DOCUMENTS

DOCUMENT ONE: THE FULTON REPORT[1]

EDITOR'S INTRODUCTION

This document is an edited version of a discussion paper prepared by E. Davie Fulton. The paper was intended to assist in the resolution of the Lubicon Lake land claim. Native Studies Review has selected this document for publication because of its significance to the Lubicon Lake Cree's struggle. Although the history of the Lubicon Lake Band's struggle for their traditional lands is a long one, a brief review is in order.

The Lubicon Lake Cree were missed by the Treaty 8 Commissioners when that treaty was negotiated and signed in 1899. As a result, when the oversight was discovered in 1939 the federal government was in a difficult position: the Province of Alberta had jurisdiction over the land and resources while the federal government had a commitment to aboriginal peoples like the Lubicon Lake Cree. In 1940 the Lubicon Lake Band was promised a reserve of 65 square kilometers, based on its membership at that time. The war intervened, however, and the promise was not fulfilled. As long as the area was occupied and used primarily by its Cree inhabitants, the problem of land title had little effect on their daily lives. Increasing oil development after 1976 changed the situation drastically. Oil exploration and exploitation scared off wildlife and made trapping and hunting virtually impossible in the area. As a result, the Lubicon increased their pressure for a land base. By the mid-seventies the federal government had changed its position on land claims and was in the process of negotiating both specific and comprehensive claims. While it was prepared to deal with the Lubicon Lake claim in principle, the problem of the size of the reserve became a practical and seemingly insurmountable obstacle. The Lubicon Lake Band maintained that the new reserve allocation be on the basis of their new membership, which included people classified by the government as non-status Indians. However, the Province of Alberta was only prepared to transfer land on the basis of the 1940 agreement. The land claim was further complicated by the issue of compensation: the Lubicon Lake Cree felt entitled to compensation both for damages done and resources lost as a result of the oil development in the area.

In 1985, after years of fruitless discussion and legal challenges, the Conservative government appointed E. Davie Fulton, a former federal justice minister, to act as mediator in the Lubicon Lake land claim. Fulton prepared an interim report in February of 1986 which was intended to serve as a discussion paper. The report was leaked to the press in March of 1986. While the report was not unconditional in its support for the Lubicon Lake Band's position, it generated a great deal of

publicity because it substantiated the Band's claim on the two most important issues: their entitlement to compensation and the size of their land base. As a result, the report gave the Lubicon Lake Cree additional credibility and helped generate support for their cause.

When the federal government continued to stall, in part because of Alberta's refusal to acknowledge the validity of the claim for more land than had been promised in 1940, the Band was forced to take a more activist approach. They sponsored a boycott of the 1988 Winter Olympic Games in Calgary to call attention to their situation. Then, on October 15, 1988 the Lubicon Lake Cree set up a blockade on their traditional lands. While the blockade ended a week later with an RCMP raid and the arrest of 27 participants, it also forced the provincial government to re-evaluate its position and promise the Band 204.5 square kilometers of land (approximately the amount Fulton had recommended). While difficulties remain, particularly over the issue of compensation and the federal government's position, it is certainly the case that the biggest obstacle has been overcome and the chances of a settlement improved.

Document One contains selected passages from the Fulton Discussion Paper. In its original form the paper was 87 pages long. It was structured around the issues of land, membership, and types of compensation. On each issue Fulton summarizes the position of the federal government, the provincial government, the Band and other interested parties. He then proposes compromises. Document One contains Fulton's analysis of the question of the size of the reserve, a few of the more important compensation scenarios, the issue of self-government, and his concluding remarks. It does not include: a summary of the various positions on these issues; discussion of a number of other compensation scenarios; details of the interests of the L'Hirondelle family who farmed and ranched in the area. Native Studies Review has selected Fulton's analyses of the most crucial questions related to the Lubicon Lake land claim for publication. Although Fulton's report was not adopted as the federal government's position, the agreement that has been reached between the Band and Alberta in the fall of 1988 to some extent vindicated his analysis. The real significance of the report was that it legitimized the Band's position. If the new spirit of compromise prevails, the parties could do far worse than going back to the Fulton report as a basis for negotiation.

Peter Kulchyski

NOTE

[1]Reproduced with the permission of the Minister of Supply and Services.

LUBICON LAKE LAND CLAIM "Discussion Paper," by E.D. Fulton, February, 1986

Claim 1. Entitlement to Reserve

Remarks

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

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

The difficulty is not lessened by Alberta's insistence--at least until this point--that if any membership figure in excess of the 127 agreed to in 1940 is to be used in the request formally put forward by Canada, it will attack that figure even as a starting point for today's solution of the problem. It had been my hope that Alberta would find, in my suggestion that compensation be paid for any excess in area asked for in 1985 over that agreed on in 1940, a reasonable basis for agreeing on the figure of 127

as the minimum starting point for today's discussions, without the need of going with a fine-tooth comb over what could surely be regarded as an accepted historical fact.

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

The fact that it was not is, on the basis of all the evidence I have seen, entirely the responsibility of Canada. Clearly Alberta remained ready for many years to carry out its obligation under that agreement and the Resources Transfer Agreement, and only changed its position after giving more than adequate notice, in light of Canada's apparent change of intent. In these circumstances, I see it as entirely the fault of Canada that the matter was not disposed of on the basis of the agreement of 1940, and that Alberta is faced today with a request for land in excess of that agreed to then. Hence in my view it is only equitable that Canada should compensate Alberta for the differences, and I have suggested to the representatives of the two Governments that the matter be settled on this basis.

It appears to be equally clear, however, that Canada's obligation to the Band as of today is to provide a Reserve on the basis of today's Band membership. There is ample precedent that the entitlement is as of the time of survey, so that 1986 is the effective date. If this be accepted, it follows that Alberta's

obligation under the Transfer Agreement is to re-convey (set aside) that amount of land which will enable Canada to discharge that obligation. If the suggestion I have made be accepted, then the inequity to Alberta occasioned by Canada's non-fulfillment of the earlier agreement will be compensated for. Such compensation should of course be on the basis of today's values. I very much hope that the representative of the two Governments will find it possible to agree on this as a fundamental basis for the settlement of this particular case.

If this is accepted as a sound base, then it would seem that agreement on the population base should not be such a formidable obstacle. Certain fundamental considerations are suggested in the hope that they will be of help. First, it is traditionally Canada's exclusive responsibility to determine and maintain the register of Indian population, and Band membership lists. Second, it is certainly not in Canada's interest to inflate those figures, having in mind generally the costs of its on-going responsibility to Indian Bands, and particularly in this case if the suggestion be accepted that Canada compensate Alberta for the extra land based on the difference between today's figure and the 1940 figure. Hence it follows that there is a strong case that there should be no attempt to go behind the 1940 figure of 127 members--this particularly so since there is the evidence that Alberta for many years following 1940 accepted and acted on that figure as the basis for the area of land it would have been willing to set aside. Indeed, on the basis of those two fundamental considerations there is a strong case that the figure of 182 members--the Band list of 1985 prior to the new Act--should be accepted as the starting point, and the efforts at reconciliation be confined to figures put forward beyond that. (It should be clear, however, that the figure of 127 would remain as the base for measuring compensation to Alberta for land in excess of that agreed to in 1940.)

There has also been discussion of the matter of the time frame which should be chosen to determine what are the rules to be applied in calculating the numbers eligible to be counted today as Band members for the purpose of fixing the entitlement.

Should it be 1930, when the Resources Transfer Agreement was signed? Or 1940, when it was first agreed that the Band should have a Reserve and Alberta agreed to set aside the land for that purpose? Or the present, when Canada and Alberta are again agreed upon the obligation to provide a reserve for the Band but so far unable to agree upon the number or the criteria for determining it?

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

I feel I should record at this stage, however, my present feeling that there would be an inequity--almost an impropriety--if the number were to be inflated by the inclusion therein of persons who, while perhaps technically qualified for membership, have not demonstrated a desire to be, or of whom it cannot be demonstrated that in historical fact they ought to be, counted as members of this Band. Thus with respect to persons of whom it is now claimed by the Band that they should be counted, and who may in fact be found to be eligible for membership, but who are

now registered as members of other bands or are not, by residence or otherwise, readily identifiable as members of the Lubicon Band community: it seems to me that before they should be included in a membership count for this purpose they should be required to indicate, by declaration or similar method, a definite desire and intention to live as part of the Lubicon Band on the Reserve to be established for them.

[. . .]

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

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

This would be for the parties to agree now that the 1940 figure be accepted as a minimum starting point, but that on the basis of traditional practice that the Band list at time of survey be used as the figure for calculating entitlement, the current actual Band list of 182 be accepted as the actual basis for entitlement. Applying what I have suggested is the equitable principle discussed above, Alberta would then be entitled to compensation for the difference between the area based on 127 and that based on 182. Canada would then offer to purchase from Alberta, and Alberta would agree to sell to Canada, the further amount of land necessary to provide the Reserve for the full number which may be found, or agreed, to be the number entitled

to be counted as members of the Band on the basis of the now current criteria for membership. The price per acre or square mile to be paid for this extra land would be the same as that fixed for compensation for the extra land involved in the differential between the area based on the membership figures of 127 and 182 referred to above.

This arrangement has the benefit to Canada and the Band that it provides the Reserve for the full community which the Band claims and which Canada accepts as its obligation to provide. At the same time it recognizes that it would be inequitable either that Alberta should be penalized for the delay in fulfilling the agreement of 1940 (for which Alberta was in no way responsible) or that Alberta should be called upon to bear the entire burden of providing extra land as a matter of legal obligation when the formula for determining the entitlement to that land, and hence the extent of the demand, has been unilaterally changed by Canada by legislation at the very time when these discussions were going forward. Neither, however, does it constitute a complete waiver by Canada of Alberta's obligation under the Resources Transfer Agreement to Canada's possible future prejudice, since that obligation would be recognized in Alberta's agreement to transfer the land to fulfill the request based on a present actual membership list of 182--the traditional obligation--although with compensation based on the unique feature of this situation, the non-fulfillment by Canada of the Agreement of 1940.

For Alberta, the benefits are that it creates no precedent by way of recognition of a legal obligation beyond the traditional one of setting aside land under the Resources Transfer Agreement to the extent determined by current Band lists. And with respect to the possibility that Alberta might be said to have waived a right to require a validated claim, the answer would be that so far as land up to the total based on the figure of 182 is concerned, the figure of 127 was accepted as valid in 1940 and Alberta has been compensated for the difference because of Canada's delay: hence this affords no precedent for dealing with cases where a totally

new request is made. Neither could this, nor the request to sell the further land based on the figure in excess of 182, be said to be a precedent for a waiver of the "counted once" rule: for the fact would be that the figure put forward and accepted as the basis for settlement would have been arrived at as the result of a special agreement arrived at on the basis of the particular circumstances of this special case.

Indeed it is difficult to see how a formula, or a method of procedure, for resolving this particular case could in any event be cited or regarded as a precedent in any other case. For the unique features of this case, crying as they do for the implementation of promises made 45 years ago on the basis that will do justice and equity to that community in this day 45 years later, create a unique problem, the solution of which cannot really form a precedent for the solution of any case which only arises for the first time in the future. The representatives of Alberta have in fact taken the position in discussion with me that Alberta is as concerned as anyone with the matter of social justice to this community: their understandable concern is that it should not be done, insofar as the actions required exceed Alberta's strictly provable legal obligation, at Alberta's sole cost and expense, especially if that may form a precedent for cases which may arise in future. My belief is that the approach suggested above contains the answer to these concerns.

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

[. . .]

As to whose is to be the responsibility for payment of compensation on the basis discussed above, it appears to me clear in principle that Canada should bear at least the major portion of the cost, since Canada's is the main responsibility for the fact that the problem exists. Had Canada carried out its part of the agreement of 1940 within a reasonable time, the Reserve would have been established and this situation could not have arisen.... What is important now is to explore actively the prospect of acceptance in principle of this suggestion for an equitable disposition of the matter in which the positions of the two parties most concerned have so far been irreconcilably opposed.

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

Claim 5. Compensation for Past Loss:

(a) With Respect to Lands Claimed as Reserve

(i) Oil and Gas Revenues

Remarks

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

rests on Canada, where rests also the responsibility for non-fulfillment of the 1940 agreement, and all the consequences thereof....[I]t is hoped, and anticipated, that Canada will accept this claim accordingly.

Claim 5. Compensation for Past Loss:

(b) With Respect to Lands Claimed as Traditional Area

(i) Loss of Livelihood From Trapping and Hunting

Remarks

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

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

As to the factual question of what has been the loss . . . with respect to both hunting and trapping, the careful survey conducted by Mr. Bodden shows a substantial reduction in both quantities and values of animals taken as between 1980-81 and 1981-82. My own discussions with Band members, while being far from a scientific survey, indicate that the decline did start from 1979-80 and has gone on apace from then until the present.

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

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

The hard fact is, of course, that the decline in the annual harvest commenced with, and has continued during, the period of active development--that is the evidence. On the other hand, while there has been reference to natural cyclical changes as an explanation, there has been no hard or scientific evidence that such a change was due or was in fact taking place. I have been flown over the area and have seen what is involved by way of

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

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

As to the questions of law and equity, it is hardly appropriate for me to make a pronouncement on the first . . . .

[. . .]

I shall accordingly confine my comment on this point to two observations which I believe are in order and are relevant. The first is that it is far from certain what would be the outcome of litigating the question: there are powerful arguments to be made on both sides. The other is that whatever might be the outcome, there is no doubt that the process of pursuing it through the Courts in the ordinary way in the various actions now outstanding would be very lengthy and exceedingly costly, with results equally crushing to the loser, whichever side that might be. I hope therefore that the parties will find it possible, and acceptable, to enter into serious and meaningful discussion of a solution of this

claim--and others where the same question is involved--on a basis which will recognize and give effect to the equities and practicalities of the situation, leaving in abeyance the question of strict rectitude of either legal position, in order to produce an answer with which all can live.

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

[. . .]

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

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

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

No one has suggested that the granting of development permits, or the seismic grid lines and installations placed in this area pursuant thereto, have removed the whole of the traditional lands generally from the category of "unoccupied Crown lands" so that the Indians have not the right to hunt and trap thereon.

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

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

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

valid claim. While it cannot be denied that Canada has some obligation in that Canada gave the first assurance, it seems to me that--again looking at the equities--the obligation to compensate should be that of Alberta. Alberta was a party to the Resources Transfer Agreement of 1930 which carried the assurance forward. Alberta has long administered these lands, and it was Alberta which permitted the development in question and has derived very substantial revenues therefrom--far beyond the amount of this claim. The position here is quite different from that with respect to the Reserve lands themselves: there, Alberta had been ready for many years to transfer the agreed area, and responsibility for the failure to secure the Reserve and the benefits therefrom to the Band was entirely that of Canada: whereas here, Alberta had agreed that the Indians should continue to enjoy the rights and benefits in question but authorized the development which destroyed or diminished the benefits of those rights, and took the revenues therefrom, without any notice to the Band or to Canada. The equities here seem clearly against Alberta.

[. . .]

Claim 9. Rights of Self-Government, Including Determination of Membership

Remarks

. . . the objective of the Band in terms of self-government and self-determination in respect of membership are in general consonant with the policy of Canada in these areas. Subject to the reservations hereafter noted, it is anticipated accordingly that specific agreement, or accommodation, between the Band and Canada with respect to a large part of the detail in the Band's proposed Constitution can be reached in further discussions, or may already have been reached . . . . As to the matters where agreement or accommodation will be more difficult, these will be of concern to both Canada and Alberta. I shall defer consideration of them until after mentioning the one or two areas which involve the Band and Alberta alone.

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

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

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

The Band has indicated a willingness to discuss with Alberta the setting up and implementation of such a program giving the Band effective control and decision-making authority. Alberta, while maintaining that it has constitutional jurisdiction in this field, has expressed a willingness to consider and discuss the setting up of a "model management program" which will recognize and protect the Band's interests and concerns in this area. It is noted that the regulation-making power contemplated in the provision above set out is subject to the introductory words of Clause 4 of the proposed Band Constitution which governs all the policies and by-laws within the scope of that Clause--that is, that they shall be "not inconsistent with the Canadian Constitution." I can only express the hope accordingly, that in those discussions especially . . . the parties . . . may reach the haven of an agreement which reflects and carries into effect the desired aims

without foundering on the rock of rigid positions on exclusive constitutional or legal authority.

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

Another matter where the wording of the Band's draft Constitution may be expected to raise concern on the part either of Canada or Alberta, or both, arises as a result of the somewhat sweeping language of other provisions giving the Governing Council law-making powers and exempting its members from liability for official acts. These include paras. 4(d) and (g) of Clause 4 relating to the punishment of persons for acts committed on the Reserve (including reference to "convicted offenders"); and Clause 45 as to limitations of liability. I do not wish to appear to assume the authority to lay down a rule as to constitutional law, but it does occur to me that the two first-mentioned provisions might be construed as trenching on the field of criminal law reserved to the exclusive jurisdiction of the Parliament of Canada, while the other may appear to conflict with the exclusive jurisdiction of the Province to legislate with respect to property and civil rights. I recognize that this conflict would not arise if the subject-matter were confined to relationships arising only within the Reserve, but the scope of the matters or acts here set out with respect to which liability would be limited clearly includes relationships having effect, and with persons, outside the Reserve.

[. . .]

Finally mention must be made of Clause 16 of the draft. While it is entirely understandable, and in keeping with developing policy, that the Band should wish that its own rules and regulations should prevail with regard to governance of its own affairs on its Reserve, there is no doubt that the scope of the matters with respect to which the power to institute policies and

enact by-laws is given throughout this Constitution is in many cases such that they could have effects which would be felt off the Reserve as well. With this in mind, I cannot fail to observe that it seems not only unrealistic, but unnecessarily provocative and prejudicial to the atmosphere for constructive discussion and settlement of differences, to include in this draft a provision which asserts, as this one does, that in the event of any inconsistency or conflict with Acts of Parliament or of the Alberta Legislature, the Band by-laws shall prevail. I would strongly urge a re-consideration of this wording.

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

[. . .]

Conclusion

The purpose of all the foregoing has been to set out the positions of Canada, of Alberta and of the Band, and of others where such interests exist, regarding the various "Points for Discussion" advanced by the Band to the Minister on 26th November, 1984, together with my appreciations of those various positions and their impact on my efforts to date in this Inquiry. . . . this Discussion Paper now serves . . . both to summarize agreements and areas of commonality between two or more of Canada, Alberta and the Band and, as well, serves as the basis for the contemplated further round of discussions between those

parties to be conducted as the next stage of this Inquiry. . . . I very much hope that it will be agreed that this further round of discussions will consist of meetings for the most part directly between representatives of Canada, Alberta and the Band.

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

It is my hope, and I trust, that this document will provide the basis for a comprehensive and acceptable resolution of the Lubicon Lake Band issue.