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File No. Dossier 45-CDA-13-1-3-LUBICON LAKE BAND
Volume 14 From-De 89-06-01 To-À 89-08-31

VOLS ACCESSION NO 169542



169542

45-CDA-13-1-3-LUBICON LAKE
Vol 14

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TITLE—TITRE:

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

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

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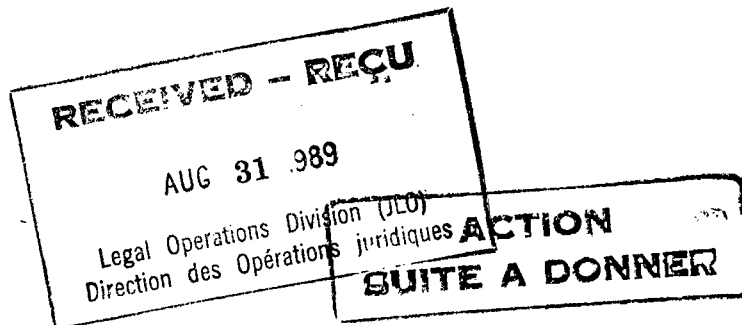
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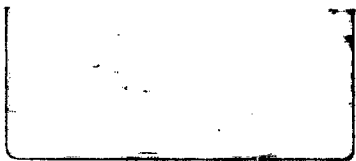
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We're going a little bit public

Ex-Lubicons in new band

We thought we'd rather write than be interviewed through the phone, and are hoping you'll publish every bit of this letter.

To tell the truth, we actually don't want anything to do with the media. But since the public wants to hear a little bit about our group, and since the man from Chicago, Fred Lennarson, is lashing unpleasant words to the public about us, we are now willing to go a little bit to the public.

Yes, we are forming a band and we're more than happy that the government has allowed us to form a band. Our band doesn't have any ideas of becoming a militant-type one, either. However, this doesn't mean that we're a bunch of helpless people who won't move when it's time to speak up or defend ourselves. But all in all, we'd rather be a band that would get along with the public and obey Canadian laws.

Our band consists of more than 350 people from three groups joined together: people on severalty; people kicked off Lubicon Band membership because they wouldn't support illegal moves; and people who weren't wanted on Lubicon Band membership because they weren't friends of the leaders.

The Woodland Cree Band-to-be are people just as much aboriginal to the area as the Lubicon Band. In other words, the people of the Woodland Cree Band-to-be are just as much entitled to the land in the area as the Lubicons are. Besides, we own a lot of traplines in

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To be on a fair basis, if the government had not allowed us to form a new band and negotiate on our own, then the other group shouldn't deserve it, either. If this other group would have settled, it would have left almost two-thirds of the people from Cadotte Lake and Little Buffalo out, and if Lannarson's there to help the Indian people, then why is he trying his best to stop the rest of us from trying for a land claim? We don't care what the Lubicons do, we just care about our people.

We believe Lennarson wants the rest of us totally left out because we don't agree with his moves. He wants to quit our thing while he continues his long battle with the government, disturbing the once-peaceful communities, and at least creating a militant right from our area.

Our group had a meeting and selected me, Archie Cardinal, William Thomas and Roy Letendre to deal with the government for us. Any deal they can reach will be put to our people to say yes or no.

Melvin Laboucan
Woodland Cree Band-to-be
Cadotte Lake

Department of External Affairs



Canada

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Comments/Remarques

Attached is the final version of Canada's submission on the merits of the Lubicon claim. Thank you for your assistance in preparing this document.

Irit Weiser
Irit Weiser

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SUBSTANTIVE COMMENTS OF THE GOVERNMENT OF CANADA
ON THE COMMUNICATION OF CHIEF BERNARD OMINAYAK
AND THE LUBICON LAKE BAND TO THE HUMAN RIGHTS COMMITTEE

I. GENERAL

The Secretary-General of the United Nations, in his note no. G/SO 215/51 CANA (38) 167/1984, dated July 14, 1989, transmitted to Canada the decision of the Human Rights Committee requesting Canada's comments on the merits of the author's communication, by September 1, 1989.

In this regard, the Government of Canada has outlined below a number of points. Firstly, it is submitted as a preliminary matter, that because Canada has not been advised of the articles on which the Committee's admissibility decision is based, Canada is prejudiced in its ability to properly prepare a response. Secondly, with respect to the substantive allegations made under articles 2(3), 14(1) and 26 of the Covenant, Canada contests the communicant's claim that a fair trial by an independent and impartial tribunal, as well as effective remedies, are unavailable in Canada. The communicants have manifestly not exhausted local remedies and delays in judicial proceedings have not been the result of governmental actions. Moreover, the Lubicon Lake Band has publicly refused to recognize the competence of Canadian courts, contrary to the principles

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underlying the Covenant. As well, the negotiations currently in process and the offer made to the Band provide an effective remedy to the Band's claims. Thirdly, in respect of articles 17 and 23(1), 18 and 27 of the Covenant, the Government of Canada disputes the factual accuracy of the assertion on which these allegations are based - namely, that the communicant's land and community have been destroyed. Canada denies that assertion as a matter of fact. Finally, as regards allegations made pursuant to articles 6(1) and 7 of the Covenant, it is the Government's position that there is no evidence to support such allegations and that they are without factual foundation.

II. NATURAL JUSTICE DENIED

The Government of Canada has on several occasions requested the Human Rights Committee to identify the specific article(s) of the Covenant on which its admissibility decision is founded. Despite these requests, the Committee has provided no information or details to clarify its decision of July 22, 1987, declaring the communication admissible, not on the basis of article 1 (as alleged by the Lubicon Band) but "insofar as it may raise issues under article 27 or other articles of the Covenant". In order to properly respond to an accusation, the principles of natural justice require that a party know the specific charge and evidence on which that accusation is based. This principle is in

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fact recognized in the context of criminal charges in article 14(3)(a) of the Covenant, which provides that everyone shall be entitled "to be informed promptly and in detail ... of the nature and cause of the charge against him." Because Canada has not been informed of the Covenant articles and evidence on which the communication was declared admissible, it is the Government's position that the principles of procedural fairness are not being respected and that Canada is prejudiced in its ability to respond to the Band's claim.

Under the circumstances, the Government of Canada has sought to address below, to the best of its ability, what it perceives to be the basis of the Committee's concerns.

III. ARTICLES 14(1) AND 26 OF THE COVENANT

(i) Judicial Proceedings

The communicants allege that "Canada has failed to provide the Band a fair, independent and impartial tribunal for resolution of its domestic claims". The communicants also refer, at page 11 of their most recent submission, to allegations made in previous submissions of bias on the part of Canadian judges. It is the Government of Canada's position that these allegations are totally without foundation. Canadian courts have a long

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tradition of performing their judicial functions impartially and with integrity. This tradition includes numerous cases won by aboriginal litigants. The communicants have presented no evidence to indicate that the judiciary acted differently in actions concerning the Lubicon Lake Band. Moreover, responsibility for any delays in the resolution of the Band's court actions lies largely with the Band itself. The communicants have not taken the necessary steps to move any of the actions they commenced forward, and they have refused to cooperate with the federal government in the action it commenced in an attempt to resolve matters with the Lubicon. (A chronology of the judicial proceedings to date is attached as Appendix 1.) On September 30, 1988, the Band declared that it did not recognize the jurisdiction of Canadian courts, effectively ending any attempt to obtain a resolution through the Canadian judicial process.

As has been outlined in the Government's previous submissions, (Communication dated June 20, 1989 at pages 5 to 6, October 7, 1987 at pages 4 to 9, and May 31, 1985 at pages 2 to 7), three actions in respect of the Band are currently outstanding. Further details are also contained in the chronology of judicial proceedings, attached as Appendix 1. The first of these three actions was commenced by the Band in the Federal Court of Canada against the Federal Government. It has been held in abeyance

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since 1981 even though it is the Band's responsibility to take the next step in the law suit. The second action was commenced by the Band in the Alberta Court of Queen's Bench against the province and certain private corporations. Since 1985, when the Band was denied an interim injunction, it has not taken any substantive steps in the proceedings and it has abandoned its appeal against the Court's refusal to add Canada as a party. This inaction on the substance of the claim continued despite a \$1.5 million ex gratia payment from the Government to the Band, to offset legal expenses. The third action was commenced in May 1988 by the federal government in an effort to overcome jurisdictional difficulties in bringing both the provincial and federal governments and the Band before the same Court, and to finally resolve matters. The Band subsequently refused to participate in this action, despite express efforts by the Chief Justice of the Court of Queen's Bench of Alberta to expedite the matter. This action also remains in abeyance. In October 1988, the Band took the public position, contrary to the principles underlying the Covenant, that it would not recognize the jurisdiction of the courts of Canada.

Each one of the above court actions provides a vehicle by which the Band could resolve its claims. Yet, the Band has not taken any substantive steps in either of its two actions, nor has it cooperated with the federal government's attempts to have a trial

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on the merits. It is therefore evident that the prolonging of domestic remedies has not been the responsibility of the Government of Canada. Moreover, under the circumstances, Canadian courts have not had an opportunity to make even an initial determination on the substance of the issues raised by the Lubicon Lake claim.

(ii) Negotiations

In addition to judicial proceedings, the Government of Canada has sought to resolve matters with the Lubicon Lake Band by way of negotiations. A new round of negotiations has been commenced and extensive efforts are being made in this regard. Discussions between the Band and the province of Alberta began on August 23, 1989, and discussions with the federal government are scheduled to begin on September 7, 1989.

During negotiations held between November 1988 to January 1989, an offer was made by the federal government which would have resulted in the Band receiving 247 square kilometres of land (95 sq. mi.), mineral rights on 205 square kilometres (79 sq. mi), community facilities for each family living on the reserve (including housing, water and sewage services, electrification, roads and a school), and an economic self-sufficiency package valued at \$10.2 million. On the basis of 500 Band members and a

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Government package worth a total of \$45 million (non-inclusive of land and mineral rights), this offer amounted to \$90,000 per person or almost half a million dollars for each family of five.

This offer met virtually each one of the communicant's demands, either in full or to the extent that equal treatment with other Canadian bands was approximated or exceeded. Only one major point of contention remained outstanding between the Government and the communicant - a claim by the Band for approximately \$167 million in compensation for economic and other losses allegedly suffered. In an attempt to settle matters with the Band to the extent possible, the Government of Canada put forward a proposal that expressly enabled the Band to accept all the terms of the offer that had been agreed upon (i.e., a 247 sq. km. permanent land base with mineral rights on 205 sq. km., new housing with all related services, a new school, self-government, and wildlife management participation over a large area), and in addition pursue its claim for general compensation in the Canadian courts.

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

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(iii) Membership

At page 12 of the communicant's most recent submission, a violation of article 26 of the Covenant is claimed, on the basis that the membership formula used by the Government of Canada in resolving the Lubicon claim is unequal and discriminatory in comparison to the treatment of other native groups. Specifically the Band states that "Canada has attempted to subject Lubicon Lake Band members to a retroactive application of the Canadian Indian Act as it stood prior to its amendment following the Committee's decision in Sandra Lovelace v. Canada." This statement is completely incorrect. In 1985, the Band submitted a membership code pursuant to the Indian Act (as amended following the Lovelace case), which was accepted by Canada and gave to the Band total control over its own membership. As a consequence, the Government of Canada's offer is based on the approximately 500 people determined by the Band alone to be members of the Lubicon Lake community. It is therefore submitted that the communicants' allegation in respect of article 26 is without any foundation.

(iv) Legal Releases

Regarding the Band's claim that to accept Canada's offer would require them to relinquish unjustly their aboriginal rights, the

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Government of Canada submits that this notion is based on a fundamental misunderstanding of the nature of aboriginal and treaty rights. By definition, a treaty of cession involves promises by a government to deliver certain rights and benefits of special interest to the aboriginal persons involved, in exchange for the voluntary release by a band of its aboriginal rights. Such arrangements bring certainty and clarity to the relations between a government and its native citizens. It is submitted that it is in the interests of indigenous groups, states, and the international community more generally, to encourage settlements to resolve such legal disputes.

It is the Government of Canada's position that the aboriginal rights claimed by the Lubicon have already been extinguished by a treaty covering the land in question, and that Canada's offer would, if accepted, fulfill all outstanding obligations to the Lubicon under that treaty. In the alternative, if the Band believes that they have unextinguished aboriginal rights, or that the offer does not fulfill Canada's outstanding obligations under the treaty, it may pursue such aboriginal or treaty claims in the courts. However, if the Band accepts Canada's offer, then it is only logical that in accepting the offer, the Band would in turn release the Government of Canada from further aboriginal or treaty claims.

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IV. ARTICLE 2(3)

It is clear from the above discussion respecting articles 14(1) & 26 of the Covenant, that effective remedies are available to the communicants in the form of both judicial proceedings, as well as negotiations and acceptance of Canada's offer. Thus, it is submitted that there is no basis on which to conclude that there has been a breach of article 2(3) of the Covenant. Specifically, it is the position of the Government of Canada that a party to a communication under the Optional Protocol cannot decline to accept the jurisdiction of the national courts. The communicants have submitted no evidence of a corrupt or unfair judicial system to justify an exception to this fundamental principle. Judicial decisions in Canada relating to aboriginal or other native claims demonstrate that the Canadian judicial system is fair and impartial.

V. ARTICLES 17 AND 23(1), 18 AND 27 OF THE COVENANT

The Government of Canada submits that the basis of the communicants' claims in respect of articles 17 and 23(1), 18 and 27 of the Covenant, is essentially the same - namely, that the land and community of the Band have been destroyed through the actions of Canada. In putting forth these claims, the

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communicants have made a number of statements which misrepresent the actual status of the lands at issue.

Firstly, at page 4 of the communicants' most recent submission, it is alleged that "Canada is participating in a project by which virtually all traditional Lubicon lands have been leased for timber development". In fact, this statement is not accurate. The Daishowa pulp mill, the project to which the Band refers, is now under construction north of Peace River, Alberta. This location is neither within the Band's alleged "traditional" lands, nor within the 247 square kilometre area (95 sq. mi) agreed to by the Band and the province of Alberta for a reserve. The Daishowa pulp mill is located approximately 80 kilometres away from the land set aside for the Lubicon Lake Band. A map attached as Appendix 2 clearly indicates the locations of the places referred to above. As regards the area available to the pulp mill to supply its operations, the forest management agreement between the province of Alberta and the pulp mill specifically excludes the land proposed for the Lubicon Lake Band. Moreover, in the interests of sound forest management practices, the area cut annually outside of the proposed Lubicon reserve will involve less than 1% of the area specified in the forest management agreement.

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Secondly, the Government of Canada contests the communicants' assertion that the 247 square kilometre area, sought by and offered to the Band, has been totally destroyed. The Government of Canada's offer to the Lubicon Band (outlined above) includes mineral rights on 205 square kilometres of the 247 square kilometre reserve area. No oil or gas has been extracted from the specified 205 square kilometre area, thus the Band's rights in this regard have in no way been impaired. Moreover, for the last approximately two years, there has been no drilling or exploration activity in the area identified for the Band.

While Canada acknowledges that seismic lines cut several years ago, may have caused limited disturbance to the vegetation and wildlife of the area, the extent of this disturbance has never been so great as to preclude the Lubicon from carrying on their traditional hunting and trapping activities. This point is evidenced by the discussions between the Band and the province of Alberta in respect of the Wildlife and Integrated Land Use Management Agreement. This agreement, the terms of which have been agreed to in principle by the parties, will give to the Band a significant measure of involvement in wildlife management and land use planning, in conjunction with other native groups who share the same traditional hunting grounds. The representations of the Band relating to the destruction of wildlife in the

- 13 -

proposed reserve area are refuted by the Band's participation in an agreement for the management of that wildlife.

It is appropriate at this point to address the Committee's request that Canada take interim measures to avoid damage to the communicant, pursuant to rule 86 of the provisional rules of procedure. As is evident from the above, there has been no interference with the land proposed for a Lubicon reserve for approximately two years. Both Canada and Alberta have refrained from actions that would prejudice or adversely affect the status of this land, including the mineral rights which attach to it. Moreover, the Government's offer to the Lubicon Lake Band would provide, if accepted, an effective remedy to the Band's claims. Finally, it should also be noted that the Government of Canada has provided overall financial assistance to the Band of over \$1.8 million to assist it in pursuing negotiations and its court actions. As well, direct and indirect funding in the amount of \$1.5 million per year is given by the Government to the Band for ongoing community programs and services.

VI. ARTICLES 6(1) AND 7 OF THE COVENANT

In regard to the Band's allegations of cruel, inhuman or degrading treatment, and violations of the inherent right to

- 14 -

life, the Government of Canada submits that there is no evidence to support such allegations.

VII. RECENT DEVELOPMENTS

Canada wishes to apprise the committee of recent developments in the Cadotte Lake/Little Buffalo community, within which the majority of Lubicon Lake Band members now reside. In December 1988, Canada was made aware of a new group within the community, who sought to resolve the rights of its members under Treaty 8, independent of the Lubicon Lake Band. This group, comprised of approximately 350 native people, sought recognition from the Government as a new band. The group consists of Lubicon Lake Band members who have formally stated their intention of joining the new band, former Lubicon members who were removed by the Band in January 1989, and other native people living within the community. Some members of the new band clearly have recognized rights to land pursuant to Treaty 8, such as the right to a reserve. To facilitate the taking of the land collectively (or in common) for the purposes of a reserve, the federal government agreed to the creation of the Woodland Cree Band. Canada recognizes the same legal obligation to the Woodland Cree as it does to Lubicon Lake Band members. A letter from the leader of the Woodland Cree to the Edmonton Journal, outlining the purpose and composition of the Band, is attached as Appendix 3.

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In addition, there have been further developments resulting from a provision of Treaty 8 that offers individuals with entitlements under the Treaty a right to elect to take land under the Treaty in common with a band, or to take land in severalty - that is, in the name of the individual Indian. In this regard, a group of Lubicon Lake Band members has recently filed a formal claim with the Government of Canada to take land in severalty to live apart from the Lubicon Lake Band.

VIII. CONCLUSION

The Government of Canada submits, based on the information above, (1) that a party to a dispute who is not informed of the specific charges to be addressed cannot prepare a proper defence. Thus, the failure of an adjudicative body to articulate provisions that are allegedly breached, puts into issue the validity of any substantive decision reached by that body; (2) that there is no evidence of a breach of the Covenant and (3) that the communication of the Lubicon Lake Band should therefore be dismissed, without prejudice to the ongoing process of negotiations between Canada and the Lubicon Lake Band, and other native groups to whom Canada has legal obligations.

APPENDIX 1

CHRONOLOGY OF THE LITIGATION OF THE LUBICON LAKE BAND

1. In 1980, the Lubicon Band commenced its original action in the Federal Court against the federal government, the Province of Alberta and certain corporations. The Federal Court, Trial Division struck the province and the corporations from that action because, by law, the Federal Court has jurisdiction only in regard to matters relating to the federal government. That decision was affirmed by the Federal Court of Appeal in 1981. The Band has taken no steps to prosecute this action against the federal government, and it therefore remains in abeyance.
2. In 1982, the Band commenced proceedings against the Province of Alberta and certain corporations in the Court of Queen's Bench of Alberta. Proceedings with respect to an interim injunction concluded in 1985 when the Supreme Court of Canada denied leave to appeal from the denial of the interim injunction.
3. In 1985, an application by the Band requesting the court to order funding from the federal government, was dismissed by the Federal Court, Trial Division, essentially on the ground that it had not been commenced under the proper judicial process. Nevertheless, in January, 1986, Canada gave the Band a \$1.5 million ex gratia payment to offset legal expenses.
4. Later in 1986, the Band commenced a fresh proceeding in the Federal Court for funding to allow it to prosecute the original Federal Court action and the action commenced in the Court of Queen's Bench of Alberta. An application to strike that Statement of Claim was heard in 1987 and allowed in part. An appeal and a cross-appeal were launched from that decision.
5. In October of 1987, the Court of Queen's Bench of Alberta dismissed an application by the Band to have the federal government added as a party in the 1982 action. An appeal from that decision was filed.
6. In March of 1988 the Band commenced another Federal Court action in response to a grant of money by the federal government towards the partial construction of the Daishowa pulp mill. A defence was filed to that action by the federal government. The Band has taken no further steps.
7. In May of 1988, Canada commenced an action against the Lubicon Lake Band and the Province of Alberta to finally resolve matters. It sought from the Court a determination of the nature and extent of Alberta's obligation to provide the lands requested by the Government of Canada for a Lubicon reserve, and as well, a determination of the basis on which the Band's entitlement to lands should be computed.

8. Two appeals were scheduled to be heard in October of 1988. The first was the Band's appeal from its unsuccessful attempt to add the federal government in the action before the Court of Queen's Bench of Alberta, and the second was the appeal and cross-appeal from the partially successful application in the Federal Court to obtain funds to finance the original two lawsuits.

9. On October 6, 1988, the Band advised the Court of Appeal of Alberta that they no longer intended to participate in any proceedings to which the Band was a party, including before the Alberta Court of Appeal, the Court of Queen's Bench of Alberta, and the Federal Court of Canada. As a result of that statement, the Alberta Court of Appeal ruled their appeal abandoned. On the same basis, the Federal Court funding action was also dismissed.

10. On October 22, 1988, the Band and Alberta negotiated a settlement proposal so as to establish a 247 square kilometre reserve. The Band abandoned its claim of aboriginal title over a large area of northern Alberta. On January 24, 1989, Canada formally offered to implement this proposal so as to create a reserve at Lubicon Lake. This land claim settlement is often referred to as the Grimshaw Agreement. The Grimshaw Agreement resolved the Band's longstanding land claim and leaves only the issue of compensation outstanding.

CONCLUSION

The Band's decision to boycott all litigation in October of 1988 was unilateral and these Court actions can be reactivated without penalty. While Canada's legal position is that no compensation is owing, Canada has repeatedly urged the Band to pursue these matters in the Canadian courts. In light of the Band's ability to accept the Grimshaw Agreement, without prejudice to their ability to litigate the issue of compensation, it is submitted that the Band can not be said to be the victim of unreasonably prolonged domestic remedies.

APPENDIX 3

The Edmonton Journal, August 11, 1989

We're going a little bit public

Ex-Lubicons in new band

We thought we'd rather write than be interviewed through the phone, and are hoping you'll publish every bit of this letter.

To tell the truth, we actually don't want anything to do with the media. But since the public wants to hear a little bit about our group, and since the man from Chicago, Fred Lennarson, is tossing unpleasant words to the public about us, we are now willing to go a little bit to the public.

Yes, we are forming a band and we're more than happy that the government has allowed us to form a band. Our band doesn't have any ideas of becoming a militant-type one, either. However, this doesn't mean that we're a bunch of helpless people who won't move when it's time to speak up or defend ourselves. But all in all, we'd rather be a band that would get along with the public and other Canadian laws.

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Our group had a meeting and elected me, Archie Cardinal, William Thomas and Roy Letendre to deal with the government for us. Any deal they can reach will be put to our people to say yes or no.

Melvin Laboucan
Woodland Cree Band-to-be
Cadotte Lake



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SECTION

Human Rights Law Section

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August 30, 1989

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**SUBSTANTIVE COMMENTS OF THE GOVERNMENT OF CANADA
ON THE COMMUNICATION OF CHIEF BERNARD OMINAYAK
AND THE LUBICON LAKE BAND TO THE HUMAN RIGHTS COMMITTEE**

I. GENERAL

The Secretary-General of the United Nations, in his note no. G/SO 215/51 CANA (38) 167/1984, dated July 14, 1989, transmitted to Canada the decision of the Human Rights Committee requesting Canada's comments on the merits of the author's communication, by September 1, 1989.

In this regard, the Government of Canada has outlined below a number of points. Firstly, it is submitted as a preliminary matter, that because Canada has not been advised of the articles on which the Committee's admissibility decision is based, Canada is prejudiced in its ability to properly prepare a response. Secondly, with respect to the substantive allegations made under articles 2(3), 14(1) and 26 of the Covenant, Canada contests the communicant's claim that a fair trial by an independent and impartial tribunal, as well as effective remedies, are unavailable in Canada. The communicants have manifestly not exhausted local remedies and delays in judicial proceedings have not been the result of governmental actions. Moreover, the Lubicon Lake Band has publicly refused to recognize the competence of Canadian courts, contrary to the principles

underlying the Covenant. As well, the negotiations currently in process and the offer made to the Band provide an effective remedy to the Band's claims. Thirdly, in respect of articles 17 and 23(1), 18 and 27 of the Covenant, the Government of Canada disputes the factual accuracy of the assertion on which these allegations are based - namely, that the communicant's land and community have been destroyed. Canada denies that assertion as a matter of fact. Finally, as regards allegations made pursuant to articles 6(1) and 7 of the Covenant, it is the Government's position that there is no evidence to support such allegations and that they are without factual foundation.

II. NATURAL JUSTICE DENIED

The Government of Canada has on several occasions requested the Human Rights Committee to identify the specific article(s) of the Covenant on which its admissibility decision is founded. Despite these requests, the Committee has provided no information or details to clarify its decision of July 22, 1987, declaring the communication admissible, not on the basis of article 1 (as alleged by the Lubicon Band) but "insofar as it may raise issues under article 27 or other articles of the Covenant". In order to properly respond to an accusation, the principles of natural justice require that a party know the specific charge and evidence on which that accusation is based. This principle is in

fact recognized in the context of criminal charges in article 14(3)(a) of the Covenant, which provides that everyone shall be entitled "to be informed promptly and in detail ... of the nature and cause of the charge against him." Because Canada has not been informed of the Covenant articles and evidence on which the communication was declared admissible, it is the Government's position that the principles of procedural fairness are not being respected and that Canada is prejudiced in its ability to respond to the Band's claim.

Under the circumstances, the Government of Canada has sought to address below, to the best of its ability, what it perceives to be the basis of the Committee's concerns.

III. ARTICLES 14(1) AND 26 OF THE COVENANT

(i) Judicial Proceedings

The communicants allege that "Canada has failed to provide the Band a fair, independent and impartial tribunal for resolution of its domestic claims". The communicants also refer, at page 11 of their most recent submission, to allegations made in previous submissions of bias on the part of Canadian judges. It is the Government of Canada's position that these allegations are totally without foundation. Canadian courts have a long

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tradition of performing their judicial functions impartially and with integrity. This tradition includes numerous cases won by aboriginal litigants. The communicants have presented no evidence to indicate that the judiciary acted differently in actions concerning the Lubicon Lake Band. Moreover, responsibility for any delays in the resolution of the Band's court actions lies largely with the Band itself. The communicants have not taken the necessary steps to move any of the actions they commenced forward, and they have refused to cooperate with the federal government in the action it commenced in an attempt to resolve matters with the Lubicon. (A chronology of the judicial proceedings to date is attached as Appendix 1.) On September 30, 1988, the Band declared that it did not recognize the jurisdiction of Canadian courts, effectively ending any attempt to obtain a resolution through the Canadian judicial process.

As has been outlined in the Government's previous submissions, (Communication dated June 20, 1989 at pages 5 to 6, October 7, 1987 at pages 4 to 9, and May 31, 1985 at pages 2 to 7), three actions in respect of the Band are currently outstanding. Further details are also contained in the chronology of judicial proceedings, attached as Appendix 1. The first of these three actions was commenced by the Band in the Federal Court of Canada against the Federal Government. It has been held in abeyance

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since 1981 even though it is the Band's responsibility to take the next step in the law suit. The second action was commenced by the Band in the Alberta Court of Queen's Bench against the province and certain private corporations. Since 1985, when the Band was denied an interim injunction, it has not taken any substantive steps in the proceedings and it has abandoned its appeal against the Court's refusal to add Canada as a party. This inaction on the substance of the claim continued despite a \$1.5 million ex gratia payment from the Government to the Band, to offset legal expenses. The third action was commenced in May 1988 by the federal government in an effort to overcome jurisdictional difficulties in bringing both the provincial and federal governments and the Band before the same Court, and to finally resolve matters. The Band subsequently refused to participate in this action, despite express efforts by the Chief Justice of the Court of Queen's Bench of Alberta to expedite the matter. This action also remains in abeyance. In October 1988, the Band took the public position, contrary to the principles underlying the Covenant, that it would not recognize the jurisdiction of the courts of Canada.

Each one of the above court actions provides a vehicle by which the Band could resolve its claims. Yet, the Band has not taken any substantive steps in either of its two actions, nor has it cooperated with the federal government's attempts to have a trial

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on the merits. It is therefore evident that the prolonging of domestic remedies has not been the responsibility of the Government of Canada. Moreover, under the circumstances, Canadian courts have not had an opportunity to make even an initial determination on the substance of the issues raised by the Lubicon Lake claim.

(ii) Negotiations

In addition to judicial proceedings, the Government of Canada has sought to resolve matters with the Lubicon Lake Band by way of negotiations. A new round of negotiations has been commenced and extensive efforts are being made in this regard. Discussions between the Band and the province of Alberta began on August 23, 1989, and discussions with the federal government are scheduled to begin on September 7, 1989.

During negotiations held between November 1988 to January 1989, an offer was made by the federal government which would have resulted in the Band receiving 247 square kilometres of land (95 sq. mi.), mineral rights on 205 square kilometres (79 sq. mi), community facilities for each family living on the reserve (including housing, water and sewage services, electrification, roads and a school), and an economic self-sufficiency package valued at \$10.2 million. On the basis of 500 Band members and a

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Government package worth a total of \$45 million (non-inclusive of land and mineral rights), this offer amounted to \$90,000 per person or almost half a million dollars for each family of five.

This offer met virtually each one of the communicant's demands, either in full or to the extent that equal treatment with other Canadian bands was approximated or exceeded. Only one major point of contention remained outstanding between the Government and the communicant - a claim by the Band for approximately \$167 million in compensation for economic and other losses allegedly suffered. In an attempt to settle matters with the Band to the extent possible, the Government of Canada put forward a proposal that expressly enabled the Band to accept all the terms of the offer that had been agreed upon (i.e., a 247 sq. km. permanent land base with mineral rights on 205 sq. km., new housing with all related services, a new school, self-government, and wildlife management participation over a large area), and in addition pursue its claim for general compensation in the Canadian courts.

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

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(iii) Membership

At page 12 of the communicant's most recent submission, a violation of article 26 of the Covenant is claimed, on the basis that the membership formula used by the Government of Canada in resolving the Lubicon claim is unequal and discriminatory in comparison to the treatment of other native groups. Specifically the Band states that "Canada has attempted to subject Lubicon Lake Band members to a retroactive application of the Canadian Indian Act as it stood prior to its amendment following the Committee's decision in Sandra Lovelace v. Canada." This statement is completely incorrect. In 1985, the Band submitted a membership code pursuant to the Indian Act (as amended following the Lovelace case), which was accepted by Canada and gave to the Band total control over its own membership. As a consequence, the Government of Canada's offer is based on the approximately 500 people determined by the Band alone to be members of the Lubicon Lake community. It is therefore submitted that the communicants' allegation in respect of article 26 is without any foundation.

(iv) Legal Releases

Regarding the Band's claim that to accept Canada's offer would require them to relinquish unjustly their aboriginal rights, the

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Government of Canada submits that this notion is based on a fundamental misunderstanding of the nature of aboriginal and treaty rights. By definition, a treaty of cession involves promises by a government to deliver certain rights and benefits of special interest to the aboriginal persons involved, in exchange for the voluntary release by a band of its aboriginal rights. Such arrangements bring certainty and clarity to the relations between a government and its native citizens. It is submitted that it is in the interests of indigenous groups, states, and the international community more generally, to encourage settlements to resolve such legal disputes.

It is the Government of Canada's position that the aboriginal rights claimed by the Lubicon have already been extinguished by a treaty covering the land in question, and that Canada's offer would, if accepted, fulfill all outstanding obligations to the Lubicon under that treaty. In the alternative, if the Band believes that they have unextinguished aboriginal rights, or that the offer does not fulfill Canada's outstanding obligations under the treaty, it may pursue such aboriginal or treaty claims in the courts. However, if the Band accepts Canada's offer, then it is only logical that in accepting the offer, the Band would in turn release the Government of Canada from further aboriginal or treaty claims.

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IV. ARTICLE 2(3)

It is clear from the above discussion respecting articles 14(1) & 26 of the Covenant, that effective remedies are available to the communicants in the form of both judicial proceedings, as well as negotiations and acceptance of Canada's offer. Thus, it is submitted that there is no basis on which to conclude that there has been a breach of article 2(3) of the Covenant. Specifically, it is the position of the Government of Canada that a party to a communication under the Optional Protocol cannot decline to accept the jurisdiction of the national courts. The communicants have submitted no evidence of a corrupt or unfair judicial system to justify an exception to this fundamental principle. Judicial decisions in Canada relating to aboriginal or other native claims demonstrate that the Canadian judicial system is fair and impartial.

V. ARTICLES 17 AND 23(1), 18 AND 27 OF THE COVENANT

The Government of Canada submits that the basis of the communicants' claims in respect of articles 17 and 23(1), 18 and 27 of the Covenant, is essentially the same - namely, that the land and community of the Band have been destroyed through the actions of Canada. In putting forth these claims, the

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communicants have made a number of statements which misrepresent the actual status of the lands at issue.

Firstly, at page 4 of the communicants' most recent submission, it is alleged that "Canada is participating in a project by which virtually all traditional Lubicon lands have been leased for timber development". In fact, this statement is not accurate. The Daishowa pulp mill, the project to which the Band refers, is now under construction north of Peace River, Alberta. This location is neither within the Band's alleged "traditional" lands, nor within the 247 square kilometre area (95 sq. mi) agreed to by the Band and the province of Alberta for a reserve. The Daishowa pulp mill is located approximately 80 kilometres away from the land set aside for the Lubicon Lake Band. A map attached as Appendix 2 clearly indicates the locations of the places referred to above. As regards the area available to the pulp mill to supply its operations, the forest management agreement between the province of Alberta and the pulp mill specifically excludes the land proposed for the Lubicon Lake Band. Moreover, in the interests of sound forest management practices, the area cut annually outside of the proposed Lubicon reserve will involve less than 1% of the area specified in the forest management agreement.

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Secondly, the Government of Canada contests the communicants' assertion that the 247 square kilometre area, sought by and offered to the Band, has been totally destroyed. The Government of Canada's offer to the Lubicon Band (outlined above) includes mineral rights on 205 square kilometres of the 247 square kilometre reserve area. No oil or gas has been extracted from the specified 205 square kilometre area, thus the Band's rights in this regard have in no way been impaired. Moreover, for the last approximately two years, there has been no drilling or exploration activity in the area identified for the Band.

While Canada acknowledges that seismic lines cut several years ago, may have caused limited disturbance to the vegetation and wildlife of the area, the extent of this disturbance has never been so great as to preclude the Lubicon from carrying on their traditional hunting and trapping activities. This point is evidenced by the discussions between the Band and the province of Alberta in respect of the Wildlife and Integrated Land Use Management Agreement. This agreement, the terms of which have been agreed to in principle by the parties, will give to the Band a significant measure of involvement in wildlife management and land use planning, in conjunction with other native groups who share the same traditional hunting grounds. The representations of the Band relating to the destruction of wildlife in the

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proposed reserve area are refuted by the Band's participation in an agreement for the management of that wildlife.

It is appropriate at this point to address the Committee's request that Canada take interim measures to avoid damage to the communicant, pursuant to rule 86 of the provisional rules of procedure. As is evident from the above, there has been no interference with the land proposed for a Lubicon reserve for approximately two years. Both Canada and Alberta have refrained from actions that would prejudice or adversely affect the status of this land, including the mineral rights which attach to it. Moreover, the Government's offer to the Lubicon Lake Band would provide, if accepted, an effective remedy to the Band's claims. Finally, it should also be noted that the Government of Canada has provided overall financial assistance to the Band of over \$1.8 million to assist it in pursuing negotiations and its court actions. As well, direct and indirect funding in the amount of \$1.5 million per year is given by the Government to the Band for ongoing community programs and services.

VI. ARTICLES 6(1) AND 7 OF THE COVENANT

In regard to the Band's allegations of cruel, inhuman or degrading treatment, and violations of the inherent right to

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life, the Government of Canada submits that there is no evidence to support such allegations.

VII. RECENT DEVELOPMENTS

Canada wishes to apprise the committee of recent developments in the Cadotte Lake/Little Buffalo community, within which the majority of Lubicon Lake Band members now reside. In December 1988, Canada was made aware of a new group within the community, who sought to resolve the rights of its members under Treaty 8, independent of the Lubicon Lake Band. This group, comprised of approximately 350 native people, sought recognition from the Government as a new band. The group consists of Lubicon Lake Band members who have formally stated their intention of joining the new band, former Lubicon members who were removed by the Band in January 1989, and other native people living within the community. Some members of the new band clearly have recognized rights to land pursuant to Treaty 8, such as the right to a reserve. To facilitate the taking of the land collectively (or in common) for the purposes of a reserve, the federal government agreed to the creation of the Woodland Cree Band. Canada recognizes the same legal obligation to the Woodland Cree as it does to Lubicon Lake Band members. A letter from the leader of the Woodland Cree to the Edmonton Journal, outlining the purpose and composition of the Band, is attached as Appendix 3.

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In addition, there have been further developments resulting from a provision of Treaty 8 that offers individuals with entitlements under the Treaty a right to elect to take land under the Treaty in common with a band, or to take land in severalty - that is, in the name of the individual Indian. In this regard, a group of Lubicon Lake Band members has recently filed a formal claim with the Government of Canada to take land in severalty to live apart from the Lubicon Lake Band.

VIII. CONCLUSION

The Government of Canada submits, based on the information above, (1) that a party to a dispute who is not informed of the specific charges to be addressed cannot prepare a proper defence. Thus, the failure of an adjudicative body to articulate provisions that are allegedly breached, puts into issue the validity of any substantive decision reached by that body; (2) that there is no evidence of a breach of the Covenant and (3) that the communication of the Lubicon Lake Band should therefore be dismissed, without prejudice to the ongoing process of negotiations between Canada and the Lubicon Lake Band, and other native groups to whom Canada has legal obligations.

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APPENDIX 1

CHRONOLOGY OF THE LITIGATION OF THE LUBICON LAKE BAND

1. In 1980, the Lubicon Band commenced its original action in the Federal Court against the federal government, the Province of Alberta and certain corporations. The Federal Court, Trial Division struck the province and the corporations from that action because, by law, the Federal Court has jurisdiction only in regard to matters relating to the federal government. That decision was affirmed by the Federal Court of Appeal in 1981. The Band has taken no steps to prosecute this action against the federal government, and it therefore remains in abeyance.
2. In 1982, the Band commenced proceedings against the Province of Alberta and certain corporations in the Court of Queen's Bench of Alberta. Proceedings with respect to an interim injunction concluded in 1985 when the Supreme Court of Canada denied leave to appeal from the denial of the interim injunction.
3. In 1985, an application by the Band requesting the court to order funding from the federal government, was dismissed by the Federal Court, Trial Division, essentially on the ground that it had not been commenced under the proper judicial process. Nevertheless, in January, 1986, Canada gave the Band a \$1.5 million ex gratia payment to offset legal expenses.
4. Later in 1986, the Band commenced a fresh proceeding in the Federal Court for funding to allow it to prosecute the original Federal Court action and the action commenced in the Court of Queen's Bench of Alberta. An application to strike that Statement of Claim was heard in 1987 and allowed in part. An appeal and a cross-appeal were launched from that decision.
5. In October of 1987, the Court of Queen's Bench of Alberta dismissed an application by the Band to have the federal government added as a party in the 1982 action. An appeal from that decision was filed.
6. In March of 1988 the Band commenced another Federal Court action in response to a grant of money by the federal government towards the partial construction of the Daishowa pulp mill. A defence was filed to that action by the federal government. The Band has taken no further steps.
7. In May of 1988, Canada commenced an action against the Lubicon Lake Band and the Province of Alberta to finally resolve matters. It sought from the Court a determination of the nature and extent of Alberta's obligation to provide the lands requested by the Government of Canada for a Lubicon reserve, and as well, a determination of the basis on which the Band's entitlement to lands should be computed.

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3. Two appeals were scheduled to be heard in October of 1988. The first was the Band's appeal from its unsuccessful attempt to add the federal government in the action before the Court of Queen's Bench of Alberta, and the second was the appeal and cross-appeal from the partially successful application in the Federal Court to obtain funds to finance the original two lawsuits.

9. On October 6, 1988, the Band advised the Court of Appeal of Alberta that they no longer intended to participate in any proceedings to which the Band was a party, including before the Alberta Court of Appeal, the Court of Queen's Bench of Alberta, and the Federal Court of Canada. As a result of that statement, the Alberta Court of Appeal ruled their appeal abandoned. On the same basis, the Federal Court funding action was also dismissed.

10. On October 22, 1988, the Band and Alberta negotiated a settlement proposal so as to establish a 247 square kilometre reserve. The Band abandoned its claim of aboriginal title over a large area of northern Alberta. On January 24, 1989, Canada formally offered to implement this proposal so as to create a reserve at Lubicon Lake. This land claim settlement is often referred to as the Grimshaw Agreement. The Grimshaw Agreement resolved the Band's longstanding land claim and leaves only the issue of compensation outstanding.

CONCLUSION

The Band's decision to boycott all litigation in October of 1988 was unilateral and these Court actions can be reactivated without penalty. While Canada's legal position is that no compensation is owing, Canada has repeatedly urged the Band to pursue these matters in the Canadian courts. In light of the Band's ability to accept the Grimshaw Agreement, without prejudice to their ability to litigate the issue of compensation, it is submitted that the Band can not be said to be the victim of unreasonably prolonged domestic remedies.

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APPENDIX 3

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The Edmonton Journal, August 11, 1989

We're going a little bit public *Ex-Lubicons in new band*

We thought we'd rather write than be interviewed through the phone, and are hoping you'll publish every bit of this letter.

To tell the truth, we actually don't want anything to do with the media. But since the public wants to hear a little bit about our group, and since the man from Chicago, Fred Lennarson, is flashing unpleasant words to the public about us, we are now willing to go a little bit to the public.

Yes, we are forming a band and we're more than happy that the government has allowed us to form a band. Our band doesn't have any ideas of becoming a militant-type one, either. However, this doesn't mean that we're a bunch of helpless people who won't move when it's time to speak up or defend ourselves. But all in all, we'd rather be a band that would get along with the public and obey Canadian laws.

Our band consists of more than 350 people from three groups joined together: people on severalty; people kicked off Lubicon Band membership because they wouldn't support illegal moves; and people who weren't wanted on Lubicon Band membership because they weren't friends of the leaders.

The Woodland Cree Band-to-be are people just as much aboriginal to the area as the Lubicon Band. In other words, the people of the Woodland Cree Band-to-be are just as much entitled to the land in the area as the Lubicons are. Besides, we own a lot of traplines in

the area, but don't own any land legally. That's one reason why we asked the government to allow us to form a new band, so we could get a reserve and be more stable.

To be on a fair basis, if the government had not allowed us to form a new band and negotiate on our own, then the other group shouldn't deserve it, either. If this other group would have settled, it would have left almost two-thirds of the people from Cadotte Lake and Little Buffalo out, and if Lennarson's there to help the Indian people, then why is he trying his best to stop the rest of us from trying for a land claim? We don't care what the Lubicons do, we just care about our people.

We believe Lennarson wants the rest of us totally left out because we don't agree with his moves. He wants to quit our thing while he continues his long battle with the government, disturbing the now-peaceful communities, and at least creating a militant right from our area.

Our group had a meeting and selected me, Archie Cardinal, William Thomas and Roy Letendre to deal with the government for us. Any deal they can reach will be put to our people to say yes or no.

Melvin Laboucan
Woodland Cree Band-to-be
Cadotte Lake



Indian and Northern
Affairs Canada

Affaires indiennes
et du Nord Canada

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BY HAND

Your file Votre référence

Our file Notre référence

Mr. Dan Livermore (IMH)
Director
Human Rights and Social Affairs Division
External Affairs, Tower C-7
125 Sussex Drive
Ottawa, Ontario
K1A 0G2

Re: Lubicon

Dear Dan:

ACC	890803
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LOC	Lake Band
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Further to our phone conversation this morning, enclosed are materials for immediate transmission to Canadian embassies and missions as well as materials for submission to the United Nations.

Concerning the material for the Canadian missions, several copies in English and French are provided of a communiqué which includes a press release, a one page summary of Canada's offer and a statement by the minister. Based on your assessment that a short summary statement translated into German with English and French materials attached would be appropriate for German language countries, I would suggest that the Canadian missions translate the top page in the communiqué. Please advise if you feel that a different summary is needed for translation.

With regard to a submission by the Canadian government to the Human Rights Committee (HRC), Martin Low and I are meeting tomorrow to discuss the details. Along with the communiqués, enclose are materials which should form the basis of that submission:


- o statement by Brian Malone, federal negotiator to the Lubicon Lake Land Claim Negotiations. This provides a context to the formal offer.
- o the formal offer by Canada to the Lubicon Lake Band.
- o the Lubicon Lake Indian Band Self-Government Framework Agreement. This was negotiated along side the formal offer on the land issues but is separate from it. The band's request to have this treated confidentially should be respected but this should pose no difficulty since the complaint procedures of the HRC are supposed to be confidential.

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These materials make clear that domestic remedies are not exhausted. In the press release, in the minister's statement and in the statement by Brian Malone, it is said that Canada's offer remains open and that the band is free to sue Canada and/or Alberta for compensation through the courts. Thus any charges that the complaint should be considered by the HRC due to exhaustion of domestic remedies could be countered. A check should also be made on the status of the 1503 complaint which the Grand Council of the Cree was supposed to have submitted concerning the Lubicon, in order to see if follow-up is needed on that complaint as well.

For your information, only copies of the formal offer were sent yesterday to Susan Norquay and Irit Weiser. By copy of this letter, the additional materials are also being sent to Martin Low.

I would trust that copies of the communiqué would serve as adequate briefing material for the members of the Canadian delegation who will be attending the Commission on Human Rights. Please advise if you think that additional briefing material is needed.


Marilyn Whitaker
Director
Constitution Directorate

cc: Martin Low, Justice
Fred Drummie, DIAND
Richard Van Loon
Bob Coulter
Ian Potter
George Da Pont



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Lubicon Lake Band

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---HRC: LUBICON LAKE INDIAN BAND

FURTHER TO REFFAX, HRC HAS STILL NOT INDICATED WHICH ARTICLES IN POLITICAL COVENANT IT WISHES US TO ADDRESS IN ABOVE CASE. IN LIGHT OF THIS, WE BELIEVED IT USEFUL TO SEEK FURTHER INFORMATION IN INFORMAL FASHION FROM HRC SECRETARIAT. AFTER DISCUSSION WITH GENEV/HYNES AND IN LIGHT OF LATTER'S PRESENCE IN CDA, SECRETARIAT WAS CONTACTED.

2. IN ABSENCE OF HRC/MOLLER, CONTACT WAS MADE WITH COLLEAGUE. HE SAID FAILURE OF HRC TO MENTION SPECIFIC ARTICLES WAS NOT QUOTE OVERSIGHT UNQUOTE. IT HAD OCCURRED AFTER LONG DISCUSSION. HOWEVER OUR INTERLOCUTOR STATED THAT IF CTTEE HAD MENTIONED ARTS, IT WOULD HAVE REFERRED TO ARTS 14, 26 AND 27; HE REFERRED IN PARTICULAR TO GUIDANCE FOUND IN NOV88 PERUVIAN DECISION MUNOZ 203/1986. HE SAID IN HIS VIEW FOR MOST PART REST OF ARTS WERE NOT RELEVANT. (HE THOUGHT ART 1 COULD BE BRIEFLY ADDRESSED; BUT IT WAS UNNECESSARY TO GO BEYOND STATING THAT SELF-DETERMINATION IS COLLECTIVE RIGHT AND

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DRAFTER/RÉDACTEUR

DIVISION/DIRECTION

TELEPHONE

APPROVED/APProuvé

J. TROTTER

IMH

992-6664

M. FORD

SIG

SIG



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▼ PAGE TWO IMH1152 CONFD

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BEYOND SCOPE OF OPTIONAL PROTOCOL. HE SAID THAT CTTEE WAS SPLIT DOWN
MIDDLE RE ART 1 AND THERE COULD BE NO CONSENSUS RE FINDING UNDER
THIS HEAD.)

3. HE SAID THERE WAS PARTICULAR INTEREST IN ART 14(1); IN VIEW OF
CTTEE THERE HAD BEEN FAILURE TO PROVIDE QUOTE PROMPT JUSTICE
UNQUOTE CONTRARY TO REQUIREMENT OF QUOTE FAIR HEARING UNQUOTE IN
ART 14(1).

4. HE SAID THAT ANOTHER POINT THAT NEEDS CLARIFICATION AND SHD BE
ADDRESSED FURTHER IS EXTENT TO WHICH LUBICON WOULD BE REQUIRED TO
RELINQUISH THEIR RIGHT TO MAKE FURTHER CLAIMS PURSUANT TO QUOTE
ABORIGINAL RIGHTS UNQUOTE SHD THEY ACCEPT CDN OFFER.

5. RE ADMISSIBILITY ISSUE, OUR INTERLOCUTOR SAID THAT, BECAUSE IT
HAD BEEN FLOODED WITH SUCH REQUESTS, HRC WOULD NOT REOPEN
ADMISSIBILITY DECISIONS EXCEPT IN EXTRAORDINARY CIRCUMSTANCES.
ACCORDING TO HIM SUCH DECISIONS HAVE BEEN REVERSED THREE TIMES
(INCLUDING ONE CASE CONCERNING CDA).

6. HE SAID SENTIMENT ON CTTEE WAS REGRET THAT NEGOTIATIONS HAD
BROKEN DOWN. HE ALSO NOTED INCIDENT THAT HAD PARTICULARLY ANNOYED
CTTEE MEMBERS WAS THAT RELATED TO PULP MILL AND TIMBER ACTIVITY. ON
GENERAL NOTE HE DESCRIBED CTTEE ATTITUDE AS REGRET CONCERNING
DISAPPEARANCE OF LUBICON QUOTE HUNTING SOCIETY UNQUOTE, COUPLED
WITH REALIZATION THAT SOCIETY CANNOT BE RESTORED.

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GVA / PAR
GVA / TKO

FILE/DOSSIER:45-13-2-LUB LAKE

PAGE 1 OF/DE 4

FM/DE GENEV YTGR4932 14JUL89

TO/A EXTOTT JLO

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DISTR IMD IFB IMH JCD IFB

---ICCPR: LUBICON COMPLAINT UNDER OPTIONAL PROTOCOL

ATTACHED IS NOTE FROM CENTRE FOR HUMAN RIGHTS PROVIDING TEXT
OF INTERIM DECISION ADOPTED BY HUMAN RIGHTS CTTEE JUL 14 ON
COMPLAINT SUBMITTED BY LUBICON LAKE BAND AND INVITING CANADA TO
SUBMIT FURTHER COMMENTS TO REACH CTTEE NO/NO LATER THAN SEPT1.

RECEIVED - REÇU**JUL 14 1989**Legal Operations Division (JLO)
Direction des Opérations juridiques

14 JUL 89 15:29 Z

DRAFTER/REDACTEUR

/SSS

TELEPHONE NBR

APPROVED/APPROUVE

TC HAMMOND

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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

RÉF. N°:

(à rappeler dans la réponse) G/SO 215/51 CANA (38)

167/1984

Palais des Nations

CH - 1211 GENÈVE 10



UNCLAS / NONCLAS
YT 4932
PAGE 2 OE/DE 4

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 14 July 1989, concerning communication No.167/1984, submitted to the Committee for consideration under the Optional Protocol to the International Covenant on Civil and Political Rights by Bernard Ominayak, Chief of the Lubicon Lake Band.

In operative paragraph 1 of the decision, His Excellency's Government is invited to submit to the Committee further explanations or statements relating to the substance of the author's allegations.

The explanations and statements of His Excellency's Government should reach the Human Rights Committee, in care of the Centre for Human Rights, United Nations Office at Geneva, not later than 1 September 1989. The Committee relies on the State party's co-operation in meeting the deadline indicated in the decision, so as to enable the Committee to adopt a final decision at its next session, to be held from 23 October to 10 November 1989.

14 July 1989

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YT 4932

PAGE 3 OF/DE 4



**INTERNATIONAL
COVENANT
ON CIVIL AND
POLITICAL RIGHTS**



Distr.
RESTRICTED */

CCPR/C/36/D/167/1984
14 July 1989

Original: ENGLISH

HUMAN RIGHTS COMMITTEE
Thirty-sixth session

DECISIONS

Communication No. 167/1984

Submitted by:

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

Alleged victim:

The Lubicon Lake Band

State party concerned:

Canada

Date of communication:

14 February 1984 (date of initial letter)

Documentation References:

Prior Decisions

- CCPR/C/WG/23/D/167/1984
(Rule 91 decision,
dated 9 November 1984)
- CCPR/C/27/D/167/1984
(Interim decision,
dated 10 April 1986)
- CCPR/C/30/D/167/1984
(admissibility decision
dated 22 July 1987)

Date of present decision:

14 July 1989

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

YT

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PAGE

4 OF 10

INTERIM DECISION

The Human Rights Committee,

Recalling its decision of 22 July 1987 to declare admissible communication No.167/1984, placed before the Committee by Bernard Ominayak, Chief of the Lubicon Lake Band, in so far as it may raise issues under article 27 or other articles of the Covenant,

Having noted the State party's request of 7 October 1987 that the Committee review its decision on admissibility pursuant to rule 93, paragraph 4, of the Committee's provisional rules of procedure, as well as the State party's contention that effective remedies continue to be available to the author,

Observing that rule 93, paragraph 4, stipulates that the Committee may review its decision on admissibility when examining a communication on its merits in the light of any explanation or statements submitted by the State party,

Having reviewed the information placed before it by the parties subsequent to the decision on admissibility,

Observing that the submissions made by the parties would enable the Committee to formulate its views on the matter under consideration,

Noting further the State party's intent, expressed in its submission of 20 June 1989, to make a further submission on the merits of the author's claims,

Decides:

1. To invite the State party to submit to the Committee any further written explanations or statements relating to the substance of the author's allegations, in addition to its earlier submissions, not later than by 1 September 1989. Any comments which the author might wish to submit thereon should reach the Committee not later than 2 October 1989. The Committee relies, in this respect, on the co-operation of the State party and the author in meeting the deadlines indicated, so as to enable the Committee to adopt a final decision at its next session;
2. To request again the State party, pursuant to rule 86 of the provisional rules of procedure and pending the Committee's final decision, to take measures to avoid damage to the author and the members of the Lubicon Lake Band; the Committee observes in this connection that its request does not imply a determination on the merits of the communication;
3. To transmit this decision to the State party, to the author and to his counsel.



External Affairs
Canada

Affaires extérieures
Canada

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MESSAGE

Accession/Référence 1/11	
File/Dossier 45-cda-13-1-3-Lubicon	
Lake Band	
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SECURITY
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FM EXTOTT JL01157 28JUN89

TO ~~GENEV~~

DELBY 290900

INFO ~~JUSTOFF~~/LOW/WEISER/FREEMAN FPROOTT/OACA/CARON

DIANDHULL/LAFRENIERE/WHITAKER/HUDSON

DISTR ~~JEB~~ ~~JGD~~ ~~IMH~~ ~~IEB~~ ~~IMD~~

REF OURFAX JL01122 21JUN, YOURTEL YTGR4585 23JUN

---ICCPR OPTIONAL PROTOCOL COMPLAINT:LUBICON LAKE BAND

ATTACHED IS FRENCH TRANSLATION OF CDN SUBMISSION FORWARDED TO YOU
IN OUR REFFAX.GRATEFUL YOU PASS COPY TO UN SECRETARIAT.

COMM CENTRE: PLEASE FAX WITH ATTACHED 10 PAGES

DRAFTER/RÉDACTEUR	DIVISION/DIRECTION	TELEPHONE	APPROVED/APPROUVÉ
J. HOLMES/tb SIG <i>[Signature]</i>	JLO	996-5407	SIG <i>[Signature]</i> ROBERT ROCHON

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**REMARQUES DU GOUVERNEMENT CANADIEN AU SUJET DES DERNIERES RÉPONSES
DU CHEF BERNARD OMINAYAK ET DE LA BANDE LUBICON LAKE
AU COMITÉ DES DROITS DE L'HOMME**

I. REMARQUES GÉNÉRALES

Dans sa note n° G/SO 215/51 CANA (38) 167/1984 du 5 mai 1989, le Secrétaire général des Nations Unies a fait part au gouvernement canadien des remarques faites dans la communication du 21 mars 1989. Par la suite, c'est-à-dire le 2 juin 1989, le Secrétaire général des Nations Unies a rédigé une nouvelle note concernant les remarques supplémentaires faites dans la communication du 30 mai 1989.

Dans le but de répondre aux remarques faites dans les communications susmentionnées, le gouvernement du Canada aimerait apporter les précisions suivantes. Premièrement, l'offre que le gouvernement canadien a faite à la bande par suite de négociations pourrait, si elle était acceptée, remédier à la violation des droits énoncés dans le Pacte dont la bande prétend avoir été victime. De plus, en omettant d'exercer des actions en justice, l'auteur de la communication n'a pas épuisé tous les recours internes disponibles comme l'exige le Protocole facultatif. Enfin, s'il ne veut pas outrepasser les limites de sa compétence, le Comité doit, conformément à la Règle provisoire 93(4), informer le gouvernement canadien de sa décision de continuer à considérer la communication de la bande comme recevable et, dans l'affirmative, préciser sur quels articles et

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éléments de preuve repose cette décision. Sinon, le gouvernement du Canada ne saurait préparer une réponse éclairée sur le bien-fondé de la communication.

II. PROGRÈS DES NÉGOCIATIONS ET DES RECOURS INTERNES

Le gouvernement canadien reconnaît que la bande Lubicon Lake a, en raison de circonstances historiques, subi une injustice et qu'elle a droit à une réserve et à des droits connexes. C'est pour cette raison que le gouvernement du Canada a entrepris des négociations avec la bande. Comme on l'explique ci-dessous, la bande a fait l'objet d'une offre qui lui permettrait de préserver sa culture, de contrôler son mode de vie et d'assurer son autonomie financière. Cette offre, si elle était acceptée, constituerait une façon efficace de remédier à la violation des droits dont la bande prétend avoir été victime. Cependant, la bande est libre d'accepter cette offre ou de la refuser. Les revendications de l'auteur de la communication et les réponses des gouvernements du Canada et de l'Alberta sont résumées sous forme de tableau à l'Annexe "A" à titre d'information.

Les négociations les plus récentes entre les hauts fonctionnaires du gouvernement canadien et le bande Lubicon Lake ont eu lieu entre novembre 1988 et janvier 1989. Le Premier ministre du Canada a rencontré le chef Ominayak. Le gouvernement du Canada a répondu à pratiquement toutes les revendications de

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l'auteur de la communication, soit en totalité, soit dans la mesure où le traitement de la bande se rapprochait de celui accordé aux autres bandes canadiennes ou lui était supérieur. L'offre faite à la bande comprenait 95 milles carrés de terres, des droits miniers s'étendant sur 79 milles carrés, des installations communautaires pour chaque famille vivant sur la réserve (y compris le logement, des services d'aqueduc et d'égout, l'électricité, des routes et une école), le contrôle sur leurs membres et une aide totalisant 10,2 millions de dollars afin de lui assurer une autonomie financière. Compte tenu du fait que la bande compte 500 membres et que les biens et services offerts par le gouvernement valent 45 millions de dollars (à l'exclusion des terres et des droits miniers), l'offre du gouvernement équivaut à 90 000\$ par personne ou à un demi-million de dollars environ par famille de cinq. Certaines revendications de la bande, comme une patinoire et une piscine, ont été refusées. Le coût de telles installations n'était pas justifié à la lumière des besoins d'autres collectivités autochtones en matière de services essentiels.

Le seul point en litige entre le gouvernement et l'auteur de la communication qui n'a pas encore été réglé touche à l'indemnité de 167 millions de dollars que la bande demande au titre des pertes financières et autres qu'elle aurait subies. Afin de permettre le règlement des questions au sujet desquelles les parties se sont entendues, le gouvernement du Canada a fait

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une proposition qui permettrait expressément à la bande d'accepter son offre en totalité tout en soumettant sa demande d'indemnisation générale aux tribunaux canadiens.

En ce qui a trait aux négociations et à l'offre qui a été faite, le gouvernement du Canada souhaite faire certaines observations. Premièrement, les renonciations dont la bande fait mention dans ses plus récentes communications ont été demandées uniquement à l'égard des articles pour lesquels la bande obtiendrait une indemnité. Cette exigence n'est pas déraisonnable comme le soutient la bande mais est essentielle si l'on veut satisfaire à des revendications (ou à des dispositions contractuelles en général). Sinon, les gouvernements ne pourraient jamais satisfaire à des revendications de façon définitive.

Deuxièmement, l'auteur de la communication a induit le Comité en erreur en déclarant que pratiquement tous les articles d'importance (visés dans l'offre) devaient faire l'objet de discussions ultérieures (communication du 30 mai 1989, p. 3). Comme le laisse voir le tableau ci-joint, le gouvernement fédéral a fait droit aux revendications de l'auteur de la communication en ce qui concerne les terres, les droits miniers, les installations communautaires, le contrôle sur les membres et l'autonomie financière.

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Enfin, il convient de remarquer que les prétentions de la bande selon lesquelles les négociations ont été menées de mauvaise foi ne paraissent absolument pas fondées. Qui plus est, ces prétentions ne sont pas en accord avec le grand nombre de revendications de la bande auxquelles le gouvernement canadien a satisfait dans son offre officielle. Si le gouvernement canadien ou la bande avait fait preuve de mauvaise foi dans le cadre des négociations, celles-ci n'auraient pas duré six semaines, n'auraient pas mené à une offre aussi complète et n'auraient pas permis de faire droit à un nombre aussi élevé de revendications de la bande. En outre, le gouvernement du Canada a versé plus de 1,8 millions de dollars à la bande pour lui aider à faire valoir ses revendications.

L'offre que le gouvernement canadien a faite à la bande constitue un moyen efficace en soi de remédier à la violation des droits énoncés dans le Pacte dont la bande prétend avoir été victime. En refusant cette offre, la bande a privé ses membres d'un domicile permanent avec les droits miniers qui en découlent, de nouveaux logements et des services que cela comporte, d'une nouvelle école, de l'autonomie gouvernementale et d'une participation à la gestion de la faune sur un vaste territoire. Une saine gestion des articles visés dans l'offre aurait facilement pu permettre à bon nombre de membres de la bande de trouver un travail valorisant pour l'avenir. La bande peut toujours accepter cette offre, mais le gouvernement canadien ne

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saurait l'obliger à le faire. En outre, le gouvernement est disposé à entreprendre des négociations avec la bande en ce qui concerne d'autres programmes destinés aux autochtones en général.

En outre, les actions en justice relatives aux revendications de la bande sont encore pendantes : l'une a été intentée contre le gouvernement fédéral devant la Cour fédérale et l'autre, contre la province de l'Alberta et certaines sociétés du secteur privé devant la Cour du banc de la Reine de cette province. (Voir les communications du Canada du 31 mai 1985, p. 2 à 7, et du 7 octobre 1987, p. 4 à 9.) En vue de surmonter les difficultés de compétence et d'amener les gouvernements provincial et fédéral ainsi que la bande devant le même tribunal, le gouvernement du Canada a entamé, en mai 1985, une action réunissant toutes les parties intéressées devant la Cour du banc de la Reine de l'Alberta. Par la suite, le 30 septembre 1988, la bande a fait savoir publiquement qu'elle ne reconnaissait pas la compétence des tribunaux du Canada -- position tout à fait contraire au Pacte et à l'obligation d'épuiser tous les recours internes. La position de la bande a eu pour effet d'empêcher les tribunaux canadiens d'examiner à fond les questions de droit et de fait en litige. En conséquence, le Comité est forcé de trancher la question d'incompatibilité avec le Pacte, sans pouvoir fonder sa décision avec conviction sur des conclusions judiciaires. Conformément à

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l'alinéa 5(2)b) du Protocole facultatif, le Canada a le droit d'exiger que les recours internes disponibles soient épuisés avant que le Comité n'examine la communication.

III. PROCÉDURE

Le Comité des droits de l'homme, dans sa décision du 6 août 1987, a déclaré recevable la communication de la bande, non pas en se fondant sur l'article premier (comme l'avait invoqué la bande), mais "parce que la communication peut soulever des questions aux termes de l'article 27 ou d'autres articles du Pacte" (c'est nous qui soulignons). Dans les remarques qu'il a faites le 7 octobre 1987, le gouvernement du Canada a demandé au Comité de réviser sa décision en matière de recevabilité conformément à la Règle 93(4) des Règles provisoires. Plus particulièrement, il a demandé au Comité, advenant qu'il confirme sa décision relative à la recevabilité, de préciser sur quels articles spécifiques du Pacte, affirmations et éléments de preuve repose cette décision, afin que le Canada puisse aborder les questions qui peuvent réellement relever du Pacte et faire connaître son opinion sur le contenu ou le bien-fondé des prétendues violations des droits énoncés dans le Pacte. En l'absence des renseignements visés ci-dessus, le Canada n'est pas en mesure de satisfaire à la revendication de la bande.

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Dans sa note du 4 décembre 1987, le Secrétariat a avisé le gouvernement du Canada que la requête du Canada allait être portée à l'attention du Comité dans le cadre de sa prochaine session (c.-à-d. en mars 1988). Dans l'intervalle, les questions soulevées dans la demande du Canada aux termes de la Règle provisoire 93(4) ont été l'objet de plus amples observations soumises au Comité tant de la part de l'auteur de la communication que du gouvernement du Canada. Depuis, le Comité n'a toujours pas apporté de précisions sur le fondement de sa décision en matière de recevabilité, précisions qui permettraient au Canada de réagir aux allégations d'incompatibilité avec le Pacte. Le gouvernement du Canada est donc d'avis que les procédures entamées n'ont pas franchi l'étape de la recevabilité.

Plus récemment, l'auteur de la communication a fait part de ses remarques au Comité, énonçant en détail les articles du Pacte auxquels le Canada, selon lui, aurait contrevenu. Dans ses remarques, l'auteur de la communication a fait des déclarations abusives et injustifiées à l'égard du gouvernement du Canada. La bande se dit victime de traitements cruels, inhumains et dégradants, de même que de préjugés de la part des tribunaux et affirme que l'on porte atteinte à son droit à la vie. Le gouvernement du Canada demande au Comité de préciser, conformément à la Règle 93(4), en vertu de quels articles spécifiques du Pacte invoqués par l'auteur il considère cette communication comme recevable. À tout le moins, dans le but de satisfaire aux

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exigences fondamentales de l'équité procédurale, le gouvernement du Canada soutient que le Comité doit se conformer à la procédure qu'il a lui-même établie dans la communication n° 198/1985 (R. Stalla Costa c. Uruguay) et citée dans le rapport de 1987 du Comité des droits de l'homme (p.105). Afin de ne pas outrepasser les limites de sa compétence, le Comité doit (1) préciser, conformément à la Règle provisoire 93(4), le résultat du réexamen de sa décision sur la recevabilité; (2) s'il déclare la communication recevable, préciser les articles et les éléments de preuve sur lesquels il s'appuie; et (3) conformément au paragraphe 4(2) du Protocole facultatif, donner l'occasion au Canada de faire connaître, dans les six mois, ses observations sur le bien-fondé de la question. Le gouvernement du Canada demande que le Comité rende sa décision sur les questions soulevées aux termes de la Règle provisoire 93(4) dans les meilleurs délais, de façon à ce que le Canada puisse, le cas échéant, commencer à préparer son dossier sur le fond afin de le déposer devant le Comité en vue de la décision finale.

IV. CONCLUSION

Le gouvernement du Canada soutient que l'offre décrite ci-dessus et la possibilité pour la bande de continuer les actions en justice entamées en vue de régler la question d'indemnisation générale constituent un recours interne efficace. L'acceptation de l'offre du gouvernement du Canada par la bande remédierait à

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toutes les violations du Pacte dont la bande prétend avoir été victime. Jusqu'à ce jour, la bande s'y est refusée. Par ailleurs, la bande n'a pas cherché à mener à terme les deux actions en justice qui avaient été entamées. On soutient donc que les recours internes disponibles n'ont pas été épuisés comme l'exige l'alinéa 5(2)b) du Protocole facultatif et que, par conséquent, le Comité devrait déclarer la communication irrecevable. Par contre, si le Comité confirme sa décision selon laquelle la communication est recevable aux termes de la Règle provisoire 93(4), le gouvernement du Canada s'attend à ce que le Comité précise sur quels articles et éléments de preuve repose sa décision de sorte que le Canada puisse préparer sa réponse quant au bien-fondé de la question.



P R O T E C T E D

FM GENEV YTGR4585 23JUN89

TO EXTOTT JLO

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WHITAKER/HUDSON/REEVE DE OCI FPROOTT/OACA/CARON/ROCAN DE OPM
DISTR IMD IFB IMH JCD IFB

---ICCPR: LUBICON COMPLAINT UNDER OPTIONAL PROTOCOL

HYNES AND IMH/TROTTIER HAD INFORMAL MEETING ON 22JUN WITH JACOB
MOLLER OF CENTRE FOR HUMAN RIGHTS AND TOOK OPPORTUNITY OF PASSING
HIM COPY OF LATEST CDN COMMUNICATION. MOLLERS TENTATIVE VIEW IS THAT
THERE NOW NO/NO QUOTE REALISTIC EXPECTATION UNQUOTE THAT HCR COULD
DEAL WITH LUBICON MATTER AT ITS JULY SESSION. HE SAID THAT CTTEES
EXPECTATION AT LAST SESSION TO MAKE DECISION IN JULY ON LUBICON WAS
UNREALISTIC (BASED ON THEIR DESIRE TO BRING MATTER TO AN END). IT DID
NOT/NOT TAKE INTO ACCOUNT WORKLOAD FOR JULY MEETING. ADDITIONAL
LUBICON-RELATED COMMUNICATIONS RECEIVED IN INTERVAL HAVE NOT/NOT
HELPED SITUATION.

2. DESPITE MOLLERS STATEMENT AND APPARENT LIKELYHOOD THAT THERE WILL
BE NO/NO JULY DECISION ON THIS MATTER, WE BELIEVE THAT YOU SHOULD BE
PREPARED FOR ONE ON CHANCE THAT IT DOES OCCUR.

3. RE SUBSTANCE OF EVENTUAL CTTEE DECISION, MOLLER SEEMS CONFIDENT
THAT DECISION WILL BE ONE THAT CDA WILL FIND QUOTE REASONABLY
SATISFACTORY UNQUOTE. BY THIS HE MEANT THAT HE EXPECTS IT WOULD BE
ONE THAT WOULD BE ALONG LINES OF OUR PREFERENCE FOR DECISION WHICH

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WOULD CALL UPON CDA TO REMEDY SITUATION(THUS PROVIDING US WITH
OPPORTUNITY OF INDICATING HOW WE WERE ATTEMPTING TO DO SO) RATHER
THAN ONE WHICH WOULD BE BROAD INDICTMENT OF PAST AND PRESENT ACTION.
MOLLER WAS LESS ANGUINE RE PROSPECTS FOR CTTEE TO CONCUR IN OUR
REQUEST FOR PRIOR SEPARATE RECONSIDERATION OF ADMISSIBILITY ISSUE.
HE SAW RISK IN CREATING PRECEDENT OPENING DOOR TO EXCESSIVE DELAYING
TACTICS BY GOVTS.

CCC/131 230920Z YTGR4585

MEMORANDUM/NOTE DE SERVICE

SECRET

File number - numéro de dossier

295310-3

Date

June 22, 1989

TO/À: DEPUTY MINISTER
VIA Associate Deputy Minister
Public Law

FROM/DE: Senior General Counsel
Human Rights Law Section

SUBJECT/OBJET: Lubicon Lake

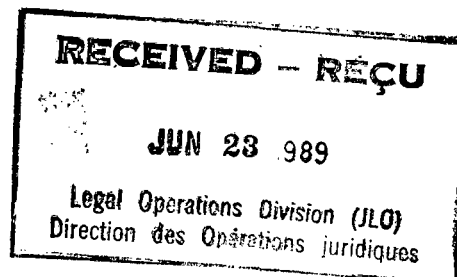
45-CD-13-1-3 - *Lubicon Lake Bank*

Comments/Remarques

External officials met today with the member of the UN Secretariat responsible for communications under the Optional Protocol. They presented the text of our submission and made the point that we were very concerned about the procedural deficiencies in this case, and the unfounded factual allegations in the Band's latest document.

X The advice from the Secretariat was that in light of these developments, there is now "little chance" of a decision in July. The Committee has a serious backlog of cases and [our procedural arguments have support from some members of the Committee.] That, together with the factual disputes would, in the Secretariat's view, produce extended debate and the Committee's schedule would not likely permit resolution of the issues in the Lubicon case at the next meeting. The possibility of the Committee's work proceeding more quickly than expected was raised by our people. The Secretariat's view was that there was only a 10% chance of that happening, but that if it should occur, the probable disposition of the substance, in the circumstances, would be a "soft" decision by the Committee that the parties should re-open negotiations.

I indicated to External that even such a "soft" decision has very serious implications for the procedure that may be followed in the future. I asked that they take the opportunity within the next week to re-emphasize that the eventual outcome of this case, while serious, is not as significant for our long term relationship with the Committee, as being confident that rigorous standards of procedural fairness will be applied by the Committee.



-2-

Commer remarques

Finally, I am attaching for your information a copy of the final version of Canada's submission to the U.N. in the Lubicon case.


D. Martin Low

Distribution

D.J.A. Rutherford
Fred Drummie
Fred Caron
Michael Hudson
Marilyn Whitaker
Bob Coulter
(John Holmes)
James Trottier
Ivan Whitehall
Martin Freeman

MEMORANDUM/NOTE DE SERVICE

ACC	REF	DATE	SECRET
FILE			File number - numéro de dossier
45-KDA-13-1-3-LUBICON LAKE BAND			295310-3
Date			June 22, 1989

TO/À: DEPUTY MINISTER
VIA Associate Deputy Minister
Public Law

FROM/DE: Senior General Counsel
Human Rights Law Section

SUBJECT/OBJET: Lubicon Lake

RECEIVED - REÇU

JUN 23 1989

IMH

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June 20, 1989

**COMMENTS OF THE GOVERNMENT OF CANADA ON THE FURTHER RESPONSES
OF CHIEF BERNARD OMINAYAK AND THE LUBICON LAKE BAND
TO THE HUMAN RIGHTS COMMITTEE**

I. GENERAL

The Secretary-General of the United Nations, in his note no. G/SO 215/51 CANA (38) 167/1984 dated May 5, 1989, transmitted to the Government of Canada the comments of the communicant dated March 21, 1989. Subsequently, by note dated June 2, 1989, the Secretary-General transmitted the additional comments of the communicant dated May 30, 1989.

In response to the above submissions, the Government of Canada has outlined below a number of points. Firstly, the offer made by the Government of Canada to the Band following negotiations, would, if accepted, remedy the violations of the Covenant alleged by the Band. As well, by failing to pursue court actions, the communicant has not followed to completion effective domestic remedies, as required by the Optional Protocol. Finally, it is submitted that to act within its jurisdiction, the Committee is obliged to inform the Government of Canada, pursuant to Provisional Rule 93(4), of whether the Committee still concludes that the communication of the Band is admissible, and if so, the article(s) and evidence on which that conclusion is based. The Government of Canada cannot otherwise prepare an informed response on the merits of the communication.

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II. RECENT DEVELOPMENTS IN NEGOTIATIONS AND DOMESTIC REMEDIES

The Government of Canada recognizes that the Lubicon Lake Band has suffered a historical inequity and that they are entitled to a reserve and related entitlements. This is why the Government of Canada entered into negotiations with the Band. As is indicated below, the Band has been offered the means to maintain its culture, control its way of life and achieve economic self-sufficiency. This offer, if accepted, would provide an effective domestic remedy to the violations of the Covenant alleged by the Band. However, such a remedy can only be offered to the Band, it cannot be imposed. For the assistance of the Committee, the demands of the communicant and the responses of the Canadian and Alberta governments are summarized in a chart attached as Annex "A" to this submission.

The most recent negotiations between the Lubicon Lake Band and the Government of Canada took place from November 1988 to January 1989. These negotiations were with senior government officials. As well, the Prime Minister of Canada met with Chief Ominayak during the Fall of 1988. The Canadian government met virtually each of the communicant's demands, either in full or to the extent that equal treatment with other Canadian bands was approximated or exceeded. Ninety-five square miles of land, mineral rights on 79 square miles, community facilities for each

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- 3 -

family living on the reserve (including housing, water and sewage services, electrification, roads and a school), control over membership and an economic self-sufficiency package valued at \$10.2 million were offered in full to the Band. On the basis of 500 Band members and a government package worth a total of \$45 million (non-inclusive of land and mineral rights), this offer amounted to \$90,000 per person or almost half a million dollars for each family of five. Certain demands of the Band, such as a request for an indoor ice arena and a swimming pool were refused. Expenditures for such purposes could not be justified, having due regard to the needs of other Indian communities for basic services.

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

In regard to the negotiations and the outstanding offer, the Government of Canada wishes to make a number of points. Firstly, the legal releases to which the Band refers in its most recent

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submissions, were required only with respect to those items for which the Band would be financially compensated. Far from being an "unconscionable demand", as suggested by the Band, this requirement is a necessary component of all claims settlements (and of all contracts, generally), without which governments would never be able to dispose of claims with any finality.

Secondly, the communicant has misleadingly represented to the Committee that "virtually all items of any significance [in the offer] were left to future discussions" (Band submission dated May 30, 1989, p.3). As the attached chart indicates, the communicant's demands for land, mineral rights, community facilities, control over membership and an economic self-sufficiency package were agreed to by the federal government.

Finally, it should be noted that the Band's allegations of negotiating in bad faith are totally without basis. Nor are these allegations consistent with the large number of the Band's demands that were met in Canada's formal offer. Bad faith negotiations by either the Band or Canada would not have lasted six weeks, resulted in such a comprehensive offer, nor seen so many of the Band's demands accepted. Moreover, the Government of Canada has provided financial assistance to the Band of over \$1.8 million to assist it in pursuing its claim.

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The Government of Canada's offer to the Band represents, in itself, an effective remedy to the violations of the Covenant alleged by the Band. By refusing this offer, the Band deprived its members of a permanent land base with attendant mineral rights, new housing with all related services, a new school, self-government, and wildlife management participation over a large area. Prudent management of the items contained in Canada's offer could easily have resulted in a high level of meaningful future employment for members of the Band. It is still open to the Band to accept this offer; it cannot, however, be imposed on the Band by the Government of Canada. Moreover, the Government is willing to negotiate with the Band in respect of other programs available to Indians generally.

In addition, court actions concerning the Band's claim are still outstanding. One action was commenced in the Federal Court of Canada against the federal government; the other in the Alberta Court of Queen's Bench against the province and certain private corporations. (See Canada's communication dated May 31, 1985 at pages 2-7 and October 7, 1987 at pages 4-9). In May 1988, in an effort to overcome jurisdictional difficulties in bringing both the provincial and federal governments and the Band before the same court, the Government of Canada commenced an action in the Court of Queen's Bench of Alberta joining all parties. Subsequently, on September 30, 1988, the Band took the public position that it would not recognize the jurisdiction of

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III. PROCESS

The Human Rights Committee, in its decision dated August 6, 1987, declared the communication of the Lubicon Lake Band admissible, not on the basis of Article 1 (as alleged by the Band), but "in so far as it may raise issues under article 27 or other articles of the Covenant" (emphasis added). In its submission of October 7, 1987, the Government of Canada requested the Committee to review its decision on admissibility pursuant to Rule 93(4) of the Provisional Rules. In particular, in order to permit Canada to address the true issues of possible concern under the Covenant, it was requested that, if the Committee maintained its decision on admissibility, it identify the specific article(s) of the Covenant, as well as the allegations

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and evidence on which its decision is based, in order to permit Canada to address comments on the substance or the merits of the alleged breach(es) of the Covenant. In the absence of the above information, Canada is prejudiced in its ability to respond to the Band's claim.

In its note of December 4, 1987, the Secretariat advised the Canadian government that Canada's request would be brought to the attention of the Committee at its next session (i.e. March 1988). In the intervening period, the issues raised in Canada's application under Provisional Rule 93(4) were the object of further submissions to the Committee from both the communicant, and the Government of Canada. Since then, the Committee has not offered any clarification of its decision on admissibility that would enable the Government of Canada to address specific allegations of incompatibility with the Covenant. The Government of Canada therefore takes the position that the current proceedings have not progressed from the admissibility stage.

Most recently, the communicant filed a submission with the Committee delineating articles of the Covenant it claimed have been breached by Canada. In its submission, the communicant made a number of extreme and unfounded allegations against the Government of Canada, for which no concrete evidence was presented. These allegations included cruel, inhuman and degrading treatment or punishment, judicial bias against the

- 8 -

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Lubicon Band and violation of the right to life. The Government of Canada requests that the Committee issue a ruling pursuant to Provisional Rule 93(4) to specify which of the articles of the Covenant cited by the communicant, the Committee accepts as meeting the requirements of admissibility. At a minimum, in order to meet the basic requirements of procedural fairness, the Government of Canada submits that the Committee is required to follow its own procedure as laid out in communication no. 198/1985 (R. Stalla Costa v. Uruguay) and cited in the 1987 Report of the Human Rights Committee (p. 105). To act within its jurisdiction, the Committee should (1) issue a ruling pursuant to Provisional Rule 93(4) indicating the outcome of its reconsideration of admissibility; (2) if it finds the communication admissible, stipulate the articles and evidence on which that finding is based; and (3) pursuant to article 4(2) of the Optional Protocol, provide Canada with a six month period in which to respond on the merits. The Government of Canada requests that the Committee provide its decision on the issues raised pursuant to Provisional Rule 93(4) as soon as possible, so that if necessary, Canada may commence preparation of its substantive case to the Committee for final determination.

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IV. CONCLUSIONS

The Government of Canada submits that the offer outlined above, as well as the ability of the Band to pursue the unresolved issue of general compensation in the courts, amounts to an effective domestic remedy. Acceptance by the Band of Canada's offer would rectify any of the violations of the Covenant the Band alleges it has suffered. To date, the Band has refused this option. Additionally, the Band has not pursued to completion the two court actions which it has already commenced. Consequently, it is submitted that effective domestic remedies have not been exhausted as required by article 5(2)(b) of the Optional Protocol, and thus, the communication should be declared inadmissible by the Committee. If, on the other hand, the Committee maintains that the communication is admissible pursuant to Provisional Rule 93(4), the Government of Canada is awaiting the Committee's identification of the article(s) and evidence on which the admissibility decision is based so that a response on the merits may be prepared.

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PRINCIPAL DEMANDS OF THE LUBICON LAKE BAND AND THE RESPONSE OF THE CANADIAN GOVERNMENT

Document disclosed under the Access to Information Act
Document divulgué en vertu de la Loi sur l'accès à l'information

RECEIVED - RECU

JUN 20 1989

Legal Operations Division (JLO)
Direction des Opérations juridiques

ISSUE

DEMAND BY BAND

OFFER BY GOVERNMENT
OF CANADA

OFFER BY GOVERNMENT OF
THE PROVINCE OF ALBERTA

Quantum of Land

- 95 square miles

- to give effect to Band/Province agreement

- agreed to Provincial offer

- agreed to Band demand for 79 sq.mi. for a reserve plus 16 sq.mi. to be purchased by Canada

Mineral Rights

Full on 95 sq.mi.
- agreed to Provincial offer of mineral rights on 79 sq.mi.

- Canada proposed full mineral rights to 95 sq.mi. subject to agreement by Band and Province.

- full mineral rights to 79 sq.mi.

Self-Government

Band sought approval for its proposal for self-government.

Band and Canada agreed to a self-government framework agreement.

Not involved.

Location of Reserve

Location to be around Lubicon Lake, Alberta.

Canada agreed.

Agreed (final minor boundary adjustments still required).

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ISSUE

DEMAND BY BAND

OFFER BY GOVERNMENT
OF CANADA

OFFER BY GOVERNMENT OF
THE PROVINCE OF ALBERTA

Membership

Band sought:

- a) control over its membership
- b) no major division between status of its members

- a) agreed to by Canada in 1986
- b) Canada agreed to "fast track" registration in accordance with Canadian law. It is likely that more than 98% of Band members are registerable as Indians, hence division problem non-existent.
- Band/Province agreement reduced importance of membership in calculation of land quantum.

Not involved.

Hunting and Trapping

Control over hunting and trapping.

Not involved

Agreement in principle reached.

Construction of a
Community

Construction of a new community.

Canada agreed to fund a single family house for each family with attendant infrastructure (sewer, water, electricity, gas, roads), a school, and principal Band building (office, health centre, community hall, hall, firehall and truck), plus planning and management.

Not involved.

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<u>ISSUE</u>	<u>DEMAND BY BAND</u>	<u>OFFER BY GOVERNMENT OF CANADA</u>	<u>OFFER BY GOVERNMENT OF THE PROVINCE OF ALBERTA</u>
<u>Trappers' Assistance</u>	Band sought mechanism to assist trappers maintain way of life.	Canada offered \$500,000 trust fund to augment incomes.	Position unknown to Canada. Negotiations ongoing.
<u>Economic Self-sufficiency</u>	Band sought means to economic self-sufficiency.	Canada offered package valued at \$10.2 million which, if prudently managed, would see very high level of meaningful employment.	Additional support possible but not explored while Canada party to discussions.
<u>Band Costs in Presenting Claim</u>	Not specified in detail.	Canada has provided \$1,814,000 to assist Band to date.	Position unknown to Canada. Negotiations ongoing.
<u>Compensation</u>	Band position has varied but thought to be \$114-275,000,000 from Canada. Amount sought from Province is unknown to Canada.	Canada did not agree to this claim. Canada gave Band option of accepting all of its offer and pursuing compensation in court. This was rejected.	Position of Province not explored while Canada was present.

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OUTLINE OF ISSUES IN THE LUBICON LAKE BAND CASE AND
THE GOVERNMENT OFFER

ISSUES

GOVERNMENT OFFER

Impairment of way of life
and economic development

- Reserve lands with full mineral rights over most of these lands
- Agreement-in-principle on hunting and trapping management
- Trust fund for trappers' assistance with other on-going negotiations
- Employment package valued at \$10.2 million
- Option of pursuing compensation through courts

Impairment of way of life
and cultural, social and
political development

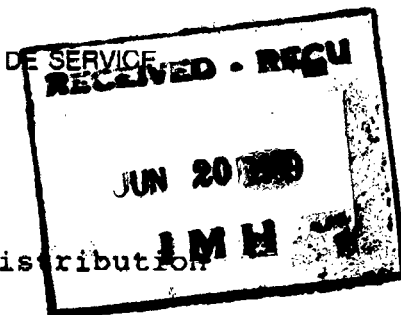
- See items above on hunting and trapping
- Construction of a community with single-family housing for each family, infrastructure of sewers, water, electricity, gas, roads, school, and band building with office, health centre, community hall and firehall
- Control over membership provided
- Agreement on a self-government framework with negotiations to follow, similar to process leading to legislative arrangements for self-government with other communities



Department of Justice
Canada

Ministère de la Justice
Canada

MEMORANDUM/NOTE



Security Classification - Cote de sécurité

File number - numéro de dossier

295310-3

Date

June 20, 1989

TO/A:

Distribution

FROM/DE:

Counsel
Human Rights Law Section

SUBJECT/OBJET:

Communication of the Lubicon Lake Band to the UN
Human Rights Committee under the Optional Protocol

Comments/Remarques

Attached is the final version of Canada's submission in regard to the above-noted matter. It incorporates the comments received from various people involved in this matter.

Thank you for your assistance.

Irit Weiser

ACC	REF	DATE
637135		
FILE	DOSSIER	
45-CDA-13-1-3-LUBICONLAKEBAND		

Distribution:

Fred Caron - Fax: 957-5750
Michael Hudson - Fax: 997-1587
Marilyn Whitaker - Fax: 953-6430 (days)
953-9027 (nights)
Bob Coulter - Fax: 997-1587
John Holmes - Fax: 990-8688
James Trottier - Fax: 952-7642
Ivan Whitehall - Room: 325
Martin Freeman - Room: 232
Ken Boutellier - Fax: (403) 425-0307

c.c. D. Martin Low

IW/dp

003304

June 20, 1989

**COMMENTS OF THE GOVERNMENT OF CANADA ON THE FURTHER RESPONSES
OF CHIEF BERNARD OMINAYAK AND THE LUBICON LAKE BAND
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003305

- 2 -

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P.4/11

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- 3 -

(including housing, water and sewage services, electrification, roads and a school), control over membership and an economic self-sufficiency package valued at \$10.2 million were offered in full to the Band. On the basis of 500 Band members and a government package worth a total of \$45 million (non-inclusive of land and mineral rights), this offer amounted to \$90,000 per person or almost half a million dollars for each family of five. Certain demands of the Band, such as a request for an indoor ice arena and a swimming pool were refused. Expenditures for such purposes could not be justified, having due regard to the needs of other Indian communities for basic services.

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003307

- 4 -

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- 6 -

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III. PROCESS

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- 7 -

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JUN 20 '89 15:27 DEPT OF JUSTICE OTTAWA

- 8 -

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JUN 20 09 15:27 DEPT OF JUSTICE OTTAWA

- 9 -

IV. CONCLUSIONS

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P.11/11

JUN 20 09 15:27 DEPT OF JUSTICE OTTAWA



External Affairs
Canada

Affaires extérieures
Canada

MESSAGE

Accession/Référence	1/2
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SUBJ/SUJ

REF YOURTEL YTGR5332 26AUG88

---HUMAN RIGHTS CTTEE(HRC):OPTIONAL COMPLAINTS:SATIAUCUM

THOUGH HRC HAS DISCONTINUED CONSIDERATION OF SUBJ
COMMUNICATION, ATTACHED IS PRESS REPORT FOR YOUR INFO DESCRIBING
RECENT FED CRT DECISION OVERTURNING 1987 IMMIGRATION APPEAL BOARD
DECISION GRANTING SATIAUCUM REFUGEE STATUS IN CDA, WHICH CAN HAVE
IMPLICATIONS FOR THIS CASE BEFORE HRC, DEPENDING ON POSSIBLE ACTIONS
TAKEN BY SUBJS LAWYERS.

COMM CENTRE: PLEASE FAX WITH ATTACHED PAGE (news paper cutting)

DRAFTER/RÉDACTEUR

DIVISION/DIRECTION

TELEPHONE

APPROVED/APProuvé

JOHN HOLMES/tb

JLO

996-5407

SIG

SIG

for ROBERT ROCHON

003314

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2/2

Court nixes native's bid for refugee status

VANCOUVER (CP) — The Federal Court of Appeal has rejected American Indian leader Robert Satiacum's bid for refugee status in Canada.

An Immigration Appeal Board panel erred in its 1987 decision that Satiacum should be declared a refugee, a three-member panel ruled Friday.

It ordered the board to reconsider Satiacum's claim "on the basis that the respondent does not on this record qualify as a refugee."

The federal government had asked the court to overturn the board ruling granting Satiacum refugee status.

The federal court said there was not sufficient evidence to back up Satiacum's claim that he could be murdered in a U.S. federal prison because of his past activism in Washington Indians' fight to acquire fishing and land claims on treaty lands.

"The evidence on which the board based its conclusions the respondent's life could be said to be in danger in federal prison is the sheerest conjecture or the merest speculation," said the judgment, written by Justice Mark MacGuigan.

"No witness was able to point to any prejudice to the lives of Indian inmates in federal institutions and one witness admitted



Robert Satiacum
Panel erred

there was no such evidence."

George Carruthers, a federal Justice Department lawyer, said there will not be a new hearing.

But Satiacum's lawyer, David Gibbons, said he expects another lengthy hearing.

The Justice Department said earlier Satiacum was the only American citizen ever to be granted refugee status in Canada.

Satiacum, a 60-year-old hereditary chief of the Puyallup Indians near Tacoma, Wash., fled to Canada in 1982 after he was convicted of 46 racketeering charges.



TO/A USS (through JFB, JCD and JEB) + DRC)
FROM/DE JLO
We understood John Tait may speak to you about this matter.
Ellee.

REFERENCE
RÉFÉRENCE
SUBJECT
SUJET

Lubicon Band Communication to the UN
Human Rights Committee

Security/Sécurité CONFIDENTIAL	
Accession/Référence	
File/Dossier	606-635
Date	June 16, 1989
Number/Numéro	JLO-1099

ENCLOSURES
ANNEXES

DISTRIBUTION

IMD
IMH

PURPOSE

To advise you of a possible effort by Justice to lobby members of the UN Human Rights Committee (HRC) on a communication before it by the Lubicon Lake Indian Band of Alberta.

BACKGROUND

2. The Lubicon Band filed a complaint with the HRC (an international expert body) in 1984, alleging that Canada had violated the Band's rights under the International Covenant on Civil and Political Rights (ICCPR). Following a series of submissions by Canada and the complainant, the HRC ruled in 1987 that the communication was admissible in that effective domestic remedies were not available to the Band and that ICCPR articles may have been violated. In accordance with the HRC's rules of procedure, Canada requested a review of the admissibility decision and, in the event that the original decision was upheld, clarification of which ICCPR articles were under consideration by the HRC as having been violated by Canada. Without replying to our arguments, the HRC, at its March 1989 session, decided that it had sufficient information with which to take a final decision on this case and that it intended to do so in July.

CANADIAN POSITION

3. In light of the HRC's March 1989 decision, the relevant interdepartmental committee has decided to make a further submission (a draft copy of which is attached). In it, Canada will again request a review of the admissibility decision, and in the event the review request is denied, will ask that the ICCPR articles under consideration be specified.

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JUN 30 1989

Legal Operations Division (JLO)
Direction des Opérations juridiques

* copy in hand.

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LOBBYING OF HRC MEMBERS

4. All departments are concerned over the impact a negative HRC decision would have on the domestic scene and all support a further submission by Canada to preclude or delay such a decision. However, some officials of DIAND and Justice believe that Canada should also lobby certain HRC members. While these officials recognize that the chances of success of lobbying are limited, they believe it should be attempted because a negative HRC decision will make the negotiation of a satisfactory settlement with the Lubicon more difficult and will encourage other Canadian indigenous groups to use the HRC. //

5. Officials of this department (JLO and IMH) have expressed strong reservations regarding a lobbying effort. During informal consultations in 1988, we were informed by the HRC that it does not want government representatives present during its consideration of complaints. Moreover, given the manner in which the HRC has handled the case thus far and our awareness of the general sympathy in the international community for indigenous issues, such lobbying would likely be counterproductive by antagonizing HRC members. While the chances of success of lobbying are minimal, the risks are substantial. Canada would be put in a very embarrassing position should word of such activities become known (as is possible since certain HRC members are sympathetic to the Lubicon cause). As well, lobbying would contradict our general foreign policy position that independent monitoring bodies such as the HRC are fundamental to the international protection of human rights. //

6. The Canadian mission in Geneva was consulted on this issue and acknowledged that some "accidental" contacts with HRC members could be acceptable and this could be carried out after broaching the matter with the HRC secretariat. Lobbying by officials from headquarters during the HRC sessions was not, however, advisable.

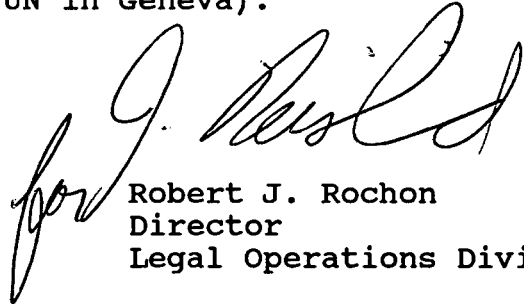
RECOMMENDATIONS

7. 1) If contacted by Justice Department officials, you should oppose any lobbying of HRC members by Canada-based officials, for the reasons stated above.

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2) If pressed, you could state that you would not object to having Ambassador Marchand or other Geneva mission staff raise the Lubicon case with HRC members they encounter on other business (some members are part of their countries' Permanent Missions to the UN in Geneva).

A handwritten signature in black ink, appearing to read "for J. Rochon". The signature is stylized and cursive, written over the printed name and title.

Robert J. Rochon
Director
Legal Operations Division

Department of External Affairs



Canada

Ministère des Affaires extérieures

F A C S I M I L E

N O N C L A S S I F I E

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TO/A Ms. I. Weiser - Dept of Justice
Mr. B. Coulter- DIAND

INFO

DISTR

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--- ICCPR: LUBICON COMPLAINT UNDER OPTIONAL PROTOCOL

As requested, Ms. Weiser, please find attached the above noted document.

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

DIRECTION GÉNÉRALE DES ORGANISATIONS INTERNATIONALES

INTERNATIONAL ORGANIZATIONS BUREAU

OUR FAX/NOTRE BELINO: (613) 952-7642

DRAFTER/RÉDACTEUR

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ACTION
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FPROOTT/CARON ^{de ott}

DISTR IMD IFB JLO JCD IFB

---ICCR: LUBICON COMPLAINT UNDER OPTIONAL PROTOCOL

ATTACHED FURTHER LUBICON SUBMISSION WAS JUST RECEIVED FROM
SECT. WE HAVE NOT/NOT YET HAD OPPORTUNITY TO STUDY TEXT.

2. WILL CONTACT TROTTIER BY PHONE TO DISCUSS THIS DOCU AND
LATEST VERSION OF DRAFT GOVT SUBMISSION.

Division Phoned D.C.

Person

Local Time 1920

seen WD

JUN 12:41

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RGE/SBS

TELEPHONE NBR

APPROVED/APProuvé

TC: HAMMOND

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

REF. N°:

(à rappeler dans la réponse) G/SO 215/51 CANA (38)

167/1984

Palais des Nations

CH - 1211 GENÈVE 10



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The Secretariat of the United Nations (Centre for Human Rights) presents its compliments to the Permanent Mission of Canada to the United Nations Office at Geneva and has the honour to transmit herewith, for information and in order to complete the files of the State party, a copy of a letter dated 30 May 1989, transmitting a further submission concerning communication No. 167/1984 (B. Ominayak and the Lubicon Lake Band v. Canada), which is before the Human Rights Committee for consideration under the Optional Protocol to the International Covenant on Civil and Political Rights.

Divided

2 June 1989

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VAN NESS, FELDMAN, SUTCLIFFE & CURTIS

A PROFESSIONAL CORPORATION
1040 THOMAS JEFFERSON STREET, N.W.

SEVENTH FLOOR
WASHINGTON, D. C. 20007

(202) 266-1800

FACSIMILE

(202) 338-2361

(202) 338-2416

WRITER'S DIRECT DIAL NUMBER

May 30, 1989

JOHN SUTCLIFFE
HOWARD J. FELDMAN
WILLIAM J. VAN NESS, JR.
BEN YAMAGATA
ROBERT G. SZABO
GRENVILLE GARGIONE
ROSS D. AIN
ALAN L. WHITE
ROBERT R. NOROMHAUS
CHARLES S. CURTIS
ADAM WENNER
PETER U. DICKSON
D. ERIC HULTMAN
SUSAN TOMASKY
JACOB J. LEW

LISA A. SHAPIRO
JESSICA S. LEFEVRE
LYNN MINNA
MARGARET A. MOORE
DONALD F. SANTA, JR.
MICHAEL A. SWIGER
SAM KALEN
BRUCE S. DEMING
ANTHONY A. TORGAN
BENJAMIN L. TORGAN
ANTHONY WILSON
STEPHEN C. FOTIS
NOREEN TAMA SPILLER
JOHN J. BUCHOVECKY
ELLEN S. TOUNG

OF COUNSEL

HOWARD ELIOT SHAPIRO
ARTHUR JOHN ARMSTRONG
CYNTHIA INGERSOLL

NOT ADMITTED IN DISTRICT OF COLUMBIA

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

Re: Communication No. 167/1984

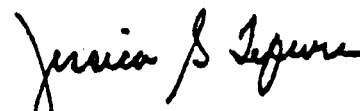
Dear Mr. Moller:

Thank you for your 5 May 1989 correspondence.

On behalf of Chief Bernard Ominayak and the Lubicon Lake Band, I have the honor to submit to the Human Rights Committee the enclosed Supplement No. 11 to Communication No. 167/1984.

On behalf of the Band, I also wish to take this opportunity to express our highest regards to the Secretary-General of the United Nations and to express our gratitude for the kind consideration of the United Nations Committee on Human Rights and of the staff of the Centre for Human Rights.

Yours truly,


Jessica S. Lefevre

Enclosure

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SUPPLEMENT NO. 11

TO

COMMUNICATION NO. 167/1984

30 May 1989

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The Lubicon Lake Band ("the Band") respectfully submits the following comments to the United Nations Committee on Human Rights ("the Committee") and requests that the Committee make the findings set forth below.

1. The Committee should reject Canada's request under article 93(4) of the provisional rules of protocol for review of the Committee's decision on admissibility.

Article 5(2)(b) of the Optional Protocol to the International Covenant on Civil and Political Rights states that the applicant shall not be required to exhaust all available domestic remedies "where the application of the remedies is unreasonably prolonged."

The Lubicon Lake Band has been pursuing its domestic claims through the Canadian courts for 14 years, since 1975. As the Band has noted for the Committee, given the nature of the claims and the judicial process involved, these actions could well continue for another 10 years. In the interim, Canada has offered the Band no relief from the pressures of development, but instead has intensified that pressure in the face of the destruction of the Lubicon economy and traditional way of life.

In 1984, the Lubicon Lake Band submitted its claim to the United Nations Committee on Human Rights. The Band informed the Committee that oil and gas development in the Band's traditional lands and the failure of the Canadian Government to provide constitutionally mandated protections for the Band threatened to destroy the Band's subsistence economy and thereby its social structure and cultural identity.

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In its submissions over the past five years, the Band described for the Committee the failure of the Canadian courts to respond to its requests for interim relief to halt the development until the Band's legal title to its lands could be settled. The Band also described for the Committee the failure of negotiations of the Band's domestic claims, following Canada's dismissal of its own inquiry officer, Mr. E. Davie Fulton, upon Canada's review of Mr. Fulton's findings corroborating the Band's claims. And the Band has described for the committee the rapid deterioration of the Lubicon community as its traditional economy disappeared.

In its July 1987 decision on the admissibility of the Lubicon claim (CCPR/C/30/D/167/1984), the Committee found that "there were no effective remedies still available to the Lubicon Band" within Canada.

In August of 1988, an independent committee of the Canadian Bar Association on Aboriginal Rights in Canada filed a report entitled "Aboriginal Rights in Canada: An Agenda for Action." In this report, the Special Committee of the Canadian Bar Association concluded that the Aboriginal Peoples of Canada have faced and continue to face injustice within the legal and justice systems of Canada (at p. 14 of the report).

While Canada has attempted to object to the Committee's July 1987 decision, it cannot dispute the fact that the Band's economy and traditional way of life have been destroyed. Nor can Canada

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dispute the fact that court actions and negotiations undertaken to halt this destruction failed to do so. Nor can it dispute the fact that court actions addressing the remaining issues of land title and compensation will be years in resolution, if resolution ever occurs.

Subsequent negotiations between the Band and the Government of Canada, even were they successful, have come much too late to offer a means of restoring the Band's subsistence economy, and thereby redressing the Band's human rights claim as submitted in 1984.

Moreover, as discussed in the Band's last submission to the Committee, Canada's refusal to agree to terms that would enable the Band to create a new economic base within its traditional lands has cast serious doubt on the future of this latest round of negotiations. Rather than seeking a realistic settlement in these negotiations, Canada presented the Band with an offer in which virtually all items of any significance were left to future discussions, decisions by Canada or applications by the Band. In return, the Band would be required to relinquish its rights to all present and future domestic or international claims against the Government of Canada. Among other effects, this would leave the Band no means of bringing Canada back to the table for the future discussions or decisions offered in the agreement.

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2. The Committee should find that Canada is in violation of the Committee's request for interim protection of the Band under rule 86 of the provisional rules of procedure.

In its July 1987 decision on admissibility, the Committee requested, pursuant to rule 86 of the Committee's provisional rules of procedure, that Canada "take interim measures to avoid irreparable damage to Chief Ominayak and other members of the Lubicon Lake Band."

- a. Canada is participating in a project by which virtually all traditional Lubicon lands have been leased for timber development.

Rather than seek to comply with the Committee's decision, Canada is participating in a project by which all but 25.4 square miles of the Band's traditional lands were leased, in the spring of 1988, for development in conjunction with a pulp mill. Please see Supplement No. 9.

- b. Canada has abandoned negotiations with the Lubicon Lake Band and instead has launched an effort to undermine support within the Band for the Band's duly elected leaders.

Following the Band's refusal to accept a settlement offer that would force the Lubicon people to relinquish all rights to legal action involving a controversy with the Canadian government in exchange for promises of future discussions between Canada and the Band, Canada abandoned negotiations with the Lubicon Lake Band. Rather than continuing

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to seek a course of compromise and settlement. Canada has sent agents into non-native communities of northern Alberta in the area immediately surrounding the traditional Lubicon territory, working through a single individual who has family ties with the Lubicon Lake Band, but has not lived in the community for 40 years, these agents are seeking other native individuals potentially interested in making their own private deals with the Canadian Government. The majority of the individuals identified by the agents appear not to be affiliated with any recognized aboriginal society. Those that are so affiliated are members of other bands or have only marginal or questionable affiliations with the Lubicon Lake Band. The Government of Canada is telling these individuals that:

- 1) under certain specified conditions, Canada is prepared to provide public benefits to individuals who can qualify as Lubicon Indians under a unusually liberal interpretation of Canadian Government rules;
- 2) the conditions specified include the requirement that the Lubicon Lake Band agree to cede all traditional Lubicon lands of Canada;
- 3) the present, duly elected, leadership of the Lubicon Lake Band must be removed if these individuals want to receive such benefits from the Canadian Government;
- 4) the present Lubicon leadership is up for election this fall;

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- 5) the Canadian Government is prepared to register, on a priority basis, any of these individuals who can be made to qualify, so that they can "have their views represented" in the up-coming Lubicon election.

In order to bring these espionage efforts to an end as quickly as possible and to preclude any future questions about their mandate or any actions they might take on behalf of their constituents, the Band leaders have called for an early election, to be held at the end of May. Since the likely outcome is re-election of the present leadership, Canada has stated publicly that the Government will continue to work with the "dissident group" it has created.

1. The Committee should find Canada in violation of Articles 2(3)(a), 6(1), 7, 14(1), 17, 18(1), 23(1), 26 and 27 of the International Covenant on Civil and Political Rights with respect to its treatment of the people of the Lubicon Lake Band.

a. Article 2(3)(a)

Article 2(3)(a) of the Covenant requires that Canada provide an "effective remedy" for violations of rights protected by the Covenant. Canada has failed to provide the Lubicon Lake Band any remedy with regard to the Band's rights under the Covenant, as demonstrated in the Band's previous submissions, and as recognized by the Committee in its decision on admissibility.

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B. Article 6(1)

Article 6(1) of the Covenant guarantees every human being the "inherent right to life." While the Government of Canada has not sought, directly, the death of any member of the Lubicon Lake Band, the circumstances deliberately created by Canada through its actions have led, indirectly if not directly, to marked increases in the mortality rate among members of the Lubicon Lake Band. Moreover, the ability of the community to replace itself is in serious doubt as the number of miscarriages and stillbirths has skyrocketed.

It is a fact well documented in both anthropological and sociological literature that the destruction of the economic base of small-scale societies and communities leads inevitably to the deterioration of a community's political and social structure. With the collapse of political and social institutions, including the breakdown of the family, communities experience dramatic increases in suicides, fatal accidents, homicides, alcohol and drug abuse, abnormal births and the illnesses associated with poverty, stress, alcohol and drug abuse.

The Band has documented for the Committee several of the tragedies experienced in the Lubicon community in recent years; tragedies which are the human reality of fear, despair and pain underlying such a sociological profile; tragedies which were previously unprecedented in the Band's history. Please see, in particular, Appendix No. 6 to Communication 167/1984 and supplement 2, pages 4-5.

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The Band's loss of its economic base and the breakdown of its social institutions, including the forced transition from the physically demanding hunting and trapping way of life to a sedentary welfare existence, has also led to a marked deterioration in the health of the Band members. In addition, the diet of the people has undergone dramatic change with the loss of their game, their forced reliance on less nutritious processed foods, and the spectre of alcoholism -- the final refuge of the hopeless -- previously unheard of in this community and which is now overwhelming it. Furthermore, the systems by which the community organized and managed some of its most basic needs, including its health and sanitary needs, has collapsed. A few years ago, the Lubicon Lake Band was a robust and thriving community that relied upon traditional medicines and that had never had running water or modern sanitary facilities and had no need of them. At this point, however, the community's traditional systems of water and sanitary management have all but disappeared.

As a result of these drastic changes in the community's physical existence, the basic health and resistance to infection of community members has deteriorated dramatically. The lack of running water and sanitary facilities in the community, needed to replace the traditional systems of water and sanitary management, combined with the declining health of community members, is leading to the development of diseases associated with poverty

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and poor sanitary and health conditions. This situation is evidenced by the astonishing increase in the number of abnormal births and by the outbreak of tuberculosis, affecting approximately one-third of the community. The Band notified the Committee of the tuberculosis outbreak in its Supplement 7.

Initially, Canada's handling of this matter might not have constituted a violation of article 8(1). However, at this point, the Government of Canada is fully aware of the increasing rate of illness and death in the community. Therefore, Canada's refusal to offer a resolution of this situation, that would permit a reversal of the precipitous decline of this community, must be found to constitute a knowing and even deliberate deprivation of the inherent right to life of members of the Lubicon Lake Band.

c. Article 7

Article 7 of the Covenant prohibits the infliction of "cruel, inhuman or degrading treatment." The appropriation of the Band's traditional lands without its consent, the destruction of its way of life and livelihood and the devastation wrought to the community, described in the Band's submissions, constitute cruel, inhuman and degrading treatment for which Canada is responsible.

Moreover, as is pointed out in the preceding section, the intentional destruction of a community, as in the case of the Lubicon Lake Band, can devastate the physical health of individual members of the community. The intentional subjection

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of a people to conditions of life resulting in such a rapid loss of physical health and increase in the rate of disease and death certainly constitutes cruel, inhuman and degrading treatment.

Furthermore, such destruction of a community involves wrenching social dislocation and loss of individual identity, as the social roles which gave identity and meaning to the lives of community members disappear. The anguish and suffering of the people who must sit helplessly by and watch their families and communities disintegrate is overwhelming.

An analogy in modern western culture is the devastation wrought by a crippling depression, such as that of the 1930s. The differences here are crucial, though. The Lubicon Lake Band has experienced not only crushing economic disaster, but is facing its own death as individuals and as a community. Furthermore, the causes here are not blind market forces, but deliberate and calculated actions by specific individuals in both levels of the Canadian Government. Therefore, the suffering of the Band is not only degrading, it is cruel and inhuman to the extent that it is deliberate, it was avoidable and as pointed out in the band's submissions to the Committee, it was predictable.

As the band has noted in its past submissions, in recognition of the overwhelming cruelty and inhumanity of the suffering wrought by the deliberate destruction of communities, the United Nations, in its Convention on the Prevention and Punishment of the Crime of Genocide, included such destruction

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within its definition of genocide. Please see Supplement 1, page 8; the Band's 31 July 1985 Comments, pages 16-18, 27-32; Supplement 2, pages 6-7; Supplement 3, pages 3-4; Supplement 5, page 17.

d. Articles 14(1) and 26

Article 14(1) of the Covenant guarantees that in the determination of a party's "right and obligations in a suit at law" everyone shall be entitled to a "fair and public hearing by a competent, independent and impartial tribunal established by law." Article 26 expands upon the guarantees of article 14(1) by guaranteeing that "all persons are equal before the law" and requiring states to provide "effective protection" against discrimination on any basis, including "race . . . religion, political or other opinion, national or social origin, property . . . or other status."

As the Band has described for the Committee in its submissions, Canada has failed to provide the Band a fair, independent and impartial tribunal for resolution of its domestic claims. Please see Communication 167/1984, pages 4-6; Supplement 1; the Band's 31 July 1985 Comments, pages 23-27; Supplement 6, pages 5-10; Supplement 7, pages 3-4; Supplement 2, pages 7-9; Supplement 3, pages 2-3; Supplement 5, pages 2-15; and Supplement 6, pages 7-10.

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With respect to article 26, specifically, the Band has set forth for the Committee in the above-cited submissions Canada's failure to provide the Band equal protection vis a vis non-Indian groups, as guaranteed by the article. Moreover, the Band has described for the Committee Canada's failure to provide the Band equal protection vis a vis other Indian Bands. For example, Canada has attempted to subject Lubicon Lake Band members to a retroactive application of the Canadian Indian Act as it stood prior to its amendment following the Committee's decision in Sandra Lovelace v. Canada (Case No. 24/1977). Thus, Canada would make the very law which the Committee held to be in violation of article 27 in the Lovelace case applicable to the Lubicon Lake Band.

Furthermore, all settlements of aboriginal and other Native claims in Canada, to date, have been based on the membership lists existing at the time of the first survey of Reserve land. However, Canada's membership formula proposed for the Lubicon Lake Band, based on the pre-Lovelace Indian Act, resulted in a membership formula never used in Canadian history. The effect of this formula was to deny aboriginal rights to more than half of the Lubicon people, treating the Lubicon people in a way that is different, unequal and discriminatory when compared with the treatment of all other Native people throughout Canada's history. See Supplement 5, pages 3-6; Supplement 8, page 18.

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e. ~~Articles 17 and 23(1)~~

Articles 17 and 23(1) provide for protection of the family and home. In contravention of the proscriptions of these articles, Canada is knowingly permitting the Lubicon Lake Band to be subjected to conditions which are resulting directly in the destruction of the families and homes of its members. In the course of this controversy, members of the Band have been threatened personally with the destruction of their homes by bulldozer if they did not accept provincial jurisdiction over their land and effectively relinquish their aboriginal land rights.

Furthermore, in an indigenous community, the entire family system is predicated upon the spiritual and cultural ties to the land and the exercise of traditional activities. When these are destroyed, as in the case of the Lubicons, the essential family component of the society is irremediably damaged.

It is also vital to take account of the fact that the traditional territory that has been taken from these peoples is their "home." It is where they have lived as a community for countless generations. In their social practices and spiritual belief system, as with most indigenous peoples, the territory in which the family and community reside is no less sacred, no less their home, no less a part of them than is the enclosed dwelling to which they retire at night. In fact, in many respects, the territory of the community is infinitely more important and more sacred than a mere dwelling.

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f. Article 18(1)

Article 18(1) guarantees the right of religious freedom. With the taking and destruction of their land, the people of the Lubicon Lake Band have been robbed of the physical realm to which their religion --and their spiritual belief system -- attaches. Again, as with other indigenous peoples, the traditional territory of the community encompasses the physical aspect of the community's spiritual life. With the loss or destruction of the territory, the only temple in which worship has meaning for these people is lost.

g. Article 27

Article 27 guarantees protection for ethnic, religious and linguistic minorities. The Lubicon Lake Band, as an indigenous or aboriginal people who have never entered a treaty with or ceded territory to Canada, is a social and political entity distinct and separate from the social and political system of Canada, rather than a minority group of Canadian society.

Nonetheless, in terms of size, the Band is clearly a minority within the territory controlled by Canada; its minority status resting on several factors, including ethnic, religious and linguistic differences. The Committee has already upheld Canada's obligation to provide protections for the indigenous peoples of Canada. Sandra Lovelace v. Canada. Canada has completely failed in any way to fulfill this obligation with respect to the Lubicon Lake Band.

20/22

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YT 3989
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4. Conclusion

In the Lovelace decision, cited above, this Committee noted that the significant matter in respect to the Covenant was the claim that the major loss to a person ceasing to be recognized as an Indian is the loss of the cultural benefits of living in an Indian community, the emotional ties to home, family, friends and neighbors and the loss of identity. These principles are likewise applicable to the complaint of the Lubicon Band. Among the many losses the Lubicon people have suffered in recent years is the loss of the cultural benefits of living in their traditional lands, the loss of their homeland, the loss of the right to enjoy their own culture, and the loss of the right to profess and practice their own religion, a religion which is inextricably linked to the land.

This Committee appears to have recognized these losses in its earlier decision of 22 July 1987. The situation of the Lubicons has deteriorated further since that time.

How are indigenous populations of the world to be convinced that the International Covenant on Civil and Political Rights contains principles which will be implemented by international organs if this Committee now reverses itself because of Canada's position that it should be judged by the words contained in its submissions to the Committee and its press releases rather than by its actions at home?

21/22

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PAGE


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-16-


If this Committee now refuses to find the Government of Canada in violation of the above specified articles of the Covenant for the abuses suffered by the Lubicon people, abuses which have gained international public attention, what possible protection can the indigenous people of the world hope to have against abuse by a state and how can this possibly advance the rule of law?

UNCLAS 1 NONCLAS
VT 3909
PAGE 21 of 21

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.


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

Prepared with the assistance of:


Virginia S. Lipp
Van Ness, Feldman, Charlioff & Curtis
1050 Thomas Jefferson Street, N.W.
7th Floor
Washington, D.C. 20007

Department of External Affairs



Ministère des Affaires extérieures

Canada

OTTAWA, Ontario
K1A 0G2

June 06, 1989

IMH-0929

Ms. Rosemary Brown
2539 Morley TR N.W.
Calgary, Alberta
T2M 4G6

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

Dear Ms. Brown:

I am writing in regards to your letter of May 20, 1989 to the Secretary of State for External Affairs, the Right Honourable Joe Clark. Mr. Clark has asked me to reply on his behalf.

In your letter you asked for a copy of communications made to the United Nations Human Rights Committee by the Canadian Government concerning the Lubicon Lake Indian Band. In fact, the policy of the Canadian Government is to maintain the confidentiality of such communications. In doing so, Canada respects and complies with the request of the United Nations that all communications with the Human Rights Committee should remain confidential.

However, I am enclosing, for your information, material issued by the Department of Indian and Northern Affairs in January 1989. This contains details about the negotiations between the Lubicon Lake Indian Band and the Government of Canada.

I trust that the above allays your concerns about this matter.

Yours sincerely,

J. Daniel Livermore
Director
Human Rights and
Social Affairs Division

Encl.



REF: BY THE OFFICE
OF THE SECRETARY OF
STATE FOR EXTERNAL
AFFAIRS,
MINISTER'S RECORDS UNIT

TRANSMIS PAR LE CABINET
DU SECRÉTAIRE D'ÉTAT
AUX AFFAIRES EXTÉRIEURES
SECTION DES DOSSIERS
DU MINISTRE

992-6428 ^{or} 995-1047
ou

TO/À
AU

IMH *IMH*

- ☐ FOR INFORMATION AND ANY NECESSARY ACTION
POUR EXAMEN ET SUITE À DONNER, S'IL Y A LIEU
- ☒ FOR DIVISIONAL REPLY
POUR RÉPONSE PAR LA DIRECTION

REMARKS/REMARQUES



R. H. D'Acoust

Signature

24-5-89

Date

Mar 20, 1989

Honourable Joe Clark
Minister for External Affairs
House of Commons
Ottawa

Dear Minister,

I am doing a project on how aboriginal issues in Canada are dealt with in the international arena. Therefore I would like to obtain a copy of the government's submission to the United Nations Human Rights Commission on the Lubicon Lake Cree. I am also writing the band for a copy of their submission.

I will be happy to cover postage and would like a copy as soon as possible.

Thank you,

Rosemary Braun
2539 Morley Tr NW
Calgary Alberta
T2M 4G6



Honourable Joe Clark
Minister of Foreign Affairs
House of Commons
Confederation Building
Ottawa
K1A 0A6

003344



00



HOUSE OF COMMONS

CHAMBRE DES COMMUNES

003345

Communiqué

1-8903

CANADA, LUBICON BREAK OFF TALKS

(OTTAWA, JANUARY 24, 1989) -- Negotiations towards settlement of a land claim by the Lubicon Lake Indian Band have broken off, after the band rejected Canada's offer of \$45 million in addition to the 95 square mile reserve the band wanted.

The band is demanding additional compensation of between \$114 and \$275 million.

During 8 weeks of negotiations, consensus was reached among government and band negotiators on the key issues of membership, reserve size, community construction and delivery of programs and services. However, the negotiators were unable to reach agreement on the issue of cash compensation.

Canada's offer to the band included the establishment of a 95 square mile reserve and \$34 million to develop a new community.

Canada's offer also included a trust fund to preserve traditional band values and a \$10 million Special Development Plan to assist the band in its transition from a traditional hunting and trapping society.

11/11/15

- 2 -

The Hon. Bill McKnight, Minister of Indian Affairs and Northern Development said the band also rejected an offer to begin construction of the community immediately, without prejudice to the band's right to take the compensation issue to the Federal Court for decision.

Mr. McKnight estimated Canada's offer is equivalent to \$300 thousand in initial benefits and cash per family.

Mr. McKnight said "Canada has a responsibility to be fair on all sides. This offer is fair to the Lubicon people because it allows them to reach their social and economic goals. It is fair to other native groups because it is consistent with the principles of other recent settlements. And it is fair to the taxpayer because it meets Canada's legal and social obligations to the Band."

Mr. McKnight said that Canada's offer remains open.

Ref: Ken Colby
Federal spokesperson
(403) 269 7006

14/

STATEMENT BY THE MINISTER

RE: LUBICON LAKE BAND LAND CLAIM

I am sorry to announce that talks between Canada and the Lubicon Lake Indian Band which began in late November have broken off. There is only one issue left in dispute - and that issue is money.

We have solved the problems of membership, we have agreed to the 95 square mile reserve, and we have offered a settlement totalling \$45 million.

We were guided in our negotiations by two tests of fairness: the first was that a settlement had to be consistent with other recent settlements; the second was that a settlement had to address the legitimate social and economic objectives of the Band.

Our offer was to establish the reserve they wanted, plus the equivalent of almost \$87 thousand for each man, woman and child on the Band's membership list.

We have offered to set aside a 95 square mile reserve for the band. That reserve would have mineral rights, including oil and gas, on 79 square miles.

We have offered \$34 million to build a new community. That would provide homes for each family. It would include a band office and a community hall. It would include a school from kindergarten to grade 12 and a new medical centre.

We have offered to establish a block-funding arrangement to deliver what will be close to \$2.5 million a year in federal support programs, including social assistance, in a way that provides administrative flexibility for the band to meet community needs.

12/11

- 2 -

And we have offered a Special Development Plan, to assist the Lubicon in establishing a viable modern economy on the new reserve. This includes:

- \$1 million for planning and staff additions
- \$5 million as "start up" capital
- up to \$4 million for "core" band projects.

While each case is unique and direct comparisons are difficult, this offer certainly compares favourably to other recent settlements.

The offer also directly addresses the Band's priorities.

The eight weeks of negotiation involved my department and the Prime Minister's Office, and drew on expertise and assistance from CEIC, DIST, the Secretary of State, Agriculture, the Department of Communications, and the CRTC. On many issues, our approach was a joint Lubicon/Canada task force.

The issue of membership is a good example of this approach. Canada recognized the Band's right to determine its membership. But membership does not equate to status as a registered Indian, and well over two hundred of the Band's members had not registered or applied for registration. Working together, the government and the Band traced the genealogy, assembled documentation, prepared affidavits and covered all the groundwork for all these people. It appears that, with few exceptions, they qualify to be registered as status Indians. Membership is no longer an issue.

Similar approaches were applied to the reserve construction program to ensure the community would be in harmony with the Band's values and traditions, and to ensure that training, employment and other benefits of construction would accrue to the Band.

- 3 -

We also reached agreement on a new administration program to give the Band greater flexibility to meet community needs; we reached a framework agreement for establishing self-government; and we reached agreement on an approach to most of the economic development priorities of the Band.

For example, we offered to establish a \$500,000 fund in support of Band elders who wanted to continue hunting and trapping. The Band would design and operate the program.

We offered extensive vocational and other training programs. We agreed to provide technical support and 80 per cent funding for such core band businesses as a commercial centre, a motel, a gravel pit, and a "start-up" community farm. Some projects - an indoor hockey rink and free cable TV are two examples - we could not agree to.

But, I am satisfied that our offer to the Band will provide its families with a good standard of living and the opportunity to become fully and gainfully employed.

I regret that the Band has rejected our offer.

However, the Lubicon people need not be deprived of the other benefits of a settlement because of this dispute over money. I have offered to proceed with membership, with establishing the reserve, with constructing a community and with the vocational and entrepreneurial training programs. The Band would still be free to sue Canada and/or Alberta for compensation.

15/3

- 4 -

I believe we have been more than fair to the Lubicon people. I must also be fair to those other native communities which have concluded settlements with the government, and I must be fair to the taxpayers of Canada. Our offer discharges our legal and moral responsibilities to the band, and it remains open.

- 30 -

Ref: Ken Colby
Federal spokesperson
(403) 269-7006

CANADA'S OFFER TO THE LUBICON LAKE INDIAN BAND

Membership

- All 514 members recognized as such
- "Fast-track" registration of all who qualify as status Indians

Reserve Area

- a 95 square mile reserve, including 79 square miles of mineral and oil and gas rights

Social Development

- a \$34 million building program, including up to 133 homes, infrastructures, a K-12 school, band offices, community hall, firehall and medical centre
- Block funding of benefits (Alternate Funding Arrangement) to provide a greater autonomy and flexibility
- Development of Self-Government legislation for the Band
- \$500 thousand trust fund, to assist those elders wishing to pursue the traditional way of life.

Economic Development

- \$5 million "seed capital"
- extensive vocational training
- \$400 thousand to establish "training trust"
- \$1 million in planning and band staff support
- \$4 million for specific band businesses

Department of External Affairs



Ministère des Affaires extérieures

Canada

Ottawa, Ontario
K1A 0G2

June 06, 1989

IMH-0928

Dr. Peter Schwarzbauer
Weissgasse 9-13/2/1
A-1170 Vienna
Austria

ACC	ATL
DOSSIER	
45-CDA-13-1-3-Lubicon Lake Band	

Dear Dr. Schwarzbauer:

Further to my letter of May 26, 1989, please find enclosed material concerning the negotiations between the Lubicon Lake Indian Band and the Government of Canada.

I trust that you will find this information to be helpful.

Yours sincerely,

A handwritten signature in cursive script, appearing to read "J. Daniel Livermore".

J. Daniel Livermore
Director
Human Rights and
Social Affairs Division

Communiqué

1-8903

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TO/A EXTOTT IMM DELIVER BY 051100

INFO JUSTOTT/FREEMAN/LOW/WEISER INANULL/LAFRENIERE/WHITAKER/HUDSON

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DISTR IMD IFB JLO JCD IFB

---ICCR: LUBICON COMPLAINT UNDER OPTIONAL PROTOCOL

ATTACHED FURTHER LUBICON SUBMISSION WAS JUST RECEIVED FROM
SECT. WE HAVE NOT/NOT YET HAD OPPORTUNITY TO STUDY TEXT.

2. WILL CONTACT TROTTIER BY PHONE TO DISCUSS THIS DOCU AND
LATEST VERSION OF DRAFT GOVT SUBMISSION.

Division Phoned D.O.
Person _____
Local Time 1920

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APPROVED APPROUVE

TC: HAMMOND

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

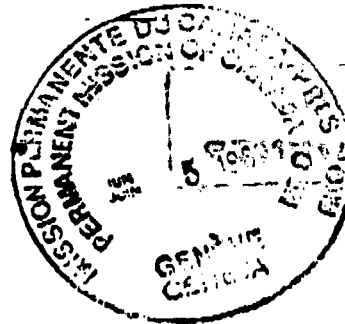
Téléphone : 34 60 11 31 02 11

REF. N°:

(à rappeler dans la réponse) G/SO 215/51 CANA (38)

167/1984

Palais des Nations
CH - 1211 GENÈVE 10



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PAGE 2

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OF/DE 21

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The Secretariat of the United Nations (Centre for Human Rights) presents its compliments to the Permanent Mission of Canada to the United Nations Office at Geneva and has the honour to transmit herewith, for information and in order to complete the files of the state party, a copy of a letter dated 30 May 1989, transmitting a further submission concerning communication No. 167/1984 (B. Ominayak and the Lubicon Lake Band v. Canada), which is before the Human Rights Committee for consideration under the Optional Protocol to the International Covenant on Civil and Political Rights.

Division of Human Rights

2 June 1989

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YT 3909

PAGE 3 OF DE 21

VAN NESS, FELDMAN, SUTCLIFFE & CURTIS

A PROFESSIONAL CORPORATION

1040 THOMAS JEFFERSON STREET, N. W.

SEVENTH FLOOR

WASHINGTON, D. C. 20007

(202) 266-1800

FACSIMILE

(202) 338-2361

(202) 338-2416

WRITER'S DIRECT DIAL NUMBER

D. LYNN SUTCLIFFE
HOWARD J. FELDMAN
WILLIAM J. VAN NESS, JR.
BEN YAMAGATA
ROBERT G. SZABO
GRENVILLE GARGIS
ROSS D. AIN
ALAN L. WHITE
ROBERT R. NORDHAUS
CHARLES B. CURTIS
ADAM WENNER
PETER J. VILASOR
D. ERIC HULTMAN
SUSAN TOMASKY
JACOB J. LEW

LISA A. SHAPIRO
JESSICA S. LEFEVRE
LYNN MINNA
MARGARET A. MOORE
DONALD F. SANTA, JR.
MICHAEL A. SWIGER
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ANTHONY A. PASCARELLI
BENJAMIN B. IGRA
ANTHONY WILSON
STEPHEN C. FOTIS
NOREEN TAMA REILLY
JOHN J. SUCHOVECKY
ELLEN S. TUONG

OF COUNSEL

HOWARD ELIOT SHAPIRO
ARTHUR JOHN ARMSTRONG
CYNTHIA INGERSOLL

NOT ADMITTED IN DISTRICT OF COLUMBIA

May 30, 1989

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

Re: Communication No. 167/1984


Dear Mr. Moller:

Thank you for your 5 May 1989 correspondence.

On behalf of Chief Bernard Ominayak and the Lubicon Lake Band, I have the honor to submit to the Human Rights Committee the enclosed Supplement No. 11 to Communication No. 167/1984.

On behalf of the Band, I also wish to take this opportunity to express our highest regards to the Secretary-General of the United Nations and to express our gratitude for the kind consideration of the United Nations Committee on Human Rights and of the staff of the Centre for Human Rights.

Yours truly,


Jessica S. Lefevre

Enclosure

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YT 3909

PAGE 4 OE/DE 2,

SUPPLEMENT NO. 11
TO
COMMUNICATION NO. 167/1984

30 May 1989

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YT 3909

PAGE 5 OF/DE 21

The Lubicon Lake Band ("the Band") respectfully submits the following comments to the United Nations Committee on Human Rights ("the Committee") and requests that the Committee make the findings set forth below.

1. The Committee should reject Canada's request under article 93(4) of the provisional rules of protocol for review of the Committee's decision on admissibility.

Article 5(2)(b) of the Optional Protocol to the International Covenant on Civil and Political Rights states that the applicant shall not be required to exhaust all available domestic remedies "where the application of the remedies is unreasonably prolonged."

The Lubicon Lake Band has been pursuing its domestic claims through the Canadian courts for 14 years, since 1975. As the Band has noted for the Committee, given the nature of the claims and the judicial process involved, these actions could well continue for another 10 years. In the interim, Canada has offered the Band no relief from the pressures of development, but instead has intensified that pressure in the face of the destruction of the Lubicon economy and traditional way of life.

In 1984, the Lubicon Lake Band submitted its claim to the United Nations Committee on Human Rights. The Band informed the Committee that oil and gas development in the Band's traditional lands and the failure of the Canadian Government to provide constitutionally mandated protections for the Band threatened to destroy the Band's subsistence economy and thereby its social structure and cultural identity.

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In its submissions over the past five years, the Band described for the Committee the failure of the Canadian courts to respond to its requests for interim relief to halt the development until the Band's legal title to its lands could be settled. The Band also described for the Committee the failure of negotiations of the Band's domestic claims, following Canada's dismissal of its own inquiry officer, Mr. E. Davie Fulton, upon Canada's review of Mr. Fulton's findings corroborating the Band's claims. And the Band has described for the committee the rapid deterioration of the Lubicon community as its traditional economy disappeared.

In its July 1987 decision on the admissibility of the Lubicon claim (CCPR/C/30/D/167/1984), the Committee found that "there were no effective remedies still available to the Lubicon Band" within Canada.

In August of 1988, an independent committee of the Canadian Bar Association on Aboriginal Rights in Canada filed a report entitled "Aboriginal Rights in Canada: An Agenda for Action." In this report, the Special Committee of the Canadian Bar Association concluded that the Aboriginal Peoples of Canada have faced and continue to face injustice within the legal and justice systems of Canada (at p. 14 of the report).

While Canada has attempted to object to the Committee's July 1987 decision, it cannot dispute the fact that the Band's economy and traditional way of life have been destroyed. Nor can Canada

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YT 3909
PAGE 7 OF/DE 2,

-3-

dispute the fact that court actions and negotiations undertaken to halt this destruction failed to do so. Nor can it dispute the fact that court actions addressing the remaining issues of land title and compensation will be years in resolution, if resolution ever occurs.

Subsequent negotiations between the Band and the Government of Canada, even were they successful, have come much too late to offer a means of restoring the Band's subsistence economy, and thereby redressing the Band's human rights claim as submitted in 1994.

Moreover, as discussed in the Band's last submission to the Committee, Canada's refusal to agree to terms that would enable the Band to create a new economic base within its traditional lands has cast serious doubt on the future of this latest round of negotiations. Rather than seeking a realistic settlement in these negotiations, Canada presented the Band with an offer in which virtually all items of any significance were left to future discussions, decisions by Canada or applications by the Band. In return, the Band would be required to relinquish its rights to all present and future domestic or international claims against the Government of Canada. Among other effects, this would leave the Band no means of bringing Canada back to the table for the future discussions or decisions offered in the agreement.

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2. The Committee should find that Canada is in violation of the Committee's request for interim protection of the Band under rule 86 of the provisional rules of procedure.

In its July 1987 decision on admissibility, the Committee requested, pursuant to rule 86 of the Committee's provisional rules of procedure, that Canada "take interim measures to avoid irreparable damage to Chief Ominayak and other members of the Lubicon Lake Band."

- a. Canada is participating in a project by which virtually all traditional Lubicon lands have been leased for timber development.

Rather than seek to comply with the Committee's decision, Canada is participating in a project by which all but 25.4 square miles of the Band's traditional lands were leased, in the spring of 1988, for development in conjunction with a pulp mill. Please see Supplement No. 9.

- b. Canada has abandoned negotiations with the Lubicon Lake Band and instead has launched an effort to undermine support within the Band for the Band's duly elected leaders.

Following the Band's refusal to accept a settlement offer that would force the Lubicon people to relinquish all rights to legal action involving a controversy with the Canadian government in exchange for promises of future discussions between Canada and the Band, Canada abandoned negotiations with the Lubicon Lake Band. Rather than continuing

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PAGE 9 OF/DE 21

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to seek a course of compromise and settlement, Canada has sent agents into non-native communities of northern Alberta in the area immediately surrounding the traditional Lubicon territory, working through a single individual who has family ties with the Lubicon Lake Band, but has not lived in the community for 40 years, these agents are seeking other native individuals potentially interested in making their own private deals with the Canadian Government. The majority of the individuals identified by the agents appear not to be affiliated with any recognized aboriginal society. Those that are so affiliated are members of other bands or have only marginal or questionable affiliations with the Lubicon Lake Band. The Government of Canada is telling these individuals that:

- 1) under certain specified conditions, Canada is prepared to provide public benefits to individuals who can qualify as Lubicon Indians under an unusually liberal interpretation of Canadian Government rules;
- 2) the conditions specified include the requirement that the Lubicon Lake Band agree to cede all traditional Lubicon lands of Canada;
- 3) the present, duly elected, leadership of the Lubicon Lake Band must be removed if these individuals want to receive such benefits from the Canadian Government;
- 4) the present Lubicon leadership is up for election this fall;

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- 5) the Canadian Government is prepared to register, on a priority basis, any of these individuals who can be made to qualify, so that they can "have their views represented" in the up-coming Lubicon election.

In order to bring these espionage efforts to an end as quickly as possible and to preclude any future questions about their mandate or any actions they might take on behalf of their constituents, the Band leaders have called for an early election, to be held at the end of May. Since the likely outcome is re-election of the present leadership, Canada has stated publicly that the Government will continue to work with the "dissident group" it has created.

1. The Committee should find Canada in violation of Articles 2(3)(a), 6(1), 7, 14(1), 17, 18(1), 23(1), 26 and 27 of the International Covenant on Civil and Political Rights with respect to its treatment of the people of the Lubicon Lake Band.

a. Article 2(3)(a)

Article 2(3)(a) of the Covenant requires that Canada provide an "effective remedy" for violations of rights protected by the Covenant. Canada has failed to provide the Lubicon Lake Band any remedy with regard to the Band's rights under the Covenant, as demonstrated in the Band's previous submissions, and as recognized by the Committee in its decision on admissibility.

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b. Article 6(1)

Article 6(1) of the Covenant guarantees every human being the "inherent right to life." While the Government of Canada has not sought, directly, the death of any member of the Lubicon Lake Band, the circumstances deliberately created by Canada through its actions have led, indirectly if not directly, to marked increases in the mortality rate among members of the Lubicon Lake Band. Moreover, the ability of the community to replace itself is in serious doubt as the number of miscarriages and stillbirths has skyrocketed.

It is a fact well documented in both anthropological and sociological literature that the destruction of the economic base of small-scale societies and communities leads inevitably to the deterioration of a community's political and social structure. With the collapse of political and social institutions, including the breakdown of the family, communities experience dramatic increases in suicides, fatal accidents, homicides, alcohol and drug abuse, abnormal births and the illnesses associated with poverty, stress, alcohol and drug abuse.

The Band has documented for the Committee several of the tragedies experienced in the Lubicon community in recent years; tragedies which are the human reality of fear, despair and pain underlying such a sociological profile; tragedies which were previously unprecedented in the Band's history. Please see, in particular, Appendix No. 6 to Communication 167/1984 and supplement 2, pages 4-5.

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The Band's loss of its economic base and the breakdown of its social institutions, including the forced transition from the physically demanding hunting and trapping way of life to a sedentary welfare existence, has also led to a marked deterioration in the health of the Band members. In addition, the diet of the people has undergone dramatic change with the loss of their game, their forced reliance on less nutritious processed foods, and the spectre of alcoholism -- the final refuge of the hopeless -- previously unheard of in this community and which is now overwhelming it. Furthermore, the systems by which the community organized and managed some of its most basic needs, including its health and sanitary needs, has collapsed. A few years ago, the Lubicon Lake Band was a robust and thriving community that relied upon traditional medicines and that had never had running water or modern sanitary facilities and had no need of them. At this point, however, the community's traditional systems of water and sanitary management have all but disappeared.

As a result of these drastic changes in the community's physical existence, the basic health and resistance to infection of community members has deteriorated dramatically. The lack of running water and sanitary facilities in the community, needed to replace the traditional systems of water and sanitary management, combined with the declining health of community members, is leading to the development of diseases associated with poverty

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and poor sanitary and health conditions. This situation is evidenced by the astonishing increase in the number of abnormal births and by the outbreak of tuberculosis, affecting approximately one-third of the community. The Band notified the Committee of the tuberculosis outbreak in its Supplement 7.

Initially, Canada's handling of this matter might not have constituted a violation of article 8(1). However, at this point, the Government of Canada is fully aware of the increasing rate of illness and death in the community. Therefore, Canada's refusal to offer a resolution of this situation, that would permit a reversal of the precipitous decline of this community, must be found to constitute a knowing and even deliberate deprivation of the inherent right to life of members of the Lubicon Lake Band.

c. Article 7

Article 7 of the Covenant prohibits the infliction of "cruel, inhuman or degrading treatment." The appropriation of the Band's traditional lands without its consent, the destruction of its way of life and livelihood and the devastation wrought to the community, described in the Band's submissions, constitute cruel, inhuman and degrading treatment for which Canada is responsible.

Moreover, as is pointed out in the preceding section, the intentional destruction of a community, as in the case of the Lubicon Lake Band, can devastate the physical health of individual members of the community. The intentional subjection

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of a people to conditions of life resulting in such a rapid loss of physical health and increase in the rate of disease and death certainly constitutes cruel, inhuman and degrading treatment.

Furthermore, such destruction of a community involves wrenching social dislocation and loss of individual identity, as the social roles which gave identity and meaning to the lives of community members disappear. The anguish and suffering of the people who must sit helplessly by and watch their families and communities disintegrate is overwhelming.

An analogy in modern western culture is the devastation wrought by a crippling depression, such as that of the 1930s. The differences here are crucial, though. The Lubicon Lake Band has experienced not only crushing economic disaster, but is facing its own death as individuals and as a community. Furthermore, the causes here are not blind market forces, but deliberate and calculated actions by specific individuals in both levels of the Canadian Government. Therefore, the suffering of the Band is not only degrading, it is cruel and inhuman to the extent that it is deliberate, it was avoidable and as pointed out in the Band's submissions to the Committee, it was predictable.

As the Band has noted in its past submissions, in recognition of the overwhelming cruelty and inhumanity of the suffering wrought by the deliberate destruction of communities, the United Nations, in its Convention on the Prevention and Punishment of the Crime of Genocide, included such destruction

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within its definition of genocide. Please see Supplement 1, page 8; the Band's 31 July 1985 Comments, pages 16-18, 27-32; Supplement 2, pages 6-7; Supplement 3, pages 3-4; Supplement 5, page 17.

d. Articles 14(1) and 26

Article 14(1) of the Covenant guarantees that in the determination of a party's "right and obligations in a suit at law" everyone shall be entitled to a "fair and public hearing by a competent, independent and impartial tribunal established by law." Article 26 expands upon the guarantees of article 14(1) by guaranteeing that "all persons are equal before the law" and requiring states to provide "effective protection" against discrimination on any basis, including "race . . . religion, political or other opinion, national or social origin, property . . . or other status."

As the Band has described for the Committee in its submissions, Canada has failed to provide the Band a fair, independent and impartial tribunal for resolution of its domestic claims. Please see Communication 167/1984, pages 4-6; Supplement 1, the Band's 31 July 1985 Comments, pages 23-27; Supplement 6, pages 5-10; Supplement 7, pages 3-4; Supplement 2, pages 7-9; Supplement 3, pages 2-3; Supplement 5, pages 2-15; and Supplement 6, pages 7-10.

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With respect to article 26, specifically, the Band has set forth for the Committee in the above-cited submissions Canada's failure to provide the Band equal protection vis a vis non-Indian groups, as guaranteed by the article. Moreover, the Band has described for the Committee Canada's failure to provide the Band equal protection vis a vis other Indian Bands. For example, Canada has attempted to subject Lubicon Lake Band members to a retroactive application of the Canadian Indian Act as it stood prior to its amendment following the Committee's Decision in Sandra Lovelace v. Canada (Case No. 24/1977). Thus, Canada would make the very law which the Committee held to be in violation of article 27 in the Lovelace case applicable to the Lubicon Lake Band.

Furthermore, all settlements of aboriginal and other Native claims in Canada, to date, have been based on the membership lists existing at the time of the first survey of Reserve land. However, Canada's membership formula proposed for the Lubicon Lake Band, based on the pre-Lovelace Indian Act, resulted in a membership formula never used in Canadian history. The effect of this formula was to deny aboriginal rights to more than half of the Lubicon people, treating the Lubicon people in a way that is different, unequal and discriminatory when compared with the treatment of all other Native people throughout Canada's history. See Supplement 5, pages 3-6; Supplement 8, page 18.

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e. ~~Articles 17 and 23(1)~~

Articles 17 and 23(1) provide for protection of the family and home. In contravention of the prescriptions of these articles, Canada is knowingly permitting the Lubicon Lake Band to be subjected to conditions which are resulting directly in the destruction of the families and homes of its members. In the course of this controversy, members of the Band have been threatened personally with the destruction of their homes by bulldozer if they did not accept provincial jurisdiction over their land and effectively relinquish their aboriginal land rights.

Furthermore, in an indigenous community, the entire family system is predicated upon the spiritual and cultural ties to the land and the exercise of traditional activities. When these are destroyed, as in the case of the Lubicons, the essential family component of the society is irremediably damaged.

It is also vital to take account of the fact that the traditional territory that has been taken from these peoples is their "home." It is where they have lived as a community for countless generations. In their social practices and spiritual belief system, as with most indigenous peoples, the territory in which the family and community reside is no less sacred, no less their home, no less a part of them than is the enclosed dwelling to which they retire at night. In fact, in many respects, the territory of the community is infinitely more important and more sacred than a mere dwelling.

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f. Article 18(1)

Article 18(1) guarantees the right of religious freedom. With the taking and destruction of their land, the people of the Lubicon Lake Band have been robbed of the physical realm to which their religion --and their spiritual belief system -- attaches. Again, as with other indigenous peoples, the traditional territory of the community encompasses the physical aspect of the community's spiritual life. With the loss or destruction of the territory, the only temple in which worship has meaning for these people is lost.

g. Article 27

Article 27 guarantees protection for ethnic, religious and linguistic minorities. The Lubicon Lake Band, as an indigenous or aboriginal people who have never entered a treaty with or ceded territory to Canada, is a social and political entity distinct and separate from the social and political system of Canada, rather than a minority group of Canadian society.

Nonetheless, in terms of size, the Band is clearly a minority within the territory controlled by Canada; its minority status resting on several factors, including ethnic, religious and linguistic differences. The Committee has already upheld Canada's obligation to provide protections for the indigenous peoples of Canada. Sandra Lovelace v. Canada. Canada has completely failed in any way to fulfill this obligation with respect to the Lubicon Lake Band.

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4. Conclusion

In the Levesque decision, cited above, this Committee noted that the significant matter in respect to the Covenant was the claim that the major loss to a person ceasing to be recognized as an Indian is the loss of the cultural benefits of living in an Indian community, the emotional ties to home, family, friends and neighbors and the loss of identity. These principles are likewise applicable to the complaint of the Lubicon Band. Among the many losses the Lubicon people have suffered in recent years is the loss of the cultural benefits of living in their traditional lands, the loss of their homeland, the loss of the right to enjoy their own culture, and the loss of the right to profess and practice their own religion, a religion which is inextricably linked to the land.

This Committee appears to have recognized these losses in its earlier decision of 22 July 1987. The situation of the Lubicons has deteriorated further since that time.

How are indigenous populations of the world to be convinced that the International Covenant on Civil and Political Rights contains principles which will be implemented by international organs if this Committee now reverses itself because of Canada's position that it should be judged by the words contained in its submissions to the Committee and its press releases rather than by its actions at home?

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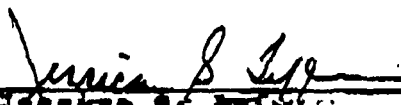
If this Committee now refuses to find the Government of Canada in violation of the above specified articles of the Covenant for the abuses suffered by the Lubicon people, abuses which have gained international public attention, what possible protection can the indigenous people of the world hope to have against abuse by a state and how can this possibly advance the rule of law?

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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.


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

Prepared with the assistance of:


Virginia S. Lipp
Van Ness, Feldman, Charlioff & Curtis
1050 Thomas Jefferson Street, N.W.
7th Floor
Washington, D.C. 20007

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

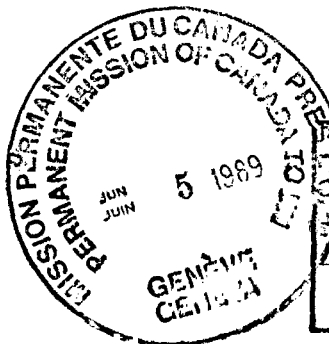
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(à rappeler dans la réponse) G/SO 215/51 CANA (38)

167/1984

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Lake Band	

The Secretariat of the United Nations (Centre for Human Rights) presents its compliments to the Permanent Mission of Canada to the ... United Nations Office at Geneva and has the honour to transmit herewith, for information and in order to complete the files of the State party, a copy of a letter dated 30 May 1989, transmitting a further submission concerning communication No. 167/1984 (B. Ominayak and the Lubicon Lake Band v. Canada), which is before the Human Rights Committee for consideration under the Optional Protocol to the International Covenant on Civil and Political Rights.

2 June 1989

VAN NESS, FELDMAN, SUTCLIFFE & CURTIS

A PROFESSIONAL CORPORATION

1050 THOMAS JEFFERSON STREET, N. W.

SEVENTH FLOOR

WASHINGTON, D. C. 20007

(202) 298-1800

FACSIMILE

(202) 338-2361

(202) 338-2416

WRITER'S DIRECT DIAL NUMBER

May 30, 1989

S. LYNN SUTCLIFFE
HOWARD J. FELDMAN
WILLIAM J. VAN NESS, JR.
BEN YAMAGATA
ROBERT G. SZABO
GRENVILLE GARSIDE
ROSS D. AIN
ALAN L. MINTZ
ROBERT R. NORDHAUS
CHARLES B. CURTIS
ADAM WENNER
PETER D. DICKSON
D. ERIC HULTMAN
GARY D. BACHMAN
SUSAN TOMASKY
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LISA A. SHAPIRO
JESSICA S. LEFEVRE
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MARGARET A. MOORE
DONALD F. SANTA, JR.
MICHAEL A. SWIGER
SAM KALEN
BRUCE S. DEMING
ANTHONY A. TARGAN
BENJAMIN L. ISRAEL
ANTHONY WILSON*
STEPHEN C. FOTIS
NOREEN TAMA BELLEGARDE
JOHN J. BUCHOVECKY*
ELLEN S. YOUNG

OF COUNSEL

HOWARD ELIOT SHAPIRO
ARTHUR JOHN ARMSTRONG
CYNTHIA INGERSOLL

*NOT ADMITTED IN DISTRICT OF COLUMBIA

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

Re: Communication No. 167/1984

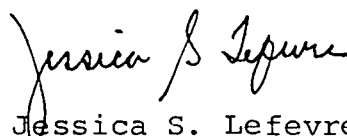
Dear Mr. Moller:

Thank you for your 5 May 1989 correspondence.

On behalf of Chief Bernard Ominayak and the Lubicon Lake Band, I have the honor to submit to the Human Rights Committee the enclosed Supplement No. 11 to Communication No. 167/1984.

On behalf of the Band, I also wish to take this opportunity to express our highest regards to the Secretary-General of the United Nations and to express our gratitude for the kind consideration of the United Nations Committee on Human Rights and of the staff of the Centre for Human Rights.

Yours truly,



Jessica S. Lefevre

Enclosure

SUPPLEMENT NO. 11
TO
COMMUNICATION NO. 167/1984

30 May 1989

The Lubicon Lake Band ("the Band") respectfully submits the following comments to the United Nations Committee on Human Rights ("the Committee") and requests that the Committee make the findings set forth below.

1. The Committee should reject Canada's request under article 93(4) of the provisional rules of protocol for review of the Committee's decision on admissibility.

Article 5(2)(b) of the Optional Protocol to the International Covenant on Civil and Political Rights states that the applicant shall not be required to exhaust all available domestic remedies "where the application of the remedies is unreasonably prolonged."

The Lubicon Lake Band has been pursuing its domestic claims through the Canadian courts for 14 years, since 1975. As the Band has noted for the Committee, given the nature of the claims and the judicial process involved, these actions could well continue for another 10 years. In the interim, Canada has offered the Band no relief from the pressures of development, but instead has intensified that pressure in the face of the destruction of the Lubicon economy and traditional way of life.

In 1984, the Lubicon Lake Band submitted its claim to the United Nations Committee on Human Rights. The Band informed the Committee that oil and gas development in the Band's traditional lands and the failure of the Canadian Government to provide constitutionally mandated protections for the Band threatened to destroy the Band's subsistence economy and thereby its social structure and cultural identity.

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In its submissions over the past five years, the Band described for the Committee the failure of the Canadian courts to respond to its requests for interim relief to halt the development until the Band's legal title to its lands could be settled. The Band also described for the Committee the failure of negotiations of the Band's domestic claims, following Canada's dismissal of its own inquiry officer, Mr. E. Davie Fulton, upon Canada's review of Mr. Fulton's findings corroborating the Band's claims. And the Band has described for the committee the rapid deterioration of the Lubicon community as its traditional economy disappeared.

In its July 1987 decision on the admissibility of the Lubicon claim (CCPR/C/30/D/167/1984), the Committee found that "there were no effective remedies still available to the Lubicon Band" within Canada.

In August of 1988, an independent committee of the Canadian Bar Association on Aboriginal Rights in Canada filed a report entitled "Aboriginal Rights in Canada: An Agenda for Action." In this report, the Special Committee of the Canadian Bar Association concluded that the Aboriginal Peoples of Canada have faced and continue to face injustice within the legal and justice systems of Canada (at p. 14 of the Report).

While Canada has attempted to object to the Committee's July 1987 decision, it cannot dispute the fact that the Band's economy and traditional way of life have been destroyed. Nor can Canada

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dispute the fact that court actions and negotiations undertaken to halt this destruction failed to do so. Nor can it dispute the fact that court actions addressing the remaining issues of land title and compensation will be years in resolution, if resolution ever occurs.

Subsequent negotiations between the Band and the Government of Canada, even were they successful, have come much too late to offer a means of restoring the Band's subsistence economy, and thereby redressing the Band's human rights claim as submitted in 1984.

Moreover, as discussed in the Band's last submission to the Committee, Canada's refusal to agree to terms that would enable the Band to create a new economic base within its traditional lands has cast serious doubt on the future of this latest round of negotiations. Rather than seeking a realistic settlement in these negotiations, Canada presented the Band with an offer in which virtually all items of any significance were left to future discussions, decisions by Canada or applications by the Band. In return, the Band would be required to relinquish its rights to all present and future domestic or international claims against the Government of Canada. Among other effects, this would leave the Band no means of bringing Canada back to the table for the future discussions or decisions offered in the agreement.

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2. The Committee should find that Canada is in violation of the Committee's request for interim protection of the Band under rule 86 of the provisional rules of procedure.

In its July 1987 decision on admissibility, the Committee requested, pursuant to rule 86 of the Committee's provisional rules of procedure, that Canada "take interim measures to avoid irreparable damage to Chief Ominayak and other members of the Lubicon Lake Band."

- a. Canada is participating in a project by which virtually all traditional Lubicon lands have been leased for timber development.

Rather than seek to comply with the Committee's decision, Canada is participating in a project by which all but 25.4 square miles of the Band's traditional lands were leased, in the spring of 1988, for development in conjunction with a pulp mill. Please see Supplement No. 9.

- b. Canada has abandoned negotiations with the Lubicon Lake Band and instead has launched an effort to undermine support within the Band for the Band's duly elected leaders.

Following the Band's refusal to accept a settlement offer that would force the Lubicon people to relinquish all rights to legal action involving a controversy with the Canadian government in exchange for promises of future discussions between Canada and the Band, Canada abandoned negotiations with the Lubicon Lake Band. Rather than continuing

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to seek a course of compromise and settlement, Canada has sent agents into non-native communities of northern Alberta in the area immediately surrounding the traditional Lubicon territory. Working through a single individual who has family ties with the Lubicon Lake Band, but has not lived in the community for 40 years, these agents are seeking other native individuals potentially interested in making their own private deals with the Canadian Government. The majority of the individuals identified by the agents appear not to be affiliated with any recognized aboriginal society. Those that are so affiliated are members of other bands or have only marginal or questionable affiliations with the Lubicon Lake Band. The Government of Canada is telling these individuals that:

- 1) under certain specified conditions, Canada is prepared to provide public benefits to individuals who can qualify as Lubicon Indians under a unusually liberal interpretation of Canadian Government rules;
- 2) the conditions specified include the requirement that the Lubicon Lake Band agree to cede all traditional Lubicon lands of Canada;
- 3) the present, duly elected, leadership of the Lubicon Lake Band must be removed if these individuals want to receive such benefits from the Canadian Government;
- 4) the present Lubicon leadership is up for election this fall;

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- 5) the Canadian Government is prepared to register, on a priority basis, any of these individuals who can be made to qualify, so that they can "have their views represented" in the up-coming Lubicon election.

In order to bring these espionage efforts to an end as quickly as possible and to preclude any future questions about their mandate or any actions they might take on behalf of their constituents, the Band leaders have called for an early election, to be held at the end of May. Since the likely outcome is re-election of the present leadership, Canada has stated publicly that the Government will continue to work with the "dissident group" it has created.

3. The Committee should find Canada in violation of Articles 2(3)(a), 6(1), 7, 14(1), 17, 18(1), 23(1), 26 and 27 of the International Covenant on Civil and Political Rights with respect to its treatment of the people of the Lubicon Lake Band.

- a. Article 2(3)(a)

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e. Articles 17 and 23(1)

Articles 17 and 23(1) provide for protection of the family and home. In contravention of the proscriptions of these articles, Canada is knowingly permitting the Lubicon Lake Band to be subjected to conditions which are resulting directly in the destruction of the families and homes of its members. In the course of this controversy, members of the Band have been threatened personally with the destruction of their homes by bulldozer if they did not accept Provincial jurisdiction over their land and effectively relinquish their aboriginal land rights.

Furthermore, in an indigenous community, the entire family system is predicated upon the spiritual and cultural ties to the land and the exercise of traditional activities. When these are destroyed, as in the case of the Lubicons, the essential family component of the society is irremediably damaged.

It is also vital to take account of the fact that the traditional territory that has been taken from these peoples is their "home." It is where they have lived as a community for countless generations. In their social practices and spiritual belief system, as with most indigenous peoples, the territory in which the family and community reside is no less sacred, no less their home, no less a part of them than is the enclosed dwelling to which they retire at night. In fact, in many respects, the territory of the community is infinitely more important and more sacred than a mere dwelling.

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f. Article 18(1)

Article 18(1) guarantees the right of religious freedom. With the taking and destruction of their land, the people of the Lubicon Lake Band have been robbed of the physical realm to which their religion --and their spiritual belief system -- attaches. Again, as with other indigenous peoples, the traditional territory of the community encompasses the physical aspect of the community's spiritual life. With the loss or destruction of the territory, the only temple in which worship has meaning for these people is lost.

g. Article 27

Article 27 guarantees protection for ethnic, religious and linguistic minorities. The Lubicon Lake Band, as an indigenous or aboriginal people who have never entered a treaty with or ceded territory to Canada, is a social and political entity distinct and separate from the social and political system of Canada, rather than a minority group of Canadian society.

Nonetheless, in terms of size, the Band is clearly a minority within the territory controlled by Canada; its minority status resting on several factors, including ethnic, religious and linguistic differences. The Committee has already upheld Canada's obligation to provide protections for the indigenous peoples of Canada. Sandra Lovelace v. Canada. Canada has completely failed in any way to fulfill this obligation with respect to the Lubicon Lake Band.

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4. Conclusion

In the Lovelace decision, cited above, this Committee noted that the significant matter in respect to the Covenant was the claim that the major loss to a person ceasing to be recognized as an Indian is the loss of the cultural benefits of living in an Indian community, the emotional ties to home, family, friends and neighbors and the loss of identity. These principles are likewise applicable to the complaint of the Lubicon Band. Among the many losses the Lubicon people have suffered in recent years is the loss of the cultural benefits of living in their traditional lands, the loss of their homeland, the loss of the right to enjoy their own culture, and the loss of the right to profess and practice their own religion, a religion which is inextricably linked to the land.


This Committee appears to have recognized these losses in its earlier decision of 22 July 1987. The situation of the Lubicons has deteriorated further since that time.

How are indigenous populations of the world to be convinced that the International Covenant on Civil and Political Rights contains principles which will be implemented by international organs if this Committee now reverses itself because of Canada's position that it should be judged by the words contained in its submissions to the Committee and its press releases rather than by its actions at home?

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If this Committee now refuses to find the Government of Canada in violation of the above specified articles of the Covenant for the abuses suffered by the Lubicon people, abuses which have gained international public attention, what possible protection can the indigenous people of the world hope to have against abuse by a state and how can this possibly advance the rule of law?

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.



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

Prepared with the assistance of:



Jessica S. Lefevre
Van Ness, Feldman, Sutcliffe & Curtis
1050 Thomas Jefferson Street, N.W.
7th Floor
Washington, D.C. 20007



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MESSAGE

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File/Dossier 45-CD-13-1-3 Lubicon Lake Band
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DRAFTER/RÉDACTEUR

DIVISION/DIRECTION

TELEPHONE

APPROVED/APPROUVÉ

J. TROTTIER
SIG

IMH

992-6664

SIG

J. D. LIVERMORE

003402



Department of Justice
Canada

Ministère de la Justice
Canada

MEMORANDUM/NOTE DE SERVICE

UNCLASSIFIED
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Security Classification - Cote de sécurité <i>Unclassified</i>
File number - numéro de dossier 295310-3
Date June 2, 1989

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TO/À: Distribution

FROM/DE: Counsel
Human Rights Law Section

SUBJECT/OBJET: Communication of the Lubicon Lake Band to the UN
Human Rights Committee under the Optional Protocol

Comments/Remarques

Attached is a draft of Canada's submission in regard to the above-noted matter, incorporating the comments I received. Please review this document and contact me with any further comments you might have by June 6, 1989. I can be reached at 957-4937.

Thank you for your assistance in this matter.

Irit Weiser

Distribution: Fred Caron - Fax: 957-5750
Michael Hudson - Fax: 957-1587
Marilyn Whitaker - Fax: 994-7043
Bob Coulter - Fax: 997-1587
John Holmes - Fax: 990-8688
James Trottier - Fax: 952-7642
Ivan Whitehall - Room: 325
Martin Freeman - Room: 232
Ken Boutellier - Fax: (403) 427-6821

IW/dp

c.c. D. Martin Low

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**COMMENTS OF THE GOVERNMENT OF CANADA ON THE FURTHER RESPONSE
OF CHIEF BERNARD OMINAYAK AND THE LUBICON LAKE BAND
DATED MARCH 21, 1989 TO THE HUMAN RIGHTS COMMITTEE**

I. GENERAL

The Secretary-General of the United Nations, in his note no. G/SO 215/51 CANA (38) 167/1984 dated May 5, 1989, transmitted to the Government of Canada the further comments of the communicant dated March 21, 1989. In reply, the Government of Canada submits the following observations.

**II. RECENT DEVELOPMENTS IN NEGOTIATIONS AND EXHAUSTION OF
DOMESTIC REMEDIES**

The Government of Canada recognizes that the Lubicon Lake Band has suffered a historical inequity and that they are entitled to a reserve and related entitlements. This is why the Government of Canada entered into negotiations with the Band. As is indicated below, the Band has been offered the means to maintain its culture, control its way of life and achieve economic self-sufficiency. This offer, if accepted, will provide an effective domestic remedy to the violations of the Covenant alleged by the Band. However, this remedy can only be offered to the Band, it cannot be imposed. For the assistance of the Committee, the demands of the communicant and the responses of the Canadian and Alberta governments are summarized in a chart attached as Appendix "A" to this submission.

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The most recent negotiations between the Lubicon Lake Band and the Government of Canada took place from November 1988 to January 1989. These negotiations were with senior government officials and included a meeting between the Prime Minister of Canada and Chief Ominayak. The Canadian government met each of the communicant's demands (with the exception of general compensation which the Government of Canada rejects as having no moral or legal basis) either in full or to the extent that equal treatment with other Canadian bands was approximated or exceeded. For example, the communicant's demands for land, housing, water and sewage services, electrification, roads, and a school were fully agreed to by the federal government. The standard Canada offered to meet in the provision of these facilities and services was the same high standard applied to all Canadian communities. An agreement in principle was also reached between the Band and the province of Alberta in respect of hunting and fishing rights.

The Government of Canada did refuse certain demands of the Band, such as a request for an indoor ice arena and a swimming pool. Expenditures on such items could not be justified by the federal government in the face of the needs of other Indian communities for basic services, such as improved housing and water systems.

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The major point of contention between the Government and the communicant was a claim by the Band for approximately 167 million dollars in compensation for economic and other losses allegedly suffered. In an attempt to permit resolution of the matters agreed upon between the parties, the Government of Canada put forward a proposal that would have enabled the Band to accept Canada's offer in its entirety and still pursue the claim for general compensation in Canadian courts. The Band refused this proposal, which would have given its members a permanent land base with attendant mineral rights, new housing with all related services, a new school, self-government, and wildlife management participation over a large area. Prudent management of the items contained in the offer could easily have resulted in a high level of meaningful future employment for members of the Band.

Finally, it should be noted that the Band's allegations of negotiating in bad faith are not consistent with the large number of the Band's demands that have been met in Canada's formal offer. Bad faith negotiations by either the Band or Canada would not have lasted six weeks, resulted in such a comprehensive offer, nor seen so many of the Band's demands agreed to.

The Government of Canada's offer remains open for acceptance by the Band. It represents in itself an effective remedy to the violations of the Covenant alleged by the Band. In addition,

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two court actions commenced by the Band are still outstanding. One action was commenced in the Federal Court of Canada against the federal government; the other in the Alberta Court of Queen's Bench against the province and certain private corporations. (See Canada's communication dated May 31, 1985 at pages 2-7 and October 7, 1987 at pages 4-9). Pursuant to article 5(2)(b) of the Optional Protocol, Canada has a right to require that effective domestic remedies be exhausted prior to a communication being addressed by the Committee.

III. PROCESS

The Human Rights Committee, in its decision dated August 6, 1987, declared the communication of the Lubicon Lake Band admissible, not on the basis of Article 1 (as alleged by the Band), but insofar as the communication may raise issues under article 27 or other articles of the Covenant. In its submission of October 7, 1987, the Government of Canada requested the Committee to review its decision on admissibility pursuant to Rule 93(4) of the Provisional Rules. Additionally, the Government of Canada requested that if the Committee maintained its decision on admissibility, the Committee identify the specific article(s), allegations and evidence on which its decision was based.

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It is, of course, impossible to respond to the substance of the Band's claim without this information being specified. In its note of December 4, 1987, the Secretariat advised the Canadian government that its request would be brought to the attention of the Committee at its next session (i.e. March 1988). In the intervening period, the issues raised in Canada's application under Provisional Rule 93(4) were the object of further submissions to the Committee from both the communicant and the Government of Canada. However, the Committee itself has not yet commented on these issues.

The Government of Canada requests that the Committee respond to these issues, including if necessary, identification of the articles of the Covenant which have been allegedly breached, and the facts and evidence which form the basis of these alleged breaches. The Government of Canada requests the Committee to provide its decision on the issues raised pursuant to Provisional Rule 93(4) as soon as possible, so that if necessary, Canada may present its substantive case to the Committee in November 1989 for final determination.

IV. CONCLUSIONS

The Government of Canada submits that the offer outlined above, as well as the ability of the Band to pursue the

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unresolved issue of general compensation in the courts, amounts to an effective domestic remedy. Additionally, the Band has not pursued to completion the two court actions which it has already commenced. Consequently, it is submitted that effective domestic remedies have not been exhausted as required by article 5(2)(b) of the Optional Protocol, and thus, the communication should be declared inadmissible by the Committee. If, on the other hand, the Committee maintains that the communication is admissible, the Government of Canada is awaiting the Committee's identification of the article(s) and evidence on which the admissibility decision is based so that a response on the merits may be prepared.

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