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The Honourable Robert Nault
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Government of Canada
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Dear Mr. Minister:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Lubicon representatives summarized the situation as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The three paragraphs tabled by Troy Chalifoux read as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

ORIGINAL SIGNED BY

Bernard Ominayak
Chief
Lubicon Lake Indian Nation