

**COMMENTS OF THE LUBICON LAKE INDIAN NATION ON THE AUGUST
15, 2006 "FOLLOW-UP" RESPONSE OF THE GOVERNMENT OF CANADA TO
LUBICON COMMUNICATION NO. 167/1984 UNDER THE OPTIONAL
PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND
POLICAL RIGHTS**

April 8, 2007

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PART I: BACKGROUND

1.) Context

As documented in earlier submissions to the Committee, resource exploitation companies are extracting billions of dollars in natural resources from Lubicon Territory with horrific consequences for the human and indigenous rights of the Lubicon people. The companies claim to have purchased rights to these resources from the Alberta provincial government.

The Alberta provincial government claims to have obtained the natural resource rights they sell to resource exploitation companies from the government of Canada by virtue of a 1930 federal/provincial land transfer agreement. This 1930 Land Transfer Agreement purports to transfer vast tracts of lands and resources allegedly under the jurisdiction of the Crown in right of Canada to the jurisdiction of the Crown in Right of Alberta.¹

The government of Canada claims to have obtained the rights to lands and resources allegedly transferred to the Alberta provincial government in 1930 through negotiation of land cession treaties with the original indigenous owners of that land. However the Lubicons are the original indigenous owners of Lubicon Territory and the Lubicons have not surrendered their rights to Lubicon Territory through treaty with the government of Canada or in any other legally or historically recognized way.

Canada consequently transferred rights to lands and resources that Canada did not properly hold to Alberta; Alberta sold resource rights that it did not properly hold to resource exploitation companies; and resource exploitation companies are extracting billions of dollars in natural resources from unceded Lubicon lands -- with horrific consequences for the human and indigenous rights of the Lubicon people -- based on resource rights purchased from the Alberta provincial government that the Alberta provincial government does not properly hold.

It is not possible to understand the continuing abuse of the Civil and Political Rights of the Lubicon people under the Covenant except in the context of this fact situation.

2.) Historic Lubicon Occupation of Lubicon Territory

Lubicon oral history is that the Lubicon people have occupied their traditional Territory since time immemorial.

A highly qualified independent ethnologist -- using anthropological, archaeological, demographic, ethnographic, historical and linguistic evidence -- concluded that "The immediate ancestors of the historic Cree lived (in Lubicon Territory) from about A.D.

¹ Copies of all documents and correspondence referred to in this submission are available upon request but are too voluminous to attach.

1400...(and)...may have lived there earlier but the amount of archaeological research represents too small a sample to be certain of the initial date”.²

Genealogical evidence documents Lubicon occupation of Lubicon Territory by the direct ancestors of the current Lubicon Cree population as early as 1750 -- well before the advent of Europeans in the area.

3.) The Procedure for the Taking of Indian Land Under Canadian Law

In 1763 English King George III issued a Royal Proclamation the purpose of which was to organize England’s North American Empire and to define relations with North American Indians including land acquisition from Indigenous Nations on the western frontier where at that point no western European had yet set foot. This Royal Proclamation is now part of the Canadian Constitution and continues to provide the legal framework for the taking of indigenous land in Canada.

The “Indian Provisions” of the Royal Proclamation read as follows:

“And where it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians (underlining added) with whom we are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds -- We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief in any of our Colonies of Quebec, East Florida, or West Florida, do presume, upon any Pretence whatsoever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective governments, as described in their Commissions: as also that no Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads of Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatsoever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.

“And We do further declare it to be our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid.

“And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for the Purpose first obtained.

“And We do further strictly enjoin and require all Persons whatever who have either willfully or inadvertently seated themselves upon any Lands with the Countries above described, or upon any other Lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.

² James G. E. Smith, “The Western Woods Cree: Anthropological Myth and Historic Reality”, AMERICAN ETHNOLOGIST 14(3), August, 1987, American Anthropological Association, 1987, p. 439.

“And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians: In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where We have thought proper to allow Settlements: but that, if at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie: and in case they shall lie within the limits of any Proprietary Government, they shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as We or they think proper to give for that Purpose...”

4.) Treaties Between Indigenous Nations and Canada

The procedure historically employed to obtain the cession of indigenous land in Canada under the Royal Proclamation is the making of a treaty with the original indigenous owners of the land. Although the indigenous understanding of the purpose and effect of the treaty is different, the position of Canada is that through the treaty the indigenous nation cedes rights to relatively vast indigenous lands and resources in exchange for exclusive use of a small reserve area and certain prescribed rights and benefits.³

5.) The Coming Into Existence of Canada as an Identifiable Political Entity

Canada was created in 1867 by the British government as a so-called “self-governing colony of the British Empire” operating under a piece of British legislation called the British North America Act. Canada therefore came into existence as an identifiable political entity, if not an autonomous political state, well after the Lubicons are known to have existed as an autonomous Indigenous Nation with a defined Territory.

The British North America Act served as an externally imposed Canadian Constitution from 1867 until 1982 when it was “patriated” or “brought home” by Canada, thereby making it subject to the Canadian Parliament rather than the British Parliament. The Royal Proclamation of 1763 is included in the “patriated” Canadian Constitution and is now part of the Canadian Constitution.

Among other things the British North America Act spells out the jurisdiction of different levels of Canadian government specifying that “Indians and Lands Reserved for Indians” are “the exclusive Legislative Authority of the Parliament of Canada”.

6.) No Treaty Between Canada and the Lubicons

Canada has not negotiated a Treaty with the Lubicon Lake Indian Nation. The constitutionally prescribed procedure for the taking of Indian lands has therefore not been followed by Canada. The Lubicons have not surrendered their rights to Lubicon Territory

³ It's not surprising that unconquered indigenous people would have a different understanding of the purpose and effect of the treaty than they were trading vast lands and resources for a small piece of land, rights they already had and some limited “benefits”.

even under the precepts of Canadian law, to say nothing of the way the Lubicon people, as an autonomous indigenous Nation with a defined Territory that existed before the creation of Canada, view and treat the issue of Lubicon Territorial rights.

7.) The Indigenous Concept of Territorial Rights

Canada implies in its latest submission to the Committee that indigenous people in the area now known as northern Alberta do not have a concept of an exclusive territory associated with one particular indigenous nation but rather wander around living off the land as best they can like “the deer in the field”.

In fact the indigenous peoples in the area now known as northern Alberta have a very definite concept of an exclusive territory associated with one particular indigenous nation. They believe their particular geographically defined Territory is where the Creator put them as a people with a sacred responsibility to care for the plants and animals. They believe the plants and animals will support them and their future generations if they meet their responsibility to the Creator and care for the plants and animals in their particular Territory. They believe that the Creator put them and only them there and it is in that sense their land, their responsibility and nobody else’s.

Asked about lands beyond their Territory, the Lubicon people say it is where the Creator put other people. They are of course aware that white people don’t share their religious views but have difficulty understanding why white people do not stay where the Creator put them or care for the plants and the animals. As one Lubicon Elder asked, “Don’t the white people understand that they can’t destroy everything and have anything left”.

Asked about the Lubicon Territory, the people of other indigenous nations in the area now known as northern Alberta know that it has always been Lubicon Territory and that Lubicon Territory is not the territory of any other indigenous nation.

8.) Negotiation of Treaty with the Indigenous Peoples in the Area Surrounding Lubicon Territory

In 1899 Canada negotiated Treaty No. 8 with various Indigenous Nations in the area surrounding Lubicon Territory. These Indigenous Nations spoke one of three distinct Indigenous languages -- Cree, Beaver and Chipewyan -- but each had its own traditional Territory and political organization. Although Canada is now trying to suggest that the Lubicons are members of an amorphous “Cree Aboriginal people living in Canada” -- “members of a thinly scattered minority group living in the midst of a more numerous population grouping” is the way Canada put it in an earlier submission to the Committee -- Canada made treaty with the political representatives of these distinct, territorially-based Indigenous Nations -- not with representatives of a Cree-speaking Nation, a Beaver-speaking Nation and a Chipewyan-speaking Nation. A Cree-speaking, Beaver-speaking and Chipewyan-speaking Nation did not exist as such any more than all

English-speaking, French-speaking or German-speaking people currently belong to the same nation.⁴

9.) Lubicons Missed When Treaty Made with Indigenous Peoples in the Area Surrounding Lubicon Territory

The Lubicons were missed when Canada made treaty with the indigenous groups in the surrounding area because the Lubicons lived in an isolated, inaccessible hinterland not transected by any major river system. The Canadian Treaty party followed the main river systems and did not venture into the hinterland. The Treaty Commissioners acknowledge as much in their report on the negotiation of Treaty 8 that says, in part:

“There yet remains a number of persons leading an Indian way of life in the country north of Lesser Slave Lake, who have not accepted treaty as Indians, or scrip as half-breeds, but this is not so much through indisposition to do so as because they live at points distant from those visited, and are not pressed by want. The Indians of all parts of the territory who have not yet been paid annuity probably number about 500 exclusive of those in the extreme northwestern portion, but as most, if not all, of this number belong to bands that have already joined in the treaty, the Indian title to the tract it covers may be fairly regarded as being extinguished.”

The surmise of Treaty Commissioners about the number of Indians in the area north of Lesser Slave Lake, and the likelihood that they belonged to Bands that had already joined treaty, was wrong on both counts. The language of the Report is notable, however, in that it makes clear that the mandate of the Treaty Commissioners was to treat with all of the “bands” in the area in order to “extinguish” the “Indian title”.

It is now known that there were several distinct Indigenous Nations in the vast hinterland area north of Lesser Slave Lake each with its own distinct Territory, separate and apart and not affiliated with Indigenous Nations that made treaty with Canada in 1899. One of these distinct Indigenous Nations in the hinterland area north of Lesser Slave Lake was the Lubicon Lake Indian Nation, which alone numbered around 3,000 persons in 1899.⁵

10.) The Coming Into Existence of Alberta as a Province of Canada

Alberta was created as a province of Canada in 1905 -- again well after the Lubicons are known to have existed as an autonomous Indigenous Nation with a defined Territory.

Although the original Canadian provinces forming Canada in 1867 were deemed to own the public lands and natural resources within their boundaries, Alberta was treated differently than the original provinces forming Canada and the Canadian federal government retained ownership of the public lands and natural resources within the boundaries of the new province of Alberta until 1930.

⁴ There are several different dialects of the Cree language so different that people who speak the Swampy Cree dialect in Quebec, for example, cannot communicate in Cree with people who speak the Woodland Cree dialect in Northern Alberta.

⁵ The Lubicon population was decimated by an influenza in 1918 from which the Lubicon people never numerically recovered.

In 1930, after nine years of contentious negotiations that continue to plague relations between the Canadian federal government and the Alberta provincial government -- and to complicate resolution of Lubicon land rights -- the Canadian federal government agreed to transfer jurisdiction and ownership of public lands and resources within the boundaries of the province of Alberta to the Alberta provincial government subject to certain specified provisions and exceptions.

Several provisions of the 1930 Land Transfer Agreement pertain to Indians and Indian lands.

Section 10 of the 1930 Land Transfer Agreement pertains to reserve lands pursuant to treaty and provides that Indian Reserves remain under federal jurisdiction and that the province has to transfer back to federal jurisdiction any land required by the federal government to enable the federal government to meet its constitutional obligations under the treaties with the Indians in the lands being transferred.

Section 10 of the Land Transfer Agreement reads:

- “10. All lands included in Indian reserves within the Province, including those selected and surveyed but not yet confirmed, as well as those confirmed, shall continue to be vested in the Crown (in Right of Canada) and administered by the Government of Canada for the purposes of Canada, and the Province will from time to time, upon the request of the Superintendent General of Indian Affairs, set aside, out of the unoccupied Crown lands hereby transferred to its administration, such further areas as the said Superintendent General may, in agreement with the appropriate Minister of the Province, select as necessary to enable Canada to fulfill its obligations under the treaties with the Indians of the Province, and such areas shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the province under the provisions hereof.”

Section one of the 1930 Land Transfer Agreement expressly excludes lands and resources that the Canadian federal government does not properly hold. Section one reads:

“In order that the Province may be in the same position as the original Provinces of Confederation are in virtue of section one hundred and nine of the British North America Act, 1867, the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province, and all sums due or payable for such lands, mines and minerals or royalties, shall, from and after the coming in force of this agreement and subject as therein otherwise provided, belong to the Province, subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same...(underlining added)”.

11.) Lubicon Lands Excepted From Lands Transferred From Federal to Provincial Jurisdiction

Since Canada had not made treaty with the Lubicons pursuant to the Royal Proclamation at the time of the land transfer agreement -- and has still not made treaty with the Lubicons respecting Lubicon rights to Lubicon Territory -- Lubicon rights to Lubicon Territory constitute an “interest other than that of the Crown in the same”, and Lubicon

lands are excepted from lands and resources transferred by the government of Canada to the Alberta provincial government via the 1930 Land Transfer Agreement.⁶

Alberta therefore does not properly hold and cannot properly sell resource rights on Lubicon lands to the resource companies, and the resource companies are extracting billions of dollars in natural resources -- with horrific consequences to the human and indigenous rights of the Lubicon people -- based on resource rights purchased from Alberta that Alberta does not properly hold.

The fact that Canada transferred rights to lands and resources to Alberta without having first properly obtained rights to those lands and resources from the original indigenous owners, and that Alberta subsequently sold resource rights on those lands worth billions of dollars to resource exploitation companies, is something neither Canada, Alberta, nor the resource companies is prepared to acknowledge, entertain, discuss or countenance. However it is still a fact. And it is a fact that must be understood in any effort to contend with the continuing abuse of the Civil and Political Rights of the Lubicon people under the Covenant.

12.) First Contact Between Canada and the Lubicon Lake Indian Nation

There were continuing reports of Indigenous Nations in the area north of Lesser Slave in the early 1900s and some individual Lubicons were put on the membership lists of Indigenous Nations in the surrounding area where they'd gone to visit or trade.

In the 1930s, in response to information from members of indigenous nations in the surrounding area that white people were going to come into the Lubicon Territory, Lubicon representatives started trying to make contact with Canada about negotiating a treaty to protect Lubicon land rights -- which was the Lubicon understanding of the purpose of the treaty. Government officials put these Lubicon representatives on the membership list of the band where they traveled to make contact and sent them on their way.

In 1939 Canada sent a delegation into Lubicon Territory expressly to determine whether the Lubicons were a distinct Indigenous Nation or merely members of indigenous nations with whom Canada had already made treaty. It was officially determined that the Lubicons were indeed a separate and distinct indigenous society -- with its own history, political organization and Territory -- that needed to be officially dealt with. Reporting on that first contact, the local Indian Agent, N. L'Heureux, wrote as follows:

“As it was the first time that a Treaty party was afforded the opportunity to visit these Indians in their own district, particular pain was taken to scrutinize their claim...Their leader, Alexis Laboucan, #81, made a short speech well to the point and concisely stated their claim; their Band as a unit has existed forever as far as they can remember, their residence at Lubicon Lake that began well before Treaty was ever mentioned; commented on their ability to hunt following the game where it goes but stating their willingness to learn agriculture for the time soon to come

⁶ Notably lands in Alberta that were privately titled prior to the 1930 Land Transfer agreement include subsurface rights. Subsurface rights to lands that became privately titled subsequent to the 1930 Land Transfer Act remain with the province.

when fur will be too scarce for them to make a living at hunting. They wish their children educated but are reluctant, they admit it, to send them to such distant schools as at Grouard and Whitefish Lake, the nearest 55 miles away by trail and the other 40 miles beyond...I would recommend that the Indians of Lubicon Lake be detached from the Cree Band of Whitefish to form the Cree Band of Lubicon Lake. I would also recommend the selection of a Reserve for this new Band.”

Regarding that same visit, Inspector of Indian Agencies in Alberta, C. P. Schmidt, wrote as follows:

“This camp is approximately 45 miles by road, North and West of Whitefish Lake. Twenty-two families -- 99 persons -- recognized as members of the Whitefish Lake Band were paid here this year, plus 19 other persons said to be Wabasca Indians, but who claim to belong to the Lubicon group live here...While considered by the Agent as members of the Whitefish Lake Band, these Indians, at a meeting held after the payment was completed, at which all were present, including several women, emphatically stated, through their leaders, Alexis Laboucan and Louis Laboucan, Senior, that they had nothing to do with, and had nothing in common with the Whitefish Lake Band; that they were a separate Band, and always had been...I would ask that the matter of giving these Indians a reserve between Lubicon Lake and Buffalo Lake be considered, and if approved, that the land mentioned by them be looked over carefully this Autumn, and that the question of including Buffalo Lake within the limits of this reserve be given careful consideration...”

Despite the provisions of the Royal Proclamation, and despite the fact that adhesions to treaty are to this day still being negotiated with indigenous nations in Alberta as part of land settlement agreements, Canadian officials off-handedly decided that negotiation of a treaty with the Lubicons, or an adhesion to treaty, was not necessary and that the Lubicons could simply be recognized as a “band” of status Indians entitled to the benefits of Treaty 8 -- including establishment of a Lubicon reserve.⁷

Following standard procedure in recognizing an Indigenous Nation, Canadian officials made up a separate Lubicon membership list consisting of Lubicon members meeting with the official 1939 Canadian delegation. Lubicon members whose names had been incorrectly added to the membership lists of other Bands in the surrounding area were transferred to the Lubicon membership list. Other Lubicons not in attendance at the 1939 meeting were to be added to the Lubicon membership list and taken into account in determining reserve land quantum when they came in from the bush. Authority was granted by the Secretary of Indian Affairs “to hold a meeting of the (Lubicon Lake) Band for the purpose of enabling the Indians to signify their choice for a Chief”.⁸

⁷ The argument Canada later sought to make that the Lubicons are merely a break-away group from the Whitefish Lake Band didn't relieve Canada of responsibility for negotiating a treaty with the Lubicons because the Whitefish Lake Band didn't adhere to Treaty 8 until 1989 as part of an outstanding land entitlement agreement for Whitefish Lake members not counted in calculating the size of the original Whitefish Lake Reserve in 1908. The 1989 Whitefish settlement also speaks to another discredited Canadian government claim that the Lubicons were already counted in calculating the size of the Whitefish Reserve in 1908 since the 1989 Whitefish settlement did not involve Lubicon members but only Whitefish members not taken into account in 1908. Canada's current position is that the Lubicons are somehow covered by Treaty 8, despite not being a party or signatory to Treaty 8, but will still be required by Canada -- as were the Whitefish Lake people in 1989 -- to formally join or “adhere” to Treaty 8 as part of any settlement of Lubicon land rights.

⁸ The title of “Chief” is not part of historic Lubicon political organization but is a role required by Canada for purposes of relations with Canada.

Arrangements were made for the Dominion Land Surveyor to survey a reserve for the Lubicon people at Lubicon Lake based on the number of Lubicons with whom the Canadian delegation met in 1939 with the proviso that “absentees” would be added to the membership list and taken into account in calculating reserve size as they came in from the bush.

13.) The Promise to Establish a Lubicon Reserve and to Provide the Lubicons with Treaty Benefits

Surveying a reserve for the Lubicon people was on the work program of the Surveyor General in 1940 but there was no viable surface access into the area and it wasn't possible for the surveyor's plane to land on the lake due to smoke and shallow lake water.

Surveying a reserve for the Lubicons was on the work program of the Surveyor General again in 1941 but the work had to again be delayed because of “drastically cut” budget estimates and “owing to the pressing need for vigorously prosecuting war preparations”.

On February 23, 1942 the federal Director of Indian Affairs, H. W. McGill, wrote the federal Superintendent of Reserves and Trusts, D. J. Allen, as follows:

“I am keenly anxious that we obtain funds in some way to secure the reserves to which the Indians in this district are entitled before the matter is compromised further by the influx of settlers”.

On April 18, 1942, Director McGill wrote the Deputy Minister of the federal Department of Mines and Resources as follows:

“This Branch is apprehensive that if the matter of setting aside these reserves is left until after the war we may have a squatter problem that will influence the Province against completing an arrangement to which they at present are sympathetic”.

On April 20, 1942 the Surveyor General, E. H. Peters, wrote Director of Indian Affairs McGill as follows:

“on account of the scarcity of labour, it appears to me that the survey of these reserves (at Hay Lakes and Lubicon Lake) can be postponed until after the war...it is suggested that the Government of Alberta be requested to reserve these lands from sale or settlement until they are surveyed and transferred to Indian Affairs”.

On May 4, 1946, after the end of the war, the Provincial Minister of Lands and Mines, N. E. Tanner, advised Canada “that the survey of this area at Lubicon Lake may be made at your convenience in accordance with the (1930) Transfer Agreement”.

On September 17, 1946 the new Director of Indian Affairs, R. A. Hoey, telegraphed the surveyor in the field, C. D. Brown, as follows:

“In view of the lateness of the season Lubicon Lake survey is not essential this year”.

On February 11, 1952 the Director of the Technical Division of the Alberta Provincial Department of Lands and Forests, T. W. Dalkin, wrote the Superintendent of the Canadian federal Department of Reserves and trusts, D. J. Allen, as follows:

“Provisional Reservation was entered into our records covering the proposed Lubicon Lake Indian Reserve but this particular Reserve has not been surveyed possibly due to the fact that this land is no longer required for such purposes...if it is not your intention to proceed with this survey and establish a reserve, it would be appreciated if you would notify me accordingly so the Reservation may be struck from our records.”

Mr. Allen wrote Mr. Dalkin back on March 15, 1952 as follows:

“At the date your Government made a provisional reservation of unsurveyed lands for the proposed Lubicon reserve, it was our intention to have the land surveyed and apply to you for a transfer of said lands. However, due to administrative difficulties, it was not possible to have the Lubicon area surveyed in the year surveys were made of the other Indian Reserve areas...Our records indicate it was intended to pick up this survey the following year but for some reason unknown at this date the survey was not carried out and we are not certain at this time whether our field staff still consider this area required for Reserve purposes”.

Mr. Allen also wrote the Canadian Regional Supervisor of Indian Agencies, G. H. Gooderham, as follows:

“You will recall that in 1946, C. D. Brown surveyed six parcels of land in the Hay Lake district for purposes of Indian Reserves...On his program for the same year was a survey at Lubicon Lake but it is our understanding that he was not able to undertake this survey during the field season and it was left over for another year. Insofar as we can tell from our records, this proposed (Lubicon) Reserve seems to have been forgotten since then and our attention has been drawn to it by a letter from T. W. Dalkin ...(advising)...that a provisional Reserve was entered in their records covering the following unsurveyed lands in the Lubicon Lake district and his Department is anxious to know whether the lands will be deleted from their records and the lands made available for other purposes.”

14.) Location of Proposed Lubicon Reserve Administratively Inconvenient

On March 27, 1952 the local Indian Superintendent, G. S. Lapp, wrote Mr. Gooderham as follows):

“Because of the inaccessibility of Lubicon Lake and the difficulty of administration...I do not recommend a reserve (at Lubicon Lake)...Both Harmon Valley and Three Creeks are more accessible than Lubicon Lake and are adjacent to non-Indian communities so that day school teachers could be retained (underlining added)”.⁹

On April 9, 1952 the Acting Superintendent of Reserves and Trusts, L. Brown, wrote Mr. Dalkin as follows:

“in the opinion of our field officer there are other areas in the district more suitable for Reserves than the proposed Lubicon Lake area...the question of establishing a permanent Reserve or Reserves for this group of Indians will be discussed with them on May 31st next...We will

⁹ Harmon Valley and Three Creeks are both located outside of Lubicon Territory near the non-indigenous Alberta communities of Reno and Peace River respectively.

communicate with you following the report on the outcome of the meeting to be held on May 31st”.

15.) Government Awareness of the Possible Existence of Valuable Natural Resources in Lubicon Territory

Mr. Dalkin wrote Mr. Brown back on April 17, 1952 as follows:

“Due to the fact that there are considerable enquiries regarding the minerals in this area and also the fact that there has been a request to establish a mission at this point, we are naturally anxious to clear our records of this provisional reservation if the land is not required by this Band of Indians.”

16.) Crown Manipulation of Lubicon Membership Lists

During the meeting on May 31st Lubicon representatives made clear to Superintendent Lapp that they were not prepared to move to a reserve outside of their historic Territory leaving behind their homes, traplines that had been in their families for countless generations, familiar hunting areas, traditional burial grounds and important religious, historical and cultural sites. Seven out of the ten families with whom Superintendent Lapp met said they’d “request enfranchisement if a reserve is not established at Lubicon Lake”.¹⁰

On June 13, 1952 Superintendent Lapp wrote Regional Supervisor of Indian Agencies Gooderham reporting on the May 31st meeting as follows:

“Several families...were in the Three Creeks district on May 31st and did not (attend the meeting). Some families who (did attend) had come...only (for the meeting)...(and)...stated their intention of returning to Three Creeks immediately. It therefore appears that Three Creeks would be a much more suitable location for a reserve than would Lubicon Lake...”¹¹

“Insufficient numbers of the Band were present at Lubicon Lake on May 31st to take a vote on the location of a reserve, but from the findings listed above it appears that Lubicon Lake is not a good location for the reserve.”¹²

On June 16, 1952 Regional Supervisor Gooderham wrote Acting Superintendent of Reserves and Trusts Brown as follows:

¹⁰ “Enfranchisement” was a way of voluntarily giving up Indian status that was later ruled illegal under Canadian law. In this case the Lubicons were telling Superintendent Lapp that they were not interested in dealing with Indian Affairs if it meant having to leave Lubicon Territory.

¹¹ Some Lubicon families would go to the Three Creeks area in the spring following trapping season to work for farmers clearing land. They were there for reasons of seasonal employment rather than residency as Superintendent Lapp, as an Indian Affairs field officer, almost certainly knew.

¹² One can only speculate whether there would have been “sufficient” members of the Band to take a vote if seven out of the ten families attending the meeting had responded positively to the possibility of a reserve outside of their historic Territory, rather than effectively telling Superintendent Lapp that they’d have nothing further to do with him or the government of Canada if it meant having to leave Lubicon Territory. Canadian history is replete with Canadian officials making questionable deals with a small number of members of an indigenous nation.

“Three Creeks...would be a much more accessible location from an administrative standpoint than Lubicon Lake...it is quite possible that the seven families (who said they’d request enfranchisement rather than leave their historic Territory) will make application for enfranchisement in the near future...Should they do so, I would recommend that enfranchisement be granted...should this enfranchisement be granted, the few remaining members of the Band could no doubt be absorbed into some other Band”

On June 26, 1952 Mr. Dalkin of Provincial Lands and Forests wrote Superintendent of Reserves and Trusts Allen again asking to “know the outcome of your meeting of May 31st when it was to be decided that the proposed Lubicon Lake Reserve would be established or abandoned”.

On August 5, 1952, the Deputy Minister of the Provincial Department of Lands and Forests, H. G. Jenson, wrote Superintendent of Reserves and Trusts Allen as follows:

“It has now been three (sic) years since this reserve was proposed and we have since that time refused any development in the area. We would now suggest that you inform us as to the desirability of this area as a permanent reserve, or, if you are not yet prepared to do so, agree to our study and development of the minerals in the area”.

On August 15, 1952, Acting (federal) Superintendent of Reserves and Trusts Brown wrote Mr. Jensen:

“We advised Mr. Dalkin on April 9th that it was expected we would be in a position to give you a definite answer following a discussion of the problem with the interested Indians...but the discussion proved most inconclusive...It is my understanding that during the course of the summer the problem was to be discussed again with some of the interested Indians from the point of view of giving up the Lubicon Lake area and seeking more suitable land elsewhere...our field staff may now be in position to make a definite recommendation on this matter, and we are requesting an immediate report and will advise you as soon as it is received.”

Also on August 15th Regional Supervisor Gooderham wrote Mr. Brown:

“The matter (of the Reserve at Lubicon Lake) has been left in abeyance for some months as you suggested...and I think you will agree that in fairness to the Province we must make some decision regarding the future of the reserved area at Lubicon Lake...Mr. Bethune (of the federal Department of Reserves and Trusts)...stated (Indian Agent) Lapp had in mind a new area to replace the Lubicon Lake Reserve.”¹³

On October 21, 1952 Deputy Minister of Provincial Lands and Forests Jensen wrote Superintendent of Reserves and Trusts Allen asking for authorization “to strike out the provisional reservation (the Province) had temporarily placed upon the (proposed Lubicon Lake Reserve)”.

On October 27th Acting Superintendent of Reserves and Trusts Brown wrote Deputy Minister of Provincial Lands and Forests Jensen advising Mr. Jensen that the federal

¹³ The new area Mr. Lapp had in mind was the Shaftsbury Sheets area located in Beaver Indian Territory on the west side of the Peace River, across the river from the non-indigenous Alberta community of Peace River, and also across the Peace River from Lubicon Territory.

government was “as yet not in a position to state whether the proposed Lubicon Lake Reserve will be required for Indian use”.

On November 1, 1952 Mr. Brown wrote Regional Supervisor Gooderham:

“I am asking Mr. Lapp to endeavor to get an expression of the wishes of representative members of the (Lubicon) Band regarding the proposed new location. Regardless of the result of such a meeting (underlining added), I certainly recommend the procuring of land (in the Shaftsbury Sheet area) as a reserve for these people in place of the Lubicon Lake area”.

On November 28th Mr. Brown wrote Mr. Gooderham again offering Mr. Gooderham his further thoughts on the Lubicon Reserve situation:

“The twenty-four sections reserved at Lubicon Lake for this group is of little value and is one of the most inaccessible locations...It can only be reached by plane during the greater part of the year...(it is therefore)...recommended that the twenty-four sections set aside for a reserve at Lubicon Lake be exchanged for the (Shaftsbury Sheet area)...I interviewed the (Provincial) Deputy Minister of Lands and Forests...(and)...he stated he did not see any objections to the transfer though there was no assurance that the mineral rights could be transferred with the (Shaftsbury Sheets area). Oil companies had been pressing for permission to explore the twenty-four sections held as a prospective reserve at Lubicon Lake and if this reserve (at Lubicon Lake) is retained the Band would have the mineral rights...I would recommend the exchange be made even if the mineral rights cannot be guaranteed (in the Shaftsbury Sheets area).” (Underlining added)

On June 17, 1953 Superintendent Lapp wrote Regional Supervisor Gooderham reporting on a meeting with the Lubicons to discuss alternative reserve sites outside the Lubicon Territory but closer to roads and non-indigenous communities:

“...the following members of the Band stated their wish to have a reserve at Lubicon Lake...All of these men stated that they did not wish to live on a reserve near Three Creeks nor William McKenzie Reserve # 151K”.¹⁴

On October 22, 1953 Mr. Dalkin from Provincial Lands and Forests wrote Mr. Gooderham as follows:

“The last information on file in this regard is a letter dated October 27, 1952, from Ottawa wherein our Deputy Minister was advised that your field staff have been investigating this problem in recent months and that you would report and make a definite recommendation on this matter.

“It is some years now since provisional reservations were entered into our records and as it is not the practice to continue such reservations indefinitely, it would be appreciated if you would confirm that the proposal to establish this Reservation has been abandoned.

“If no reply is received within 30 days, it would be assumed that the reservations have been struck from the records.”

On October 26th federal Regional Supervisor Gooderham wrote Mr. Dalkin back as follows:

¹⁴ William McKenzie Reserve #151K is a Beaver Indian Reserve outside Lubicon Territory near the non-indigenous Alberta community of Reno.

“...the matter has been referred to our Director at Ottawa with the request that a decision as to establishment of this reserve be made within the next thirty days as requested by you.”

Mr. Gooderham also wrote the Director of Indian Affairs, R. A. Hoey, as follows:

“You will note from Mr. Dalkin’s letter that the Province proposed to cancel the reserve if no confirmation is received within the next thirty days that it is required as an Indian Reserve.”

On February 25, 1953 Regional Supervisor Gooderham wrote Superintendent Lapp:

“As you are no doubt aware, the Deputy Minister, (provincial) Department of Lands and Forests has from time to time asked when our Department was likely to make a decision as to whether or not to take up this reserve. There were so many inquiries that it was becoming embarrassing to state that it could not be entered. That situation existed when our Branch was advised that unless the Department gave a definite answer before the end of 1953 the Provincial authorities were disposed to cancel the reservation and return it to (provincial) Crown lands which could then be explored.

“This was discussed when I was in Ottawa last October. I was of the opinion that our Branch had taken no action and that the block would automatically return to Provincial Crown lands. Apparently this is not the case.

“In approaching the subject with the Indians I think it would be well to keep in mind that the mineral rights that go with the land may be very much more valuable than anything else and if the Indians were deprived of these rights, they could make it very unpleasant for Branch officials. If this block (at Lubicon Lake) was given up then it is very unlikely that mineral rights would be made available with the surface rights of any other reserve that might be picked up. You are fully familiar with the situation and the Indians and their habits (underlining added).”

In May of 1954 -- unable to convince the Lubicons to leave their traditional Territory and move to more convenient reserve land elsewhere -- Superintendent Lapp started questioning whether the federal government “authorized the establishment of a separate Lubicon Lake Band”. Contrary to the express, written conclusions of the first government delegation to visit Lubicon in 1939, Mr. Lapp asserted, in a letter to the Acting Regional Supervisor E. A. Robertson dated May 5, 1954, “the Lubicon Lake Band was originally part of the Whitefish Lake Band”. He indicated that he thought a number of Lubicons “would be willing to return to the Whitefish Lake Band...and that the members of the Whitefish Lake Band would agree to the transfer if the Whitefish Lake Reserve were enlarged...”

Mr. Lapp wrote “I do not recommend the establishment of a reserve at Lubicon Lake because of the lack of educational facilities and the impossibility of administration by Indian Health Services and Indian Affairs due to lack of roads”. “However”, he wrote, “I do favor the establishment of a small reserve near Three Creeks” and “an attempt will be made to persuade those members of the Lubicon Lake Band who are present (at a meeting on May 22, 1954) to consent to the establishment of a reserve in that locality...”

On June 22, 1954 Superintendent of Reserves and Trusts Brown wrote a memo to a member of his staff named Miss Burke asking that she “consult the appropriate files and advise...whether action was taken by the Department to officially establish the (Lubicon

Lake) Band as a Band for at this time any such action appears rather short-sighted and if the group was never established as an official Band it will serve our purpose very well at the present time (underlining added)".

Miss Burke referred Mr. Brown's memo to the Registrar for Indian Membership, a controversial Indian Affairs official named Malcolm McCrimmon. Mr. McCrimmon had been responsible for wholesale disenfranchisement of hundreds of status Indians in 1942 that had been reviewed by a subsequent judicial inquiry and found to be entirely inappropriate. Mr. McCrimmon is known to have ignored judicial findings reversing his removal decisions and to have manipulated official records in order to support or justify his actions. Ignoring file documents pertaining to recognition of the Lubicons as a separate and distinct indigenous nation, Mr. McCrimmon scribbled a handwritten note across the bottom of Mr. Brown's memo saying "No official action was ever taken to establish the Lubicon Lake Indians as a Band".

On November 2, 1954 Mr. Dalkin of Provincial Lands and Forests wrote Regional Supervisor Gooderham as follows:

"On October 26, 1953 you advised that the establishment of this Indian Reserve had been referred to your Director at Ottawa and as no reply has been received it is assumed that by this time you are no longer interested and the provisional reservation has been struck from our records."

During the next few years federal officials actively sought to make the Lubicons disappear, at least from official government records. Lubicon members who were to be added to the Lubicon membership list following the 1939 agreement were not added. Lubicons who had been improperly removed from the official membership Lubicon membership list in 1942 by Mr. McCrimmon were not reinstated despite the conclusion of a judicial inquiry that they should have not been removed. Some Lubicons were transferred to the membership lists of Bands in the surrounding area despite being born and living all their lives in Lubicon Territory and never being accepted as a member by the other Bands. Other Lubicons were convinced to have their names transferred to the membership lists of other bands telling them they wouldn't have to leave the Lubicon area but their children could attend government residential schools located elsewhere -- something that turned out to be a horrific experience for many indigenous children in Canada but fortunately few Lubicon children lasted very long away from home. One man was transferred to the membership list of the Whitefish Lake Band without his knowledge or permission when he went there for a visit -- something he didn't learn until years later. Another was told he could try "enfranchisement" and living "like a white man" -- which among other things meant being able to legally drink alcoholic beverages - - and then go back to living like an Indian if he didn't like "living like a white man". In fact "enfranchisement" was an irreversible process resulting in permanent loss of Indian status and rights and the man was enfranchised by fraud.

By 1973 the Lubicon situation was being officially described in government correspondence by the Chief of the Lands Division of Indian Affairs, H. T. Vergette, as follows:

“The Treaty Indians mentioned in your letter are members of the ‘Lubicon Lake Band’, a group which broke away from the Whitefish Lake Band about 1940. When the group settled at Lubicon Lake, the Province of Alberta in 1949, tentatively reserved approximately 24 sections of land for the Indians...In 1952 it was decided to forego the establishment of a reserve for various reasons and in November of 1953 the Province of Alberta accordingly struck the reservation of the land from their records.

“Although the Lubicon group has been referred to as a band, they are not an Indian Band within the meaning of the (Indian) Act and, strictly speaking, are still members of the Whitefish Lake Band.

“We have not located any requests from the Lubicon group for the establishment of a reserve and we are not aware of any plans being made to create one.”

All of these actions by federal officials to make the administratively inconvenient Lubicons disappear served to vastly complicate the Lubicon membership situation on paper -- something the Canadian government is continuing to use in its current “follow-up response” to the Committee -- but they had little practical effect on the lives of the Lubicon people until completion of an all-weather road into unceded Lubicon Territory in 1979. Until then the Lubicons continued to carry on pretty much as they always had -- living in log houses with sod roofs chinked with mud, using dog sleds and horse drawn wagons for transportation, speaking their Cree language, practicing their traditional religion, hunting and trapping for a living, having no phones, no newspapers, no television and only minimal, occasional contact with the outside world.

17. Impact of All-Weather Road

Completion of the all-weather road into the unceded Lubicon Territory in 1979 allowed for the onset of massive resource exploitation activity that destroyed the Lubicon hunting and trapping economy and set the stage for the current tragic situation documented in earlier Lubicon submissions to the Committee.

PART II: COMMENTS ON THE “INTRODUCTION” SECTION OF THE FOLLOW-UP RESPONSE OF THE GOVERNMENT OF CANADA

18.) No Negotiations

The INTRODUCTION to the Canadian follow-response says:

“The Government of Canada is negotiating in good faith and is making every effort to reach a settlement with the Lubicon Lake Cree; it continues to work toward a fair resolution of the claims of the Lubicon Lake Cree.”

In the very next sentence, the Canadian submission says:

“The Government of Canada does not wish to jeopardize the chance that negotiations with the Lubicon Lake Cree may resume at some point in the future”.

The claim that “Canada is negotiating in good faith and making every effort to reach a settlement” is obviously inconsistent with the statement that “The Government of Canada does not wish to jeopardize the chance that negotiations...may resume at some point in the future”. Either “Canada is negotiating in good faith and making every effort to reach a settlement”, as the Canadian submission claims, or there are no negotiations and “Canada does not wish to jeopardize the chance that negotiations...may resume at some point in the future”.¹⁵

In fact there have been no Lubicon land negotiations of any kind since November of 2003 when Canadian government negotiators took the position that they had no mandate to negotiate long outstanding, pre-agreed settlement issues including financial compensation and self-government.

19.) The Canadian Definition of Negotiations and Canada’s Refusal to Negotiate

The Canadian submission says “The parties failed to complete a settlement in 2003 because of two aspects of the negotiations”. It says “Negotiators for the Lubicon Lake Cree did not accept the increased amount of settlement money on offer and rejected the Government of Canada’s approach to the self-government aspect of the claim”. Those two sentences are revealing. Canada’s concept of negotiations is that Canada tables a position and the Lubicons accept it or negotiations end and there is “failure to complete a settlement”.

20.) Canada Refuses to Negotiate Financial Compensation

With regard to the issue of financial compensation, the Canadian submission confuses the issue of financial compensation with capital construction costs -- which Canada acknowledges later in the submission have basically been agreed. Negotiations did not

¹⁵ Canadian representatives frequently exhibit similar contradictory behavior at the negotiating table putting forward a position that they say they have no mandate to negotiate, for example, but denying that their position represents a “take-it-or-leave-it” offer.

reach an impasse over basic capital construction costs. Negotiations reached an impasse when Canadian negotiators refused to negotiate the issue of financial compensation.¹⁶

Financial compensation has been an expressly agreed settlement agenda item since 1984 when an ex-Canadian Justice Minister named E. Davie Fulton, who'd been appointed by then Canadian Indian Affairs Minister David Crombie, proposed to base financial compensation owing by the federal government on the value of lost programs, benefits and services that the Lubicons should have been receiving since the signing of Treaty 8 in 1899 but hadn't received. Mr. Fulton argued that these programs, benefits and services are owing to status Indians in Canada whether they are party to treaty or not pointing out that Indians in the Maritime Provinces, British Columbia and the Northwest Territories who are not party to treaty still receive these programs, benefits and services. He argued that the value of lost programs, benefits and services would be easier to quantify than things like the dollar value of damages and loss of way of life.

The Lubicons agreed to base the amount of financial compensation owing from the federal government on the value of lost programs and services. The resulting calculation, based on government figures and going back to the signing of Treaty 8 in 1899, was \$167 million in 1984 dollars. This figure was being discussed with Mr. Fulton when he was suddenly and unexpectedly replaced in 1985. His successors have ever since refused to discuss any substantive bases for financial compensation.

In 1988 negotiators for the province asked the Lubicons to suggest a formula for financial compensation owing from the province rather than negotiating the dollar value of natural resources taken from unceded Lubicon Territory by the resource companies -- which provincial representatives refused to discuss saying it would take too much time. The Lubicons proposed 10% of the roughly 20% the province receives in royalties for the value of natural resources extracted from unceded Lubicon Territory by the resource companies -- two cents on the dollar.

The following week the provincial premier publicly announced that the Lubicon formula would generate "more than \$100 million in taxpayer's money" -- which is of course not where the money came from. (If two cents on the dollar amounted to more than \$100 million in royalty payments to the province nine years after commencement of major resource exploitation activity in the unceded Lubicon Territory, the oil companies by that point had extracted natural resources having a dollar value in excess of \$5 billion, and the province had received royalties on those resources of more than \$1 billion. Projecting these same provincial government numbers to 2007 -- without taking into account skyrocketing oil prices and a huge amount of additional activity that has occurred since 1988 -- the dollar value of natural resources extracted from unceded Lubicon Territory to the current time is conservatively estimated to exceed \$15 billion, and the amount

¹⁶ Basic capital construction costs are in fact provided to all status Indians in Canada under normal government programs and services -- independent of the issue of unceded land rights -- although historically they were not provided to the Lubicons and are only minimally provided now. The Lubicons, for example, are the only recognized status band in Alberta, and maybe in Canada, that does not have water and sewer service.

received by the province in royalties on those resources is conservatively estimated to exceed \$3 billion.)

Provincial negotiators have never been prepared to discuss the compensation formula they requested from the Lubicons.

Instead of negotiating substantive bases for negotiation, federal negotiators proposed that the Lubicons simply table a bottom line figure the Lubicons would be prepared to accept from both levels of Canadian government for financial compensation. The Lubicons tabled a bottom line figure of \$100 million in 1988 Canadian dollars from both levels of Canadian government -- as over against the two numbers of \$167 million from Canada and \$100 million from Alberta then on the table for negotiation.¹⁷

Neither level of Canadian government was prepared to discuss the bottom line figure that had been requested from the Lubicons although at one point during the provincial election in 1993 the responsible provincial Minister, Mike Cardinal, did propose to equally split the Lubicon bottom line figure between the federal and provincial governments. The Lubicons agreed to the approach proposed by the provincial Minister but neither level of government has been willing to discuss the provincial Minister's proposal and he has since denied making it.

Federal negotiators next proposed to negotiate the tabled Lubicon bottom line as though it were the opening Lubicon position without reference to any substantive bases for calculating financial compensation. When the Lubicons refused to treat the requested bottom line as the starting point for negotiations and suggested a return to negotiation of substantive bases of financial compensation, federal negotiators tabled an amount of \$20 million that they said represented what was left over in their unspecified mandate after they'd compensated companies for leases and permits sold to the companies by the province in the proposed 247 square kilometer Lubicon Reserve area -- which is only a tiny fraction of the 10,000 square kilometer unceded Lubicon Territory, and is tantamount to reimbursing the companies with Lubicon compensation money for leases and permits in unceded Lubicon Territory that the companies had purchased from the province.

When the Lubicons refused to simply accept what was left over in the Federal negotiators unspecified mandate after they'd reimbursed the companies for leases and licences in the proposed 247 square kilometer Lubicon reserve area sold to the companies by the province, and proposed alternative ways the Lubicon goal of providing an on-going source of independent funds for Lubicon society in exchange for rights to Lubicon Territory, federal negotiators took the position that they had no mandate to negotiate anything more or different than the \$20 million amount they'd tabled. It's this \$20 million figure, plus an additional \$2 million that the province has proposed to contribute out of the billions the province has received in royalties on resources extracted from

¹⁷ Consistent with the Lubicon canon to always plan seven generations ahead, the Lubicons propose to put the \$100 million in 1988 dollars in an interest-generating fund to earn interest revenues in perpetuity for future Lubicon generations of approximately \$4.5 million a year after inflation is taken into account. Functionally this amount would effectively provide an alternative to the potential tax base the Lubicons would lose by ceding rights to Lubicon Territory to Canada.

unceded Lubicon Territory -- offered effectively on a take-it-or-leave-it basis -- to which the Canadian submission is referring when it talks about “the increased amount of settlement money on offer...the Lubicon Cree did not accept”.

21.) Canada Refuses to Negotiate Recognition of the Right of Self-Government as Part of a Settlement of Lubicon Land Rights

With regard to self-government, the Canadian submission says “Negotiators for the Lubicon Lake Cree are pursuing an ‘all or nothing’ approach to their claim and are currently refusing to return to the negotiating table unless they can negotiate their self-government objectives on (Lubicon) terms”. The Canadian submission does not describe Lubicon “terms” or Canada’s approach until later in the Canadian submission and then only in misleading and deliberately abstruse language.

In point of fact the truth isn’t all that complicated or hard to understand. Canada recognizes that the inherent right of self-government is an existing aboriginal right within section 35 of the Canadian Constitution. The Lubicons have all along insisted that recognition of their right to retain governance of their own affairs has to be part of any settlement of Lubicon land rights.

Appreciating that it will take time to work out how recognized jurisdiction of the different governments in Canada can be exercised in a way that is complementary and not in conflict, the Lubicons have indicated that they are prepared to negotiate how jurisdiction is to be exercised over time post settlement of Lubicon land rights -- in the same way the different levels of Canadian government negotiate their respective exercise of recognized jurisdiction all the time.¹⁸

In the fall of 2003 Canadian negotiators took the position that they had no mandate to negotiate self-government as a part of settlement of Lubicon land rights and offered instead “to enter into negotiations on a (non-binding) Self-government Framework Agreement pursuant to Canada’s Inherent Right Policy” -- independent of Lubicon land settlement negotiations -- “or to include legally binding clauses in the Land Claim Settlement Agreement, agreeing to enter into self-government negotiations after the successful ratification of the Land Claim Agreement”.¹⁹ In both cases Canadian negotiators flatly refused to negotiate recognition of the right of the Lubicon people to be self-governing as part of a settlement of Lubicon land rights. In neither case was Canada prepared to agree to do anything but talk about Lubicon self-government post settlement of Lubicon land rights.

¹⁸ Indians and Indian lands, for example, are recognized as exclusive federal jurisdiction under the Canadian Constitution; post-secondary education is recognized to be under provincial jurisdiction. That begs the question of how to deal with the issue of Indians in post-secondary education. Federal and provincial representatives in Canada meet all the time and negotiate how to handle such things in a way that is complimentary and not in conflict. Such on-going negotiations between different levels of government in Canada practically define the nature of Canadian confederation.

¹⁹ August 18, 2004 letter to Chief Ominayak from federal Indian Affairs Minister Jim Prentice.

Canada's so-called "Inherent Right Policy" prescribes a complicated, multi-phase, multi-year process involving negotiation of a number of non-binding "protocols" including letters of intent, letters of instruction, letters of understanding, letters of agreement, a framework agreement, an agreement-in-principle and then, if Canadian self-government policy hasn't changed in the meantime, negotiation of a self-government agreement followed by negotiation of a funding agreement. Just getting to the stage of talking about a non-binding framework agreement has taken others -- attempting to negotiate self-government with the government of Canada under the "Inherent Rights Policy" independent of land rights negotiations -- 5 years and longer to achieve.²⁰

As with the complicated process of negotiating settlement of Lubicon land rights, there is no binding self-government agreement until everything is agreed -- and in the meantime Canada proceeds as though indigenous people have no rights, to undermine and subvert indigenous societies and rights, to exploit the resources on disputed land and to literally call out the army if desperate indigenous people -- frustrated with interminable, non-productive negotiations -- take action to try and protect their rapidly eroding vital interests.

22.) Instructions to Negotiate Self-Government in Bad Faith

Moreover Canada's so-called "Inherent Right Policy" includes secret Canadian Justice Department "Guidelines for Federal Self-Government Negotiators" instructing federal self-government negotiators how to negotiate self-government agreements in bad faith. Openly distressed that the Lubicons have provided the Committee with a copy of these secret Guidelines,²¹ Canada tries to rationalize the existence of these secret Guidelines in the Canadian submission as follows:

"While the Government of Canada has acknowledged that self-government is an aspect of Aboriginal rights within the meaning of s.35 of the Constitution Act, 1982, Canada's approach does not require proof of the existence or scope of the Aboriginal right of self-government of the particular Aboriginal group before engaging in self-government negotiations, nor does the Government of Canada acknowledge, through the negotiation process, an Aboriginal right to self-government for any specific group. The Canadian government focuses its efforts on arriving at the legal agreements necessary to making local governance authority (for the particular Aboriginal group) work within the larger structure of the Canadian Constitution."

In fact these secret Justice Department Guidelines provide carefully drafted language for federal self-government negotiators to use in negotiating agreements that won't be legally binding on Canada. They instruct federal government negotiators not to vary this

²⁰ Treaty 8 First Nations, for example -- negotiating self-government under the "Inherent Rights Policy" independent of land rights negotiations -- completed negotiation of a non-binding "Declaration of Intent" in 1998, followed by a non-binding "Joint letter of Instruction" in 1999, followed by a non-binding "Preliminary Framework Agreement" in 2003 after which they commenced negotiations on a non-binding "Comprehensive Framework Agreement" which is still being negotiated and is now tentatively targeted for completion in 2009.

²¹ See footnote 24 in the Canadian submission

carefully drafted language. They conduct workshops on these so-called “Guidelines” for federal self-government negotiators.²²

Although Canada recognizes that the inherent right of self-government is an existing aboriginal right within section 35 of the Canadian Constitution, the Guidelines say -- and if one can get through the purposefully convoluted language the Canadian submission says no different -- the Canadian government does not recognize that any particular indigenous society has the right of self-government.

The Guidelines include instructions to federal government negotiators to always refer to a “First Nation” in the plural because, they say, it is then part of a collective and cannot legally assert the constitutionally protected right of self-government on behalf of the whole Nation.²³

If certain problematic language cannot be avoided because it is part of the public lexicon in Canada for discussing the issue of Aboriginal self-government, the Guidelines instruct federal self-government negotiators to include it only in the preamble of an agreement and not in the body of an agreement because, the Guidelines say, language in the preamble won’t be considered binding by the courts unless there’s a referent in the body of the agreement.²⁴

The Lubicons asked the Canadian government to renounce these secret Justice Department Guidelines and to send government negotiators to the table with instructions to negotiate self-government in good faith. That request, and the demand that federal negotiators return to the table with a full mandate to negotiate all outstanding settlement issues including financial compensation, are the only Lubicon conditions for returning to the table. This is the “all or nothing approach” the Canadian submission says the Lubicons are pursuing; these are the self-government “terms” the Canadian submission says the Lubicons are insisting upon as a prerequisite of returning to the negotiating table.

Caught off guard when the Lubicons obtained a copy of the secret Justice Department Guidelines, chagrined federal negotiators responded to the Lubicon demand that the secret Guidelines be renounced, and federal negotiators sent to the table with instructions to negotiate self-government in good faith, by taking the position that the secret Guidelines can’t be renounced because, they said, the Guidelines have been approved by the federal Cabinet. Justice Department officials unabashedly (and illegally) denied the existence of the Guidelines when asked for a copy by the media under Canadian Access to Information legislation. The Canadian Indian Affairs Minister responded to the Lubicon demand that the government renounce the Guidelines and send government negotiators to the table with instructions to negotiate Lubicon self-government in good

²² A copy of the secret Canadian Justice Department “Guidelines for Federal Self-government Negotiators” is attached to the October 17, 2005 Lubicon submission to the Committee.

²³ This legal trickery is clearly part of the reason for referring to the Lubicons as “part of the Cree Aboriginal people living in Canada” in the Canadian submission.

²⁴ Federal negotiators with law degrees, one of whom is a law professor in a Canadian University, falsely assured doubtful Lubicons that general self-government language put in the preamble of a settlement agreement would have the same legal force and effect as detailed clauses in the body of the agreement.

faith by ignoring all reference to the secret Guidelines and simply denying indignantly that Canada ever negotiates in bad faith.

23.) Legal Technicalities

The Canadian submission argues that “The issue of self-government does not fall within the scope of article 27 of the Covenant, nor”, according to the Canadian submission, “was it an aspect of the 1990 decision of the Human Rights Committee”. The Canadian submission goes on, in footnote 2, to say “issues of self-determination, which are dealt with under Article 1 of the Covenant, are not justiciable in communications brought pursuant to the *Optional Protocol to the International Covenant on Civil and Political Rights* (the first Optional Protocol)”.

The Lubicons are not qualified to debate legal technicalities before the Committee but do note the specific references to Article 1 under the Covenant in sections 8 and 9 of the Concluding Observations of the Eighty-Fifth session of the Committee. Section 9 in particular reads:

- “9. The Committee is concerned that land claim negotiations between the Government of Canada and the Lubicon Lake Band are currently at an impasse. It is also concerned about information that the land of the Band continues to be compromised by logging and large-scale oil and gas extraction, and regrets that the State Party (Canada) has not provided information on this specific issue (articles 1 and 27).”

In the end it is of course up to the Committee to decide whether Canada is to be given a pass for serious violation of the civil and political Rights of the Lubicon people on technical grounds. However the Lubicons point out that the 1990 decision holds Canada in violation of Article 27 so long as “historical inequities...and certain more recent developments (continue to) threaten the way of life and culture of the Lubicon Lake Band”, and that the only conceivable way to prevent completion of the deliberate and systematic destruction of Lubicon society as a distinct social order, and to end the consequent suffering and loss of life of Lubicon people, is through a settlement of Lubicon land rights that includes, among other things, recognition of the right of the Lubicon people to retain governance of their own affairs.

PART III: COMMENTS ON PART II OF THE FOLLOW-UP RESPONSE OF THE GOVERNMENT OF CANADA REGARDING “THE CURRENT SITUATION OF THE LUBICON LAKE CREE”

24.) Canada’s Redefinition of Traditional Indigenous Territory

The Canadian submission says “The Lubicon Lake Cree are part of the Cree Aboriginal people living in Canada in an area of the north central part of what is now the Province of Alberta”. In fact the Lubicon Lake Indian Nation is an indigenous Nation of Cree-speaking people who have functioned as an autonomous Nation with a defined geographic Territory since well before Canada was created as a colony of Great Britain or Alberta was created as a trifling second-class province of Canada.

The Canadian submission says “The land that is claimed by the Lubicon Lake Cree also has been used by Aboriginal people of other communities for their traditional activities of hunting and fishing, as well as for commercial scale trapping of fur bearing animals”. In fact the indigenous Nations in the area now known as northern Alberta historically each occupied their own distinct Territory, recognized and respected by other indigenous Nations. The boundaries of these distinct indigenous territories associated with a particular indigenous nation have only recently come into question as a direct result of deliberate efforts on the part of Canadian government to foment tensions within and between indigenous nations, and to subvert indigenous land rights under Canadian law.

In the Lubicon case government efforts to undermine the definition of an exclusive territory associated with one particular indigenous nation surfaced in 1989 when the Canadian government fabricated a new Indian Band under the Indian Act that Canada claimed had an equal right to Lubicon Territory. Creation of this new Band, dubbed the Woodland Cree Band by Canadian spin doctors after a dialect of the Cree language spoken by the Cree-speaking people in the area, started out as a well documented effort on the part of the Canadian government to organize the political overthrow of duly elected Lubicon leadership following the break down of negotiations in January of 1989.

When the well-documented Canadian government effort to overthrow duly elected Lubicon leadership failed, Canada concocted the Woodland Cree Band out of a number of disparate individuals from half-a-dozen different indigenous nations in northern Alberta; falsely characterized the new Band as a break away group from the Lubicon Lake Indian Nation unhappy with Lubicon leadership; negotiated a sweetheart settlement agreement on behalf of this new Band with a government selected and paid lawyer; and then took the position that the Lubicons no longer hold unceded aboriginal rights to Lubicon Territory because, supposedly, the rights to Lubicon Territory have been ceded by an aboriginal society with equal rights to it.

Using the same lawyers that Canada had selected, hired and paid to cobble together the new Woodland Cree Band, Canada next negotiated another sweetheart settlement agreement with a neighboring indigenous nation called the Loon River Band. Canada initially characterized the Loon River Band falsely as another breakaway group from the Lubicon Lake Indian Nation and occasionally still do. Provincial Cabinet Ministers

demonstrably encouraged the members of the newly recognized Loon River Band to assert territorial rights in Lubicon Territory and to demand to be hired by oil companies working in Lubicon Territory.

Next government affiliated lawyers for the Woodland and Loon River Bands drew up maps purporting to show the traditional Woodland and Loon territories as overlapping Lubicon Territory. These maps are currently being used by both provincial regulatory agencies and resource companies to try and circumvent the Lubicons regarding resource company activity on unceded Lubicon Territory.

Only having been fabricated by the Canadian government in 1989, the Woodland Cree Band doesn't have much of a tradition to rely upon and its claimed "traditional territory" is unlike any known traditional indigenous territory. Instead of encompassing historically used and occupied land as defined by things like traditional trails and waterways, traditional communities, traditional religious and cultural sites, family traplines and burial grounds, the alleged traditional territory of the new Woodland Cree Band is in the shape of a tidy horizontal rectangle that comes at the Lubicon community of Little Buffalo Lake from the west and actually includes the historic Lubicon community of Little Buffalo Lake.

The alleged traditional territory of the Loon River Band, which unlike the fabricated Woodland Cree Band actually has a traditional Territory that other indigenous nations in the area acknowledged and respected, keeps growing with each succeeding map of it -- to the point where the claimed traditional Territory of the Loon River Band now nearly reaches the eastern end of Lubicon Lake.

On the south, a traditional land use study done by industry financed so-called researchers based at the University of Alberta -- peddled to the Whitefish Lake Band as a requirement for the Whitefish Lake Band to meet provincial regulatory requirements for gaining work in the forestry industry -- urged Whitefish Lake Elders to falsely claim that the traditional Whitefish Territory extended to the southern shore of Lubicon Lake. When the Whitefish Elders protested that this was not true, they were told by the university-based, industry-financed so-called researchers that this is the way the modern world works and, if Whitefish Elders did not cooperate and claim that the traditional Whitefish Territory extended to the southern shore of Lubicon Lake, that their desperately poor people would miss out on the "forestry boom" the way they'd missed out on the "oil boom".

Urged by government associated lawyers to claim bigger and bigger areas in order to supposedly be able to negotiate more jobs and other concessions; assured by government associated lawyers that there is nothing to lose by asserting overlapping traditional territories; encouraged by provincial Cabinet Ministers to assert jurisdiction in each other's Territory in order to be obtain work from resource companies, the unworldly leaders of poorly educated, badly damaged indigenous societies in isolated areas plagued with high unemployment rates and myriad social problems have proven sadly vulnerable to these cynical Canadian government tactics. The deliberate Canadian government effort to blur the boundaries of distinct traditional territories associated with particular indigenous nations does not, however, change the fact that distinct traditional territories

associated with particular indigenous nations historically existed, or that Lubicon Territory has always been exclusively associated with the Lubicons.

The bottom line, evident throughout the Canadian submission, is the deliberate creation of an ethnological myth that indigenous people don't have exclusive territories associated with one particular nation in the western Europeans sense, but only wander about the bush living off the land as best they can -- like "the deer in the field". Consequently, goes the contrived Canadian legal argument built on this deliberately concocted ethnological myth, indigenous people don't have territorial and resource rights in the sense of western Europeans but rather only limited surface rights of subsistence hunting, fishing, food gathering and non-commercial forestry.

25.) Attempt to Assert Provincial Government Jurisdiction Over the Traditional Lubicon Community of Little Buffalo Lake

The Canadian submission asserts that "About half of the members of the Lubicon Lake Cree are currently residing on public (Provincial Crown) land in a community called Little Buffalo". That may be Canada's position, and it's certainly consistent with the portrayal of the Lubicons in the Canadian submission as a contemporary version of the white man's burden, but it is not indisputable legal or historical fact that the Lubicons reside on provincial Crown land and again begs the question of just how Alberta came into rightful possession of the land where the traditional Lubicon community of Little Buffalo Lake is located.

At one point the province sent provincial surveyors into the traditional Lubicon community of Little Buffalo, surveyed 2 acre plots around Lubicon homes and offered to give the Lubicons these two acre plots -- without subsurface rights -- in exchange for signing a quitclaim stating that they didn't have any other land rights. Provincial government representatives lied about the nature of the quitclaim telling people who could neither read nor write that it was merely an application for free land and had nothing to do with Lubicon land rights.

Provincial officials labeled Lubicons that refused to accept the two acre plots as "squatters on provincial Crown land" and threatened to bulldoze Lubicon homes as "unauthorized improvements to provincial Crown land" unless the Lubicons acknowledged provincial jurisdiction over unceded Lubicon Territory by accepting the two acre plots. The Lubicons prepared to defend their homes with loaded rifles whereupon sweaty federal government officials quickly intervened and headed off the possibility of the Lubicon jurisdictional dispute breaking into a shooting war by leasing the 2 acre Little Buffalo lots from the province, allowing the Lubicons to have their homes without acknowledging provincial jurisdiction over unceded Lubicon Territory.

26.) Little Buffalo Land

The Canadian submission says "The land on which the community of Little Buffalo is located was added fairly recently to the Proposed Reserve Land at the request of the Lubicon Lake Cree, so that the location of their current community could be included as

part of the eventual settlement of their claim”. In fact the discussion about adding the traditional Lubicon community of Little Buffalo Lake to proposed Lubicon reserve lands revolves around exchanging earlier agreed land containing valuable gas reserves -- that the province wants to retain -- for the Little Buffalo land. The Lubicons are prepared to make this exchange because they would rather retain a traditional site than fight over subsurface resources but the suggestion that the proposed addition of Little Buffalo is the result of Canadian benevolence is another Canadian government misrepresentation.

27.) The Proportional Size of the Proposed Lubicon Reserve

The Canadian submission says:

“For a sense of the size of the land at Lubicon Lake (28,650 hectares) that is proposed for the exclusive use of the Lubicon Lake Cree (approximately 500 people), one can consider the city of Frankfurt, Germany (population of 660,000 in 2006) which covers 24,831 hectares.”

The analogy is invalid, irrelevant and downright silly for a country with the second largest land area in the world and a total national population smaller than the city of Tokyo.

To paraphrase the Canadian submission: For a sense of the size of the land that Canada claims for the exclusive use of the Canadian people (997,614,000 hectares for approximately 32 million people or about 31 hectares per person), one can consider that the city of Frankfurt, Germany (population of 660,000 in 2006) that has less than half a hectare of land per person.

For a sense of Canadian demography, ninety per cent of the Canadian population lives within 160 kilometers of the U. S. border; the Lubicons live 1000 kilometers away from the U. S. border and 500 kilometers away from the nearest Canadian city of any appreciable size.

For a sense of proportion, unceded Lubicon Territory is approximately 10,000 square kilometers and the reserve “proposed for the exclusive use of the Lubicon Cree” is 247 square kilometers.

Finally it is well notable that the only people who permanently reside in Lubicon Territory, or who have ever permanently resided in Lubicon Territory, are Lubicons -- not Frankfurters or Canadians or anyone else.

In point of fact the size of national territory is not determined by the size of some urban population in another country. The suggestion that the “size of the land at Lubicon Lake that is proposed for the exclusive use of the Lubicon Lake Cree” is somehow exorbitant or generous says more about the mentality of those drafting the Canadian submission than it does about whether the relatively small amount of land the Lubicons are likely to retain for their “exclusive use” post settlement -- and which must then provide a land

base for the Lubicon population forever -- is appropriate, reasonable, fair or even adequate.²⁵

28.) Lubicon Membership Criteria

The Canadian submission says:

“The Lubicon Lake Cree include individuals who have status under the Indian Act and others who may have joined the group through marriage, birth into an ethnically-mixed family, acceptance or other means.”.

That statement is untrue. With the exception of one white woman who was put on the Lubicon status list by Canada under the provisions of the Indian Act when she married a Lubicon man, all Lubicons are aboriginal people related to each other by blood and to Lubicon Territory by history. Written, official Lubicon membership rules expressly so provide.

Canada knows this statement is untrue because Canada was involved with the Lubicons in a joint genealogy study of the Lubicon population completed in 1984; Lubicon membership rules were officially approved by the federal Minister of Indian Affairs in 1985; and Lubicon membership rules were reviewed by federal negotiators in 1999 and officially accepted as the basis for determining the beneficiaries of any settlement of Lubicon land rights.

29.) Lubicon Population Size

The Canadian submission says “According to the submission of the Lubicon Lake Cree to the Human Rights Commission on the occasion of the presentation of Government of Canada’s fifth report in October of 2005, there are approximately 500 members of this group”. It then meanders about the population issue implying that this population number is suspect by stating that “there are 405 persons with Indian status that identify as members of the Lubicon Lake Cree”.

In fact Canada is well aware that there are a number of Lubicons who have purposely not registered as Indians under the Indian Act because of the Lubicon position that it is the Lubicon Nation and not Canada that decides Lubicon membership. By agreement at the negotiating table the Lubicons will provide Canada with the Lubicon membership list at the time of settlement, consistent with the way Treaty 8 was made with indigenous nations in the surrounding area in 1899.²⁶

²⁵ Although the size of the Lubicon reserve was not determined based on population size, the amount of reserve land involved is consistent with the amount of reserve land set aside for indigenous nations in the surrounding area based on a Treaty 8 Reserve land formula that is tied to population size.)

²⁶ The Lubicon membership number used at the negotiating table for purposes of calculating housing requirements is 477 with provision for adjusting that number upward or downward based on the actual number of people on the Lubicon membership list at the time of settlement.

30.) Confidentiality of Lubicon Membership Information

Related to the question about Lubicon population size, footnote 8 in the Canadian submission reads:

“As the Lubicon Cree control their own membership and protect their membership information, the Government of Canada does not have a complete list of all members of this aboriginal group.”

That statement is true and there’s good reason why the Lubicons hold their membership information confidential.

The earlier mentioned joint genealogy study was done on the basis of an agreement between the Lubicons and the federal Indian Affairs Minister that the results of the study would be kept confidential between the two parties unless both agreed that the results of the study could be released to a third party. The third party of concern was the Alberta government.

The Lubicons insisted on this confidentiality agreement as a precondition to participating in the joint genealogy study because the Alberta government was insisting on approving federal determination of Lubicon land rights before transferring land back to federal jurisdiction under the 1930 Land Transfer Agreement -- effectively seeking to exercise a veto over the federal government’s exclusive constitutional responsibility for dealing with Indians and Indian lands -- and was proposing to apply wholly new criteria for determining indigenous land rights that would have effectively disenfranchised the members of any indigenous nation in Alberta.

At the time treaty was negotiated with the indigenous nations in the area surrounding Lubicon Territory, membership was determined by the Indian Nation telling the federal treaty commissioners who their members were. The indigenous nations determined their own membership. It was on this basis that membership lists were made up at the time of the signing of Treaty 8 in 1899. The number of people on the membership list in turn determined the amount of reserve land the indigenous nation would retain for its exclusive use.

The Lubicon position all along has been that they determine their own membership for all purposes and they insist on being treated the same as the indigenous nations that made treaty with Canadian in 1899 -- not to have their membership determined by continually changing rules to determine Indian status unilaterally made up by Canada to serve Canada’s evolving purposes. They have been prepared to discuss the membership issue with federal representatives as part of land rights negotiations but not with provincial officials who the Lubicons maintain have no role to play in determining Lubicon land rights either from a Lubicon perspective or under the Canadian Constitution.

Once the genealogical study was completed a federal Justice Department lawyer named Ivan Whitehall surreptitiously slipped “Solicitor for Alberta” Howard Irving²⁷ an

²⁷ The architect of the province’s two acre plot strategy, Howard Irving continues his service to the interests of the province as a Judge in the Alberta Court of Appeal.

unauthorized copy, angrily denying publicly that he'd done so; threatening to sue Lubicon advisor Fred Lennarson for publicly revealing that he had; privately telling people in the Indian Affairs Minister's office that the Lubicons might have an agreement with the federal Indian Affairs Minister to keep the study confidential but that they didn't have an agreement with him.²⁸

In 1988, following 14 years of unsuccessful effort to achieve redress through the Canadian courts detailed in earlier submissions to the Committee -- and about which the Committee rendered a procedural decision in 1987 that Canada totally ignored instructing Canada "to take interim measures of protection to avoid irreparable damage to (Lubicon) Chief Ominayak and other members of the Lubicon Lake Band" -- the Lubicons established passport control at all main points of entry into Lubicon Territory precipitating a confrontation with Canadian government that culminated in an agreement with the Alberta government called the Grimshaw Accord which provided that Alberta, if so requested by Canada, would transfer back to federal jurisdiction 79 square miles of land with subsurface rights under the 1930 Land Transfer Agreement, plus an additional 16 square miles without subsurface rights, for a total of 95 square miles of land (247 square kilometers) for the purpose of establishing a Lubicon reserve.²⁹

With Alberta no longer blocking Canada's ability to meet its obligations under the Canadian Constitution, Lubicon land negotiations then proceeded with the federal government. Federal officials agreed, ala the practice with other indigenous nations that made Treaty 8 with Canada in 1899, that all persons on the Lubicon determined membership list were entitled to adhere to treaty, and that all persons that adhered to treaty would thereby become beneficiaries under a Lubicon settlement agreement and have status Indians under the Indian Act. In anticipation of an imminent settlement of Lubicon land rights, the Lubicons provided Canada with the Lubicon membership list.

Following the break down in negotiations in January of 1989, described in earlier submissions to the Committee, agents of the government of Canada used the Lubicon membership list they had been provided by the Lubicons during negotiations as a recruitment list in their efforts to organize the overthrow of duly elected Lubicon leadership, literally going person to person with that list in hand, offering to provide all kinds of incentives -- including housing, medical benefits, education benefits, hunting rights and off-road bush machines -- to those who would work with federal officials and lawyers to help overthrow duly elected Lubicon leadership in an upcoming Lubicon election.

²⁸ Alberta has added the Lubicon genealogy information to the genealogy information it collects on all the indigenous nations in Alberta as part of its on-going effort to block or at least minimize the extent of recognized indigenous land rights in Alberta and consequently the amount of land that the province has to transfer back to federal jurisdiction. Canada is complicit in this provincial government effort to subvert indigenous land rights because Canada seeks to divest itself of the financial responsibility for the "special status" of indigenous people under the Canadian Constitution, or, in other words, to weasel out of the obligations whereby Canada came into possession of indigenous lands.

²⁹ While the amount of reserve land agreed is essentially the same as would have been set aside under the Treaty 8 reserve land formula, the membership controversy was finessed at the suggestion of the provincial Premier who proposed to transfer the land on the basis of what he and the Lubicon Chief agreed was "fair" rather than on the basis of the Treaty 8 membership formula.

Unable to recruit a sufficient number of real Lubicons to achieve its purpose, Canada also contacted persons not on the Lubicon membership list -- many of whom had been removed from the membership lists of a number of Indian Bands by Mr. McCrimmon in 1942 and had ended up poor and on welfare in non-indigenous northern Alberta communities -- and offered them similar incentives to work with government officials and lawyers in the effort to overthrow duly elected Lubicon leadership.

These non-Lubicon individuals were initially added to the membership lists of the Bands from which they had been removed. They were then transferred to the government held Lubicon membership list -- typically again without Lubicon knowledge or involvement.

The entire section of Indian Affairs charged with reinstating people who'd been improperly removed from Indian status was put to work on building up the Lubicon membership list with people who'd agreed to work with Canada in overthrowing Lubicon leadership. People were being reinstated to the membership of their original Band and then transferred to the membership list of the Lubicon Band in as little as one week when normal applications for reinstatement were typically taking 5 years and longer.

31.) Canada's List of Lubicon Members

As noted in Footnote 8 of the Canadian submission, the government of Canada maintains its own Lubicon membership list with eligibility, the Canadian submission says, "largely determined by degree of descent from Indian ancestors". In fact eligibility for the government's "status" list is determined by the provisions of the much-revised Indian Act and is based at least as much on racism and utility in accomplishing Canadian government objectives as it is on "degree of descent from Indian ancestors."

Following the 1951 revisions to the Indian Act and before the 1985 revisions, for example, a woman's status followed the status of her legal spouse. If a woman was a full-blooded indigenous person who married a non-Indian she legally became a "non-Indian" under the Act because it was assumed that her "non-Indian" husband would provide for her. If she was a woman with absolutely no indigenous blood at all and married a status Indian, it was assumed that her Indian husband would not be able to provide for her and she legally became a status Indian under the Act -- and effectively a ward of the state without, until as recently as 1960, even the basic legal right to vote.³⁰

32.) Creation of the Woodland Cree Band

When this hodgepodge of disparate individuals culled together by Canada failed to overthrow Lubicon leadership in a Lubicon election, Canada constituted them into the so-called Woodland Cree Band under Section 17 of the Canadian Indian Act. Section 17 of the Canadian Indian Act -- still in force -- reads as follows:

³⁰ (It was under these continually changing Indian Act criteria that the one non-indigenous woman ended up on the Lubicon membership list -- put there by Canada.)

- “17. (1)(b) The Minister may, whenever he considers it desirable (underlining added), constitute new Bands and establish new Band lists with respect thereto from existing Band lists, or from the Indian Register (maintained by the government), if requested to do so by (an unspecified number) or persons proposing to form the new Bands.
- “17. 2) Where pursuant to subsection (1) a new Band has been established from an existing Band or any part thereof, such portion of the reserve lands and funds of the existing Band as the Minister determines (underlining added) shall be held for the use and benefit of the new Band.
- “17 (3) No protest may be made (underlining added) under section 14.2 (the section of the Indian Act that provides for the making of protests) in respect of the deletion from or the addition to a Band list consequent on the exercise by the Minister of any of his powers under subsection (1)”.

Section 17 of the Indian Act therefore gives the Canadian Indian Affairs Minister the absolute power -- if he doesn't like the attitude of the duly elected leadership of an indigenous nation in Canada -- to simply take that indigenous nation apart, and to then distribute the land and resources belonging to that indigenous nation as he sees fit. He could, for example, decide to give 95% of the land and other resources belonging to an indigenous nation of 500 people -- with whom Canada disagrees for whatever reason -- to 5 dissident members of that indigenous nation who are willing to do Canada's bidding -- as members of the new Woodland Cree Band publicly indicated they were prepared to do.³¹ All the Minister needs to proceed in this way is a request from some unspecified number of individuals, clearly solicited in the Lubicon case by agents of Canada, who are “proposing to form the new Band”.³²

33.) Recognition of the Loon River Band

Provincial negotiators requested a copy of the Lubicon membership list arguing that membership numbers were no longer an issue since agreement to transfer land back to federal jurisdiction had been made based on what the Premier and the Chief considered “fair”. In a show of good faith the Lubicons gave provincial negotiators a copy of the regularly up-dated Lubicon membership list.

In analyzing the Lubicon membership list provincial genealogists identified some individuals they considered to be members of the neighboring indigenous community of Loon Lake -- with whom there is some intermarriage and family relationships. The indigenous community of Loon Lake had a history not unlike that of the Lubicons with the exception that it had never been recognized as a band under the Indian Act by Canada. Within a matter of days the lawyers who'd been selected and hired by Canada to fabricate the Woodland Cree Band were in Loon Lake -- working hand in glove with provincial genealogists -- proposing to help the non-status people from the hitherto

³¹ One of the leaders of the new Woodland Cree Band, Roy Letendre, told reporters that the reasonable Woodlanders were prepared to accept anything Canada was prepared to give him.

³² The details of the creation of the Woodland Cree Band are described in an article entitled “A Helping Hand” published in the December 1991 edition of a prestigious national Canadian news magazine *Saturday Night*.)

unrecognized indigenous community of Loon Lake negotiate a settlement of the unceded land rights of the Loon Lake people. Shortly thereafter a second sweetheart settlement deal was negotiated by government selected and paid lawyers on behalf of the Loon Lake people and Canada was claiming that another significant number of Lubicons had broken away from the Lubicon Lake Nation over alleged disputes with a supposedly intransigent Lubicon leadership.

It was at that point -- after Lubicon membership information had been misused several times by Canadian government for illicit political purposes -- that the Lubicons resolved to hold their membership list confidential until the point of settlement. In this regard, at the point of settlement the Lubicons propose to review any cases of possible membership overlap with the involved parties and, where a person qualifies for membership in more than one indigenous nation -- as is possible under some circumstances with neighboring Indigenous Nations and where there's a history of Canada transferring people to the membership of a different indigenous nation without their knowledge or permission -- to offer the person the choice of where they wish to have their membership.

34.) Indigenous Self-Government in Canada

The Canadian submission acknowledges that the Lubicons are “an Indian Band within the meaning of the *Indian Act*”. It notes the Lubicons “have their own membership code from which they determine who is eligible to vote in their elections”. It says “They govern them-selves through an internally elected Band Council”. And it says “The (Lubicon) Band Council administers or manages a variety of programs and services for their members”.

While not exactly untrue, these statements do not accurately communicate the situation of indigenous people in Canada.

It is true that the Lubicons “have their own membership code from which they determine who is eligible to vote in their elections” -- and they have always had their own membership code from which they determine who is eligible to participate in selection of Lubicon leaders. However it is also true that Canada takes the position that it has to approve a Band membership code before authorizing a Band to “control” their own membership -- despite the fact that Canada does not then accept that all of the people who qualify for Band membership under a government approved Band membership code also qualify for status as an Indian under the government's Indian Act rules.³³

Secondly the “programs and services” administered by Indian Bands are “administered” for the government of Canada under government of Canada rules and regulations and are provided only for those members Canada recognizes as status Indians under Canada's

³³ The Woodland Cree Band, for example, was encouraged to have a very non-restrictive membership code but Canada reportedly recognizes only about half of Woodland Cree members as status Indians who qualify for governmental programs and services for Indians.

Indian Act rules -- despite Canada insistence on approving Band membership codes before “allowing” Bands to “control” their own membership.³⁴

And thirdly -- in addition to earlier noted efforts by Canada to manipulate the Lubicon political process -- Canada regularly intervenes and interferes in Band governance, conducting Band elections, overturning Band elections, suspending Band administrations, locking elected Indian politicians out of their office, taking over the management of Band programs and services and so on.³⁵

The Canadian government submission says:

“The Government of Canada provides funds annually to the Lubicon Lake Cree to assist them to administer various local programs and services, including elementary, secondary and post-secondary education, housing, economic development, social services, human resource development (training skills for the labour market) health services and infrastructure development and maintenance, as well as assistance with the costs of local Band government. The total amount of annual funding paid to the Lubicon Lake Cree for these programs and services in 2004/05 by the Government of Canada was \$3,445,955 Canadian dollars.”

In truth the money Canada provides the Lubicons only allows the Lubicons to administer their own poverty at bare subsistence levels by government provided rules and regulations.

Half of the three million dollars, for example, goes directly to the province to run a K-12 school in the Lubicon community of Little Buffalo Lake.

The Lubicons are Cree and speak the Cree language. The teachers in the provincial school are white and speak English.

During the school year the white, English-speaking teachers who teach in the provincial school in Little Buffalo Lake live in a little white colony located in the middle of the Lubicon community of Little Buffalo Lake. The teachers socialize with each other and identify with the dominant Canadian society. They do not live in the community during the summer months and they take their holidays during the school year out of the community.

The provincial schoolteachers who live in the little white colony in the middle of the Lubicon community of Little Buffalo Lake have running water and indoor toilets. The Lubicon people in the surrounding Lubicon community have neither running water nor indoor toilets.

The curriculum used in the Little Buffalo Provincial School is determined by the province. The higher education system served by K-12 schools in Alberta is heavily

³⁴ In the case of the Woodland Cree Band, this means that half the people on the Woodland Cree membership list under government-approved membership criteria don't receive government programs and services administered by the Woodland Cree Band for their members on Canada's behalf.

³⁵ Thirteen out of 45 Indian Bands in Alberta are currently under what's called “co-management”. Under “co-management” all checks written by a Band have to be co-signed by an official of the Department of Indian Affairs

subsidized by resource companies who have a major influence on both the culture and the curriculum of the post secondary schools that train Alberta's teachers.

Many of the white teachers in the Little Buffalo Provincial School are Pentecostal Christians who view the traditional Lubicon religion of the parents of many of their students as "devil worship".

The Lubicons are given \$122,233 a year to pay for post-secondary education.

Health services consist primarily of a health unit trailer hauled into Little Buffalo Lake in 1987 in response to a tuberculosis epidemic affecting a third of the Lubicon population where the Lubicons could go for related hypodermic injections. The nurse providing the tuberculosis injections refused to go to the homes of sick people citing unpaved driveways. Prior to then there were no health services at all.

Currently no nurse works at the health unit trailer and it is used largely to schedule immunizations provided by medical personnel who come to the community from time to time and to make appointments with doctors and dentists in Peace River over 100 kilometers away. People with serious medical problems or injuries are sent by ambulance to a hospital in Peace River. It sometimes takes an hour or longer for the ambulance to arrive in Little Buffalo Lake and another hour for the ambulance to deliver the sick or injured person to the hospital in Peace River. Lubicon people regularly die for lack of basic medical services.

Over \$800,000 of the three million dollars is subsistence welfare at the rate of \$234 per month for a single individual. This money must be viewed in the context of a situation where the traditional Lubicon hunting and trapping economy has been devastated by massive resource exploitation activity and the Lubicon people can no longer rely on the land for their food or disposable income (and where they have \$122,000 a year available to provide alternative skills training).

The Lubicons do not have indoor plumbing. All of the traditional sources of Lubicon drinking water have been contaminated by resource exploitation activity and the Lubicons are dependent upon bottled water for their drinking water. The Lubicons have to travel over 100 kilometers one way in order to purchase bottled drinking water at \$5 for 18 liters. It costs \$80 for gasoline to make the round trip to the nearest commercial facilities to purchase food and water. Many Lubicons don't have vehicles.

The Lubicons receive \$140,100 a year for social housing. It barely scratches the housing needs of the Lubicon people. The Lubicon people live in third world housing conditions with as many as three generations living in a small, flimsy, badly insulated 81 square meter bungalow with no running water and no indoor toilet facilities. People share beds; sleep in hammocks hung from the ceiling above the bed, on couches and in chairs. Some of the old people have to be physically helped to get to outhouses especially in the winter with snow several feet deep and temperatures that drop below -40°C.

PART IV: COMMENTS ON PART III OF FOLLOW-UP RESPONSE OF THE GOVERNMENT OF CANADA REGARDING “THE EFFECT OF LOGGING AND OIL AND GAS EXTRACTION IN NORTHERN ALBERTA ON TRADITIONAL LAND USE BY THE LUBICON LAKE CREE”

35.) Impact of Resource Exploitation Activity on Traditional Activities

The Canadian submission says “It does not appear that the development of natural resources in the Province of Alberta is preventing the Lubicon Lake Cree from pursuing their traditional activities of hunting and fishing within the area claimed to be traditionally used by them”.

In fact the horrific impact of massive resource exploitation activity on the hunting and trapping economy and way of life of the Lubicons has been well documented and independently verified on a number of occasions.

Prior to the winter of 1979-80, moose provided the main source of food for the Lubicons. A moose could typically be found within a few kilometers. It would be killed and the meat distributed. Nobody went hungry.

Trapping provided the only source of disposal income (through barter with fur buyers who would come into Lubicon Territory in the fall to provide grubstakes and then in December and again in the spring to trade commercial items for fur). A good trapper could earn as much as \$10,000 a year in trade goods.

Between 1979 and 1982 over 400 oil wells were drilled within a 25 kilometer radius of the Lubicon community of Little Buffalo Lake. The number of moose killed for food dropped from 219 in 1979 to 110 in 1981 to 37 in 1982 to 19 in 1983 where it has basically remained ever since.

Average income from trapping during the same period dropped from an average of over \$5,000 per year per trapper to less than \$400 per year for the best trappers. No one has been able to earn a living from trapping since the advent of massive resource exploitation activity in Lubicon Territory.³⁶

The devastated Lubicon hunting and trapping economy was replaced by state provided welfare. Moose kill dropped more than 90 per cent from 1979 to 1983; income from trapping decreased more than 90 per cent during the same period; dependence on welfare increased from under 10 per cent to 95 per cent. Welfare has remained the primary source of income for the Lubicon people ever since.

In 1983, after reviewing over 10,000 pages of court materials including sworn affidavits by anthropologists, wildlife biologists and other qualified experts pertaining to destruction of the traditional Lubicon hunting and trapping economy and its

³⁶ Master trappers would return from their traplines with only a few squirrels to show for their efforts worth about a dollar each.

consequences for the Lubicon people, the World Council of Churches wrote then Canadian Prime Minister Pierre Trudeau a letter charging “In the last couple of years the Alberta government and dozens of multi-national oil companies have taken actions (in Lubicon Territory) which could have genocidal consequences (for the Lubicon people)”.

In 1984 Ex-Canadian Justice Minister Fulton -- on behalf of the Canadian Indian Affairs Minister David Crombie -- examined this same question and concluded:

“The hard fact is, of course, that the decline in the annual harvest commenced with, and has continued during, the period of active development - that is the evidence. On the other hand, while there has been reference to natural cyclical changes as an explanation, there has been no hard or scientific evidence that such a change was due or was in fact taking place. I have flown over the area and have seen what is involved by way of seismic grid lines driven through this previously wilderness area in a criss-cross pattern, and of installations dotting the previously unlit landscape. It is a fact, of course, that construction and servicing of such installations involve the intrusion and movement of heavy mobile equipment into and through the area...

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

In 1987 the Curator of North American Ethnology in the Museum of the American Indian, Dr. James G. E. Smith, studied the situation and wrote in the prestigious *Cultural Survival Quarterly* published at Harvard University:

“The subsistence base and the fur resources were suddenly and catastrophically destroyed. The resources of the modern social welfare state could replace the physical necessities of life. But not all the social welfare services of an oil-rich province or of the industrial Canadian state could replace human dignity or the status of being a self-supporting family head and a man or woman of standing. The government’s services could not replace an autonomous social and cultural system in which the individual found meaning and satisfaction.

“Without the environmental resources of the past, the men and women cannot teach their children the knowledge and skills of their culture; in the isolation of the hinterland Elders do not have the knowledge, skills and resources to help the young generation adapt to modern industrial society. The generation gap has become a cultural gap; young people are neither adapted to the past nor to the future...”

In 1993 a broadly based, non-partisan independent Commission³⁷ reviewed the evidence and held hearings. One of the Commissioners, a prominent Conservative businessman from the neighboring non-indigenous community of Peace River named John MacMillan, wrote:

³⁷ The Lubicon Settlement Commission of Review was established under the auspices of the Office of the Leader of the Official Opposition in Alberta in 1992 as an independent, non-partisan body “to investigate, compare, assess and report on the presentation of the Lubicons and the two levels of (Canadian) government and to report to the three parties, but also to the public”.

“...I was born and have lived my whole life in the Peace River country. I know the people here, including the Lubicons. I know how the Lubicons lived off the land in the past and how they live today. I know the country and what’s possible to do here. I know the cost of doing things and I know the value of the resources which have been extracted from the disputed Lubicon Territory, especially over the last ten to twelve years...

“It’s certain that this multi-billion dollar development activity has destroyed the traditional Lubicon hunting and trapping economy and all but destroyed the Lubicon society. It’s certain that the value of the settlement which the Lubicons are asking for is only a tiny fraction of the value of the resources that have been extracted and continue to be extracted from these disputed lands -- perhaps 2 per cent of the value to date. It’s certain that we’re not talking about spending taxpayer’s money to settle with the Lubicons, but rather investing a small portion of the value of the resources taken from this disputed land so that the Lubicons can try to rebuild their society instead of being forced to live on welfare -- to the everlasting shame of the rest of us. And it’s certain that all interests in the area -- not only the interests of the Lubicons -- will be continually at risk until this dispute is fairly and honourably settled”.³⁸

By 2002 the number of known gas and oil wells drilled in Lubicon Territory had more than quadrupled and spread throughout the entire 10,000 square kilometer Lubicon Territory. In 2006 alone the Alberta government approved the drilling of 76 new oil and gas wells and 75 new pipelines.

36.) Forestry in Lubicon Territory

Canadian submission says:

“It does not appear there has been extensive logging in the area of land claimed by the Lubicon Lake Cree as traditional use territory since the 1990 decision of the Human Rights Committee...the principal holder of rights to log timber within (Lubicon Territory), DMI/Daishowa-Marubeni International Ltd., has made a formal agreement to the Lubicon Lake Cree to refrain from harvesting or purchasing timber in this area until a land claim settlement is reached with the Government of Canada or the area of the land claim is adjusted by the Lubicon Lake Cree.”³⁹

While there has not been extensive logging in Lubicon Territory, the truth is more complicated and quite different than the false impression created by this statement in the Canadian submission. The facts are as follows.

37. Daishowa’s Peace River Bleached Kraft Pulp Mill

On February 8, 1988 the Alberta government announced construction of a huge new greenfield bleached kraft pulp mill⁴⁰ to be located on the west side of the Peace River -- across the Peace River from Lubicon Territory -- about 16 kilometers north of the

³⁸ “The Commissioners Speak: Excerpts from Statements made by Commissioners”, The Lubicon Settlement Commission of Review Final Report, Edmonton, Alberta, March 1993.

³⁹ It is not known what Canada means by the phrase “or until the area of the land claim is adjusted by the Lubicon Lake Cree”. There have never been any discussions about the Lubicons “adjusting the area of the land claim”.

⁴⁰ Environmentalists advise that a bleached kraft pulp mill is the worst kind of pulp mill from an environmental point of view.

northern Alberta town of Peace River. The town of Peace River is located about 100 kilometers west of the Lubicon community of Little Buffalo Lake.

The new bleached kraft pulp mill was described by the Alberta government as “the largest hardwood pulp mill in Canada”. When completed in the fall of 1990, provincial officials said, it would employ 600 people -- 300 people to harvest the trees and another 300 to turn those trees into pulp. It would “produce” 1,000 metric tons of dehydrated pulp per day; 800 metric tons of which would be shipped to Japan without further local processing. It would clear-cut trees at the rate of about 11,000 per day; over 4 million trees a year. The trees to supply this enormous new pulp mill, it was soon learned, were to come from an enormous 29,000 square kilometer timber lease that completely blanketed the unceded 10,000 square mile unceded Lubicon Territory.

The Alberta government announcement said the estimated cost of the new pulp mill was \$500 million including \$62.5 million in direct subsidies from the provincial government and another \$9.5 million from the federal government. Final estimated cost of the new mill was quoted at \$550 million, plus another \$20 million from the federal government for unspecified purposes, and an additional \$1.3 billion from the province for related support infrastructure including rail connections, roads providing access into hinterland areas and a major new bridge across the Peace River providing direct access from the new mill into unceded Lubicon Territory.

The provincial Forestry Minister, LeRoy Fjordbotten, said the multi-million dollar provincial “contribution” to the new pulp mill would be used to build rail and road access and other infrastructure “necessary...to proceed in this relatively remote location”. He said “Lack of such access has long been an impediment to development of the forest industry in Northern Alberta”.

The \$9.5 million federal contribution to the new mill was provided by the federal Indian Affairs Minister Bill McKnight in his capacity as Minister responsible for the Western Diversification Fund”. Mr. McKnight said the purpose of the federal “contribution” to the new pulp mill was to demonstrate “how two governments can work together with the private sector to make a significant contribution towards the development and diversification of the Alberta economy”. As federal Minister of Indian Affairs, Mr. McKnight was also constitutionally responsible for ensuring that the rights of indigenous people in Canada are recognized and respected.⁴¹

Mr. Fjordbotten admitted that the Lubicons weren’t consulted or even informed about construction of the new mill. However, he said the Lubicons could have attended public meetings held by Daishowa in the Peace River area.

The Lubicons had heard about the new pulp mill and had made inquiries of the provincial Forestry Department regarding where the trees for the new mill would come from. Provincial officials told the Lubicons no decision had been made about timber leases but that the Lubicons had no cause for concern because there are lots of trees on the west side of the Peace River. Dubious that the provincial government would be planning a major

⁴¹ Under the Canadian Constitution the federal government has a legal “fiduciary” responsibility for Indians in Canada.

new pulp mill without knowing where the trees would come from, the Lubicons pressed provincial officials for specific information on where the trees would come from. Provincial officials assured the Lubicons that the Lubicons would be informed just as soon as any decisions were made about timber leases for the new pulp mill. The Lubicons did not learn that the provincial government had sold the trees to the entire Lubicon Territory to a Japanese forestry company until they read about it in the newspaper the day after the new Japanese pulp mill was publicly announced.

Minister Fjordbotten publicly defended the sale of Lubicon trees to a Japanese forestry company claiming that the Lubicon people were asserting unextinguished aboriginal land title to over 10% of the province and that “holding up the creation of jobs because they are claiming 10% of the province is not reasonable”. Aside from the issue of whether Lubicon land rights can be ignored simply because the province considers them “unreasonable”, Mr. Fjordbotten’s claim that the Lubicons were asserting land rights over 10% of the province was untrue and he knew it.⁴²

Indian Affairs Minister McKnight denied that his efforts as Minister responsible for the Western Diversification Fund were in conflict with his responsibilities as federal Indian Affairs Minister. He claimed to be protecting Lubicon land rights by asking the provincial government to exclude a 66 square kilometer area set aside in 1939 as a partial reserve for the Lubicon people but never made into a reserve. He argued that the Lubicons would benefit from the new mill by working for Daishowa as loggers and/or by selling Daishowa the trees from that 66 square kilometer area that both levels of Canadian government denied the Lubicons owned.

During the next month public outrage built over sale of Lubicon trees to a Japanese forestry company including nation-wide demonstrations, critical newspaper editorials, political charges that Mr. McKnight had contravened a federal cabinet order requiring an environmental assessment before federal funds are “contributed” to such enterprises, charges that Mr. McKnight was guilty of conflict of interest, demands that Mr. McKnight resign or be fired as Indian Affairs Minister and threats of legal action to stop construction of the new mill. Mr. McKnight responded to the deluge of critical reaction by denying that he knew provincial officials “would award (Daishowa) cutting rights in the disputed area” when he made the \$9.5 million “contribution”.

38.) The First Agreement with Daishowa

On February 25, 1988, an aboriginal organization called United Native Nations announced that it was organizing a major demonstration to be held on March 7th in front of Daishowa’s head Canadian office in Vancouver, British Columbia. A spokesman for United Native Nations said that representatives from indigenous nations from across British Columbia would be participating in the demonstration and that Lubicon Chief Bernard Ominayak would be attending.

⁴² The claim that the Lubicons were asserting jurisdiction over 10% of Alberta came from a legal action filed on behalf of the Lubicons in 1980 containing incorrect information that had been corrected in an amended statement of claim filed shortly thereafter. Unceded Lubicon land rights in fact involve less than two per cent of land within Alberta provincial boundaries.

On March 2, 1988 Lubicon Chief Bernard Ominayak received a telephone call from Daishowa Senior Vice President and General Manager Koichi Kitigawa asking for a meeting. A meeting was agreed for March 7th when Chief Ominayak would be in Vancouver for the planned demonstration.

Mr. Kitigawa told Chief Ominayak that Daishowa officials had asked provincial officials about meeting with the Lubicons and had been told not to worry about the Lubicons -- that Lubicon land rights were being negotiated and that any effort by Daishowa to deal directly with the Lubicons "would only interfere with negotiations". In fact there were no negotiations.

During the meeting with Daishowa on March 7th Daishowa representative Henry Wakabayashi told Chief Ominayak "We went into the Peace River project in good faith". He said "We know about pulp mills, not about land claims". He said "We got caught in the middle". He said "We don't want to get involved in land claim negotiations".

Chief Ominayak told Daishowa officials that the situation is simple. Chief Ominayak said "The Lubicon people own the land and will continue to own the land until at least the question of Lubicon land rights is settled". If Daishowa didn't want to become involved in the land dispute, the Chief said, it should stay out of unceded Lubicon Territory until the land dispute is settled.

Mr. Kitigawa pointed out that there was already a lot of resource exploitation activity in Lubicon Territory.

Chief Ominayak acknowledged that there was already a lot of resource exploitation activity in unceded Lubicon Territory. He said it had taken place without consulting the Lubicons, without Lubicon consent and over the protest of the Lubicon people while the Lubicon people were trying to protect Lubicon land rights through normal Canadian legal and political channels. He said great and irreversible damage had been done to the traditional Lubicon economy and way of life while the Lubicons were trying to protect their Territory and way of life through normal Canadian legal and political channels. He said the Lubicons were not prepared to continue just standing by while outsiders come into the unceded Lubicon Territory and destroy everything the Lubicons have and value.

If Daishowa really wanted to stay neutral, Chief Ominayak said, it should stay out of Lubicon Territory until the question of land rights is resolved. If Daishowa tried to proceed prior to settlement of Lubicon land rights, the Chief said, Daishowa would by definition be siding with one party to a two party dispute and aligning itself with provincial government claims to Lubicon Territory. He said the Lubicons would respond accordingly.

Mr. Wakabayashi pointed out that the proposed pulp mill was not located in Lubicon Territory.

Chief Ominayak acknowledged that the proposed pulp mill was not located in Lubicon Territory. He also noted that Daishowa's timber license from the province was nearly three times the size of the entire Lubicon Territory.

If Daishowa is only proposing to cut trees for the new pulp mill outside of Lubicon Territory, the Chief said, the Lubicons would not protest. The problem would only arise, the Chief said, if Daishowa tried to harvest trees in Lubicon Territory prior to settlement of Lubicon land rights. Once there's a settlement of Lubicon land rights, the Chief said, the Lubicons would be willing to sit down and see if an agreement could be negotiated that would allow Daishowa to proceed in Lubicon Territory while respecting Lubicon wildlife and environmental concerns.

Mr. Wakabayashi asked about specific Lubicon wildlife and environmental concerns.

Chief Ominayak said the Lubicon economy was hunting and trapping. He said countless generations of Lubicon people had cared for the plants and animals so the land and the animals would be able to support future generations of Lubicon people. He said resource exploitation activity already undertaken in Lubicon Territory had done great damage to the land and animals literally threatening the existence of the Lubicon people as a separate and distinct indigenous nation. He said any further activity would have to be done in such a way so as not to do irreparable damage to the land and animals.

Mr. Kitigawa said cutting the trees may scare away some of the animals but that there were studies to show that clear-cutting the trees also improves animal habitat. He said Daishowa's agreement with the province requires consultation with people in the area which, he said, Daishowa is prepared to do. He said "We won't encroach on reserve lands without first negotiating an agreement with the Lubicon people".

Chief Ominayak pointed out that there is no "reserve". He said a reserve is only one element of a settlement of Lubicon land rights. He repeated that the Lubicons assert jurisdiction over the entire Lubicon Territory and will continue to assert jurisdiction at least until there's a settlement of Lubicon land rights.

Chief Ominayak said the Lubicon people had learned to their dismay that it was possible to buy a study that said just about anything you want it to say. However, he said, Lubicon on-the-ground experience with resource exploitation activity had made it painfully clear that the kind of resource exploitation activity that had been undertaken so far in Lubicon Territory destroyed rather than improved the environment.

Mr. Wakabayashi asked the Chief if the Chief was saying that no resource activity would ever be allowed in Lubicon Territory.

Chief Ominayak repeated that the Lubicon people will oppose any resource exploitation activity prior to settlement of Lubicon land rights but would be prepared to try and work out some kind of mutually acceptable agreement with Daishowa post-settlement.

Mr. Wakabayashi said “We need to start planning”. “If the Lubicon people don’t want any development at all”, he said, “then Daishowa shouldn’t pursue the area at all”. “Or”, he asked, “are the Lubicon people prepared to negotiate a compromise?”⁴³

Chief Ominayak repeated that the Lubicons would be willing to talk once Lubicon land rights are settled.

Mr. Kitigawa said “We’re prepared to observe all applicable (provincial) government regulations” which he described as “some of the toughest in North America”.

Chief Ominayak challenged the claim that provincial government regulations are “some of the toughest in North America” characterizing them as both weak and frequently not enforced. He repeated “The Lubicon people are the legitimate owners of Lubicon land”. He said “We intend to have our environmental concerns respected whatever the provincial government may or may not do”.

After some further repetitive back and forth Mr. Kitigawa said “We’re prepared to talk to the Lubicons before trying to do any cutting in the traditional Lubicon area”. “If you’re reasonable and we’re reasonable”, he said, “then we should be able to work out a compromise”.

Chief Ominayak agreed saying “Once our land rights are settled, I’m sure we’ll be able to work something out”.

Mr. Wakabayashi said “We’re peaceful people and we don’t want any trouble”. He said “We’re prepared to come and talk whenever the Lubicon people are ready”.

Chief Ominayak replied “We’re peaceful people too but we’re committed to defending our vital interests”. He said “We’ll welcome you to our community to talk once our land rights have been settled”.

On March 9, 1988 Lubicon advisor Fred Lennarson phoned Mr. Kitigawa to inform Mr. Kitigawa that after the March 7th meeting the Lubicons had decided not to proceed with a legal action against Daishowa to enjoin construction of the pulp mill but were still considering legal action against Mr. McKnight over conflict of interest and breach of a federal cabinet order requiring the conduct of a socio-economic assessment prior to committing federal funds to such projects. Mr. Kitigawa was out of the office. Fred Lennarson’s call was directed to another Daishowa Vice President named Tom Hamaoka who had also attended the March 7th meeting. Fred Lennarson told Mr. Hamaoka that Chief Ominayak wanted Daishowa to know that an action against Mr. McKnight was not intended as an action against Daishowa but might adversely affect transfer of the \$9.5 million federal “contribution”.

⁴³ It became clear over time that Daishowa never had any intention of not proceeding in the Lubicon area and just raised the prospect of not proceeding in Lubicon Territory because Daishowa officials thought the Lubicon position was a tactic for negotiating more from the companies and that threatening to pull out would therefore worry the Lubicons. It’s a common assumption on the part of resource companies but resource companies pulling out is not a concern to the Lubicons because the primary Lubicon concern really is protection of the plants and animals and they would be perfectly happy if all the resource companies packed up and left.

Mr. Hamaoka said he assumed that this latest Lubicon action meant that Daishowa should be lobbying the federal government as well as the provincial government to settle Lubicon land rights.

Fred Lennarson told Mr. Hamaoka that the federal government is the only level of government in Canada that is constitutionally empowered to settle Indian land rights and that encouraging the federal government to meet its constitutional responsibilities would be a good idea.

On March 14th Fred Lennarson sent Mr. Kitigawa maps outlining Lubicon Territory that Chief Ominayak had agreed to provide during the March 7th meeting. On March 25th Mr. Kitigawa wrote Fred Lennarson acknowledging receipt of the maps. Mr. Kitigawa's letter read, in part:

“The wildlife management and environmental protection responsibilities will be spelled out in our Forest Management Agreement (with the provincial government), however, we will endeavor to cooperate and consult with the Lubicon people prior to the planning and harvesting of the timber resources”.

Fred Lennarson referred Mr. Kitigawa's letter of March 25th to Chief Ominayak. Chief Ominayak responded to Mr. Kitigawa's March 25th letter as follows:

“The wildlife management and environmental protection provisions included in your Forest Management Agreement with the Alberta Provincial Government are irrelevant. We never ceded our traditional Territory to the Canadian government in any legally or historically recognized way. The Canadian government didn't have the right to transfer our traditional Territory to the Alberta government. Provincial jurisdiction doesn't apply and the terms and conditions of any business you might want to do in our traditional Territory will therefore have to be negotiated directly with us.

“As we told you during our meeting on March 7th, we don't intend to allow logging in our traditional Territory at least until our aboriginal land rights are settled. Once our aboriginal land rights are settled, we're prepared to talk about acceptable terms and conditions regarding wildlife management and environmental protection, sale of timber from reserve land being cleared for agricultural purposes, economic development opportunities resulting from logging activities in our traditional area and other matters of possible mutual interest and/or concern.”

39.) The First Daishowa Agreement Breached

On September 14, 1989, Daishowa signed a 20 year Forest Management Agreement with the Alberta government.

On August 17, 1990, as provincial Forestry Ranger named Ralph Woods hand-delivered a document to Chief Ominayak entitled “Proposed Timber Harvesting Activities 1990/91”. It showed that the provincial government had granted 5 huge timber licenses in Lubicon Territory to four different logging companies. All five of these timber licenses, the document said, involved “Timber Harvesting for Mill Facility”.

Chief Ominayak asked Ranger Woods about volumes of timber to be harvested and proposed starting dates. Ranger Woods said he didn't know volumes or starting dates but presumed logging activity would start "at freeze-up".⁴⁴

On August 31, 1990, a spokesman for Daishowa named Wayne Crouse publicly confirmed that a Daishowa subsidiary named Brewster Construction and three other Daishowa related companies "will be logging in the area that is claimed to be the traditional (Lubicon) hunting and trapping area this winter".

Mr. Crouse said that "Brewster Construction, purchased earlier this year by Daishowa, made plans to log the traditional Lubicon area two years ago when a land settlement with the Lubicons was thought to be imminent". "Now", he said, "there is no alternative for Daishowa to use Brewster's logging in the area to provide the mill with needed fiber".

"Boucher Brothers", Mr. Crouse said, "will log in Daishowa's assigned area in Lubicon-claimed lands by an agreement with Daishowa". "It's really been a policy to hold off as long as possible from going in there because we know there is a dispute", he said, "but in order to keep Boucher Brothers operating they have to have a wood supply, and their operation is crucial to our operation".

"The two other companies", Mr. Crouse said (Buchanan Lumber and Bissell Brothers), "will supply Daishowa with aspen and coniferous wood chips, as well as harvesting spruce and pine for their own lumber mills".

Mr. Crouse claimed that "Daishowa has maintained good relations with the Lubicons and the company is optimistic that the Band will permit the planned logging operations".⁴⁵ "Daishowa", he said, "will advise the Lubicon of any logging activity in advance".

Asked by reporters for reaction, Chief Ominayak said there'd been no further discussions with Daishowa but that the Lubicons had an agreement with Daishowa that Daishowa would stay out of Lubicon Territory until there was a settlement of Lubicon land rights and agreement between Daishowa and the Lubicons on Lubicon wildlife management and environmental concerns. As an honorable company, the Chief said, the Lubicons expected Daishowa to keep the agreement. If Daishowa failed to keep the agreement, the Chief said, the Lubicons would do whatever was necessary to prevent clear-cut logging of unceded Lubicon Territory.

On September 4, 1990, provincial Forestry Minister Fjordbotten claimed "The province took care to exclude enough land to accommodate the Band's claim prior to signing any of its forest management agreements". He admitted that "The logging zones may fall within the area the Band claims as its traditional hunting and trapping territory", but, he said, "they're outside the proposed (247) square kilometer reserve (agreed at Grimshaw in 1988)". Presumably referring to the brief, uninformative visit of Ranger Woods on

⁴⁴ "Freeze-up" in Lubicon Territory usually occurs in November when the ground is sufficiently frozen to allow for the movement of vehicles and heavy equipment.

⁴⁵ There had been no further communication between Daishowa and the Lubicons after the exchange of correspondence in March of 1988.

August 17th, Mr. Fjordbotten claimed “The province has lived up to its commitment to consult the Lubicons concerning timber harvest plans”.

In mid-September, Mr. Crouse told reporters that Daishowa was “hoping to set up talks with the Lubicons, Alberta Forestry and Daishowa’s logging contractors to discuss the future of logging Lubicon-claimed land”. “Even though it is a dispute between the government and the Lubicons”, he said, “we are still concerned because we are impacted by that”.

Mr. Crouse reaffirmed that “The companies will be logging in the area that is claimed to be the traditional (Lubicon) hunting and trapping area this winter”. He said “The Lubicon land is probably seven or eight times the size of the proposed reserve”.

Mr. Crouse said “There won’t be any logging until we sit down and talk about the disputed land”. He said “We know it is a very sensitive issue”.

On September 22nd Tom Hamaoka told reporters “Aboriginal land claims is something we’re going to have to face”. He said “Daishowa Canada...is making its preparations based on the fact that the Lubicon settlement with both levels of (Canadian) government will be settled by the time we go in and log (in a couple of months)”.

On September 24, 1990 provincial Forestry Minister Fjordbotten praised Daishowa for “building flexibility into its woodland plan to try and accommodate Indian land claims”. He claimed “Daishowa, (provincial) Forestry and Chief Ominayak will meet during the coming week in an effort to reach an agreement on issues raised by the company’s logging plans”.

Lyman Brewster, the President of Daishowa-owned Brewster Construction, met with the Lubicon Chief and Council on September 24th. He began the meeting by presenting and reading a letter addressed “Chief Omieniak (sic)& fellow members of your council”. That letter, complete with grammatical, punctuation and spelling errors, read as follows:

“We have requested this meeting with you and your council, basically to make you aware of our position for the winter of 1990 & 91 logging season.

“We plan to log the P5 and S15 licenced areas, of which you are all aware of their specific locations. In doing so, the entry to S15 will be done from Highway 88 directly east of the licence, it is approximately 6 miles off Highway 88. What we are planning for the P5 licence is to have early access past Haig Lake and up to Bison Lake, this is merely for early entry, there will be no logs hauled out this way.⁴⁶

“Due to circumstances between various Government Departments, both Federal and Provincial and your particular native group, we would like to point out the following. First we want no part of the problems involved, that is strictly between your group and the Government. Secondly, we know you are aware of the fact that the Alberta Forestry Service has approved out licence and given us the go ahead to cut timber in the two specified areas mentioned. We as a subsidiary of Daishowa have no alternative but to cut timber in the designated areas in order to keep our Mill in operation.

⁴⁶ The area described by Mr. Brewster in his letter is right in the middle of unceded Lubicon Territory.

“Due to the circumstances which exist between the Government and the native people, we further want to express the fact that we want no part of the problem. But, we felt that we owed you the courtesy of making you aware of our winter operation.

“While Brewster Construction is a subsidiary of Daishowa, we have a obligation to run an efficient operation or be closed down. This would be to no one’s advantage, as you are aware the timber is overmature & rotting on the stump and should be harvested. Regardless of the outcome of your settlement, it would still be harvested, but under no circumstances do we feel that we are interfering with either the Government or the Native people by carrying out work.

“Your consideration of these facts would be appreciated because, as I have pointed out, we have no alternative but to log in the specified Areas as previously mentioned for this winter.”

Chief Ominayak responded to Mr. Brewster’s reading of the letter by telling Mr. Brewster that the Lubicon people had no intention of allowing the harvesting of Lubicon trees prior to settlement of Lubicon land rights and agreement with the Lubicon people respecting Lubicon wildlife and environmental concerns. He told Mr. Brewster that Mr. Brewster should be pressuring the Canadian government to settle rather than pressuring the Lubicons to allow continued exploitation of Lubicon resources.

Mr. Brewster proposed that stumpage fees which would ordinarily go to the Alberta government could be put in a trust account pending settlement of Lubicon land rights. He said putting the stumpage fees in a trust account would put the government under pressure to settle.

Chief Ominayak suggested that Mr. Brewster put his proposal in writing but reiterated that the Lubicons have no intention of allowing logging of Lubicon trees until there’s a settlement of Lubicon land rights and agreement on Lubicon wildlife and environmental concerns.⁴⁷

Mr. Brewster told Chief Ominayak that he didn’t think it would be a good idea for him to put the proposal in writing. He said he thought “it would be better if a letter came from the Band”. He proposed that the Band “write the provincial government saying you sold our resources and suggesting that stumpage fees be put in a trust account until the land question is settled”.

Not getting the response he’d hoped for from Chief Ominayak, Mr. Brewster turned to non-indigenous Lubicon advisor Fred Lennarson and asked Fred Lennarson if Fred Lennarson understood what was being proposed.

Fred Lennarson told Mr. Brewster that he didn’t think the problem was lack of understanding. He said he thinks the problem is that the Lubicons understand all too well what’s being proposed.

Fred Lennarson pointed out that stumpage fees in Alberta are nominal -- only a couple of dollars per cubic meter for softwood and only about 25 cents per cubic meter for

⁴⁷ The specter of clear-cut logging the forest upon which they’ve traditionally depended for survival is beyond imagination to the Lubicons who believe they will be finished as a people “if they take our trees on top of everything else”.

hardwood. At those rates, he said, a 60 foot aspen tree is worth only about 18 cents and a 40 foot spruce tree is worth only about 60 cents -- not much especially when the harvesting method is environmentally disastrous clear-cut logging.

Secondly, Fred Lennarson said, once the Lubicon trees were gone there'd be no hope of preserving even the remnants of the traditional Lubicon way of life; there'd be no hope of achieving respect for Lubicon wildlife and environmental concerns and the Lubicons would have lost leverage with regard to negotiating a settlement of Lubicon land rights.

Fred Lennarson said experience with the oil companies made clear that the Lubicons made a terrible mistake allowing the oil companies to come into Lubicon Territory and extract billions of dollars of resources, and in the process destroying the Lubicon hunting and trapping economy and way of life, while the Lubicons talked, negotiated and litigated in front of an ex-head oil company lawyer turned provincial court judge, the ex-partner of the head oil company lawyer on the case turned provincial court of appeal judge, the provincial premier's ex-family lawyer turned provincial court of appeal judge and an ex-oil company lawyer turned Supreme Court of Canada judge.

Following Fred Lennarson's remarks Mr. Brewster angrily stormed out of the Lubicon office and caucused with his colleagues from Daishowa and Boucher Brothers who were outside waiting to meet Lubicon leaders. Shortly thereafter representatives of Daishowa and Boucher Brothers came into the office to meet Lubicon leaders.

Daishowa was represented by Fibre Superintendent Tom Hoffman, Wood Resources Manager Wayne Thorp and Human Resources Manager Stu Dornbierer. Boucher Brothers was represented by Norm and John Boucher.

Chief Ominayak asked Daishowa representatives about reports that indigenous people were being told they couldn't hunt on Daishowa logging leases.

Mr. Thorp told Chief Ominayak that Daishowa had nothing to do with telling indigenous people they couldn't hunt on Daishowa logging leases. He said provincial Fish and Wildlife had declared an area 400 meters on either side of a logging road to be a "wildlife sanctuary".

Chief Ominayak asked "What happens to the wildlife sanctuary when the area is clear-cut?"

Mr. Thorp told the Chief "The area is being protected from hunting, not from logging".

Mr. Boucher said "We're here to show you people where we will log this winter." He said "We have a map" which he then unrolled and presented. The map showed an area at the northeast corner of Lubicon Lake immediately across the boundary from the proposed Lubicon reserve -- again right in the middle of Lubicon Territory.

Chief Ominayak asked "Who speaks for Daishowa".

Mr. Thorp said "Me and Tom speak on behalf of wood management".

Chief Ominayak asked “What about our agreement with Daishowa that there’d be no logging in the Lubicon area until Lubicon land rights are settled and a logging agreement worked out with the Lubicon people?”

Mr. Thorp claimed “Daishowa is respecting that agreement”. He said “Daishowa is not logging in the Lubicon area”.

Chief Ominayak pointed out that a wholly owned Daishowa subsidiary and three Daishowa sub-contractors are proposing to log for Daishowa in Lubicon Territory.

Mr. Boucher said “A lot of people in Nampa depend on logging for a livelihood”. He asked the Chief “What are these people going to do if they can’t log?”

Chief Ominayak told Mr. Boucher “A lot of people have been doing very well stealing Lubicon resources”. “However”, he said, “we have an agreement with Daishowa that we expect Daishowa to honor”.

Mr. Dornbierer repeated “Daishowa has no intention of breaking the agreement”. “However”, he said, “a distinction has to be made between Daishowa and these logging companies”.

Chief Ominayak told Mr. Dornbierer “The distinction is unimportant”. He said “The companies are either owned by Daishowa or are Daishowa sub-contractors”. He said “The companies are operating in the Daishowa’s FMU (Forest Management Unit) pursuant to an agreement with Daishowa”. “Consequently”, the Chief said, “the Lubicon people will consider any logging done by these companies on Lubicon land to be a breach of the Lubicon agreement with Daishowa”.

Mr. Dornbierer asked about the (federal government’s 1989 (take-it-or-leave-it settlement offer)”.

Chief Ominayak gave Mr. Dornbierer a copy of the federal government’s 1989 take-it-or-leave-it settlement offer so Mr. Dornbierer could read it and judge for himself whether it was a serious attempt to settle Lubicon land rights. After reviewing the federal government’s 1989 settlement offer Mr. Dornbierer said “I can appreciate the frustration felt by the Lubicon people”. He said “I hope this matter will be settled soon and we won’t face confrontation”.⁴⁸

Chief Ominayak told Daishowa representatives “We won’t face confrontation if Daishowa honors our agreement”.

On September 27, 1990 a spokesman for Brewster Construction named Doug Adikat announced that Brewster Construction would be seeking police protection for their planned logging operations in unceded Lubicon Territory. He said Brewster, as a wholly

⁴⁸ Details of Canada’s 1989 “take-it-or-leave-it” settlement offer are provided Supplement No.10 to Communication 167/1984 submitted to the Committee on March 22, 1989.

owned subsidiary of Daishowa purchased after the agreement between Daishowa and the Lubicons, didn't consider itself bound by the agreement between Daishowa and the Lubicons.

Daishowa spokesman Crouse told reporters "The Company policy right now is we are not going to directly log in that area at all but that still leaves the problem of the contract people". "If they have no wood, they have no business, and it becomes a problem for (Daishowa) down the line in the chip supply (used by Daishowa to produce pulp)".

Chief Ominayak told reporters that the Lubicons didn't intend to allow Daishowa to circumvent the agreement by working through a wholly owned subsidiary and sub-contractors. He said the Lubicon people would prevent any logging in unceded Lubicon Territory. He said "We stated very clearly that we have no intention of allowing anybody to steal any more of our resources".

Referring to Mr. Brewster's September 24th letter that Brewster Construction had "no alternative but to log in specified areas", Mr. Adikat told reporters that the company would be forced out of business and 60 people would lose their jobs if it could not log in Lubicon Territory that winter.

Chief Ominayak responded "We have a whole community of people who have been forced onto welfare by resource exploitation activity".

On October 6th Norm Boucher of Boucher Brothers said that he'd been told by Daishowa Vice President Tom Hamaoka that planned logging operations in Lubicon Territory "will be dropped in order to avoid confrontation with the Lubicons". He said he agreed with the decision. He said "It's just not right to bulldoze people". However, Mr. Boucher said, the decision "is good for this logging season only". He said "I guess next year (1991-92) we will have to go in there".

Asked by reporters how badly Brewster Construction needed to log unceded Lubicon Territory, Lyman Brewster said "It's not necessary enough to go in there and get into trouble".

Also on October 6, 1990 the Deputy Minister of the Alberta provincial Forestry Department, Ken Higginbotham, told reporters a decision whether or not to "abort" logging plans in Lubicon Territory would be made the following week. He said "We are looking at the alternatives here, including alternative areas".

Mr. Higginbotham said "This is not strictly a Forestry matter". He said "That decision (to abort logging plans in the unceded Lubicon Territory) will require some political sanction". He said it would have to be "politically approved by Forestry Minister LeRoy Fjordbotten and Premier Don Getty".

On October 9th Forestry Minister Fjordbotten announced "There will be no new forestry deals to compensate Daishowa Canada for delaying a timber harvest in land claimed by the Lubicon Lake Band".

On October 10th, Daishowa spokesman Crouse announced “We are not logging in that disputed territory, nor are any sub-contractors or our subsidiary”. However, he said, “Before coming to a final announcement, we want to sit down with Chief Ominayak”. He said “That meeting will occur as soon as Daishowa Vice President Tom Hamaoka can arrange it”.⁴⁹

On October 17th a reporter phoned Lubicon advisor Fred Lennarson to discuss reports that “Bissell Brothers and Buchanan Lumber were being forced by the provincial government to provide wood to Daishowa and that Daishowa was being required by the province to accept that wood”. The reporter told Fred Lennarson that “Bissell and Buchanan are not considered Daishowa sub-contractors in that they’d normally be harvesting the spruce and leaving the aspen to rot on the ground”.⁵⁰ However, the reporter said, “they’d both been given timber leases by the province that requires them to stack the aspen for pick-up by Daishowa and Daishowa is being required by the province to pick up that stacked wood”.

Buchanan Lumber commenced logging operations in unceded Lubicon Territory at the end of October 1990. Shortly thereafter employees of Brewster Construction were caught bulldozing roads on Chief Ominayak’s trapline.

On November 8, 1990 Chief Ominayak issued a statement indicating that any unauthorized resource exploitation project operating in unceded Lubicon Territory would be “subject to removal at any time without further notice”.

Alberta Attorney General Ken Rostad responded to the Lubicon statement by incorrectly characterizing the jurisdictional dispute between the Lubicons and Canada as a dispute between the Lubicons and logging companies. He said the Lubicons would “be making a foolish mistake if they didn’t respect provincial laws”.

On November 19th Lyman Brewster publicly denied Lubicon charges that his employees had tried to sneak into Lubicon Territory and were bulldozing roads on the Chief’s trapline. He claimed “The Lubicons ran into one of our people who was in the Lubicon area on his own for some unknown reason”.

Mr. Brewster’s claims were immediately contradicted by the General Manager of Daishowa’s Edmonton Corporate Office, Jim Morrison, who announced “Brewster will commence logging operations tomorrow in the disputed area”. Mr. Morrison claimed that Brewster’s logging of Lubicon Territory didn’t contravene the Lubicon agreement with Daishowa because that agreement supposedly provided that Daishowa would only stay

⁴⁹ Mr. Hamaoka did not contact Chief Ominayak to arrange a meeting and no meeting was held.

⁵⁰ In a clear-cutting operation everything is cut down without regard to type or size of tree. Trees the company has rights to take and are 100 mm in diameter or larger are considered to have commercial value. Everything else is left “to rot on the ground”.

out of unceded Lubicon Territory until the Lubicon concluded the Grimshaw Accord with the Alberta government.⁵¹

40.) Logging Camp Destroyed

The evening of November 24, 1990 a logging camp belonging to Buchanan Lumber operating in Lubicon Territory without Lubicon consent was destroyed. No one was injured but equipment valued variously at between \$20,000 and \$50,000 was torched.

Daishowa spokesman Morrison responded by denying that there had ever been an agreement between Daishowa and the Lubicons. He claimed “What happened at that (March 7th) meeting (between Daishowa and the Lubicons) was a discussion on the negotiations going on at that time between the Lubicons and the Province”.⁵²

“What was decided”, Mr. Morrison continued -- contradicting his previous statement that there had not been an agreement between Daishowa and the Lubicons -- “was that there’d be no logging in new areas”. He claimed “Daishowa had not violated that agreement”. He claimed “The Lubicons told Daishowa that Daishowa could continue to log in traditional logging areas”. He claimed “That’s what Buchanan and Brewster were doing”.

On November 26, 1990 Daishowa announced that it was “instructing” Brewster Construction to continue logging unceded Lubicon Territory despite destruction of the Buchanan logging camp.⁵³ Allan Wahlstrom, General Manager of Woodlands and Lumber for Daishowa, said “We’re certainly concerned but we did avoid what we felt were the majority of sensitive areas of the Lubicon”.⁵⁴

41.) Lubicons Charged and Tried

The response of the Royal Canadian Mounted Police (RCMP) to destruction of the logging camp was immediate and massive. Twelve to fifteen officers are known to have been assigned to the case full time. Phones were tapped.⁵⁵ Police cars cruised around the Lubicon community of Little Buffalo Lake around the clock. Teams of officers interrogated Lubicon suspects for up to 5 hours at a time. People were held

⁵¹ The agreement with Daishowa was made in March of 1988 at a time when nobody could have predicted the Grimshaw Accord which was not made until October of 1988. Moreover all the Grimshaw Accord provides is that the province will transfer back to federal jurisdiction up to maximum of 247 square kilometers if so requested by the federal government for purposes of establishing a Lubicon reserve. It thereby allowed the federal government to proceed with Lubicon land negotiations. It was not by any measure a settlement of Lubicon land rights.

⁵² At that point there were no negotiations between the Lubicons and the province. There had been only one meeting between the Chief and the Premier at which the Premier agreed to support bilateral negotiations between the Lubicons and the federal government.

⁵³ This was the first public admission by Daishowa that Daishowa was in any way involved with the operations of its wholly owned subsidiary. Previously Daishowa had publicly maintained that Brewster was somehow independent and therefore not covered by the agreement between Daishowa and the Lubicons.

⁵⁴ Mr. Wahlstrom did not indicate how Daishowa determined “the majority of sensitive areas of the Lubicons” but apparently Chief Ominayak’s trapline was not included.

⁵⁵ Transcripts of taped phone conversations were later obtained by Lubicon lawyers.

incommunicado for hours, denied access to legal counsel and then released without being charged. One 14 year old was taken from home at 2 am and interrogated in a garbage dump. At one point a Lubicon lawyer repeatedly asked to speak to his client during a 4-hour interrogation but RCMP refused to “interrupt the interview” so the suspect could speak to his legal counsel.

On December 12, 1990 the RCMP issued a press release stating that they were charging 13 Lubicons with the offenses of arson, mischief in causing damage over \$1,000, possession of an explosive and wearing a mask while committing an indictable offense.

The first court appearance of the Lubicon 13 was on January 7, 1991. The Lubicon position throughout the legal proceedings was that the Canadian courts do not have jurisdiction over unceded Lubicon Territory. The accused therefore stood mute before the court. The court entered a plea of “not guilty” on their behalf.

In making the charges the provincial government divided the accused into five different groups for trial allowing the government to issue subpoenas to some of the accused with regard to giving evidence against others -- despite the fact that all of the accused were charged with the same offenses. Lubicon lawyers argued unsuccessfully that this tactic was only a roundabout way of violating the constitutional right to remain silent and not to incriminate oneself. The issue was not resolved before the case collapsed for other reasons.

The RCMP also claimed that one of the accused was a “confidential police informant” whom they refused to identify requiring each of the accused to have a different lawyer. Government lawyers then used the claim that there was a “confidential police informant” to withhold information from the defense arguing that to do so would reveal the identity of alleged “confidential police informant”. The judge allowed government lawyers to “edit” the information so as to protect the alleged “informant” but ruled that the name of the so-called “confidential police informant” would have to be revealed to defense lawyers in confidence before any evidence was given to the jury.

Full disclosure remained a problem throughout the trial. Government lawyers objected to providing defense lawyers with related RCMP files (including transcripts of phone taps). The judge allowed these files to be edited as well to supposedly protect the identity of the alleged “confidential police informant”.

Under questioning about RCMP minutes about the investigation, one officer acknowledged that one of the accused was set up as the “fall guy” in the obtaining of a search warrant under which the RCMP had broken into the trapping cabin of a different person who was never charged.

Another officer relied on notes that he’d made at the time and admitted he had not disclosed to the defense.

A third officer who’d testified that he’d let the Lubicon driver of a vehicle taking 5 Lubicons to hospital go after ten minutes was contradicted by the evidence and notes of

another officer that the driver had been interrogated for 2 ½ hours and for a full hour after expressly asking to be allowed to take the sick people to the hospital.

A fifth officer was unable to recall a comment in RCMP meeting notes instructing RCMP officers to “Grind them good”.

A sixth officer described the investigation of a \$20,000 arson as a “full scale investigation” involving five teams of two officers each, bought in from outside the area to question suspects, and a total of twelve to fifteen officers plus a senior government attorney.

At one point defense lawyers discovered that there had been a secret, “in camera” meeting involving the judge, prosecution lawyers and one of the police witnesses. This information, along with multiple problems with the issue of disclosure and abuse of constitutional rights led to a mistrial and eventually, in January of 1996, to a decision by the government not to proceed with the charges.

42.) Daishowa Agreement Denied

While the court case against the Lubicons was proceeding so was Daishowa. In a letter to the Chairman of the Toronto-based Task Force on the Churches and Corporate Responsibility dated April 12, 1991, General Manager of Daishowa’s Edmonton Corporate Office James P. Morrison wrote “Daishowa at no time made a commitment to the Lubicon Band that involved their traditional territory”. Rather, Mr. Morrison wrote, “In March of 1988 Daishowa met with Chief Ominayak and explained the provisions contained in the proposed Forest Management Agreement”.

“During the March 7, 1988 meeting”, Mr. Morrison wrote, “Daishowa told the Chief that it would not log in the future (66 square kilometer reserve set aside in 1939) reserve”. “Further”, Mr. Morrison wrote, “due to the possibility that the reserve area could be expanded in the future as negotiations progressed, Daishowa told the Chief that it would do its best to avoid logging immediately adjacent to the proposed reserve area”.⁵⁶

“When the Forest Management Agreement was signed in September of 1989 (between Daishowa and the Alberta government)”, Mr. Morrison wrote, “a larger area of 243 sq. km. was provided for”.

“Daishowa cannot”, Mr. Morrison concluded, “indefinitely postpone the timber harvest to which it is entitled”. “After all”, Mr. Morrison wrote, “Daishowa’s \$580 million dollar investment in the Peace River (pulp) mill was premised on having that secure wood supply”.

43.) Boycott of Daishowa Paper Products

⁵⁶ Mr. Morrison did not attend the March 7, 1988 Vancouver meeting. Where he obtained his fanciful information about what transpired during that meeting is not known.

This situation was reviewed in July of 1991 by organizations from across Europe concerned with human rights and environmental issues. On July 17, 1991 they passed a resolution which said:

“WHEREAS the people of the Lubicon Lake Indian Nation have never ceded ownership of their traditional Territory in any legally or historically recognized way;

“AND WHEREAS the Governments of Canada and Alberta claim jurisdiction over traditional Lubicon Territory with no apparent legal or historical justification;

“AND WHEREAS the Governments of Canada and Alberta have sought to impose their questionable jurisdiction over unceded Lubicon Territory by, among other things, selling Lubicon natural resources;

“AND WHEREAS over the past 15 years the Governments of Canada and Alberta have sold the right to exploit Lubicon oil resources to dozens of oil companies, whose massive exploitation activities have destroyed the traditional Lubicon hunting and trapping economy and threatened the very existence of the Lubicon Lake Indian Nation;⁵⁷

“AND WHEREAS Daishowa plans to start clear-cutting huge parts of the unceded Lubicon Territory as early as this fall, which, if those plans are acted upon, will almost certainly assure the complete destruction and extinction of the traditional Lubicon society;

“NOW THEREFORE we, the participants of the 7th European Meeting of North American Indian Support Groups, representing Austria, Belgium, Canada, Czechoslovakia, France, Germany, Luxembourg, the Netherlands, Norway, Poland, Sweden, Switzerland, the United Kingdom, the United States and various aboriginal nations and organizations, do hereby demand that Daishowa not take advantage of the jurisdictional dispute between the Governments of Canada and the Lubicon Lake Indian Nation for its own economic benefit and stay out of the traditional Lubicon Territory until the jurisdictional dispute between both levels of Canadian Government and the Lubicon Lake Indian Nation is satisfactorily resolved.”

In order to give force to the European resolution, meeting participants agreed to research and identify major Daishowa customers in their respective countries; to pressure major Daishowa customers in their respective countries to boycott Daishowa paper products unless Daishowa stays out of the traditional Lubicon Territory until the question of Lubicon land rights is settled; and to communicate and coordinate Daishowa boycott efforts with interested environmental groups across Europe and around the world.

Advised of the European resolution and European boycott plans, Mr. Morrison was dismissive. He characterized Daishowa as an “innocent third party”. He said “the Europeans are just looking for publicity and sympathy.”

One organization in Canada -- the Toronto-based Friends of the Lubicon -- soon became the focal point of the Boycott Daishowa campaign. Through research they identified companies using Daishowa paper products and Daishowa competitors from whom people could buy paper products instead. Working with Lubicon supporters in Alberta, they protested the City of Edmonton’s use of Daishowa paper products in Edmonton phone books. They called upon the Ontario Liquor Control Board to stop using Daishowa paper

⁵⁷ A number of representatives at the conference had been following the Lubicon situation for years; had visited Lubicon Territory -- some of them several times -- and had written extensively about the Lubicon struggle including representatives from Austria, France, Germany, Sweden, Switzerland and the United Kingdom.

bags. They picketed the Pizza Pizza restaurant chain for using Daishowa paper products. Companies that had not been identified as Daishowa customers started contacting the Friends of the Lubicon and joining the boycott. Soon 50 major companies had joined the boycott.⁵⁸

Daishowa mounted a campaign of its own pointing out to the Mayor of Edmonton that Daishowa had “located our Alberta corporate office in Edmonton and have directly spent hundreds of millions of dollars on your city”, arguing that the Peace River pulp mill represented a capital investment of \$630 million “a good portion of this spent in Alberta and locally”, claiming that “the mill is designed to comply with the standards set out in the provincial Licenses to Operate” and that “a variety of components of the effluent are closely monitored”.⁵⁹

In a speech to the Edmonton Chamber of Commerce On October 9, 1991 Mr. Hamaoka said “Finally the Canadian and Provincial Governments simply must face up to their responsibilities across Canada to settle Native land claims”. He said “It’s totally unacceptable to subject business -- foreign or domestic or innocent third parties -- to hostile threats and potential violent actions associated with unresolved land claims”.

44.) Daishowa Seeks to Enjoin the Boycott of Daishowa Paper Products

In February of 1995 -- plagued by the continuing Daishowa boycott and the public attention it focused on possible Daishowa activities in Lubicon Territory -- Daishowa launched a major legal action against boycott organizers. Daishowa claimed losses from the boycott of \$5 million over the preceding three years and on-going losses at a current rate of \$3 million a year. It asked the Canadian courts to enjoin the Toronto Friends of the Lubicon, certain named individuals associated with the Friends of the Lubicon and anyone having knowledge of the injunction from contacting Daishowa customers and asking them to stop buying Daishowa paper products. It asked that the Friends of the Lubicon and certain named individuals associated with the Friends of the Lubicons be ordered to pay court costs and an unspecified amount in damages to compensate Daishowa for the “irreparable harm” allegedly suffered by Daishowa as a result of the boycott.⁶⁰

The Daishowa legal action accused the Toronto Friends of the Lubicon of “illegal boycott activities” including inducing breach of contract between Daishowa and its customers, using “secondary” boycott and picketing tactics, conspiracy to injure, conspiracy to intimidate and spreading lies about Daishowa’s activities.

⁵⁸ The list of companies supporting the boycott was characterized by the Judge hearing the main action as reading “like a Who’s Who of the retail and fast food industries in Ontario”.

⁵⁹ Alberta environmental regulations depend on “self-reporting” by companies.

⁶⁰ The Toronto Friends of the Lubicon is a small voluntary association with no assets consisting largely of young people with limited assets. Simply the costs of defending themselves in a major court action launched by a large wealthy corporation was clearly both intimidating and a huge challenge.

The charge of “illegal boycott activities” was based on labor laws passed in the 1930s to curtail the power of unions then considered to be a threat to western civilization. The relevance of outdated labor law to a consumer boycott outside of a labor dispute was questionable on technical grounds but the potential impact of such a legal action on the issue of freedom of expression was inescapable.⁶¹

The “lies” that Daishowa claimed the Friends of the Lubicon had allegedly been spreading about Daishowa included that Daishowa was breaking an agreement with the Lubicons, is responsible for clear-cut logging in Lubicon Territory, plans to clear-cut in Lubicon Territory in the future and is complicit in genocide.

On May 19, 1995 Ontario Court Judge Frances Kitley declined to grant Daishowa an interlocutory injunction restraining the Toronto Friends of the Lubicon from boycotting Daishowa paper products.⁶² Judge Kitley rejected Daishowa’s accusations of wrongful interference with economic interests, inducing breach of contract, intimidation, conspiracy, defamation, injurious falsehoods and nuisance. She ruled that information pickets outside stores that use Daishowa products -- so-called “secondary picketing” -- are not illegal. She also ruled that Daishowa would not likely suffer greater harm from lack of an interim injunction than the Lubicons would suffer from clear-cut logging should the interim injunction be granted and clear-cut logging proceed.

With regard to the use of the term “genocide” Judge Kitley found the Toronto Friends “may have been intemperate” and ordered them to stop using the term. She also ordered the Toronto Friends to stop referring to the March 7th agreement between Daishowa and the Lubicons because, she concluded, the existence of the agreement isn’t proven.

Daishowa immediately issued a press release announcing that “The Ontario Court of Justice today granted a court order prohibiting the Friends of the Lubicon from using misleading and untruthful statements in its boycott of Daishowa Inc. and imposed restrictions on future Friends of the Lubicon conduct”. However, a spokesman for Daishowa said, Daishowa would be appealing the decision since “Daishowa remains concerned that an interim order was not made to protect its customers from secondary picketing and other unlawful boycotting activities”.

On January 24, 1996 the Toronto Friends of the Lubicon read in the newspaper that the Kitley decision had been reversed the day before. Contacting the court about media reports, the Toronto Friends were told that they hadn’t been informed of the decision because their volunteer Sierra Legal Defense Fund lawyers are based in Vancouver and the Ontario courts don’t make long distance phone calls.

In a one to two decision, a panel of three Canadian judges ruled the Daishowa boycott illegal and granted Daishowa an interim injunction pending the hearing of Daishowa’s application for a permanent injunction and compensation for losses then estimated at \$8

⁶¹ It’s a highly controversial legal tactic called a “SLAPP suit” “SLAPP is an acronym for “Strategic Law Suit Against Public Participation”.

⁶² The purpose of the an interim injunction would have been to enjoin the Friends of the Lubicon from engaging in boycott activities until Daishowa’s application for a permanent injunction could be heard.

million Canadian.⁶³ While finding that all boycotts aren't necessarily illegal, the court held that boycotts intended to cause economic damage to the target company are illegal.

On the key issue of freedom of expression under the Canadian Charter of Rights and Freedoms, the presiding judge, Madam Justice Marie Corbett, found the Charter applies to the common law "only in so far as the common law is the basis of some governmental action which, it is alleged, infringes a guaranteed right or freedom". She wrote "The Charter does not apply to private litigation in the absence of government action". "Since no government action is involved", she wrote, the parties "owe each other no other constitutional duties".

The main action seeking a permanent injunction began in the fall of 1987 and was decided on April 14, 1998. The presiding Judge, James MacPherson, refused to grant the requested injunction. "Is there anything unlawful about such a consumer boycott", he wrote, "I think not".

"If the great principle of freedom of expression protects a corporation", Judge MacPherson wrote, "say Daishowa, whose simple message is 'Here is why you should buy our products', then is there any reason why the same principle should not protect a small group of consumers of Daishowa products, say the Friends, from saying to fellow consumers, 'Here is why you should not buy Daishowa products?'" "In my view", he wrote, "there is no reason, in logic or in policy, for restraining a consumer boycott".

Judge MacPherson wrote that he had "serious doubts about using the phrase 'secondary picketing' to describe the second stage of the Friends campaign". He said "The Friends are engaged in a consumer boycott, not a labour dispute". He said he was persuaded "that the label 'secondary picketing' should not be used to describe the Friends activities in this case".

While allowing the consumer boycott to proceed, Judge MacPherson ordered the word "genocide" no longer be used, because, he said, "In my view the plain and ordinary meaning of the word 'genocide' is the intentional killing of a group of people".⁶⁴

Judge MacPherson also ordered no further reference to the March 7, 1988 agreement between Daishowa and the Lubicons concluding that the evidence did not support it.

Daishowa again immediately issued a press statement claiming that that the Ontario General Court had "granted Daishowa Inc. a limited injunction against the tactics used by the Friends of the Lubicon" The Daishowa press statement said the Judge "decided that

⁶³ Before the trial was over claimed losses were over \$20 million.

⁶⁴ In ordering that the word "genocide" no longer be used, Judge MacPherson commented on the "disintegration of a proud people who had lived successfully and prospered, for centuries". He wrote "The loss of hunting, trapping and gathering, the negative effect of industrial development on a communal spirituality anchored in nature, the disintegration of a social structure grounded in families led by successful hunters and trappers, alcoholism, serious community health problems such as tuberculosis and poor relations with governments and corporations engaged in oil and gas and forest operations on the land the Lubicons regard as theirs -- all of these have contributed to a current state of affairs for the Lubicon which deserves the adjectives tragic, desperate and intolerable".

the picketing of Daishowa's customers by the FOL as part of their boycott campaign was not unlawful". It said "This legal aspect of the decision contradicts an earlier appeal Court decision where the FOL's picketing was found to be unlawful". It said "The Company plans to appeal the contentious legal issue in the ruling regarding the legality of the FOL's picketing of Daishowa's customers".

45.) Second Daishowa Agreement

The following week, on May 20, 1998, Daishowa President Tokiro Kawamura wrote Chief Ominayak "to formally advise you of DMI's public commitment not to harvest or purchase timber in your area of concern, until your land issue is resolved with both levels of government, including harvesting rights, fish and wildlife concerns".

Chief Ominayak wrote back the following day as follows:

"Hopefully your letter and public announcement that you'll stay out of the Lubicon 'area of concern' pending settlement of Lubicon land rights will end the current dispute between us and allow Lubicon supporters to wind down the boycott of Daishowa paper products. However, given the various definitions of the phrase 'area of concern' used by Daishowa in the past, the Lubicon people require that you publicly define this phrase Lubicon 'area of concern'".

On June 11, 1998 Mr. Kawamura wrote the Chief back clarifying that "the area of concern which Daishowa-Marubeni International Ltd. made a commitment on May 20, 1998 is the approximately 4,000 square miles (10,000 square kilometers) outlined in the attached map". The area in outlined on the attached map was Lubicon Territory.

46.) Continuing Efforts to Clear-Cut Lubicon Territory

In 1999, while Lubicon land rights were under negotiation with Canada, the Alberta Regional Office of the Canadian Department of Indian Affairs gave a grant of \$150,000 to a tribal council called the Kee-Tas-Kee-Now Tribal Council (KTC) to set up a new logging company called Kee-Tas-Kee-Now Logging Ltd. The KTC consists of the Whitefish, Loon and Woodland Bands.

Next the Department gave the new logging company an additional \$65,000 to assist them in "negotiations with the resource sector, employment, business opportunities or to maximize financial benefits from resource development". Kee-Tas-Kee-Now Logging Ltd. then negotiated a deal to clear-cut trees for Daishowa within their so-called "traditional territory" -- much of which they claimed overlapped Lubicon Territory.

The Lubicons confronted both Daishowa and the federal land negotiator over the KTC/Daishowa agreement; Daishowa because it breached the 1998 agreement with Mr. Kawamura not to log or purchase timber from Lubicon Territory; the federal negotiator because agents of the federal government were acting to subvert land rights under negotiation at the table. Both pleaded ignorance of what had been done.

Daishowa agreed to revise the KTC deal so as to only purchase timber taken from outside Lubicon Territory. The federal negotiator arranged to have Department officials meet

with the KTC and obtain agreement that KTC would confine their logging activities to an area outside of Lubicon Territory “at least for now”.

On August 1, 2000 the Regional Office of Indian Affairs gave the KTC an additional \$100,000 “to undertake efforts to form tripartite working arrangements (with forestry companies and the Alberta government)”.

On August 15, 2000 the Regional Office of Indian Affairs gave the KTC an additional \$20,000 “to develop business plans to negotiate the purchase of the Brewster Sawmill (from Daishowa)” which Daishowa indicated it wanted to sell “to reduce Daishowa’s debt”.⁶⁵

Indian Affairs documents obtained by the Lubicons indicated that “the benefits of this (Indian Affairs sponsored and funded) project moving forward include joint ownership of (the Brewster) sawmill”. The documents also indicated that Indian Affairs would be providing the KTC an additional \$150,000 in 2001 toward purchase of the Brewster Sawmill.

The Alberta Regional Director of the federal Department of Indian Affairs, Barrie Robb, told the Lubicons that he didn’t think KTC purchase of the Brewster Sawmill would cause a problem because, he said, he understood “the new company won’t be cutting in (Lubicon Territory) for three years”. He said “I think (Lubicon land) negotiations will be done in one and a half to two years” and “that (the three year lead time) would leave enough room to conclude (Lubicon land) negotiations”.

Asked by the Lubicons to stipulate that KTC would have to stay out of Lubicon Territory until there’s a settlement of Lubicon land rights, Mr. Robb replied “They (KTC) might want to argue that they don’t want their business held up until Lubicon land rights are settled”. He said “We can’t stop a group of (government sponsored and funded) First Nations trying to better their lives and we should support them”.

Told by the Lubicons that the Department of Indian Affairs should not be using some indigenous people to subvert the rights of other indigenous people, Mr. Robb proposed to buy dinner for Chief Ominayak and the “Grand Chief” of the Kee-Tas-Kee-Now Tribal Council Paddy Noskiye “to discuss the details of the KTC proposal”. He said, indicating that he understood very well the potential implications of setting up some indigenous people to clear-cut the Territory of other indigenous people, “We don’t want to see a war between the Lubicons and the KTC”.⁶⁶

Pressed by the federal government to involve an experienced sawmill operator in operation of the Brewster sawmill, the KTC entered into a partnership with a British

⁶⁵ Part of the reason Daishowa wanted to sell Brewster was that much of Brewster’s timber quota was within Lubicon Territory that Brewster as a subsidiary of Daishowa couldn’t access because of Daishowa’s agreement with the Lubicons. The Daishowa agreement of course wouldn’t be binding on the KTC.

⁶⁶ Mr. Robb never followed up on his proposal to “buy dinner” for Chiefs Ominayak and Noskiye “to discuss the details of the KTC proposal”.

Columbia-based forestry company called West Fraser Timber Co. Ltd. to jointly buy Brewster Construction from Daishowa and to take over Brewster's timber quotas -- including Brewster's quotas in Lubicon Territory.

Following purchase of the Brewster Sawmill by West Fraser and KTC, the Regional Office of Indian Affairs provided KTC with additional funds to purchase logging equipment. Under pressure from the Lubicons at the Lubicon land negotiating table, the funds were provided on the condition that the equipment purchased with the grant money could not be used within Lubicon Territory.⁶⁷

Daishowa and the Lubicons continue to talk, primarily about harvesting techniques other than clear-cut logging that would be acceptable to the Lubicons post settlement of Lubicon land rights. Daishowa representatives regularly advise that the Alberta government is threatening to take away their logging rights if they don't proceed in Lubicon Territory and argue that the Lubicons should allow them to do so since, they argue, they are more sensitive to Lubicon concerns than anybody else who might end up with those rights. The Lubicon position remains the same with Daishowa and everybody else; namely, no logging in Lubicon Territory until there's a settlement of Lubicon land rights and an agreement negotiated with the Lubicon people respecting Lubicon wildlife management and environmental protection concerns.

The point of the foregoing history is that limited forestry in the unceded Lubicon Territory is not the result of a reassuring agreement with "the principal holder of (provincially granted) rights to log to timber (in Lubicon Territory) -- as falsely suggested in the Canadian submission -- but is rather the result of the continuing struggle of the Lubicon people to survive, to protect their traditional Territory from the known ravages of massive clear-cut logging and to achieve respect for their civil and political rights.

47.) Agreement with Surge Global Energy

The Canadian submission says:

"Oil and resource exploration and development have been ongoing with the lands claimed by the Lubicons for traditional use since 1990 (sic). According to documents available on the Internet, Deep Well Oil and Gas and its partners recently announced plans to develop oil sands leases in the Sawn Lake area of Alberta, on lands within the area claimed for traditional use by the Lubicon Lake Cree. Test wells have been drilled and preliminary results have been positive. In October 2005, two operating partners, Surge Global Energy and Pan Orient Energy, signed an agreement with the Lubicon Lake Cree giving them a say in oil well drilling on the land which they claim. These companies have indicated that the Lubicon Lake Cree will be consulted by them on future drilling plans before they apply to the Province of Alberta for further permits."

The facts are as follows.

⁶⁷ Once the equipment was purchased there was no practical way to prevent government sponsored and funded Kee-Tas-Kee-Now from using the equipment as they pleased.

48.) Deep Well Oil and Gas

On August 31, 2004 the Lubicons learned from newspaper reports that the province had issued oil sands exploration leases right in the middle of Lubicon Territory to a company with close ties to the Alberta government called Deep Well Oil and Gas. Deep Well Oil and Gas subsequently picked up additional adjacent leases through the takeover of another oil company giving them majority interest in oil sands leases covering over 160 square kilometers of Lubicon Territory.

Ex-provincial Culture and International Trade Cabinet Minister Horst Schmid is Chairman of the Deep Well Board of Directors. An ex-Shell oil executive named Len Bolger is one of the Directors. Mr. Bolger is also Co-Chairman of the Alberta Energy Research Institute. The Alberta Energy Research Institute is the planning arm of the provincial Energy Department.

Deep Well announced publicly that it intended to drill up to 512 wells in Lubicon Territory to extract heavy oil. Heavy oil is the small fraction of oil sands deposits that can be extracted using relatively conventional methods. Once the heavy oil has been extracted, companies use the infrastructure built to extract the heavy oil to begin extracting oil from the asphalt-like material in which most of it is embedded.

The method used to extract oil from tar sands deposits of the type found in Lubicon Territory involves injecting large amounts of superheated water or steam into underground layers of tar sands in order to liquefy the material sufficiently to be pumped out of the ground. It takes 4 to 5 barrels of water to produce one barrel of oil. Most of the water cannot be recycled and is lost from the surface of the earth forever. No one knows where all of this water will come from, or what impact pumping these huge amounts of steam into the subsurface will have on the water table and the fragile boreal ecosystem. The entire focus, especially with skyrocketing fossil fuel prices, is the money to be made.

On September 1, 2004 -- after reading in the newspaper about the new Deep Well leases in Lubicon Territory -- the Lubicons wrote Deep Well President and Chief Executive Officer Steven Gawne asking for a meeting to discuss Deep Well plans for Lubicon Territory. Mr. Gawne never responded.

49.) Deep Well Caught Clearing Lubicon Territory Without Consultation or Consent

On March 2, 2005 the Lubicons caught contractors working for Deep Well clearing a large area in Lubicon Territory. The contractors were asked to stop operations until a meeting could be held between the Lubicons and Deep Well as earlier requested. A number of attempts were also made to contact Deep Well to arrange a meeting. Deep well officials did not take or return the calls.

On March 3, 2005 Lubicon legal counsel Richard Gariepy received a phone call from Deep Well lawyer Robert Hladun alleging that the Lubicons were "blockading" the work site and claiming the blockade was costing Deep Well "\$100,000 a day". Mr. Hladun

gave Mr. Gariepy a cell phone number where “a senior Deep Well official” named John Brown could be reached. After a number of tries the Lubicons reached Mr. Brown and a meeting was arranged for later that same afternoon. (Mr. Brown was unavailable to meet earlier in the day because he was meeting with local RCMP asking for police protection for Deep Well contractors.)

Mr. Brown claimed to only be “a consultant” to Deep Well with no authority to make agreements or commitments. He agreed to set up a meeting with Deep Well officials the following week. He promised to phone back with a time and date for the proposed meeting with Deep Well officials. Mr. Brown failed to phone back as promised with a date and time for a meeting with senior Deep Well officials. Deep Well officials continued to ignore repeated efforts to contact them directly.

The Lubicons contacted the Alberta Energy and Utilities Board (AEUB) and inquired about the work Deep Well was doing in Lubicon Territory. The AEUB is the provincial regulatory body responsible for issuing licenses and permits for gas and oil wells in Alberta. Deep Well had not applied to the provincial regulatory agency for the required drilling licenses and the AEUB was unaware that Deep Well had clear-cut a large area in Lubicon Territory involving approximately 18 truck loads of spruce trees and 12 truck loads of aspen trees.

The AEUB ordered the work to stop pending procurement of the required drilling license. Deep Well retroactively initiated the process for obtaining a well license for a single well at the cleared site.

Aware from public information that the proposed project involved 512 wells the Lubicons began exploring means to assess the cumulative environmental impact of the proposed 512 well project rather than just the impact of this first well.

50.) No Cumulative Environmental Impact Assessment in Alberta

No environment assessment of a project like the one proposed by Deep Well is required in Alberta until the company builds a plant on site to process the oil. All that is assessed is the impact of each individual well ignoring the fact that the cumulative amount of contaminants generated by 512 wells is perforce significantly greater than that produced by each of the 512 individual wells. The company could consequently drill 512 wells; build whatever roads, pipelines and other surface infrastructure they require -- and inject 4 or 5 barrels of steam or superheated water into the subsurface for every barrel of oil extracted -- without any assessment of the cumulative environmental, social and economic impact of these activities on the Lubicon people and Lubicon lands. By the time potentially adverse effects of a large-scale tar sands operation are apparent, the damage could have been done. Moreover by the time the plant is proposed the baseline environment will have been significantly altered rendering meaningful environmental assessment impossible.

In addition the mandate of the AEUB has more to do with management of the resource than it does with protection of the environment. In 2005, for example, the people of a

non-indigenous community in northeastern Alberta called Bonnyville were horrified to learn that the AEUB had approved the drilling of a gas well under the lake from which the people of Bonnyville obtained their drinking water. The people of Bonnyville appealed the AEUB decision approving the drilling of the well. The AEUB reaffirmed their approval. The AEUB decision reaffirming the approval reads, in part:

“Underlying almost all of the written and oral objections was the view that the residents were not prepared to accept any risk, no matter how small, to the well-being of Moose Lake because of its importance as a source of drinking water and recreational activities. While the Board acknowledges this sincerely held position, it must weigh the benefits of oil and gas development in the public interest of all Albertans with the potential impacts to the residents and environment of the area.”⁶⁸

51.) Lack of Federal Impact Assessment

The Canadian Federal Minister of the Environment is empowered under Section 48 of the Canadian Environmental Assessment Act (CEAA) to order an environmental assessment of a proposed project if he is of the opinion “that the project may cause significant adverse environmental effects on lands...in respect of which Indians have interests”.

On April 12, 2005 Chief Ominayak wrote the federal Minister of the Environment, Stéphane Dion, asking for a full panel environmental assessment of the Deep Well Oil and Gas heavy oil extraction project.

The Chief wrote that the Lubicons are concerned that the project might contaminate the air, lands and water in Lubicon Territory.

The Chief wrote, in part:

“We were told by officials at Alberta Environment that no environmental assessment is necessary for a project of this sort until the company builds an in situ plant on the site. That means that unless there is a federal environmental assessment of this project the companies will be able to drill up to 512 wells, build whatever roads and other surface infrastructure they require, and begin thermal recovery operations which pump up to four or five barrels of potable water into the ground for every one barrel of oil they get out -- all without any independent assessment of the environmental, social and economic impacts of these activities on our lands and our people...

“These are Lubicon lands. We have never ceded aboriginal title to these lands in any legally or historically recognized way. The Lubicon Lake Indian Nation has never signed treaty with Canada. These lands and resources are the subject of a long-standing land rights dispute between the Lubicons and both levels of Canadian government. For many years now we have been attempting in good faith to negotiate a land rights settlement with Canada which would resolve the question of title in this area. Until such time as the question of title is resolved, however, the Lubicon Nation retains unextinguished aboriginal title in this area.

“Even while we attempt to negotiate the issue of land rights in good faith, the Alberta government has sold leases to these companies to exploit the very lands and resources which are the subject of negotiations. They have never consulted with the Lubicon Nation about the issuance of oil sands leases on our unceded Traditional Territory.

“Canada, for its part, has a fiduciary duty to the aboriginal people of the area to protect our interests. Our interests are now threatened by large-scale oil sands exploitation in the heart of our

⁶⁸ The “benefits” are employment and royalties on the resource paid to the province by the company.

unceded Traditional Territory. We ask that, at a minimum, Canada initiate a full panel review of this project under Section 48 of the CEAA before it is too late...

“We understand these companies intend to drill their first well at any time. They say they will complete the first well by July at the latest. We hope to hear from you as soon as possible.”

On September 9, 2005 Chief Ominayak received a letter from the Director of the Regional Office of the Canadian Environmental Assessment Agency, R. Lanny Coulson, responding to the Chief’s April 12th letter to the federal Environment Minister. Mr. Coulson’s letter was dated August 30, 2005. Mr. Coulson wrote, in part:

“As currently proposed, the Agency understands the project to be the drilling of a single conventional vertical well plus a conventional horizontal production test well from the vertical bore and then potentially a second conventional vertical well plus a conventional horizontal production test well. If the Lubicon Nation has any concern regarding the above noted project I invite written comment to be provided by September 13, 2005 to the Agency to ensure any concerns and/or comments are considered when providing advice to the Minister regarding the April 12, 2005 petition request”.

The Chief responded to Mr. Coulson’s letter on September 12th as follows:

“While it is in the company’s interest to define the project as narrowly as possible when dealing with regulatory agencies, it is the responsibility of regulatory agencies concerned with environmental protection to critically assess a company’s various statements and to consider the full scope of a company’s plans and their cumulative impacts on the environment. This critical oversight is what distinguishes an agency representing the public interest from one which merely rubber stamps decisions made for private interests.

“Your letter, however, accepts Surge Global Energy’s most narrow definition and identifies the “project” under consideration as two conventional horizontal wells...

“While negative results from the initial wells or any other number of other factors could alter the scope of the projects, we have to base our definition of the “project” not on the narrow interpretation the company is now putting forward to limit public and regulatory scrutiny of it’s Sawn Lake project but rather on the company’s well publicized overall plan for oilsands exploitation in our unceded Traditional Territory...

“The proponents of this proposed project -- Deep Well Oil and Gas, Surge Global Energy, Pan Orient Energy and Paradigm Oil and Gas -- say quite openly that they plan to extract almost 820 million barrels of oil from unceded Lubicon Territory through an initial group of up to 512 wells. Once they have extracted the small percentage of oil (approximately 8%) that can be produced through conventional oil extraction methods, these companies have indicated that they plan to inject large quantities of steam or superheated water into the tar sands formation in which the majority of the oil resource is embedded.

“Page 14 of Surge Global Energy’s May 16, 2005 10QSB Report to the Security Exchange Commission indicates that Surge has a ‘farmout’ agreement with Deep Well Oil and Gas which covers ‘63 square miles (164 square kilometers)’. ‘Using an average of four wells per (square mile) section’, the Surge Report continues, Surge ‘would be able to drill over 250 wells on this property’.

“A 2004 Welwyn/Pan Orient Annual Information Form says:

‘Development of the Sawn Lake Property is to be conducted in two phases...Phase 1 consists of drilling 10 pilot wells, currently scheduled for 2005. Phase 2 consists of the

drilling of 64 wells between December of 2006 and June 2007...The drilling and production from the first two phases of drilling are only a fraction of the entire reservoir development plan...'

"A March 28, 2005 Surge news release says:

'Recently the Surge Board of Directors approved an operating budget that will enable Surge to drill at least 15 horizontal wells in the Sawn Lake area over the next 12 months...With Surge's 40% undivided working interest in the properties covered by the farmout agreement, there are estimated to be a total of 328 million barrels of oil reserves in place, of which we expect that the primary recovery, using only conventional cold pumping methods, would yield at least 10% or 32.8 million barrels of heavy oil...'

"Clearly this proposed project involved a lot more than one or two wells. Just as clearly the social, environmental and economic impact of this proposed project cannot be properly assessed without taking into account the cumulative effects of this massive new oil sands project on top of all of the conventional gas and oil activity which is already being conducted in the area...

"You asked whether the Lubicon Nation 'does not object to the initial vertical well and its horizontal production well'. The answer is that we do object to drilling these initial two wells without an assessment of the environmental and social impact of the overall project of which these are a very small part."

On October 4, 2005 Chief Ominayak received a letter from Director Coulson responding to the Chief's letter of September 12th. It reads:

"The Canadian Environmental Assessment Agency (the Agency) acknowledges receipt of your letter received on September 16, 2005 responding to the Agency's August 30th, 2005 letter.

"Prior to making its recommendation to the Minister of the Environment, the Agency is reviewing your comments. In addition, we are awaiting responses from various departments on the potential of the project, as defined in the August 30, 2005 letter from the Agency, to cause adverse transboundary⁶⁹ environmental effects and the significance of any such effects. These responses will be considered in the Agency's recommendation to the Minister on the course of action to be undertaken in regards to the Lubicon Indian petition of April 2005 to the Minister".

The Lubicons have heard nothing further from Mr. Coulson, from "The Agency" or from the federal Environment Minister.

52.) The Stop Deep Well/Surge Global Energy Campaign

On March 11, 2005 Lubicon lawyer Richard Gariepy wrote the President of Surge Global Energy Fred Kelly explaining Lubicon concerns with the project, advising Mr. Kelly of repeated Lubicon attempts to discuss the project with Deep Well and Deep Well's lack of response. The Lubicon lawyer received no response from Mr. Kelly.

Walter Whitehead, the trapper on whose trapline the proposed Deep Well/Surge oil sands project is located, wrote to Deep Well President and CEO Gawne on March 30, 2005 advising Mr. Gawne that Walter Whitehead had never been consulted and expressing his concerns about the proposed project. A noted copy of Walter Whitehead's letter was sent

⁶⁹ What boundaries Mr. Coulson is talking about is not known.

to Surge President Fred Kelly. Neither Mr. Gawne nor Mr. Kelly ever responded to Walter Whitehead's letter.

On July 8, 2005, Walter Whitehead received a letter from Surge President Kelly dated June 22, 2005. The letter gave Walter Whitehead "10 day notice as requested of Surge by Alberta Environmental Protection" that Surge has "recently applied to Alberta Environment for access onto lands covered...on the attached survey plan". The letter advised Walter Whitehead that "traps and traplines affected by this disposition should be removed/relocated at this time to prevent accidental damage".

Walter Whitehead responded to Mr. Kelly by fax on July 11th telling Mr. Kelly "it's a little late to warn me about potential damage to traps and trap lines when your contractors already cleared a large site on my trapline (the previous March 2nd) without any notification or consultation". Walter Whitehead told Mr. Kelly "the lands you are proposing to tear apart are at the heart of the Lubicon Lake Indian Nation's unceded traditional Territory". Walter Whitehead advised Mr. Kelly "your project will not be allowed to go ahead while you continue to ignore the Lubicon Nation's request to meet and discuss the proposed project". Walter Whitehead received no reply to his July 11th fax to Mr. Kelly.

In the meantime Lubicon supporters were informed about the developing problem with Deep Well and its partners Surge Global Energy, Pan Orient Energy and Paradigm Oil and Gas. Opposition politicians raised questions in the provincial legislature. European supporters contacted potential investors. Environmental groups issued statements. Newspaper reporters wrote stories. High school students wrote letters. Market analysts wrote articles and made predictions. A debate raged on the Internet between Deep Well/Surge investors who blamed the company for precipitously falling stock prices and those who blamed the Lubicons.⁷⁰

Surge Chairman David Perez phoned the Lubicon office and a meeting was agreed for July 31, 2005. During that meeting Mr. Perez made a number of commitments including a commitment not to use potable or surface water to extract heavy oil and a commitment to seek Lubicon agreement not to oppose proposed activities before applying to the province for provincially required licenses and permits.

Formalizing agreements in writing with the involved companies proved more difficult. However, on October 14, 2005 a Letter of Agreement was signed between Surge Global Energy, its partners and the Lubicon Lake Indian Nation.

In December of 2005 operating responsibility for the Sawn Lake project passed to another corporate entity created by the participating companies called Signet Energy.

⁷⁰ A typical anti-Lubicon posting read: "What is the population of the lubicon nation? If you eliminated everyone of them it would be considered a blessing to the rest of society...I know the Public Relations Officer from Deep Well Oil and Gas called these first nations people 5th on the human chain when it comes to importance, nothing first about them, perhaps first to win every darwin award possible". Another read: "500 filthy maggots are stopping this development, buggers -- at least DWOG did some bulldozing on their property". A third read: "I am personally all for DWOG bulldozing every square inch of your community and every other ignorant fawk who wants to barricade my future investment...Someone send a yankee to 'accidentally' bomb them. Good riddance!"

Signet Energy officials have verbally indicated that they will honor the terms of the Surge agreement but as yet there is no agreement in writing with Signet.

Where all of this is going is unclear. The Lubicons oppose environmentally threatening “enhanced recovery” steam injection techniques for exploiting the tar sands in their Territory in the same way they oppose clear-cut logging. What acceptable alternative technology might be developed to exploit the involved resource is as yet unknown. At the moment there is no economically viable alternative technology available begging the question of what happens next. Lubicon experience with resource companies to date is not encouraging.

The point of the foregoing, as in the case with the Daishowa agreement, is that the situation with regard to the agreement with Surge et al. is not as simple, straightforward and reassuring as the companies involved have “signed an agreement with the Lubicon Lake Cree giving them a say in oil drilling...and indicated that the Lubicon will be consulted by them on future drilling plans before they apply to the province of Alberta for further permits”. The Surge agreement is again the result of the continuing struggle of the Lubicon people to survive, to protect their traditional Territory and to achieve respect for their civil and political rights.

53.) Hunting, Trapping and Fishing Rights

The Canadian submission says “Wildlife management and conservation, generally speaking, are matters that fall within provincial jurisdiction under the Canadian Constitution”. That is the position of Canada but it is not the position of the Lubicon Lake Indian Nation and, as indicated earlier, it is arguable under Canadian law.

Lawyers for Canada and Alberta assert that Canada transferred Lubicon land to Alberta by virtue of the 1930 Land Transfer Agreement; that the Lubicons are covered by Treaty 8 and that Lubicon land rights consist only of an outstanding land entitlement under Treaty 8 and Section 10 of the 1930 Land Transfer Agreement. The sections in the Canadian submission entitled “Commercial Trapping” and “A Constitutional Right to Hunt and Fish for Food” rely upon acceptance of those assertions.

The Lubicons do not accept these assertions by Canada either as matters of fact or as matters of law. As indicated earlier, the Lubicons are not a party to Treaty 8; Lubicon Territory was not ceded to Canada by Treaty 8 in 1899; Lubicon lands are an “interest other than that of the Crown in the same” under Section 1 of the 1930 Land Transfer Agreement; and Lubicon land rights were therefore not properly transferred to Alberta by virtue of the 1930 Land Transfer Agreement but remain intact and unceded in any legally or historically recognized way.

54.) Hunting, Trapping and Fishing Rights Under Treaty 8

At the negotiations of Treaty 8 the Treaty Commissioners found that the Indians were reluctant to sign Treaty 8 for fear that doing so might adversely affect their hunting, fishing and trapping rights. The Indians were repeatedly assured that their way of life

would not be disrupted except to the extent that the land would be shared. The Superintendent-General of Indian Affairs Clifford Sifton assured the Indians “There is not likely to be any marked change on account of the making of the Treaty”. The Lieutenant Governor of the Territories and Treaty 8 Commissioner David Laird told the Indians that any laws made for the conservation of fish and wildlife were “rather for the benefit of the Indians than of whiteman, as the whitemen live more on farm products than game”.

The official report of the Commissioners regarding the negotiation of Treaty 8 reads:

“Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it...(underlining added)”

The written text of the treaty, however, instead provides:

“...they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes (underlining added)”.

It is the position of the government of Canada that it is only legally bound by the written text of the treaty, not by the written report of the Treaty Commissioners describing what was negotiated and agreed.⁷¹

55.) Impact of Non-Indians on Indian Hunting, Trapping and Fishing Rights Under Treaty

Starting in the early 1920's, and presaging developments in Lubicon Territory 50 years later, an influx of white trappers into Northern Alberta threatened the livelihood of many Indians who turned to the federal government for protection of their Treaty 8 hunting, trapping and fishing rights. These were the same Indians who had been assured 20 years earlier that their hunting, trapping and fishing rights would be preserved. In addition the department had its own concerns; namely, the prospect of increasing welfare costs for Indians who were no longer economically self-sufficient.

The Annual Report of the Department of Indian Affairs to March 31, 1929 reads as follows:

“The condition of the Indians in the northerly and outlying districts who are still dependent upon the chase for their livelihood has become a matter of grave concern to the department.

⁷¹ This is the kind of legal slight-of-hand practiced regularly by Canada with regard to indigenous issues.

“During recent years there has been an alarming increase in the number of white trappers who are encroaching upon hunting grounds in the northern parts of the various provinces, which were formerly used by Indians only. White trappers are using poison extensively, and this illegal and vicious practice is becoming a grave menace to game conservation. Not a single instance of the use of poison by any Indian has ever come to the attention of the department.

“It is felt that unless some protection is afforded, the Indian trappers in the northern regions, where other means of livelihood are not available, may become dependent, owing to the depletion of game.

“Hunting and fishing are the aboriginal vocations of the primitive Indians. By immemorial usage the Indians are conservationists of the game and fish, and may be expected to continue so, if protected; on the other hand, if whites are allowed to deplete the fish and game on Indian hunting grounds, the Indians themselves will naturally take all they can, while they can, and there is a grave danger that such a situation may bring about intensive competition between whites and Indians, ending in the virtual extermination of valuable species. Indian families, in most cases, are permanent residents, and their hunting grounds are recognized among themselves, and handed down from one generation to another.⁷² whereas white trappers are frequently of the itinerant class, whose practice is to trap out an area and move elsewhere (underlining added).

56.) Impact of the 1930 Land Transfer Agreement on Indian Hunting, Trapping and Fishing Rights under Treaty

The Alberta Natural Resources Act of 1930 contains a single section pertaining directly to Indian hunting, trapping and fishing rights. In that section, section 12, “...Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, fishing and trapping game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access”.

57.) Exclusive Indian Hunting, Trapping and Fishing Preserves to Protect Treaty Hunting, Trapping and Fishing Rights.

The federal government was not prepared to abandon its interest in Indian hunting, trapping and fishing rights with the transfer of natural resources to Alberta. The Indian Affairs Branch was facing growing protests from Indians charging that their hunting, trapping and fishing rights under Treaty were being abridged, and the increasing cost of relief to Indians who could no longer make a living by traditional means.

Throughout the 1930's the federal government continued to press the Alberta government for the establishment of exclusive hunting preserves for Indians. The province discussed the idea with federal officials but turned most of its attention to the development of a profitable trapping industry in Alberta. Since the 1920's, when white trappers had greatly increased the fur harvest in the province and the province had imposed a tax on fur exports, the revenues accruing to the province from trapping had become quite substantial. Prior to the advent of large-scale trapping by whites, the Chief Alberta Game

⁷² It is well notable that this 1929 Indian Affairs Annual Report does not accord with Canada's current characterization of Indians as like “the deer in the field” with no proprietary sense of territory.

and Fish Guardian noted in the Annual Reports of the Department of the Alberta Department of Agriculture, 1923-34, Indians only hunted and trapped to meet their needs.

Federal officials argued that exclusive Indian hunting, trapping and fishing preserves were in the interests of conservation. Provincial officials recognized the need for conservation but their interest was in protecting provincial revenues rather than protection of Indian rights or concern with federal welfare rolls. As put by the Chief Alberta Game and Fish Guardian in the Annual Reports of the Department of the Alberta Department of Agriculture, 1923-34, game conservation was seen as “...nothing more or less than a business proposition”.

By 1937 a Catholic Bishop named Breynat had collected affidavits from witnesses to Treaty 8 attesting that the Treaty 8 Commissioners had specifically promised as part of the Treaty 8 negotiations that Indians would be protected from white competition in hunting and trapping. As a result of this renewed pressure, in 1938 the Alberta government once again exchanged correspondence with the federal government on the issue of establishing exclusive Indian hunting, trapping and fishing reserves. The province was prepared to consider establishment of exclusive Indian hunting, trapping and fishing preserves in exchange for the federal government assuming financial responsibility for the health and education of non-status persons of mixed Indian/non-Indian lineage or Metis.⁷³ This proposal was unacceptable to the federal government.

After 1938 Alberta assumed an increasingly unsympathetic attitude towards establishing exclusive Indian hunting, trapping and fishing preserves pursuant to Treaty 8. In 1939 the province implemented the provincial trapline registration system with a deliberate policy of no preference towards Indians in allocation of provincially recognized traplines.

58.) Claims by Canada that Moose Populations are Increasing in Lubicon Territory

The Canadian submission says “As of 1995-96 moose populations have improved in the area claimed as traditional territory used by the Lubicon Lake Cree”. It attributes this information to an Alberta government study entitled “General Status of Alberta Wild Species 2000” and to the Sustainable Resources Development website of the Province of Alberta.

A review of the sources cited in the Canadian submission contains no reference to moose populations in the Lubicon area. Rather the cited report says only that moose populations in the province as a whole are not at risk.

59.) Consultation in Alberta and the Alberta Energy and Utilities Board

The Canadian submission says:

“Since 1995, the Alberta Energy and Utilities Board ((EUB)...has been regulating the development of energy resources in Alberta...The EUB is tasked with ensuring that the discovery,

⁷³ Non-status indigenous people in Canada are a provincial responsibility.

development and delivery of Alberta resources takes place in a manner that is fair, responsible and in the public interest. Public consultations, including consultations with Aboriginal people and groups, are an important aspect of the regulatory function of the EUB.”

In fact the AEUB replaced a predecessor organization called the Energy Resources and Conservation Board (ERCB). History relevant to the issue of consultations and provincial regulation of energy projects is as follows.

60.) The Shell Oil Plant Expansion

In 1984 Shell Oil proposed to build a 200 million dollar expansion on their Peace River tar sands facility just to the west of Lubicon Territory. Prevailing winds carry contaminants from the Shell plant into Lubicon Territory.

A public hearing was held to hear presentations from concerned citizens. The Lubicons made a presentation raising a variety of serious environmental questions the Shell application had failed to address. The ERCB listened politely to the concerns and then approved the facility without responding to the environmental questions raised by the Lubicons.

61.) The Chieftain Pipeline

The following February, Chieftain Development applied to the ERCB to build a major new pipeline across Lubicon Territory. The Lubicons asked their supporters to write directly to the President of Chieftain supporting the Lubicon position that major new energy construction projects should not be commenced prior to settlement of Lubicon land rights. Chieftain Development cancelled the project.

62.) The Rainbow Pipeline

In June of 1985 the Lubicons learned that the Rainbow Pipeline Company had applied to the ERCB for permission to build a major pipeline across Lubicon Territory. The Lubicons prepared to oppose it.

On Friday, July 19, 1985 a lawyer for the ERCB hand-delivered a letter to a Lubicon lawyer that read, in part:

“The Board is aware that the pipeline traverses an area on which the Lubicon Lake Band is claiming aboriginal rights and for which an action in the Court of Queen’s Bench has been commenced.⁷⁴

“The Board does not believe that it can delay its decision on these applications until that land claim is settled particularly since there is not a connection between the current land claim and the Board’s jurisdiction to regulate pipelines in the Province of Alberta. The Board is of the view that the application is properly made and that the route of the pipeline, public safety, environmental

⁷⁴ The Lubicons had applied for an interlocutory injunction blocking further resource exploitation activity in Lubicon Territory pending settlement of Lubicon land rights. The injunction was denied by a Judge who had previously been the head lawyer for one of the defendant oil companies. Details of the legal action were provided to the Committee prior to the 1987 procedural decision to hear the Lubicon complaint.

impacts and other similar matters are not an issue.⁷⁵ The Board concludes therefore that the pipeline should be approved. The Board would like to meet with the Band, Rainbow Pipeline Company, Ltd. and possibly Shell Oil to discuss the Board's decision and possible benefits and impacts this project may have on the Band".

The requested meeting was held in Peace River on August 1, 1985. ERCB representatives reiterated their position that the Lubicon complaint was "outside of the Board's jurisdiction". They said they had no authority to stop development of resource exploitation activity "merely to keep the area the same". They said they had therefore decided "to process" the Rainbow application without holding a public hearing which they said was not a requirement but a matter of discretion on their part. They said they were "meeting with the Band only to explain the Board's decision".

The Lubicons challenged the ERCB's contention that holding a hearing was a matter of discretion pointing out that the ERCB's enabling legislation required the Board to give notice to any person who might be directly and adversely affected by a proposed energy facility and, if that person objects to the proposed development, an opportunity to ask questions and present evidence. The Lubicons noted the mandate does not specify certain types of adverse affects or certain kinds of rights.

Under the circumstances, Lubicon representatives told ERCB representatives, the only available Lubicon recourse was to challenge the Boards interpretation of its enabling legislation in the courts. Challenging the Board's interpretation of the enabling legislation would have cast the sustainability of Board approval decisions in doubt.

The President of the Rainbow Pipeline quickly intervened agreeing to consult with the Lubicons on Lubicon wildlife management and environmental concerns and to offer the Lubicons work on the project in areas they were prepared and qualified to be involved.

63.) The Union Oil Pipeline

On October 2, 1985 ERCB Board member Victor Bohme phoned Lubicon advisor Fred Lennarson and advised that the ERCB had received an application from Union Oil Company to "loop" or "twin" an existing pipeline across the 66 square kilometer area set aside for a Lubicon reserve in 1939.⁷⁶ "Looping", Mr. Bohme explained, is a means of increasing pipeline transmission capacity by constructing a second pipeline parallel to an existing pipeline and then connecting the two pipelines at either end.

Mr. Bohme said he wanted to arrange a meeting between the Lubicons and the Union Oil Company so officials of Union Oil Company could explain the employment and other benefits which the Lubicons could expect as a result of pipeline construction. On instructions Fred Lennarson told Mr. Bohme that the Lubicons opposed construction of another pipeline through the area set aside for a Lubicon reserve in 1939 and asked Mr.

⁷⁵ The Lubicon interlocutory injunction application before the Court of Queen's Bench was supported by thousands of pages of documentary evidence of irreparable harm to Lubicon lands and society caused by resource exploitation activity.

⁷⁶ The existing pipeline was constructed in 1981 over Lubicon objections including a legal challenge which the court agreed to consider as part of the unsuccessful Lubicon application for an interlocutory injunction.

Bohme if the ERCB would be giving the Lubicons formal notice of the Union application. Mr. Bohme assured Mr. Lennarson that the ERCB would be giving the Lubicons formal notice of the Union application.⁷⁷

On October 7, 1985 Lubicon lawyer James O'Reilly received a phone call from federal negotiator E. Davie Fulton advising that officials of Union Oil "were seriously considering a proposal (from Mr. Bohme) to meet with the Band for the purpose of explaining to Band members the urgency of a pipeline across the 64 square kilometers set aside in 1939 and how little damage would be done to Lubicon lands". In any event, Mr. O'Reilly was told, Union Oil planned to proceed with the pipeline in a couple of weeks. Mr. O'Reilly told Mr. Fulton that he doubted the Lubicons would be interested in a meeting to discuss a decision already made which everybody knew the Lubicons opposed.⁷⁸

On October 8, 1985 Lubicon lawyer Ken Staroszik talked with Union Oil lawyer Richard Kline about the Union Oil pipeline. Mr. Kline tried to convince Mr. Staroszik that building the pipeline across the 66 square kilometers set aside in 1939 would cost the least money and cause the least amount of environmental damage because the lands outside the 66 square kilometers were mainly wetlands.⁷⁹ In addition, Mr. Kline argued, because the surrounding area was mainly wetlands, construction outside the 66 square kilometers would could not be done immediately but would have to wait until freeze up and Union Oil wanted to proceed immediately. Mr. Kline asked Mr. Staroszik if Mr. Staroszik could speak to the Lubicons about the matter and arrange for a meeting.

Mr. Staroszik consulted with Mr. O'Reilly. Mr. O'Reilly told Mr. Staroszik that the Lubicons had declined to meet with Union about the pipeline because the only declared purpose of the meeting would be to discuss a decision already made. If Union was prepared to consider other possibilities, Mr. O'Reilly suggested, they should make their proposals to the Lubicons through Mr. Fulton.⁸⁰

On October 10, 1985 the Indian Affairs Critic of the Liberal Party of Canada Keith Penner raised the Lubicon issue in the House of Commons asking the Indian Affairs Minister David Crombie about the Lubicon situation pointing out that an "All-Party Report on Indian Self-Government tabled in 1983 made particular reference to the Lubicon Lake Indian Band in Alberta". Mr. Penner said "The way of life and the economy of that Band have been virtually destroyed by development activity..." He said "Last winter the Minister appointed E. Davie Fulton to make an inquiry into this

⁷⁷ Subsequent developments took over and no notice of application was ever received.

⁷⁸ Mr. O'Reilly was right. Chief Ominayak told Mr. O'Reilly that the Lubicons were not interested in meeting to discuss the urgency of the pipeline and how little damage would be done to Lubicon lands. Chief Ominayak said the Lubicons opposed construction of another pipeline through lands the Lubicons wanted to retain for reserve purposes.

⁷⁹ The reason the Lubicons have always valued the area involved is precisely because it is not wetlands.

⁸⁰ Mr. Staroszik phoned Mr. Fulton on November 25, 1985 and asked Mr. Fulton if Mr. Kline had ever phoned to suggest flexibility or alternative proposals. Mr. Fulton said the only time he'd spoken to Mr. Kline was on October 7th when Mr. Fulton asked Union to reconsider postponing or withdrawing their application.

situation". He asked "Is the Minister prepared to table any and all reports that the Hon. E. Davie Fulton has made concerning the situation of the Lubicon Lake Indian Band?"

Mr. Crombie responded that he's spoken to Mr. Fulton and provincial minister responsible Milt Pahl the day before; that Mr. Fulton was "mediating the matter between the two levels of government and the Indian people involved"; that Mr. Fulton is preparing a further report on the matter and he asked "for the Hon. Member's patience".

The Indian Affairs Critic of the New Democratic Party of Canada Jim Manly issued a press release that said, in part:

"Last February I toured the Lubicon region and saw first hand the genocidal results on the Lubicon people of the oil companies' resource exploitation. Elders spoke of growing alcoholism and social problems. Trappers reported yearly income had dropped to \$400 from previous levels of \$10,000. The number of those on welfare has increased 89%. The Lubicon fear their extinction as a people...

"The Union Oil project must be stopped until the Lubicon land claim is settled. It is highly objectionable that Union Oil is applying for immediate approval of the project from the Alberta Energy Conservation Board in order that the Lubicon Band will not have a chance to voice its opposition. In the past, the board has stated that it does not consider Indian rights to be part of its mandate...

"I have requested a special meeting of the Standing Committee on Indian Affairs and Northern Development. In addition, letters of opposition have been sent to Minister Crombie, E. Davie Fulton, Union Oil Company of Canada and the Alberta Energy Resources Board."

Dennis MacDermott, President of the Canadian Labour Congress, issued a press statement that said, in part:

"The Canadian Labour Congress supports the position of the Lubicon Lake Indian Band...The Lubicon Lake Indian Band's claim to certain lands has been left unresolved for several decades. In the meantime, economic development has proceeded despite the objections of the Band to the point where a traditional way of life is threatened with complete destruction. Before it is too late, we urge the federal and Alberta governments to impose a moratorium on further development such as the planned pipeline, at least until the land claims are settled fairly with the Lubicon Lake Band."

On October 22, 1985 Chief Ominayak held a press conference in Ottawa announcing Lubicon opposition to proposed construction of a pipeline across Lubicon lands by Union Oil of Canada. Joining Chief Ominayak in the press conference was the Primate of the Anglican Church of Canada Archbishop E. W. Scott, the National Chief of the Assembly of First Nations Georges Erasmus, the Indian Affairs Critic for the Liberal Party of Canada Keith Penner, and the Indian Affairs Critic for the New Democratic Party of Canada Jim Manly. Archbishop Scott spoke on behalf of an interchurch coalition sponsored by the Canadian Conference of Catholic Bishops, the Anglican Church of Canada, the United Church in Canada, the Presbyterian Church in Canada, the Society of Friends (Quakers), the Mennonite Central Committee, the Evangelical Lutheran Church in Canada and the Christian Reformed Church. Dennis McDermott, President of the Canadian Labour Congress, made a public statement in support of the Lubicon position while the Lubicon press conference was in progress.

On October 31, 1985 the Confederation of First Nations unanimously passed a resolution opposing the pipeline and supporting the Lubicons.

On October 23, 1985 E. Davie Fulton responded to a letter of October 18th from Indian Affairs Critic for the New Democratic Party of Canada Jim Manly as follows:

“I fully agree with you that it is most undesirable that this application should be proceeded with at a time when the whole question of the Band’s entitlement, and the settlement of this and other outstanding claims, are under active inquiry and consideration. I want to assure you that I have recently made every effort I can think of, by representations to both the Government of Alberta and the Government of Canada, to prevent the application from going forward while this Inquiry is under way, or at the least to ensure that the Band is a party to the proceedings and will be heard as fully and effectively as though the mechanics of the Reserve had been completed. I have endeavored to make it clear that I am very much concerned for the effects on the Band -- and also my Inquiry -- if the application is allowed to proceed without due and effective regard for the Band’s position.”

On November 7, 1985 there was a demonstration of Lubicon supporters in front of Union Oil’s Calgary office. Participating in the demonstration were Calgary Alderman Bob Hawkesworth, Director of the Social Action Arm of the United Church of Canada Carolynne Bouey Shank and President of the Indian Association of Alberta Wilf McDougall. Director Bouey Shank said “Land claims negotiations should continue without pressure from Union Oil’s development plans in the disputed area; Alderman Hawkesworth called on the ERCB to table the Union Oil pipeline application until Lubicon land rights are settled and a public hearing is held on the matter; President McDougall pledged 100% support for the Lubicon struggle to block development until Lubicon land rights are settled and said the IAA would help man barricades if Union Oil attempted to build the pipeline across Lubicon lands.

Responding to the demonstration, a Union Oil spokesman told reporters “The Company considers the land claim to be a matter between the band and the federal and provincial governments and the planned pipeline will not add significantly to any environmental disruption”.

On November 11, 1985, upon a motion by the Alberta Federation of Labour, the Annual Convention of the Alberta New Democratic Party unanimously passed a resolution opposing the pipeline and supporting the Lubicons.

On November 14, 1985, the Vice President of Operations for Union Oil John Vandermeer told reporters “We foresee no adverse impact whatsoever on area wildlife and construction itself is a matter of days”.

At a November 18, 1985 meeting of the Parliamentary Standing Committee on Indian Affairs and Northern Development, Indian Affairs Critic for the New Democratic Party of Canada Jim Manly asked Indian Affairs Minister Deputy Minister Bruce Rawson for a progress report. Deputy Minister Rawson said:

“I do not have anything to announce in terms of hard progress, Mr. Chairman. I will say that we are as aware and concerned about the situation, as all the parties appear to be. We feel the Band should be involved in any new decisions affecting the area. As the Committee may recall the

Minister has appointed the Hon. E. Davie Fulton as his representative. Discussions are ongoing with the province. It certainly is a complex situation and I guess really all I can assure the Committee of is that the Minister remains committed to resolving the concerns as soon as possible and hopes to make an announcement in the near future”.

Mr. Manly responded:

“I find that very hard to accept, considering the length of time this issue has been before the department and the Minister. There is just a stonewall, and I think we all know that the stonewall is the Alberta government. I think we also know that the department and the federal government have certain obligations that they have to meet towards the Lubicon people. “The department has not been willing to assert itself in dealing with the Alberta government to protect the interests of the Lubicon. I think it is absolutely essential that there be action taken immediately to protect their whole way of life...”

Later in that same session of the Standing Committee Mr. Manly asked Indian Affairs Minister David Crombie about Mr. Fulton’s report and recommendations regarding settlement of Lubicon land rights. Mr. Crombie responded:

“I am sure the hon. member knows, Mr. Chairman, that this is not simply a decision to be made only by the federal government. On any change we might be thinking about or any suggestions made by someone else, it requires going to the three parties again. One of the difficulties has been to make sure that each time there has been a nuance, we have had to check it around. I am hopeful that we will be able to conclude our discussion with respect to the interim report very soon and be able to make a statement with respect to it -- both in terms of the land base recommendations and in terms of the financial compensation.

“I want to do so because I want to be able to establish the fact that the government is going to deal with Lubicon Lake, that it has confidence in Mr. Fulton, and that it is able to move the thing quickly as possible. I am sorry that it has taken so long; I did not intend it...”

“With respect to the final report (from Mr. Fulton), I am advised by the deputy earlier that we are about two or three weeks away from the final report...”

Mr. Manly told Mr. Crombie:

“I would, in the ironic mood that is prevailing this evening, simply want to encourage the Minister that this is absolutely essential to the well being, indeed the continued existence of the Lubicon Lake people as a people. I want to impress this on the Minister. I am sure he is aware of it already. I think it has to be stressed. If the Minister is meeting with some intransigence from the Government of Alberta -- I do not expect you to say so, but I understand this is the case -- I hope that you will persist and continue to fight the battle for the Lubicon Lake people. They are a very small group of people and they are up against a very powerful industry and a very powerful province. They depend upon the kind of help that only you, as their Minister, can give.”⁸¹

⁸¹ Mr. Fulton delivered his long awaited final report on February 7, 1986. The Lubicons considered his recommendations helpful and met with Mr. Fulton to discuss the report. The provincial government refused to discuss Mr. Fulton’s report with him or to talk with him ever again. The federal government terminated Mr. Fulton’s mandate without discussing his final report with him. Mr. Fulton was replaced by an ex-Justice Department official named Roger Tasse who was only willing to talk to Lubicons on the government’s recognized membership list prior to the passage of C-31 (1985 amendments to the Indian Act broadening the governments definition of who qualified for Indian status under the Indian Act)”. “Anybody else that thinks they have any rights”. Mr. Tasse said, “can go to court”. Under those circumstances Lubicon land negotiations predictably broke down.

On November 21, 1985 Chief Ominayak obtained a copy of a letter written to the ERCB by Union Oil lawyer Richard Kline. Mr. Kline claimed that Union Oil had made a number of attempts through a number of intermediaries to try and arrange a meeting with the Lubicons but the Lubicons had refused to meet. "As a result", Mr. Kline wrote, "Union Oil feels that it has done its utmost to attempt to listen to the concerns of the Band and deal with them, however, it has been rebuked in every attempt to meet with them." "As a result", Mr. Kline wrote, "Union Oil desires to proceed with its application and requests the ERCB proceed accordingly".

Chief Ominayak responded to Mr. Kline's letter that same day in a letter to the Chairman of the ERCB, Mr. Verne Millard, as follows:

"This letter badly distorts and misrepresents both the nature and the content of various efforts to arrange a useful and productive meeting between Union Oil and the Band.

"At no time did officials of Union Oil agree to do more than 'explain' to the Band the so-called "urgency" of proceeding with construction of their proposed pipeline and how little environmental damage it would supposedly do. They expressed no interest in hearing our views or concerns. And they most certainly did not 'request a meeting that would have a broader scope including discussing various options that might be available in the event the Band agreed to cooperate...(including)...increasing the capacity without necessarily installing any facilities on the Band's proposed reserve lands at this time'.

"Needless to say we would be pleased if Union Oil could do what they want to do without "necessarily" installing any additional facilities on our land. However we do wonder about the purpose of a meeting with us if they can really do what they seem to be suggesting.

"Regarding Mr. Kline's curious comment about not 'necessarily installing any facilities on the Band's proposed reserve lands at this time', we should like to point out and underline and emphasize and make absolutely clear that our aboriginal lands include more than just the 25.4 square miles area (66 square kilometers) on the western shore of Lubicon Lake set aside and agreed by both levels of Government as long ago as 1940."

64.) Agreement with Union Oil

On January 15, 1986 Union Oil Vice President Vandermeer phoned Chief Ominayak and asked for a meeting. Mr. Vandermeer told the Chief Union Oil was prepared to discuss alternatives to "looping" the pipeline across the 66 square kilometer area set aside in 1939. A meeting was agreed for January 17th.

After repeating Union Oil's known arguments as to why "looping" the pipeline across the 66 square kilometer was the best alternative, and repeatedly asking the Lubicons what they'd take by way of financial compensation to allow Union Oil to do so -- which the Lubicons repeatedly refused to consider -- Mr. Vandermeer proposed to "loop" the pipeline only to the northern border of the 66 square kilometer area and then starting again on the other side of the southern border.⁸² This arrangement would allow Union to

⁸² Mr. Vandermeer asked "How much do you want?" The Lubicons told him they didn't want the pipeline built across the 66 square kilometer area. Mr. Vandermeer said "OK, you guys are really tough negotiators, we're prepared to go higher -- how much do you want?" The Lubicons repeated that they didn't want the pipeline built across the 66 square kilometer area. This back and forth went on for some time with Mr. Vandermeer never quite accepting that the issue was not one of money -- even after an acceptable alternative was agreed not involving the payment of money.

transport a greater volume of oil without requiring any construction activity on the 66 square kilometer area set aside in 1939.

Union further agreed to consult the Lubicons regarding Lubicon wildlife and environmental concerns in the immediate area of any construction activity and to offer the Lubicons construction related work the Lubicons were prepared and equipped to do.

The Lubicons agreed to talk again about the possibility of “looping” the pipeline across the 66 square kilometer area after Lubicon land rights had been settled.

65. Agreement with the ERCB

Following the agreement with Union Oil, and in an effort to avoid the kind of public confrontation that had just taken place, the ERCB agreed to ask companies to consult with the Lubicons prior to making application to the ERCB respecting proposed projects in Lubicon Territory and to hopefully obtain Lubicon agreement not to oppose an application to the ERCB. If agreement not to oppose could be made, an application to the ERCB would go forward in the normal way.

As long as the proposed project didn't threaten a particularly sensitive site such as a burial ground,⁸³ or the area the Lubicons sought to retain for reserve purposes post settlement⁸⁴ -- and the company agreed to offer the Lubicons related work the Lubicons were prepared and equipped to do -- agreement not to oppose could usually be made within 24 hours including checking with the involved trapper and faxing off a letter to the ERCB agreeing not to oppose.

In the next several years hundreds of such agreements not to oppose were negotiated. Fewer than a dozen proposed projects had to be cancelled or modified to take Lubicon concerns into account.

66.) The Unocal Sour Gas Processing Plant

In October of 1993 Union Oil, now renamed Unocal, contacted the Lubicons to discuss agreement not to oppose expansion of an existing oil battery station and construction of some new feeder lines. An oil battery station collects oil for transport out of the area by pipeline. Feeder lines connect oil wells from a surrounding oil field to the battery station. Billed simply as add-on to existing facilities the Lubicons saw no reason for concern and agreed not to oppose an application to the ERCB.

The construction was subsequently approved and built. It was only later that the Lubicons learned that the so-called “plant expansion” added a sour gas processing facility to the

⁸³ A burial ground had earlier been bulldozed in the central part of Lubicon Territory near Haig or Fish Lake some 80 kilometers north of Lubicon Lake -- not far from where Surge et al. is currently proposing to develop a tar sands operation.

⁸⁴ The ERCB agreed to advise companies in advance that projects in the immediate area around Lubicon Lake that the Lubicons sought to retain post settlement for reserve purposes would not be considered.

existing oil battery station. A potentially deadly sour gas processing plant located on a hill overlooking the proposed reserve area, down wind and down stream and less than 3 kilometers from the area the Lubicons seek to retain for reserve purposes, was a different matter.

After Unocal got caught trying to slip construction of a sour gas processing plant past the Lubicons by deceit they first tried to argue that they didn't need Lubicon agreement not to oppose because, they claimed, their new sour gas processing facility was outside the 247 square kilometer area proposed reserve area and was therefore supposedly outside of the ERCB "notification area". This claim was demonstrably untrue. Their original letter to the Lubicons on this matter reads "We have been advised by the Energy Resources Conservation Board that the consent of the Lubicon Lake Nation must be obtained in support of the referenced plant expansion".

Told that their new sour gas processing plant was well within the so-called ERCB "notification" area Unocal argued that the notification area shouldn't be any bigger than the proposed reserve area because, they argued, the original agreement provided for a bigger area only because nobody knew in 1986 how big an eventual Lubicon reserve would be or where it would be located. The 1986 ERCB agreement in fact had nothing to do with protecting an eventual reserve area but rather with protecting particularly sensitive Lubicon sites scattered throughout Lubicon Territory including 19 different burial grounds.

The Lubicons appealed the approval of the Unocal sour gas processing facility on the grounds that Unocal had deceived both the Lubicons about the sour gas processing plant, and the ERCB about Lubicon agreement not to oppose construction of a sour gas processing plant.

The hearing lasted ten days over a three week period in November and December of 1994.

A number of interveners applied to give evidence in support of the Lubicon appeal. Unocal tried unsuccessfully to disqualify all interveners under threat by the Unocal lawyer Brian O'Ferrell -- who is coincidentally a law partner of ex-Alberta Premier Peter Lougheed -- that an adverse ERCB decision would "negatively the way Unocal views Alberta as a place to invest".

The President of Unocal Canada Fritz Pershon attended the hearing throughout supported by several other senior Unocal officials, the ex-head of the provincial Native Affairs Secretariat now hired as an expert witness by Unocal, current senior provincial Native Affairs officials backing up Unocal lawyers and the ex-head of the provincial Native Affairs Secretariat, an ex-provincial government wildlife officer hired by Unocal on contract and representatives of an environmental consulting firm which is coincidentally partners with the provincial government in ownership of a controversial toxic waste disposal plant which the province guarantees a profit based on a percentage of the cost of its growing facilities despite having considerable excess capacity.

Lubicon Chief and Council also attended throughout supported by local, provincial, national and international environmental organizations; Indian Nations and organizations; organized labor; human rights organizations; civil rights organizations; aboriginal rights organizations; church representatives, the Alberta Liberal Party, the Alberta New Democratic Party and members of the Lubicon Settlement Commission of Review.

67.) ERCB Agreement Broken

Regarding Lubicon charges of fraud the ERCB concluded that “there was a misunderstanding between the parties in the discussion of this project prior to the issuance of the plant approval”. That wasn’t the evidence. The Lubicon evidence was that Unocal didn’t tell the Lubicons about plans to build a sour gas processing plant. The Unocal evidence was that Unocal did tell the Lubicons verbally about plans to build a sour gas processing plant but didn’t provide the Lubicons with written materials on it in any of the written materials they’d given the Lubicons because they thought their plans could be better explained to the Lubicons verbally.

The ERCB decision goes on to say “While there is some onus on the applicant (Unocal) to present the proposed development in a fair way, there is also an obligation on the affected parties (the Lubicons) to make efforts to understand the implications of the project”. It says “It is not evident that such efforts were made by the Lubicons in securing advice from those in a position to provide it.”⁸⁵

On the question of whether the Lubicons retain unceded aboriginal land rights over traditional Lubicon Territory, and thus whether an agency of the Alberta government had the right to approve construction of a sour gas processing facility on Lubicon Territory, the ERCB concluded both that “the Board...has no authority to enter into such issues”, and that “The Board believes it has full statutory authority to regulate energy related activities on this disputed land and holds the view that the mineral and land surface leases were properly obtained by Unocal from the (Provincial) Crown”.

Going beyond the issue of the Unocal sour processing plant, the ERCB cancelled the 1986 “notification agreement” accepting the factually inaccurate Unocal argument that it was based on protecting an eventual reserve area the location of which nobody knew in 1986 but is now known.

⁸⁵ The decision does not say how the Lubicons could exercise their responsibility to “understand the implications of a project” when they didn’t know it was being planned. Once the Lubicons learned that Unocal had built a sour gas processing plant, the evidence is clear that they consulted broadly in an effort to understand the implications of having a sour gas processing plant located on a hill over looking their proposed reserve area, down wind and down stream from where they raise their children.

PART V: COMMENTS ON PART IV OF THE FOLLOW-UP SUBMISSION OF THE GOVERNMENT OF CANADA REGARDING “CONSULTATION PROCESSES IN RESPECT OF LICENCES FOR ECONOMIC DEVELOPMENT IN ALBERTA”

68.) Alberta’s Consultation Model

The Canadian submission says:

“In May of 2005, the Province of Alberta introduced a new policy, the First Nations Consultation Policy on Land Management and Resource Development,⁸⁶ specifically to address consultations with Aboriginal people. Alberta is currently engaged with industry and First Nations in the development of the various guidelines required by each government ministry in order to fully implement the new policy. It is our understanding that at every step in the development of this new consultation process, efforts have been made by Alberta to engage each of the First Nations in Alberta, including the Lubicon Lake Cree, and to engage industry.”

The truth is as follows.

In 2004 a provincial official named Andy Masiuk provided the Lubicons with a draft copy of Alberta’s “Proposed First Nations Consultation Policy on Land Management and Resource Development”. That was the extent of Lubicon involvement in its development. The other First Nations in Alberta have all rejected the provincial government’s new First Nations consultation policy as inadequate, unsatisfactory and unacceptable.

Mr. Masiuk told the Lubicons that the new provincial “Consultation Policy” covers basically the same ground and supercedes a wildlife management agreement and environmental protection agreement negotiated between the Lubicons and the provincial government in 1988, pursuant to the Grimshaw (reserve land) Accord, and designed to come into force at the point of settlement of Lubicon land rights. In fact this new provincial “Consultation Policy” does not cover the same ground as the 1988 agreement and the Lubicons do not accept that the provincial agreement has the right to unilaterally decide to replace an agreement that provides, among other things, “This Agreement may only be amended by the mutual agreement of Alberta and the (Lubicon Lake) Band”.

The 1988 agreement between the Lubicons and the province “Respecting Wildlife and Integrated Land Use Management for the Lubicon Lake Area” creates, concurrent with settlement of Lubicon land rights, a special provincial wildlife management unit covering the entire 10,000 square kilometer Lubicon Territory -- managed by a Wildlife Management Council on which the Lubicons have significant representation -- with powers and responsibilities that include:

- a.) allocation of traplines (Registered Fur Management Areas);

⁸⁶ “Resource development” in this context is a euphemism for “resource exploitation”. Resources are being taken. Nothing is being “developed”.

- b.) determination of how much big game can be taken; how much big game is required for the “Indian subsistence harvest”; and how many hunting tags can consequently be issued to people from outside the area;
- c.) identification of critical ecological, cultural and historical significance for protection.
- d.) authority to review and advise Alberta on land use considerations affecting wildlife, forest management plans, fur management regulations, the Trappers’ Compensation Program, hunting seasons, fishing seasons and related enforcement issues.

The province’s new “First Nations Consultation Policy on Land Management and Resource Development” only requires companies or government to consult with the First Nation “where the development of natural resources on Crown land may infringe First Nations’ Rights and Traditional Uses”. It does not require companies or government to accommodate First Nations’ Rights or Traditional Uses. The requirement is to consult; not to reach agreement. Having consulted the company or government can proceed. The obligation to consult under the new provincial consultation policy has been met. The process is controlled by Alberta and all decision-making power remains with provincial regulatory bodies.

PART VI: COMMENTS ON PART V OF THE FOLLOW-UP SUBMISSION OF THE GOVERNMENT OF CANADA REGARDING “STATUS OF NEGOTIATIONS BETWEEN THE GOVERNMENT OF CANADA AND THE LUBICON LAKE CREE”

69.) The 1989 “Take’-it-or-Leave-it” Lubicon Settlement Offer

The Canadian submission says:

“In 1989, following a number of years of thorough negotiations regarding the claim of the Lubicon Lake Cree,⁸⁷ the Government of Canada presented a formal offer to the Lubicon Lake Cree with a view to satisfying Canada’s obligations pursuant to Treaty 8.⁸⁸ The Human Rights Committee found in 1990 that this offer was appropriate to rectify the threat to their rights under Article 27 of the Covenant that the Lubicon Lake Cree perceived from proposed resource development in and around their traditional hunting and fishing areas.”⁸⁹

The truth is as follows.

Canada’s “offer to the Lubicon Lake Cree with a view to satisfying Canada’s obligations pursuant to Treaty 8” was unexpectedly dropped on the Lubicons on a “take-it-or-leave-it” basis on January 24, 1989. The Lubicons were told negotiations were over if they didn’t accept it. They didn’t accept it and negotiations ended.

The 1989 Canadian offer was based on normal government programs and services available to all Indians in Canada irrespective of land rights. It included neither financial compensation nor self-government and made no provision for the Lubicons to once again achieve economic self-sufficiency. The details of Canada’s 1989 “take-it-or-leave-it” are provided in Lubicon Supplement No.10 to Communication No. 167/1984 dated 22 March 1989.

Normal Canadian government programs and services for Indians in Canada provide for subsistence and intergenerational poverty and dependency on government provided welfare. They are neither designed nor intended to provide for self-sufficiency. The Lubicons rejected the 1989 “take-it-or-leave-it” offer because they are not prepared to cede the heritage of their children and children for a future on welfare that they could have in any case.

The 1990 Human Rights Committee decision does not say the Committee found the 1989 “take-it-or-leave-it offer “appropriate to rectify the threat to (Lubicon) rights under article

⁸⁷ The negotiations that ended abruptly on January 24, 1989 with a “take-it-or-leave-it” offer by Canada started the previous November 29th. Those negotiations therefore occurred over a two month period and were interrupted in mid-stream with a “take-it-or-leave-it” offer -- not “following a number of years of thorough negotiations”. While there had been talks about talks before -- and negotiations with Mr. Fulton during 1984 and 1985 -- none of the earlier talks had ever produced anything and the negotiations that commenced on November 29, 1988 started from scratch.

⁸⁸ The negotiations were conducted on a “without prejudice” basis with regard to the positions of the parties on the nature of Lubicon land rights. The position of Canada is that the Lubicons only have outstanding treaty land entitlement rights. The position of the Lubicons is that they retain unceded aboriginal land rights.

⁸⁹ This decision is reported in UN document CCPR/38/D/167/1984 dated March 28, 1990.

27 of the Covenant that the Lubicon Lake Cree perceived from proposed resource development in and around their traditional hunting and fishing areas”. The UNHRC decision says “historical inequities...and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 for long as they continue”.

However, taking at face value Canadian assurances that Canada was seeking a negotiated settlement with the Lubicons that would respect Lubicon rights -- as supposedly evidenced by a settlement offer that Canada did not tell the UNHRC had been tabled on a “take-it-or-leave-it” basis -- the Committee also found that Canada “proposes to rectify the situation with a remedy that the Committee deems appropriate within the meaning of article 2 of the Covenant”.⁹⁰

Commenting on the relationship between finding Canada in violation of the Covenant so long as the situation continues, and the finding that Canada proposes to rectify the situation with a remedy that the Committee deems appropriate within the meaning of article 2 of the Covenant, a Committee official was quoted in the Canadian media as saying the Committee “is telling both sides to continue negotiating in good faith (underlining added)”.

The interpretation of the 1990 decision that the Committee “is telling both sides to continue negotiating in good faith” is consistent with the Concluding Observations of the Eighty-Fifth Session of the UN Human Rights Committee in October of 2005 that reads as follows:

“The Committee is concerned that land claim negotiations between the Government of Canada and the Lubicon Lake Band are currently at an impasse...The State party should make every effort to resume negotiations with the Lubicon Lake Band, with a view to finding a solution which respects the rights of the Band under the Covenant, as already found by the Committee...”

70.) The Nature of Lubicon Land Rights

The Canadian submission says “the land at issue in the Lubicon Cree claim lies within the territory covered by Treaty 8”. It says “The land rights of the Lubicon Lake Cree, therefore, are governed by Treaty 8”. If this were true it would let Canada off the hook for transferring rights to land that Canada did not properly hold. However, as indicated earlier in this submission, indigenous land rights are neither determined nor extinguished simply by the geographic location of the Territory involved.

The Canadian submission says since Lubicon Territory is located “within the territory covered by Treaty 8...some aspects of the Lubicon Lake claim fall within the Specific Claims Policy”. Again if this were true things would be simpler for Canada which has a policy box for Indian land not covered by Treaty, which Canada calls “Comprehensive Claims”; and a policy box for Indians who are party to treaty but haven’t received their

⁹⁰ That the Committee would find a negotiated settlement to be an appropriate remedy, as distinct from the “take-it-or-leave-it” offer being an appropriate remedy, is consistent with the 1987 Committee procedural decision that “there are no effective (domestic legal) remedies still available to the Lubicon Band”.

reserve land entitlement under treaty or all of it, which Canada calls “Specific Claims”; but no policy box for Indians who are not a party to treaty, and are consequently not covered by treaty, but who live in an area where others are a party to treaty.

To preclude this very problem treaty commissioners tried to make sure that they got all the Indians in the area signed up. A second treaty party was consequently sent out in 1900 to sign up known indigenous societies that were not signed up in 1899.

In his December 11, 1900 report on negotiating adhesions in 1900 with indigenous societies that were missed when Treaty 8 was negotiated with others in 1899, the Treaty Commissioner, J. A. MacRae, says:

“My commission to take adhesions to Treaty Eight was designed to enable me to treat with the Indians of Fort St. John in the Upper Peace River, and the various Bands on the Great Slave Lake that trade with Fort Resolution, to the end of bringing them into treaty relations with Her Majesty’s government.”(underlining added)

The January 3, 1901 Order In Council ratifying the adhesions to Treaty 8 negotiated in 1900 says:

“On a report dated December 22, 1900, from the Superintendent General of Indian Affairs referring to the Order in Council of February 20, 1900, approving of the Treaty known as Treaty 8, made in 1899, with the Cree, Beaver, Chipewyan and other Indians inhabiting the territory lying within and adjacent to the Provisional District of Athabasca, and stating that as the Commissioners who negotiated treaty with the above mentioned, were unable last year to meet the Indians of Fort St. John and Fort Resolution, it was necessary to appoint a Commissioner during the season of 1900 to take the adhesion of the Indians in those localities and on March 2, 1900, James Ansdell MacRae, Esquire, was commissioned by Order and Council to obtain such adhesions.”

As indicated earlier, all land negotiations between Canada and the Lubicons have been on a without prejudice basis with respect to the positions of the parties on the nature of Lubicon land rights. It is the position of the Lubicons that they retain unceded aboriginal land rights to their traditional Territory. It is the position of Canada that the Lubicons are somehow covered by Treaty 8 but will still have to sign an adhesion to Treaty 8 as part of any settlement of Lubicon land rights.⁹¹

71.) The Lubicon Request for Reserve Land

The Canadian submission says:

“Due to the nomadic lifestyle of the Cree Indians living in northern Alberta in 1899, the year Treaty 8 was concluded, it was not unusual for groups of the Cree to delay their request for reserve land.”

⁹¹ Technically the Lubicons could sign either an adhesion to Treaty 8 or a whole new treaty with different terms. This point has been discussed at the negotiating table many times with the Lubicons preferring to negotiate a whole new treaty and Canada determined to bring the Lubicons into Treaty 8 as part of any settlement agreement. In the end the Lubicons are prepared to sign an adhesion to Treaty 8 if settlement terms not limited to the terms of Treaty 8, which would not include financial compensation, self-government of off-reserve wildlife management and environmental protection rights, can be agreed.

This imagery is of course consistent with the “deer in the field” myth Canada is seeking to create but in fact the Lubicons were no more “nomadic” than people who live in the suburbs, work downtown and have a summer cottage. In the fall the Lubicons would fan out throughout their vast Territory to traplines historically associated with their family where they would stay in permanent cabins they owned. In the spring they would return to open prairies around Lubicon lake to get away from the bugs, gather wild foods, care for little gardens, repair trapping equipment and where they would again live in permanent cabins they owned. In the fall they would return to their traplines and the regular, predictable cycle of Lubicon life would be repeated.

The Canadian submission says:

“Prior to 1916, various groups of Cree used land at Lubicon Lake as a seasonal refuge. After the seasonal camp grew into a permanent settlement, a request for Band status and Reserve land was made”.

“Once they decided to settle their community into a fixed location in the 1930’s, the Cree Indians living at Lubicon Lake petitioned the Canadian government for Band status under the Indian Act and for Reserve Land according to the terms of Treaty 8.

“The Lubicon Lake Band was established under the Indian Act in 1940.”

These comments are a total fabrication and Canada knows they are a total fabrication.

Prior to the influenza of 1918 a much larger Lubicon population lived in 39 known communities scattered around Lubicon Territory with 19 documented burial grounds. The existence of these communities can be documented back to 1850 in the records of missionaries and back to 1750 in genealogical records. The three main communities were at Lubicon Lake, Fish (Haig)Lake and Bison Lake. Canada knows all of this because of documentation produced for court cases and because of the joint genealogy study in which Canada participated.

The Lubicons did not “petition...for Reserve Land according to the terms of Treaty 8” in the 1930’s. They did not know the reserve land terms of Treaty 8 in the 1930’s.

Moreover the terms of Treaty 8 were never discussed with the Lubicons. Despite the provisions of the Royal Proclamation and the fact that adhesions were negotiated with others both before and after first contact with the Lubicons, government officials decided that negotiation of a treaty or an adhesion to treaty was not necessary and that the Lubicons could simply be added as a “band” of status Indians entitle to the benefits of Treaty 8 -- including establishment of a Lubicon reserve.

The Lubicons started trying to make contact with Canada in the 1930’s because they understood from intermediaries on the periphery of their Territory that white people were going to be coming into the bush and trying to make a living by hunting and trapping.⁹² They understood, again through intermediaries on the periphery, that the purpose of making treaty was to protect Indian lands -- an idea Indians got from Canadian

⁹² This movement of white trappers was also noted migration was noted in the Annual Report of the Department of Indian Affairs to March 31, 1929 quoted in section 55 of this submission.

government officials. Back the in bush, isolated, familiar only with their own culture, history and religious beliefs, they believed all they needed to do was let the white people know Lubicon Territory was their land and there would be no problem.

The history of Lubicon contact with Canada is documented in section 12 of this submission on first contact and in sections 13 through 16 on the promise to establish a Lubicon reserve. The documents quoted in these sections are all either government of Canada or government of Alberta documents. Canada is well aware of these documents. These documents give the lie to statements made to the Committee by Canada in this section of the Canadian submission.

72.) Canadian Efforts to Negotiate a Settlement of Lubicon Land Rights

The Canadian submission says:

“Since the 1980’s, with the onset of interest in major resource development projects in northern Alberta, the Government of Canada has been working toward reaching a settlement of the land claims of the Lubicon Lake Cree.”

This statement is untrue and Canada knows it is untrue.

Peter Lougheed was elected Conservative Premier of Alberta in 1971. One of the planks of his new government was “development” of northern Alberta.

As part of “developing” northern Alberta the provincial government started construction of an all weather road into Lubicon Territory from Peace River. Again concerned about an influx of outsiders into their Territory, the Lubicons made renewed efforts to contact the government about their land rights. Neither level of Canadian government would talk to the Lubicons deeming them to be merely “squatters on provincial Crown land”.

The Lubicons contacted the Indian Association of Alberta, an Indian political organization, and asked for help. The Indian Association involved lawyers. Neither level of Canadian government would talk to the leaders of the Indian Association or Indian Association lawyers about Lubicon land rights.

Indian Association lawyers advised the Lubicons to file a caveat under provincial land registration putting resource companies on notice that title to Lubicon Territory was disputed. The provincial government refused to accept and file the caveat as provincial land registration legislation then provided.

In 1974 Indian Association lawyers went to court asking the court to order the provincial government to obey provincial law and file the caveat. The government of Canada, with constitutional fiduciary responsibility for Indians and Indian lands and the rights of a recognized band of status Indians involved, intervened on behalf of the province.

The province asked the court for a postponement of the hearing of the case pending the outcome of a similar case in the Northwest Territories called the Paulette case. The Paulette case went against the Indians in the Northwest Territories but the decision read

that the court would have ruled for the Indians if the land registration legislation in the Northwest Territories read like the land registration legislation in the provinces of Alberta and Saskatchewan.

The Alberta government went back to court and asked the court for another postponement of the hearing of the case during which time the provincial government re-wrote the provincial land registration legislation, revised the sections of the legislation under which the Lubicons went to court, and made the effect of the re-written legislation retroactive before the time the Lubicons went to court. The court then dismissed the Lubicon action as no longer having any basis in law.

The all-weather road was completed into Lubicon Territory in 1979-80 with consequences of which the Committee is aware.

In 1980 the Lubicons undertook an aboriginal rights action in the federal court of which the Committee is aware.

In 1982 the Lubicons asked the provincial court for an interlocutory injunction freezing resource exploitation activity of which the Committee is aware.

In 1983 the World Council of Churches wrote Canadian Prime Minister Pierre Trudeau a letter of which the Committee is aware charging that “the Alberta government and dozens of multi-national oil companies have taken actions which could have genocidal consequences” for the Lubicons.

In 1984 the Lubicons filed the complaint with the UNHRC of which the Committee is aware.

Although there were discussions back and forth with Canada about all of this, primarily in a legal adversarial context, there were no serious discussions regarding negotiation of Lubicon land rights until Mr. Fulton was appointed by the Minister in the late fall of 1984.

73.) Land

Land is basically agreed but there is no reserve or anything else until all of the elements of settlement are agreed. To quote Chief Federal Negotiator Dr. Bradford W. Morse, “Nothing is agreed until everything is agreed”.

74.) Money and Reserve Construction

As indicated earlier, reserve construction is agreed. It’s based on what’s available under normal government programs and services and has changed little from the 1989 “take-it-or-leave-it” offer. The differences in the numbers are largely due to inflation and accretions in what’s available under normal government programs and services.

Although the federal government represents reserve construction money as a “global offer” the essence of which is supposedly flexibility, the amount involved is in fact tied to federal government requirements and criteria such as so many students per classroom, average family size for number of houses, road construction specifications for different classes of roads and so on. In other words the money has to be used to build specified buildings and facilities consistent with specified requirements and criteria. The true purpose of the “global offer” is to limit federal financial exposure with a large-scale, complicated, multi-year construction project.

The Canadian submission says:

“This new community is to be located where the Lubicon Lake Cree were residing in 1939, prior to their voluntary move to the community of Little Buffalo. A new community at Lubicon Lake will cost almost twice as much as an upgrade to the current community at Little Buffalo.”

What’s being implied here is that it’s costing Canada more money to move the Lubicons from place to place. The implication is untrue. The “almost twice as much” calculation is fictional.

The Lubicons did gradually move from Lubicon Lake to Little Buffalo Lake in the 1950’s, a distance of about 8 kilometers, in order for their children to be able to go to a small, on-again off-again mission school. They do want to return to Lubicon Lake, which is where they’re from. Had their traditional hunting and trapping economy and way of life not been destroyed by multi-billion dollar resource exploitation activity without their consent and over their protest, they could have returned to Lubicon Lake at their pleasure on their own at no cost to Canada.

It is not true that it will cost almost twice as much to build a new community at Lubicon Lake than it would cost to upgrade the current community at Lubicon Lake. Moreover the numbers have never been calculated. To suggest otherwise is pure fabrication.

The homes in Little Buffalo are small, flimsy, crowded, poor quality, poorly insulated bungalows without indoor plumbing. Numbers were run on how much it would cost to provide them with running water and bring them up to minimum Canadian health and safety standards. It was determined that it would cost more to bring them up to minimum Canadian health and safety standards than it would cost to build new houses. Currently the proposal at the negotiating table is to use them for storage buildings at the expense of the owner. Everything else with the exception of a rudimentary gravel road system built by the province in Little Buffalo as part of their 2 acre land tenure program will have to be built one place or the other at basically the same cost.

The Canadian submission says:

“In 2003, the Lubicon Lake Cree began to express the wish to have some of their members, particularly their Elders, remain at Little Buffalo Lake. The Government of Canada has agreed that the terms of settlement would include some upgrades to the community in Little Buffalo”.

This is the situation referred to earlier in section 26 of this submission involving exchanging earlier agreed reserve land with valuable gas reserves -- which the province wants to retain -- for the Little Buffalo land. If that happens some Elders have indicated that they would prefer to stay where they are rather than go to the effort of relocating. The cost of upgrades is a wash as between building new roads to connect the proposed new road system at Lubicon Lake to the provincial road system, or up-grading the existing road system in Little Buffalo Lake and using it to connect the proposed road system at Lubicon Lake to the provincial road system.

75.) Economic Development

In the same way the Canadian submission deliberately confuses reserve construction costs with financial compensation, it deliberately confuses Lubicon economic development proposals on the table in writing for negotiation since 1984 with financial compensation.

Carefully researched and repeatedly vetted by Canadian officials, Lubicon economic development proposals are now basically agreed. They include things to try and replace the traditional Lubicon hunting and trapping economy based on wild plants and animals with a hopefully viable mixed economy based on agriculture and the fact that the Lubicons now live in the middle of massive resource exploitation activity that is still remote from sources of commercial goods and services.

Financial compensation is money to generate independent interest revenues to meet the civic needs of current and future Lubicon society -- a kind of tax base so to speak for a society that has effectively lost the national lands and resources upon which societies normally base taxes. Canada refuses to negotiate financial compensation despite the fact that it has been a separate, mutually agreed settlement item on the table for negotiation since 1984.

The Canadian submission suggests, falsely, that these Lubicon economic development proposals are based on "resource development within their Proposed Reserve (particularly oil and gas extraction) to advance their economic development and self-sufficiency." As is the case with so much of what's said in the Canadian submission, this is untrue and Canada knows it's untrue. Exploitation of on-reserve gas and oil resources is to the Lubicons a dicey proposition at best and one they intend to approach with great care so they don't destroy the long term agricultural potential of reserve lands, required to support their people forever, for short term economic profit.

Lubicon economic development proposals, well known to Canada, include clearing reserve land for agricultural purposes; cultivation of grain and forage crops on cleared reserve land; development of a large-scale cow/calf cattle operation taking advantage of Lubicon familiarity and comfort with large animals; construction of a large animal veterinary clinic to provide for Lubicon animals and provide a career line for their young people; construction of a professional slaughterhouse to provide for their own needs and to provide meat products to sell to resource company camps scattered throughout Lubicon Territory; purchase of a refrigerator truck to deliver meat products to resource

company camps scattered throughout Lubicon Territory; development of on-reserve gravel resources and purchase of a concrete batch plant to provide for their own construction needs and to produce gravel and concrete swamp weights and drilling pads for resource companies working throughout Lubicon Territory; development of a commercial wild rice crop in area lakes considered to have excellent potential for cultivating wild rice; development of a commercial berry crop for a rapidly expanding specialty market; construction of a general store, gas station and coin laundry to provide for their own needs, provide an outlet for their meat and agricultural products and to cater to resource company workers scattered throughout Lubicon Territory; and the construction of a 15 unit motel with a restaurant to provide for their own needs and to cater to the needs of resource company workers scattered throughout Lubicon Territory.

76.) Self-Government

See section 21 of this submission on Canada's refusal to negotiate recognition of the right of self-government as part of a settlement of Lubicon land rights; section 22 of this submission on instructions to Canada's self-government negotiators on how to negotiate self-government agreements that are not legally binding on Canada; and section 34 of this submission on indigenous self-government in Canada.

77.) Current Status of Negotiations

The Canadian submission says:

“Negotiators for the Government of Canada have a mandate from the federal Cabinet to settle, pursuant to Treaty 8, all aspects of the Lubicon Lake Cree claim. In addition, the mandate includes authority to negotiate the funds to construct a new community for the Lubicon Lake Cree and to negotiate a framework agreement for their self-government, which is the first step toward a self-government agreement.”

This is deliberately tricky language and deserves close examination.

First it is not what federal negotiators at the negotiating table say about their mandate. Federal negotiators at the table say they have no mandate to negotiate either financial compensation or self-government as part of a settlement of Lubicon land rights.

Secondly Canada is carefully separating settlement of Lubicon land rights from Canada's negotiated and agreed obligations to fund reserve construction. Federal negotiators argued at the table that the Lubicons would not want to jeopardize a constitutionalized land settlement agreement, which they characterize as forever, with some supposedly inconsequential dispute over whether Canada has met its negotiated and agreed obligations to fund reserve construction as part of that settlement agreement.⁹³ The Lubicons reject this position on the part of Canada and maintain that Canada cannot expect to keep negotiated land rights and default on the terms of the agreement by which Canada obtains those land rights. The language currently agreed at the negotiating table,

⁹³ In the case of the James Bay settlement in Northern Quebec such a supposedly inconsequential dispute involved raw sewage running down the street in the community resulting in a number of serious medical problems.

as part of the capital (reserve construction) agreement, is “The Parties acknowledge and agree that any failure to abide by a decision (of an agreed dispute resolution tribunal regarding default under the reserve construction agreement) shall constitute a breach of the Final Settlement Agreement”.

Thirdly the “authority to negotiate...a (non-binding) framework agreement for (Lubicon) self-government” is not authority to negotiate recognition of self-government as a part of a settlement of Lubicon land rights. In this regard see section 21 of this submission on Canada’s refusal to negotiate recognition of the right of self-government as part of a settlement of Lubicon land rights.

Footnote 23 in the Canadian submission reads:

“The negotiation of the final agreement setting out the practical arrangements for self-government would be carried out in further the (sic) self-government negotiations if the Lubicon Lake Cree pursued that process after the land claim settlement negotiations.”

What this means, once one gets through all of the deliberate obfuscation, is that federal negotiators have no mandate to negotiate self-government as a part of settlement of Lubicon land rights but Canada is prepared “to enter into a (non-binding) Self-Government Framework Agreement pursuant to Canada’s Inherent Rights Policy” -- independent of Lubicon land settlement negotiations -- “or to include legally binding clauses in the Land Settlement Agreement, agreeing to enter into self-government negotiations after the successful ratification of the Land Claim Agreement”.⁹⁴

The Canadian submission says:

“From the perspective of the Government of Canada, the global offer was fair both in respect of the Lubicon Lake Cree and in light of settlements with other First Nations that are parties to Treaty 8 and that have settled similar claims. The financial aspect of the offer was not acceptable to the Lubicon Lake Cree and agreement could not be reached on the self-government aspect of the Lubicon Lake Cree claim, leading to a failure to reach a settlement in 2003. The difference in approach to self-government between the Government of Canada and the Lubicon Lake Cree has led to the refusal by the negotiators for the Lubicon Lake Cree to continue any negotiations”.

First the use of the term “global offer” purposefully confuses agreed reserve construction and economic development costs with things that are not agreed such as financial compensation and self-government. The so-called “global offer” pertains only to reserve construction.

Secondly there are no “other First Nations that are parties to Treaty 8 and that have settled similar claims.” The closest examples would be the government fabricated Woodland Cree Band and the previously unrecognized Loon River Band; both of which were represented in land settlement negotiations with Canada by government selected and paid lawyers; both of which signed settlement agreements drafted for them by the

⁹⁴ See section 21 of this submission on Canadian refusal to negotiate recognition of self-government as part of a settlement of Lubicon land rights.

government⁹⁵; both of which joined or “adhered” to Treaty 8 only as part of their government prepared settlement agreements.

Thirdly it is a blatant misrepresentation to suggest negotiations broke down over “a difference in approach to self-government negotiations between the Government of Canada and the Lubicon Lake Cree (leading) to refusal by the negotiators for the Lubicon Lake Cree to continue any negotiations”. Lubicon negotiators did not refuse to negotiate. Government negotiators tabled positions that they refused to negotiate saying that they had no mandate to negotiate them. All that would have been required for negotiations to continue, and all that is still required for negotiations to continue, is for government negotiators to return to the table with a mandate to negotiate long-standing and pre-agreed settlement items in good faith including financial compensation and recognition of the right of self-government as part of a settlement of Lubicon land rights.

The Canadian submission claims:

“The Government of Canada has made several attempts to resume negotiations, most recently in November of 2005. Out of concern for the length of negotiations, the Government of Canada made an offer for partial settlement to the Lubicon Lake Cree at the end of 2005...An outline of this offer for partial settlement, provided to the negotiators for the Lubicon Lake Cree by the Government of Canada, was attached by Lubicon Lake Cree to representatives to their submission to the Committee on Economic, Social and Cultural Rights on the occasion of Government of Canada’s fourth and fifth reports under that Covenant and is therefore available on the UN website”.

The Canadian submission then goes on to complain in footnote 24 that:

“This confidential offer was subject to negotiation privilege. In a similar fashion, the Lubicon Lake Cree provided the Human Rights Committee with a privileged document prepared by the Government of Canada as instructions for its negotiators dealing with self-government issues. The Lubicon Lake Cree characterized this document, which included privileged legal advice on the meaning of possible language to be included in final agreements, as a mandate to negotiate in bad faith.”

It is factually inaccurate to say “The government of Canada has made several attempts to resume negotiations”. Rather Canada has largely ignored a number of written offers by Lubicon Chief Ominayak to return to the table and negotiate all outstanding settlement items in good faith occasionally reiterating Canada’s non-negotiable positions on financial compensation and self government.

The federal government’s entire effort to resume negotiations consisted of presenting the Lubicons with a non-binding draft “Memorandum of Intent” in November of 2005 providing that “the parties will pursue an agreement” that didn’t include key settlement items including economic development, financial compensation or self-government. Regarding the missing items the non-binding draft “Memorandum of Intent” says only “All other elements of the Lubicon Lake Land Claim Settlement Agreement would remain outstanding and eligible for future negotiation”.

⁹⁵ The Woodland Cree Band effectively signed the “take-it-or-leave-it- settlement offer drafted by Canada and tabled with the Lubicons on January 24, 1989.

This draft “Memorandum of Intent” is the document the Canadian submission now characterizes as “an offer for partial settlement...subject to negotiation privilege”. It is not an offer to settle of any kind. It is an offer to return to the table but only if the Lubicons accept in advance Canada’s position on key settlement issues. Notably it was made after two years of no negotiations to a society Canada knows is under great stress.

How this non-binding draft “Memorandum of Intent” comes to be covered by “negotiation privilege” is unknown. There was no discussion about it being a confidential document. There was no agreement that it would be held confidential. There was no agreement that negotiations would be kept confidential, although federal negotiators sought such an agreement. The only thing the Lubicons agreed with regard to confidentiality was not “to negotiate in the media” while negotiations were proceeding, which the Lubicons respected and federal negotiators did not.

The obvious reason the Lubicons feel compelled to release these documents to the Committee, and to others, is because Canada regularly misrepresents what’s going on. The purpose of releasing the documents is so people can read them and judge for themselves. The two examples raised by Canada in the Canadian submission are good cases in point.

In the Canadian submission Canada says it made “an offer of for partial settlement to the Lubicon Lake Cree at the end of 2005”. That’s untrue as the document provided to CESCRC in 2006 clearly shows.

Similarly the Canadian submission describes the “secret” Justice Department Guidelines to Canadian Self-Government Negotiators as a “privileged document” containing “privileged legal advice on the possible language to be included in final agreements”.⁹⁶

In fact these Justice Department Guidelines are clearly instructions to federal self-government lawyers on how to negotiate self-government agreements that are not legally binding on the federal government. They expressly say so. Federal Lubicon land negotiators are known to have attended Justice Department workshops on these Guidelines. These Guidelines were literally used as a script by federal negotiators in 2003 pretending that language taken directly from the 1996 Guidelines had been drafted the night before in a Peace River motel.

The Lubicons submit that proposing language expressly designed by Justice Department lawyers in 1996 to not be legally binding on Canada, represented by federal Lubicon land negotiators in 2003 as having been drafted overnight in a Peace River motel, is a classic example of negotiating in bad faith. The Lubicons are pleased to make these secret Justice Department Guidelines available to the Committee and to others interested in reading them and judging the content and intent for themselves.

⁹⁶ Whether the Lubicons are under any obligation to keep Canada’s perfidy from public exposure is unknown.

**PART VII: COMMENTS ON THE “CONCLUSIONS” OF CANADA’S
FOLLOW-UP RESPONSE TO LUBICON COMMUNICATION NO.
167/1984 UNDER THE OPTIONAL PROTOCOL TO THE
INTERNATIONAL COVENANT ON CIVIL AND POLITICAL
RIGHTS (PART VI OF THE CANADIAN SUBMISSION)**

The Canadian submission reiterates the claim that the Committee found Canada’s 1989 “take-it-or-leave-it” offer to be an appropriate remedy to the plight of the Lubicon people.⁹⁷ It says “The Lubicon Lake Cree have yet to accept the remedy that the Government of Canada proposed”.

The Committee has information on the 1989 “take-it-or-leave-it” offer and will have to decide whether it considers Canada’s 1989 offer to be an appropriate remedy to the plight of the Lubicon people, and whether Canada’s characterization of the Committee’s 1990 decision is correct.

The Canadian submission claims Canada made serious efforts “throughout the 1990’s and into the present... to reach a negotiated settlement with the Lubicon Lake Cree...(culminating in)...an offer to the Lubicon Lake Cree in 2003 which was enhanced in every aspect over previous offers”.

The history of those “serious efforts” is as follows:

In 1992 Canada tabled a re-packaged version of the 1989 offer, again based on normal government programs and services, claiming it was worth considerably more and releasing charts comparing 1992 figures to 1989 figures without taking the impact of inflation into account. When the impact of inflation was taken into account, the dollar amount of the 1992 offer, released by the Minister of Indian Affairs to the media at the Calgary Airport rather than presenting it directly to the Lubicons, was actually worth less.

In 1996 Canada tabled another re-packaged version of the 1989 offer, again based on normal government programs and services -- this time proposing to go back to federal Cabinet post agreement to seek a revised mandate to negotiate outstanding settlement items in good faith.

The last round of negotiations commenced in 1998 and broke in 2003. Those negotiations ended at the point discussed in this submission. Taking at face value the Canadian government claim that the 2003 offer is “enhanced in every respect over previous offers”, people can judge for themselves the nature of Canadian settlement offers.

The Canadian submission states “The Lubicon Lake Cree leadership, and its negotiators, have always insisted on a full settlement of all aspects of their claim...and...are only

⁹⁷ The Indian Affairs Minister of the day, waxing more enthusiastic than the author(s) of the current Canadian submission to the Committee, told Canadian Parliament that the Committee found the Lubicon compliant “to be completely without foundation” and that Canada’s “take-it-or-leave-it” offer “more than met any obligation Canada has under the Covenant”.

willing to negotiate the self-government aspect of their claim on their terms...”
“Consequently”, the Canadian submission says, Lubicon leaders “have been unwilling to negotiate toward a settlement of those aspects of their claim which are relevant to this communication and for which there is substantial agreement, including the question of the amount and location of the land and the construction of a new community”.

These comments by Canada of course herald back to the argument Canada makes in the INTRODUCTION of the Canadian submission that “The issue of self-government does not fall within the scope of article 27 of the Covenant”, nor, according to the Canadian submission, “was it an aspect of the 1990 decision of the Human Rights Committee”. These comments by Canada have already been addressed to some extent in section 23 of this submission but additional comments need be made.

It should be very clear that the Lubicons are prepared to negotiate recognition of the right of self-government as a part of a settlement of Lubicon land rights. All Canada has to do is agree to negotiate recognition of the Lubicon right of self-government in good faith as part of a settlement of Lubicon land rights.

Canada is in fact refusing to negotiate recognition of the right of self-government as part of a settlement of Lubicon land rights and is insisting that the Lubicons cede rights to their valuable traditional lands and resources, in effect legitimizing illicit expropriation of those lands and resources, before Canada will be prepared to talk with the Lubicons about Lubicon self-government.

The Lubicons do not see their right of self-government to be something they must obtain from Canada through negotiations post settlement of their land rights, and doubt it will be possible to negotiate recognition of their right of self-government under Canada’s purposefully convoluted “Inherent Right Policy” once they cede rights to their land.

In the Canadian submission Canada is offering to build the Lubicons a new subsistence community on 247 square kilometers of Lubicon Territory and to appropriate the remaining 9,753 square kilometers with associated resources. With regard to the related issues of self-government and self-determination, Canada is telling the Lubicons to forget it and the UNHRC to mind its own business.

Even if Canada could be trusted to deliver on what it says it’s offering, which is hardly assured given the history of the struggle of the Lubicon people, the Lubicons have made clear that they are not prepared to cede their right as a people to manage their own affairs in exchange for a new subsistence community on 247 square kilometers of their own land. As indicated earlier, they are prepared to negotiate post settlement how implementation of their jurisdiction can be implemented in a way that is compatible and not in conflict with the exercise of jurisdiction by other governments in Canada -- as other Governments in Canada do all the time. However they are not prepared to cede their rights to their Territory without recognition that the Lubicon people as a distinct people have the inherent aboriginal right of self-government.

The Canadian submission says:

“Since 2003, the negotiators for the Lubicon Lake Cree have been unwilling to reopen negotiations. In 2005, they declined an offer from the Government of Canada for a partial settlement, which was made on the basis that it was without prejudice to the remaining, unresolved aspects of their claim.”

None of these statements are true.

In fact the Lubicons have repeatedly proposed in writing to return to negotiate all outstanding settlement issues including financial compensation and self-government as a part of a settlement of Lubicon land rights. When Canada has bothered to respond to the Lubicons at all it has simply reiterated its refusal -- and continues to reiterate its refusal in its current “follow-up” submission to the Committee -- to negotiate financial compensation and self-government as a part of a settlement of Lubicon land rights.

The 2005 so-called “offer from the Government of Canada for a partial settlement” wasn’t an offer of any kind of settlement but a non-binding draft “Memorandum of Intent” offering to return to the table “to pursue an agreement” that didn’t include economic development, financial compensation or self-government. A copy of Canada’s non-binding draft “Memorandum of Intent” was attached, much to Canada’s chagrin, to the May 1, 2006 submission to the 36th Session of the UN Committee on Economic, Social and Cultural Rights on the Occasion of the review of Canada’s 4th and 5th Periodic Reports. People can read it and judge for themselves whether it’s an offer of a “partial settlement”.

Canada’s claim that the 2005 so-called offer of a partial settlement “was without prejudice to the remaining, unresolved aspects of the claim” -- is vacuous in light of Canada’s stated refusal to negotiate those items.

The Canadian submission repeats that “The Government of Canada is committed to a resolution of those aspects of the Lubicon Lake Cree claim that would deliver the proposed remedy found appropriate by the Human Rights Committee”. In Canada’s submission, those “aspects” do not include key settlement issues pre-agreed for negotiation including financial compensation and self-government as part of a settlement of Lubicon land rights.

No settlement of Lubicon will be possible unless Canada is prepared to negotiate all outstanding settlement issues in good faith including financial compensation and recognition of the Lubicon right of self-government as part of a settlement of Lubicon land rights. The Committee must therefore clarify its position on the 1989 “take-it-or-leave-it” offer -- upon which Canada’s position relies -- for there to be a remedy for the continuing violation of the civil and political rights of the Lubicon people under the Covenant.

Finally the government of Canada submission says “The Government of Canada is committed to a resolution of the Lubicon Lake Cree claim...and...is willing to return to the negotiating table to resume negotiations at any time should the Lubicon Lake Cree be willing to return to the negotiating table.

The Lubicons are prepared to return to the negotiating table whenever Canada is prepared to resume negotiation of all outstanding settlement issues in good faith including financial compensation and recognition of the Lubicon right of self-government as part of a settlement of Lubicon land rights.