at least with respect to that portion which can be shown (if such segregation is in fact possible) to have been in excess of what would have been required only for continued negotiation, including this Inquiry.

I suggest, with respect, that this approach overlooks the unique nature of the circumstances surrounding this whole matter. It must be remembered that the Band's claims go back as far as 1933, the year of its first Petition to be recognized as a Band and have a Reserve allocated to it in accordance with its entitlement under the treaty. They were promised that Reserve - an area specifically set aside and designated by agreement between them and the two Governments - in 1940. That was 45 years ago - and they still have not got it. Starting in the late 1970's they saw not only their traditional hunting area but the very area which they had been promised as their Reserve - their homeland - subjected to intensive exploration and development against their wishes and with distastrous consequences to them. Substantial revenues accrued from the Reserve, but not to their benefit, and still no action was taken on their behalf. It is not putting it too strongly to say that in all the circumstances it could appear - certainly it did to them - that if they had not started Court action in 1982, which was 42 years after the original promise, nothing would have been done for them to this day.

In such circumstances, when their need was urgent, their situation was desparate and was worsening daily, and their best efforts along the line of negotiation to protect their interests were producing no results in spite of the merits of their position, it could be said without exaggeration that there appeared to be no practical alternative but

Claim - 7. COMPENSATION - BAND'S COSTS TO DATE:

Remarks - Including Possible Areas of Agreement or Reconciliation (cont'd.)

recourse to litigaton. And it is a fact that it was not until after that recourse to litigation that meaningful negotiations - now including this Inquiry - were initiated by Canada.

All these circumstances taken together seem to me to suggest very strongly that this is an exceptional case to which the general policy mentioned above should not be applicable. And the very real and practical difficulty outlined above of segregating the legal costs into two categories further reinforces the case in favour of an exception. Finally, the very fact that there are such unusual and exceptional circumstances would dispose of the possibility that to accept the claim here might represent a precedent or a weakening of the policy generally.

With these considerations in mind I venture the hope that in the further discussions to follow as to the calculation and up-dating of this claim as submitted in Appendix "B", the representatives of Canada will find it possible to proceed on the basis that the full legal as well as the other costs attributable to formulation and processing of the Band's claims will be accepted in full.

Claim - 8. CATCH-UP DEVELOPMENT AND SOCIAL BENEFIT PROGRAMS:

(a) General

Band's Position

In view of the long delays and hardships suffered since 1940, multiplied since the onset of oil and gas development in the 1970's, the Band claims entitlement to a "catch-up" or accelerated program to settle it on its Reserve as soon as possible after that is established, to include the physical aspects of settlement and arrangements for the immediate establishment and full delivery of programs of social services at a level comparable to those which Indian bands receive generally.

Claim - 8. CATCH-UP DEVELOPMENT AND SOCIAL BENEFIT PROGRAMS:
(a) General
Band's Position (cont'd.)

The Band's requirements and proposals have been summarized as follows:

1. A comprehensive socio-economic development package including:

   (a) housing and community facilities and community infrastructure and community services comparable to other Northern communities;

   (b) the cost of developing Reserve land for agricultural purposes, including the cost of clearing, breaking, fencing, equipment, facilities and livestock;

   (c) the cost of helping community people to develop a capability to pursue alternatives to the rapidly disappearing traditional economy, including necessary vocational training and related capital costs.

2. On-going programs and services comparable to those received by other Indians in Canada.

Item 2 of these requirements would of course normally include schools and educational programs. The Band feels however that it has special problems in that area which require special mention and consideration, so the matter of education will be dealt with under a separate head. Item 1.(c), which is also a special need of the Band, is however also mainly referable to the area of education, and will be included under that separate sub-head.

The claim now being considered is addressed primarily to Canada, although the Band does not rule out the possibility of the integration of certain of those services with services being offered by the Province once all outstanding claims have been settled and the atmosphere permits of harmonious on-going relationships.

Claim - 8. CATCH-UP DEVELOPMENT AND SOCIAL BENEFIT PROGRAMS:
(a) General
Band's Position (cont'd.)

The Band places special emphasis on the necessity to be provided annually with assured core funding to enable it to prepare its budgets for administration of its affairs in accordance with the concept of on-going responsible self-government discussed under Claim 9 below. This is another area where early agreement on the population figure of membership in the Band, or on those to be regarded as members of the community for purposes of entitlement and administration, is essential to progress is disposing of the claims.

Position of Canada

As to the matters included in Item 1. of the Band's Position, Canada is already on record in a letter dated December 14, 1983, from the then Federal Minister to the Hon. Mr. Pahl, as proposing "a 'catch up' program of housing, community infrastructure, and economic development". The purpose of this program has been described as bringing the Reserve community to a level comparable to other Bands in Northern Alberta.

As to Item 2. under the Band's Position, it is understood that this is also the position of Canada. Canada is prepared to discuss with the Band the type and level of services involved and the method of delivery.

With respect to the whole, however, representatives of Canada have stated that although there is no reservation in principle, there will be problems in relation to matters such as how many are to be included in the community which is to be moved to the Reserve, and the pace at which it is possible to implement delivery of full-standard services. As to provision of housing, school and community buildings, infrastructure, etc., again there is no disagreement in principle with an accelerated program, but there will be practical problems in implementation. It is estimated that for a community of 300, total costs of design, construction and installation would be in the order of $25,000,000.00 (1985 prices).

Claim - 8. CATCH-UP DEVELOPMENT AND SOCIAL BENEFIT PROGRAMS:
(a) General
Position of Canada (cont'd.)

Representatives of Canada have emphasized that clearly discussion and agreement will be necessary as to phasing of construction and of implementation of social service programs.

Position of Alberta

Alberta is not primarily involved in provision of the socio-economic development package envisaged here. Alberta has however shown no disinclination to extend to the Band the benefits of Provincial social services and programs for which its members may be qualified or eligible, and appears ready to discuss integration of Provincial and Federal services in this context.

Remarks - Including Areas of Possible Reconciliation or Accommodation

It appears that there is agreement in principle here, and that there should be no great obstacle to working out the details of such a program or programs. These will have to include the matter of the time limit within which, or at any rate the objective as to the earliest date when, the physical phases of establishment - construction of buildings, infra-structure, breaking and sowing of land, introduction of livestock, etc. - should be completed. A program phased over a period of five years has been suggested, with appropriate support measures to sustain the Band during the process of moving and becoming established.

The need to settle the numbers of persons to be included in the community for whom these facilities and services are being provided emphasizes the urgency of early agreement between Canada and the Band on the population matter.

Negotiations will of course be required to determine the level of assistance to be provided. Subsequently, an on-going consultation mechanism would likely be required to monitor progress and co-ordinate activity, including parallel activity which may be agreed to be undertaken by Alberta in these areas.

Claim - 8. CATCH-UP DEVELOPMENT AND SOCIAL BENEFIT PROGRAMS:
(a) General
Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

In fact, agreement was reached some months ago that representatives of the Band would meet with Regional and National officials of the Federal Department to discuss these matters, and that a memorandum would be prepared outlining areas of specific agreement and indicating those areas where further discussion or negotiation is necessary. I understand that such meetings have taken place, co-ordinated by Mr. J.R. Wright, the special Liaison Officer appointed by Canada to assist in this Inquiry. I hope that report or memo as suggested may be available in the near future.

(b) Education

Band's Position

The Band is strongly opposed to the school system presently in effect. Under this system as I understand it, the School Board constituted by the Band has no true autonomy or authority with respect to the levels and standards of schooling provided for children of the community, but has merely an advisory role, the administration and decision-making processes being entirely those of the Northlands School District, a Provincial organization, with most of the children from the community being bussed for considerable distances to and from provincially-run school(s).

The position of the Band is that planning provision should be made now for the opening of a school on the Reserve as soon as they are settled thereon, that school to be under Federal jurisdiction. That school should admit also children of non-status or Metis people who, although not members of the Band, are recognized as members of the community under the self-government structure envisaged for the future. The school should be administered by the Band's School Board, the constitution of which now provides for participation by non-status members. The objective is that there should be one school, on the Reserve, administered by the Band, for all children of school age who are members of families within the community.

Claim - 8. CATCH-UP DEVELOPMENT AND SOCIAL BENEFIT PROGRAMS:
(b) Education
Band's Position (cont'd.)

Particular emphasis is placed on the need to provide in the school system for programs of vocational and technical training, and related capital costs thereof, to enable Band members to acquire the skills necessary to live in the rapidly changing economy and environment brought about by development, and to take advantage of employment opportunities therein. (See Item 1.(c) under sub-head (a) of this Claim above.)

The Band accepts, however, that it is most desirable that the programs of education carried out and the standards maintained in the school should be such that children leaving it, or graduating from it, should be qualified and eligible for admission at equivalent grades into schools or post-secondary institutions in the Provincial system. It wishes also that its School Board be authorized, and endowed with the capacity, to enter into reciprocal arrangements with other communities for attendance of pupils from one community at schools of the other or others, particularly at secondary school levels. It looks forward to the opportunity to enter into discussions with appropriate authorities of Canada and Alberta to work out these and other details.

Position of Canada

Canada has not as yet indicated any position in detail to me, although again it was emphasized that, notwithstanding that there is no reservation in principle, there may be practical problems with respect to the pace at which the delivery of full educational programs, including the establishment of a school, can be carried out. It is understood that these matters are also included in the discussions between Band and Regional and National departmental officals arranged by Mr. Wright, referred to above under sub-head (a) of this Claim.

Position of Alberta

As I understood them, representatives of Alberta have indicated that, since responsibility in this field will be

Claim - 8. CATCH-UP DEVELOPMENT AND SOCIAL BENEFIT PROGRAMS:
(b) Education
Position of Alberta (cont'd.)

primarily that of Canada once the Band is settled on its Reserve, it will be for Canada to indicate to what extent, if any, it is desired that the Provincial education system should be involved in the matter of providing schooling and technical training for the Band. Alberta is willing to take part in discussions of this matter, if desired.

Remarks - Incuding Areas of Possible Reconcilation or Accommodation

It was my understanding that the whole matter of education, including the responsibility for financing the construction of a school on the Reserve, and the constitution and authority of the Band's School Board to administer the education program, was included in the discussions at the meetings between Band representatives and Departmental Officials arranged by Mr. Wright, referred to earlier. These discussions were to include the Band's concept that the structure to be established should provide for the allocation of funds annually, through the overall budgetary process discussed under the next head, to meet the requirements of the agreed educational program, such funds to be administered by the Band's School Board which will be responsible for carrying out that program.

One matter which it would appear most desirable to canvass as well is the establishment of uniformity of standards and grades so as to ensure that when it is desired, or becomes necessary, for pupils to move from one school to another or when they reach graduation level, the move to the other school or into the institution of higher learning may be accomplished without loss of grades or of an academic year or similar problems. This matter will of course involve discussion with and agreement of Provincial authorities.

I look forward to receipt of the report of the meetings with Departmental Officals already referred to, and will be glad to assist in any way in arranging discussions at any stage with the appropriate Provincial authorities.

Claim - 9. RIGHTS OF SELF-GOVERNMENT, INCLUDING DETERMINATION OF MEMBERSHIP

Band's Position

The Band claims the right to self-government, once established on its Reserve, including the right to determine who will be members of the Band. The objective in this last respect is that the Band in effect should constitute a continuing community, including initially and caring for all persons of known aboriginal ancestry and historic ties to the traditional lands of the Lubicon Lake people and their descendants, although membership may thereafter be denied to children who are the issue of a union between a non-member and a member who himself or herself has one non-member parent.

The Band has submitted a document entitled GOVERNMENT OF THE LUBICON LAKE PEOPLE which comprises a detailed and considered constitution embodying its proposals for the determination of who will be its members, their rights, and the organization, powers and responsibilities of its government. This document is hereinafter referred to as "the Constitution".

It is the Band's position that once this self-governing structure is in place, the Band should be entirely autonomous with respect to the regulation and administration of its affairs such as the establishment, maintenance and operation of local services including (amongst others) fire and police protection, health, education, welfare and many other enumerated activities and services. The specified powers include also the regulation, construction, maintenance and repair of buildings and the construction, maintenance and regulation of public works and community infrastructure.

The concept, which Band representatives emphasized, is that Canada would no longer administer these or other matters directly for the Band, but rather would continue to provide only block funding annually. This funding might designate the types or categories of purposes to which the funds may be applied, but the actual division of such funds and allocation thereof to specific purposes would be determined by the Band's Governing Council in accordance with and under the authority of its own annual budget prepared for that purpose.

Claim - 9. RIGHTS OF SELF-GOVERNMENT, INCLUDING DETERMINATION OF MEMBERSHIP

Band's Position (cont'd.)

The proposed self-government Constitution provides also that the balance of monies which may be realized from the settlement of all the Band's land claims here under consideration, together with moneys to be derived from resource royalties, will not be distributed among Band members on a per capita basis, but rather will be invested and the interest income therefrom used only, as authorized from time to time by the Governing Council, to meet the cost of such programs and purposes as shall be approved in such authorization.

Position of Canada

Canada has not as yet indicated any precise position with regard to the details of this proposal. It is understood, however, that an increasing degree of autonomy and self-determination by Bands in matters of local concern is in fact an objective of Federal policy. Canada has also pointed out that the right of an Indian Band to control its own membership in the future has now been provided by legislation (Bill C-31).

Position of Alberta

Alberta is not involved in the matters under consideration here except to the extent noted in the Remarks section hereunder. Its position will be discussed there.

Remarks - Including Areas of Possible Reconciliation or Accomodation

As already observed, the objective of the Band in terms of self-government and self-determination in respect of membership are in general consonant with the policy of Canada in these areas. Subject to the reservations hereafter noted, it is anticipated accordingly that specific agreement, or accommodation, between the Band and Canada with respect to a large part of the detail in the Band's proposed Constitution can be reached in further discussions, or may already have been reached in the meetings arranged for by Mr. Wright. As to the matters where agreement or accommodation will be more

Claim - 9. RIGHTS OF SELF-GOVERNMENT, INCLUDING DETERMINATION OF MEMBERSHIP

Remarks - Including Areas of Possible Reconciliation or Accomodation (cont'd.)

difficult, these will be of concern to both Canada and Alberta. I shall defer consideration of them until after mentioning the one or two areas which involve the Band and Alberta alone.

Here reference is made first to para. (c) of Clause 4, the clause which sets out the Powers of the Governing Council of the Band (therein referred to as the Lubicon Lake People) under the proposed Constitution. This particular provision would empower the Council to make by-laws for the purpose of:

> Wildlife management and environmental protection throughout the traditional lands of the Lubicon Lake people including pollution control, the protection of historic and cultural sites, the protection of natural flora and fauna, the protection of wildlife breeding grounds and the regulation of hunting, trapping and fishing;

This is consistent with the corresponding provision in para. (a) of Cl. 3, the Objects clause.

This raises once again the question of whose is, or will be, the authoritiy to control and manage these matters in this area. The Band's position is as set out under Claim 3 above: that as part of the settlement of all these matters it should be recognized that it has the authority to manage the wildlife resource and protect the environment in its traditional area in order to ensure that those members who depend on hunting and trapping for their livelihood will be assured of the wildlife stocks to make that right a practical reality, and that this must be reflected in a program set up to give effect thereto.

The Band has indicated a willingness to discuss with Alberta the setting up and implementation of such a program giving the Band effective control and decision-making authority. Alberta, while maintaining that it has constitutional jurisdiction in this field, has expressed a willingness to consider and discuss the setting up of a "model management program" which will recognize and protect the Band's interests and

Claim - 9. RIGHTS OF SELF-GOVERNMENT, INCLUDING DETERMINATION OF MEMBERSHIP

Remarks - Including Areas of Possible Reconciliation or Accomodation (cont'd.)

concerns in this area. It is noted that the regulation-making power contemplated in the provision above set out is subject to the introductory words of Cl.4 of the proposed Band Constitution which governs all the policies and by-laws within the scope of that Clause - that is, that they shall be "not inconsistent with the Canadian Constitution". I can only express the hope accordingly, that in those discussions especially - although also in all discussions which follow hereafter - the parties will have due regard to the considerations and objectives outlined earlier on pages 22 - 31 so that they may reach the haven of an agreement which reflects and carries into effect the desired aims without foundering on the rock of rigid positions on exclusive constitutional or legal authority.

And I hope I may be permitted to suggest also that the Band's representatives might consider holding in abeyance their position on the formality of the wording of the provision under discussion here, until it is seen whether some modification is indicated to reflect in legislative form the substance and reality of the program as actually agreed.

Claim - 9. RIGHTS OF SELF-GOVERNMENT, INCLUDING DETERMINATION OF MEMBERSHIP

Remarks - Including Areas of Possible Reconciliation or Accomodation (cont'd.)

Another matter where the wording of the Band's draft Constitution may be expected to raise concern on the part either of Canada or Alberta, or both, arises as a result of the somewhat sweeping language of other provisions giving the Governing Council law-making powers and exempting its members from liability for official acts. These include paras. 4(d) and (g) of Cl. 4 relating to the punishment of persons for acts committed on the Reserve (including reference to "convicted offenders"); and Cl. 45 as to limitation of liability. I do not wish to appear to assume the authority to lay down a rule as to constitutional law, but it does occur to me that the two first-mentioned provisions might be construed as trenching on the field of criminal law reserved to the exclusive jurisdiction of the Parliament of Canada, while the other may appear to conflict with the exclusive jurisdiction of the Province to legislate with respect to property

Claim - 9. RIGHTS OF SELF-GOVERNMENT, INCLUDING DETERMINATION OF MEMBERSHIP

Remarks - Including Areas of Possible Reconciliation or Accomodation (cont'd.)

and civil rights. I recognize that this conflict would not arise if the subject-matter were confined to relationships arising only within the Reserve, but the scope of the matters or acts here set out with respect to which liability would be limited clearly includes relationships having effect, and with persons, outside the Reserve.

I raise these matters for consideration only.

Finally mention must be made of Cl. 16 of the draft. While it is entirely understandable, and in keeping with developing policy, that the Band should wish that its own rules and regulations should prevail with regard to governance of its own affairs on its Reserve, there is no doubt that the scope of the matters with respect to which the power to institute policies and enact by-laws is given throughout this Constitution is in many cases such that they could have effects which would be felt off the Reserve as well. With this in mind, I cannot fail to observe that it seems not only unrealistic, but unnecessarily provocative and prejudicial to the atmosphere for constructive discussion and settlement of differences, to include in this draft a provision which asserts, as this one does, that in the event of any inconsistency or conflict with Acts of Parliament or of the Alberta Legislature, the Band by-laws shall prevail. I would strongly urge a re-consideration of this wording.

Having made these observations, I wish nevertheless to record my respectful opinion on two matters of principle. First, that it is desirable that the Band should be given, and should assume, the widest powers of self-determination and self-government to enable its members to realize the concept of the preservation and continuance of their way of life as an Indian community in a manner that is compatible with a balance between their rights and interests and those of others with whom they must live in harmony. And second, that notwithstanding the reservations I have taken the liberty of expressing as to certain specific provisions, my view is that this draft represents a commendable and constructive effort to turn that concept into reality. I hope that

Claim - 9. RIGHTS OF SELF-GOVERNMENT, INCLUDING DETERMINATION OF MEMBERSHIP

Remarks - Including Areas of Possible Reconciliation or Accomodation (cont'd.)

the considerations I have put forward may assist in discussions which will lead to the working out of agreement on those modifications which will render this draft an acceptable Constitution for Band self-government.

CONCLUSION

The purpose of all the foregoing has been to set out the positions of Canada, of Alberta and of the Band, and of others where such interests exist, regarding the various "Points for Discussion" advanced by the Band to the Minister on 26th November, 1984, together with my appreciations of those various positions and their impact on my efforts to date in this Inquiry. Although delayed somewhat, this Discussion Paper now serves, in accordance with the schedule of activities agreed upon by the three major participants with me at the outset of the Inquiry, both to summarize agreements and areas of commonality between two or more of Canada, Alberta and the Band and, as well, serves as the basis for the contemplated further round of discussions between those parties to be conducted as the next stage of this Inquiry. As I have remarked in the past, I very much hope that it will be agreed that this further round of discussions will consist of meetings for the most part directly between representatives of Canada, Alberta and the Band.

I did not propose, by the summations and observations contained in this Paper, to preclude further discussions regarding development of the respective parties' positions or accords which may arise between them on various matters in subsequent discussions. My purpose rather has been to record for the benefit of all parties in their future approach to the various matters touched upon in this Inquiry my understandings of the facts and attitudes made known to me as at the time of writing, as well as attempting where possible to lay the basis for agreements to be embodied in my Final Report to the Minister which is to be the product of this Inquiry. Nor do I, for that matter, hold the absolute

CONCLUSION (cont'd.)

expectation at this time that the contemplated further round of discussions may not alter to some degree my present appreciations with respect to the various topics of the Inquiry which are set out by me in the body of this Discussion Paper.

It is my hope, and I trust, that this document will provide the basis for a comprehensive and acceptable resolution of the Lubicon Lake Band issue. In order to move the matter forward, I shall be in touch soon with all concerned to arrange for the schedule of further meetings.

DATED AND DELIVERED the 7th day of February, 1986.

VANCOUVER, B.C.
7TH FEBRUARY, 1986

Hon. E.D. Fulton, P.C., Q.C.

EDF5B.35588

APPENDIX "A"

to

Discussion Paper dated 28th November, 1985

(ref. pp.42 ff)

EXTRACTS FROM TREATY 8

- Treaty Benefits

Paragraph A

And with a view to show the satisfaction of Her Majesty with the behaviour and good conduct of Her Indians, and in extinguishment of all their past claims, She hereby, through Her Commissioners, agrees to make each Chief a present of thirty-two dollars in cash, to each Headman twenty-two dollars, and to every other Indian of whatever age, of the families represented at the time and place of payment, twelve dollars.

Paragraph B

Her Majesty also agrees that next year, and annually afterwards for ever, She will cause to be paid to the said Indians in cash, at suitable places and dates, of which the said Indians shall be duly notified, to each Chief twenty-five dollars, each Headman, not to exceed four to a large Band and two to a small Band, fifteen dollars, and to every other Indian, of whatever age, five dollars, the same, unless thereby some exceptional reason, to be paid only to heads of families for those belonging thereto.

Paragraph C

FURTHER, Her Majesty agrees that each Chief, after signing the treaty, shall receive a silver medal and a suitable flag, and next year, and every third year thereafter, each Chief and Headman shall receive a suitable suit of clothing.

Paragraph D

FURTHER, Her Majesty agrees to supply each Chief of a Band that selects a reserve, for the use of that Band, ten axes, five hand-saws, five augers, one grindstone, and the necessary files and whetstones.

Paragraph E

FURTHER, Her Majesty agrees that each Band that elects to take a reserve and cultivate the soil, shall, as soon as convenient after such reserve is set aside and settled upon, and the Band has signified its choice and is prepared to break up the soil, receive two hoes, one spade, one scythe and two hay forks for every family so settled, and for every three families one plough and one harrow, and to the Chief, for the use of his Band, two horses or a yoke of oxen, and for each Band potatoes, barley, oats and wheat (if such seed be suited to the locality of the reserve), to plant the land actually broken up, and provisions for one month in the spring for several years while planting such seeds; and to every family one cow, and every Chief one bull, and one mowing-machine and one reaper for the use of the Band when it is ready for them; for such families as prefer to raise stock instead of cultivating the soil, every family of five persons, two cows, and every Chief two bulls and two mowing-machines when ready for their use, and a like proportion for smaller or larger families. The aforesaid articles, machines and cattle to be given one for all for the encouragement of agriculture and stock raising; and for such Bands as prefer to continue hunting and fishing, as much ammunition and twine for making nets annually as will amount in value to one dollar per head of the families so engaged in hunting and fishing.

APPENDIX "B"

to

Discussion Paper dated 28th November, 1985

(ref. pp.70 ff)

BAND'S SUMMARY OF EXPENSES AND COSTS

to Nov.28, 1984

Loan Interest[1]	166,018.51
Operating Costs	
Incorporation	1,005.56
Bank Charges	227.25
Meeting Expenses	1,820.46
Office Supplies, Postage & Deliveries	5,327.84
Reproduction	19,489.30
Telephone	18,326.63
Board Travel	32,400.85
Audit	1,650.00
Miscellaneous	416.35
Total Operating Costs	$ 80,664.24
Field Worker Fees & Travel	$ 5,429.05
Legal Fees & Expenses	$880,124.46
Research Fees & Expenses	$ 9,699.65
Technical Fees & Expenses	$234,820.74
Management Fees & Expenses	$163,040.61
GRAND TOTAL	$1,539,797.26

NOTE

Loan Interest calculations are up to September 30, 1984, because the bank statement has not yet been received. Monthly interest charges run at approximately $9,500.00.

Aug 1-85

Government of Canada / Gouvernement du Canada

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Department of External Affairs

Ministère des Affaires extérieures

Canada

OTTAWA, ONTARIO
K1A 0G2

May 22, 1986

Mr. Martin Low
General Counsel
Human Rights Section
Department of Justice
6th Floor, Room 601
239 Wellington Street
OTTAWA, Ontario
K1A 0H8

Martin

Dear Mr. Low.

RE: Complaints under the Optional Protocol:
(1) Lubicon Lake Case (Communication No.167/1984)
(2) Landry (Communication No. R.25/112)

... Attached please find a copy of the decision of the Human Rights Committee declaring the Landry communication ... inadmissible, as well as a copy of the Committee's interim decision and further submissions from the complainant with respect to Lubicon Lake.

not attached

You will note that with respect to the latter the Committee is asking for further information by July 2, 1986. We would be grateful if you would contact us regarding the likelihood of our meeting this deadline.

Yours sincerely,

Peter McRae
Acting Director
Legal Operations
Division

J.S. Crowther/IMHS/992-6664/amm
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OTTAWA, ONTARIO
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S E C R E T

ACC 451219 REF | DATE
FILE 45-CDA-13-1-3-LUBICON DOSSIER
LAKE BAND
MAY MAI 20 1986

Dear Colleague,

Thank you for your letter of February 28, 1986 concerning the negotiation and settlement strategy to resolve the long standing grievances of the Lubicon Lake Indian Band.

The Band's complaint to the Human Rights Committee is of great concern to me and my Department. The Committee has still not completed its review of Canada's observations on the admissibility of the complaint and has not, consequently, rendered a decision. However, should the Committee decide that the case is admissible, then serious questions on the principle of self-determination, as stated in the International Covenant on Civil and Political Rights and as applied to Indian populations in Canada, will be raised. While I am confident our arguments will lead the Committee to rule in Canada's favour, it would no doubt be preferable to have this complaint withdrawn as part of a package settlement with the Band.

I have received correspondence on this issue from many parts of the country, but particularly from Alberta. Some of this correspondence criticizes both the federal and Alberta governments for their failure to redress these old wrongs. A successful negotiated settlement should no doubt put these adverse reactions to rest. In addition, I would hope that a settlement could eventually lead to improved economic and social conditions for the Lubicon Lake Band.

.../2

The Honourable David Crombie, P.C., M.P.
Minister of Indian and Northern Affairs,
Room 511-S, Centre Block
House of Commons
Ottawa, Ontario
K1A 0A7

I thank you for your offer to have Mr. Rawson brief me, or my senior officials, should the need arise. For the moment, however, I would appreciate simply being kept up-to-date on any new development in the negotiations, as it may become necessary that I comment publicly on this matter in the event that the Human Rights Committee should decide that the case is admissible.

Yours sincerely,

Original signed by: MINISTER
Original signé par: JOE CLARK

External Affairs Canada / Affaires extérieures Canada

MESSAGE

Accession/Référence	
File/Dossier	

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INFO: INFO PRMNY BH SECSTATEHULL/DADSON BH JUSTOTT/LOW

DISTR: DISTR IMH JCD

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---HUMAN RIGHTS CTTEE:LUBICON LAKE CASE(COMMUNICATION NO 167/1984)
RECEIPT OF REFTEL COINCIDED WITH THAT OF NOTE FROM
CENTRE FOR HUMAN RIGHTS,ADVISING OF INTERIM DECISION BY
CTTEE DURING ITS 27TH SESSION.DECISION REQUESTS STATE
PARTY TC INFORM CTTEE OF OUTCOME OF REVIEW OF CASE BY
SPECIAL ENVCY(DESIGNATED BY MIN OF IAND IN 85MAR)AND
CF ANY MEASURES TAKEN OR PLANNED ON PART OF STATE PARTY
IN THAT CONNECTION.AUTHOR OF COMMUNICATIONS IS REQUESTED
TC INFORM CTTEE OF ANY DEVELOPMENTS IN LEGAL ACTIONS BEFORE
CDN CCURTS.DEADLINE FOR REPLY TO THESE REQUESTS FOR INFO IS
02JUL.
2.CENTRES NCTE ALSO CONVEYS COPY OF SUPPLEMENTARY SUBMISSION
FRCM AUTHOR CF COMMUNICATION DATED 09APR.THIS SUPPLEMENT PURPORTS
TC SUMMARIZE HISTORY OF CONTROVERSY FROM 1933 TO 1986,
INCLUDING FULTON ENQUIRY,IN RESPECT OF WHICH QUOTE FEDERAL
AND PROVINCIAL GOVTS HAD WITHDRAWN THEIR SUPPORT UNQUOTE
WITHIN DAYS OF FILING OF FIRST DRAFT OF FULTONS DISCUSSION
PAPER.CCPIES OF CENTRES NOTE AND ATTACHMENTS FOLLOW BY

...2

PAGE TWO YTGR3482 CONFD

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CCC/258 0711077 YTGR3482

EXTERNAL AFFAIRS **AFFAIRES EXTÉRIEURES**

TO / À: The Under-Secretary of State for External Affairs OTTAWA (JLO)

FROM / De: The Permanent Mission of Canada GENEVA

REFERENCE / Référence: Our telegram YTGR-3482 of May 7, 1986

SECURITY / Sécurité: RESTRICTED

DATE: May 7, 1986

NUMBER / Numéro: 3483

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

ENCLOSURES / Annexes

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DADSON

... Attached is the Centre's Note No.G/SO 215/51 CANA(38) 167/1984 conveying the Human Rights Committee's interim decision on this communication, as well as a copy of the latest submission by the complainant.

The Permanent Mission

cc - IMH
cc - file 45-17-7 - Lubicon

OFFICE DES NATIONS UNIES A GENÈVE

CENTRE POUR LES DROITS DE L'HOMME

UNITED NATIONS OFFICE AT GENEVA

CENTRE FOR HUMAN RIGHTS

Télégrammes : UNATIONS, GENÈVE
Télex : 28 96 96
Téléphone : 34 60 11 31 02 11

Palais des Nations
CH - 1211 GENÈVE 10

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

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 of an interim decision adopted by the Human Rights Committee on 10 April 1986, 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 (assisted by J. Lefevre).

With reference to the information furnished by the State party on 31 May 1985, concerning the designation of a special envoy to meet with representatives of the Lubicon Lake Band and others to review the entire situation and to formulate recommendations thereon, the State party is requested, pursuant to operative paragraph 1 of the interim decision, to inform the Committee of the outcome of the special envoy's review and of his recommendations as well as of any measures which the State party has taken or may intend to take in that connection.

The information from His Excellency's Government should reach the Human Rights Committee, in care of the Centre for Human Rights, United Nations Office at Geneva, within two months of the transmittal of the present decision, that is not later than 2 July 1986.

The Secretary-General also has the honour to transmit herewith the text of a further submission from the author, date 9 April 1986.

2 May 1986

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

CCPR

Distr.
RESTRICTED*

CCPR/C/27/D/167/1984
10 April 1986

ORIGINAL: ENGLISH

HUMAN RIGHTS COMMITTEE
Twenty-seventh session

DECISIONS

Communication No. 167/1984

Submitted by: Bernard Ominayak, Chief of the Lubicon Lake Band (assisted by J. S. Lefevre of the International Indian Treaty Council)

Alleged victim: The Lubicon Lake Band

State party concerned: Canada

Date of communication: 14 February 1984

Documentation references: Decisions - 9 November 1984 (CCPR/C/WG/23/D/167/1984)

Date of present decision: 10 April 1986

Interim decision

The Human Rights Committee,

Recalling the information furnished by the State party on 31 May 1985, concerning the designation, in March 1985, of a special envoy of the Minister of Indian and Northern Affairs to meet with representatives of the Lubicon Lake Band, other native communities and the Province, to review the entire situation and to formulate recommendations thereon,

---

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

Noting also that, based on the submissions of both parties, legal actions initiated by the Lubicon Lake Band appear still to be pending before the Canadian courts,

Taking note of the latest submission from the author of the communication, dated 9 April 1986,

Decides:

1. That the State party be requested to inform the Committee of the outcome of the special envoy's review and of his recommendations as well as of any measures which the State party has taken or may intend to take in that connection;

2. That the author of the communication be requested to inform the Committee of any developments in the legal actions pending in the Canadian courts;

3. That the parties be requested to furnish the Committee with the information sought within two months of the transmittal to them of the present decision;

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

NATIONS UNIES

CCPR

Pacte international relatif aux droits civils et politiques

Distr.
RESTREINTE*

CCPR/C/27/D/167/1984
10 avril 1986
FRANCAIS
ORIGINAL : ANGLAIS

COMITE DES DROITS DE L'HOMME
Vingt-septième session

DECISIONS

Communication No 167/1984

Présentée par : Bernard Ominayak, chef de la bande du lac Lubicon (avec le concours de J. S. Lefevre, du Conseil international des traités indiens)

Victime présumée : La bande du lac Lubicon

Etat partie concerné : Canada

Date de la communication : 14 février 1984

Références : Décision - 9 novembre 1984 (CCPR/C/WG/23/D/167/1984)

Date de la présente décision : 10 avril 1986

Décision provisoire

Le Comité des droits de l'homme,

Rappelant les informations fournies le 31 mai 1985 par l'Etat partie au sujet de la désignation, en mars 1985, d'un envoyé spécial du Ministère des affaires indiennes et des affaires des territoires septentrionaux qui a été chargé de rencontrer des représentants de la bande du lac Lubicon, d'autres communautés autochtones et de la Province, d'examiner la situation dans son ensemble et de formuler des recommandations,

* Chacun est prié de respecter strictement le caractère confidentiel du présent document.

Notant aussi que, d'après les communications des deux parties, les actions en justice intentées par la bande du lac Lubicon devant les tribunaux canadiens semblent toujours pendantes,

Prenant acte de la dernière communication, datée du 9 avril 1986, émanant de l'auteur de la communication,

Décide :

1. De prier l'Etat partie de l'informer des résultats de l'examen effectué par l'envoyé spécial et de ses recommandations ainsi que de toutes mesures que l'Etat partie a prises ou peut entendre prendre à cet égard;

2. De prier l'auteur de la communication de l'informer de tout fait nouveau touchant les actions en justice pendantes devant les tribunaux canadiens;

3. De prier les parties de lui fournir les informations demandées dans les deux mois qui suivront la date à laquelle la présente décision leur aura été communiquée;

4. De communiquer la présente décision à l'Etat partie et à l'auteur de la communication.

VAN NESS, FELDMAN, SUTCLIFFE & CURTIS
A PROFESSIONAL CORPORATION
1050 THOMAS JEFFERSON STREET, N. W.
SEVENTH FLOOR
WASHINGTON, D. C. 20007
(202) 331-9400

S. LYNN SUTCLIFFE
HOWARD J. FELDMAN
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DONALD F. SANTA, JR.
PAUL NOLAN

OF COUNSEL
D. ERIC HULTMAN
HOWARD ELIOT SHAPIRO

April 9, 1986

Mr. Jakob Th. Moller
Chief, Communications Unit
Center for Human Rights
c/o United Nations Liaison Office
42nd Floor
United Nations Headquarters
New York, N.Y. 10017

RE: Communication No. 167/1984

Dear Mr. Moller:

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

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

Sincerely,

Jessica S. Lefevre

Enclosure

SUPPLEMENT NO. 2 TO COMMUNICATION NO. 167/1984

SUBMITTED BY CHIEF BERNARD OMINAYAK

AND THE LUBICON LAKE BAND OF ALBERTA, CANADA

INTRODUCTION

On February 14, 1984, Chief Bernard Ominayak and the Lubicon Lake Band, with the assistance of Jessica S. Lefevre, submitted Communication No. 167/1984 ("Communication") to the United Nations Committee on Human Rights ("Committee") for its consideration. On March 27, 1985, the same parties submitted a Supplement to the Communication ("Supplement No. 1") to provide the Committee further information on events relevant to the Band's status. The present Supplement is being submitted for the purpose of further informing the Committee with regard to events which have transpired since the submission of Supplement No. 1.

SUMMARY OF THE HISTORY OF THE CONTROVERSY

1933: The Lubicon Lake Band petitioned the Federal Government of Canada for recognition as a Band and for establishment of a Federal Reserve.

1940: The Federal Government informed the Band that such a Reserve would be established. To date, this commitment remains unfulfilled.

1940-1972: The people of Lubicon Lake continued to pursue their traditional way of life essentially undisturbed.

1972-1975: The Alberta Provincial Government commenced construction of an all-weather road into the Band's traditional area, the purpose of which was to open the Band's traditional area for oil and gas exploration and development.

1975-1977: The Band attempted to file a caveat with the Alberta Provincial Government. This would have placed potential developers on notice that the Band's aboriginal land title had never been ceded or otherwise extinguished. Provincial officials refused to accept and file the caveat as Provincial law, at the time, required. The Band filed a motion in court, requesting that the Alberta Provincial Government be compelled to accept and file the caveat as Provincial law at the time, required. The Provincial Government requested that the hearing on the Band's motion be postponed. The request was granted and during the time of this stay, the Alberta Provincial Government rewrote the relevant law, making the changes retroactive to before the time the Band attempted to file the caveat. In light of the rewritten, retroactive law, the courts dismissed the Band's action as no longer having any basis in law. The Committee may wish to note that in a country with a modern constitution, such a retroactive application of the law would have been blatantly unconstitutional.

1978-1979: The Provincial Government's all-weather road into the Band's traditional area was completed.

1979-1980: Dozens of energy corporations invaded the Band's traditional area and commenced large-scale development activity on leases granted by the Alberta Provincial Government. With the commencement of this activity, the game which the Band relied upon for its livelihood began to disappear. In conjuction with the development, the community's traps and traplines were deliberately destroyed, and trapline routes were expropriated and fenced off for use as private oil company roads.

During 1980 the Band instituted legal action in Federal Court, seeking recognition of its aboriginal title to its traditional lands.

1982: Several major forest fires occurred in the area and were allowed to burn out of control, decimating the remaining populations of game animals.

The Band instituted legal action in Provincial Court, based upon essentially the same claims as were being pursued in Federal Court. In conjunction with this Provincial case, the Band requested an interim injuction to halt oil and gas development in the area until the title issue and related questions are settled. This request for an interim injunction was heard and denied, by a judge with clear ties to the energy corporations operating in the area, leaving the Band no effective means of redress within the domestic legal system.[1/] See Supplement No. 1.

1983: By this time the energy corporations operating in the area, as well as the Alberta Provincial Government, were realizing substantial revenues from the development, including lease and bonus payments from within the area that Canada had designated as a Reserve for the Lubicon Lake Band in 1940. The Band was and remains completely excluded from enjoyment of the revenue accruing as a result of the energy development on its land. To the contrary, among the people at Lubicon Lake, the level of debt, in what had been an entirely self-sufficient community, had begun to rise dramatically.

1984: By this time, the community's level of welfare dependency had risen to 90 percent. The resulting psychological devastation of the members of the community began to manifest itself through an increase in the use of alcohol.

1/ Both court cases have been held up on procedural questions and are only now coming to trial. The trial and appeals process will take another five years at minimum. As the development in the area progresses, the substantive issues raised in the Federal and Provincial Courts become increasingly moot. It is clear at this point that by the time these suits are completed the Band will have ceased to exist.

The Band, despairing of redress within the domestic system in Canada looked to the United Nations for assistance and filed its initial Communication with the U.N. Committee on Human Rights. In its Communication to the Committee, the Band requested that the Committee find the Federal Government of Canada in violation of Articles 1(1), (2), and (3) of the International Covenant on Civil and Political Rights ("Covenant"). With regard to Article 1(3) of the Covenant, the Band stated that "Canada is denying the People of Lubicon Lake the physical means for exercising the self-determination they have enjoyed since time immemorial, and the continuation of which is guaranteed by Article 1(3). Physical destruction of the environment and deliberate efforts to undermine the Band's economic base have accompanied energy exploration in the area, thus depriving the Band of any means by which to subsist on its own." Communication, p. 3.

The Band further informed the Committee that "with the loss of its traditional economic base, the Lubicon Lake Band is faced with extinction as a People. The pattern and results of many other essentially similar situations demonstrate that the destruction of the economic base of small-scale societies is followed by irreversible deterioration of the political and social structure." Communication, p. 9. This deterioration is progressing at a rapid pace at Lubicon Lake.

1985-1986: As a result of the destruction of the Band's economy, the Band members now have been unable to support themselves for three years. During 1985 and 1986, the community has begun to experience a widespread deterioration of its social structure and community norms. The inability of the men in the community to support their families through hunting and trapping, or any other means, is bringing about a breakdown of traditional family roles which, inevitably, is resulting in an

increase in violence and alcoholism, problems unknown to these people only a short time ago.

Recently, the first suicide in the known history of the Band occurred. In another incident, six adolescents were killed in an auto accident, the community's first victims of this type of violent death. A woman died two months ago when her house burned down. She had been drinking. In the neighboring community of Peerless Lake, six people died after drinking a mixture of lysol and methylhydrate (photocopying fluid). The container from which these people were drinking was clearly marked as containing poison, thus making it unclear as to whether this incident should be classified as chemical abuse or suicide.

For the people of Lubicon Lake and its neighboring communities, such incidents were completely unheard of only months ago.[2/] The pressures which brought about these events and that will inevitably result in an escalating rate of such incidents are directly related to the conditions of life to which these people have been subjected, without consultation and entirely against their will. These events, themselves, are clear evidence that the people at Lubicon Lake are being subjected to living conditions which are a threat to their continued physical existence.

2/ The Lubicon Lake Band is presently comprised of approximately 350 to 450 people. The Band, however, is only one of several Indian communities in the area that are being destroyed as a result of the expropriation of their territory and the decimation of their economies. The total number of people affected by these circumstances is approximately 2500 to 3000. Neighboring communities, unfortunately, do not enjoy the strong political leadership and organization of the Lubicon Lake Band, which has enabled the Band to press its claims in the face of this tragedy. It is hoped, however, that if the Government of Canada can be brought to recognize the claims of the Lubicon Lake Band, it will also give recognition to the destruction of the neighboring communities.

GENOCIDE AT LUBICON LAKE IN ALBERTA, CANADA

In its Supplement No. 1, filed in 1985, the Band respectfully informed the Committee that, as a result of the conditions imposed upon the Band through the deliberate destruction of its economy and the clear lack of redress within Canada's domestic system, "at the very least, cultural, if not physical genocide is successfully being practiced upon the Crees of Lubicon Lake with the concurrence and complicity of the Federal Government of Canada." Supplement No. 1, p. 8.

The Band realizes that this is a strong charge. However, we request that the Committee consider the evidence and then note that the United Nations Convention on the Prevention and Punishment of the Crime of Genocide ("Convention"), which the Government of Canada has ratified, defines genocide as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such . . . [including] . . . deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part . . . ." The Convention also lists among its punishable acts "complicity in genocide."3/

The Federal Government of Canada is fully aware of the situation at Lubicon Lake and has time and again made promises to rectify the situation, in recognition of its trust responsibility to the Indigenous people of Canada. Yet, to date, the Government of Canada has done nothing of actual substance to bring about a resolution to the problems being faced by the people at Lubicon Lake. Despite the fact that it has both the ability and the responsibility to intervene on behalf of the

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3/ The Band is aware that enforcement of the Genocide Convention is not within the Committee's jurisdiction. The language of this Convention is referenced as an example of the internationally agreed upon definition of acts which constitute and are punishable as genocide.

Lubicon Lake Band, Canada continues to do nothing more than issue empty promises, designed to appease public conscience, while permitting the Province and the energy corporations to literally bulldoze the Band and its neighboring communities out of existence.

THE ATTEMPT AT A NEGOTIATED SETTLEMENT

Last year, the Federal Government of Canada appointed Mr. E. Davie Fulton to act as a special investigator and conduct an inquiry into the status of the Lubicon Lake situation. Mr. Fulton is a widely known and respected public figure in Canada. He is a former Federal Minister of Justice, a former Justice of the Supreme Court of British Columbia, and a broadly supported candidate for the position of Prime Minister of Canada. The work product of Mr. Fulton's inquiry was a "Discussion Paper" which outlined the major issues in the Lubicon Lake controversy and set forth the positions of the Band, the Federal Government, the Province, and interested third parties on each of the issues. Mr. Fulton also provided comments and suggestions for possible approaches to negotiation on each of the issues.

While the Band found Mr. Fulton's characterization of the issues and the various parties' positions objectionable in certain respects, the Band recognized that Mr. Fulton was, by all appearances, attempting to provide a fair assessment of the situation and to seek an equitable settlement. For example, Mr. Fulton set forth and provided favorable comment upon the Band's proposals for a settlement that would allow energy development in the area to go forward while at the same time providing the Band the ability to replenish the area's wildlife resources and the opportunity to begin to build a mixed economy for the community, based upon traditional subsistence pursuits as well as wage-based employment undertaken in conjunction with the energy development activities.

With regard to the history of the case, the Discussion Paper verified the Band's position that the Federal Government ultimately must bear the blame for what has been done to the people at Lubicon Lake. In particular, based upon a full review of the evidence, Mr. Fulton concluded that "there is no question in my mind that Canada's obligation to the Band exists, [and that this obligation] was recognized in 1940 . . . In these circumstances, I see it as entirely the fault of Canada that the matter was not disposed of on the basis of the agreement of 1940 . . . ." Discussion Paper, pp. 6,7.

With regard to the issue of the Band's right to compensation for its costs in pursuing a settlement of this situation, Mr. Fulton stated that "Canada's formal position to date has been to deny any obligation to pay costs incurred directly or incidentally in connection with litigation on the ground that these costs were incurred before negotiations were exhausted." In his comments, Mr. Fulton suggested

> that this approach overlooks the unique nature of the circumstances surrounding this whole matter. It must be remembered that the Band's claims go back as far as 1933 . . . They were promised [a] Reserve - an area specifically set aside and designated by agreement between them and the two Governments - in 1940. That was 45 years ago and they still have not got it. Starting in the late 1970's they saw not only their traditional hunting area but the very area which they had been promised as their Reserve - their homeland - subjected to intensive exploration and development against their wishes and with distastrous consequences to them. Substantial revenues accrued from the Reserve, but not to their benefit, and still no action was taken on their behalf. It is not putting it too strongly to say that in all the circumstances it could appear - certainly did to them - that if they had not started Court action in 1982, which was 42 years after the original promise, nothing would have been done for them to this day.
>
> In such circumstances . . . their need was urgent, their situation was desparate (sic) and was worsening daily, and their best efforts along the line of negotiation

> to protect their interests were producing no results in spite of the merits of their position . . . Discussion Paper, pp. 71-73.

Mr. Fulton filed the first draft of this Discussion Paper with the Federal Government of Canada in December of last year. Within days of its filing, the Federal and Provincial Governments had withdrawn their support for the proceedings, the inquiry had been closed, and Mr. Fulton had been reassigned to a wholly unrelated position. Although the press has become aware of the Discussion Paper, the document itself has yet to be released to the public. (See Attachments.)

The Band, while not surprised, was extremely disappointed in these events. Mr. Fulton's inquiry and the tone of his Discussion Paper had certainly raised hopes that a negotiated settlement might be possible. Currently, however, prospects for such a resolution are extremely remote. In the meantime the health of the community continues to deteriorate.

CONCLUSION

Despite widespread public support for the claims of the Lubicon Lake Band, and favorable recommendations by the Federal investigator appointed to inform the Canadian Government of the true status of the situation, the Government of Canada has yet to offer a remedy for the tragedy to which the Indian people in the Lubicon Lake region of Alberta are being subjected. The people themselves, who are fiercely independent and are accustomed to complete self-sufficiency, are now economically destitute and have no available means of survival beyond the abject poverty of welfare dependents. This is a situation which spells complete psychological and social ruin, and for many it will ultimately spell death, as it already has for some.

In its attempt to save its people, the Band has, in good faith, offered a settlement proposal that would allow the Band to survive as a community while at the same time allowing the energy development in the area to go forward. This proposal, which was tacitly endorsed by the Federal Government's own investigator, has been rejected by the Government of Canada. It appears that the only resolution of interest to the Canadian Government is the ultimate destruction and thereby the disappearance of the Indian communities in this area.

It is appalling that such a result can be allowed in our day and age, in a country which, in international circles, boasts of its human rights record, while denouncing events such as this in other countries. As stated in a recent editorial in the Calgary Herald, "the Lubicon Lake issue won't let us sleep comfortably . . . We're confronted with too many disturbing facts which jolt us into rethinking what it should mean to live in a free, democratic, progressive and just society. . . It's also not morally right for us to watch a once contented, industrious community in our own country - not in a far away South Africa - lose its way of life, its livelihood and its self-determination within a few short years, and not speak up in protest."

The Lubicon Lake Band originally approached the United Nations Committee on Human Rights in the hope that such an august body would be able to provide desperately needed assistance to the Band in its attempt to convince the Government of Canada to act responsibly with regard to this matter, before the destruction of the community is complete. That is still the hope of the people at Lubicon Lake. However, with the passing months, that hope too is fading.

Attachments

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

Submitted by:

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Lubicon Lake knows forked tongue

In a way, it is just a routine case of the looting and deceit inflicted on native people by Canadian governments for a century. Even by those historical standards, however, the Cree of Lubicon Lake know all too much of poverty and broken promises.

This particular band survives in the bush north of Peace River, in northern Alberta. It was country rich in game, and in oil and gas. But that has been small benefit to the Lubicons.

They have been literally dispossessed, their land taken by the Crown. In 1940, they had a promise from the federal and Alberta governments for a reserve. It was a small promise — just 65 square kilometres — but even so it was never kept.

In 1979, the oil companies moved in. Their arrival has damaged the Lubicons' subsistence hunting and trapping. Revenues started to flow from that promised reserve site, though none flowed to the Lubicons.

The band went to court in 1982, but has so far won nothing except sympathy. Two years ago the World Council of Churches attacked the actions of the provincial government and the oil industries, and said they could have "genocidal consequences."

It was extreme language. Alberta's ombudsman investigated the charges and denied them. But the federal government was concerned enough last year to appoint E. Davie Fulton, the former minister and judge, to inquire again.

Fulton's interim report, leaked this week, confirms the main facts of the Lubicon case: the broken promise of a reserve, the destruction of hunting and trapping, the exclusion of the Cree from the benefits of oil and gas development. Average family trapping income among the 350 Indians has fallen to $400 this year, from $5,000 in the winter of 1979-80, Fulton reports.

Indian Affairs Minister David Crombie now has an opportunity to begin putting right these wrongs. With the Fulton report in hand, he has no reason not to try.

Last month Crombie tabled a policy proposal to provide native groups with autonomous political power as well as long-sought settlements of land and cash. It is a wise proposal that deserves support.

There would be no better place to launch that policy than Lubicon Lake.

[illegible] process has been viewed as suspect."

p. 1

p. 2

Globe & Mail

March 31/86

Mediator supports natives' grievances about oil developers

/ GEOFFREY YORK
e Globe and Mail

The unreleased report of a feder- mediator confirms charges by s World Council of Churches that and gas development in Northern berta has had disastrous consc- ences for the 350 Indians of Lubi- n Lake.

The plight of the Lubicon Cree used an uproar in 1984 when the church council said the actions of multinational oil companies and the Alberta Government could have "genocidal consequences" for the Indians.

The development, which began in 1979, has caused "a substantial and damaging decline" in the tradition- al hunting and trapping activities of the Lubicon Indians, mediator E. Davie Fulton said.

Mr. Fulton, a former federal Cabinet minister, was appointed by Ottawa in 1985 to conduct an inquiry into the Lubicon problem.

Alberta's ombudsman investigat-

INDIANS — Page A2

Your morning smile

Some people's iden of keeping a cret is refusing to say where they ard it.

Indians did not benefit

From Page One

ed and denied the allegation by the churches. Now, Mr. Fulton's report has supported many of the band's grievances.

The average family in the band will have less than $400 in trapping income this year, compared with $5,000 a family in the winter of 1979-80, Mr. Fulton noted.

Quoting a report by a wildlife expert, he said the total value of subsistence hunting and trapping by the Lubicon Indians has fallen to one-tenth of its 1979-80 level.

For example, the Indians expect to kill fewer than 20 moose this year. Before 1979-80, they killed more than 200 annually.

The Lubicon Indians, who live 120 kilometres east of Peace River, were promised a reserve in 1940. Ottawa and Alberta agreed then to provide an reserve of 65 square kilometres at the west end of Lubicon Lake.

However, the federal Government backed out of the deal and a reserve was never created.

Substantial revenues flowed from the reserve site, but none of the benefits reached the Indians, Mr. Fulton said. The Lubicon Lake area has become a prime site for oil and gas development.

The report states that if the Indians had not launched a legal action in 1982, it is reasonable to think that "nothing would have been done for them to this day."

"In such circumstances, when their need was urgent, their situation was desperate and worsening daily, and their best efforts along the line of negotiation were producing no results. ... There appeared to be no practical alternative but recourse to litigation," it says.

"And it is a fact that it was not until after that recourse to litigation that meaningful negotiations — now including this inquiry — were initiated by Canada."

The reserve for the Lubicon Indians should be larger than 65 square kilometres because the band's membership has increased since 1940, Mr. Fulton says. He recommends a genealogical study to determine total band membership, which would be used to set the size of the reserve.

In December, Alberta offered to give the Indians a 65-square-kilometre reserve if they agreed to drop their legal action against the province.

Milton Pahl, Alberta's Minister of Native Affairs, said the federal Government had accepted the deal.

But David Crombie, federal Minister of Indian Affairs, said Ottawa has never supported Alberta's demand that the Indians withdraw their lawsuit.

The band rejected the Alberta offer. The Indians want 210 square kilometres, plus other benefits and aboriginal hunting rights.

Mr. Fulton recommends that Alberta compensate the Indians to offset the damage caused by "the unrestricted development which has been allowed to take place without their consent and before they have had time to adjust."

He says that Alberta "permitted the development in question and has derived very substantial revenues therefrom — far beyond the amount of this claim."

The report also recommends implementing an environmental protection program in the Lubicon region, a policy of giving priority to band members for jobs, compensation to the Indians for oil and gas revenue from the reserve, and a catch-up program of federal spending on housing, water, sewage and economic development for the Indians.

Mr. Fulton's report, not yet officially released, is an interim report. Further negotiations are expected to take place among Ottawa, Alberta and the Lubicon Band.

Money's not issue —chief

By KAREN BOOTH
Journal Staff Writer

Although cash compensation for the Lubicon Lake band could reach hundreds of millions of dollars, Chief Bernard Ominayak says money has never been a primary issue.

The Cree band, involved in a lengthy land claim struggle, has said it is entitled not only to a reserve but to compensation for lost oil and gas revenues and loss of livelihood from trapping and hunting.

The band is located in an area of intense oil and gas exploration and development near Peace River and had been promised a reserve in 1940.

The band's position, as outlined by federal negotiator E. Davie Fulton in his confidential discussion paper, is that compensation is due from both levels of government because the band never surrendered native title to the area and its aboriginal rights were never extinguished.

"Land is the No. 1 item we've been pursuing," Ominayak said. "We want all of what we're entitled to, but the money is negotiable."

The band has claimed Alberta owes "in the area of $90-$100 million" to compensate for past loss of oil and gas revenue on lands claimed as its traditional area.

Alberta has rejected any obligation to account for oil and gas revenues and royalties and doesn't recognize a claim based on continuing aboriginal title.

Native Affairs Minister Milt Pahl said oil and gas revenue from the original reserve site — a 25.4-square-mile area — "is zero" and said Monday he would not speculate on the amount of revenue and royalty money flowing from the 80 square miles claimed by the band.

"There's a very high potential for oil and gas (development) and that's accepted . . . but there are small areas of land that are specifically eligible."

Although the federal government doesn't accept liability for payment, the band claims Canada had the obligation to provide benefits and that it was negligent in not protecting the band's interests and native title to the area.

Fulton's remarks appear to support the World Council of Churches' charges in 1984 that development has had disastrous consequences for the band.

"I am no expert in this matter, but I do share the general knowledge of the adverse effects such a pattern of intrusion . . . may be expected to have on shy wildlife species by way of the disruption of breeding cycles and changing of patterns of movement, rest and refuge," he said.

Fulton said Sunday he did not make recommendations in the discussion paper. "Anyone who goes in there and sees the facts can draw their own conclusions."

THE EDMONTON JOURNAL, Tuesday, April 1, 1986

Lubicon band numbers could reach 450—chief

By KAREN BOOTH
Journal Staff Writer

Membership in the Lubicon Lake Indian band could reach 450 and its reserve entitlement increase accordingly if the recently amended Indian Act is applied.

The band, whose lengthy land claim battle prompted federal Indian Affairs Minister David Crombie to appoint special negotiator E. Davie Fulton, could receive more than 80 square miles of reserve land if the federal government applies the provisions of the new act.

The band's membership code was approved last week by the Department of Indian Affairs. Under a land entitlement formula of 128 acres per member for a federal estimate of up to 400 band members, the band could receive 80 square miles.

Bill C-31, which amended the Indian Act last year, gives bands the opportunity to develop their own membership rules pending federal approval.

The Lubicon Lake band, located 100 km east of Peace River, had been promised a reserve in 1940. The federal government's position, as outlined in Fulton's confidential discussion paper, is that the band is entitled to a reserve, including the area agreed to in 1940.

". . . There would seem to be no inequity to Alberta in applying the 1985 criteria to determine actual membership as the basis of today's entitlement," Fulton states in his discussion paper. Alberta would be compensated for any increase above the 1940 figure.

Chief Bernard Ominayak estimated band membership could increase to "more than 400, maybe 450" under the terms of Bill C-31.

In addition to land, the band could be entitled to hundreds of millions of dollars in compensation from both levels of government for lost oil and gas revenues and loss of livelihood from hunting and trapping.

Also included in Fulton's discussion paper are an environmental protection plan for the area, priority hiring for band members and compensation for federal programs such as housing, water and economic development.

Ominayak said he's reluctant to detail his concerns about the report for fear that it could jeopardize the band's resumption of negotiations with the federal government.

THE EDMONTON JOURNAL, Wednesday, April 2, 1986

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MESSAGE

Accession/Référence

File/Dossier 45-COA-13-1-3-

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... Further to our telex under reference and at the request of the Department of Indian and Northern Affairs we are providing you with a copy of a memorandum prepared for their Minister, David Crombie, concerning negotiations with the Lubicon Lake Band. This memorandum has been released to several newspapers in Canada and therefore may be used by posts to respond to eventual queries on this matter.

F.D. Pillarella
Director
Human Rights and Social Affairs Division

EXT 407

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UNCLAS

Indian and Northern Affairs Canada
Affaires indiennes et du Nord Canada

Deputy Minister
Sous-ministre

Ottawa, Canada
K1A 0H4

Minister

Lubicon Lake

The purpose of this memorandum is to give you an update on the events related to the Lubicon Lake Band. I know you want this grievance resolved through negotiation. We have been working hard to get the Band to the negotiating table as Cabinet has directed. Up to this point the Band has refused to have Alberta present at the negotiations and have concentrated instead on their media program. Let me try to put these events in perspective by sketching the key background events and our most recent efforts.

Background

You appointed Mr. Fulton in March of 1985 as a fact finder to consider the Lubicon Lake claim and to report back to you. His mandate included the responsibility to review the history of the claim, analyze the divergent views of the parties (particularly between the Band and Alberta) and to make preliminary recommendations. Mr. Fulton's interim report recommended that $1.5 million be made available to the Band for expenses they incurred.

On December 20th 1985, I met with the Lubicon Lake Band's legal advisor, Mr. J. O'Reilly, and Mr. F. Lennarson, the Band's principal consultant to find a way to begin full negotiations with a view to final settlement. I indicated you were willing to go to Cabinet for a full settlement mandate. At that time I proposed:

Canada

1) we enter into intensive negotiations for a two month period commencing in March;

2) during the negotiations that all parties avoid "negotiating in the press";

3) Alberta be present at the negotiations as an observer; and

4) Canada would consider payment of $1.5 million to cover the Band's expenses.

The Band asked that Mr. Fulton undertake a final round of consultations and we agreed. The Band representatives indicated they would advise us of the Lubicon Lake Band's reaction to points 1, 2, and 3 above before Christmas. On December 24, 1985, Mr. J. O'Reilly advised Mr. Bob Green, our solicitor, that the Band accepted the three points in question.

On January 8th, 1986, payment of $1.5 million was made to the Lubicon Lake Band.

On February 12, 1986, Cabinet Committee on Social Development approved your detailed proposal to attempt to achieve a full and final settlement through negotiations. This was later (February 27, 1986) confirmed by Cabinet.

On March 18th, 1986, I advised Mr. J. O'Reilly that the Federal Government was prepared now to begin negotiations and that Mr. Roger Tassé had been appointed as our representative. At that time, I asked that the Band negotiating team come to a meeting with Alberta to finalize the arrangements for the negotiations. Mr. O'Reilly asked that instead, a meeting be arranged with Band representatives, Mr. Tassé, and myself (bilateral). I agreed.

On March 27th, 1986, Mr. Roger Tassé and I met with Mr. J. O'Reilly, the Band's legal advisor, and Mr. F. Lennarson, the Band's principal consultant to discuss the proposed negotiations. The Band representatives indicated at the meeting that they were unwilling to abide by the agreement which was reached with them last December that Alberta would participate in the negotiations as an observer. The position passionately maintained by the Band is that Alberta, by writing letters to the editor of Alberta newspapers about the Band's claim, by placing advertisements in newspapers, and by its behavior, has demonstrated they are not serious about negotiations. The Band is, as a result, unwilling to participate in negotiations at which Alberta is present either as an observer or full participant unless they could be convinced of Alberta's good faith.

At the meeting, the Band representatives indicated they were planning a major media campaign including meeting with organizations in Luxembourg and New York in the very near future.

On April 2nd, 1986, I contacted Mr. H. Thiessen, the Alberta Deputy Minister of Native Affairs, and described the position taken by the Band. Mr. Thiessen restated Alberta's willingness to participate in discussions. As I understand it, their position is that further evidence of their "good faith" is unnecessary.

Present Situation

The Band argues that bilateral negotiations (Band/Canada) should begin. Contrary to their position in December 1985, they refuse to negotiate with Alberta at the table. Their position now is that Canada has sole responsibility.

Our position is that Alberta is important to any viable attempt to reach a final resolution of this matter. The Land question is critical to the Band's claim, past mineral revenue is in Alberta's hands, hunting and fishing matters are in their court and economic development, employment, parts of education and more are all matters in which Alberta could help in resolving problems. To state the obvious, the future reserve will be an Alberta community and the relations between the Band and Alberta will have to be improved.

It is possible, but extremely clumsy for us to carry on two simultaneous negotiations, one with Lubicon and a separate negotiation with Alberta. In my view this would be an unattractive option as it would drag out the negotiations, run risks of misunderstanding and perhaps cause further suspicions to develop.

I propose we wait until the Band's current overseas public campaign is completed and try again to persuade them to come to the table with Alberta present. I assure you that Mr. Tassé and I will do everything we can to achieve a reasonable settlement. Is there anything you can see that we are not doing that we should get onto?

Bruce Rawson.

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---LUBICON LAKE INDIAN BAND

FURTHER TO OUR REFTEL,WE HAVE LEARNT THAT HUMAN RIGHTS CTTEE OF INTERNL COVENANT ON CIVIL AND POLITICAL RIGHTS CONSIDERED LUBICON LAKE BAND COMPLAINT AGAINST CDN GOVT THIS PAST WEEK,LODGED UNDER OPTIONAL PROTOCOL MECHANISM.WHILE MTG WAS IN CAMERA,GIST OF DECISION TAKEN IS THAT FURTHER INFO IS NEEDED FROM LUBICON LAKE BAND AND GOVTS INVOLVED.THE DECISION WILL BE COMMUNICATED THROUGH CDN MISSION,GENEV ONCE HR BUREAU RETURNS TO GENEV.

2.FAX OF HRC DECISIONS WILL BE SENT TO IMH,JLO,AND IMU TODAY.

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MESSAGE

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---LUBICON LAKE INDIAN BAND

PURPOSE OF TEL IS TO BRING TO YOUR ATTENTION ARTICLE IN OTTAWA CITIZEN OF APRIL 03 CONCERNING ALBERTAS LUBICON LAKE INDIAN BAND.

2.CITIZEN STORY TITLED QUOTE LUBICON INDIANS ATTEMPT BOYCOTT OF CALGARY GAMES UNQUOTE SETS OUT LUBICON PLANS TO ~~QUOTE~~ CALL FOR AN INTERNATIONAL BOYCOTT OF 1988 CALGARY GAMES (WINTER OLYMPICS)ON GROUNDS THAT Federal and Alberta ~~CANADIAN~~ GOVERNMENTS ARE PRACTISING QUOTE RACIAL GENOCIDE UNQUOTE ON THEIR OWN CITIZENS. ~~UNQUOTE~~.ARTICLE ALSO STATES THAT BOYCOTT WHICH WILL BE ANNOUNCED AT LINKED SIMULTANEOUS PRESS CONFERENCE AT LUXEMBOURG AND NEW YORK ON APRIL 13 WILL QUOTE SEEK TO MOBILIZE PUBLIC OPINION-PARTICULARLY EUROPEAN - AGAINST CANADA UNQUOTE.ARTICLE FURTHER INDICATES THAT BANDS AGENTS WILL MEET IN LUXEMBOURG THIS WEEK WITH EUROPEAN SYMPATHIZERS AND LUBICON CHIEF WILL FLY TO NEW YORK TO MEET WITH TWO SUPPORT GROUPS THERE. PRESUMABLY PLAN IS TO MAKE ARRANGEMENTS FOR APRIL 13 PRESS CONFERENCE AND FOLLOW-UP ACTIVITY.

3.FOR YOUR INFO LUBICON DOMESTIC GRIEVANCES HAVE RECEIVED

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DRAFTER/RÉDACTEUR	DIVISION/DIRECTION	TELEPHONE	APPROVED/APPROUVÉ
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EXT 518-1 (83/11)

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CONSIDERABLE PUBLICITY IN CANADA IN RECENT YEARS.MUCH OF PUBLICITY DERIVES FROM SEVERAL LEGAL ACTIONS LAUNCHED BY THE BAND BOTH IN ALBERTA AND FEDERAL COURTS.LUBICON BAND HAS SOUGHT FROM COURTS TITLE TO LAND BASED ON ABORIGINAL AND TREATY RIGHTS AS WELL AS COMPENSATION FOR LOSS OF REVENUES FROM BOTH OIL AND GAS DEVELOP-MENT AND TRADITIONAL HUNTING AND TRAPPING ACTIVITIES.TWO OF THESE LEGAL ACTIONS,ONE IN THE FEDERAL COURT OF CANADA AND ONE IN THE ALBERTA COURT OF THE QUEENS BENCH ARE STILL PENDING.

4.THIS VERY COMPLEX ISSUE IS OF GREAT INTEREST TO DIAND MINISTER CROMBIE.IT IS ALSO OF PARTICULAR INTEREST TO THIS DEPARTMENT BECAUSE OF COMPLAINT BAND HAS MADE TO UN HUMAN RIGHTS COMMITTEE. THAT COMPLAINT IS STILL UNDER EXAMINATION BY COMMITTEE.

5.WE HAVE EXCERPTED BELOW PORTIONS OF CITIZEN ARTICLE SO THAT YOU MIGHT BE FULLY AWARE OF LUBICON BANDS CURRENT INTENTIONS.RELEVANT PARAS FROM ARTICLE AS FOLLOWS:QUOTE SOMETIME THIS COMING WEEK, MONTREAL LAWYER JAMES OREILLY,THE LUBICON LEGAL ADVISER,AND TWO OTHER CONSULTANTS WILL FLY TO LUXEMBOURG FOR THE SECOND EUROPEAN MEETING OF SUPPORT GROUPS FOR NORTH AMERICAN INDIANS,WHERE SOME 150 EUROPEAN SYMPATHIZERS - INCLUDING THE ACTIVIST GREEN MOVEMENT - ARE EXPECTED TO BE IN ATTENDANCE.ALREADY SCHEDULED ON THE LUXEMBOURG AGENDA IS AN ITEM ENTITLED:QUOTE ORGANIZATION AND EUROPE-WIDE CO-ORDINATION OF DEMONSTRATIONS BEFORE CANADIAN EMBASSIES

FULL TEXT BEING FAXED TO PRMNY

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CONCERNING LUBICON CREE CASE UNQUOTE.AS WELL,A PETITION MOVEMENT IN SUPPORT OF THE LUBICON HAS BEEN GAINING CONSIDERABLE MOMENTUM IN EUROPE - 300 PETITIONS HAVE BEEN COLLECTED IN BERLIN ALONE.AT THE SAME TIME, CHIEF OMINAYAK AND BAND MEMBER FRED LENNARSON WILL HEAD FOR NEW YORK WHERE THEY WILL MEET WITH VARIOUS MEDIA AND THE RURAL URBAN MISSION,A SMALL AGENCY OF THE UNITED NATIONS THAT HAS BEEN PROVIDING FINANCIAL SUPPORT TO THE BAND IN RECENT YEARS.THE TWO ALBERTANS PLAN ALSO TO MEET WITH THE INTER-RELIGIOUS FOUNDATION FOR COMMUNITY ORGANIZATIONS,AN UMBRELLA GROUP THAT HAS ALREADY TAKEN AN ACTIVIST ROLE IN A NUMBER OF ISSUES INVOLVING AMERICAN INDIANS OF THE NORTHWEST PACIFIC COAST UNQUOTE.

6.GRATEFUL YOU REPORT ON PUBLIC AND PRESS REACTIONS TO PLANNED MEETINGS AND PRESS CONFERENCE.

Peter - this is ordinary CDN EYES ONLY
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file 45-Cda-13-1-3-Lubicon

CONFIDENTIAL*

CCPR/C/27/CRP/R.1
4 April 1986
ENGLISH
ORIGINAL: FRENCH

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HUMAN RIGHTS COMMITTEE
Twenty-seventh session

WORKING PAPER SUBMITTED BY MR. POCAR, SPECIAL RAPPORTEUR FOR COMMUNICATION NO. 167/1984, LUBICON LAKE BAND V. CANADA

I. THE PROBLEMS

1. The "Lubicon Lake Band" case raises several questions whether from the viewpoint of the Covenant or from that of the Optional Protocol. In determining the list of questions to be considered, it should also be recalled that the communication is before the Committee at the stage of admissibility; at this stage, therefore, it is necessary only to take into consideration those questions which are likely to influence the Committee's decision concerning the admissibility of the communication. Accordingly, this report will not deal with problems deriving from the interpretation of the Covenant except in so far as that may be necessary in that context and will concentrate on the conditions for admissibility provided for in the Optional Protocol.

2. Without listing all the conditions for the admissibility of communications, it suffices to note that, while the parties to the proceedings agree on the fact that certain conditions are fulfilled, the existence of others is contested. In particular, the discussion bears: (a) on the legitimation of the author to submit the communication under article 2 of the Protocol; (b) on the compatibility of the communication with the provisions of the Covenant under article 3 of the Protocol; and (c) on the exhaustion of domestic remedies under articles 2 and 5 of the Protocol. Separate consideration should be given to each of these three questions, which seem to be of capital importance for the purposes of resolving the case, it being borne in mind that an affirmative response to all three is necessary if the communication is to be declared admissible.

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

II. THE RIGHT

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3. The first question to which an answer must be sought is whether the right, or the rights, provided for in article 1 of the Covenant are rights that may be invoked by an individual before the Committee under the Optional Protocol.

4. The question should be considered primarily in the light of article 2 of the Protocol, according to which "individuals who claim that any of their rights enumerated in the Covenant have been violated ... may submit a written communication to the Committee for consideration". The possibility of submitting communications is thus made subject to the conditions that they emanate from "individuals" and that the latter claim that any of their rights enumerated in the Covenant have been violated.

5. A purely literal interpretation of the expressions used in article 2 of the Protocol does not seem to lead to an entirely satisfactory and unequivocal solution, while tending towards a qualification of communications as purely individual. The term "particulier", in the French text, which is used also in the preamble and in article 1 of the Protocol, clearly refers to individuals, as do also the equivalent terms used in the other versions of these articles ("individuals" in the English text; "individuo" in the Spanish text; the Russian text seems less clear in articles 1 and 2 but explicitly refers to individuals in the preamble).

6. Although it is doubtful whether the reference to individuals rules out, ipso facto, a legitimation of groups, as being composed of individuals, the doubt is removed in the light of the preparatory work of the Protocol, which may be referred to under article 32 of the Vienna Convention on the Law of Treaties. Turning to the discussions which took place at the twenty-first session of the General Assembly concerning the insertion in the Covenant of an article 41 bis - which subsequently became the basis for a separate Protocol - concerning the possibility of individual petition to the Human Rights Committee, we find, in the statements of delegations, only a reference to "individuals" to emphasize the importance of that channel of recourse within the framework of the protection of human rights. 1/ It is true that the expression "individuals" might have been used quite simply in order to distinguish communications emanating from private persons from communications emanating from States, referred to in article 41 of the Covenant. On the other hand, however, it should be mentioned that a Netherlands amendment, which referred expressly to petitions from "individuals or groups of individuals", and another amendment by France, 2/ which referred to communications from "individuals or groups of individuals", were subsequently withdrawn in favour of a text which spoke only of "individuals", as does the final text of the Protocol.

7. It must thus be concluded that the communications referred to in the Protocol were conceived of as a means of recourse offered to individuals and not to groups, which do not have legitimation to submit them to the Committee. The latter has, moreover, upheld that view when application has been made to it on behalf of a group of individuals, by denying that a political party might submit a

communication under the Optional Protocol; 3/ and by declaring inadmissible "by lack of personal standing" a communication from a group of associations for the defense of the rights of persons belonging to a specific category. 4/

8. If it follows from the above observations that a group is not entitled to submit a communication to the Committee under the Protocol, it remains to be determined whether an individual may invoke the violation of a right belonging to a group.

9. It is clear, and the constant legal precedents set by the Committee demonstrates, that an individual may denounce the violation by a State of a right of which the victim is another individual, provided that a sufficiently close link exists between the victim and the author of the communication. From that we might deduce the possibility that, in the same circumstances, an individual might denounce to the Committee the violation of a right conferred on a group of persons.

10. In support of such a conclusion, the French text of article 2 of the Protocol would seem, at first sight, to contribute valuable elements, because it refers, as the subject of a communication from an individual, to "la violation de l'un quelconque des droits énoncés dans le Pacte", without making a distinction between individual rights and collective rights. However, a cursory examination of the provision leads to a different conclusion.

11. Firstly, the other language versions of article 2 refer expressly, unlike the French version which has just been mentioned, to the rights of individuals, while adding an adjective that links the right violated to the individual. Thus, the English text states that communications may be submitted by "individuals who claim that any of their rights enumerated in the Covenant have been violated"; similarly, the Spanish text refers to "todo individuo que alegue una violacion de cualquiera de sus derechos enumerados en el Pacto"; the Russian text conveys the same sense, although it does not use the term "individual" in article 2, as we have mentioned above. Moreover, if one takes a closer look at the French version, it too permits the linkage of the violated right to the individual, by requiring that the individual claims to be the victim of the violation of a right, which presupposes that he is the one entitled to that right.

12. On the basis of these considerations, the interpretation of article 2 of the Protocol that emerges from the text is entirely clear and unequivocal to the effect that an individual may not invoke the violation of a right unless it is a question of an individual right. In the circumstances, it is the literal interpretation that must be adhered to, as provided in article 31 of the Vienna Convention on the Law of Treaties.

13. The conclusion at which we have arrived leads us to broach a final problem, the solution of which is necessary in order to answer the first question raised in this report, namely, whether the right, or the rights, provided for in article 1 of the Covenant may be invoked by an individual in his individual capacity. In other words, the problem consists in determining whether article 1 of the Covenant provides for individual rights or collective rights; in the latter case, the possibility of invoking them under the Covenant should be excluded, whereas it

should be admitted on the basis of the first hypothesis. Thus the Committee has on many occasions affirmed, in cases introduced by an individual on behalf of a group of persons, a communication is admissible if the author is able to prove "that he is personally a victim of a violation of any rights contained in the Covenant". 5/

14. The Covenant enumerates, in articles 6 to 27, a series of rights most of which are purely individual, while others may have an individual or a collective character: for example, the right to manifest a religion (article 18), the right of assembly (article 21), the right of association (article 22), the rights of minorities (article 27). However, it is not necessary here to ascertain whether this dual character - individual and collective - of the rights just mentioned is recognized and protected by the Covenant. What must be emphasized, in the context of the present report, is that all the provisions under consideration - with the exception of article 21, whose wording contains no stipulation in this regard - bring out the individual aspect of the rights in question by at least recognizing, without prejudice to the existence of the collective right, the right of the individual to behave in a certain manner or to express an opinion, in common with the other members of a group.

15. If we come now to consider article 1 of the Covenant, we note immediately that it is the only one where the individual aspect of the right in question is not emphasized. On the contrary, paragraph 1 of that article, either by proclaiming the right to self-determination or by specifying the essential features of that right, attributes it expressly to "peoples". The same is true of paragraph 2, concerning the right fully to dispose of natural wealth and resources, which unquestionably constitutes a natural consequence of the right to self-determination but might also be regarded as a right distinct from the latter. Whatever the notion of "people" that we adopt - we shall revert to this concept in the second part of this working paper - it unquestionably implies a group of individuals and, consequently, the collective character of the right protected.

16. However, while this conclusion follows from the literal meaning of the rule under consideration, it would perhaps be over hasty to derive from it inevitably the further consequence that individual rights are excluded from the scope of that same rule. Just as, in the case of the other provisions mentioned above, the fact that they emphasize the individual aspect of the rights protected does not automatically imply that any collective aspect is ruled out, the emphasis placed by article 1 on the collective aspect might - a fortiori even, since a people is composed of individuals - not rule out recognition of a right of individuals forming part of a group. The problem thus arises of knowing whether the interest of individuals is taken into consideration only indirectly and hence remains at the level of an interest or whether it also becomes the content of a right directly attributed by the rule to individuals.

17. If one turns to the preparatory work of the Covenant, the first alternative seems to be correct. First, the background of article 1 of the Covenant should be recalled. At the eighth session of the Commission on Human Rights, in 1952, when there was discussion of inserting in the Covenant an article on self-determination, the Yugoslav draft resolution on this subject was worded as follows: "All peoples have the right to self-determination. This includes the right of every person to

references to preparatory work

participate, with all the members of a group inhabiting a compact territory, to which he belongs ethnically, culturally, historically or otherwise, in the free exercise of its right to self-determination ...". 6/ The draft was subsequently amended, because it lent itself to a confusion between the right of peoples and the right of minorities, to read: "The right of self-determination of peoples shall include the right of every person to participate in action to establish the independence of the people to which he belongs". 7/ The reasons for such an amendment lay, as the delegate of Yugoslavia stated in the debate, in the need to stipulate expressly the right of an individual to participate in action aimed at establishing the right of peoples to self-determination, because "it was not correct to claim that there was no need to affirm that right as a personal right, inasmuch as recognition of the right of peoples to self-determination was tantamount to recognition of the exercise of that right by individuals". 8/ The introduction of express recognition thus seems to respond to the conviction that mere provision for a right of peoples is not sufficient to attribute, besides a collective right, an individual right to individuals forming part of a people.

18. The Yugoslav proposal was rejected by the Commission. Although the Commission's vote was split (6 votes in favour, 6 against and 6 abstentions), the clear and express manner in which the question had been raised leads one inevitably to believe that the intention of the majority was against direct recognition of the entitlement of individuals to a right in this matter. This conclusion seems to be confirmed also both by a statement by the Yugoslav delegate after the vote, in which the vote was interpreted as meaning that every individual was not entitled to exercise the right to self-determination, 9/ and by the report of the Third Committee to the General Assembly at its tenth session in 1955.

19. When giving an account of the views expressed in the course of the debate by the various delegations on the subject of the appropriateness of inserting an article on self-determination in the Covenant, the Rapporteur mentions, among the reasons invoked against such insertion, the circumstance that "self-determination did not constitute an individual right" but "was a collective right and, therefore, inappropriate for inclusion in a covenant which was attempting to lay down the rights of individuals". 10/ On the other hand, the delegations in favour of the inclusion of the right to self-determination in the Covenant do not seem to have disputed the collective nature of that right but rather stressed the circumstance that it was "essential for the enjoyment of all other human rights" and that "in many cases, individual rights could not be exercised because peoples did not enjoy the right of self-determination"; 11/ it was further emphasized that "if self-determination constituted a collective right, it nevertheless affected each individual", because "to be deprived of the right of self-determination entailed the loss of individual human rights". 12/ While establishing the link between the right to self-determination and individual rights, these last-quoted statements draw a clear line between the right dealt with in article 1, which has a collective character, and the other rights, which have an individual character; the link is represented by the fact that the individual rights have their antecedent in the right to self-determination, which is a right of the people and which constitutes the prerequisite for them.

look in Henkin, Sieghart, etc to see if they refer to work papers on S-d.

20. It follows that the opinion that the right to self-determination is recognized and protected in the Covenant as a collective right attributed to peoples and not also as an individual right attributed to the individuals who compose it constituted a general opinion at the time of the drafting of the Covenants. This finding thus serves to confirm the interpretation that emerges from the literal terms of article 1.

21. The same trend is, moreover, found in other successive documents of the United Nations, such as the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, 13/ which, reiterating the principle enshrined in the Charter of the United Nations, refers expressly only to the right of peoples, without mentioning the position of individuals.

22. Reverting to the question raised earlier, it must thus be concluded, in the light of the remarks just made, that article 1 refers only to a collective right, which can thus not be invoked by an individual in his individual capacity.

23. Accordingly, the above considerations lead the Special Rapporteur to reply in the negative to the first question which forms the subject of this report: the right provided for in article 1 is a right which cannot be invoked by an individual before the committee under the Optional Protocol.

24. Some remarks should, however be added to these considerations.

25. Firstly, the fact that article 1 cannot be invoked directly by an individual in no way means that the violation thereof cannot be denounced indirectly, within the framework of a communication dealing with the violation of one of the individual rights guaranteed by the Covenant, by arguing that the violation itself results specifically from the fact that the collective right to self-determination is not ensured. This consequence derives inevitably from the affirmation, already mentioned, that self-determination constitutes the prerequisite for enjoyment of the individual rights provided for in the Covenant. This last-mentioned conception of the right to self-determination corresponds, moreover, to that adopted by the Committee in its general comments on article 1, where it is stated that the "realization [of the right of peoples to 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". 14/

26. Secondly, it must be noted that, while the purely collective nature of the right to self-determination is undisputed in the preparatory work and in the practice of the first decades of the United Nations, it might be less so in the future. The fact should not be overlooked that, particularly with regard to the aspect of the right to self-determination which consists in freely determining economic, social and cultural development, for the enjoyment of which control over natural riches and resources represents an essential means, as stated in article 1 of the Covenant, a trend is emerging towards the development of the individual aspect of the right to self-determination also. It is a trend which should not be underestimated, if one takes into consideration a draft declaration on the right to development currently under discussion in the General Assembly, in which it is stated that "the right to development is an inalienable human right by virtue of

which every human being and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development" and further that "the human right to development also implies the full realization of the right of peoples to self-determination, which includes the exercise of their inalienable right to full sovereignty over all their natural wealth and resources". 15/ If such a declaration were to be adopted, the above-mentioned trend would be confirmed and might subsequently lead to an interpretation of the scope of the right to self-determination within the framework of United Nations practice different from the current interpretation which has been given above.

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27. The second question which arises, and which concerns the compatibility of the communication with the Covenant, is whether the Lubicon Lake Band may be considered a people under the terms of article 1 of the Covenant. Whatever the nature, individual or collective, of the right to self-determination, article 1 requires that there be a people in order that one may speak of this right. The communication regarding a group of individuals who cannot be described as a "people" would therefore make it incompatible with the Covenant.

28. A preliminary remark is necessary, however, in this respect. The Special Rapporteur has a certain hesitation in approaching this question within the framework of this report because its solution concerns the substance of the case rather than the question of the admissibility of the communication by the Committee. Any verification of the conformity with the Covenant implies a certain degree of consideration of the substance of the communication; hence, the incompatibility with the provisions of the Covenant leading, under article 3 of the Protocol to a statement of inadmissibility should be reserved for situations of obvious incompatibility in which the communication is clearly unjustified. Since this is not the case in the matter under discussion, the consideration of this question at this stage of the procedure is not incontestable. The report considers it because the basic aim is to provide a complete picture of the questions which arise in this case.

29. We now come to the notion of "people" adopted in article 1 of the Covenant. To begin with, we must point out that this notion is nowhere defined in the Covenant. From the Covenant we can draw the conclusion only that it is a notion distinct from that of "State" and distinct from that of "minority", since we find both these terms in the text of the Covenant.

30. If we consider the preliminary work done on the Covenant we shall not find that any substantial progress was made towards the definition of this term. We find a distinction between "people" and "nation" in the sense that the term "nation" would come closer to the idea of "State" while the term "people" would be better adapted to the Covenant because it would contain a more marked human element. 16/ We also find references to the preamble of the Charter of the United Nations and to other General Assembly documents with a view to stressing the broad scope of the notion "people". 17/ Moreover, emphasis is laid on the disadvantages caused by the absence of a definition and the difficulties which would confront any organ having the task of solving the problems arising from the right of peoples. 18/

31. In the absence of any definition, the only useful element that we may draw from the preliminary discussions is the link with the Charter, which is moreover confirmed by article 1, paragraph 3 of the Covenant, which states that the parties to the Covenant "shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations". In these circumstances, we may attribute to the notion of "people" the same content which has been given to it in practice by United Nations organs which have referred to the principle of the self-determination of peoples in the implementation of the Charter.

32. If we examine the existing rules on the self-determination of peoples and the practice of the United Nations in this respect, we may stress the following points:

(a) When the Charter was being drafted, a memorandum by the Secretariat, who had been instructed to verify the use of the terms "State, nation, people" used in the draft, affirmed that the word "peoples" refers to groups of human beings who may, or may not comprise States or nations. 19/ In so doing, the Secretariat gave the widest possible meaning to the term "people".

(b) Chapter XI (Article 73) of the Charter, which contains the statement relating to non-self-governing territories, refers to those territories as entities which have not yet exercised the right to self-determination. It defines them as territories whose peoples have not yet attained a full measure of self-government.

(c) The determination of the territories referred to in Article 73 has led to the inclusion within the scope of that provision of territories traditionally known as colonies but to the exclusion of the metropolitan territories of Member States, in accordance with Article 74, which makes a distinction between these two types of territories. The attempts made by certain States to extend the obligations derived from Chapter XI to metropolitan territories inhabited by peoples who have not attained a full measure of self-government or who have been deprived of their autonomy, were not successful because of the opposition of other States. 20/

(d) Two resolutions adopted by the General Assembly in 1960 appear to confirm that the principle of self-determination does not apply to metropolitan territories. General Assembly resolution 1514 (XV) refers to colonial countries and peoples; General Assembly resolution 1541 (XV) refers to territories which are geographically separated and ethnically or culturally distinct from the administering Power. The aim is to limit to these territories the obligation of States to transmit to the Secretary-General the information covered in Article 73 (e) of the Charter.

(e) Exceptions to this principle have been made only in quite special situations, namely, the situation of territories considered as autonomous but in which the European colonizers maintained a dominant position based on racial discrimination, such as Northern and Southern Rhodesia and South Africa; or the situation of territories which have been described as metropolitan but which may be considered as colonies, such as Algeria. The only exception so far to this principle appears to be Bangladesh. We must note, however, that either Algeria or

Bangladesh may be brought back into line with the principles laid down in General Assembly resolution 1541 (XV), which refers to "geographically separate" territories. 21/

33. From the foregoing, we may conclude that the United Nations has applied the principle of self-determination only in colonial situations or situations which may be regarded as such. It has therefore adhered to Article 73, although other more general provisions of the Charter would have permitted a broader interpretation and application of the principle itself. From the normative point of view, we find, it is true, principles to which we might ascribe a broader scope, such as the Declaration contained in the last subparagraph of the paragraph devoted to self-determination in resolution 2625 (XXV) concerning friendly relations between States. 22/ However, in practice, these principles have only been implemented to the extent that they have concerned colonial situations. These principles have not been applied inter alia to situations concerning parts of the metropolitan territory whose inhabitants have never been described as peoples for the purposes of self-determination, at least up to the present time. This fact does not exclude, however, that the notion of "people" may be used in a broader sense in the future.

34. In these circumstances and although we must approach such a complex problem 23/ with great prudence, an interpretation of article 1 of the Covenant based on the notion of "people" now accepted and applied in the United Nations must lead to a negative reply to the second question because the Lake Lubicon Band constitutes a group inhabiting a part of the metropolitan territory of Canada. Only if we assimilate the situation of the Band to a colonial situation or if we abandon the current interpretation of territories affected by the right to self-determination, can the Band be considered as a "people" under the terms of article 1 of the Covenant.

C

35. The third question to which we must give a response in this report concerns the exhaustion of internal remedies, which is a condition for the admissibility of any communication presented under the Protocol. Indeed, this Protocol stipulates in article 5, which endorses with greater precision the general provision of article 2 that, "the Committee shall not consider any communication from an individual unless it has ascertained that: ... (b) The individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged".

36. With regard to these domestic remedies, the situation in this case is basically as follows:

(a) A request for a caveat was filed in 1975 and rejected. Although it was contested between the parties as to whether the case had been settled by this rejection, because of the retroactive nature of the law applied by the judge in the case, it was not contested that this remedy has been exhausted.

/...

(b) Proceedings were instituted before the Federal Court in 1980 against the Federal Government, the government of Alberta and the oil companies. This claim was partially rejected because of a jurisdictional conflict with regard to the government of Alberta and all the oil companies except one. The case is still pending against the Federal Government and this oil company, while the litigant has not resumed the case before the competent judge with respect to the other defenders.

(c) In 1982 a claim for an interim injunction was filed before the court of Alberta in order to halt oil prospecting and development on the territory of the Band. This request was rejected by the court and, instead of continuing the proceedings on the substance, the litigant submitted an appeal against the rejection of the interim injunction to the Court of Appeal, which confirmed the rejection decision. The request for authorization to appeal against this latter decision was in its turn rejected by the Supreme Court of Canada.

37. It follows from this situation that a remedy is still pending before the Federal Court against one of the parties and that another remedy could have been and probably could be instituted before the provincial court of Alberta on the substance of the case. At first sight, there still exist available remedies which have not been exhausted.

38. However, before reaching definitively such a conclusion, we must verify whether the remedies available are effective and efficacious and whether the application of the remedies has been unreasonably prolonged.

39. The existence of the first condition, namely, the effective and efficacious character of available remedies is contested by the author of the communication, who affirms that the only means of effective remedy was represented by a temporary injunction, since otherwise the slowness of the procedure would not have made it possible to safeguard the rights of the Band. The State party expresses a different opinion.

40. The heart of the problem consists in knowing whether a remedy must be considered efficacious solely when such a remedy makes it possible to avoid the violation of the protected right or to repair the consequences of its violation in practice, or again when such a remedy makes it possible to obtain compensation by financial payments, it being obvious that the question arises only in the case where the first alternative is always possible.

41. As we tackle this problem, we must refer to the principles of international customary law in the matter of the exhaustion of domestic remedies. Although the Protocol contains no reference to international law, as does, for example, article 26 of the European Convention on Human Rights, a reference to this principle can be considered implicit, as it is a well established rule of general international law, 24/ applicable either to the treatment of foreigners or to the treatment of nationals to the extent that the treatment of nationals is the subject of international obligations. 25/

42. If we consider international practice, we may conclude that such practice requires only the exhaustion of remedies which provide real prospects, and not

purely formal prospects, of success for the plaintiff, whether they are conducive to the realization of the result prescribed by the international regulation of the violation in question or whether they make it possible to secure an equivalent result. 26/ The practice is, on the contrary, less clear on the question of whether the individuals concerned must remain content with an equivalent result in the case where the international obligation is still capable of being met. The question has been tackled in the Phosphates in Morocco Case but the Permanent Court did not take a decision on this point. 27/ It arose also in the Finnish Vessels Case where it was resolved in the negative. 28/

43. In its turn, Mr. Ago's report on State responsibility points out that, if the result required by the international obligation is in fact attainable, "it would appear that the individuals concerned cannot be compelled to settle for an equivalent result - in other words for reparation instead of restitution". 29/ Along the same lines, the text proposed to the Commission (article 22) states that individuals must have exhausted domestic remedies "which possessed the necessary effectiveness to ensure either that the required treatment continued to be accorded to them, or if that should prove impossible, that appropriate compensation be awarded them". 30/

44. If we follow this argument, we must affirm that in principle the best means of achieving the attainment of the protected right was represented in the case before the Committee by an interim injunction prohibiting any activity by the oil companies on the territory of the Band. The decision rejecting the claim for an injunction is, on the contrary, based on the consideration that, by pursuing the proceedings on the substance, the Band would have been able to obtain a monetary reparation if its claim had been judged to be well founded. 31/ Hence, we have here a recognition that the proceedings on the substance would have brought only a reparation by an equivalent; if we adhere to the point of view expressed in Mr. Ago's report, the domestic remedies would have been exhausted because the individuals cannot be compelled to remain content with the reparation in the case where the result prescribed by international law was still attainable. As for the existence of this last circumstance at the time of the submission of the communication, this is a question of fact which must be reserved; we must merely point out that the author of the communication has affirmed that the protected right would no longer be attainable at present, for the culture and means of subsistence of the Band would have been entirely destroyed. 32/

45. Turning now to the question of delays in the procedure or procedures, instituted by the State party, we must point out that this is a condition prescribed explicitly by the Protocol, although also admitted in general international law. 33/ It is also a condition which eludes a strictly legal definition, as it is derived from the actual text of article 5, 1 (b) of the Protocol, which refers to remedies which are "unreasonably prolonged".

46. One criterion to be followed might consist of comparing the delay with the measure requested and with the consequences of the violation of the protected right. Thus, a delay of almost two years is no doubt reasonable for the definition of a procedure on the substance, but it is less reasonable for the issuance of a preliminary injunction; however, it could be reasonable in the latter case if the

injunction is directed against activities which are envisaged but have not yet taken place.

47. Since this is a question of fact and appreciation to some extent discretionary, the Special Rapporteur feels that it is not part of the task entrusted to him by the Committee to formulate conclusions in this respect.

48. In the light of the observations which have been made, the solution of the third question previously asked is now dubious, to the extent that it depends on the evaluations which can be made by the Committee.

III. CONCLUSIONS

49. From this consideration of the three questions concerning the admissibility of the communication and the reply that can be proposed to these questions, it is possible to draw a number of conclusions.

50. The first conclusion is that the admissibility of the communication can be retained only with difficulty. As we emphasized at the beginning, an affirmative response to all the questions considered is necessary in order to conclude that the conditions prescribed by the Protocol are fulfilled. Quite the contrary, the reply is, in principle, negative for all of them. It is true that the solution of each of these questions presents margins of uncertainty and that there are arguments for reaching a different solution. But, with regard to each question, it would not perhaps be easy to go against the conclusion which emerges from the very solid basic framework of the practice followed so far.

51. The second conclusion which we may draw concerns the difficulty of justifying, if necessary, a decision of inadmissibility on the reply to the second question, although this reply is in principle negative, at least in the light of the present practice of the United Nations concerning the notion of "people". This question, as we have pointed out, relates mainly to the substance of the case. A decision based on this reply would seem to be justified only if the Committee felt able to adopt a positive reply to the other questions. But, even in that case, as we have pointed out, it would be more correct to declare the communication admissible and to reject it later, if necessary, by a decision on the substance. Again, if the Committee felt that this question does not concern only the substance, but concerns at the same time questions of admissibility and substance, it could reserve its position explicitly, in a decision declaring the communication admissible, and announce that it would come back on the question of admissibility at the stage of the final decision, settling at that final stage both questions conjointly.

52. The third conclusion is as follows. A decision based on the non-exhaustion of domestic remedies also presents difficulties. In favour of such a decision we may note that some remedies are still pending or may be instituted by the author of the communication in the State party. But we may doubt whether these will be effective and efficacious remedies. In this regard, we cannot underestimate the fact that a remedy, which is without any doubt efficacious from the viewpoint of the attainment of the allegedly violated right, has been rejected, while the desirability of

pursuing a procedure permitting only an equivalent remedy has been advocated. And we can only accept with hesitation the argument that the efficacity of the domestic remedies must be related to the equivalence of the reparation even when the attainment of the right is possible, especially in the matter of the protection of fundamental rights. Moreover, it is difficult to ignore the fact that the proceedings instituted in the State party have been continuing for 11 years; this seriously raises the question of the reasonable nature of the delays.

53. The last conclusion concerns the legitimation of the author of the communication; a decision of inadmissibility based on the absence of such legitimation also presents some difficulties. In its favour we may bring to bear the legal precedents of the Committee regarding the inadmissibility of communications from groups and the collective nature of the right covered in article 1 of the Covenant. However, we cannot ignore any developments that might occur in the practice of the United Nations. In spite of this possibility, a decision of inadmissibility based on this argument would have the undeniable advantage of settling the matter definitely and of making clear an important aspect of the procedure relating to individual communications.

54. In submitting his conclusions, the Special Rapporteur feels he must refrain from putting forward the text of a definite resolution. The aim of this working document is basically to provide the Committee with the elements likely to enable it to take a deeper and more carefully pondered decision.

Notes

1/ A/C.3/SR.1441, pp. 383-385, and A/C.3/SR.1446, p. 412.

2/ A/6546, p. 119 et seq.

3/ See the decision on inadmissibility of 6 April 1983 concerning communication No. 104/1981 (J.R.T.W.G. Party v. Canada) (A/38/40, p. 231).

4/ See the decision on inadmissibility of 9 January 1984 concerning communication No. 163/1984 (Coordinamento of disabled and handicapped persons v. Italy) (A/39/40, p. 197).

5/ See in particular the decision of 20 July 1984 concerning communication No. 78/1980 (A.D. v. Canada) (A/39/40, p. 200).

6/ E/CN.4/L.22 of 15 April 1952.

7/ E/CN.4/L.22/Rev.1 of 21 April 1952.

8/ Statement by Mr. Jevremovic (E/CN.4/SR.261, pp. 10-11).

9/ Ibid., p. 13.

Notes (continued)

10/ A/3077, para. 34. See also in this connection the statement by the Canadian delegate Mrs. Houck in the debate in the Third Committee, 674th meeting, 28 November 1955, p. 249, and the comments addressed to the Secretary-General by Canada at the tenth session of the Commission on Human Rights (E/CN.4/694/Add.6, p. 2).

11/ Ibid., para. 35.

12/ Ibid., para. 40.

13/ General Assembly resolution 2625 (XXV).

14/ CCPR/C/21/Add.3, p. 2.

15/ Unofficial translation of the English text of article 1 of the resolution (A/C.3/40/L.53).

16/ Cf. the statement made by the representative of El Salvador, Mr. Urquia, in the Third Committee of the General Assembly at its tenth session (A/C.3/SR.674, p. 254).

17/ See the statement by the representative of Yugoslavia, Mr. Jevremovic, at the eighth session of the Commission on Human Rights (E/CN.4/SR.256, p. 9).

18/ Cf. the report of the Third Committee to the General Assembly (A/3077, p. 14) and the statement made by the United Kingdom representative, Mr. Hoare, at the eighth session of the Commission on Human Rights (E/CN.4/SR.260, p. 5).

19/ United Nations Conference on International Organization, Documents XVIII, p. 658.

20/ For an analysis of these attempts, see Rigo Sureda, "The Evolution of the Right of Self-determination" (Leiden, 1973), p. 103 et seq.

21/ See in this respect Crawford, "The Creation of States in International Law" (Oxford, 1979), p. 116 et seq.

22/ This subparagraph speaks of States conducting themselves in compliance with the principle of self-determination and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

23/ See in this respect Efrat, "Self-Determination: Canadian Perspectives", in Self-Determination: National, Regional and Global Dimensions, Ed. by Alexander and Friedlander (Boulder, Colorado, 1980), p. 38 et seq.

24/ See the sixth report on State responsibility submitted by Mr. Ago to the nineteenth session of the International Law Commission (A/CN.4/302, No. 90).

Notes (continued)

25/ Sixth report, op. cit., No. 102-105.

26/ See for this practice Gaja, "L'esaurimento dei ricorsi interni nel diritto internazionale" (Milan, 1967), p. 109, et seq.

27/ C.P.J.I. Publications, Series C, No. 84, p. 452 et seq., 817, 822, et seq.

28/ Reports of Arbitral Awards, III, p. 1497.

29/ Sixth report, op. cit., No. 109.

30/ Sixth report, op. cit., No. 113.

31/ See the reply of the Canadian Government (CCPR/C/FS/167/1984/Add.1, p. 6).

32/ See the comments of the author of the communication (CCPR/C/FS/167/1984/Add.2, p. 7).

33/ Sixth report, op. cit., No. 109.

Minister of Indian Affairs and Northern Development

CANADA

Ministre des Affaires indiennes et du Nord canadien

The Honourable L'honorable
David Crombie

SECRET

FEB 28 1986

The Right Honourable Joe Clark, P.C., M.P.,
Secretary of State for External Affairs,
Room 163 - EB,
House of Commons,
Ottawa, Ontario
K1A 0A6

AR.A-01743-86
IMD

ACC 451217 DATE
FILE 45-CDA-13-1-3 DOSSIER LUBICON LAKE BAND

Dear Joe:

Negotiation and Settlement Strategy: Lubicon Lake Band

On February 12, 1986, I presented the above noted memorandum to the Cabinet Committee on Social Development where it received favourable consideration. The purpose of this letter is to advise you of the details of this initiative which involves negotiations with the Province of Alberta.

The objective of my initiative was to obtain approval of a negotiation strategy to resolve the longstanding grievances of the Lubicon Lake Band, together with a mandate and instructions for a federal negotiator. An integral part of this strategy is a communication plan which will enable Canada to publicly defend its position and demonstrate, in the event negotiations fail, that a fair offer of settlement was made.

As you may be aware, the Lubicon Lake Band has sued Canada and Alberta with respect to its grievances and has also taken its case to the United Nations Human Rights Committee. Rather than let the Band's legal cases proceed, I feel it is preferable to seek a negotiated settlement to the Band's grievances. I have been advised by the Department of Justice that, should this case go to trial, there is a real likelihood that Canada will be found liable to establish a reserve and meet unfulfilled obligations under Treaty 8 and, there is a possible exposure for damages for loss of use of the land as well as court costs.

The Department of Justice [redacted]

The Cabinet Committee on Social Development agreed with my proposal that this matter be treated as a problem of Canada rather than as one for my Department exclusively and that it be treated as a contingent liability of the Government of Canada. Approval-in-principle was consequently granted for the payment of any settlement from the Consolidated Revenue Fund. The total estimated cost to Canada of this initiative, including the construction of a community ($10.8 - $13M), is in the range of $12.00 - $20 million. An additional contribution of land and cash from Alberta in the range of $8.6 - $14 million is foreseeable.

My initiative contains a number of important innovations in respect to resolving Native claims, including a pre-determined negotiating period, the use of a pre-approved Cabinet mandate and a committee of senior officials, and a strong communications plan to, as mentioned above, defend Canada's position publicly. The details of these innovations are summarized in an attachment to this letter.

It is my sincere hope that the strategy for negotiations I have proposed results in a fair settlement of the Band's grievances which have long been a focus of public concern. However, should negotiations fail, either through lack of agreement with the Band or a failure to come to terms with Alberta, I believe the mandate I have sought will enable Canada to make a fair offer of settlement and I am prepared to strongly defend that offer publicly.

Should you, or your senior officials, desire elaboration or clarification of this initiative, my Deputy Minister, Mr. Bruce Rawson, will be pleased to meet with you at your early convenience.

Hope all is well. Take care.

Sincerely,

David Crombie.

SECRET

INNOVATIONS
PROPOSED LUBICON LAKE NEGOTIATIONS

The proposed negotiations contain a number of important innovations in terms of the negotiations process, the Cabinet mandate, and the communications strategy. These innovations can be summarized as follows:

Negotiations:

- negotiation period of 60 days (March 1 - April 30, 1986)
- no publicity during this period
- no party can break-off negotiations during this period
- at the conclusion of negotiations, if there is no settlement, all parties to make their positions public
- full involvement of the Province of Alberta
- the appointment of a senior negotiator with knowledge of subject matter and government

Cabinet Mandate:

- advance approval of a two tier negotiation mandate, which includes instructions for a negotiator and cost limits based on full consultation at official's level
- the first level contains an offer of settlement without further reference by the negotiator
- the second level contains an offer of settlement subject to reference to a DIAND, Treasury Board and Justice Committee of senior officials which is designed to provide fast instructions
- requested mandate based upon Justice view of future liability of Canada (contingent liability)

Communications:

- predetermined date for public debate allows Canada to prepare fully and marshall all resources (April 30)
- concentrated efforts on communications aspect by Minister, senior officials, and M.P.'s
- full consultation with Communication Committee of Cabinet

OFFICE OF THE SECRETARY OF STATE FOR EXTERNAL AFFAIRS
CABINET DU SECRETAIRE D'ETAT AUX AFFAIRES EXTERIEURES

ACTION REQUEST/FICHE DE SERVICE

From/De : HONOURABLE DAVID CROMBIE MP
MINISTER OF INDIAN AFFAIRS & NORTHERN DEVELOPMENT

No.: A-01743-86

Subject/ SETTLEMENT STRATEGY LUBICON LAKE BAND
Objet: HUMAN RIGHTS GENERAL * DROITS DE LA PERSONNE GEN

Action div./Dir. resp.: IMD
Info div(s)/Dir(s) informee(s):

Let./Tel. dated Let./Tel. en date du	Date sent to division Date d'envoi a la direction	Deadline Date Echeance
28 FEB 86	04 MAR 86	**18 MAR 86**

Comments/Commentaires

SSEA SIGNATURE IF REQUIRED

ACTION REQUIRED/SUITE A DONNER

FOR DIVISIONAL USE
RESERVE A LA DIRECTION

[X] Reply for signature of SSEA
Reponse pour la signature du SEAE

Date received/Date recue

[ ] Reply for the signature of
Reponse pour la signature de

Action officer/Agent resp.

[ ] Reply by division
Reponse de la direction

Disposition and/et date

[ ] CAMPAIGN: Reply for signature of SSEA
CAMPAGNE: Reponse pour la signature du SEAE
Quantity/Quantite :

[ ] For information and any necessary action
Pour examen et suite a donner, s'il y a lieu

For MINA use/
Reserve a MINA

MAY MAI 20 1986 Original signed by
Original signé par
JOE CLARK

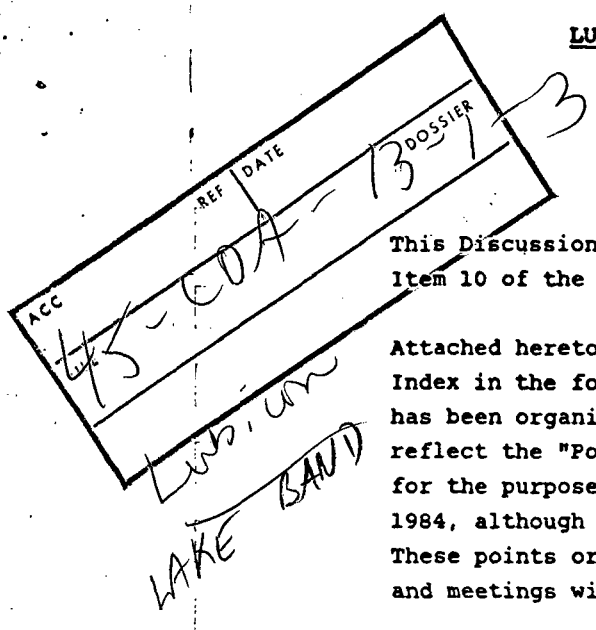
ALL TRANSFERS TO BE REPORTED TO MINA RECORDS (995-1047 OR 992-6428)
LE REGISTRE DE MINA DOIT ETRE AVISE DE TOUT CHANGEMENT

White - Return to MINA registry when action completed
Blanche Retouner au registre de MINA lorsque suite a ete donnee

Yellow - Divisional secretary
Jaune Secretaire de direction

Green - File with original incoming letter
Verte Au dossier avec la lettre recue

December, 1985 ATTACHMENT 2
First Draft



LUBICON LAKE INDIAN BAND - INQUIRY

DISCUSSION PAPER

Introduction

This Discussion Paper has been prepared in accordance with Item 10 of the agreed Schedule for this Inquiry.

Attached hereto immediately following this Introduction is an Index in the form of a chart showing how the subject matter has been organized under various Heads of Claim. These Heads reflect the "Points For Discussion" put forward by the Band for the purpose of a meeting with the Minister on November 26, 1984, although not necessarily in the order therein appearing. These points or claims have served as the agenda for discussions and meetings with the parties and their representatives to date.

As shown on the Index-Chart, each Head of Claim (or sub-head) is followed successively by sections which set out respectively the positions of the Band, of Canada, and of Alberta with respect to that claim; then by a section which endeavors to identify the interests of any Third Parties who may be involved or affected, with a brief statement of the positions of those Third Parties; and finally by a "Remarks" section. The contents of the "Position" sections contain a summary of the positions of the respective parties as I so far understand them to be on the basis of my discussions with them and their representatives to this date. The same is true with respect to the sections setting out the interests of Third Parties. In the "Remarks" sections I have endeavored to summarize the areas where there appears to be agreement or disagreement and, in the case of the latter, to suggest possible areas of accommodation or methods of reconciliation where discussions to date, or further reflection, have suggested such possibility.

The material which follows thereafter reflects this organization Index-Chart, which also shows the number of the page on which each of the sections commences.

INDEX CHART

Claim	Band's Position	Position of Canada	Position of Alberta	Third Party Interests	Remarks - Including Areas of Possible Reconciliation or Accommodation
7. COMPENSATION - BAND'S COSTS TO DATE	page 70	page 71	page 71		page 71
8. CATCH-UP DEVELOPMENT AND SOCIAL BENEFIT PROGRAMS					
(a) General	74	76	77		77
(b) Education	78	79	79		80
9. RIGHTS OF SELF-GOVERNMENT, INCLUDING DETERMINATION OF MEMBERSHIP	81	82	82		82
CONCLUSION (page 87)					

Claim - 1. ENTITLEMENT TO RESERVE

Band's Position

The Band should receive a Reserve at the Western end of Lubicon Lake to include the site agreed on in 1940, to consist of a total area calculated in accordance with Treaty 8 based on a membership of at least 347 (as determined by joint Band-ONC Genealogical study). Historically, the basis of entitlement is numbers properly eligible for membership at the date of survey. On this basis the total number to be counted to establish actual entitlement according to today's criteria for eligibility is in excess of 400. This would entitle them to an area at least twice, and probably three times, as large as the 25.4 sq. mi. set aside in 1940; the Band claims that this extra area should adjoin the 25.4 sq. mi. at the south-west end of Lubicon Lake and extend thence easterly along the south shore of the lake.

As to the interests of others in the surface of the area claimed, or sought, as Reserve land, the position of the Band is that:

(a) they are prepared to recognize and confirm such small holdings as may be within the Reserve area, including the 160 acre homestead applied for by Mr. L'Hirondelle, and Oil and Gas Company access and other surface holdings;

(b) the Sawan and Calihaisen leases are not within the area claimed or sought, and are not challenged; nor is the Little Buffalo Hamlet challenged;

(c) the area to the South and East of Lubicon Lake in which the Band is interested as the extra area to be included beyond the agreed 25.4 sq. mi., does not to their knowledge include any other surface holdings save possibly Oil and Gas Company rights as in category (a) above, which again are not challenged.

This leaves the known area of contention as the two large agricultural leases presently held by the Co-op, of which the present membership consists entirely of members of the L'Hirondelle family. The principal lease was issued in 1975 for a term of 25 years.

Claim - 1. ENTITLEMENT TO RESERVE

Band's Position (cont'd.)

The Band's position is that these leases should be terminated on transfer of the land to Canada as its Reserve, as the area in question will be required for the Band's own intended agricultural undertakings. The Band takes no position on whether compensation should be paid to the L'Hirondelles for this termination, except that it should not be in any way at the Band's expense. In support of its position the Band emphasizes that when the leases were first entered into, and also when renewed, it was known to the L'Hirondelles that they were situated entirely within the 25.4 sq. mi. claimed by the Band as its Reserve. The Band is opposed to the idea of leaving the leases undisturbed and extending the boundaries of the Reserve by a corresponding acreage, as the lease areas lie at the heart of the Band's traditional homeland and are so substantial and are so centrally located as to be an impediment to the cohesive and efficient operation of the Band's intended agricultural activities.

Position of Canada

The Band is entitled to a Reserve, which is to include the area at the western end of Lubicon Lake agreed to in 1940. The membership figure to be used to calculate the total area is to be the figure at date of survey - i.e. the present number. The starting figure for this purpose is 182 (present registered membership) to be increased to a number between 250 - 300 if the criteria as to eligibility for membership in the Indian Act prior to the 1985 changes ("the old Act") are applied, or between 350 - 400 if the provisions of the new Act are applied. Canada will in due course put forward a firm number with the formal request for transfer of the land accordingly, and make available to Alberta the material on which this figure is based, although this material may not include the Joint Genealogical Study unless the Band consents. As to the location of the extra area involved, Canada supports the Band's position.

Canada has not as yet indicated any official position with regard to termination or otherwise of the agricultural leases, but neither has it specifically opposed the suggestion for termination and adequate compensation.

Claim - 1. ENTITLEMENT TO RESERVE

Position of Alberta

Subject to reservations as to protection of existing interests of third parties, Alberta raises no objection to location, or to entitlement in principle. Subject thereto, Alberta remains ready to honour the commitment of 1940, and to transfer the 25.4 sq. mi. at the western end of Lubicon Lake as agreed in 1940 - which was on the basis of a Band membership of 127. Alberta awaits receipt of a validated claim and request for transfer from Canada accordingly; but if the claim and request put forward is based on a figure of Band membership in excess of 127, Alberta reserves the right to challenge that figure and the entire basis of calculation, including the calculation of 127 in 1940. Alberta claims to have information which shows that the number entitled to be counted in 1940 was considerably less than 127, and that the numbers so entitled today are very much lower than the figures put forward by the Band and discussed by Canada.

Third Party Interests

The Metis Association, through its leader, Mr. Sam Sinclair, has stated that it does not oppose the Band's claim to a Reserve in the area, provided that the rights of all Native people are acknowledged and protected. It appears that there will be no conflict in respect of the areas discussed, with the exception of the agricultural leases.

Chester L'Hirondelle, speaking for himself and the 10 members of his family who are the present and only members of the Co-op (which is the actual holder of the agricultural leases in question) is opposed to the idea of their receiving compensation and having to move elsewhere to carry on their livelihood. He said it would be more sensible for their leases to be left undisturbed, and for the boundaries of the Reserve to be adjusted to take in an equivalent additional acreage. He spoke of the active pursuit of the land claim as being a comparatively recent development, which would put it as a matter revived only after the agricultural leases were first taken out. His position is, in effect, that the agricultural leases were granted when the claim to a Reserve was entirely in abeyance, and that in fact the Band had knowledge of the existence of the leases when they revived this claim.

Claim - 1. ENTITLEMENT TO RESERVE
Third party Interests (cont'd.)

As to the suggestion that a possible solution might be for the leases to remain in the name of the Co-op, but membership in the Co-op be fully opened to members of the Band, so that the original position might be restored and the agricultural activities be pursued as a truly joint venture, Mr. L'Hirondelle was entirely non-committal. He said only that the present Board of Directors of the Co-op would have to decide on any application for membership.

The Oil and Gas Companies concerned expect to have their interests, including the location of and rights of access to installations and works, protected in any arrangement made for the setting up of the Reserve, whatever may be its size or boundaries. This does not conflict with the Band's position.

Remarks - Including Areas of Possible Reconciliation or Accommodation

There appears to be general agreement that the Reserve should be located at the western end of Lubicon Lake. Alberta is prepared to agree to the setting aside of the 25.4 sq. mi. previously agreed, subject to its reservation as to disputing the actual area if other numbers are to be put forward. The Band and Canada are in agreement as to the location of any additional area, extending easterly along the south shore of Lubicon Lake; Alberta has not opposed this location if the Band is in fact found to be entitled to a larger area for its Reserve.

The question of the membership number to be used as the basis of calculation of the size of the Reserve remains, unfortunately, an area in which little progress towards reconciliation of the conflicting views has been made. The difficulty has been compounded by the refusal of the Band, at least up to this point, to allow the joint genealogical study (which it claims supports the figure of 347 members on the basis of the old Act) to be made available for study at a meeting at which the genealogical experts of the Band and the two Governments would have available both that report and the studies done by Alberta. It had been my hope that such a meeting, and the comparative analysis of the two sets

Claim - 1. ENTITLEMENT TO RESERVE
Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

of studies by the experts of all concerned, would produce some common ground as to a starting figure.

The difficulty is not lessened by Alberta's insistence - at least until this point - that if any membership figure in excess of the 127 agreed to in 1940 is to be used in the request formally put forward by Canada, it will attack that figure even as a starting point for today's solution of the problem. It had been my hope that Alberta would find, in my suggestion that compensation be paid for any excess in area asked for in 1985 over that agreed on in 1940, a reasonable basis for agreeing on the figure of 127 as the minimum starting point for today's discussions, without the need of going with a fine-tooth comb over what could surely be regarded as an accepted historical fact.

It is still my earnest hope that accommodation - or reconciliation of conflicting views - can be found on this basis. I fully appreciate Alberta's concern at being asked today to agree to the transfer of a substantially larger area of land than that agreed to in 1940, which land has a value today far in excess of what was known in 1940, let alone contemplated in 1930 when the undertaking to re-convey lands to enable Canada to meet its treaty obligations to the Indians was first entered into. (However there is no question in my mind that Canada's obligation to the Band exists, was recognized in 1940 and that it was then agreed by both Governments that a Reserve based on a membership of 127 would be created at the western end of Lubicon Lake. The matter would have been disposed of, and the Band would be settled thereon and enjoying all the benefits and revenues therefrom if that agreement had been carried out.)

The fact that it was not is, on the basis of all the evidence I have seen, entirely the responsibility of Canada. Clearly Alberta remained ready for many years to carry out its obligation under that agreement and the Resources Transfer Agreement, and only changed its position after giving more than adequate notice, in light of Canada's apparent change of intent. (In these circumstances, I see it as entirely the fault of Canada that the matter was not disposed of on the

Claim - 1. ENTITLEMENT TO RESERVE
Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

basis of the agreement of 1940, and that Alberta is faced today with a request for land in excess of that agreed to then. Hence in my view it is only equitable that Canada should compensate Alberta for the difference, and I have suggested to the representatives of the two Governments that the matter be settled on this basis.

It appears to be equally clear, however, that Canada's obligation to the Band as of today is to provide a Reserve on the basis of today's Band membership. There is ample precedent that the entitlement is as of the time of survey, so that 1985 is the effective date. If this be accepted, it follows that Alberta's obligation under the Transfer Agreement is to re-convey (set aside) that amount of land which will enable Canada to discharge that obligation. If the suggestion I have made be accepted, then the inequity to Alberta occasioned by Canada's non-fulfillment of the earlier agreement will be compensated for. Such compensation should of course be on the basis of today's values. I very much hope that the representatives of the two Governments will find it possible to agree on this as a fundamental basis for the settlement of this particular case.

If this be accepted as a sound base, then it would seem that agreement on the population base should not be such a formidable obstacle. Certain fundamental considerations are suggested in the hope that they will be of help. First, it is traditionally Canada's exclusive responsibility to determine and maintain the register of Indian population, and Band membership lists. Second, it is certainly not in Canada's interest to inflate those figures, having in mind generally the costs of its on-going responsibility to Indian Bands, and particularly in this case if the suggestion be accepted that Canada compensate Alberta for the extra land based on the difference between today's figure and the 1940 figure. Hence it follows that there is a strong case that there should be no attempt to go behind the 1940 figure of 127 members - this particularly so since there is the evidence that Alberta for many years following 1940 accepted and acted on that figure as the basis for the area of land it would have been willing to set aside. Indeed, on the

Claim - 1. ENTITLEMENT TO RESERVE
Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

basis of those two fundamental considerations there is a strong case that the figure of 182 members - the Band list of 1985 prior to the new Act - should be accepted as the starting point, and the efforts at reconciliation be confined to figures put forward beyond that. (It should be clear, however, that the figure of 127 would remain as the base for measuring compensation to Alberta for land in excess of that agreed to in 1940.)

There has also been discussion of the matter of the time frame which should be chosen to determine what are the rules to be applied in calculating the numbers eligible to be counted today as Band members for the purpose of fixing the entitlement. Should it be 1930, when the Resources Transfer Agreement was signed? Or 1940, when it was first agreed that the Band should have a Reserve and Alberta agreed to set aside the land for that purpose? Or the present, when Canada and Alberta are again agreed upon the obligation to provide a reserve for the Band but so far unable to agree upon the number or the criteria for determining it?

The problem is, of course, that the criteria for determining Indian status, which bears directly on eligibility and therefore on Band membership, have been changed several times since 1930. Again traditionally, however, it has been the current population figures at the time of survey which have been used to calculate reserve land entitlement. On this basis, it would be the Band membership list established in accordance with the new (1985) Indian Act which would be used to determine the size of the Reserve. My present understanding is that the criteria or rules for determining Indian status, and hence affecting eligibility for Band membership, are not substantially different as between those contained in this Act and those in force in 1940: that what has happened is that restrictive changes were introduced in 1951 but have now been effectively repealed. More precise information and analysis is needed - and is awaited from Canada - on this point. If this be correct, however, there would seem to be no basic inequity to Alberta in applying the 1985 criteria to determine actual membership as the basis of today's entitlement, having in mind in this regard

Claim - 1. ENTITLEMENT TO RESERVE
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the suggestion that Alberta be compensated for any increase in the validated numbers over the 1940 figure.

I feel I should record at this stage, however, my present feeling that there would be an inequity - almost an impropriety - if the number were to be inflated by the inclusion therein of persons who, while perhaps technically qualified for membership, have not demonstrated a desire to be, or of whom it cannot be demonstrated that in historical fact they ought to be, counted as members of this Band. Thus with respect to persons of whom it is now claimed by the Band that they should be counted, and who may in fact be found to be eligible for membership, but who are now registered as members of other bands or are not, by residence or otherwise, readily identifiable as members of the Lubicon Band community: it seems to me that before they should be included in a membership count for this purpose they should be required to indicate, by declaration or similar method, a definite desire and intention to live as part of the Lubicon Band on the Reserve to be established for them.

As to the method by which the number eligible to be counted for this purpose is to be determined, the Band still refuses authorization for the joint Band-ONC genealogical study and report to be made available for study by experts from Alberta who have carried out studies and made reports on the same matter. I had envisaged that each of those reports would be made available for study and analysis and discussion between both sets of experts, after which I would meet with both groups of experts together and hear and discuss their opinions and conclusions. On this basis, to the extent that I was not able to reconcile their remaining differences, I would have been in a position to reach an informed opinion as to the number to be counted for this purpose and make appropriate comments in this Discussion Paper, which might lead to a further reconciliation.

The Band's withholding of consent still represents a substantial obstacle to direct progress, necessitating a considerable detour. The best alternative route I have been able to lay out and follow so far has been a meeting of the two sets of

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experts at which, lacking authority to refer to specifics in support of particular conclusions, virtually no progress with respect to conclusions or agreement on numbers was possible. We were however finally able to reach agreement resulting in the production of a paper by the two sets of experts, in which each sets forth a summary of the principles and criteria regarded as applicable, and applied, in reaching the conclusion which each believes to be correct. While there are appreciable areas of common approach thus established, there are significant areas of difference.

In the result I am left with the formidable task not only of deciding which principles and criteria are the most acceptable where there are differences, but of applying them myself to the material available in order to reach a conclusion as to the appropriate number to be counted for the purpose of my report - or of further discussion prior thereto. Lacking expertise in this field, this would be for me a very lengthy, and possibly unwise, undertaking. I therefore intend to recommend to the Minister that I be authorized to retain the services of an independent genealogical expert to assist me in this process. I propose that the joint Band-ONC study and the studies prepared by Alberta experts, together with the paper referred to above, and any other material considered relevant, be made available to this expert, and that he be authorized to discuss them with the experts for the parties, all on the same without prejudice and confidential basis that characterizes all submissions and discussions in this Inquiry, and that he then report to me with his analysis and recommendation as to the correct Band membership number to be used for the purpose of calculating the entitlement to reserve.

I must point out also that at this stage I am still awaiting the submission of a definite figure from the representatives of Canada which they consider is the one that should be used as the basis of calculating entitlement. In the absence of such a figure it has really not been possible to carry on very concrete discussions on this question. I should like to receive that figure at an early date, not only because it would be relevant for the discussion lastly referred to, but

because it would be essential to further the alternative settlement concept which I now put forward for consideration.

This concept constitutes an alternative approach to the matter of compensation to Alberta for extra land asked for beyond that agreed upon in 1940, which would provide a way around the present impasse created by conflicting views as to strict legal obligations and duties, while not doing any violence to those concepts.

This would be for the parties to agree now that the 1940 figure be accepted as a minimum starting point, but that on the basis of traditional practice that the Band list at time of survey be used as the figure for calculating entitlement, the current actual Band list of 182 be accepted as the actual basis for entitlement. Applying what I have suggested is the equitable principle discussed above, Alberta would then be entitled to compensation for the difference between the area based on 127 and that based on 182. Canada would then offer to purchase from Alberta, and Alberta would agree to sell to Canada, the further amount of land necessary to provide the Reserve for the full number which may be found, or agreed, to be the number entitled to be counted as members of the Band on the basis of the now current criteria for membership. The price per acre or square mile to be paid for this extra land would be the same as that fixed for compensation for the extra land involved in the differential between the area based on the membership figures of 127 and 182 referred to above.

This arrangement has the benefit to Canada and the Band that it provides the Reserve for the full community which the Band claims and which Canada accepts as its obligation to provide. At the same time it recognizes that it would be inequitable either that Alberta should be penalized for the delay in fulfilling the agreement of 1940 (for which Alberta was in no way responsible) or that Alberta should be called upon to bear the entire burden of providing extra land as a matter of legal obligation when the formula for determining the entitlement to that land, and hence the extent of the demand, has been unilaterally changed by Canada by legisla-

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tion at the very time when these discussions were going forward. Neither, however, does it constitute a complete waiver by Canada of Alberta's obligation under the Resources Transfer Agreement to Canada's possible future prejudice, since that obligation would be recognized in Alberta's agreement to transfer the land to fulfill the request based on a present actual membership list of 182 - the traditional obligation - although with compensation based on the unique feature of this situation, the non-fulfillment by Canada of the Agreement of 1940.

For Alberta, the benefits are that it creates no precedent by way of recognition of a legal obligation beyond the traditional one of setting aside land under the Resources Transfer Agreement to the extent determined by current Band lists. And with respect to the possibility that Alberta might be said to have waived a right to require a validated claim, the answer would be that so far as land up to the total based on the figure of 182 is concerned, the figure of 127 was accepted as valid in 1940 and Alberta has been compensated for the difference because of Canada's delay: hence this affords no precedent for dealing with cases where a totally new request is made. Neither could this, nor the request to sell the further land based on the figure in excess of 182, be said to be a precedent for a waiver of the "counted once" rule: for the fact would be that the figure put forward and accepted as the basis for settlement would have been arrived at as the result of a special agreement arrived at on the basis of the particular circumstances of this special case.

Indeed it is difficult to see how a formula, or a method of procedure, for resolving this particular case could in any event be cited or regarded as a precedent in any other case. For the unique features of this case, crying as they do for the implementation of promises made 45 years ago on a basis that will do justice and equity to that community in this day 45 years later, create a unique problem, the solution of which cannot really form a precedent for the solution of any case which only arises for the first time in the future. The representatives of Alberta have in fact taken the position

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in discussion with me that Alberta is as concerned as anyone with the matter of social justice to this community: their understandable concern is that it should not be done, insofar as the actions required exceed Alberta's strictly provable legal obligation, at Alberta's sole cost and expense, especially if that may form a precedent for cases which may arise in future. My belief is that the approach suggested above contains the answer to these concerns.

And of course it is also a fact that the acceptance of this approach will have the advantage to all parties that it will lead to what I believe will be a just and equitable, and relatively speedy, solution to the problem of the Band's entitlement to a reserve which is basic to the whole area of the Band's claims before me in this Inquiry. It is my impression that if such a solution is reached, it will represent a long step towards acommodation and solution of other parts of the claims as well. It is my earnest hope that all concerned will consider this approach with all of the above factors in mind.

As to Third Party interests, the main problem is clearly the agricultural leases held by the Co-op. I can see little profit at this stage in rehearsing the history of membership in that entity, or the question of whether any subtle plot or intent underlay the changes in membership over the years. The historic fact is that the membership which initially included a number of Band members now consists entirely of members of the L'Hirondelle family. But it is also a fact that the L'Hirondelle family have roots in the area going back to at least 1913, and that of late years it has been the members of that family exclusively who have organized and carried on the farming and ranching operation of the Co-op, on which they are largely dependent for their livelihood.

There are thus two conflicting positions or interests - both of them legitimate - which are extremely difficult to reconcile. On the one hand is the position and interest of the Band, who have an unquestioned legitimate claim or right, fulfillment of which was promised to them 45 years ago -

Claim - 1. ENTITLEMENT TO RESERVE
Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

that is, to have a Reserve at the western end of Lubicon Lake. This includes, of course, the right to carry on agricultural pursuits there, which are in fact of increased and increasing importance to them now that their traditional livelihood from hunting and trapping is so seriously diminished. The continuance in the hands of others of these agricultural leases, located so centrally and strategically as they are, would be a continuing serious and thorny obstacle to the fulfillment of this right.

On the other hand is the position of the L'Hirondelle family, who have been in the area for over 70 years, whose industry and ability in carrying on the operations based on those leases is not questioned, and who have a lawful and legitimate interest as members of the Co-op in maintaining those leases and the livelihood they derive therefrom. Discussions with Mr. Enns, reported to me, do not support the suggestion that the transformation of membership in the Co-op from a situation of full participation by Band members to one of exclusive membership of the L'Hirondelle family was entirely the result of plan or design by that family: rather that it was a combination of circumstances including both the Band's growing opposition to participation in anything which would recognize the right of Alberta to dispose of the land in question - as the granting and continuance of the Co-op leases might suggest - and the continuing activity and interest of Band members in hunting and trapping, which took them away from the scene of the Co-op's activities at crucial times.

The facts are that the positions and interests of both parties in this situation are legitimate but appear to be irreconcilable. In such circumstances the answer to the question of which should yield and which should prevail is generally regarded as depending on the answers to certain other questions or tests. Those are: where lies the precedence or priority in point of time between the conflicting claims or interests? and where lies the balance of convenience and necessity?

Claim - 1. ENTITLEMENT TO RESERVE

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

As to the first, the answer must be in favour of the Band. Its claim to a Reserve as of right was first put forward in 1933, and was recognized and accepted in 1940 as being the 25.4 sq. mi. at the western end of Lubicon Lake. This of course is an interest which is similar in many ways to a fee simple and, while affirmative action was withheld by Canada, neither Canada nor Alberta have ever denied the right, and the claim or interest has never been abandoned or withdrawn by the Band; whereas the interest of the L'Hirondelles is in the continuance of a leasehold interest only which was first granted to the Co-op in 1975, with knowledge of the subsisting claim and interest of the Band. As to convenience and necessity, the balance would again be seen to be in favour of the Band, not only in terms of the numbers of persons interested and affected, but also in terms of continuing hardship and inconvenience if the leases are not terminated.

For while it is true that the loss of physical area could be compensated for by an equivalent enlargement of the boundaries of the Reserve, the fact is that the actual lease areas are, by their size and location, strategically essential to the pursuit of a successful agricultural operation within the Reserve. Their continuance as an alien operation in the centre or heartland of the Reserve would be not only a continuing physical but also a psychological impediment of the sort for which really no compensation can be devised. Whereas the information I have received is that an equivalent area of unoccupied land of comparable quality can be found, and could be made available to the L'Hirondelles, in territory immediately adjacent to what would be the boundaries of the Reserve. Since the Band is prepared to agree to the grant of the 160 acre homestead applied for by the L'Hirondelles (although within the Reserve boundaries) this would mean that that family could carry on its agricultural operations from its home site in an area in reasonable proximity thereto. If this were done, then of course a reasonable time should be given to enable them to effect the transfer.

The question of compensation would also have to be addressed. There is no doubt that the effect of this arrangement would

Claim - 1. ENTITLEMENT TO RESERVE
Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

be the equivalent of an expropriation, and although it accords with the principles of precedence and balance of convenience and necessity, the application of those principles also invokes the equitable principle of compensation to minimize, so far as possible, the hurt resulting to the party called upon to make the surrender of its interests. The measure of the damages includes not only the value of the interest thus surrendered, but also the cost of placing that party as nearly as possible in the equivalent position to that which he enjoyed before the taking. That would include, in this case, any actual cost of transfer plus the cost of breaking the soil, fencing, etc., to put the new holding in an equivalent position to that of the old, and also any loss of income received or extra expense incurred (purchase of feed, etc.) during such period as may be required to bring the new land into production. These last two items could perhaps be eliminated, or reduced, if the L'Hirondelles were allowed the continued use of the present lease areas during the time required to do that.

There might also be a question with regard to access. If the L'Hirondelles are to continue to live where they do now, or if the base of operation is the 160 acre homestead under application (which will be within the boundaries of the Reserve) then it is to be anticipated that access will be required for the movement of both equipment and cattle between that location and the new lease area. This should not be a major problem, but it is one which should be addressed in the course of discussions which may follow.

I recommend accordingly that Mr. L'Hirondelle or his representative and the representatives of Canada and Alberta meet with me to consider the acceptance in principle, and discuss the application, of a solution to this problem along the lines outlined above. If it be so accepted, I would suggest that Mr. L'Hirondelle and representatives of Alberta meet as soon as may be thereafter to agree on the area which Alberta would make available by way of lease or leases to replace the existing leases. While I recognize that it has not yet been settled that the area of the Reserve will exceed the 25.4 sq. mi. previously agreed on, I recommend most strongly that

Claim - 1. ENTITLEMENT TO RESERVE
Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

the area considered for this purpose not include any area which would be within the boundaries of that Reserve as it would be if extended easterly along the south shore of Lubicon Lake. Thereafter there should be further meetings to be arranged to work out the details to be embodied in my Report recommending the arrangements thus arrived at as the agreed course of action to settle this aspect of the Band's claims.

As to whose is to be the responsibility for payment of compensation on the basis discussed above, it appears to me clear in principle that Canada should bear at least the major portion of the cost, since Canada's is the main responsibility for the fact that the problem exists. Had Canada carried out its part of the agreement of 1940 within a reasonable time, the Reserve would have been established and this situation could not have arisen. This subject, however, including any considerations put forward which may suggest modification of this approach, will be fully covered in that portion of this Discussion Paper dealing specifically with the claim for compensation in all its aspects. What is important now is to explore actively the prospect of acceptance in principle of this suggestion for an equitable disposition of the matter in which the positions of the two parties most concerned have so far been irreconcilably opposed.

The existing interests of oil and gas companies, including existing surface installations and rights of access thereto, are not incompatible with the occupancy and use of the area by the Band as its Reserve, including agricultural activities, and their continuance therefore presents no problem. The only change will be that lease and royalty payments therefor will accrue to the government of Canada for the benefit of the Band after the Reserve is set up.

Claim - 2. SUBSURFACE RIGHTS WITH RESERVE LANDS

Band's Position

The transfer by Alberta of the lands constituting the Reserve should convey full subsurface rights, including oil and gas. This should apply not only to the 25.4 sq. mi. agreed on in 1940, but also to such additional area as is to be included in the Reserve. It is not to be contemplated that the area set aside for the use and occupancy of the Band as its Reserve should consist of two classes of land - land with full mineral rights including oil and gas, and land without such rights. The Band is prepared to accept that the transfer of lands for its Reserve should recognize and protect existing interests of oil and gas companies therein, provided however that such interests are thereafter to be subject to the relevant provisions of the Indian Act and the Indian Oil and Gas Act so that the royalties, etc., shall be paid to Canada for the benefit of the Band. The details, including such matters as the necessary surrender by the Band to bring the lands within the operation of the relevant provisions of those Acts, have not been discussed and will require to be settled prior to transfer.

Position of Canada

Canada supports the Band's position, and I am not aware of any differences between them on this subject.

Position of Alberta

Alberta appears ready to agree that the transfer of the 25.4 sq. mi. area should include full mineral rights (subject to protection of existing interests therein) but has not shown such readiness with respect to any area beyond that. In discussion of mineral rights with respect to the 25.4 sq. mi., the expression used was that Alberta agrees in principle, on the basis that what would take place insofar as mineral rights are concerned would be "simply a change in landlords, with the new landlord respecting existing rights." There is no conflict between this position and the positions of the Band and of Canada.

With respect to any additional area, however, the position is not so clear. At our second meeting, when the matter of a possible approach to agreement on setting aside an addi-

Claim - 2. SUBSURFACE RIGHTS WITH RESERVE LANDS

Position of Alberta (cont'd.)

tional area was under discussion, it appeared that Alberta might consider the possibility of agreeing to a Reserve area on the basis of a membership figure of 182 (with compensation for the difference between that and the area based on 127) but that while Alberta may also be prepared to consider setting aside an area in excess of that on grounds of social justice, etc., this would be by way of a "land purchase", and that additional area would not have the status of "a full Indian Reserve". This of course closely parallels the suggestion made above as to the approach to resolve the differences as to the surface area to be included in the Reserve, although that suggestion does not contemplate different types of holdings. The matter was not elaborated at the meeting in question, but there may well be an inference that what Alberta so far contemplates is that mineral rights not be included with any area in excess of that based on a membership of 182.

Third Party Interests

The oil and gas companies expect that their rights to oil and gas under whatever lands may finally constitute the Reserve, including their rights to extract the same, be fully recognized and protected and be continued after the transfer to the same extent as they presently exist. There is no conflict between this position and that of the Band or of either government.

Remarks - Including Areas of Possible Reconciliation or Accommodation

It appears that there is positive agreement on the inclusion of subsurface rights with respect to the area of 25.4 sq. mi., and probable agreement with respect to the whole area based on membership of 182, but that possibly Alberta does not yet agree to the inclusion of such rights in the transfer of any area beyond that.

As to reconciliation of this conflict - if there be one - I venture to suggest that the considerations in support of the position of the Band and of Canada outweigh those in support of the position of Alberta, and should be accepted. There

Claim - 2. SUBSURFACE RIGHTS WITH RESERVE LANDS
Remarks - Including Areas of Possible
Reconciliation or Accommodation (cont'd.)

is of course the consideration based on precedent. I do not suggest that this is conclusive, for we are not discussing here a rigid or legalistic approach but rather one based on goodwill and a desire to resolve conflicts while doing what is equitable in the circumstances: but considerable weight must surely be attributed - even in this context - to the fact that historically the lands set aside as Reserves for the benefit of Indians in the Treaty areas have never excluded, but always included, full mineral rights. It would surely put the Lubicon Lake Band in an anomalous position if it were to be the only one which had that resource excluded from a portion of the Reserve set aside for its use and benefit.

In the area of justice and equity, from the point of view of the Band there is the consideration that the entire area of the Reserve will be their homeland. If full subsurface rights are included the Band will have, as is desirable, control over what further rights for oil and gas exploration and development will be allowed thereon, for although the title would be vested in Canada such rights could only be granted with the Band's consent through the surrender process. But if subsurface rights are not included in the portion under discussion then the Band will not have any control over those matters with respect to that portion of its homeland - and it will be an appreciable portion of the whole. Or, at the very least, even if it be accepted that some consultative process be established, there would be divided jurisdiction which would be both a continuing and cumbersome inconvenience and incompatible with the whole concept of control by the Band over what takes place on its homeland. Added to which, of course, would be the loss of the right to the benefit of royalty revenues derived from such development, which would belong to the party retaining title.

From the point of view of equity to Alberta, there would be nothing inconsistent or anomalous in Alberta's relinquishing jurisdiction over subsurface rights here as compared to the situation with respect to lands set apart for the use and occupancy of Indians as their Reserve in any other case. And although it is suggested that the portion of land in

Claim - 2. SUBSURFACE RIGHTS WITH RESERVE LANDS
Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

question be purchased as a compromise solution to the conflict with respect to strict legal rights and obligations, it is still surely not to be regarded as anything other than part of the area necessary to provide a Reserve to meet the recognized and legitimate needs of the Band. There would appear, then, to be no inherent violation of propriety or precedent with respect to jurisdiction if this transfer is also accompanied by full subsurface rights.

As to the other equitable consideration from Alberta's point of view - the loss of lease and royalty revenue - this is taken care of by the proposal that there be compensation by way of an agreement to purchase that portion of the Reserve which exceeds the area based on a membership figure of 182. The value of the land, whether for the purpose of compensation or of purchase price, would of course be fixed having regard to its potential for oil and gas production, so that Alberta would not suffer economically from inclusion of subsurface rights in the transfer of this portion.

There is however one modification in Alberta's favour which might be considered and found acceptable: that is the suggestion that Alberta be paid a portion (50% was the figure mentioned) of any lease and royalty revenues actually derived from this excess portion after the date of transfer. (If this were agreed, presumably there would be a proportionate reduction in the purchase price to be paid). The rationale behind this compromise would be recognition of the special nature of the settlement of which it would be a part: that is, a formula to assist the parties in coming to overall agreement on how to deal with a situation with respect to parts of which it is difficult or impossible to reach agreement in detail. It is not unusual for parties to adopt such compromises which afford a route around what is otherwise an impasse. It is my hope that consideration of these various suggestions may provide a means of reaching mutual accommodation.

Claim - 3. WILDLIFE MANAGEMENT AND ENVIRONMENTAL PROTECTION PROGRAMS

Band's Position

The Band asks, with respect to its traditional hunting and trapping area, that there be set up a wildlife management and environmental protection program in which they would have active participation and an effective voice. The object would be to ensure that the development and operation of oil and gas extraction are carried on with due regard for the Band's interests and rights with respect to the maintenance of wildlife in the area from which traditionally they have derived their livelihood, and not in virtual disregard thereof which they feel has been the case to date. And they claim that their rights in this respect are the same whether based on continuing native title or on entitlement under the treaty by which the continuation of those rights was guaranteed.

It is not the Band's position that oil and gas development and extraction must cease, for they believe that rehabilitation and maintenance of wildlife to support a considerable trapping and hunting livelihood, and continuance of oil and gas operations, are compatible provided that the latter are planned and carried out with due regard for the former. Nor is it their position that the continuance of their hunting and trapping activities as the exclusive or main source of their livelihood would be required in perpetuity, for they recognize that future generations may well come to follow other lifestyles and occupations as they become increasingly aware thereof and receive the education and training necessary to enable them to do so. Rather their position is that they are entitled to have the basis of their traditional lifestyle and livelihood maintained so that such of their members as presently know no other may continue to follow it, and so that future generations of members may have a choice as to whether to follow it, rather than being bulldozed, as it were, into another lifestyle.

The Band accordingly asks for a commitment that there will be established a management program which

(a) recognizes and is based on the principle that the resources of the area will be so managed that development of the oil and gas - or any other particular resource - will be allowed to proceed only in a manner consistent with the continued

Claim - 3. WILDLIFE MANAGEMENT AND ENVIRONMENTAL PROTECTION PROGRAMS

Band's Position (cont'd.)

existence of sufficient stocks of wildlife as required to support the continuing rights and needs of the Band in respect of that resource;

(b) gives effect thereto by providing for the setting up of a management authority to administer the program so constituted that the Band will have an effective voice in making decisions which will ensure that this objective is maintained, including decisions governing such matters as the setting of levels at which stocks are to be maintained, the setting of limits and determination of persons who are to be permitted to hunt and trap in the area, and the resolution of conflicts between the maintenance of the desired level of wildlife and the activities or proposed activities of those engaged in the development and exploitation of other resources in the area.

Spokesmen for the Band have stated that they accept the necessity for self-discipline and are ready to be bound by limits applicable to themselves as well as others in order to achieve and maintain the fair and continuing balance of interests envisaged in this program. Thus they envisage specifically the probable necessity, in light of the low levels to which development has presently reduced wildlife in the area, of cutting back the numbers of furbearing animals to be taken by trapping for some years, until stocks are restored. It is their stated desire that the program should be set up and operated not in such a way as to disregard or submerge the interests of developers entirely in favour of those of the Band but rather so that, a balance between them having been set out in principle, the voice of the Band will be heard and will prevail in the resolution of differences, after discussion, as to how that balance should be applied and maintained.

The Band wants also, however, specifically to have that effective voice in the determination of such matters as what game management programs are to be initiated. For instance, they doubt whether the moose population could in fact be rehabilitated and maintained at a substantial or meaningful

Claim - 3. WILDLIFE MANAGEMENT AND ENVIRONMENTAL PROTECTION PROGRAMS

Band's Position (cont'd.)

level in the face of continuing active development and operation of oil and gas installations in this formerly wilderness area, but they believe there is an alternative species of big game animal which is not so sensitive to such activities and which could be introduced and, if an appropriate game farm program were developed, could be brought up to and maintained at a sufficiently high population level to provide once again a substantial portion of their livelihood, both as food and as hides for sale, as the moose formerly did. They envisage that they would have an effective voice and part in the introduction and operation of such particular management programs.

As to the interests of others in hunting and trapping in that area, the Band does not claim exclusive rights or privileges. Although they claim that theirs has historically always been, and still is, the predominant use of the area for these purposes, they recognize that other native peoples have carried on the same activities, though to a lesser degree, in some parts of the area. They are prepared to accept the continued exercise of such rights, and to speak and act for their protection and continuance in their role as participants in the design and implementation of the management program.

With respect to administration insofar as trapping is concerned, the Band asks that it have authority to determine which Band members are to have trapline licences. They also want it to be clear that the program be administered on the basis that if there is conflict, in the matter of granting trapping and hunting permits, between the native and non-native people, the conflict be resolved in favour of native applicants. They put this on the basis of the priority which is due to their interests in hunting and trapping in their traditional area which, they say, is the same whether the claim be founded on native title or on the guarantee in the treaty.

Reverting to the matter of a reduction to be imposed on trapping generally, until wildlife stocks are rehabilitated, the Band suggests generally that the management program be integrated with the Alberta Trappers' Compensation Program,

Claim - 3. WILDLIFE MANAGEMENT AND ENVIRONMENTAL PROTECTION PROGRAMS

Band's Position (cont'd.)

and specifically that compensation for the reduction in revenues during this initial period is one aspect of discussion which should be undertaken with Alberta as to the application of the Trappers' Compensation Program to their situation. This will be dealt with more fully under the appropriate sections of this Paper dealing with Compensation.

The Band accepts, on the same without prejudice basis that applies to all statements and discussions in this Inquiry, that Alberta's is the jurisdiction involved in the working out and implementation of such a program as is here outlined. The Band may prefer to have Canada represent them at least in the initial stages of discussion of this claim, but it appears they would be prepared to join in discussions so soon as the proposal may be accepted in principle.

Position of Canada

Representatives of Canada have not yet taken any position in detail, but have stated that they would support the Band in consultations with Alberta to ensure protection of the Band's interests and rights in respect of hunting and trapping in its traditional area, with Band involvement in a management program which recognizes and safeguards those interests.

Position of Alberta

Alberta does not accept that it has any specific obligation to the Band in this connection beyond what it owes to all Albertans with respect to the management of resources and the protection of wildlife. Nevertheless Alberta does not deny the historic interest of the Band in hunting and trapping in this area, and its special concern for the restoration and preservation of wildlife stocks. Accordingly, Alberta is prepared to consider and discuss the setting up of a model management program which would take account of these concerns, with Band participation therein, provided that the Band is prepared to accept the need for and exercise self-discipline in this field and to respect the legitimate interests of others.

Claim - 3. WILDLIFE MANAGEMENT AND ENVIRONMENTAL PROTECTION PROGRAMS

Position of Alberta (cont'd.)

In response to the observation that the Band has declared itself ready to do this, but wishes the program to be so shaped and managed that they will have an effective voice in the protection of their rights, the position of Alberta was somewhat guarded. Nevertheless, although paramountcy of the Band's interests was not conceded, Alberta's spokesman repeated that Alberta is prepared to consider the Band's suggestions and work actively towards the establishment of a model management program.

Alberta emphasized, however, that a necessary pre-requisite to success in this area is a climate for discussion based on evidence of goodwill and a desire to co-operate on both sides, and expressed the hope that such a climate will be created and prevail so that fruitful discussions may be carried on in this and other areas.

Third Party Interests

I have met with representatives of eight of the Oil and Gas companies operating in the area - believed to be a reasonably representative group of those concerned. With one exception, they indicated agreement in principle with the general concept of a management program as outlined, with the Band having an effective voice in its operation, but expressed a desire to take part in discussions of the details before committing themselves further. The one exception was to the effect that more information as to the content and actual method of operation of such a program would be required before any position could be indicated. Several of those taking part expressed concern, however, that care should be taken that such a program be so designed and implemented that it does not constitute just another bureaucracy increasing costs and delays in obtaining access.

In general, the outcome was a positive reaction to the concept and to Alberta's position regarding a "model management program", and a desire to take part in discussions giving them an "opportunity for input" in the formative stages.

Claim - 3. WILDLIFE MANAGEMENT AND ENVIRONMENTAL PROTECTION PROGRAMS

Remarks - Including Areas of Possible Reconciliation or Accommodation

Clearly there are grounds to believe that a mutually acceptable solution to this problem will be achieved. The basis is there in the readiness of the Band on the one hand to recognize the interests of others, to accept self-discipline in the attainment of the objective of rebuilding and maintenance of stocks of wildlife, to accept that there must be a balance between their rights in respect of that resource and the rights of others in respect of other resources and, in their role in the management of the program, to act as protector of other native interests in the wildlife resource as well as of their own interests therein. It is there in the readiness of Alberta - indeed the desire, as I appreciate it - not only to accept in principle the desirability of a model wildlife management and environmental protection program which recognizes the interests of the Band and accepts that there must be a balance between the preservation and exercise of those interests and the exercise of other interests, but also in the readiness to enter into active discussion of the establishment of such a program in a manner which will give the Band an effective voice in its implementation. It is also particularly encouraging to note that the representatives of the oil companies with whom the matter was discussed were prepared, with one exception, to indicate acceptance in principle of the concept of a management program which would recognize and protect the rights of the Band in maintaining the wildlife population, and expressed an interest in participating in discussions of the content and implementation of such a program. Their concern, however, to avoid adding appreciably to the burden of regulatory authority and time taken to deal therewith is understandable, and should surely be borne in mind in working out the details.

It would not be realistic, however, to disregard an issue which must be faced and worked out in the course of discussion. That is, what I will call the question of paramountcy: where there is conflict, whose interest, and whose voice, is to be given the paramount consideration? As I appreciate it, this problem arises not with respect to the general principle on which the program itself is to be based, and which it would reflect, but rather with respect to its application or administration.

Claim- 3. WILDLIFE MANAGEMENT AND ENVIRONMENTAL PROTECTION PROGRAMS

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

other authority administering the program, in which it would have an effective voice, be directed to resolve the conflict on that basis.

On the face of it, it may appear that the Band is reaching too far in asking that the program incorporate this approach. But it is fair to ask: would the program have any real meaning or benefit for them on the basis of any other approach? The wildlife resource is the vulnerable one: if it is not protected, it ceases to exist, and with it goes the whole lifestyle and living which depend upon it. It is the continuation of wildlife which is threatened by development, not development which is threatened to the point of extinction by continuation of wildlife. There must be very few, if any, situations where development cannot be effectively continued notwithstanding the necessity of modification of a particular program or alteration of a particular location: plans for such can be made and modified, for they are under human control. But there will be cases where the implementation of such plans, if not altered, will disrupt and severely diminish, if not extinguish, the wildlife, or effectively drive it away, and that result - if that particular development is allowed - cannot be altered, for the pattern of wildlife reaction to such situations is not under human control.

Given the recognition of the Band's interest in the wildlife resource, then, it can be argued that it follows as a fact - certainly as a matter of logic - that where there is an irreconcilable conflict between that interest and the interest of developers which cannot be solved by the application of the fair balance principle, there must be acceptance of the paramountcy of the Band's interests as the guide to the outcome.

Another factor to be weighed in this connection is the Band's position that it is not necessarily asking for this in perpetuity: that there may well come a time when its members no longer wish to follow the lifestyle that depends on the maintenance and exploitation of the wildlife resource in the traditional area. But there is a large number of

Claim- 3. WILDLIFE MANAGEMENT AND ENVIRONMENTAL PROTECTION PROGRAMS

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

members who presently do not know, and have not the training and ability to follow, any other. What is asked for is a program that will ensure to the Band the ability to maintain that resource at least for so long as there is an appreciable number of its members who are dependent upon it for their way of life.

An appreciation of the Band's position also requires a reference to the Treaty. True, the Band does not rest its claims upon Treaty entitlement, but on a wider basis including unextinguished native title: but both governments deny the latter, and have so far maintained that the Band's claims must be measured on the basis of treaty entitlement alone. Accepting this for the purpose of this discussion, it must be observed that the Treaty which gives to the Indians concerned the right to continue their usual vocations of hunting, trapping and fishing throughout their traditional lands, provides that this right is subject to only two exceptions or limitations. The first is, that it must be exercised "subject to such regulations as may from time to time be made by the Government of the country...", now the Government of Alberta. The Band accepts this for this discussion: what it is asking is indeed no more than that the regulations to be made and applied to that area by Alberta be those in the model program under consideration.

The other exception is that those rights may be pursued throughout the entire area "saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, ... or other purposes". The intent that Alberta should give effect to the rights thereby granted, and the limits of this restriction thereon, are reflected in s.12 of the Resource Transfer Agreement which provides that "In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence" the game laws in force in the Province shall apply to Indians therein, and goes on specifically to provide "that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing for game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access".

Claim- 3. WILDLIFE MANAGEMENT AND ENVIRONMENTAL PROTECTION PROGRAMS

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

In the light of the clear intent and acceptance by both governments of the implications of that interest - that is, that the Indians should have the continuing right to hunt and trap in their traditional area - it would be difficult to conclude that by the mere granting of concessions to prospect for oil and gas in that area, and to develop those resources when they may be found, the Province has terminated or abrogated - or had the intent to do so - the rights of the Indians to pursue their usual vocations of hunting and trapping in this territory, vast spaces of which are not "occupied" in any meaningful sense of that word. It would surely take a very clear expression or indication of intent to do so. And if the Indians have a continuing right to hunt and trap there, then surely they have a continuing and pressing interest in the maintenance of the resource - the wildlife - without which that right becomes a mockery.

These facts and factors, including my conception of the problem area remaining to be resolved, are set out not so as to pre-empt discussion, but rather with the hope that they will provide a helpful background or climate for further discussion and resolution of the problem. I emphasize again that the positions and attitudes of all parties to this matter in discussions to date have been such as to encourage the hope that further discussions within the parameters outlined will enable me to report that there is in fact agreement that there should be such a program and on the basic principles which it should reflect and in accordance with which it should be administered.

Finally in this respect I can only concur in the feeling expressed by Alberta that a favourable climate for such discussion is essential. This can only be created by evidence of goodwill and readiness to co-operate, which includes a readiness on both sides to appreciate and understand the concerns and views of others. It also involves, and I urge equally upon both sides to accept, a readiness to exercise self-restraint and refrain from administrative acts and public statements which destroy the climate and diminish the likelihood of fruitful discussions in respect of this and all other issues.

Claim - 4. EMPLOYMENT OPPORTUNITIES AND JOB TRAINING

Band's Position

With respect to natural resources development activity carried on by various enterprises within the Band's traditional hunting and trapping area located generally north of Lubicon Lake, the Band proposes that such enterprises adhere to a program which would

(a) provide notification to the Band of employment opportunities available with those enterprises in order to allow Band members to apply for that employment; and

(b) give preference for such employment to Band applicants.

Such a program would include training programs conducted by the employer where practical in order that Band members could gain employment and experience in the natural resources development industry.

The Band intends by this program to develop alternatives to the traditional hunting and trapping economy of that community. Hitherto, the Lubicon Lake Band has received little, if any, timely notification regarding employment opportunities created by natural resources development within the Band's traditional hunting and trapping area. The Band seeks to rectify this situation and make provision for employment opportunities for those who have a close historical and social nexus to the area in which the development employment opportunities arise. The Band states that where its member applicants are not qualified for specific available employment, or are unavailable to offer their work services for positions of employment, development enterprises should then of course look to alternative sources for employees for those positions.

Position of Canada

Although this is seen as basically an area of provincial jurisdiction and responsibility, neverthless Canada generally encourages priority in employment where practical for native peoples. Canada would use its good offices to assist all concerned in working out and implementing a program of this nature.

Claim - 4. EMPLOYMENT OPPORTUNITIES AND JOB TRAINING

Position of Alberta

Alberta feels that this matter does not fall specifically within rights recognized as belonging to native peoples in the Treaty 8 area, but has indicated a readiness to work with the Band and with natural resources development entities towards meeting the Band's desires in this matter so far as reason and practicality will allow. In this context the view was expressed that "...the James Bay model is an excellent one".

Third Party Interests

Representatives of the eight Oil and Gas companies with whom I have met indicated that they are not averse to providing notice of employment opportunities to native peoples living in the area of development activity. Nor are they averse to employing those local individuals who are interested in obtaining and maintaining employment in their operations. Some of the representatives with whom I met indicated that they have to varying degrees in the past instituted training programs for, and have employed, native peoples residing in development activity areas, and that, indeed, it was cost-efficient to the employer to be able to find a willing and steady source of local workers.

The companies indicated, however, two concerns in this regard. The first is a concern that additional governmental and regulatory body control would entail more "red tape" in respect of their operations. The second concern arises out of some of the companies' experiences wherein local native workers have failed to retain interest in maintaining the employment which had been made available to them. It is acknowledged by the companies with which I have met, however, that there have been several examples of successful and effective employment liaisons with local native peoples and that the companies had not had specific contact with the members of the Lubicon Lake Band.

With respect to implementation of a program of notification to, and priority in hiring of, Band members and other local residents, it was pointed out that the majority of employee hirings for natural resources development is done by sub-contractors of the companies holding interests in the Band's traditional area, not directly by the companies themselves.

Claim - 4. EMPLOYMENT OPPORTUNITIES AND JOB TRAINING
Third Party Interests (cont'd.)

The representatives with whom I spoke indicated that a program such as is proposed would need the active involvement of those sub-contractors. Some of the companies do, however, stipulate in their contract-bid documents that such sub-contractors must endeavour to hire locally (although it was not specifically stated that such a stipulation is expressly directed to the hiring of Indian or native peoples). The companies themselves would wish to avoid any direct responsibility for the hiring practices of such sub-contractors.

A very real problem is said to exist in that the Alberta Individual Rights Protection Act has been so construed and applied, according to the information given to me, as to prevent a preference in employment being given to a particular group on grounds that this would be a discrimination against others. It was also stated, however, that the Government has power to designate areas in which the operation of this Act may be suspended.

In general, the representatives of the companies with whom I met indicated agreement in principle to the introduction of a mechanism whereby timely notification of available job opportunitites would be given to the Band and, to the extent necessary and practicable, some training programs made available to qualify its members for employment in those positions. The matter of giving preference in employment to Band members with respect to available work in its traditional area for which they are qualified was not opposed in principle, but the extent to which this can and should be done would be dependent on discussions with Alberta for approval and for resolution of legal problems posed by the Individual Rights Protection Act. The company representatives expressed a willingness to meet with representatives of the Band and of Alberta to discuss the matter in an endeavour to work out practical and acceptable proposals.

Remarks - Including Areas of Possible Reconciliation or Accommodation

The Band's proposals regarding this matter are directed at securing reasonable notification of and preference in filling employment opportunities within its traditional hunting and trapping area. It was made clear that the Band would not

Claim - 4. EMPLOYMENT OPPORTUNITIES AND JOB TRAINING

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

expect this to apply immediately to jobs requiring a high degree of technical skill or knowledge, but would expect that the program include provision for technical training so that Band members may qualify for at least reasonably skilled work. There are, however, many types of work such as clearing and developing sites, and maintenance work, for which Band members are qualified now or could be with a reasonable degree of on-the-job training and supervision. It is felt that the program could and should be implemented immediately with respect to this type of employment opportunity.

The Oil and Gas company interests with whose representatives I have met have indicated their general interest in hiring local residents who are interested in the employment offered. As employers they seek to maintain in the long term an efficient operation and welcome the opportunity to utilize workers who reside near, and have knowledge of, the area in which the natural resources development activity exists.

Alberta has shown an encouraging response and apparent readiness to consider practical measures to make such a program a reality.

Representatives of Canada have until now gone only so far as offering their good offices to promote the active working out of such a program, which they regard as primarily within Alberta's jurisdiction. It is to be hoped, however, that Canada would be prepared to consider some direct responsibility, or at least a supporting role, in the matter of technical or job training programs in the light of its jurisdiction in matters pertaining to the education of Indians.

On the basis of the foregoing positions and expectations I believe it is reasonable to anticipate the active collaboration of all concerned in working out a program which will provide for timely notification to the Band of opportunities for employment in resource development activities in the Band's traditional living and hunting area, establish training programs to assist Band members in becoming qualified for positions within their potential, and give preference in

Claim - 4. EMPLOYMENT OPPORTUNITIES AND JOB TRAINING

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

employment to Band members in such positions as they are now or may by such training become qualified to fulfill.

The justification for the preference is of course based, in principle if not in law, on the Band's traditional identification with and interest in this area, and on the fact that as development takes place therein, it is bound to affect their traditional lifestyle and source of livelihood and that they are accordingly entitled to expect first consideration in employment in that new development which has diminished their ability to rely upon the old methods. Although there have been some reservations I have heard, in the course of my discussions, no objection in principle to this concept of reasonable preference. It must be recognized, of course, that there are legal and constitutional limits in the area of preference in employment, which will be for consideration by Alberta in respect to the application or modification of its Individual Rights Protection Act, but I have a strong feeling, on the basis of the positions taken in discussions to date, that there is ground for hope that the these problems will be resolved and that an acceptable program can be worked out.

Since there was reference in this context to the James Bay Agreement as being an excellent model for such a program (although the reservations expressed by Alberta to the applicability of that model in other contexts are noted) it may be appropriate to touch briefly on its provisions here. Sections 28.8 through 28.10 of that Agreement make provision for training programs for the Cree Indians concerned, and provide clearly for priority to be given to those Indians in notification of employment opportunities and fulfillment of positions throughout the territory in question. Although the emphasis is initially on employment in government services or government-initiated projects, the concluding portion of s.28.10 provides as follows:

> 28.10.4 Quebec and Canada shall take all reasonable measures, including but not limited to regulations, to establish priority to available and duly qualified local persons or entrepreneurs in respect to contracts and

Claim - 4. EMPLOYMENT OPPORTUNITIES AND JOB TRAINING

Remarks - Including Areas of Possible Reconciliation or Accommodation
(cont'd.)

employment created by development in the Territory.

There would seem to be no reason why the same approach should not be taken in working out and implementing a program to give priority to the Band with respect to opportunities created by development in its traditional area. The Band feels that once it is settled and organized on its Reserve, and the program is in place, it should be in a position not only to take advantage of employment opportunities for individuals, but to tender on some of the contracts for development as well. This objective should be kept in mind in the discussions which follow.

It is not inappropriate to emphasize here that not only the working out of such an employment opportunities program but also its implementation in practice will call for both mutual understanding and co-operation and for acceptance by both sides of the responsibilities which are peculiar to this situation. Thus, with respect to employment, the success of the program will rest upon both parties to see that the practical requirements of the employer are met by the employee and that the employing party recognize the lack of experience and exposure of Band members to the regimented demands of the daily work schedule. Three ingredients are necessary here: (1) a mechanism for notification to, and an application by, members of the Band regarding employment opportunities; (2) an organizational structure within the Band to marshall those Band members interested in such employment; and (3) the maintenance of interest on the part of Band members in an employment and training program which parallels the willingness shown by governments and developers in providing that program.

On the basis of all the foregoing, I anticipate being able to report, following the next round of discussions, that there is positive agreement on the matter of an Employment Opportunities and Job Training Program, and that representatives of the Band, the two governments, and the developers will be meeting to work out its provisions and implementation.

CLAIMS FOR COMPENSATION

General

The Band's claim for compensation as contained in the "Points For Discussion" document referred to at the outset of this Paper is very generally stated. As the matter has developed in my discussions to date, however, it appears that there are two main categories of claim under this head: compensation for damages or losses incurred to date, and compensation for anticipated future damage or loss. The claim in each category actually covers a variety of distinct areas or heads of claim. For convenience, and to ensure that all aspects of this claim are in fact considered, I have divided each category accordingly into separate sub-heads. This organizational approach is reflected in what follows.

Of particular interest, however, is the fact that spokesmen for the Band have alluded to the possibility that satisfactory settlement of the claim(s) for compensation based on destruction of its traditional lands would in the normal course entail, by implication if not specifically, the end of all further claims based on the assertion of aboriginal rights. The one exception would be with respect to the area of residual hunting and trapping rights for those who would be primarily dependent on that form of livelihood: but to a great extent this matter and the rights connected therewith would be subsumed under the Management Program (including Trappers' Compensation) discussed under that heading. It is urged that this approach - this possibility - be carefully borne in mind in the consideration of the further portions of this Paper dealing with compensation.

Claim - 5. COMPENSATION FOR PAST LOSS:

(a) With Respect to Lands Claimed as Reserve

(i) Oil and Gas Revenues

Band's Position

The Band claims compensation for lease and royalty revenues derived from the exploration for and development of oil and gas on the approximately 25.4 square miles proposed as its Reserve in 1940. Without prejudice to its claims based on native title, the Band points to the facts that in 1940 it was agreed that this area should be its Reserve, that both

Claim - 5. COMPENSATION FOR PAST LOSS:

(a) With Respect to Lands Claimed as Reserve

(i) Oil and Gas Revenues

Band's Position (cont'd.)

Canada and Alberta took certain initial steps to secure this Reserve pursuant to that agreement, and that had it not been for Canada's failure to carry out its further obligations under that agreement the Band would long since have been settled on that area and enjoyed the benefits and revenues derived therefrom. Even given that the exigencies of the 1939-45 War afford reasonable cause for some delay in implementing that agreement and effecting settlement on the Reserve, the Band's position is that it should have been settled there and commenced the enjoyment of those benefits by the end of 1946.

On this basis the Band claims compensation for the loss of all oil and gas rentals and royalties which have accrued with respect to those lands since the commencement of exploration and development, which was well after 1946. It is the Band's position that it would have agreed to such development as has in fact taken place had it been settled thereon, for it did not depend on this area for its traditional hunting and trapping livelihood, and the development which has taken place is not incompatible with its ability to live there and carry on a considerable and profitable agricultural activity. The quantum of this claim is submitted accordingly as the entire amount of such revenues as have in fact been received by Alberta with respect to these lands, together with interest thereon from the respective dates of receipt.

As to which government is liable to compensate it, the Band's claim is directed primarily against Canada, notwithstanding that Alberta has in fact received those revenues. This is on the basis first, that Alberta was ready for many years to implement the agreement of 1940 and transfer that land, including mineral rights, and that the responsibility for the fact that the agreement was not implemented is entirely that of Canada; and second, that it was known to Canada throughout that the Band attached great importance to the securing of the mineral rights with the land, so that the loss to the Band of the benefit of those revenues was a foreseeable consequence of Canada's failure to implement the agreement. It is of course a matter of indifference to the

Claim - 5. COMPENSATION FOR PAST LOSS:

(a) With Respect to Lands Claimed as Reserve

(i) Oil and Gas Revenues

Band's Position (cont'd.)

Band which government actually pays the compensation, but it regards Canada as having the direct liability to it therefor for the reasons stated.

Position of Canada

What will be the final position of the government of Canada is not known at the time of writing, but the Hon. Mr. Crombie has accepted my recommendation for the payment of an interim advance on account of compensation on the basis of the Band's claim which has been summarized above. He has prepared a submission accordingly which he has presently under advisement with his Cabinet colleagues.

Position of Alberta

Alberta does not accept any responsibility for non-fulfillment of the agreement of 1940, and does not accept liability to compensate the Band for revenues received from these lands, whether under the claim based on Native title or on any other basis.

Remarks - Including Areas of Possible Reconciliation or Accommodation

On the basis of all the evidence that the Band would have been settled on this area as its Reserve long ago and enjoyed the benefit of all revenues therefrom but for Canada's failure to fulfill its part of the agreement of 1940, and bearing in mind particularly that Canada today agrees that the Band should have this 25.4 square miles included in its Reserve, there is a very strong case that the Band is entitled to compensation for those revenues which it has not received. It can be equally strongly argued that the responsibility for payment of that compensation rests on Canada, where rests also the responsibility for non-fulfillment of the 1940 agreement, and all the consequences thereof.

In the light of the position of Canada summarized above it is hoped, and anticipated, that Canada will accept this claim accordingly.

Claim - 5. COMPENSATION FOR PAST LOSS:

(a) With Respect to Lands Claimed as Reserve

(ii) Treaty Benefits

Band's Position

The Band's position is, again without prejudice to its claims based on Native title, that it is clear on the same basis as what has been set out above under the sub-head of Oil and Gas Revenues that if it had not been for Canada's failure and neglect to carry out its part of the agreement of 1940, the Band would in fact have been settled on the Reserve and enjoyed the consequences very shortly thereafter. Even if one were disposed to accept that pressures and shortages of the 1930-45 War afford an acceptable reason for delay in carrying out the legal survey of and implementing the administrative and other arrangements for the actual setting up and operation of the Reserve, there is no good reason why the Band should not have been settled thereon at least by 1946. The Band says it follows that Canada is responsible for the failure of the Band to receive the further benefits provided by Treaty 8 to Bands settled on Reserves, and is liable to make compensation therefor, at least from 1946.

The claim has not yet been developed in detail with respect to each of the various benefits. I will accordingly deal with the matter further in the "Remarks" Section hereunder, and make some suggestions as to what approach might be taken with respect to clarification and quantification of the claim with respect to these benefits.

Position of Canada

Canada has indicated a readiness to discuss the various sub-heads of this claim, although making as yet no formal admission of liability. Where individual members of the Lubicon Lake community have been denied social services or annuities as a result of unjustifiable removal from the Band List, Canada is in principle prepared to address the matter of recompense to those persons.

Claim - 5. COMPENSATION FOR PAST LOSS:

(a) With Respect to Lands Claimed as Reserve

(ii) Treaty Benefits (cont'd.)

Position of Alberta

Alberta is not involved in this area of claim.

Remarks - Including Areas of Possible Reconciliation or Accommodation

The benefits here are of two kinds: money payments; and provision of tools, livestock and farm implements, hunting and trapping equipment, and clothes. I have attached hereto as Appendix "A" two pages reproducing the relevant paragraphs of the Treaty providing for these benefits. For convenience I have marked them, and will refer to them in what follows, as Paragraphs A, B, C, D and E respectively.

As to the money payments, which are called for under Paragraphs A and B, the problem here arises perhaps not so much from failure to implement the agreement of 1940 as from differences and difficulties over the numbers of those entitled to receive the payments. This applies particularly with respect to the annual payments to be made pursuant to Paragraph B on the basis of population. Such payments have been made, but deficiencies appear to exist on account of deletions such as were made following the McCrimmon Report and the application of the "counted once" (or counted elsewhere) rule. Controversy over the figures properly constituting Band membership continues to this day: I shall have to reach a conclusion for the purpose of my final Report, but it has not been possible to do so by this time. From such information as I have presently received, however, I am reasonably satisfied that final resolution will indicate that there have been appreciable deficiencies in payment over the years and that when a final calculation can be made a considerable sum will be found to be due on account thereof.

As to the provision of tools called for in Paragraph D, again since the Band had certainly selected a Reserve in 1940, the qualification for eligibility for that benefit is met. I am satisfied that the qualification for eligibility for the provision of farm implements, livestock and seeds in Paragraph E ("elects to take a reserve and cultivate the soil") is also met. The Report of the Indian Agent (August 14,

Claim - 5. COMPENSATION FOR PAST LOSS:

(a) With Respect to Lands Claimed as Reserve

(ii) Treaty Benefits

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

1939) on his discussion with the Band as to their wishes in this regard shows not only that they wanted the Reserve, but that they wished "to learn agriculture" for the years ahead. There is no doubt in my mind that had they been settled on the Reserve they would have wanted to cultivate it and to raise livestock upon it, and would have been eligible to receive the supplies enumerated in that Paragraph at least by 1946. Equally, there is no doubt that the failure to receive them is due to the failure by Canada to carry out the agreement of 1940, and that the Band is entitled to compensation. And since clearly some would have wished to continue hunting they are entitled to compensation for supplies of ammunition and twine not received annually in 1946 and thereafter.

The quantification of these claims is admittedly somewhat complicated, and I am clearly not in a position to do so at this time. There are however certain observations which can be made or principles suggested which, it seems to me should, subject to modifications suggested by such precedents as may exist, govern the calculation. The first is that the deficiencies in the annual payments have the character of debts owing to the Band from the time they occurred. A debt normally carries interest until the date it is paid; the fact that these are debts due by the Crown should not - especially in view of the fiduciary relationship between the parties and the very difficult situation which has been created for the Band as the result of Canada's long delay in carrying out its obligations - be taken as grounds for treating these debts differently. I consider therefore that interest should be added, and that the rate applicable should be that payable on Government of Canada Treasury Bills. The calculation, because of the fluctations in rates over the 40-year period from 1946, will be complicated. One method might be to apply the average of that rate over this period, but I have not had the opportunity of discussing this matter with representatives of the parties, and a conclusion on this point will have to await further discussion.

Claim - 5. COMPENSATION FOR PAST LOSS:

(a) With Respect to Lands Claimed as Reserve

(ii) Treaty Benefits

Remarks - Including areas of Possible Reconciliation or Accomodation (cont'd.)

As to the tools, livestock and implements not received, the result of this failure is that the Band and its members have been deprived not only of the capital value of the items themselves, but also of the annual income to which their use on the Reserve would have given rise. Although this is a foreseeable consequence of the failure to implement the 1940 agreement, its translation into terms of an annual figure for each of the years from 1946 to the present is again a formidable task, calling for detailed mathematical calculation and much expertise in such matters. Again, this is a matter which should be the subject of further discussion.

(iii) Programs and Services

Band's Position

The Band claims compensation for those programs and services which (apart from the specific Treaty Benefits dealt with above) are provided by Canada to Indian Bands generally, and which it has not received. It is the Band's position that the reason why it has not received the benefit of such programs is that it has not been settled on a Reserve and that the responsibility for this fact is again that of Canada. The Band claims that it is entitled to monetary compensation from Canada for the value of the programs and services not received.

The claim embraces the cost or value of such items as Canada normally provides by way of assistance in the construction and maintenance of housing and community buildings and infrastructure such as water and sewage systems and roads, and social services including schooling and medical care.

The Band has not provided a detailed break down of the claim with respect to those various items, although I have received a Table showing the short-fall in terms of what would have been the total value of all such benefits had they in fact been provided. This is calculated annually on a per capita basis, first by dividing the total amount allocated by Canada each year for Indian programs by the total number of

Claim - 5. COMPENSATION FOR PAST LOSS:

(a) With Respect to Lands Claimed as Reserve

(iii) Programs and Services

Band's Position (cont'd.)

status Indians in the country for whom such programs were provided, and then multiplying the result by the figure of the Band population. Additional calculations are made to add interest at the effective rate for the year of (non) receipt, and to bring the annual totals into terms of current dollars by allowing for variations in the annual Consumer Price Index. Deductions are made for the value of such programs and services as are admitted to have been in fact received - which in this calculation is said to have been begun only in the year 1984. I shall make further reference to this Table in the "Remarks" section hereunder.

Position of Canada

Canada has indicated by letter of the Minister dated December 14, 1983 to the Alberta Government that a "catch-up" program for the Band's housing, economic development and community infrastructure needs is, in Canada's view, something which should be provided, and in recent discussions with Canada's representatives I have been informed that such a "catch-up" program could be part of an ancillary agreement to settlement of the Reserve Lands.

Canada does not admit, however, that there has been any significant shortfall in its provision of social service benefits to Band members. Where individual members of the Lubicon Lake community have been denied social services or annuities as a result of unjustifiable removal from the Band list, Canada is in principle prepared to address the matter of recompense to those persons. Further, Canada would include as a heading for the negotiation of compensation, the matter of reimbursement to individuals for moving costs and loss of improvements during the transfer of residence to such Reserve lands as may be allotted.

Position of Alberta

As the provincial authority, Alberta of course does not stand responsible for such shortfall as may exist in respect of Treaty benefits or social service programs normally

Claim - 5. COMPENSATION FOR PAST LOSS:

(a) With Respect to Lands Claimed as Reserve

(iii) Programs and Services

Position of Alberta (cont'd.)

provided by Canada, or for costs of a comprehensive community development program. Alberta has, however - and this should be noted - incurred the expense of some housing assistance to Band members in recent years at Little Buffalo Lake.

Remarks - Including Areas of Possible Reconciliation or Accommodation

It is noted that in the Table submitted on behalf of the Band, referred to above, the calculation of the annual shortfall commences from the year 1899 - the year Treaty 8 was signed. It is also noted that for the purpose of that calculation the Band population is taken as four hundred (400) for each year from 1899 to the present.

Inasmuch as the Lubicon Lake Crees did not acquire Band status until 1940, it is not easy to see how there can be any claim for loss of the type of program and service contemplated here until at least that year, for certainly the majority of these programs and services are referrable to the normal situation of a Band occupying a Reserve. It could be suggested again that because of administrative difficulties and manpower shortages due to the 1939-45 war, the effective date of commencement of the claim should be regarded as 1946. I am not aware that a claim has ever been recognized - if indeed any has ever previously been made - on the basis that Band members were entitled to the benefit of these programs before such time as they were constituted as a Band.

As to the numbers entitled for calculation of the claim, I am aware of the feeling that the figure of one hundred and twenty-seven (127) accepted as the membership in 1940 did not reflect the true population in that there were a number who were absent in the course of their normal pursuits when that figure was arrived at. But I am not aware of any firm evidence which puts the true membership at as high a figure as four hundred (400) by 1940. It seems that the questions both of the starting date and the population figures to be used for the calculation of this claim are matters still to be discussed and settled between the Band and Canada.

Claim - 5. COMPENSATION FOR PAST LOSS:

(a) With Respect to Lands Claimed as Reserve

(iii) Programs and Services

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

Subject thereto, however, it seems that in principle the Band has a valid claim, to the extent that it can be documented that there was a shortfall between what they should have received by way of such programs and services had they been settled on their Reserve, and what they have in fact received since the time when they should have been so settled, whether that be agreed as 1940 or 1946.

There are of course a number of details to be discussed and settled in any event. Thus with respect to housing and community buildings, etc., the fact is that the majority of Band members appear now, and for a number of years, to have been provided with reasonably adequate housing, and there are now community office and storage buildings available and being used, in their community at Little Buffalo. There are roads serving that community. True, a considerable portion of these facilities have been provided by, or with the help of, Alberta and Canada has not had to make these expenditures. But the question remains: can the Band claim the full value as a shortfall, or should what they have in fact received be taken into account? If Canada is in fact to pay for everything that it has not provided in this area, although the Band has enjoyed the use of some of those things, then it can be suggested that in equity Canada should pay for that portion not to the Band but to Alberta which has in fact provided them. This is an area that requires further discussion.

Similarly with respect to the non-material, or social services aspect, of this claim: Canada claims that for some years at least Band members have received benefits under social service programs which are the equivalent of those being received by other Bands. It is alleged that the difference is mainly, if not entirely, in respect of those individuals (and their affected family members) who were unjustifiably removed from the Band list after 1940. Canada has indicated a readiness to make recompense in such cases. I have asked that Canada make a study to compare the levels and values of services and programs which would or should have

Claim - 5. COMPENSATION FOR PAST LOSS:

(a) With Respect to Lands Claimed as Reserve

(iii) Programs and Services

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

been provided by Canada from 1946 to the present had the Band been established on its Reserve, with the levels and values of those actually received, but the results are not yet available. I would urge that this be expedited, and that the results be studied by representatives of both sides in the same spirit of readiness to make recompense as was indicated with respect to those improperly removed from the Band list.

Finally in this connection it has been suggested that this claim might be subsumed in, or at least modified to the extent that there is assurance of, an accelerated and meaningful catch-up program to settle the Band on its Reserve when that is established, including housing and community buildings, roads, sewage and water systems, and organization and delivery of full social service programs including schooling. That matter will be dealt with more fully later under the head of Claim 8.

It is hoped that these considerations and suggestions may afford the basis of further discussions between representatives of the Band and of Canada leading to a satisfactory resolution of this area of claim.

(b) With Respect to Lands Claimed as Traditional Area

(i) Loss of Livelihood from Trapping and Hunting

Band's Position

The Band rests its claim here primarily on the position that it has never surrendered its native title to this area, and that such title and the rights thereunder have never been extinguished; or alternatively that if they have been extinguished (by, e.g., assertions and acts of sovereignty by Alberta) - which is not admitted - it was without their consent and the Band is entitled to compensation and damages for the consequences. For the purpose of these discussions, and without prejudice to its claim based on native title, the Band points secondly to the assurance given in the

Band's Position (cont'd.)

Treaty, reflected in sec.12 of the Resources Transfer Agreement, that the Indians would have the right to carry on their usual vocations of hunting, trapping and fishing throughout the area.

With reference to this second basis of its claim, the Band recognizes that there are words of apparent limitation on the extent of the right, contained in both the relevant paragraph of the Treaty and in sec.12 of the Agreement, but takes the position, as I understand it, that it was not the intent and is not the effect of those words that the rights thus assured and recognized could be elimintated at will by the mere grant of limited exploration and development rights in the area in question. According to this position, these lands are not thereby rendered "occupied" lands in any meaningful sense of that word, hence their rights still subsist and they are entitled to compensation for the damage done to them - or again, that if the rights have been eliminated they are entitled to compensation for that loss.

The claim thus far is directed against Alberta; in the final alternative the Band says that if the effect of the Transfer Agreement was to give to Alberta the power to extinguish the rights in this area assured to the Indians by the Treaty, then Canada was negligent or in default of its trust obligations in failing to live up to and protect that assurance, and Canada is liable to the Band for the damages it has suffered as a result of that negligence or breach of trust.

As to quantum, the Band dates this claim from the start of development activity in the area in 1979-80. I have been provided with a copy of the Report dated September 15, 1982, by Kenneth R. Bodden, an expert in the matter of wildlife resources and harvesting, which was filed in support of the Band's claim in the Alberta Court of Queen's Bench. This report shows the amounts of wild animal meat of various species taken and consumed by the Band in each of the years 1980-81 and 1981-82 (Table 3) and the amounts and values of total Fur Harvest Revenue for the same years (Tables 4, 5

Claim - 5. COMPENSATION FOR PAST LOSS:

(b) With Respect to Lands Claimed as Traditional Area
(i) Loss of Livelihood from Trapping and Hunting

Position of Canada (cont'd.)

In effect Canada is saying, as I appreciate it, that although the Treaty assures to the Indians the right to pursue their usual vocations of hunting and trapping throughout the area, there is nothing in the Treaty which assured them that the supplies of animals for that purpose would be maintained or remain at existing, or any, levels. And further that indeed the Treaty contemplated restriction on or diminution of the quantity, in that the same paragraph assuring the right expressly provides that it may be diminished by excepting therefrom such tracts as may from time to time be taken up "for settlement, ... or other purposes."

Canada's position is that there is thus no negligence or breach of trust on Canada's part in having transferred the land to Alberta on a basis which permits Alberta to open up this area for development purposes, even if that has the result of diminishing the stocks of wildlife available for the exercise of the right of hunting and trapping, so long as the right itself remains undiminished with respect to the tracts which are not in fact so occupied or taken up by that development. This position is, so far as I understand it, based on the view that it is the right which is protected or assured, not the maintenance of the level of harvest available as the result of exercising that right.

Position of Alberta

The position of Alberta appears in effect to be much the same as that of Canada. Alberta does not recognize any claim based on continuing native title. As to the continuing right to hunt and trap assured to Indians under the Treaty, Alberta's position is that it owes no obligation to the Band under Treaty, that any claim here must be addressed to Canada, and that in any event Alberta is not in breach of the only obligation or pledge in this area which it gave to Canada as protector of the Indians, namely, under sec.12 of the Resources Transfer Agreement, to allow the Indians the right of hunting and trapping for food at all seasons of the year on all unoccupied Crown lands.

Claim - 5. COMPENSATION FOR PAST LOSS:

(b) With Respect to Lands Claimed as Traditional Area
(i) Loss of Livelihood from Trapping and Hunting

Remarks - Including Areas of Possible Reconciliation or Accommodation

It appears from the foregoing that there are formidable obstacles in the way of even a common approach to, let alone an agreed solution of, the issues arising under this head of claim. Nevertheless, I consider I should make some analysis of the areas of difference and disagreement, in the hope that some suggestion for at least a common or shared view of the problem may emerge which would form the basis for further discussion.

The dimensions of the problem seem, as is so often the case, to fall into two areas or categories, which may be designated as the practical or factual area, and the legal area. In the former are such questions as, what loss has in fact been suffered by the Band, and is that loss in fact attributable to oil and gas development or are there other causes, including natural cycles? In the other category are of course the questions first, if there has been such loss due to other than natural causes, does there exist a legal basis for an assertion of liability and, if so, against whom? And secondly, if there can be no common ground as to the strict legal position, can there be any common approach based on what may be called the practical equities of the situation?

As to the factual question of what has been the loss, I have referred to the table in Mr. Bodden's Report, and the summary submitted by the Band on the basis thereof. In fact, no statistical research or other authority is quoted in that summary with respect to the information for years other than 1980-81 and 1981-82, and the conclusions are thus subject to verification. Also, no figures are given for similar summary comparison between 1979-80 and the present with respect to other areas surveyed by Mr. Bodden. It is a fact, however, that with respect to both hunting and trapping, the careful survey conducted by Mr. Bodden shows a substantial reduction in both quantities and values of animals taken as between 1980-81 and 1981-82. My own discussions with Band members, while being far from a scientific survey, indicate that the decline did start from 1979-80 and has gone on apace from then until the present.

Claim - 5. COMPENSATION FOR PAST LOSS:

(b) With Respect to Lands Claimed as Traditional Area
(i) Loss of Livelihood from Trapping and Hunting

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

I would suggest accordingly that it be accepted in principle - or for the purpose of further discussion, unless and until the contrary is proven - that there has been a substantial and damaging decline in the livelihood derived from the traditional area over this entire period. If agreement can be reached in principle, then of course it would be desirable that the Band take the steps necessary to establish the total amounts in detail in accordance with such method as may be agreed.

As to whether this decline is due to the impact of development, or is due to natural or other causes, there is not agreement. I have heard it suggested that it is due to natural cycles - some of the species of animals concerned are known to be subject to cyclical waves in population. Mr. Bodden himself remarks on this, and on the corresponding effect brought about in the population of predators by cyclical changes in the population of the animals which are their prey, such as rabbits and hares. And while Mr. Bodden outlines the decline as between the two years which he studied, he does not state that this is due to the impact of development. Others have suggested that the decline in take is due to the growing disinclination of Band members to follow the traditional but arduous pursuits of hunting and trapping for their livelihood. This is denied by the Band members to whom I have spoken who traditionally engage in these pursuits: they are firm in stating that they have continued - in some cases increased - their efforts in the face of development activity, but that in spite of their best efforts they have not been able to maintain their harvest from these activities. Concrete examples have been given of the disruption of traplines and the flight of, for instance, the moose population.

The hard fact is, of course, that the decline in the annual harvest commenced with, and has continued during, the period of active development - that is the evidence. On the other hand, while there has been reference to natural cyclical changes as an explanation, there has been no hard or scientific evidence that such a change was due or was in fact

Claim - 5. COMPENSATION FOR PAST LOSS:

(b) With Respect to Lands Claimed as Traditional Area
(i) Loss of Livelihood from Trapping and Hunting

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

taking place. I have been flown over the area and have seen what is involved by way of seismic grid lines driven through this previously wilderness area in a criss-cross pattern, and of installations dotting the previously unlittered landscape. It is a fact, of course, that construction and servicing of such installations involve the intrusion and movement of heavy mobile equipment into and through the area. I am no expert in this matter, but I do share the general knowledge of the adverse effects such a pattern of intrusion and development may be expected to have on shy wildlife species by way of the disruption of breeding cycles and changing of patterns of movement, rest and refuge.

I venture to suggest, then, that in the absence of proof that there is or was a natural cyclical change due at this period, the weight of the evidence is that the decline in harvesting from hunting and trapping is not attributable to the coincidence of a cyclical change, which is speculative, nor to a sudden disinclination on the part of Band members to pursue their traditional means of living, which is not proven, but is due to the impact of development which is an established fact which coincided with the onset and continuance of the decline, and which decline is consistent with the known fact that many of the species of wildlife population involved here are averse to such human intrusion and interference.

As to the questions of law and equity, it is hardly appropriate for me to make a pronouncement on the first. The question of whether there was subsisting native title to the traditional area when development began, or whether and when it was extinguished, and the legal consequences flowing therefrom, are before the Courts in the various actions commenced by the Band, prosecution of which was to be held in abeyance during the currency of this Inquiry. No party has indicated any change, or likelihood of change, in its views on this legal matter during the course of my discussions. In these circumstances it is not to be expected that anyone at this stage will be prepared to entertain further

Claim - 5. COMPENSATION FOR PAST LOSS:

(b) With Respect to Lands Claimed as Traditional Area
(i) Loss of Livelihood from Trapping and Hunting

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

discussion shaped by a firm statement of opinion from me on this question - even if it were proper for a person in my position to make one at this point.

But I may be permitted, I hope, to express the view that there are very formidable obstacles in the way of a holding that there was subsisting native title at the time of commencement of development. Not only are there the questions of the effect of the Treaty itself on native title generally and of whether in fact the Band did, in 1933 and subsequently, adhere to the Treaty particularly, but also there are the implications and effects in this area of the actions of Alberta, as the sovereign power since 1930, in placing all these and other lands within the Province under its Lands Title system with the intended result that it may thereafter issue Crown Grants thereof free and clear of all encumbrances save and except only such as it may expressly reserve.

I am aware, of course, that the law with respect to native title and what is required for its extinguishment is perhaps not yet entirely settled, but it does seem that the claim here at law is far from certain. And there is no doubt that, whatever the outcome, the process of pursuing it to final decision through the Courts in the ordinary way would be very lengthy and costly.

Next is the question of rights or entitlement conferred by the Treaty. It is true that the Band does not rest its claim here on this ground, stating rather that they have never adhered thereto, but Canada's position is that although native title was extinguished by the Treaty, there was substituted therefor, in the case of Indians such as this Band, the right to adhere to the Treaty and to claim and enjoy the benefits thereby conferred. And although Alberta takes the position that it has no direct obligation to the Band under the Treaty, it agrees that it does have those obligations to Canada contemplated in the Resources Transfer Agreement to enable Canada to discharge its Treaty obligations to the Indians. Thus far Alberta has stated this position

Claim - 5. COMPENSATION FOR PAST LOSS:

(b) With Respect to Lands Claimed as Traditional Area
(i) Loss of Livelihood from Trapping and Hunting

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

only in the context of the question of Reserve land entitlement under the Treaty and its own obligation under sec.12 of the Transfer Agreement, but I am hopeful that both Alberta and Canada may be prepared to consider the question of obligations in the context of hunting and trapping rights assured under the Treaty as well.

This approach in my view is suggested by the wording of sec.12 of the Transfer Agreement. It is admittedly difficult to assert and validate the concept I have outlined in terms of strict legal obligation or liability arising under the wording of the Treaty and the Agreement, but I consider that it can be demonstrated that something is owed in terms of what is equitable. Again I stress that law and equity are not strangers, and I suggest that the facts of the situation be examined on this basis.

This approach looks first at the words of that paragraph of the Treaty which assures to the Indians that they shall have "the right to pursue their usual vocations of hunting, trapping and fishing throughout "the area in question. True, this right is to be exercised subject to regulations - but this does not contemplate or intend the extinguishment of the right. Then follow the only words of limitation: "saving and excepting such tracts as may be required or taken up from time to time for settlement ... or other purposes." There is one view that says these words clearly contemplate that the right - or at any rate the assurance of a yield from its exercise - may be diminished or terminated by subsequent policies or acts of the sovereign. But that this was not the intention is, in the view under consideration here, established by what was agreed to between Alberta and Canada when the Crown lands were transferred to the Province. Section 12 of the Resources Transfer Agreement starts with the words: "In order to ensure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence ..." (emphasis added). Clearly this contemplates the very opposite of the termination of the supply: rather it contemplates the continuance of the

Claim - 5. COMPENSATION FOR PAST LOSS:

(b) With Respect to Lands Claimed as Traditional Area
(i) Loss of Livelihood from Trapping and Hunting

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

supply in fulfilment of the right assured to the Indians under the Treaty, at least for such time as the Indians must rely upon it "for their support and subsistence". And in order to ensure the continuance, "Canada agrees that the laws respecting game in force in the Province ... shall apply to the Indians ...": but this contemplates laws intending to ensure that continuance, such as bag limits and seasons, which is the object of game laws, not a system or a right to end that supply or its availability.

Then follow words which some argue indicate an intent - or at least confer an absolute right - to limit or end the benefit thus assured: "Provided however that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access." But if one considers these words in their full context, this provision is seen to be inconsistent with such an intent. The immediately preceding passage has as its intent the securing to the Indians of the continuance of the supply, and to this end has provided that the exercise by the Indians of their rights is subject generally to provincial game laws (which have as their object the preservation of stocks of game animals): that passage lastly quoted is a loosening of this restriction to make clear that the right of hunting and trapping for food (i.e. for subsistence, as distinguished from commercial purposes or support) may be exercised at all seasons of the year on unoccupied Crown lands and all other lands to which they may have access.

No one has suggested that the granting of development permits, or the seismic grid lines and installations placed in this area pursuant thereto, have removed the whole of the traditional lands generally from the category of "unoccupied Crown lands" so that the Indians have not the right to hunt and trap thereon. They must do so, it is true, subject to provincial game laws in force (except that they may hunt and

Claim - 5. COMPENSATION FOR PAST LOSS:

(b) With Respect to Lands Claimed as Traditional Area
(i) Loss of Livelihood from Trapping and Hunting

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

trap for food at all seasons): and this they accept, and this they have done and continue to do. Provincial game laws do not prevent or restrict them from access to their traditional area for the purpose of hunting and trapping: the point is, that the availability of game upon which they rely for their support (fur and hides for commercial sale) and subsistence (meat for food) has been seriously diminished as a result of development, notwithstanding that the continuance of the supply was, by the agreement of both governments, to be secured to them.

As I appreciate it, it is not the position of the Band that development must stop or that the continued availability of supply be assured to them forever exactly as it used to be. Rather they recognize that as time passes their own people will probably turn more and more to other ways of living, and their continuing dependence on this supply for their livelihood will be increasingly diminshed. (This aspect of their position has been more fully set out under Claim 3 above.) But they claim compensation in full for the loss they have suffered to date, on the basis that what was assured under the Treaty, the right to the continuance of which was recognized by both Governments in the Resources Transfer Agreement, and upon which they have depended for their livelihood, has been seriously diminished by the unrestricted development which has been allowed to take place without their consent and before they have had time to adjust. The equities of this situation, in the context of what has been discussed above, seem strongly to support their claim and I am hopeful that further discussion, in the light of the approach suggested, may result in the establishment of an acceptable basis for agreement and settlement.

While I am most anxious to avoid putting anyone off by appearing to "point the finger", as it were, there is one other point which I think cannot be avoided. That is the question of which government should pay, if it be accepted that there is a valid claim. While it cannot be denied that Canada has some obligation in that Canada gave the first

assurance, it seems to me that - again looking at the equities - the obligation to compensate should be that of Alberta. Alberta was a party to the Resources Transfer Agreement of 1930 which carried the assurance forward. Alberta has long administered these lands, and it was Alberta which permitted the development in question and has derived very substantial revenues therefrom - far beyond the amount of this claim. The position here is quite different from that with respect to the Reserve lands themselves: there, Alberta had been ready for many years to transfer the agreed area, and responsibility for the failure to secure the Reserve and the benefits therefrom to the Band was entirely that of Canada: whereas here, Alberta had agreed that the Indians should continue to enjoy the rights and benefits in question but authorized the development which destroyed or diminished the benefits of those rights, and took the revenues therefrom, without any notice to the Band or to Canada. The equities here seem clearly against Alberta.

Indeed, there is one aspect of Alberta's position in another context which supports the suggestion that Alberta may be ready to accept responsibility here. I refer to Alberta's indicated readiness, without prejudice to the general denial of liability or breach, to discuss the matter of the application, and possible modification, of the Trappers Compensation Program so as to bring the area of compensation to the Band for loss of revenue from trapping while stocks of wildlife are being re-built, within the ambit of that program. This was spoken of in the context of compensation for future loss, but it occurs to me that there might be some willingness to consider it in the context of past loss of trapping revenue as well.

(ii) Oil and Gas Revenues

Band's Position

The Band claims compensation in an amount equal to all lease and royalty revenues derived from exploration for and development of oil and natural gas throughout its traditional area.

Claim - 5. COMPENSATION FOR PAST LOSS:

(b) With Respect to Lands Claimed as Traditional Area
(ii) Oil and Gas Revenues

Band's Position (cont'd.)

The claim is based primarily on the Band's assertion that, since it did not adhere to the Treaty, it has unextinguished native title to this area and those revenues are its as of right, or that if title was extinguished by the fact of such exploration and development, the revenues are owed as compensation for that extinguishment. Alternatively, the Band claims these revenues as an aspect of compensation owing for benefits due but not received pursuant to the Treaty.

The first branch of this claim is directed against Alberta, and the total of revenues received and claimed is understood to be in the area of $90-$100,000,000.00. The alternative branch of the claim would appear to be directed primarily against Canada, on the basis that Canada had the obligation to provide the benefits in question, and also that Canada was negligent in not protecting the Band's interests and its native title to the area.

Position of Canada

Canada does not accept liability for payment under either aspect of the claim put forward as against it. Canada's position is that native title was extinguished by the Treaty, whether or not the Band adhered thereto, so that there was no negligence in permitting Alberta to authorize development of the resources and retain the revenues. As to compensation based on non-receipt of Treaty benefits, Canada's position is that this cannot be linked to or measured by the amount of revenues derived from oil and gas development, for the Band cannot both claim compensation for non-receipt of benefits entitlement to which is due only under the Treaty, and at the same time deny that it has ever adhered to or come under the Treaty - which would unquestionably have resulted in the extinguishment of title to the land and resources in question.

It should be noted, however, that Canada does seem prepared to entertain the claim for compensation for non-receipt of Treaty benefits under the separate head of Claim 5(a)(ii) above and on the basis there discussed.

Claim - 5. COMPENSATION FOR PAST LOSS:

(b) With Respect to Lands Claimed as Traditional Area
(ii) Oil and Gas Revenues (cont'd)

Position of Alberta

Alberta does not recognize any claim based on continuing native title. In addition, Alberta's position generally is that its only obligations in the context of lands or mineral rights with respect thereto claimed by Indians are obligations to Canada which arise pursuant to the Resources Transfer Agreement and are triggered only by formal request from Canada pursuant thereto. Alberta therefore rejects any obligation to account for oil and gas revenues and royalties.

Remarks - Including Areas of Possible Reconciliation or Accommodation

For the reasons discussed above under s.(b)(i) of this head of Claim, it is not appropriate for me to make a pronouncement on the legal validity of a claim by the Band based on native title. But on the basis of the considerations also mentioned there, I feel that the claim here based on native title would be difficult to establish as a matter of law. Certainly I have heard and seen nothing in discussions so far which enables me to suggest that there are strong grounds for a modification of the views on the legal aspect put forward in this context by both Canada and Alberta.

An additional difficulty is the inconsistency between this claim based on native title and the claims dealt with above for compensation for Treaty benefits not received and for revenues and other benefits which have accrued with respect to the Reserve area since 1940 but were not received by the Band. For the various reasons there outlined, it is my strong feeling that the Band has a valid claim to compensation in those areas. But the strength and validity of those claims rests on the basis that the Band should have had the Reserve promised to it in 1940, and should have enjoyed the benefits therefrom and from other provisions of the Treaty shortly thereafter. It is difficult indeed to see how that position can be maintained and those claims enforced and paid, if at the same time the Band is actively pursuing a claim which rests on an assertion of the continuance of native title during the same period as that covered by those other claims. For settlement upon the Reserve and acceptance

Claim - 5. COMPENSATION FOR PAST LOSS:

(b) With Respect to Lands Claimed as Traditional Area
(ii) Oil and Gas Revenues

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

of the benefits therefrom and from other provisions of the Treaty must surely have operated to extinguish the title upon which the right to the compensation claimed here is said to be based.

As to the equities, the considerations with regard to this sub-head of Claim seem quite different from those discussed with respect to the previous sub-head (Compensation for Loss of Livelihood from Trapping and Hunting). There, the continued right of members of the Band to derive their livelihood from those pursuits was expressly recognized by both Governments, whatever may have been the situation with respect to native title, and a review of the relevant considerations seems to support the view that it would be equitable that Alberta, as the Government which derived the revenues from oil and gas development, should compensate the Band for the consequences thereof in the diminution of the livelihood derived from that right. These considerations do not apply, however, to the Band's claim to oil and gas rights in the traditional area, which were not so assured to them and on which they had not previously relied for their living. Nor is there here the same foundation for the claim to compensation for oil

and gas revenues not received as there is with respect to those derived from the Reserve area: in that case, the Band had been specifically promised that area as a Reserve and would have enjoyed those revenues but for the non-fulfillment of that promise.

I am, therefore, unable at this time to suggest any specific compromise or adjustment which might reconcile the differences between the parties in respect of this particular sub-head of Claim. It should be emphasized, however, that if the considerations I have put forward in previous sections of this Paper in fact lead to acceptance of the accommodations there suggested with respect to the claims for past losses of oil and gas revenues on Reserve land, of Treaty benefits, programs and services, and of loss of revenues from hunting and trapping, then the Band will in fact receive substantial sums by way of compensation. It might be felt that this would mitigate to a considerable extent the non-recognition of the claim now being discussed, which to me seems very difficult to establish.

Claim - 6. COMPENSATION FOR FUTURE LOSSES:

(a) Hunting and Trapping - Trappers Compensation Program

Band's Position

The Band believes - and I see no reason to doubt it - that the loss suffered in support and subsistence for its members from hunting and trapping in its traditional area will continue as the result of development at least until such time as there is instituted an effective Wildlife Management and Environmental Protection Program as discussed above under Claim 3, and that Program achieves its objective. The basis on which the Band rests its claim for compensation here is the same as that for the claim with respect to past loss in this category.

Claim - 6. COMPENSATION FOR FUTURE LOSSES:

(a) Hunting and Trapping - Trappers Compensation Program

Band's Position (cont'd.)

As to the amount, the Band's position is that the loss should be measured by the deficiency in the value of each year's actual take as compared to the value in the year preceding the commencement of development (1979-80), and be paid annually as it occurs. Recognizing that there will over the years almost certainly be a diminishing number of members wishing to follow, and actually following, this method of obtaining their livelihood, the Band suggests that the loss be calculated and paid on a per capita basis - i.e., the total value in the base year divided by the number of persons then actually engaged in that activity, as compared with the yield on a similar per capita basis derived by those actually so engaged in each future year.

With regard to the possibility of bringing the trapping side of this loss within the ambit of the Provincial Trappers Compensation Program, the Band raises the question whether this presently provides a mechanism whereby individuals who trap for a living can be compensated for a shortfall in income due to the incursions of resource developers and other outside forces, as distinguished from natural cyclical changes. As it stands now, I am informed that the Provincial Program in place would reimburse the trapper with respect to loss due to development only for loss of equipment were his traplines to be damaged or lost through another's act.

The Band would, however, welcome the opportunity to discuss this matter with Provincial authorities, and is prepared to have this aspect of its claim handled through the Trappers Compensation Program, although it believes that modification to increase the scope of that program would have to be made to enable it fully to meet the needs of their situation. The Band asks, however, that its claims here, and with respecting to hunting, be accepted in principle and expects to receive the support of Canada.

Position of Canada

Again, Canada does not recognize any claim for compensation based on continuing native title. So far as the claim is

Claim - 6. COMPENSATION FOR FUTURE LOSSES:

(a) Hunting and Trapping - Trappers' Compensation Program

Position of Canada (cont'd.)

based on the assurance under the Treaty of the continued right to hunt and trap, Canada's position seems to be that any claim here should be directed against Alberta, which has authorized the development which diminishes the returns, and has received the revenues from that development. Canada would use its good offices to assist in the conclusion of an accommodation between the Band and Alberta through the medium of the Trappers Compensation Program or otherwise.

Position of Alberta

Alberta also rejects the claim based on native title, but has indicated a readiness to discuss with the Band the modifications necessary, if any, to the existing Trappers Compensation Program to enable that program to meet the legitimate needs of those dependent on that form of livelihood.

Remarks - Including Possible Areas of Agreement or Reconciliation

In light of the readiness of Alberta to discuss modifications of the Trappers Compensation Program, if necessary to meet the position and needs of Band members who will be dependent on this form of livelihood in the future, I am encouraged to believe that agreement can be reached in this area which would achieve the position desired by the Band if preliminary and basic agreement can be arrived at regarding the administration of such a program. To date, the information I have been given is that Band members for the most part have not participated in the current program. The reasons given to me are, essentially, that the program as it now exists is ineffective because of:

(a) restrictions on the causes and types of loss for which compensation will be available; and

(b) administrative difficulties caused by lack of communication with, and consequent failure to take advantage of even that coverage now available by,

Claim - 6. COMPENSATION FOR FUTURE LOSSES:

(a) Hunting and Trapping - Trappers' Compensation Program

Remarks - Including Possible Areas of Agreement or Reconciliation (cont'd.)

isolated communities such as the Band wherein the majority of trappers reside.

Essentially, I see here a lack of communication caused by the unfamiliarity with the administrative process by those sought to be assisted under the current Compensation Program, and if agreement can be reached between Alberta and the Band regarding modification of those provisions of the current legislation which provide for compensation so as to make it clear that loss resulting from development is covered, then a restructuring of communication channels between trapper and Compensation Program authorities should see a successful resolution of this matter.

This, of course, does not take care of the matter of future loss of livelihood from hunting, as distinct from trapping. It appears to me to be beyond question that the Band experiences a demonstrable financial loss here, in that moose meat, for instance, was a major subsistence item in its daily living, and has had to be replaced by commercial purchases of meat. This burden can be expected to continue in the future, at least until such time as the management program envisaged under Claim 3 is implemented and effective.

I would hope, accordingly, that Alberta, which derives the revenue from the development which produces this loss, will be prepared to entertain in principle a request for some compensation program here to help the Band meet the cost of this deficiency while it exists. It occurs to me that an approach similar in concept to the program for compensation to trappers and co-ordinated also with the administration of the Trappers Compensation Program (perhaps under the overall Wildlife Management Program) might be an acceptable approach. I shall look forward to the prospect of assisting to bring about specific discussions between the parties on this subject.

Claim - 6. COMPENSATION FOR FUTURE LOSSES:

(b) Oil and Gas Revenues

Band's Position

The wording of the document "Points for Discussion" referred to at the outset of this Paper is sufficiently broad to include a claim for compensation to the Band for the value of oil and gas revenues and royalties to be derived from the traditional area in the future. (The claim here discussed is confined to those revenues to be derived from the traditional area: if the matter of the Reserve entitlement is satisfactorily settled along the lines hitherto discussed, the revenues from that area would in fact accrue to the Band in the future.)

The Band's position seems again to be based on its assertion of continuing native title; or alternatively, that if that title is extinguished, or is to be extinguished, the Band is entitled to compensation for the value of that which has been lost to them. Again, this claim has not been quantified, but reference is made to the fact that the revenues derived from oil and gas extraction in this area are many millions of dollars annually.

Position of Canada

Canada does not accept this claim based on native title, or recognize any liability to pay compensation in this respect on any other ground.

Position of Alberta

Alberta likewise rejects the concept of liability to account to the Band with respect to these revenues under any head of claim whatsoever.

Remarks - Including Areas of Possible Reconciliation or Accommodation

There appears to be no possibility of reconciliation between the parties in this area if the Band persists in its claim. However, while it is not for me to adjudicate, or to pronounce a final conclusion at this point of my Inquiry, I do nevertheless hope that some observations as to the apparent

Claim - 6. COMPENSATION FOR FUTURE LOSSES:

(b) Oil and Gas Revenues

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

merits of the claim, and as to the wisdom of pursuing it in the light of possible agreement and settlement in other areas, may conduce to further thought as to the advisability of maintaining the claim.

The first consideration is the apparent incongruity, if not indeed irreconcilability, between this claim for compensation for future loss based on native title, and the claim for Reserve lands and the entitlement flowing therefrom if that claim is accepted, based as it is on Treaty rights and on the right to adhere to the Treaty.

There can be no doubt that the claim to a Reserve - whether the area be determined with reference to a population of 127, 182 or a larger number - is referable solely to entitlement under Treaty. Equally, there is no doubt that the mutual obligations of Canada and of Alberta (as embodied in the Resources Transfer Agreement), the one to request and the other to comply that land be conveyed and constituted as a reserve for the Band, are referable exclusively to the Treaty. Such lands are to be selected and transferred in order "to enable Canada to fulfull its obligations under the treaties with the Indians of the Province".

If, then, the claim to land for a Reserve is to be accepted and satisfied, as all parties are agreed should be done - indeed as was agreed in 1940 should be done - it would necessarily follow that there is an acceptance of the Treaty and consequent cession of native title. Hence, the question arises: How can there be maintained any claim for compensation for revenues arising hereafter which are referable only to native title? That will have been surrendered, and no rights for the future in terms of such revenues are reserved - the only exception being the right to hunt and trap as formerly.

Nor does the Treaty provide any compensation for that which is given up other than the right to reserve lands and the other treaty benefits expressly provided - and again the

Claim - 6. COMPENSATION FOR FUTURE LOSSES:

(b) Oil and Gas Revenues

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

claims for those treaty benefits not received will, if the thrust of the earlier portions of this Discussion Paper are accepted, be recognized and paid. I know of no case where a Band has been regarded as, or held to be, entitled both to its Reserve lands and other treaty benefits provided for under the Treaty, and as well to continuing oil and gas rights over its traditional area or compensation in lieu thereof.

It may be that the Band finds itself being pierced by one or other of the horns of a very awkward dilemma here, but it does seem that there are grave difficulties, if not dangers, in maintaining a claim to compensation for loss of future oil and gas revenues from the traditional area, alleged to be theirs as of right, at the same time as they look to receive full satisfaction of their claims for Reserve lands and loss of benefits therefrom and other benefits to date, which are theirs only by virtue of adherence to that Treaty which extinguishes the other right.

In this context I must refer again to the fact that there is, however, a difference between the situation here and that with respect to the claim for compensation for loss of future benefits from hunting and trapping in the traditional area. The right to continue hunting and trapping in the traditional area is assured to the Indians under the Treaty, notwithstanding the cession of native title thereunder, so the inconsistency - the contradiction - does not arise with respect to that claim as it does here. On the other hand, the maintenance of that claim, and its recognition and acceptance which seem indicated at least in part, further emphasize the inconsistency. For there again the claim is based on the express provision of the Treaty, which however operates to extinguish the right to future oil and gas revenues in the traditional area.

Reference should be made again also to the possibility mentioned by a spokesman for the Band (supra, p.38) that a satisfactory agreement and compensation for loss consequent

Claim - 6. COMPENSATION FOR FUTURE LOSSES:

(b) Oil and Gas Revenues

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

upon development and destruction in its traditional lands (which is understood to refer primarily to the claims for past and future loss of livelihood from hunting and trapping and the approach to settlement thereof discussed above) might well entail the end of all further claims based on aboriginal rights. It is understood that this would assume also satisfactory resolution of the claim to Reserve lands and compensation with respect thereto along the lines also discussed earlier.

In this connection it should be borne in mind that, on the basis of all that has been set out previously, the indications are that there is a positive willingness to discuss satisfactory and constructive solutions in the area of a Wildlife Management Program aimed at rehabilitating and maintaining a continuing wildlife population, and the matter of compensation for losses incurred in respect thereto including possible integration with the Provincial Trappers Compensation Program. And there are positive indications that there is a basis for satisfactory resolution of the matter of Reserve entitlement, including compensation for loss of revenues from the area agreed on in 1940 and for Treaty benefits and programs not received. From all these considerations, there seems inevitably to arise the question: to the extent that it seems possible that there will be a favourable solution in many of those other areas mentioned and to the extent that success in bringing this possibility into reality depends on a sense of realism and readiness to make practical compromises or accommodations in the discussions which will follow hereafter, does the Band wish to jeopardize those prospects by maintenance of this claim which on the face of it seems so fraught with difficulties and inconsistent with success in those other areas? I must leave this matter there for consideration by representatives of the Band, for there is no basis that I can see at present to bring about a reconciliation of the present positions on this head of claim.

Claim - 7. COMPENSATION - BAND'S COSTS TO DATE:

Band's Position

The Band asks to be compensated for the costs and expenses incurred in pursuing its claims to date. Basic to this claim is the Band's position that it had been waiting since 1933 for action on its request to be given a Reserve and established thereon, and since 1940 for action to fulfill the promise then made to it; that renewed discussions and requests to protect its rights and interest threatened by the onset of oil and gas development produced no results so it had no alternative but to commence legal action to compel recognition and protection of those interests; and that the record establishes that had it not been for such action by it in the Courts and in other forums and the publicity and pressure thereby generated, it is doubtful whether even the progress towards a settlement represented by this current Inquiry would have been achieved.

The Band claims accordingly that it is entitled to compensation for the entire cost of the steps which it has been compelled to take in an effort to protect its position and way of life at a time when it had not even been given the basic requirement of a Reserve as its settled homeland and its very existence as a community was in jeopardy. A statement outlining these expenses, totalling $1,539,797.26 as at November 28, 1984, has been provided and is attached hereto as Appendix "B". This list was originally attached to a letter of the same date to the Hon. Mr. Crombie from Chief Ominayak.

A considerable portion of these costs is represented by interest on a Bank loan which the Band was compelled to take out to meet its need in this connection. Interest is calculated to September 30, 1984, and has continued since and will continue at the rate of approximately $9,500.00 per month until the Band is put in a position to repay the loan. The Band points out that it has also incurred further costs since November 30, 1984, including costs of research and representation in connection with this Inquiry, although this may be partly offset by amounts recently made available by Canada under an interim financing arrangement. The Band is prepared to enter into an accounting in this respect.

Claim - 7. COMPENSATION - BAND'S COSTS TO DATE:

Position of Canada

Canada's formal position to date has been to deny any obligation to pay costs incurred directly or incidentally in connection with litigation on the ground that these costs were incurred before negotiations were exhausted. Canada has however been providing some funding recently (under the Item of the Task Force on Treaty 8) on the basis that the Band is entitled to assistance in meeting its current costs of negotiation. Canada is also prepared to consider reimbursement for past expenses of organizing and carrying out field work, surveys and research and matters of a similar nature which are of the type which would have had to be done for, and can be used in the course of, the present Inquiry and negotiations arising therefrom, as distinct from counsel fees and other costs referable only to the litigation.

(It is important to note that Canada's position as summarized here should not be confused with the position in respect of the request for an interim advance on account of compensation to enable the Band to meet its pressing needs to make payment on account of the obligations referred to above. That advance will be made on a without prejudice basis: that is, as an advance against whatever compensation may finally be agreed to be due under all the various heads of claims for compensation including this one, without thereby constituting an admission of liability at this time in respect of any specific claim. I am advised that the submission for payment of such an advance, based on my Interim Report on that matter, is now before Cabinet, and that substantial progress has been made in moving it through the various stages required for final approval.)

Position of Alberta

Alberta is not involved in this head of claim.

Remarks - Including Possible Areas of Agreement or Reconciliation

It appears from the foregoing that there is the basis for agreement on a substantial portion of the Band's claim here - that portion not attributable solely to the preparation for and conduct of the litigation. But it is also apparent

Claim - 7. COMPENSATION - BAND'S COSTS TO DATE:

Remarks - Including Possible Areas of Agreement or Reconciliation (cont'd.)

that unless Canada is prepared to modify its position and include litigation costs as well, there will be a formidable task of segregating the amounts of legal fees and costs incurred which are to be accepted and paid as being of the type which would be incurred in the course of continued negotiation, including preparing the Band's claims for this Inquiry, from those which are to be rejected as having no relation to matters now being considered.

Thus with respect to fees charged for time spent in preparing pleadings and in preparation for appearances in Court: can it be said that these should be rejected as having no relevance to this Inquiry? For after all, the Band is surely entitled to have the assistance of legal experts in the preparation and submission of its position and in discussions thereof before me. The other parties have been assisted by their Counsel from time to time. And surely the time spent by Counsel in preparation of the material and of arguments for Court has been of value to them in their appearances before me. Perhaps Counsel fees for time actually spent in Court can be singled out for rejection, but where else is the line to be drawn, and how is it to be drawn with respect to other types of legal costs and costs associated with research, field work and surveys initially undertaken in preparation for the Court cases but undoubtedly of value, if not indeed essential, to the preparation of the full case in this Inquiry?

Not only is the idea of distinction between legal and other costs incurred as being of value in relation to this Inquiry on the one hand, and those of value only in terms of the litigation on the other, extremely difficult when it comes to its practical application, but I believe that there are, in the special circumstances of this case, reasons to question whether there is a sound basis for maintaining the position which necessitates the distinction.

I recognize that it is not normally the policy of the Government of Canada to reimburse persons or organizations for their costs in preparing and prosecuting a case against

Claim - 7. COMPENSATION - BAND'S COSTS TO DATE:

Remarks - Including Possible Areas of Agreement or Reconciliation (cont'd.)

Canada in Court, except to the extent that the Court may order in the outcome of the litigation. And here, according to the view expressed so far by Canada, the Band commenced its litigation before having exhausted the process of negotiation with respect to its claims. It is on these grounds that Canada has so far declined to entertain the claim for reimbursement of the Band's legal costs, at least with respect to that portion which can be shown (if such segregation is in fact possible) to have been in excess of what would have been required only for continued negotiation, including this Inquiry.

I suggest, with respect, that this approach overlooks the unique nature of the circumstances surrounding this whole matter. It must be remembered that the Band's claims go back as far as 1933, the year of its first Petition to be recognized as a Band and have a Reserve allocated to it in accordance with its entitlement under the treaty. They were promised that Reserve - an area specifically set aside and designated by agreement between them and the two Governments - in 1940. That was 45 years ago - and they still have not got it. Starting in the late 1970's they saw not only their traditional hunting area but the very area which they had been promised as their Reserve - their homeland - subjected to intensive exploration and development against their wishes and with distastrous consequences to them. Substantial revenues accrued from the Reserve, but not to their benefit, and still no action was taken on their behalf. It is not putting it too strongly to say that in all the circumstances it could appear - certainly it did to them - that if they had not started Court action in 1982, which was 42 years after the original promise, nothing would have been done for them to this day.

In such circumstances, when their need was urgent, their situation was desparate and was worsening daily, and their best efforts along the line of negotiation to protect their interests were producing no results in spite of the merits of their position, it could be said without exaggeration that there appeared to be no practical alternative but

Claim - 7. COMPENSATION - BAND'S COSTS TO DATE:

Remarks - Including Possible Areas of Agreement or Reconciliation (cont'd.)

recourse to litigaton. And it is a fact that it was not until after that recourse to litigation that meaningful negotiations - now including this Inquiry - were initiated by Canada.

All these circumstances taken together seem to me to suggest very strongly that this is an exceptional case to which the general policy mentioned above should not be applicable. And the very real and practical difficulty outlined above of segregating the legal costs into two categories further reinforces the case in favour of an exception. Finally, the very fact that there are such unusual and exceptional circumstances would dispose of the possibility that to accept the claim here might represent a precedent or a weakening of the policy generally.

With these considerations in mind I venture the hope that in the further discussions to follow as to the calculation and up-dating of this claim as submitted in Appendix "B", the representatives of Canada will find it possible to proceed on the basis that the full legal as well as the other costs attributable to formulation and processing of the Band's claims will be accepted in full.

Claim - 8. CATCH-UP DEVELOPMENT AND SOCIAL BENEFIT PROGRAMS:

(a) General

Band's Position

In view of the long delays and hardships suffered since 1940, multiplied since the onset of oil and gas development in the 1970's, the Band claims entitlement to a "catch-up" or accelerated program to settle it on its Reserve as soon as possible after that is established, to include the physical aspects of settlement and arrangements for the immediate establishment and full delivery of programs of social services at a level comparable to those which Indian bands receive generally.

Claim - 8. CATCH-UP DEVELOPMENT AND SOCIAL BENEFIT PROGRAMS:
(a) General
Band's Position (cont'd.)

The Band's requirements and proposals have been summarized as follows:

1. A comprehensive socio-economic development package including:

   (a) housing and community facilities and community infrastructure and community services comparable to other Northern communities;

   (b) the cost of developing Reserve land for agricultural purposes, including the cost of clearing, breaking, fencing, equipment, facilities and livestock;

   (c) the cost of helping community people to develop a capability to pursue alternatives to the rapidly disappearing traditional economy, including necessary vocational training and related capital costs.

2. On-going programs and services comparable to those received by other Indians in Canada.

Item 2 of these requirements would of course normally include schools and educational programs. The Band feels however that it has special problems in that area which require special mention and consideration, so the matter of education will be dealt with under a separate head. Item 1.(c), which is also a special need of the Band, is however also mainly referable to the area of education, and will be included under that separate sub-head.

The claim now being considered is addressed primarily to Canada, although the Band does not rule out the possibility of the integration of certain of those services with services being offered by the Province once all outstanding claims have been settled and the atmosphere permits of harmonious on-going relationships.

Claim - 8. CATCH-UP DEVELOPMENT AND SOCIAL BENEFIT PROGRAMS:
(a) General
Band's Position (cont'd.)

The Band places special emphasis on the necessity to be provided annually with assured core funding to enable it to prepare its budgets for administration of its affairs in accordance with the concept of on-going responsible self-government discussed under Claim 9 below. This is another area where early agreement on the population figure of membership in the Band, or on those to be regarded as members of the community for purposes of entitlement and administration, is essential to progress is disposing of the claims.

Position of Canada

As to the matters included in Item 1. of the Band's Position, Canada is already on record in a letter dated December 14, 1983, from the then Federal Minister to the Hon. Mr. Pahl, as proposing "a 'catch up' program of housing, community infrastructure, and economic development". The purpose of this program has been described as bringing the Reserve community to a level comparable to other Bands in Northern Alberta.

As to Item 2. under the Band's Position, it is understood that this is also the position of Canada. Canada is prepared to discuss with the Band the type and level of services involved and the method of delivery.

With respect to the whole, however, representatives of Canada have stated that although there is no reservation in principle, there will be problems in relation to matters such as how many are to be included in the community which is to be moved to the Reserve, and the pace at which it is possible to implement delivery of full-standard services. As to provision of housing, school and community buildings, infrastructure, etc., again there is no disagreement in principle with an accelerated program, but there will be practical problems in implementation. It is estimated that for a community of 300, total costs of design, construction and installation would be in the order of $25,000,000.00 (1985 prices).

Claim - 8. CATCH-UP DEVELOPMENT AND SOCIAL BENEFIT PROGRAMS:
(a) General
Position of Canada (cont'd.)

Representatives of Canada have emphasized that clearly discussion and agreement will be necessary as to phasing of construction and of implementation of social service programs.

Position of Alberta

Alberta is not primarily involved in provision of the socio-economic development package envisaged here. Alberta has however shown no disinclination to extend to the Band the benefits of Provincial social services and programs for which its members may be qualified or eligible, and appears ready to discuss integration of Provincial and Federal services in this context.

Remarks - Including Areas of Possible Reconciliation or Accommodation

It appears that there is agreement in principle here, and that there should be no great obstacle to working out the details of such a program or programs. These will have to include the matter of the time limit within which, or at any rate the objective as to the earliest date when, the physical phases of establishment - construction of buildings, infra-structure, breaking and sowing of land, introduction of livestock, etc. - should be completed. A program phased over a period of five years has been suggested, with appropriate support measures to sustain the Band during the process of moving and becoming established.

The need to settle the numbers of persons to be included in the community for whom these facilities and services are being provided emphasizes the urgency of early agreement between Canada and the Band on the population matter.

Negotiations will of course be required to determine the level of assistance to be provided. Subsequently, an on-going consultation mechanism would likely be required to monitor progress and co-ordinate activity, including parallel activity which may be agreed to be undertaken by Alberta in these areas.

Claim - 8. CATCH-UP DEVELOPMENT AND SOCIAL BENEFIT PROGRAMS:
(a) General
Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

In fact, agreement was reached some months ago that representatives of the Band would meet with Regional and National officials of the Federal Department to discuss these matters, and that a memorandum would be prepared outlining areas of specific agreement and indicating those areas where further discussion or negotiation is necessary. I understand that such meetings have taken place, co-ordinated by Mr. J.R. Wright, the special Liaison Officer appointed by Canada to assist in this Inquiry. I hope that report or memo as suggested may be available in the near future.

(b) Education

Band's Position

The Band is strongly opposed to the school system presently in effect. Under this system as I understand it, the School Board constituted by the Band has no true autonomy or authority with respect to the levels and standards of schooling provided for children of the community, but has merely an advisory role, the administration and decision-making processes being entirely those of the Northlands School District, a Provincial organization, with most of the children from the community being bussed for considerable distances to and from provincially-run school(s).

The position of the Band is that planning provision should be made now for the opening of a school on the Reserve as soon as they are settled thereon, that school to be under Federal jurisdiction. That school should admit also children of non-status or Metis people who, although not members of the Band, are recognized as members of the community under the self-government structure envisaged for the future. The school should be administered by the Band's School Board, the constitution of which now provides for participation by non-status members. The objective is that there should be one school, on the Reserve, administered by the Band, for all children of school age who are members of families within the community.

Claim - 8. CATCH-UP DEVELOPMENT AND SOCIAL BENEFIT PROGRAMS:
(b) Education
Band's Position (cont'd.)

Particular emphasis is placed on the need to provide in the school system for programs of vocational and technical training, and related capital costs thereof, to enable Band members to acquire the skills necessary to live in the rapidly changing economy and environment brought about by development, and to take advantage of employment opportunities therein. (See Item 1.(c) under sub-head (a) of this Claim above.)

The Band accepts, however, that it is most desirable that the programs of education carried out and the standards maintained in the school should be such that children leaving it, or graduating from it, should be qualified and eligible for admission at equivalent grades into schools or post-secondary institutions in the Provincial system. It wishes also that its School Board be authorized, and endowed with the capacity, to enter into reciprocal arrangements with other communities for attendance of pupils from one community at schools of the other or others, particularly at secondary school levels. It looks forward to the opportunity to enter into discussions with appropriate authorities of Canada and Alberta to work out these and other details.

Position of Canada

Canada has not as yet indicated any position in detail to me, although again it was emphasized that, notwithstanding that there is no reservation in principle, there may be practical problems with respect to the pace at which the delivery of full educational programs, including the establishment of a school, can be carried out. It is understood that these matters are also included in the discussions between Band and Regional and National departmental officals arranged by Mr. Wright, referred to above under sub-head (a) of this Claim.

Position of Alberta

As I understood them, representatives of Alberta have indicated that, since responsibility in this field will be

Claim - 8. CATCH-UP DEVELOPMENT AND SOCIAL BENEFIT PROGRAMS:
(b) Education
Position of Alberta (cont'd.)

primarily that of Canada once the Band is settled on its Reserve, it will be for Canada to indicate to what extent, if any, it is desired that the Provincial education system should be involved in the matter of providing schooling and technical training for the Band. Alberta is willing to take part in discussions of this matter, if desired.

Remarks - Incuding Areas of Possible Reconcilation or Accommodation

It was my understanding that the whole matter of education, including the responsibility for financing the construction of a school on the Reserve, and the constitution and authority of the Band's School Board to administer the education program, was included in the discussions at the meetings between Band representatives and Departmental Officials arranged by Mr. Wright, referred to earlier. These discussions were to include the Band's concept that the structure to be established should provide for the allocation of funds annually, through the overall budgetary process discussed under the next head, to meet the requirements of the agreed educational program, such funds to be administered by the Band's School Board which will be responsible for carrying out that program.

One matter which it would appear most desirable to canvass as well is the establishment of uniformity of standards and grades so as to ensure that when it is desired, or becomes necessary, for pupils to move from one school to another or when they reach graduation level, the move to the other school or into the institution of higher learning may be accomplished without loss of grades or of an academic year or similar problems. This matter will of course involve discussion with and agreement of Provincial authorities.

I look forward to receipt of the report of the meetings with Departmental Officals already referred to, and will be glad to assist in any way in arranging discussions at any stage with the appropriate Provincial authorities.

Claim - 9. RIGHTS OF SELF-GOVERNMENT, INCLUDING DETERMINATION OF MEMBERSHIP

Band's Position

The Band claims the right to self-government, once established on its Reserve, including the right to determine who will be members of the Band. The objective in this last respect is that the Band in effect should constitute a continuing community, including initially and caring for all persons of known aboriginal ancestry and historic ties to the traditional lands of the Lubicon Lake people and their descendants, although membership may thereafter be denied to children who are the issue of a union between a non-member and a member who himself or herself has one non-member parent.

The Band has submitted a document entitled GOVERNMENT OF THE LUBICON LAKE PEOPLE which comprises a detailed and considered constitution embodying its proposals for the determination of who will be its members, their rights, and the organization, powers and responsibilities of its government. This document is hereinafter referred to as "the Constitution".

It is the Band's position that once this self-governing structure is in place, the Band should be entirely autonomous with respect to the regulation and administration of its affairs such as the establishment, maintenance and operation of local services including (amongst others) fire and police protection, health, education, welfare and many other enumerated activities and services. The specified powers include also the regulation, construction, maintenance and repair of buildings and the construction, maintenance and regulation of public works and community infrastructure.

The concept, which Band representatives emphasized, is that Canada would no longer administer these or other matters directly for the Band, but rather would continue to provide only block funding annually. This funding might designate the types or categories of purposes to which the funds may be applied, but the actual division of such funds and allocation thereof to specific purposes would be determined by the Band's Governing Council in accordance with and under the authority of its own annual budget prepared for that purpose.

Claim - 9. RIGHTS OF SELF-GOVERNMENT, INCLUDING DETERMINATION OF MEMBERSHIP

Remarks - Including Areas of Possible Reconciliation or Accomodation (cont'd.)

in the Provincial legislation setting up the management program, and the power to make regulations implementing the program will be vested in the authority set up under the legislation for that purpose. While it is anticipated that the Band will have an effective voice in the administration - possibly by having a representative appointed to the administrative authority - it would follow that the by-laws or regulations of the Band's Governing Council in this field could only be subordinate to, and enacted for the purpose of carrying into effect so far as Band members are concerned, the policy of and regulations made under that Provincial legislation.

It is accordingly strongly urged that, in order to avoid not only actual conflict but even the appearance thereof and consequent misunderstandings and difficulties in discussions as to setting up that management program which is so central to the Band's desires for the future, these points be accepted and that the Band's spokesman should indicate, in further discussions, a readiness to modify the wording of this paragraph to reflect the realities above outlined.

Another matter where the wording of the Band's draft Constitution may be expected to raise concern on the part either of Canada or Alberta, or both, arises as a result of the somewhat sweeping language of other provisions giving the Governing Council law-making powers and exempting its members from liability for official acts. These include paras. 4(d) and (g) of Cl. 4 relating to the punishment of persons for acts committed on the Reserve (including reference to "convicted offenders"); and Cl. 45 as to limitation of liability. I do not wish to appear to assume the authority to lay down a rule as to constitutional law, but it does occur to me that the two first-mentioned provisions might be construed as trenching on the field of criminal law reserved to the exclusive jurisdiction of the Parliament of Canada, while the other may appear to conflict with the exclusive jurisdiction of the Province to legislate with respect to property

Claim - 9. RIGHTS OF SELF-GOVERNMENT, INCLUDING DETERMINATION OF MEMBERSHIP

Remarks - Including Areas of Possible Reconciliation or Accomodation (cont'd.)

and civil rights. I recognize that this conflict would not arise if the subject-matter were confined to relationships arising only within the Reserve, but the scope of the matters or acts here set out with respect to which liability would be limited clearly includes relationships having effect, and with persons, outside the Reserve.

I raise these matters for consideration only.

Finally mention must be made of Cl. 16 of the draft. While it is entirely understandable, and in keeping with developing policy, that the Band should wish that its own rules and regulations should prevail with regard to governance of its own affairs on its Reserve, there is no doubt that the scope of the matters with respect to which the power to institute policies and enact by-laws is given throughout this Constitution is in many cases such that they could have effects which would be felt off the Reserve as well. With this in mind, I cannot fail to observe that it seems not only unrealistic, but unnecessarily provocative and prejudicial to the atmosphere for constructive discussion and settlement of differences, to include in this draft a provision which asserts, as this one does, that in the event of any inconsistency or conflict with Acts of Parliament or of the Alberta Legislature, the Band by-laws shall prevail. I would strongly urge a re-consideration of this wording.

Having made these observations, I wish nevertheless to record my respectful opinion on two matters of principle. First, that it is desirable that the Band should be given, and should assume, the widest powers of self-determination and self-government to enable its members to realize the concept of the preservation and continuance of their way of life as an Indian community in a manner that is compatible with a balance between their rights and interests and those of others with whom they must live in harmony. And second, that notwithstanding the reservations I have taken the liberty of expressing as to certain specific provisions, my view is that this draft represents a commendable and constructive effort to turn that concept into reality. I hope that

the considerations I have put forward may assist in discussions which will lead to the working out of agreement on those modifications which will render this draft an acceptable Constitution for Band self-government.

CONCLUSION

The purpose of all the foregoing has been to set out the positions of Canada, of Alberta and of the Band, and of others where such interests exist, regarding the various "Points for Discussion" advanced by the Band to the Minister on 26th November, 1984, together with my appreciations of those various positions and their impact on my efforts to date in this Inquiry. Although delayed somewhat, this Discussion Paper now serves, in accordance with the schedule of activities agreed upon by the three major participants with me at the outset of the Inquiry, both to summarize agreements and areas of commonality between two or more of Canada, Alberta and the Band and, as well, serves as the basis for the contemplated further round of discussions between those parties to be conducted as the next stage of this Inquiry. As I have remarked in the past, I very much hope that it will be agreed that this further round of discussions will consist of meetings for the most part directly between representatives of Canada, Alberta and the Band.

I did not propose, by the summations and observations contained in this Paper, to preclude further discussions regarding development of the respective parties' positions or accords which may arise between them on various matters in subsequent discussions. My purpose rather has been to record for the benefit of all parties in their future approach to the various matters touched upon in this Inquiry my understandings of the facts and attitudes made known to me as at the time of writing, as well as attempting where possible to lay the basis for agreements to be embodied in my Final Report to the Minister which is to be the product of this Inquiry. Nor do I, for that matter, hold the absolute

APPENDIX "A"
to
Discussion Paper dated 28th November, 1985
(ref. pp.42 ff)

EXTRACTS FROM TREATY 8
- Treaty Benefits

Paragraph A

And with a view to show the satisfaction of Her Majesty with the behaviour and good conduct of Her Indians, and in extinguishment of all their past claims, She hereby, through Her Commissioners, agrees to make each Chief a present of thirty-two dollars in cash, to each Headman twenty-two dollars, and to every other Indian of whatever age, of the families represented at the time and place of payment, twelve dollars.

Paragraph B

Her Majesty also agrees that next year, and annually afterwards for ever, She will cause to be paid to the said Indians in cash, at suitable places and dates, of which the said Indians shall be duly notified, to each Chief twenty-five dollars, each Headman, not to exceed four to a large Band and two to a small Band, fifteen dollars, and to every other Indian, of whatever age, five dollars, the same, unless thereby some exceptional reason, to be paid only to heads of families for those belonging thereto.

Paragraph C

FURTHER, Her Majesty agrees that each Chief, after signing the treaty, shall receive a silver medal and a suitable flag, and next year, and every third year thereafter, each Chief and Headman shall receive a suitable suit of clothing.

Paragraph D

FURTHER, Her Majesty agrees to supply each Chief of a Band that selects a reserve, for the use of that Band, ten axes, five hand-saws, five augers, one grindstone, and the necessary files and whetstones.

CONCLUSION (cont'd.)

expectation at this time that the contemplated further round of discussions may not alter to some degree my present appreciations with respect to the various topics of the Inquiry which are set out by me in the body of this Discussion Paper.

It is my hope, and I trust, that this document will provide the basis for a comprehensive and acceptable resolution of the Lubicon Lake Band issue. In order to move the matter forward, I shall be in touch soon with all concerned to arrange for the schedule of further meetings.

DATED the 28th day of November, 1985.

E.D. Fulton, P.C., Q.C.

Claim - 9. RIGHTS OF SELF-GOVERNMENT, INCLUDING DETERMINATION OF MEMBERSHIP

Band's Position

The Band claims the right to self-government, once established on its Reserve, including the right to determine who will be members of the Band. The objective in this last respect is that the Band in effect should constitute a continuing community, including initially and caring for all persons of known aboriginal ancestry and historic ties to the traditional lands of the Lubicon Lake people and their descendants, although membership may thereafter be denied to children who are the issue of a union between a non-member and a member who himself or herself has one non-member parent.

The Band has submitted a document entitled GOVERNMENT OF THE LUBICON LAKE PEOPLE which comprises a detailed and considered constitution embodying its proposals for the determination of who will be its members, their rights, and the organization, powers and responsibilities of its government. This document is hereinafter referred to as "the Constitution".

It is the Band's position that once this self-governing structure is in place, the Band should be entirely autonomous with respect to the regulation and administration of its affairs such as the establishment, maintenance and operation of local services including (amongst others) fire and police protection, health, education, welfare and many other enumerated activities and services. The specified powers include also the regulation, construction, maintenance and repair of buildings and the construction, maintenance and regulation of public works and community infrastructure.

The concept, which Band representatives emphasized, is that Canada would no longer administer these or other matters directly for the Band, but rather would continue to provide only block funding annually. This funding might designate the types or categories of purposes to which the funds may be applied, but the actual division of such funds and allocation thereof to specific purposes would be determined by the Band's Governing Council in accordance with and under the authority of its own annual budget prepared for that purpose.

Claim - 9. RIGHTS OF SELF-GOVERNMENT, INCLUDING DETERMINATION OF MEMBERSHIP

Band's Position (cont'd.)

The proposed self-government Constitution provides also that the balance of monies which may be realized from the settlement of all the Band's land claims here under consideration, together with moneys to be derived from resource royalties, will not be distributed among Band members on a per capita basis, but rather will be invested and the interest income therefrom used only, as authorized from time to time by the Governing Council, to meet the cost of such programs and purposes as shall be approved in such authorization.

Position of Canada

Canada has not as yet indicated any precise position with regard to the details of this proposal. It is understood, however, that an increasing degree of autonomy and self-determination by Bands in matters of local concern is in fact an objective of Federal policy. Canada has also pointed out that the right of an Indian Band to control its own membership in the future has now been provided by legislation (Bill C-31).

Position of Alberta

Alberta is not involved in the matters under consideration here except to the extent noted in the Remarks section hereunder. Its position will be discussed there.

Remarks - Including Areas of Possible Reconciliation or Accomodation

As already observed, the objective of the Band in terms of self-government and self-determination in respect of membership are in general consonant with the policy of Canada in these areas. Subject to the reservations hereafter noted, it is anticipated accordingly that specific agreement, or accommodation, between the Band and Canada with respect to a large part of the detail in the Band's proposed Constitution can be reached in further discussions, or may already have been reached in the meetings arranged for by Mr. Wright. As to the matters where agreement or accommodation will be more

difficult, these will be of concern to both Canada and Alberta. I shall defer consideration of them until after mentioning the one or two areas which involve the Band and Alberta alone.

Here reference is made first to para. (c) of Clause 4, the clause which sets out the Powers of the Governing Council of the Band (therein referred to as the Lubicon Lake People) under the proposed Constitution. This particular provision would empower the Council to make by-laws for the purpose of:

> Wilflife management and environmental protection throughout the traditional lands of the Lubicon Lake people including pollution control, the protection of historic and cultural sites, the protection of natural flora and fauna, the protection of wildlife breeding grounds and the regulation of hunting, trapping and fishing;

This is consistent with the corresponding provision in para. (a) of Cl. 3, the Objects clause.

Two observations may be made here. The first is, that insofar as this purports to give power to make such regulations generally applicable to the traditional area, it raises the question of conflict with the jurisdiction of Alberta. It is true that this power is subject to the introductory words of Cl. 4, which govern all the policies and by-laws within the scope of that clause - that is, that they shall be "not inconsistent with the Canadian Constitution". The jurisdiction of Alberta over this area is provided by that Constitution, and the Band would by now have adhered to the Treaty so that there would be no question of continuing native title, hence it could be maintained that the problem with regard to conflict is theoretical rather than practical. However in my view it would be desirable to avoid the appearance or possibility of conflict, which could quite easily be done by a careful wording to make clear that such by-laws may not conflict with any laws or regulations of Alberta in force in that area.

Claim - 9. RIGHTS OF SELF-GOVERNMENT, INCLUDING DETERMINATION OF MEMBERSHIP

Remarks - Including Areas of Possible Reconciliation or Accomodation (cont'd.)

Or it may be that the intention in this paragraph is to empower the Council to make regulations applying only to the governance and conduct of Band members in respect of the matters set out therein. There could be no objection, constitutionally or otherwise, if the Band wished to super-impose on its own members standards of conduct with respect to the protection of such matters as cultural sites and wildlife breeding grounds over and above those provided generally by Alberta laws. But again if this is the purpose, it would seem prudent to avoid the appearance or possibility of conflict (and misunderstanding in the course of discussion) by the use of wording to make this clear.

The second and perhaps more important observation is that this particular paragraph deals with a matter - wildlife management and environmental protection throughout the Band's traditional area - which has been discussed under the head of Claim 3. above. The Band's position as there recorded (after discussion with its representatives) is that they ask for the establishment by Alberta of such a program as will recognize and give effect to the interest of Band members in and their dependence on the preservation of wildlife stocks for their livelihood, and will also give them an effective voice in the management of that program. After canvassing the position of Alberta in response thereto - its readiness to consider and discuss the setting up of a "model management program" in an endeavour to respond to these needs - and the various considerations and requirements which should be taken into account in shaping such a program, I expressed the hope that further detailed discussion would take place which would enable me to report that there is in fact agree-ment that there should be such a program and on the basic principles which it should reflect and in accordance with which it should be administered.

This is still my hope. If it is to be realized, however, clearly the policy regarding wildlife management and other matters enumerated in para. (c), will be set by or reflected

Paragraph E

FURTHER, Her Majesty agrees that each Band that elects to take a reserve and cultivate the soil, shall, as soon as convenient after such reserve is set aside and settled upon, and the Band has signified its choice and is prepared to break up the soil, receive two hoes, one spade, one scythe and two hay forks for every family so settled, and for every three families one plough and one harrow, and to the Chief, for the use of his Band, two horses or a yoke of oxen, and for each Band potatoes, barley, oats and wheat (if such seed be suited to the locality of the reserve), to plant the land actually broken up, and provisions for one month in the spring for several years while planting such seeds; and to every family one cow, and every Chief one bull, and one mowing-machine and one reaper for the use of the Band when it is ready for them; for such families as prefer to raise stock instead of cultivating the soil, every family of five persons, two cows, and every Chief two bulls and two mowing-machines when ready for their use, and a like proportion for smaller or larger families. The aforesaid articles, machines and cattle to be given one for all for the encouragement of agriculture and stock raising; and for such Bands as prefer to continue hunting and fishing, as much ammunition and twine for making nets annually as will amount in value to one dollar per head of the families so engaged in hunting and fishing.

APPENDIX "B"

to

Discussion Paper dated 28th November, 1985

(ref. pp.70 ff)

BAND'S SUMMARY OF EXPENSES AND COSTS

to Nov.28, 1984

Loan Interest[1]	166,018.51
Operating Costs	
Incorporation	1,005.56
Bank Charges	227.25
Meeting Expenses	1,820.46
Office Supplies, Postage & Deliveries	5,327.84
Reproduction	19,489.30
Telephone	18,326.63
Board Travel	32,400.85
Audit	1,650.00
Miscellaneous	416.35
Total Operating Costs	$ 80,664.24
Field Worker Fees & Travel	$ 5,429.05
Legal Fees & Expenses	$880,124.46
Research Fees & Expenses	$ 9,699.65
Technical Fees & Expenses	$234,820.74
Management Fees & Expenses	$163,040.61
GRAND TOTAL	$1,539,797.26

NOTE

Loan Interest calculations are up to September 30, 1984, because the bank statement has not yet been received. Monthly interest charges run at approximately $9,500.00.

05

LUBICON LAKE BANK INQUIRY

ADDENDUM TO DISCUSSION PAPER

After consideration of the Discussion Paper herein dated November 28th, 1985, representatives of the Band requested a meeting with me to discuss portions of the Paper setting out or commenting on the "Band's Position" with respect to various aspects of its claims which, they felt, did not accurately or completely reflect that position. This meeting was held on January 6th - 8th, 1986. As the discussion developed, it became apparent that the concern was not only that certain statements in the "Band's Position" portions of the Paper did not put that position entirely as the Band maintains it, but that this resulted in inaccurate inferences or conclusions in some of the "Remarks" portions as well.

Having considered what was then said, I feel that I should now set out in this Addendum a general modification or clarification of the presentation of the Band's position as it emerges from the Discussion Paper, and as well suggest certain specific amendments and revisions to the text which will reflect that clarification.

First, however, I believe I should put the matter in context by a reference to the general purpose and character of the Discussion Paper itself. The purpose was not merely to set out the Band's specific position on each of its claims as I understood that position to be, but also and very importantly to go on to suggest possible approaches to modifications or variations which, in the light of the positions of Canada and Alberta, might lead to substantial agreement on some, if not all, of the issues. These suggestions are found in the "Remarks" sections of the Paper under each specific head of Claim. In some of those sections of the Paper I did accord-

ingly make comments on certain aspects of the Band's position which appeared to be inconsistent with another position or positions which in turn seemed to be at least inherent in what the Band was asking and which, if accepted, would more readily form the basis of a negotiated settlement or agreement. As a result of the discussions on January 6th - 8th I now accept that the result was an apparent misconception or misstatement of what is the underlying and consistent basis on which the Band in fact rests its approach to each of these claims - that is, the assertion of unextinguished Native Title.

Before coming to a general re-statement of the Band's position as it is now understood by me and should be reflected in the Discussion Paper, and the specific corrections based thereon, I should however emphasize that I did not intend, or purport, in that Paper to make a judicial pronouncement on the merits of the Band's legal position generally or its claims specifically. Nor did I seek in that Paper to analyze the various parties' legal arguments and positions as the rationale for further proceedings in this Inquiry and thus for my Report to the Hon. Mr. Crombie. The legal theories and arguments are not my immediate concern: rather, I wished in the Remarks sections of that Paper to open up the possibility of drawing the parties onto common ground by reference to equity and established facts.

Having reviewed the Discussion Paper in the light of my subsequent discussions with representatives of the Band I now accept that there are passages in that Paper by way of statement of or comment on the Band's position which do not truly reflect the basic position as the Band in fact asserts it. I wish accordingly to make clear that I accept that the Band's primary and unaltered position, upon which it rests

each individual claim, is that legally it has continuing and unextinguished aboriginal right and title in and to the lands historically occupied by its members and their forebears.

The Band does not rest any portion of its claim - including the specific claims to land as its Reserve and to hunting and trapping rights - primarily on Treaty right or entitlement, but rather refers to Treaty only as a minimum measure of the rights or quantum it should receive under certain heads of its claim based on Native Title or as a final alternative in the event that that claim fails in law. This position, I must admit, was not fully articulated by me in the Discussion Paper, or was obscured by reference to inconsistencies as contained in certain passages thereof, and I wish now to correct any misstatement of, or misapprehension as to my understanding of, the Band's position by forwarding this Addendum to all recipients of the Discussion Paper.

It follows from this understanding of where the Band places its main and continuing emphasis with respect to the legal basis of its claims, that there are three passages in the Discussion Paper which require modification generally as to their thrust and effect. These are passages appearing at pp.55, 61 and 67 where, as I now realize, I do at least appear directly to question the legal validity of the Band's position as to its continuing Native Title, and where later I point out a seeming inconsistency between a claim based on that position and a claim or claims based on Treaty entitlement.

As to the first aspect of these passages, I emphasize that it is not my role or function to pronouce upon the legal validity of the Band's position and I wish to make it clear that those passages were not intended, and should not be taken or read as, a direct or indirect statement of opinion

that the claim to continuing Native Title is not valid. Particularly at this stage of my Inquiry, I must and do refrain from any expression of opinion one way or the other on this question, and withdraw anything which states or implies any such opinion. As to the second aspect, given that the Band refers to Treaty primarily as simply the measure of entitlement or compensation in certain specific areas (which entitlement itself rests still on Native Title) and would rely on Treaty as a basis of entitlement only as a last alternative if the other head of entitlement is ruled out by competent authority, the apparent inconsistency no longer presents the problem in the legal sense in which it was posed in the passages under consideration.

Having made this unreserved withdrawal/modification as to the intent and effect of those passages, I nevertheless consider that I should emphasize again that the primary purpose I had in mind in writing them was not to pronounce upon the legal validity of any particular claim or the underlying basic position on which it rests (Native Title), but rather to open the door to consideration of alternative approaches which might facilitate reconciliation or settlement as between the opposing views and present approaches. For I was, and am still, aware of the great difficulty felt by Alberta - and indeed by Canada - in accepting, or even negotiating, any aspect of a claim which rests on the assertion of continuing Native Title. This, however, is a problem of negotiation or reconciliation and, while I still hope that this is a purpose which may be served by this Inquiry, it does not affect the statement of my understanding of the Band's present position as to the legal basis of its claims, or my desire to present it fully and fairly as I have endeavored to do in this Addendum with its modifications and explanations of what appears in the Discussion Paper.

I consider also, however, that it is fair to record in this context that in the course of the discussions at the recent meetings with Band representatives referred to, it was stated by one of them as a basis for possible reconciliation of these matters, that the Band is prepared to negotiate a basis for its adhesion to Treaty 8. He summarized his possible approach as being a readiness by the Band, without abandoning its basic position with respect to native title, to consider adhering to the Treaty, if the other parties to the discussion are prepared to agree that the Band should receive compensation for the damage and loss it has suffered to date, and entitlements for the future on a basis which will result in not less than what has been received, or should have been received, by those Indians who did adhere to Treaty 8.

In addition to this general correction and clarification, there are, in accordance with what was pointed out by Band representatives at the meeting on January 6 - 8, a number of specific modifications or corrections which I agree should be made in the text to give effect thereto. As well there are a number of points requiring amendment to correct unintentional inaccuracies or omissions in detail in the statements of the Band's specific positions, or in comments thereon. I have prepared and enclose new pages incorporating these general modifications and specific corrections, to be substituted for the original pages, but in order that the effect thereof may appear in full context, I set out hereunder the specific alterations, preceded in some cases by an explanatory note, or followed by a comment, as to the reasons for or significance of the specific changes. These are as follows:

Page 2:

(a) first para., line 3: delete the words "in accordance with Treaty 8" and substitute "on a basis which would render to the Band no less than the allotment calculated in accordance with Treaty 8".

(b) at the end of the first para., add the following sentences: "Also, two non-contiguous areas are sought as recognized Band lands. These lands are the site of residences of Band members and of cemeteries of Band forebears, and consist of areas of approximately one square mile each on the eastern shores of Bison and Haig Lakes."

(c) sub-para. (a), line 4: insert the word "present" before the words "Oil and Gas Company".

(d) delete the last main para. and substitute the following: "This leaves two known areas of contention. The first is the two large agricultural leases presently held by the Co-op, of which the present membership consists entirely of members of the L'Hirondelle family. The principal lease was issued in 1975 for a term of 25 years. The second matter is Grazing Lease 38048, which was renewed on April 1st, 1985, and on which new developments have taken place since these matters were initially discussed. The Band's position is that this Lease should be dealt with in the same way as suggested below for the other Co-op leases."

The existence of Grazing Lease 38048 was overlooked at the time of my discussion with the Band, and they now ask that it be included.

Page 4: in the first para. under the heading "Third Party Interests", delete the words "does not oppose" in the second line, and substitute "supports".

Page 5: second para., line 1: after the word "their" insert the word "present".

Page 7: para. 2, line 5: delete "1985" and substitute "1986".

Page 8: with respect to the comments in para. 3, the Band wishes that it be noted again that its position is that its entitlement to land is based on aboriginal rights, not Treaty, although they are prepared to negotiate measurement on the basis of the Treaty formula.

Page 9: first full para.: the Band wishes it to be noted that they have set up a system which would give effect to the comments contained here.

Page 17: last para.: the Band points out that they did not intend to indicate that the existing Oil and Gas interests present no problem. This para. should be deleted and the following substituted: "The Band is prepared, with some reluctance, to accept existing interests of Oil and Gas companies, including existing rights of access thereto, as these can be accommodated within the occupancy and use the Band would make of its Reserve. They do not wish, however, to be taken as agreeing in advance to any expansion of actual surface holdings or installations, even if provided for in terms of existing leases: they feel these should be a matter for consultation at the least. It is of course also noted and expected that lease and royalty payments therefor will accrue to the government of Canada for the benefit of the Band after the Reserve is set up."

Page 21: last para.: the Band wishes it to be clear that the modification suggested in the opening sentence of this paragraph does not come from them. The Band feels that it should receive the same entitlement to lease and royalty revenues from lands set aside as its Reserve as other Bands have received.

Page 22: Band representatives have made it clear that in that part of the Discussion Paper dealing with Claim 3 its Position has been misconstrued and in part mis-stated in the opening section, with resultant inconsistencies in the Remarks Section. Basically the thrust of the Band's position, which I regret is not fully comprehended in this part of the original Discussion Paper, is two-fold: that its right to manage the wildlife and protect the environment is based on its unextinguished native title (and in this context is inherent in the relative Treaty provision, although that is but an alternative basis of the Claim); and that although they are prepared to discuss the possibility of a joint Band/Alberta program which would give effect to their aims, the basic claim is unaltered: that this must be a program which recognizes the Band's right to control these matters in its traditional area.

In order to reflect the Band's position thus properly understood, and to give relevance thereto in the Remarks Section, the following revisions in and additions to this portion of the Discussion Paper must be made:

Page 22:

(a) first para.: delete the last sentence.

(b) after the first para. thus amended, insert the following para.: "The Band rests its claim with

respect to wildlife and environmental management rights on the same basis as all other claims - i.e. unextinguished Native Title. Hence it claims the right to control these matters in its traditional lands. Thus the Band envisages a new program which would combine support for those members who continue to pursue the traditional means of livelihood but find their income reduced as a result of development, with the exercise by the Band of control of such activities in its traditional area - a Trappers Support Program, rather than a Trappers Compensation Program."

Pages 24-25: delete the para. at the bottom of p.24 and the top of p.25 and the first full para. on p.25 and substitute the following: "Without prejudice to the question of jurisdiction, or to its assertion that it has the right to a program which gives it control of these matters on the basis of continuing Native Title (or in the alternative on the basis of the Treaty provision) the Band is prepared to discuss with Alberta the setting up of a joint Band-provincial program which will reflect and give effect to these objectives. It is emphasized, however, that there would have to be incorporated, in a joint or any other program, provisions which reflect the fact that support for the continued existence of trapping and hunting as a way of life and not merely compensation for losses resulting from unrestricted development activity is the governing principle of the program, and that the right of the Band to an effective voice in the determination of specific policies and in the resolution of disputes thereunder is a key element in the administration of the program. The Band emphasizes that it does not conceive this as a welfare program applicable to its members generally, but as a program designed to support and make possible the

continued activities of those who do engage in and rely on that lifestyle as their livelihood.

"The Band's basic position remains, whatever be the precise course of discussion or vehicle chosen to implement its rights, that by virtue of its continuing aboriginal title or on the alternative basis of the rights guaranteed to Indians in the Treaty, supported in either case by the guarantee now found in the Constitution, it has the right to protect and manage the wildlife in its traditional area and to a program, whether solely based on these foundations or erected in co-operation with the Province, which gives it the control and protection of its way of life."

Page 30, first full para.: delete the last sentence, and substitute the following: "The Band's contention here is that this does not confer the right on any government, including the Province, to adopt laws, regulations or policies which extinguish the right guaranteed by the Treaty - rather by necessary intendment the reference is to regulations which are consistent with the recognition and continued exercise of that right. In this context it is noted that the Treaty Commissioners themselves emphasized that the Indians raised the question of the continuation of this right, and signed the Treaty only on receipt of 'solemn assurances' that they would 'be as free to hunt and fish as they would be if they never entered into it.'"

Pages 32-37 inclusive: in this portion of the Discussion Paper dealing with the Claim regarding Employment Opportunities and Job Training, it is unfortunately not made clear that the Band is concerned not only with the employment of individual members by developers and contractors working in its traditional area, but equally with the opening of contract and related entrepreneurial activities for tender and opera-

tion by its members or by entities owned or controlled by the Band or its members. It is felt that there are a number of aspects or facets of development activities - such as the clearing and rehabilitation of the land and disposal of timber after entry to mention only one type - in which the Band, or entities to be established by the Band and/or its members, should be able to participate, and be given preference in participation, not simply by having individuals employed by contractors or sub-contractors but also as direct contractors or sub-contractors themselves.

This aspect of their concern was covered by the Band's representatives in their discussions with me, and in my discussions with others concerned, but unfortunately does not emerge in the present wording in many of the passages of this portion of the Paper, although it is mentioned specifically towards the end, in the first paragraph on p.37. I would ask accordingly that the words "employment", "employment opportunites", "job opportunities" and similar expressions be read and interpreted with this clearly in mind wherever they appear throughout this portion of the Discussion Paper.

In addition, there is a specific comment which should be added with respect to the mention of the Individual's Rights Protection Act, as follows:
Page 34:

(a) after the second para., insert the following para.: "In this respect, however, I have since been referred to recent case law including particularly the case of Athabaska Tribal Council v Amoco Canada Petroleum Company Ltd. et al (S.C.C.) [1981] 6 W.W.R. 342. It appears that this may well dispose of the concern with regard to the application or effect of that legislation in this context.

(b) in line 12 of the third para., after the word "problems" insert ", if any,".

Page 36: first full para.: The comment above applies also to the mention of the Individual's Rights Protection Act in this paragraph.

Page 38:

(a) delete the second full para. under the head "General". It is felt that the implications of the opening sentence of this paragraph as stated are very far-reaching and it would perhaps be unfair to the Band to leave it as it stands, while to elaborate in detail upon the implications would be inappropriate, if not impossible, at this stage of the Inquiry.

(b) insert the following new paras. in place of the second para.: "The Band now emphasizes that its claims here, including the claim for lost oil and gas revenues from both the Reserve area and the traditional lands, are based on continuing aboriginal right and title. On this basis it is stated that the claims would include not only lost lease and royalty revenues, but also the actual value of the resources extracted from their lands without their consent. Unfortunately, this aspect of the claim was not made clear to me, or at any rate was not perceived by me in the various earlier meetings I had with the Band and its representatives, so that it was not raised by me in discussion with other parties. Nor of course is it reflected in the following portions of the Discussion Paper

which deal with the claims with respect to Oil and Gas Revenues.

"Since this aspect of the claims was not discussed earlier, it is not possible to do more now than to record the fact of the Band's position with regard thereto and to ask all concerned to note it for future discussion. I do not consider, however, that it alters the statement or discussion of the Band's claims with respect to the lease and royalty component of oil and gas revenues, and those portions of the Discussion Paper accordingly stand basically unaltered, although with textual amendments as noted immediately hereunder to reflect specific modifications which the Band feels should be made so as more accurately to set out its position in detail."

Page 39:

(a) line 1: delete the word "initial".

(b) line 6: delete the full sentence beginning "Even given that the exigencies of the 1939-45 War...".

(c) delete the first full para. and substitute the following: "On this basis, and as an additional or alternative ground to that based on Native Title, the Band claims compensation for the loss of oil and gas rentals and royalties which have accrued with respect to those lands since the commencement of exploration and development. The quantum of this claim is submitted accordingly as the entire amount of such revenues as have in fact been received by Alberta with respect to these

lands, together with interest thereon from the respective dates of receipt."

Page 41: delete the first para. and substitute the following: "This claim is put forward only as part of the alternative basis of the Band's position, and would be pressed only if it be held that the Band and its members no longer have aboriginal rights. In that case, runs the thrust here, the Band is entitled not only to compensation for the extinguishment of its title (which would encompass at least all, if not more than, the claims for damages or compensation discussed here) but also to damages or compensation for non-performance of the Treaty and non-receipt of the benefits which it was supposed to confer.

"In this respect it is the Band's position that it was the obligation of Canada from the outset to locate and identify the various Bands and communities which lived in the Treaty area and to whom its provisions and benefits should apply, and that the existence and presence of the Lubicon Lake Indians as such a Band or community was a fact in 1899 and for generations prior to that time. Hence the claim for these benefits, and for compensation for the non-receipt thereof, commences from 1899, not just from the time when they were in fact identified and promised a Reserve in 1940."

Page 42:

(a) after the first full para. in the "Remarks" section, insert the following para.: "It has been noted that the Band's position is that this claim (which again rests on Treaty entitlement only as an alternative to the claim(s) based on continuing Native Title) dates back to 1899. Without, however,

for a moment presuming or intending to question the validity of that contention, it is a fact of which account should be taken that the Band was recognized as such in 1940 and was then promised a Reserve, which promise has not been fulfilled to this day. Even if it were to be held that there was no obligation until the Band was in fact formally identified and established, the year 1940 would stand as at least the minimum point from which the calculation should commence. The comments which follow are equally applicable whatever be the starting date."

(b) in the present second para. in the "Remarks" section, delete the first sentence and substitute the following: "As to the money payments, which are called for under Paragraphs A and B, apart from the matter of the starting date, the main problem would seem to be in establishing the numbers of those entitled to receive the payments."

(c) delete the present third para. of the "Remarks" section (pp.42 and 43) and substitute the following: "As to the provision of tools called for in Paragraph D, there can be little doubt that, whatever the starting date, the qualification for eligibility for that benefit is met. The same applies to the qualification for eligibility for the provision of farm implements, livestock and seeds in Paragraph E ('elects to take a reserve and cultivate the soil'). The Report of the Indian Agent (August 14, 1939) on his discussion with the Band as to their wishes in this regard shows not only that they wanted the Reserve, but that they wished 'to learn agriculture' for the years ahead. There can

surely be little question, on the basis of their attitude and on the basis of the experience with other bands, that this would have applied whenever this Band had been identified and recognized: they would have wanted then the things to which recognition and establishment as a band entitled them. They would accordingly have been eligible to receive the annual supplies enumerated in that Paragraph from that time forward. It would follow that the failure to receive them is due to the failure by Canada to discharge its obligations, whether arising generally in 1899 or specifically by the agreement of 1940. And since clearly some members would have wished to continue hunting they are entitled to compensation for supplies of ammunition and twine not received annually over the period in question."

Page 43:

(a) in the 5th line from the bottom of the page, delete the phrase "over the 40-year period from 1946" and substitute "over the period in question".

(b) in the 4th line from the bottom, delete the word "this" and substitute "that".

(c) at the bottom of the page, add the following full sentence: "Account should also be taken of the factor of inflation."

Page 44:

(a) delete the second full sentence (commencing at line 5) and substitute the following sentence:

"Although this would be a foreseeable consequence of alleged breach of duty to locate and identify the Band after 1899, and certainly of the failure to carry out the agreement of 1940, its translation into an annual figure for each of the years in the period involved is again a formidable task, calling for detailed mathematical calculation and much expertise in such matters."

(b) after the first full para. insert the following further para.: "Band representatives have emphasized that this claim for compensation for lost Treaty benefits is secondary, and in the alternative, to the claims based on un-extinguished Native Title: the Band's basic and primary position is that its Native Title was not extinguished by the Treaty or subsequently, and that it is entitled to compensation for the damage it has suffered as a consequence of acts done contrary to its rights and interests under that title. It is only if it should ever be held, or agreed, that it cannot or should not maintain its claim on that basis that the claim on the basis of Treaty entitlement would be pursued. It is not the Band's intention to claim both."

(c) after the first para. under sub-head (iii) Programs and Services, insert the following additional para.: "Band spokesmen have expressed the view that this claim is not inconsistent with the claim based on continuing Native Title: they are simply asking for what Canada has apparently always recognized as its responsibility to provide for recognized Indian communities, whether under Treaty or otherwise. To the extent, however, that

it may be held or agreed that the claim is inconsistent with the claim based on Native Title, the Band would not press this claim, except as part of the alternative position if the decision on continuing Native Title should be adverse."

Page 45: line 10: delete "1984" and substitute "1974".

Page 46: delete the first three paras. in the "Remarks" Section and substitute the following: "The Band dates its claims here from the year 1899 on the same basis as previously outlined: that it existed as an identifiable Indian Band or community at that time, and that Canada's obligations in these respects commenced no later than that year. Again, without pre-judging or denigrating that position it can be observed at the outset that if Canada had no earlier obligations to identify and deal with the Band, its obligations surely commenced no later than the year 1940, the year of the specific recognition and promise. Again, the observations which follow are applicable whatever year be determined as the starting point.

"As to the numbers of people entitled to those benefits for the purpose of calculation of the claim, the Band has used the figure of 400 throughout. The recent discussions with Band representatives have clarified the basis on which this figure is submitted. In brief, this is that the genealogical studies referred to earlier support the conclusion that the membership in this community was a large and growing one, possibly as high as 2,500 - 3,000 by 1918, when it was decimated by the 'flu epidemic of 1918-19, which is known to have wiped out up to 90% of communities in that area; that the population has grown gradually since then to the figure of 450 identified by that genealogical study as the present

population; and that accordingly the figure 400 represents a fair average of the population throughout the period.

"This is understood, but it must be observed that the approach raises again the problem of whether the numbers thus found to be members of the 'community' are acceptable as determining the membership of the Band for purposes of calculating entitlement in this context, as it does with respect to the calculation of entitlement to Reserve land discussed earlier. It seems that the questions both of the starting date and the population figures to be used for the calculation of this claim are matters still to be discussed and settled between the Band and Canada."

Page 47:

(a) in first para. line 3: insert the word "should" before the word "have".

(b) lines 6-7: delete the words "whether that be agreed as 1940 or 1946." and substitute "whatever be agreed as the date when that should have taken place."

(c) delete the second para. commencing "There are of course a number of details..." and substitute: "There are a number of other details which require to be discussed and settled. Thus with respect to housing and community infrastructure: although some houses were provided at Little Buffalo under a provincial housing scheme, this was protested by the Band, as was the case with the roads which were laid down by Alberta in that community. The Band maintains that the houses were in any event never properly finished, and that what was done by

the Province was in contravention of, and as part of an effort to undermine, the Band's position that it had Native Title to this area, and that no credit should be given for the costs of such buidings or installations, certainly not at the expense of the Band's claims against Canada in this respect. And while Canada has provided some housing and community buildings, I understand that this was not done until 1980-81 and that the substantial majority of members of the community still require housing assistance. There is clearly a deficit here in what has been provided by Canada in the way of housing, community buildings and infrastructure as compared to what has normally been provided to Indian Bands, which supports the Band's claim and calls for discussion in detail."

Page 48:

(a) lines 1 and 2: delete the words "from 1946 to the present had the Band been established on its Reserve," and substitute "from the time when the Band should have been identified and commenced receipt of these benefits,"

(b) after the end of the para. at the top of this page (presently line 8) insert the following para.: "Account should also be taken of the Band's contention that not only is there a substantial deficit in the receipt of social services by actual Band members in terms of the commencement date and the quantum of such programs as were received, but that a large proportion of members of the community have never been on the official Band list and have never received any such benefits. The problem to

be addressed here seems in part at any rate to be of the same nature as that involved in determining the numbers of those to be counted for the purpose of establishing the area of Reserve entitlement."

Page 49: line 12: correct the typographical error in the word which should be "eliminated".

Page 54, line 7 of the last para.: delete the words "was to be" and substitute "has been".

Page 55:

(a) delete the first and second full paras. and substitute the following para.: "I shall accordingly confine my comment on this point to two observations which I believe are in order and are relevant. The first is that it is far from certain what would be the outcome of litigating the question: there are powerful arguments to be made on both sides. The other is that whatever might be the outcome, there is no doubt that the process of pursuing it through the Courts in the ordinary way in the various actions now outstanding would be very lengthy and exceedingly costly, with results equally crushing to the loser, whichever side that might be. I hope therefore that the parties will find it possible, and acceptable, to enter into serious and meaningful discussion of a solution of this claim - and others where the same question is involved - on a basis which will recognize and give effect to the equities and practicalities of the situation, leaving in abeyance the question of strict rectitude of either legal position, in order to produce an answer with which all can live."

(b) present third full para.: delete the first sentence and that portion of the second sentence ending with the words "on this ground" and substitute the following: "This brings us logically to a consideration of what may be the rights and obligations created by the Treaty in the context of this situation. It is true that the Band does not rest its claim here on Treaty entitlement except as an alternative and last resort,"

Pages 57-58: delete the sentence commencing with the words "They must do so" two lines from the bottom of page 57 and continuing on the first two lines at the top of page 58 and substitute the following: "There is disagreement as to whether the Province has jurisdiction, and/or as to the extent of that jurisdiction, to diminish the rights secured by Treaty read in conjunction with sec.88 of the Indian Act, but it is noted that the Courts have recently tended to interpret this question in favour of the Indians. In any event"

Page 58, line 10 of the first full para.: after the words "on the basis" insert the words "of unextinguished Native Title or alternatively".

Page 60:

(a) in the first para. at lines 6-8, delete the sentence commencing "Alternatively, the Band claims" and substitute the following: "The Band claims these revenues as the measure of damages or compensation owing for the failure to protect its interests under that title."

(b) second para. line 11: delete "$90 - $100,000,000.00" and subsitute $700,000,000.00 - $1,000,000,000.00.

(c) delete lines 14-16 inclusive and substitute: "to protect, and was negligent and in breach of its fiduciary duty in not protecting, the Band's Native Title to the area and its interests thereunder."

(d) add the following para. under the heading "Band's Position": "Reference should also be made here to the Band's further position, of which I have only recently been fully apprised, that by virtue of its continuing Native Title it has a claim to damages for the results of the intrusions it has suffered and the consequent disruption and destruction of its way of life. The claim might be in the nature of, or comprehend, an action in trespass, and would include as parties the governments which permitted or authorized that wrong, and one measure of the damages would be the revenues realized as a result. This claim, of which I have only recently become aware, is more fully discussed in a new portion of this Discussion Paper to be inserted after page 67."

(e) delete the two paras. under the heading "Position of Canada" and substitute the following: "Canada does not accept liability for payment under any aspect of the claim put forward as against it. Canada's position is that Native Title was extinguished by the Treaty, whether or not the Band adhered thereto, so that there was no negligence or breach of fiduciary duty in permitting Alberta to authorize development of the resources and retain the revenues. This same position would be

put as the answer to any claim for these revenues based on trespass, or having authorized or permitted a trespass.

"It should be noted, however, that Canada does appear ready to support the Band's claim to reasonable compensation for the actual loss of livelihood and to a program for rehabilitation and protection of wildlife to support that way of life in the future."

Page 61:

(a) add the following sentence at the end of the first para.: "Alberta would also reject any claim for damages based on trespass or permitting trespass and disruption, although Alberta also has indicated a readiness to discuss a "model management program" designed to rehabilitate and preserve stocks of wildlife and control the environment."

Pages 61, 61A and 62: for reasons discussed at the outset, it is desirable to re-cast entirely the "Remarks" section commencing on page 61. Accordingly all the text under that heading should be deleted and the following substituted:

"In my initial discussions with Band representatives it was not clear to me (if indeed it was advanced at all) that the claim here included the value of the oil and gas extracted to date, as well as the lease and royalty revenues derived therefrom by government. I regret if this was a misunderstanding on my part, or a failure to appreciate that, since the Court actions include the Oil and Gas Companies as defendants, this aspect of the claim should have been addressed in my discussions. The result has been that I did

not raise this aspect of the matter in my discussions with the Oil and Gas Companies (Third Party Interests) referred to in earlier portions of this Paper - or indeed with the representatives of either Government. As a result, I am not able to state with certainty what position they take in response.

"On the basis of the facts, however, and what is known of their response to the Band's basic position that it has continuing Native Title, I would assume that all other parties concerned would deny liability to the Band with respect to that portion of this claim relating to the value of the oil and gas extracted from the traditional area, as they have done with respect to the lease and royalty revenues resulting from that development. That is, all concerned will deny any liability to the Band on the basis that it had continuing Native Title to this area, or that there is liability in trespass or otherwise for entry (or authorizing or allowing entry) for development with resultant disruption of the traditional way of life.

"In searching for a route to possible adjustment or reconciliation of differences in this sub-head of Claim, it is difficult to find an alternative approach as was suggested with respect to the previous sub-head (Compensation for Loss of Livelihood from Trapping and Hunting). There, the continued right of Indian people to derive their livelihood from those pursuits was expressly recognized by both Governments, whatever may have been the situation with respect to Native Title, and a review of the relevant considerations seems to support the view that it would be equitable that Alberta, as the Government which derived the revenues from oil and gas development, should compensate the Band for the consequences thereof in the diminution of the livelihood derived from that right. These considerations do not apply, however, to

the Band's claim to oil and gas rights in the traditional area, which were not so assured to them and on which they had not previously relied for their living. Nor is there here the same alternative foundation for the claim to compensation for oil and gas revenues not received as there is with respect to those derived from the Reserve area: in that case, the Band's case rests upon the alternative position that it should have been recognized and established on a Reserve shortly after 1899, and that in any event it had been specifically promised the area in question as a Reserve in 1940 and would have enjoyed those revenues but for the non-fulfillment of that promise.

"I am, therefore, unable at this time to suggest any specific compromise or adjustment which might reconcile the differences between the parties in respect of this particular sub-head of Claim. Perhaps I may be permitted, however, to point out that if the considerations I have put forward in previous sections of this Paper in fact lead to acceptance of the accommodations there suggested with respect to the claims for past losses of oil and gas revenues on Reserve land, of Treaty benefits, programs and services, and of loss of revenues from hunting and trapping, then the Band will in fact receive substantial sums by way of compensation. It may be, then, that a generous recognition and satisfactory resolution of those claims, and of others such as Wildlife Management and Employment Opportunities where the problem seems more one of respect and accommodation for the interest concerned rather than payment of money, would conduce to some readiness to compromise with respect to the maintenance of this claim."

Page 62, Claim 6, sub-head (a): delete the present wording of this sub-head and substitute "Hunting and Trapping Livelihood and Revenues".

This change should also be made on pages 63, 64 and 65.

Page 63: delete para. 3 and subsitute: "The Band would be glad to discuss this matter with provincial authorities, although it believes that significant modifications to increase the scope and change the administration of any existing provincial program would have to be made to enable it fully to meet the needs and rights of its members. The Band asks, however, as a necessary preliminary to any such discussion, that its claim here, and with regard to hunting, be accepting in principle, and expects to receive the support of Canada in this matter."

Page 65:

(a) first full para.: delete the words "Compensation Program" in the second last line and substitute "Program".

(b) third full para., 5th line from the end: delete "Trappers Compensation Program" and substitute "the new or modified program set up for that purpose".

Page 66: delete the first 2 paras. under the heading "Band's Position" and substitute the following: "Although the wording of the document 'Points for Discussion' referred to at the outset of this Paper is sufficiently broad to include a claim for compensation to the Band for the value of oil and gas revenues and royalties to be derived from the traditional area in the future, Band representatives have now made clear the position that such a claim, based as it would be on continuing Native Title, would terminate with a satisfactory resolution of the other matters in dispute leading to overall settlement and particularly its settlement

on its Reserve. (Oil and gas revenues from selected Reserve lands would of course accrue to the Band under the arrangements previously discussed.)"

Pages 66-69 incl.: delete the entire text on these pages following the new para. above on page 66, and substitute the following:

" Remarks - Including Areas of Possible Reconciliation or Accomodation

"In light of the above statement of the Band's position, it is not necessary to add anything further under this sub-head of Claim, except the comment that it emphasizes the desirability and importance of a satisfactory solution of the Band's claims generally, and the necessity of an approach on the part of all concerned to perceive and appreciate the deep-rooted and understandable apprehensions of the Band concerning its future unless it receives long-delayed and adequate adjustments and compensation for the neglect and injuries it has suffered, and on the part of the Band for the concern of Goverments for their overall constitutional and other responsibilities to all the citizens to whom they must account. I am sure that the the two Governments, and especially Alberta, will appreciate the significance of the possible termination of this substantial claim, and that there will be sincere efforts by all concerned to appreciate the positions and needs of the others and to explore every possibility of reconciliation and accommodation so as to bring about the all-embracing settlement desired."

After new page 66, insert the following new material, as pages 67ff.:

"Claim 6.1 COMPENSATION FOR TRESPASS, WASTE, and DESTRUCTION of CULTURE and LIFESTYLE

"Band's Position

"An avenue of claim advanced by the Band comprises damages for trespass and waste by others, under the auspices of the federal and provincial governments, of the Band's traditional lands and way of life. This claim includes compensation for damage to and loss of the aboriginal culture and lifestyle (as opposed or in addition to loss of income from the aboriginal means of livelihood such as hunting and fishing) consequent upon the entry and activities of non-aboriginal entities on the Band's traditional lands. Damages are claimed here to the extent that they can be quantified.

"The Band holds that aboriginal rights include the right to maintain and carry on the traditional Indian way of life. Alternatively, that right is included among Treaty rights.

"This claim is directly referrable to the invasion of the Band's traditional lands by non-native outsiders in the latters' endeavours to exploit and develop surface and sub-surface natural resources in that area. The compensation sought here can be described as "damages for negative effects on aboriginal people and destruction of aboriginal way of life, including interference with use of the [traditional] land[s], traditional activities, hunting and trapping, access to all of the traditional land, interference with burial sites, traditional practices and ties to the land, culture and traditions" of the Band community. The Band points to destruction of wildlife and the environment in its traditional lands as the waste which it says resulted

from these outsiders' unwelcomed activities such as road building, cutting of lines, and construction of pipelines, wells and other projects in that area.

"Alberta's Position

"This particular claim topic was not discussed with Alberta, apart from the discussions referred to above in respect of compensation for Past, and for Future, Losses.

"Canada's Position

"This claim was not addressed in my discussions with Canada's representatives, other than those noted above in the sections on Compensation for Past, and for Future, Losses and below, in Claims 7 and 8(a).

"Remarks - Including Areas of Possible Reconciliation or Accomodation

"This aspect of the Band's claim was not specifically noted in my earlier discussions with the Band. It has, however, been forwarded by Band representatives in our January, 1986 exchange, and accordingly draws my following observations.

"Firstly, although this claim may be thought in some quarters as too theoretical or as a duplication of compensation claims set out elsewhere, the Band does recognize that money damages under this heading are possible only insofar as quantum can be determined - the Band's primary position is that interference with aboriginal rights, treaty rights, or independent hunting and trapping rights [under Section 12 of the Natural Resources Transfer Agreement] causes damages which are irreparable.

"Secondly, that portion of the instant claim referring to damages for trespass and waste appears to be in reference to aboriginal title to the affected land as well as, by analogy, to the rights of hunting and lifestyle dependent upon the land. Aboriginal title has not been satisfactorily defined by the courts - rather it retains, to date, the judicial characterization of an "usufructuary right". Whether that characterization will be assisted by further court pronouncement and whether aboriginal title will be held in law to sustain an action for common law waste and trespass damages are not matters immediate to this Inquiry. At a minimum, however, description of this claim heading provides a fuller understanding of the Band's central concerns.

"Further, the reference under this heading to the damages claim for loss of lifestyle/way of life/culture is also made without benefit of specific discussion by me with either government. This part of the claim is easily distinguished from the claim for compensation for loss of income or loss of production from hunting, fishing and gathering efforts. "However, I do not see in law precedent for compensation specifically addressing loss of lifestyle or culture due to technological change or social interaction between member groups of a political unit or, indeed, of the international human community. It appears that this aspect of claim is based on the premise that common law damages flow from what the common law would regard as normal and usual social and technological exchange and development. I do not know, without further discussion with the Band and the two governments, on what basis common ground can be had unless this claim heading is in effect identified with other measures which I hope it may be agreed will be taken to preserve the environment and natural resources of the Band's traditional lands on which the claimants and their forebears have so long depended.

"In this context the following further comments may be relevant. It is unfortunate but nevertheless a fact that change in lifestyle has historically been the apparently inevitable consequence to a native culture of the arrival and advancement of the white man's civilization and economy, although I am not aware of any legal basis upon which monetary damages have been assessed and awarded for that consequence apart from the demonstrable economic losses flowing from the interference with native right and title. Indeed, Band representatives have themselves alluded to the possibility that future generations may well prefer - or at any rate decide - to follow that other lifestyle with its new economic opportunities. These facts seem to emphasize the desirability of generous attitudes towards acceptance of claims such as those for compensation for programs and services not received in the past (which might have eased the disruption), for employment opportunities and job training programs, and for a full and generous "catch-up" program to establish the Band upon its Reserve and bring it the benefits of educational and other services and programs which will assist the members of this community to recover from the severe dislocations and disadvantages to which they have undoubtedly been subjected and to adjust to the future problems which the continuance of development undoubtedly poses for them."

Page 70, last 4 lines: delete the comma after the word "Inquiry" and replace it with a full stop; delete all further words in those four lines and replace them with the following sentence: "The Band acknowledges receipt of funds recently to apply on the loan and interest expense, and is prepared of course to provide details of all its costs and expenses to date in pursuing its claim, showing the balance owing after giving credit for such monies as it has received."

Page 83: correct the typographical error in the first word of the indented para., which should read "Wildlife".

Pages 83-85: delete all that portion from the commencement of the paragraph opening with the words "Two observations may be made here" on page 83 to and including the para. ending "to reflect the realities above outlined." on page 85, and substitute the following: "This raises once again the question of whose is, or will be, the authoritiy to control and manage these matters in this area. The Band's position is as set out under Claim 3 above: that as part of the settlement of all these matters it should be recognized that it has the authority to manage the wildlife resource and protect the environment in its traditional area in order to ensure that those members who depend on hunting and trapping for their livelihood will be assured of the wildlife stocks to make that right a practical reality, and that this must be reflected in a program set up to give effect thereto.

"The Band has indicated a willingness to discuss with Alberta the setting up and implementation of such a program giving the Band effective control and decision-making authority. Alberta, while maintaining that it has constitutional jurisdiction in this field, has expressed a willingness to consider and discuss the setting up of a "model management program" which will recognize and protect the Band's interests and concerns in this area. It is noted that the regulation-making power contemplated in the provision above set out is subject to the introductory words of Cl.4 of the proposed Band Constitution which governs all the policies and by-laws within the scope of that Clause - that is, that they shall be 'not inconsistent with the Canadian Constitution'. I can only express the hope accordingly, that in those discussions especially - although also in all discussions which follow hereafter - the parties will have due regard to the consider-

ations and objectives outlined earlier on pages 22 - 31 so that they may reach the haven of an agreement which reflects and carries into effect the desired aims without foundering on the rock of rigid positions on exclusive constitutional or legal authority.

"And I hope I may be permitted to suggest also that the Band's representatives might consider holding in abeyance their position on the formality of the wording of the provision under discussion here, until it is seen whether some modification is indicated to reflect in legislative form the substance and reality of the program as actually agreed."

Page 88: change the dateline to read: "DATED AND DELIVERED the 7th day of February, 1986."

VANCOUVER, B.C.
7TH FEBRUARY, 1986

Hon. ~~E.D.~~ Fulton, P.C., Q.C.

Vol: 3

To
Hon. Prime Minister
Brian Mulroney
House of Commons
Ottawa
Ontario
Canada

c Hon. D.Crombie
Minister of Indian
Affairs
Ottawa
Ont. K1A OH4
Canada

c Hon. M.Pahl
Minister of Native
Affairs
The Legislature Bldg.
Edmonton/Alberta
Canada

PETITION ON THE LUBICON LAKE SITUATION

Whereas The Lubicon Lake Indian people in Northern Alberta have never ceded their traditional lands and therefore retain unextinguished aboginal land rights thereto;

And whereas The Alberta Provincial Government and dozens of oil companies have undertaken a massive campaign to undermine and subvert the aboriginal land rights of the Lubicon Lake Indians, so that they might have unrestricted access to the valuable gas and oil resources which those lands are now known to contain;

And whereas The massive campaign undertaken by the Alberta Provincial Government and the oil companies to undermine and subvert the aboriginal land rights of the Lubicon Lake Indians has included the deliberate and systematic destruction of the Band's traditional lands, traditional economy and traditional way of life;

And whereas The deliberate and systematic destruction of the Band's traditional lands, traditional economy and traditional way of life has now reached the point where the very survival of the Band as a society of aboriginal people is in serious jeopardy;

Now therefore The undersigned citizens of West Germany ~~demand~~ Elsewhere demand that the Canadian Government immediately take any and all action necessary to ensure that the Lubicon Lake Indians are protected from further abuse, and to ensure that the aboriginal land rights are properly recognized and respected.

Name	Adress	Signature
[redacted]		
Joe Ryan	814 NE 40 Seattle WA USA	Joe Ryan
Volker Hustedt	Am Waldschlösschen 40, D-4500 Osnabrück	Volker Hustedt
Joanna K Carino	Cordillera Peoples Alliance, Northern Philippines	
Hans	P.O Box 9841 Homeland Missionary	Holland
Marco Colace	via Baldo degli Ubaldi 190 00167 - Roma - Italia	Marco Colace
Marco Bisiani	via Monte Ripoli TIVOLI (Roma) ITALY	Marco Bisiani
Maria Ilde Bisiani	via Massimi 146 Roma	
Giuseppe FURNO	Via Massimi 146 Roma	Giuseppe Furno
Vittorio Consiglio	via Valsolda 129, Roma, ITALY	Vittorio Consiglio
Cristina Rompa	via Nomentana Rome ITALY	

EXTERNAL AFFAIRS

AFFAIRES EXTÉRIEURES

TO / À: The Under-Secretary of State for External Affairs OTTAWA (IMU)

FROM / De: The Permanent Mission of Canada GENEVA

REFERENCE / Référence: Our Letter 4977 of July 16, 1985

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

SECURITY / Sécurité: RESTRICTED

DATE: October 3, 1985

NUMBER / Numéro: 6916

FILE / DOSSER
OTTAWA
MISSION: 45-13-2-Lubican Band

ENCLOSURES / Annexes

DISTRIBUTION

By Ottawa:

Justice/Low
SISS

... Attached is a Note dated September 24, 1985 from the Centre for Human Rights (G/50 215/51 CANA (38) - 167/1984), conveying a copy of the revised submission of Mr. Ominayak's counsel. As indicated, the revision merely reflects typographical and other technical corrections to the material conveyed to you under cover of our July 16 letter.

The Permanent Mission

000668

Ext. 407B/Bil.

OFFICE DES NATIONS UNIES A GENÈVE

CENTRE POUR LES DROITS DE L'HOMME

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

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 refer to its note of 12 July 1985 (G/SO 215/51 CANA (38) - 167/1984) by which it transmitted to the Permanent Mission copies of the comments, dated 8 July 1985, of Chief Bernard Ominayak on the State party's submission of 31 May 1985 on the question of admissibility of communication No.167/1984, which he has submitted to the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights on behalf of the Lubicon Lake Band.

By letter of 31 July 1985, the legal representative of Bernard Ominayak submitted a "revised version" of the comments of 8 July 1985.

The Secretariat has ascertained that the "revised version" does not change the substance of the comments earlier received and transmitted to the Permanent Mission, but mainly corrects typographical errors and adds some missing sub-headings to the earlier version.

..... For the record, copies of the "revised version" are enclosed
..... herewith, together with a copy of a Note for the File, by which the Secretariat draws the attention of the Committee to the corrections made. For the convenience of the State party, the Secretariat also
..... encloses copies of the original comments with the corrections inserted by hand (by the Secretariat).

24 September 1985

VAN NESS, FELDMAN, SUTCLIFFE & CURTIS
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D. ERIC HULTMAN
HOWARD ELIOT SHAPIRO
OF COUNSEL

July 31, 1985

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

RE: Communication No. 167/1984

Dear Mr. Moller:

I am transmitting to you a revised version of Bernard Ominayak's comments on the May 31, 1985 response of the Federal Government of Canada to Communication No. 167/1984.

Due to the very short deadline under which we were operating, the comments sent to you on July 8, 1985 contain some typographical errors. These errors have been corrected in the enclosed version.

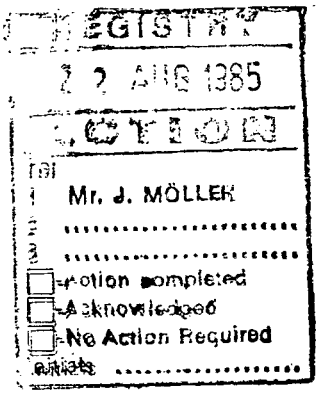
My apologies for any inconvenience. As always, we are most grateful for your kind assistance.

Respectfully yours,

Jessica S. Lefevre

Jessica S. Lefevre

Enclosure



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

I. Summary

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

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

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

II. Admissibility of the Lubicon Lake Band's Communications

A. Whether domestic remedies have been exhausted

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

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

The Band and its members depend for their survival, subsistence and way of life on the wildlife resources of their traditional hunting/trapping territory. The massive and intensive energy resource development in the Band's traditional territory, carried on despite the institution and conduct of court proceedings respecting aboriginal rights (or alternatively treaty rights), threatened the survival, livelihood and way of life of the Lubicon Lake People. While the legal debate continued, energy exploration and development progressed on an ever accelerated basis. The scale and pace of this development forced the Lubicon Lake Band to pursue interim injunction proceedings in an attempt to protect its very means of subsistence -- i.e., its traditional economy. Without the preservation of the status quo, a final judgment on the merits, even if favorable to the Band, would be rendered ineffectual.

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

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

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

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

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

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

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

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

1. The Caveat Litigation

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

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

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

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

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

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

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

[footnote continued next page]

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

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

[footnote continued from previous page]

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

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

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

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

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

3. Criteria for an interim injunction

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

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

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

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

4. Proceedings on the merits

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

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

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

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

5. The scope of aboriginal and treaty rights

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

B. Additional Remedies

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

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

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

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

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

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

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

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

C. Right Of Self-Determination

1. Question of Genocide

The Government of Canada raises a preliminary point with regard to the question of genocide, which will be addressed here. In its Supplementary Communication of March 27, 1985, page 8, the Lubicon Lake Band stated that "at the very least, cultural, if not physical genocide is successfully being practiced upon the Crees of Lubicon Lake with the concurrence and complicity of the Federal Government of Canada."6/

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

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

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6/ See also, discussion below, p. 27.

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

> A culture's destruction is not a trifling matter. A healthy culture is

[footnote continued next page]

the facts set out in the Band's original submission provide a sound basis for arguing that the Provincial Government and the energy corporations, which are its lessees, have attempted to impose conditions of life upon the Band calculated to bring about its destruction. They have acted with a clear intent to destroy both the Band's means of physical subsistence and the cultural base which binds it as a group, and to thereby provide themselves unfettered access to the Band's territory and the oil and gas it contains. With full knowlege that these actions were bringing about the rapid and thorough destruction of the Band's economic and cultural base, Canada has refused to

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> all-encompassing of human lives . . . If people suddenly lose their "primary symbol," the basis of culture, their lives lose meaning. They become disoriented, with no hope. . . The loss and human suffering for those whose culture has been healthy and is suddenly attacked and disintegrated are incalculable.
>
> One should not speak lightly of "cultural genocide" as if it were a fanciful invention. The consequence in real life is far too grim to speak of cultural genocide as if it were a rhetorical device to beat the drums for "human rights." The cultural mode of group extermination is genocide, a crime. Nor should "cultural genocide" be used in the game: "Which is more horrible, to kill and torture; or, remove the reason and will to live?" Both are horrible.

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

intervene on behalf of these people, as is required by its trust responsibility and as it promised to do 45 years ago when it informed the people of Lubicon Lake that a reserve would be set aside for their benefit. It is arguable that this gross negligence on the part of the Federal Government of Canada should constitute a basis for holding it responsible, under international jurisdiction, for the genocidal (or at a minimum, ethnocidal) actions of one of its provinces.

2. Incompatibility Ratione Personae

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

The Lubicon Lake Band is an indigenous, self-identified, relatively autonomous, socio-cultural and economic group. Moreover, the Federal Government of Canada has recognized, through treaty negotiations and the creation of a fiduciary relationship, that indigenous peoples are unique, and in certain respects, separate from other groups within Canada. Therefore, the Lubicon Lake Band respectfully submits that, by

virtue of its status as a centuries-old, self-sufficient (until recently) indigenous people, which has occupied its territory since time immemorial, it is deserving of the respect for and the rights of a "people" represented by the principles contained in Article 1 of the International Covenant on Civil and Political Rights. In particular, it is deserving of the right of self-determination so that it may "freely pursue [its] economic, social and cultural development." Of even greater importance at this point in time, it deserves not to "be deprived of its own means of subsistence."

Canada's argument that the Lubicon Lake Band is only one of 582 Indian Bands in Canada and a sub-group of the Canadian Cree Indians, as well as its argument that the Lubicon Lake territory is claimed by several Native communities, is irrelevant to the claim submitted here. First, a group's size should not be allowed to serve as a basis for depriving it of its means of existence. Secondly, the multiple claims in the Lubicon territory have arisen as a result of the fact that the Native communities have been forced from their traditional territories into much smaller areas of land. Furthermore, the Native peoples involved here are willing to cooperate in a settlement. Finally, the Canadian Government should not be allowed to use its inability to resolve these claims as an excuse for its failure to protect the Lubicon People from decimation. For the same reasons, its argument that a ruling

by the Committee in favor of the Band could be detrimental to other claimants within the territory should be given no merit. The Band does not request that the Committee issue a determination as to its territorial rights. Rather, it asks only that the Committee assist it in attempting to convince the Government of Canada that the Band's existence is seriously threatened and that Canada is responsible for the current state of affairs and for their correction.

3. Collective Rights Under the Optional Protocol[8/]

The Government of Canada argues that communications under the Optional Protocol may only be submitted by individuals and may relate only to violations of

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

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

individual rights. Two responses to this argument are available. First, groups are clearly composed of individuals. In the present context, an attempt to maintain a distinction between the two is meaningless. If individuals are deprived of their means of subsistence, the group will perish as a physical entity; if individuals are deprived of their ability to pursue economic, social and cultural development, the group will perish as a cultural entity.

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

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

This Comment, as well as the other points of Canada's argument here, appear to provide more support for the proposition that the Committee should enforce the "collective" rights enumerated in Article 1 of the Covenant than they do for the proposition that the Committee should determine that these rights are outside of its jurisdiction. In particular, if, as Canada argues, the Committee is mandated to protect individual rights, and if the realization of the right of

self-determination is "an essential condition for the effective guarantee and observance of" these rights, then the Committee would be very seriously hampered in its duties if it were unable to consider questions relating to the right of self-determination.

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

D. <u>Misrepresentations</u>

The Government of Canada suggests that the Committee should dismiss the Band's Communications on the basis of alleged misrepresentations made by the Band. In its

Communications to the Committee, the Lubicon Lake Band has attempted to state the facts of this case as accurately as possible. It is the Band's position that these facts demonstrate a miscarriage of justice so gross and inexcusable that even the slightest exaggeration on the part of the Band would be superfluous.

1. Dismissal of the Band's Application for Interim Injunction

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

2. Denial of Leave to Appeal by the Supreme Court of Canada

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

Furthermore, Canada is incorrect in its assertion that the issues of constitutionality and equality were not before the Supreme Court of Canada. These issues were placed directly before the courts in the Band's written submissions and they were strongly argued in oral argument. In the first application, applicants specifically submitted that it is of considerable importance that the Supreme Court of Canada determine whether any special or different considerations apply when interim injuctive relief is sought on the basis of constitutional rights or Indian title by Aboriginal Peoples (par. 19, p. 102 of the first application). Moreover, among the grounds on which the first application was based were the scope: of Indian title, of existing aboriginal and treaty rights within the meaning of section 35 of the Constitution Act, 1982, and of rights of Indians under the Alberta Natural Resources Transfer Agreement (Constitution Act, 1930) - first application, p. 30.

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

3. Impartiality of the Canadian Courts

The Government of Canada describes the Band's stated concern over the impartiality of the Canadian Courts as "totally unfounded", without ever addressing the clear-cut basis of the Band's concern. The Band's stated concern, which the Band continues to assert, is that "...it is difficult to believe that the court could be truly impartial given the extremely large sums of money to be gained by the Province and the energy corporations...and taking into account the close business and personal relationships that exist among the corporations, Provincial officials and members of the court". The Government of Canada does not and cannot deny the extremely large sums of money to be gained by the various involved parties, nor do they nor can they deny the close business and personal relationships that exist among the corporations, Provincial officials and members of the court. Rather they chose to simply assert, in spite of these well known facts,

that representatives of Government and the judiciary "...have a long history of performing their tasks with integrity and honesty."

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

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

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

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

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

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

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

4. The Charge of Genocide

The Government of Canada denies as "completely unfounded" the allegation that "...cultural if not physical genocide is successfully being practiced upon the Cree of Lubicon Lake with the concurrence and complicity of the Federal

Government of Canada." This denial totally ignores considerable evidence in support of this allegation which the Government of Canada has not, does not and cannot deny, including:

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

> "There is a very great risk that if development activity, particularly gas and oil exploration, drilling and development, increases...in the traditional hunting/trapping territory of the Crees of Lubicon Lake, the result of the continuation of such activities will be the destruction of the society, culture, traditions and way of life of the Crees of Lubicon Lake and the destruction of their economic base."

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

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

> (in the hands of the Government of Canada)...and... disastrous consequences can be avoided only by...immediate (Federal Government) action."

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

> "I must point out, that within the last few months, the Band's situation has become progressively worse. As a result of industrial development in the Lubicon region, the autumn harvest was negligible. The threat to the Band's traditional lifestyle is even more pronounced. If this Band is to survive as a group and to preserve its identity, a reserve is desperately needed."

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

> "We wish to report that we found the well documented allegations presented to us are substantially correct. In the short time we were there, the violation of human rights became apparent to us. The traditional economy, which we believe was intact a few years ago, is in a state of ruin. The trust and confidence in the social structure of the Band and in the elders is being severely tried. Everyone is very confused about the sudden lack of control over their lives. Unity amongst the people is being threatened from without. We found that the traditional lifestyle of the Lubicon Lake Cree is in serious jeopardy in light of rapid

> encroachment of oil and gas development, all without the people's consent. Traditional hunting and trapping trails are criss-crossed by private oil company roads protected by gates and no trespassing signs. We found ourselves subjected to the harassment that Band members say happens to them continually...we wish to stress that the legal responsibility for the Lubicon Lake Band lies squarely with the Federal Government by virtue of the BNA Act and the (Canadian) constitution. We urge it to immediately begin serious negotiations with the Band to ensure that their traditional and aboriginal rights are respected and to provide the necessary funding so that lack of financial resources does not remain a barrier to the Band pursuing its legitimate rights through the legal system." (Emphasis added.)

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

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

f. an editorial which appeared in the April 13, 1984, edition of the Edmonton Journal which reads, in part:

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

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

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

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

> "This letter is to draw your attention to the situation of the Lubicon Lake Band which causes deep resentment and anger to this unit. It is a story of political neglect and bureaucratic deceit extending back for more than 40 years. While the Provincial Government of Alberta may be the major culprit, the past actions of the Federal Government and its officials can justifiably be termed irresponsible, unfair, uncaring and at times even fraudulent, as personnel of the Department of Indian Affairs have

> in retrospect admitted...In light of the dreadful and unjust treatment that the Band has received, it is not too strong a statement to say that the consequences are genocidal...A reserve is essential for the Band's survival. The oil companies are only doing what the Government of Alberta permits and it (the Government of Alberta) is motivated by the desire for gas and oil royalties. We are sure that you will agree that, under the Canadian constitution, it is the responsibility of the Federal Government to look after the Indians."

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

> "Although both Federal and Provincial Governments have been told about the growing danger to the Lubicon people, industrial development continues with no attempt to provide the Lubicon people with an adequate land base. That being the case, I can only conclude that the destruction of their economy and the devastation of their way of life is deliberate. Unless this process is reversed, the end result will be the death of the Lubicon Indians as a people."
> (Emphasis added.)

167/1984 OMINAYAK (CANA) 23.9.1985

Note for the file

(to be inserted in member files)

Rule 91 decision was adopted by the Working Group of the Committee's 23rd session. The State party's submission under rule 91 is dated 31 May 1985. The text of the author's comments, is dated 8 July 1985.

By letter of 31 July 1985 the author submits minor corrections to its prior submission. Besides correcting a number of typrographical errors on pages 3, 18, 20, 23, 24, 25 and 28 of the text, the author makes the follwoing additions to the text as reproduced in the original English language version:

page 16: add "p.27" to footnote 6/

page 23: before the first paragraph, add the sub-heading:
"1. Dismissal of the Band's Application for Interim Injunction"

page 23: before the second paragraph add the sub-heading:
"2. Denial of Leave to Appeal by the Supreme Court of Canada"

page 24: before the last paragraph, numbered 3, add the sub-heading:
"3. Impartiality of the Canadian courts"

page 27: before the third paragraph, numbered 4, add
"4. The Charge of Genocide"

page 30: before the second paragraph of the first newspaper quotation, add the sub-heading:
"f. an editorial which appeared in the April 13, 1984, edition of the Edmonton Journal which reads, in part:"

pages 30-31: sub-paragraph f becomes g
" g " h
" h " i

Corrections inserted by Maud/HPM

Author's comments under rule 91, dated 8 July 1985

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

I. Summary

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

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

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

II. Admissibility of the Lubicon Lake Band's Communications

A. Whether domestic remedies have been exhausted.

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

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

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

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

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

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

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

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

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

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

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

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

1. The Caveat Litigation

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

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

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

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

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

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

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

[footnote continued next page]

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

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

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

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

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

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

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

3. Criteria for an interim injunction

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

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

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

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

4. Proceedings on the merits

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

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

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

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

5. The scope of aboriginal and treaty rights

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

B. Additional Remedies

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

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

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

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

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

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

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

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

C. Right Of Self-Determination

1. Question of Genocide

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

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From p. 15

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

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

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

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6/ See also, discussion below, p. 27.

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

> A culture's destruction is not a trifling matter. A healthy culture is all-encompassing of human lives . . . If people suddenly lose their "primary symbol," the basis of culture, their lives lose meaning. They become disoriented, with no hope. . . The loss and human suffering for those whose culture has been healthy and is suddenly attacked and disintegrated are incalculable.
>
> One should not speak lightly of "cultural genocide" as if it were a fanciful invention.

[footnote continued next page]

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

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

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

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

2. Incompatibility Ratione Personae

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

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

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

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

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

3. Collective Rights Under the Optional Protocol[8/]

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

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

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

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

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

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

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

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

D. Misrepresentations

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

1. Dismissal of the Band's Application for Interim Injunction

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

2. Denial of Leave to Appeal by The Supreme Court of Canada

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

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

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

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

3. Impartiality of the Canadian Courts

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

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

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

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

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

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

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

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

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

4. The Charge of Genocide

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

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

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

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

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

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

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

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

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

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

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

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

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

f. an editorial which appeared in the April 13, 1984 edition of the Edmonton Journal which reads, in part:

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

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

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

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

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

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

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

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

External Affairs Canada / Affaires extérieures Canada

JLO/C.Swords/6-5507/lmdp

TO/À • JCX (through JLO)

FROM/DE • JLO

REFERENCE • RÉFÉRENCE

SUBJECT • SUJET Lubicon Lake, Self-determination and Property Rights: Letter from JUSTOTT

Security/Sécurité: CONFIDENTIAL

Accession/Référence: 416120.

File/Dossier: 45-Cda-13-1-3-Lubicon Lake Band

Date: Sept. 30, 1985

Number/Numéro: JLO 1378

ENCLOSURES
ANNEXES

DISTRIBUTION

You may recall that JUSTOTT [redacted] We agreed reluctantly in order to get the response in by a deadline. At the same time, we reserved the right to reconsider the argument at the merits stage, if necessary (ie. the Human Rights Committee may rule the complaint inadmissible at the admissibility state). We further requested that the Department of Justice put their position in writing. The result is the attached letter.

not attached.

2. Although we do not find this letter a model of clarity, we think it is arguing essentially that:

(1) [redacted]

(2) [redacted]

(3) [redacted]

3. As to (1) we accept entirely that aboriginal title is not equivalent to fee simple, but question what appears to be the assumption in the letter [redacted]

4. As to (2) we think we need to accept [redacted] This argument is the compelling one.

EXT 407

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5. As to (3) this would require some research and careful thinking to evaluate. The stock answer that [redacted]

6. We would be inclined to provide this letter with a short acknowledgement accepting their concern re [redacted]

Meanwhile someone ought to be allocated to prepare a detailed analysis of this question. This is not an easy task as it would require considerable reading in both domestic and international law. It is a research task that, to be properly executed would take several months, to be minimally accomplished would take a month (it's hard to accurately determine). There are existing Canadian analyses (Doug Sanders - Pro, Leslie Green - Anti) but these are somewhat like the pro and anti-abortion debates - when the converted does the research the results are predictable.

7. In conclusion, unless someone is allocated still to do this analysis for a sufficient period of time, or we provide a contract to someone (not already converted) to do the work, we will be unable to provide current, solid advice. This may be the only possible result, but we felt it important to raise the issue with you.

Philippe Kirsch
Director
Legal Operations
Division

FOUR DIRECTIONS COUNCIL
A NON-GOVERNMENTAL ORGANIZATION IN CONSULTATIVE STATUS (CATEGORY II)

It 9

THE RIGHT OF PEOPLES TO SELF DETERMINATION AND ITS APPLICATION TO PEOPLES UNDER COLONIAL OR ALIEN DOMINATION OR FOREIGN OCCUPATION

B;40.

Unfortunately it is today becoming fashionable to suggest that the problem of colonialism is a matter of history. In the more conservative European press there has even been a marked tendency over the last two years to imply that the practice of colonialism was not or is not such a bad thing; anti-colonialism is popularly equated with everything which threatens western political and economic freedoms and a smug private satisfaction is taken in the difficulties of the newly decolonized nations of Africa, Asia and the Pacific.

We appeal to the members of this Commission and other states members and non-governmental organizations to recognize that the phenomenon of the subjection of Peoples to alien subjugation and colonial domination, far from being a blight almost eradicated from our planet, is on the contrary a problem as grave and widespread as ever. And moreover despite the suggestion of those who would rewrite history to expiate the sins of Europe we would ask this Commission to continue to acknowledge that the dehumanizing phenomenon of colonialism remains in whatever guise the principle source of conflict and instability around the globe.

Twenty five years after the passing by the United Nations General Assembly of the historic Declaration on the granting of Independance to Colonial countries and Peoples the practice of the denial by one People of anothers right to self determination and even the attempted eradication of certain distinct Peoples, continues to be common.

It is a mistake to concentrate on the predatory economic characteristics of colonialism to the exclusion of all other features of this pathogen in collective human relations. The urge to dominate, doctrines of cultural and racial superiority, ~~xxxxxxxxxxx~~ cultural ethnocentrism and religious fanaticism are amongst other powerful motives for the widespread practice of the alien subjugation of Peoples and their exposure to exploitation and the denial of the right of self determination.

As an individual from one small sub-arctic People, the Innu, sometimes referred to as the Montagnais or Montagnais -Naskapi, I can personally attest to human degradation, epidemic ill-health, poverty and the progressive disintegration of Innu society under thirty years of European colonialism and subjugation of our People. According to one recently released report, suicide, which up until the coming of the foreigner to establish colonial control of our land approximately 25 years ago was unknown among our People, is now recorded at a level of 337 per 100,000 population for the age group 15 to 24 years. This represents by comparison a suicide rate almost seventeen times higher than that of the same age group within the settler society which is colonizing our People and our Northern territory of NTESINAN.

Some authors have stated that the rate of violent deaths from all causes is a better indicator than reported suicides. Drawing from the same report for which the data was gathered in the Northern or Labrador part of NTESINAN, the Innu territory one sees that for the ten year period 1971 - 1980 the rate of deaths due to Accidents, poisonings and violence was 355 per 100,000 a rate five times that of our colonizers. When one takes into account that most of the APV deaths attributed to the latter group were as a result of road accidents and that there are virtually no roads in our country it emphasizes the dimmensions of the crime that is being committed against the Innu People.

The rates in our territory for death by drowning and by fire are a staggering 44 and 18 times the rate amongst our colonizers.

Almost all these deaths are not strictly speaking accidental but are a consequence of self destructive behaviour, usually exacerbated by alcohol, amongst a People abruptly brought from freedom and an independant prosperous life of dignity to the squalor, humiliation, idleness and indignity of a dispossessed population living under foreign domination.

My father grew up in a country that was then still free. It meant nothing to the innu People at that time that Europeans had made abstract claims on maps to a territory which few Europeans had visited and no European inhabited. We remained an independant People until well into my father's adult life - although we were isolated by our geography from other Peoples of the world.

Then in the 1950's foreigners began to appear in strength in our country - they put up buildings and established the structure of colonial administration at Sept Iles and Goose Bay. They encouraged American mining interests and hydroelectric power surveyors and engineers to enter our country.

At the same time using the Oblate missionaries and the police they began their attempts to bantustanize us, that is to remove us from the great expanse of our land and to confine us in sordid villages built and administered by our colonizers and without any economic base whatever.

A comprehensive array of hunting and fishing restrictions, closed seasons, and permit requirements imposed with unbending harshness then deftly destroyed our economy, denied us our means of subsistence and rendered us dependent. This process has been described by another Innu Kanantuapatshet spokesman Gilbert Pilot in earlier submissions to this Commission under the World Council of Indigeneous Peoples. Once the colonizer had successfully encapsulated the Innu Population in their ghettoes our land Ntesinan was made available to the mining companies and hydroelectric corporations. In 1971 the heartland of our country was flooded to feed the turbines of the Churchill Falls hydroelectric power complex. The objections of the Innu were ignored.

Since the early 1970's the first generation of Innu with some working knowledge of French or English have grown to adulthood and begun to articulate forcefully and persistently the objections of the Innu People to the colonization of Ntesinan and the total disregard for the right of the Innu People to

self de.ermination. Far from paying any attention the colonizing regime has proceeded to strengthen and entrench its alien bureaucracy, to encourage the colon -ization of our territory by Europeans and in the last six years to aggressively promote the militarization of our occupied country. This is being done by the conversion of large blocs of Innu territory into extra-low level flight training areas and bombing ranges for military aircraft. Our country is being hawked internationally to NATO and other western countries as an uninhabited wastelandxxxxx where already Phantoms, Tornados, Alpha Jets and other military aircraft fly at tree top level at speeds overxxx 950 kilometers an hour. This latter initiative has led to the terrorization of Innu families, including small children, trying to live in the interior, hearing damage and other health problems, disturbance of the feeding patterns of wildlife, on which we depend and the disruption of caribou migrations.

On what basis is this open violation of the rights of Peoples justified. Originally it was argued that our lands were Terra Nullius: since this argument has been exposed by the International Court of Justice in Advisory opinion on Western Sahara as nothing more than racism - we do after all exist and have a history in Ntesinan that pre-dates the Pharoahs- the tune has changed. We are now told that we must "...negotiate comprehensive settlements which will compensate for loss of current traditional use of land" unquote, from a letter dated july 18th 1978 from Hugh Faulkner, Minister of Indian Affairs to Penote michel, Innu Kanantuapatshet. When we refuse, saying far from wanting to lose our land or to receive compensation for being dispossessed of it, we want freedom from foreign domination, the right to be self determining, and decolonization we are told to be, quote, "realistic" and to accept a fait accompli. In an article in the mid-January 1985 edition of the magazine AFRIQUE/ASIE below a photograph of an Innu couple from Unemeinshipit, Ntesinan, Selim Jibrane illustrates in his text the level on which the question of our rights is being approached by our colonizers, quote :

".. The first inhabitants of Canada have now for some years been undertaking a legal battle to regain their hunting and fishing rights and even their own ship over certain of their territories. The response of the courts has been quote: ' In 1763, the Europeans did not consider the natives as their equals. Consequently it is inconceivable that the king (George III of England) would have conceded them a vast and unrestricted territory.'

This masterpiece of bad faith and hypocrisy was pronounced by a judge of the Supreme Court of Ontario. That might seem incredible, but it is in this way at the dawn of the 21st century that Canada renders justice. Ignoring the rights of Peoples, it refers to the right of conquerors, it being well appreciated that this right operates esentially to confirm and extend its hegemony.In this particular case it ensures that the juridical story of Canada begins only with the arrival of the Settlers. It is well known that before the coming of Europeans, these territories belonged to the Native Nations. But this historical truth is annulled by the"good sense" of a judge who considers it inconceivable that the king of England could have conceded to the native inhabitants of Canada territories which actually belonged to them. Thus is white law written in terms of the rights of the stronger. And the example of Canada may be generally extended to take in International Law put in place by western powers and quite often

to the detriment of the rights of Peoples (South Africa, Palestine,) and serving in the final analysis only to lend comfort to injustice itself." unquote

In conclusion Mr Chairman, I must tell the Commission that when I am asked by other Innu People why as a People suffereing precisely the same phenomenon of European colonialism as other Peoples in Africa and elsewhere have suffered, our plight should in practice be ignored and our People exempted from the scope of International law on the rights of Peoples, I am at a loss for an answer to give. The right of Peoples to self-determination is in theory a universal right;international law when condemning the practice of colonialism and the foreign domination of Peoples does not restrict itself to certain areas of the globe. Yet it appears in practice that certain states may violate these standards with impunity and Peoples of certain racial groups will look in vain for international censure of those who by treating them as nothing if not unfinished Europeans, question their humanity.

There seems to be no just or good reason for this discrepancy in the application of collective human rights standards.

Thank you , Mr Chairman

ACTION
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---HUMAN RIGHTS CTTEE:LUBICON LAKE COMMUNICATION 167/1984

ASSUME JLO/SWORDS WILL HAVE INFORMED YOU,ON BASIS HER RECENT DISCUSSIONS WITH SECRETARIAT,THAT CTTEE WORK TOOK NO/NO ACTION ON THIS COMMUNICATION SINCE COMMENTS OF COMPLAINANTS COUNSEL (IN RESPONSE TO CDN GOVTS TARDY SUBMISSION IN MAY)WERE NOT/NOT AVAILABLE IN TRANSLATED FORM FOR LAST SESSION.

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

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REF YOUR MEMO IMU1520 01AUG

---ICSA-SUMMARY OF MTG HELD 05JUN85(ILO AND FAO BUDGET)

GRATEFUL 01AUG COMPREHENSIVE REPORT OF ICSA MTG HELD 05JUN AND RECEIVED ROME 05AUG.

2.WE NOTE ON PAGE 8 OF ABOVE REPORT MS LAPOINTE(EXT/IMU) IN REFERRING TO GG STANCE ON ILO BUDGET REPORTED LIKELY BREAKDOWN IN GG ZERO GROWTH POSITION.WE HAVE ALREADY REPORTED OUR REACTION TO BEING CAUGHT OFF GUARD ON THIS ONE AND WOULD HAVE APPRECIATED ADVANCE WARNING OF POSSIBLE GG SPLIT(AND INDEED CDN POSITION) ON ILO BUDGET-RATHER THAN BEING TOLD OUR POSITION BY FAO/DGM

3.AS FAO COUNCIL AND CONFERENCE RAPIDLY APPROACHING WE WOULD APPRECIATE CONFIRMATION GENERAL POSITION OF GG(SEE PAGE 3 ITEM 4 OF ABOVE REPORT)THAT GG REMAINS COMMITTED TO ZERO REAL GROWTH WITH RESPECT TO FAO BUDGET.

4.ROME TELS WTAC0592 AND 0593 OF 28JUN AND 02JUL RESPECTIVELY REPORTED CONSIDERABLE QUOTE APPARENT UNQUOTE UNITY ON ZERO REAL GROWTH WITH GG MEMBERS BUT BELIEVE QUESTION SHOULD BE RAISED AND REINFORCED IF NECESSARY.GRATEFUL ANY COMMENTS.

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

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---COMITE DES DROITS DE L HOMME:COMMUNICATION LUBICON LAKE BAND NO. 167/1984.

COMME LE COMITE VIENT DE TERMINER LES TRAVAUX DE SA SESSION D ETE A GENEV,AIMERIONS SAVOIR SI COMITE A EXAMINE COMMUNICATION SUS-MENTIONNEE ET EN EST VENU A UNE DECISION.VOUS POURRIEZ DONC,DISCRETEMENT,VOUS INFORMER AUPRES DU SECRETARIAT SUR DERNIERS DEVELOPPEMENTS DANS CETTE AFFAIRE.

CCC/171 022202Z IMU1555

External Affairs Canada / Affaires extérieures Canada

MGTC/DIARY/CIRC/FILE
MGTC/JOURNAL/CIRC/DOSSIER

Accession/Référence

File/Dossier 45-COA-13-1-3- Lubicon Lake Band

MESSAGE

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

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SECURITY / SÉCURITÉ: CONFIDENTIEL

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---COMITE DES DROITS DE L HOMME:COMMUNICATION LUBICON LAKE BAND NO. 167/1984.

COMME LE COMITE VIENT DE TERMINER LES TRAVAUX DE SA SESSION D ETE A GENEV,AIMERIONS SAVOIR SI COMITE A EXAMINE COMMUNICATION SUS-MENTIONNEE ET EN EST VENU A UNE DECISION.VOUS POURRIEZ DONC,DISCRETEMENT,VOUS INFORMER AUPRES DU SECRETARIAT SUR DERNIERS DEVELOPPEMENTS DANS CETTE AFFAIRE.

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

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EXT 518-1 (83/11)

PAR TEL

TNAME: Lahey/JC (R)P: 01

IMU/Jacqueline Caron/2-8040/mp

DIST: JLO

FILE/CIRC/DIV/DIARY/WFILE

OTTAWA, (Ontario)
K1A 0G2

Le 1 août 1985

IMU-1520

Monsieur Jim Lahey
Directeur
Élaboration et planification
des politiques
Terrasses de la Chaudière
25, Eddy Street
Hull, Québec

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

Monsieur,

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

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

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

Veuillez agréer, Monsieur, mes salutations distinguées.

ORIGINAL SIGNED BY
R. M. MIDDLETON

Robert M. Middleton
Directeur
Direction des Affaires
des Nations Unies

XTNAME: Lahey/JC (R)P: 01

IMU/Jacqueline Caron/2-8040/mp

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OTTAWA, (Ontario)
K1A 0G2

Le 1 août 1985

IMU-1520

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