

Lubicon Lake Indian Nation

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August 29, 2004

The Hon. Andy Scott
Minister of Indian and Northern Affairs
Government of Canada
Ottawa, ON K1A 0H4

Via Fax: 1-613-953-4941

Dear Mr. Scott;

Prime Minister Martin has said publicly that he's "committed to a just settlement of (the Lubicon) land claim, one that is acceptable to the Lubicon Nation and the governments of Alberta and Canada." He has said "settlement of the Lubicon Nation land claim has been a priority of the Government of Canada and must be effectively pursued until a mutually acceptable solution is negotiated". And he has said "recognizing Aboriginal peoples' inherent right to self-government and negotiating land claim treaties is incredibly important in ensuring they take control of their own destiny."

Mr. Martin's views on the importance of recognizing the inherent Aboriginal right of self-government, on Canadian priorities and on commitment to achieving a just settlement of Lubicon land rights are not being reflected in the actions his officials or your Department.

Lubicon settlement negotiations stalled last December during the last days of the Chretien government over the issues of self-government and financial compensation. Although the Lubicon people have proceeded to do necessary follow-up work agreed earlier at the negotiating table, there have been no formal negotiating sessions since the Martin government assumed office. Moreover there is currently no indication that the Martin government is prepared to resume serious Lubicon settlement negotiations.

On financial compensation federal negotiators effectively pre-empted negotiation of numbers arrived at earlier through a mutually agreed approach by requesting a "bottom line number". They then proposed to treat the requested "bottom line" as a new starting point for negotiations. Although the focus of the discussions at the end of last year was on self-government rather than on financial compensation, federal negotiators have not been prepared to seriously discuss any approach to financial compensation other than now negotiating the earlier requested Lubicon "bottom line". (Needless to say that's not negotiations at all but rather the kind of offensive gamesmanship frequently associated in the minds of many, especially in the Aboriginal community, with the most unattractive stereotype of duplicitous federal government lawyers and bureaucrats.)

On self-government, after months of pretending to be prepared to discuss long-standing Lubicon self-government proposals, late last year Chief Federal Negotiator Brad Morse refused to discuss anything but agreement to talk about Lubicon self-government post-settlement. (We learned later that Professor Morse also falsely reported to senior Departmental officials last September and to Minister Nault last October that the Lubicons were for the first time insisting that self-government be included in the Lubicon settlement agreement. In fact the Lubicon position that self-government had to be part of any Lubicon settlement agreement has been on the table in writing since 1985, was included in written Lubicon settlement proposals presented to Professor Morse in July of 1998, and was repeatedly expressed by Lubicon representatives during the subsequent 5 years of negotiations.)

Over the Christmas holidays the Lubicon people obtained copies of “GUIDELINES FOR FEDERAL SELF-GOVERNMENT NEGOTIATORS” (Numbers 1 and 2) drafted by Justice Department lawyers in 1996. These Guidelines are effectively instructions on how to negotiate Aboriginal self-government in bad faith and to subvert what most people would take to be the intent of the Constitutionally protected inherent right of Aboriginal self-government.

The Justice Department guidelines to federal self-government negotiators recommend language identical to language which federal negotiators put forward on September 10, 2003 claiming falsely that they’d drafted the language overnight in a Peace River motel in an effort to overcome the impasse in Lubicon self-government negotiations. (Professor Morse actually went so far as to suggest that the language proposed by federal negotiators on September 10th would have to be checked with self-government experts in Ottawa since it had supposedly been drafted overnight in Peace River without consulting self-government experts in Ottawa.)

The proposal put forward by federal negotiators on September 9th and 10th was to include three general clauses on self-government in the preamble of the Lubicon settlement agreement. In response to a question Professor Morse falsely assured a room full of Lubicon people that clauses in the preamble had the same legal force and effect as clauses in the body of the agreement. Regarding these same three clauses, the 1996 Justice Department Guidelines read:

“In determining where to place a given clause, negotiators should bear in mind the different legal effects of including wording in the preamble to an agreement as opposed to the body of the agreement itself. Preambular language serves to set the stage for the substance of the agreement which follows, and may help to establish the context in which an agreement has been reached. Preambles are given less legal weight than the substantive provisions of the agreement (where the ‘meat’ of the agreement is reflected) and are generally only referred to by the courts to assist in interpreting ambiguous substantive provisions in the body of the agreement.” (Obviously there’s nothing to interpret if there are no clauses in the body of the agreement to refer to and we know from previous experience that Justice Department lawyers take the position that the government is only legally bound by what’s in the body of the agreement.)

Professor Morse's contract as Chief Federal Negotiator was not renewed at the end of last fiscal year. He has been replaced by an in-house Departmental negotiator named Sharman Glynn.

Ms. Glynn was a member of the federal negotiating team under Professor Morse and she was fully complicit in the deceitful self-government charade scripted by the Justice Department Guidelines. (As a member of the federal negotiating team Ms. Glynn also had to be aware at least to some extent of the false reports that Professor Morse was making to Minister Nault and to senior officials of the Department; she knew better and she made no known effort to correct the misinformation.)

Since her appointment as Chief Federal Negotiator Ms. Glynn has taken the position that she knew nothing about the Justice Department Guidelines when she participated in tabling language taken verbatim from them and that moreover the Justice Department Guidelines are a perfectly appropriate effort by Justice Department lawyers to ensure that self-government powers are determined through negotiations rather than the courts. They are not. They are instructions on how to negotiate in bad faith and to make sure that self-government provisions of an agreement are not binding.

Ms. Glynn has also taken the position that the Guidelines are the Cabinet-approved position of the government of Canada which she says she is bound to follow. Needless to say having the federal government negotiator bound by instructions on how to negotiate in bad faith and try to trick the Lubicon people into agreeing to a settlement agreement which makes no effective provision for recognition of the right of the Lubicon people to be self-governing is not acceptable to the Lubicon people.

First Professor Morse and now Ms. Glynn have pointedly rejected the characterization of the federal government's position as "take-it-or-leave-it" saying incongruously that they've "exhausted their mandate" (and now that Ms. Glynn is also bound by the Justice Department Guidelines) but that doesn't mean the federal position is final. Federal negotiators can't have it both ways. Either they have a mandate to negotiate further or they don't.

Both Professor Morse and Ms. Glynn have suggested that their lack of a mandate to negotiate further is our problem -- that their mandate limits what can be discussed at the negotiating table. The Lubicon people don't accept that position. If the governments of Canada and Alberta want to legitimize their otherwise illicit claims to traditional Lubicon lands and resources they are going to have to be prepared to come to the negotiating table and, to quote Prime Minister Martin, negotiate "until a mutually acceptable solution is negotiated".

We wrote to your predecessor Andy Mitchell on two occasions to raise the issue of mandate and to express our distress over the obvious lack of good faith negotiations on the part of federal negotiators. We spoke with Mr. Mitchell's Chief of Staff Paul Bresee about this matter on several occasions and sent Mr. Bresee extensive documentation on the situation and the problem. And we spoke with other government officials about this matter including Jeff Copenace -- the Prime Minister's Senior Special Assistant on Aboriginal Affairs.

We waited for a never received response from Mr. Mitchell. We didn't hear back from Mr. Copenace and when we finally caught up with him he referred us to Mr. Bresee. We waited for but never received a promised response from Mr. Bresee.

We also waited while Parliament dissolved and Canadians went to the polls to elect a new government. And we waited for the new Martin government to be formed and for you to be appointed as Mr. Mitchell's successor as the new Minister of Indian Affairs.

Over two months after your appointment Ms. Glynn now tells us that we should wait for her to have a chance to brief you on Lubicon negotiations, maybe later this month, and for the reconvening of Parliament next month. It is not hard to imagine all of the kinds of things that will postpone a response once Parliament reconvenes.

While we have waited for your negotiators to be given a proper mandate to negotiate a settlement of Lubicon land rights we have continued with work agreed upon at the table including the negotiation and drafting of agreements with third parties on the transfer of interests in settlement lands, research on settlement issues raised by your negotiators at the negotiating table and discussion of settlement issues with provincial and county governments.

However, while work on our side of the table is continuing, your Department has unilaterally cut off negotiations loan funding to the Lubicon Lake Indian Nation -- again raising very real questions about whether the Martin government is serious about negotiating a settlement of Lubicon land rights.

Each year the Lubicon Nation receives a loan from Canada to fund legal and technical work in support of settlement negotiations. Each year's budget is based on the experience of prior years and any anticipated changes in budget requirements such as increased funding to cover legal work if, for example, it is expected that more legal drafting will have to be done in the coming year.

We also prepare a work plan outlining the kinds of work that we expect will have to be done based on what's already been done, what's being done and what's left to be done as discussed and agreed with federal negotiators at the negotiating table. At the end of each fiscal year your Department receives a report detailing what work has been done during the previous year as well as a clear audited statement showing how last year's loan funds were spent.

This year we prepared and submitted a budget and work plan in the same way as all previous years. Research and Negotiations Funding Manager Martine Larocque, however, told us that our work plan -- which had already been discussed and agreed with federal negotiators -- is not acceptable. Consequently, she said, the proposed budget is not acceptable.

Ms. Larocque said that the Lubicons will now have to spell out in advance which Lubicons are going to be meeting with whom, where, for how long to discuss what. She said she would then determine whether the federal government would be prepared to loan the Lubicon people money to cover the costs of the proposed meetings.

Ms. Larocque was told that it is not possible to provide this kind of information in advance because specific work assignments and meetings are decided at the negotiating table in process and no one knows in July that there's going to have to be a two day meeting in Ottawa in September involving a lawyer and 4 other Lubicon representatives to discuss self-government with whomever. Moreover, Lubicon representatives told Ms. Larocque, the Lubicon people are not prepared to accept federal officials effectively determining how the Lubicons prepare and conduct and staff negotiations by deciding which negotiation associated costs can be paid, especially when we are talking about loans to the Lubicon Nation in anticipation of a settlement of Lubicon land rights.

Ms. Larocque brusquely told Lubicon representatives that she would then just have to make the Lubicons an "offer" based on the amount of money she had available for negotiation loans irrespective of the proposed Lubicon budget based on past experience or the work to be done as agreed with federal negotiators. She further told Lubicon representatives that she would get back to us by the end of the month with an offer. It has now been over three months. Ms. Larocque has not provided any loan funding and is not returning our phone calls.

This fiscal year is nearly half over and we have yet to receive the loan that allows us to pay for work agreed at the table or to participate in further negotiations. We have incurred significant expenses in order to carry out work already agreed upon and undertaken in good faith. If loan funding is not provided, we can only conclude that Canada is not willing to negotiate a settlement of Lubicon land rights with the Lubicon Nation and we will have to make other arrangements and take other measures to defend our land rights.

If federal negotiators are given a proper mandate to settle with the Lubicon people we are convinced that settlement can be achieved within the lifetime of this minority government. If federal negotiators don't have a proper mandate to negotiate, no settlement will be possible unless and until you provide them with one. If federal negotiators have a mandate to stall, prevaricate, lie, manipulate, misrepresent and otherwise draw out the process endlessly -- or if for whatever reason that's how federal negotiators interpret or exercise whatever mandate they have -- no settlement will be possible.

I am copying this letter to your cabinet colleagues on the Cabinet Aboriginal Affairs Committee. Some, like Prime Minister Martin, have expressed their support for a settlement and should know why one has not yet been achieved. Others are new to Cabinet and may not yet be familiar with the hardships the Lubicon people have endured. It is hoped by copy of this letter these new Cabinet Committee members will become more familiar with the situation and the problems preventing settlement.

As we have repeatedly told federal government representatives we would do if we could not get a timely response to this situation from responsible federal officials and politicians, we will also now be sharing information on this situation with Lubicon supporters across the country and around the world. With their support, the support of the Prime Minister and the support of your colleagues and our friends in Parliament, I'm sure you will be able to provide Canada's negotiators with a proper mandate to successfully negotiate settlement of Lubicon land rights in good faith -- including self-government and financial compensation.

Sincerely,

ORIGINAL SIGNED BY

Bernard Ominayak
Chief, Lubicon Lake Indian Nation