

Canada

“Time is wasting”: Respect for the land rights of the Lubicon Cree long overdue

Introduction

“I hope people will understand we’re trying to survive from day to day and need all the help we can get from the general public. It’s a battle against time.”

Lubicon Chief Bernard Ominayak

“Time is wasting. Innumerable studies and reports have been prepared over past years, and they have only served to slow progress in the negotiations for a land and resource base. It is time for action... We support the swift resolution of all claims, and consider the Lubicon claim to be a priority.”

Letter from then Leader of the Opposition Jean Chrétien (now prime minister) to Friends of the Lubicon, 27 May 1993.

The Lubicon Cree have seen the land on which they depend transformed by logging and large-scale oil and gas extraction. The Lubicon, an Indigenous nation of approximately 500 people living in northern Alberta, have never surrendered their rights to their traditional lands. The Lubicon were simply overlooked when a treaty was negotiated with other Indigenous peoples in the region in 1899. A reserve promised to them forty years later was never established. Since the mid-1980s, negotiations with the federal and provincial governments around land rights have repeatedly broken down. Meanwhile, the Lubicon say that their health, their way of life and their culture itself are being steadily destroyed by resource extraction to which they have never consented.

Lubicon elder Reinie Jobin said in an interview (released on video in 2000 by a Canadian church coalition), “I have seen sickness which should be unacceptable in any

community in Canada. Now I'm going to be seeing the total destruction of the forests in this area. When that is destroyed that will destroy our people."¹

In March 1990, the United Nations Human Rights Committee (UNHRC) concluded that "historical inequities" and "more recent developments" have endangered the way of life and the culture of the Lubicon Cree. The Committee ruled that "so long as they continue" these threats are a violation of the Lubicon's fundamental human rights.²

At the time, the Canadian government assured the UNHRC that it was seeking a settlement that would protect the rights of the Lubicon. To date, however, no such settlement has been reached.

There have been five rounds of talks between the Lubicon and the federal government since 1986. The latest round began in 1998. A number of longstanding points of contention have been resolved and the Lubicon and the federal and provincial governments have all expressed optimism about the progress that has been made. At the same time, supporters of the Lubicon point out that previous negotiations have failed even when a settlement appeared close at hand.

Resource extraction threatens Lubicon way of life

"We never had anything fancy but we never went hungry. Then all of a sudden they found oil and we were caught in a situation where we were in the way."

Lubicon Chief Bernard Ominayak³

Only a generation ago, the Lubicon lived almost entirely off the land. Trapping provided a modest income but most families didn't need much money: the forest and the waters provided virtually all their needs.

The land at the centre of the dispute, some 10,000 square kilometres of forest north of Lesser Slave Lake and east of the Peace River, is part of a broad swathe of oil-rich land that stretches across northern Alberta. In the early 1970s, the provincial government initiated a massive program of oil extraction throughout the region, including the construction of an all-weather road into the hunting and trapping territory of the Lubicon.

From the point of view of the Alberta government, the area was crown land available for leasing to national and international oil companies. But in the absence of a treaty with the Lubicon Cree transferring lands to Canada, the Lubicon assert that they still retain rights over their traditional territory. Given the Lubicon's relative isolation, the ownership of the land

¹ ON CUE Film & Video Productions. "A Fight Against Time". 1995. Clip appears in: Canadian Ecumenical Jubilee Initiative. 2000. "Sacred Land, Scarred Land." Toronto.

² United Nations Human Rights Committee Communication No. 167/1984 : Canada. 10/05/90. CCPR/C/38/D/167/1984. *Ominayak and the Lubicon Lake Band v. Canada*.

³ Goddard, John. 1991. *Last Stand of the Lubicon Cree*. Douglas & McIntyre, Vancouver/Toronto.

was not really an issue until 1975 when oil and gas companies started moving in. At this point the Lubicon tried to inform the Alberta land registry office that they were contesting the province's ownership over some of the area scheduled for development.

When the land registry office refused to file the notice, the matter was referred to an Alberta court for judgment. While the case was still before the court, the Alberta government passed a new law that retroactively prohibited certain title claims on crown land. The Lubicon case was then rejected by the court as no longer having a basis under the new law. This was the first of a series of legal setbacks that would eventually lead the Lubicon to seek a ruling from the UNHRC.

Meanwhile construction of the all-weather road into the Lubicon territory went ahead despite the Lubicon's objections. When the road was completed in 1979 an oil boom was just beginning. Four years later the Lubicon were able to count more than 400 oil and gas wells within a 25-kilometer radius of their community.⁴

In 1984, the federal government appointed a special envoy, E. Davie Fulton, a judge and former federal Justice Minister, to look into the Lubicon land dispute. Fulton later described flying over the territory and seeing "seismic grid lines driven through this previously wilderness area in a criss-cross pattern and... installations dotting the previously uncluttered landscape."⁵

According to the Lubicon, disruption of the forests by oil exploration and drilling led to a catastrophic decline in wildlife. A survey of Lubicon hunters and trappers found that the numbers of animals killed for meat or fur had fallen by roughly 90 percent. The federal and provincial governments argued that other factors, such as a declining fur market or cyclical changes in animal populations, accounted for the collapse of the Lubicon hunting and trapping economy. But E. Davie Fulton, the federal government's own envoy, stated that this argument was unsupported and that the "weight of evidence" supported the testimony of Lubicon hunters and trappers that trap lines had been destroyed and wildlife driven from the territory by the activities of the oil companies. Fulton concluded:

Starting in the late 1970's they [the Lubicon] saw not only their traditional hunting area but the very area that they had been promised as their Reserve – their homeland – subjected to intensive exploration and development against their wishes and with disastrous consequences to them. Substantial revenues accrued from the Reserve, but not to their benefit, and still no action was taken on their behalf.⁶

With the dramatic decline of their hunting and trapping economy, the number of Lubicon families dependent on welfare climbed sharply from one in ten when oil

⁴ Goddard, pg 76.

⁵ Honourable E. Davie Fulton. Lubicon Lake Indian Band – Inquiry. Discussion Paper. 1986.

⁶ Fulton. Op cit.

development started in 1979 to nine in ten by 1983.⁷ The Lubicon later told the United Nations Human Rights Committee that they did not have the money and other resources necessary to create the new jobs and community infrastructure they suddenly needed when their old economy collapsed. The result, the Lubicon told the UNHRC, was severe strain on the health and social fabric of the community:

As a result of these drastic changes in the community's physical existence, the basic health and resistance to infection of community members has deteriorated dramatically. The lack of running water and sanitary facilities in the community, needed to replace the traditional systems of water and sanitary management ... is leading to the development of diseases associated with poverty and poor sanitary and health conditions. This situation is evidenced by the astonishing increase in the number of abnormal births and by the outbreak of tuberculosis, affecting approximately one third of the community.⁸

The Lubicon also described growing alcoholism, "previously unheard of in this community and which is now overwhelming it."⁹

In 1982 the Lubicon applied for a temporary injunction against resource development activity in the disputed territory to prevent further damage to their culture and livelihoods pending settlement of their land rights. The oil companies argued that the Lubicon had no claim to their traditional hunting and trapping territory because the now high welfare rates indicated that they were no longer living in a traditional way. The Alberta court judge who heard the case refused to grant the injunction saying that it would cause "large and significant damages" to the government and the oil companies while any harm done to "a few individuals who hunt and trap" could be financially compensated later if the Lubicon eventually proved their claim. The decision was later upheld by the Alberta Court of Appeal which agreed that if the Lubicon ever won their land rights, they could gain "sufficient moneys to restore the wilderness".¹⁰ The Supreme Court of Canada refused to hear a further appeal.

In 1987, the UNHRC agreed to examine the case because the Lubicon no longer had any recourse through Canadian courts that would address the threats to their culture and livelihoods in a timely and effective manner. In view of the seriousness of the Lubicon's allegations that they were on the verge of extinction, the UNHRC asked Canada "to take interim measures of protection to avoid irreparable damage" to the Lubicon Cree while the UNHRC considered whether the Lubicon's rights under the International Covenant on Civil and Political Rights were being violated.¹¹

⁷ Ominayak, Bernard with Ed Bianchi, "The Lubicon Cree: Still No Settlement After All These Years." Aboriginal Rights Coalition. 2001. in Bird, John et al. Nation to Nation: Aboriginal Sovereignty and the Future of Canada. Toronto: Irwin Publishing, 2002, pp 163-174.

⁸ Quoted in CCPR/C/38/D/167/1984.

⁹ Ibid.

¹⁰ Goddard. Op cit. P. 113.

¹¹ CCPR/C/30/D/167/1984. Op. Cit.

Despite this request, resource extraction on the disputed land continued to accelerate. In 1989, the Alberta government gave a Canadian subsidiary of Daishowa Paper Manufacturing Company Limited of Japan logging rights throughout much of the disputed territory. Faced with a consumer boycott campaign against companies buying its products, Daishowa suspended logging after two years and later agreed in writing not to resume cutting until the land dispute is settled. Then, in 1994 the US-based Unocal Corporation received permission to build a sour gas plant (a plant which removes lethal hydrogen sulphide from natural gas) just four kilometres upstream and upwind from the site where the Lubicon had proposed building their new community. The plant was built without the consent of the Lubicon and before a regulatory hearing was held.

Since 1998, negotiations between the Lubicon Cree and the federal government have resulted in agreements over a number of key issues including the right of the Lubicon to define their own membership, the amount of land the Lubicons will retain for reserve purposes, and a government commitment to fund the construction of new housing and community facilities on reserve lands. While these are significant achievements, the fact remains that a just resolution of the dispute is long overdue. There are still numerous other points that must be settled before an agreement can be finalized. The Lubicon are concerned that if negotiations do not proceed to a timely settlement, their rights may be further jeopardized.

The rights of Indigenous peoples in national and international law

“Canada must now work out fair and lasting terms of coexistence with Aboriginal people.... Canada's claim to be a fair and enlightened society depends on it.”

Recommendation of the Royal Commission on Aboriginal Peoples, 1996.¹²

The Canadian government's Royal Commission on Aboriginal Peoples (RCAP) found in its 1996 final report that widespread illegal encroachment on and expropriation of Indigenous peoples' land and resources threatens the survival of Indigenous cultures throughout Canada and unfairly deprives Indigenous communities of opportunities for healthy and sustainable livelihoods. According to the RCAP, “the actual reserve or community land base of Aboriginal people has shrunk by almost two-thirds since Confederation [of Canada as a country in 1867], and on-reserve resources have largely vanished.”¹³ The Royal Commission,

¹² Canada. Royal Commission on Aboriginal Peoples. *People to People, Nation to Nation: Highlights from the Report of the Royal Commission on Aboriginal Peoples*. 1996. Pg. 1.

¹³ Canada. Royal Commission on Aboriginal Peoples. *Final Report of the Royal Commission on Aboriginal Peoples*. 1996. CD-ROM version, record 7608.

which included a Supreme Court justice and a Quebec Court of Appeal justice as Commissioners, issued the warning that:

“Aboriginal nations need much more territory to become economically, culturally and politically self-sufficient. If they cannot obtain a greater share of the lands and resources in this country, their institutions of self-government will fail. Without adequate lands and resources, Aboriginal nations will be unable to build their communities and structure the employment opportunities necessary to achieve self-sufficiency. Currently on the margins of Canadian society, they will be pushed to the edge of economic, cultural and political extinction. The government must act forcefully, generously and swiftly to assure the economic, cultural and political survival of Aboriginal nations.”¹⁴

Many Indigenous peoples in Canada, including the Lubicon Cree in Alberta, and the majority of Indigenous peoples in British Columbia, Quebec and the eastern provinces, have never signed treaties with the Crown nor ceded their inherent aboriginal land and resource rights. Nonetheless, they have seen their lands unilaterally declared Crown property, their natural resources appropriated or sold off, and resource exploitation policies imposed without their consent. Although inherent aboriginal rights are embedded in the Canadian Constitution and recognized by Canadian courts, the Royal Commission pointed out that the Canadian government works on the assumption that Indigenous peoples don't hold title to disputed land. To prove title, Indigenous peoples must meet what the RCAP called a “very exacting” burden of proof. Then, before they can enter into a treaty relationship with the Crown, the Canadian government requires all Indigenous peoples to accept the extinguishment of their inherent rights.

Indigenous communities that have sought to exercise what they understand to be their inherent rights in respect to lands and resources have been subjected to aggressive and sometimes violent enforcement actions, as Amnesty International has previously commented on. For example, at Ipperwash Provincial Park in Ontario where an unarmed native protester was killed by police in 1995, and at the community of Burnt Church in New Brunswick where excessive force may have been used in 2000 in asserting federal jurisdiction over the lobster fishery.¹⁵

¹⁴ Ibid. Record number 8380.

¹⁵ Amnesty International has called on the Canadian government to take action to implement an outstanding recommendation by the United Nations Human Rights Committee which called for an independent inquiry into the police shooting of an unarmed Indigenous rights activist, Dudley George, at Ipperwash Provincial Park in Ontario on 6 September 1995. Please see Amnesty International 2001 Annual Report entry on Canada. <http://web.amnesty.org/web/ar2001.nsf/webamrcountries/CANADA> Amnesty International Canada. Also *Without Discrimination: The Fundamental Right of All Canadians To Human Rights Protection. A Brief to the U.N. Committee on the Elimination of Racial Discrimination on the Occasion of the Examination of the Thirteenth and Fourteenth Periodic Reports Submitted by Canada*. July 2002. http://www.amnesty.ca/library/canada/un_cerd.htm

Amnesty International believes that the rights of Indigenous peoples already recognized in international law, treaties with the Crown, the Canadian Constitution, and rulings of Canadian courts and other aspects of Canadian law are an essential part of the framework of protecting and promoting human rights in Canada. Therefore Amnesty International calls on all levels of government in Canada to uphold and promote all rights of Indigenous peoples, rather than continuing to seek ways to diminish, extinguish, undermine or circumvent these rights.

Amnesty International also calls on the Canadian government, like all governments, to uphold the commitments it has made in signing and ratifying core international human rights conventions, to live up to widely agreed upon human rights standards, and to comply without delay and in a broad and systematic fashion with the urgent recommendations of its own commissions and UN treaty monitoring bodies.

In 1998, the United Nations Committee on Economic, Social and Cultural Rights, which monitors states' compliance with the International Covenant on Economic, Social and Cultural Rights, called on the Canadian government, in light of its obligations under the Covenant, to "act urgently with respect to the recommendations of RCAP... to take concrete and urgent steps to restore and respect an Aboriginal land and resource base adequate to achieve a sustainable Aboriginal economy and culture."¹⁶

This recommendation was then echoed by the UNHRC which, when reviewing Canada's compliance with the International Covenant on Civil and Political Rights (ICCPR) in 1999, urged "decisive and urgent action be taken towards the full implementation of the RCAP recommendations on land and resource allocation." The UNHRC also recommended that Canada's policy of requiring extinguishment of inherent or aboriginal rights be abandoned because it violates Canada's human rights obligations under the ICCPR.¹⁷

In 2002, the UN Committee on the Elimination of Racial Discrimination expressed its concern over the slow progress toward implementing the recommendations of the RCAP.¹⁸

In addition to the above calls by the UN to address general concerns related to Indigenous peoples' access to land and resources, Canada also has an outstanding obligation to take action on the specific 1990 UNHRC decision under Article 27 of the Covenant regarding the rights of ethnic, religious and linguistic minorities to enjoy their own culture, that continued threats to the Lubicon's culture and way of life constitute a violation of their human rights.

¹⁶ Concluding observations of the Committee on Economic, Social and Cultural Rights: Canada. 10/12/98. E/C.12/1/Add.31

¹⁷ Concluding observations of the Human Rights Committee : Canada. 07/04/99. CCPR/C/79/Add.105

¹⁸ Concluding Observations of the Committee on the Elimination of Racial Discrimination : Canada. 01/11/2002. A/57/18

Canada is also obligated to uphold the general recommendation to all states by the UN Committee on the Elimination of Racial Discrimination to "ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent."¹⁹ The requirement of informed consent is also found in other international human rights instruments which, although they are not yet legally binding on Canada, are nonetheless highly authoritative and indicate minimum standards which the federal government should meet. These instruments include the Convention on Indigenous and Tribal People (ILO Convention 169), the Draft United Nations Declaration on the Rights of Indigenous Peoples, and the Organization of American States draft American Declaration on the Rights of Indigenous Peoples.

Acting on these human rights requirements necessarily involves both federal and provincial levels of government. The federal government has argued that it cannot uphold human rights treaties or the recommendations of UN treaty bodies in areas of provincial jurisdiction. But, in fact, the federal government has responsibility under the Canadian Constitution to protect the interests and lands of Indigenous peoples. The federal government also has an obligation to ensure that the international human rights conventions it ratifies are upheld in all jurisdictions in Canada. This obligation of the federal government has been repeatedly affirmed by UN human rights bodies which have stressed that inaction at the provincial level does not excuse Canada's failure to comply.

Conclusion: the time for fair settlement is now

"It seems that as long as the Lubicons are engaged in negotiations, the federal government feels assured that the Lubicons will not cause political embarrassment for them. That's not much of an incentive for them to proceed quickly towards settlement. Lubicon supporters, therefore, need to remind the federal government that support for a settlement is strong and negotiations need to be productive and timely. Otherwise these negotiations will be considered no more honourable than outright denial of Lubicon rights."

Lubicon Chief Bernard Ominayak.²⁰

It has now been more than 100 years since the Lubicon were overlooked in the Alberta treaty process, more than 60 since years they were first promised recognition of a secure land base, more than a quarter century since the first negotiations began with the federal government,

¹⁹ The Committee on the Elimination of Racial Discrimination, General Recommendation XXIII (51) Concerning Indigenous Peoples (August 1997).

²⁰ Ominayak. Op cit.

and more than a decade since the United Nations called on Canada to stop the violation of the Lubicons' human rights. To say that justice is overdue is an understatement.

The current Prime Minister Jean Chrétien demanded in 1993 that there be a "swift resolution" to the Lubicon situation. That swift resolution has never been delivered. The Prime Minister now plans to step down in February 2004. The government's commitment to the negotiation process could be affected by the campaign for the leadership of the governing Liberal party and the subsequent federal election. At the same time, the Lubicon continue to face pressure from ongoing and potentially expanded resource extraction on the disputed land.

Amnesty International is urging that Prime Minister Chrétien to ensure that prior to his departure from office a fair and just settlement is reached with the Lubicon Cree that ensures the protection of their rights as required by international and national law.