

Lubicon Lake Indian Nation

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July 3, 2005
The Hon. Andy Scott
Minister of Indian and Northern Affairs
Government of Canada
Ottawa, ON K1A 0H4

Dear Mr. Scott;

I am in receipt of your letter of June 23, 2005 responding to my earlier letters of March 22, 2004, and August 29, 2004. Needless to say a 15-month delay in responding to my letter of March 22, 2004 asking for appointment of a negotiator with a mandate to negotiate outstanding Lubicon settlement issues in good faith is hardly consistent with statements by the Prime Minister that settlement of Lubicon land rights "has been a priority of the Government of Canada and must be effectively pursued until a mutually acceptable solution is negotiated".

Your estimate that it will take "at least a year" to explore the "possibility that the Negotiation Roundtable work (with the AFN) may result in recommendations to the Inherent Rights Policy that could possibly address the concerns (the Lubicon people) have expressed regarding self-government" is not only highly qualified but, given past history and numerous failed past attempts to re-structure the relationship between the government of Canada and aboriginal people in Canada, is obviously optimistic in terms of both timetable and likelihood of success. Current talks with the AFN cannot be used as a tactic for the federal government to duck responsibility for a federal government position on Lubicon land negotiations based on flagrant misrepresentation of outstanding Lubicon settlement issues and indefensible federal Justice Department instructions to federal negotiators on how to negotiate the constitutionally recognized "inherent right" of self-government in bad faith.

There is nothing which should prevent a sincere federal government from successfully negotiating a settlement of Lubicon land rights except perhaps a duplicitous "inherent rights" policy which is clearly inconsistent with both constitutional recognition of the inherent aboriginal right of self-government and the honor of the Crown. Such a policy can easily be renounced and must be renounced if the Martin government has any respect for the Canadian Constitution or concern for the honor of the Crown. All that would then be required to achieve a settlement of Lubicon land rights is for federal negotiators to be given a mandate to come to the table and negotiate well-known and long outstanding Lubicon settlement issues in good faith. Self-government and financial compensation have both been on the table from the very beginning and successive federal negotiators, starting with the Hon. E. Davie Fulton in 1985, have been prepared to negotiate both of these issues. Good progress has in fact been made on all settlement issues at one point or another, including self-government and financial compensation, only to have one level of Canadian government or the other then backpedal when political pressure to behave honorably lessened and behaving honorably was no longer politically required or expedient.

Refusal to renounce Justice Department instructions to federal government negotiators on how to negotiate self-government in bad faith makes good faith negotiations on anything with the government of Canada almost unimaginable. Refusal to negotiate well-known and long outstanding Lubicon settlement issues pending the "possibility" that indeterminate discussions with the AFN "could possibly" address Lubicon "concerns" at some unspecified future date is tantamount to abdication of the federal government's constitutional responsibility for dealing with unceded Lubicon aboriginal land rights and is neither workable nor acceptable. Facing the awful consequences of the systematic and deliberate destruction of our traditional economy and way of life by dominant Canadian society, the Lubicon people need a settlement of Lubicon land rights now -- and no settlement of Lubicon land rights is possible unless and until all of the outstanding settlement issues are resolved (or, to quote Prime Minister Martin, "until a mutually acceptable solution is negotiated").

With regard to your review of the Lubicon file, materials obtained under an Access to Information request make clear that the information you are being provided by your officials is, to put it politely, selective, slanted, inaccurate, incomplete and misleading. On numerous occasions we caught Chief Federal Negotiator Brad Morse misrepresenting things said and agreed at the negotiating table. Everyone at the negotiating table, including other federal negotiators, was well aware of this continuing problem. Twice -- once regarding the provision of social services to Lubicon members and once regarding the issue of construction cost increases resulting from changes in construction codes and standards -- we caught Professor Morse providing purposefully inaccurate and deliberately misleading information to then Minister Nault. (Mr. Nault addressed this problem to some extent by establishing direct communications with us when problems arose -- an arrangement which we proposed to both you and Mr. Mitchell but which neither of you deigned to even acknowledge -- presumably on the advice of those selfsame officials.)

The Access to Information materials are too voluminous to review here in detail but a few examples serve to illustrate the point. On August 31, 2004 Departmental staff prepared a "Question Period Card" for you which reads, in part:

"In June of 2003 former Minister Nault proposed to Alberta Minister Hancock and Chief Ominayak and the Lubicon Elders the beginning of an intense level of negotiations with the goal of initialing an agreement-in-principle (AIP) by Christmas 2003. All parties agreed with this time line and negotiations immediately moved to compensation, which at the time Canada believed was the last major outstanding item...(section blacked out)...the Lubicon raised the issue of self-government, citing it as a priority, and insisting that agreement on how to deal with it would have to be part of an AIP."

In fact our agreement with Mr. Nault was not to negotiate an AIP by Christmas but to try and negotiate a full settlement agreement by Christmas. To that end the Lubicon people were prepared to engage in full time negotiations. Chief Federal Negotiator Morse was unprepared to commit more than a day or two a month to negotiations and wanted the agreement to be in the form of a non-binding AIP arguing that it would not be possible to negotiate a full settlement agreement by Christmas.

After twenty years of vetting Lubicon settlement issues from every imaginable angle the Lubicons were and are convinced that it should now be possible to put together a settlement of Lubicon land rights in short order. We insisted on at least trying to negotiate a full settlement agreement by Christmas. Contrary to your August 31st "Question Period Card", we never at any point agreed to negotiate an AIP. Professor Morse then proceeded to conduct negotiations in such a way so as to make it impossible to negotiate anything other than a highly general, non-binding AIP by Christmas. (I enclose for your information a copy of a November 14, 2001 letter to Mr. Nault describing, among other problems, the lackadaisical federal negotiating schedule.)

By October of 2003 it was clear that it would not be possible to negotiate a settlement by Christmas unless something was done about the way Professor Morse was conducting negotiations. I therefore wrote Mr. Nault the attached October 24, 2003 letter expressing concern about what was going on at the negotiating table. (It was not until December of 2003 that we obtained a copy of the Justice Department Guidelines to federal self-government negotiators and realized that Professor Morse had flat-out lied to us about drafting "preambular" self-government clauses in Peace River overnight, supposedly without consulting the self-government experts in Ottawa, and that he was rather following a pre-prepared script drafted by federal Justice Department lawyers in 1996 carefully calculated to ensure that any negotiated self-government agreement would not be legally binding.)

In a Briefing Note sent to you on February 3, 2004, current Chief Federal Negotiator Sharman Glynn makes the following statement:

"Discussions focused on outstanding land issues, third party interests, compensation and self-government, which had not been identified by the Lubicon as a priority issue until July of 2003."

In fact, as detailed in the attached October 24, 2003 letter to Mr. Nault, self-government had demonstrably been on the list of essential Lubicon settlement items from the very beginning; had been on the table in writing as an essential settlement item in every round of negotiations since at least 1984; was presented to Chief Federal Negotiator Brad Morse in writing along with other essential settlement items when the last round of negotiations commenced in July of 1998, and was referred to periodically during the five year long course of negotiations with Professor Morse as an item that had to be resolved for there to be a settlement of Lubicon land rights.

Ms. Glynn continues:

"Both Canada and Alberta tabled compensation offers in July. The Lubicon's (sic) only response was to elicit (sic) demands for more money or our bottom line. The department fleshed out the value of the entire package arguing that (the Lubicons) have been extremely conservative in assessing future returns on their investments, thereby undervaluing our offer. The department also refused to offer more money until we get a response on the existing offer (section blacked out)...Because the Lubicon refused to move from their opening position on compensation (\$60 million), exploratory discussions have not yet commenced."

In fact, as detailed in the October 24, 2003 letter to Mr. Nault, the Lubicon position on compensation is not the Lubicon opening position on compensation at all but the result of Canadian government effectively bringing negotiation of financial compensation to a halt by asking for a Lubicon bottom line. Once the Lubicons tabled the requested bottom line, Canadian government tried to transform the Lubicon bottom line into a new Lubicon opening position, neatly avoiding discussion of the substantial basis for the original Lubicon position on financial compensation, and then proposing to negotiate the Lubicon bottom line as a straight negotiation of numbers without regard for the original basis for compensation. It was the requested Lubicon bottom line that the Lubicons refused to treat as an opening position for negotiation, not the Lubicon opening position. We are prepared to go back and publicly negotiate our opening position on compensation on it's merits -- which neither level of Canadian government was prepared to do since it was based on huge sums of money they'd either saved, received to stood to receive at Lubicon expense -- but we are not prepared to be jerked around by people who ask for a bottom line, mischaracterize that requested bottom line as our opening position, propose to treat our bottom line as though it were our opening position and then accuse us of being unreasonable when we refuse to negotiate the requested bottom line as though it's our opening position.

With regard to the vague statement that "The department fleshed out the value of the entire package arguing that (the Lubicons) have been extremely conservative in assessing future returns on their investments, thereby undervaluing our offer", Ms. Glynn is obviously seeking to reinforce the impression of a reasonable federal position which the unreasonable Lubicons inexplicably refused to consider. In fact Ms. Glynn is referring to anecdotal assertions put forward by provincial negotiator John McCarthy that the Lubicons could earn a higher rate of return on a proposed capital fund than the Lubicons are calculating and that the Lubicons therefore didn't need as large a capital investment fund. The Lubicons assessed Mr. McCarthy's assertions and were advised by qualified financial advisors that a higher rate of return was possible at greater risk but that Real Return Bonds issued by the Government of Canada are the only investment vehicle available in Canadian denominated dollars capable of meeting Lubicon objectives of ensuring a targeted annual investment income, ensuring safety of principal, having a long investment duration and preserving the purchasing power of the capital pool and annual interest payments. Neither Mr. McCarthy nor Professor Morse were able to substantively respond to Lubicon financial advice, and neither had any further suggestions on how the Lubicons could be assured of annual investment income in lieu of the vast resource wealth which the Lubicons are being asked to cede -- other than through a conservatively managed capital investment fund with inflation protection and a targeted rate of real return.

On June 4, 2004 Ms. Glynn wrote your Deputy Minister a Briefing Note which says, in part:

"...obtained a copy of the 1996 Department of Justice (DOJ) document entitled 'Guidelines for Self-Government Negotiators' (section blacked out) In actual fact, none of the federal team members were in possession of the document."

Well in actual fact, Mr. Minister, as detailed in the attached March 22, 2004 letter to then Minister Mitchell, on September 25, 2003 federal negotiators tabled “preambular” language drawn verbatim from the 1996 Justice Department Guidelines. In an obviously choreographed performance Professor Morse then went on to express concern about the tabling of these clauses by federal negotiators claiming that federal negotiator (and fellow lawyer) Troy Chalifoux had exceeded his authority tabling these clauses because the clauses had allegedly been drafted the night before in a motel in Peace River without consulting federal self-government authorities in Ottawa. In subsequent discussion of the clauses, Professor Morse falsely assured us that there was no real difference between the legal force and effect of clauses in the preamble and clauses in the body of an agreement.

Anybody who reads the 1996 Justice Department Guidelines knows immediately where the “preambular” clauses tabled by federal negotiators on September 25th came from, as well as where the idea to put the clauses in the preamble came from. Ms. Glynn’s statement that “none of the federal team members were in possession of the (Justice Department) document” is either an artful use of language to deliberately create a false impression or it is an outright lie. The Justice Department Guidelines read:

“In determining where to best place a given clause, negotiators should bear in mind the different legal effects of including wording in the preamble to an agreement as opposed to the body of the agreement itself. Preambles are given less weight than the substantive provisions of the agreement (where the ‘meat’ of the agreement is reflected) and are generally only referred to by the courts to assist in interpreting ambiguous substantive provisions in the body of the agreement”.

On September 14, 2004 Ms. Glynn sent you a Briefing Note which says:

“During an intense level of negotiations in late 2003, with the goal of reaching an agreement in principle by Christmas, the LLIN (Lubicon Lake Indian Nation) refused to compromise on money and self-government. It (the Lubicon Lake Indian Nation) insists that Canada and Alberta must seek new mandates, never once considering a review of its own, which has been in place since the 1980s”

In fact what Ms. Glynn is talking about is federal negotiators taking the position that they were unprepared to negotiate financial compensation unless the Lubicons agree to negotiate the requested bottom line as though it were the Lubicon opening position, and that they were unprepared to discuss self-government as part of a Lubicon settlement agreement and were only prepared to discuss agreement to talk about self-government post-settlement.

Professor Morse denied that this federal position was in effect another take-it-or-leave-it offer from the government of Canada. He said he was prepared to discuss the federal position but that he’d reached the extent of (his) mandate” and had “no mandate to go beyond what (he’d) already tabled”. (This position that the federal offer is not a take-it-or-leave-it offer but federal negotiators have no mandate to discuss anything other than what they’ve tabled has since been reiterated by Ms. Glynn.)

As for Ms. Glynn's childish allegation that the Lubicons "insist that Canada and Alberta...seek new mandates, never once considering a review of its own", the Lubicons have in fact been making significant compromises on items on the table from the very beginning. All we have been unwilling to compromise, and will never be prepared to compromise, is our objective of a settlement which gives our people half a chance of once again achieving self-sufficiency in our own land while others extract billions of dollars from our lands in natural resources.

The federal government's position, on the other hand -- clearly expressed in Professor Morse's contract and reflected in federal government positions at the negotiating table -- has remained limited by what's available to aboriginal people anyway under normal government programs and services. That was the basis of the "take-it-or-leave-it offer tabled by the Mulroney government in January of 1989 and it was the basis of the so-called "global offer" tabled by Professor Morse in April of 1999. (Lubicon advisor Fred Lennarson was once asked by a federal official what was wrong with a settlement of valuable Lubicon land rights based on what was available to aboriginal people anyway through normal government programs and services. Fred Lennarson asked the official to name one single aboriginal society in Canada that is self-sufficient based solely on normal government programs and services. The official said "You know I can't do that". Fred Lennarson told the official "That's what's wrong with a settlement of Lubicon land rights based solely on what's available through normal government programs and services".)

As detailed in the October 24, 2003 letter to Mr. Nault, normal government programs and services are also the basis of the federal government's position on self-government. To quote a revealing Briefing Note Ms. Glynn sent to you on December 8, 2004:

"The Lubicons are requesting recognition of their inherent right of self-government -- something which has been requested by many First Nations, but has never been granted to any, and would require a Cabinet-approved change to Canada's approach to self-government".

Recognition of our right to manage our own affairs on our own land will be part of any settlement of valuable Lubicon land rights -- whatever is available generally to aboriginal people in Canada under normal government programs and services, to quote Professor Morse, "for aboriginal groups who have aspirations for self-government". Financial compensation for the damages our people have suffered and the billions dollars in resources which have been illicitly extracted from our unceded traditional Territory will also be part of a settlement of Lubicon land rights. These are not new positions on our part and they are not unreasonable positions. They have been our position all along and have been supported by a wide range of independent observers including E. Davie Fulton and the Lubicon Settlement Commission of Review.

We ask again that the Martin government meet it's constitutional responsibility to the Lubicon people and not use current talks with the AFN as a dodge to try and avoid meeting that responsibility.

We ask again that the Martin government renounce the 1996 Justice Department Guidelines to federal self-government negotiators on how to negotiate self-government in bad faith.

We ask again that the Martin government appoint a negotiator with a mandate to negotiate outstanding Lubicon issues in good faith and to give that negotiator instructions to reach a settlement of Lubicon land rights by the end of the calendar year (as distinct from just using the pretense of negotiations to buy time while resource exploitation continues and vital Lubicon interests are systematically and deliberately eroded).

We ask again that the Lubicon people be loaned the money necessary to allow us to do the work necessary for us to participate effectively in negotiations.

And we ask that Lubicon land negotiations be open and public so that Canadians can follow the negotiations and judge the issues and positions of the parties for themselves.

Sincerely,

Bernard Ominayak
Chief, Lubicon Lake Indian Nation

CC: AFN National Chief Phil Fontaine
Canadian Prime Minister Paul Martin