

University of Alberta

Framing the Intervention:
How Canada Staged its Takeover of the Lubicon Lake Nation

by

Dietlind Bork

A thesis submitted to the Faculty of Graduate Studies and Research
in partial fulfillment of the requirements for the degree of

Master of Arts

Department of Anthropology

© Dietlind Bork
Spring 2012
Edmonton, Alberta

Permission is hereby granted to the University of Alberta Libraries to reproduce single copies of this thesis and to lend or sell such copies for private, scholarly or scientific research purposes only. Where the thesis is converted to, or otherwise made available in digital form, the University of Alberta will advise potential users of the thesis of these terms.

The author reserves all other publication and other rights in association with the copyright in the thesis and, except as herein before provided, neither the thesis nor any substantial portion thereof may be printed or otherwise reproduced in any material form whatsoever without the author's prior written permission.

Abstract

In 2009, against the backdrop of halted land claim negotiations and increasing oil extraction from Lubicon traditional territory, a challenge was brought against the Lubicon custom election code. The challenge triggered a response from band members, a response later dismissed by Indian and Northern Affairs Canada (INAC). This thesis presents the resulting situation as an impasse between conceptual frames. On the one hand, the majority of Lubicon people understand the issue of the disputed election code to have been resolved according to Lubicon custom. On the other hand, INAC officials have determined the Lubicon situation to be an ongoing internal leadership dispute, a determination that requires INAC to appoint a third party to manage Lubicon affairs on behalf of the Lubicon people. The thesis examines this intervention, and the consequences for the Lubicon, not as an INAC response to financial default, but as a political response stemming from INAC's interests.

Table of Contents

1	Introduction.....	1
1.1	Responding to an unresolved internal leadership dispute.....	1
1.2	The approach.....	3
1.3	Thesis outline.....	4
1.4	The starting point.....	8
2	An overview of Lubicon-Canada Relations (1899-2009).....	14
2.1	“The promised land”.....	14
2.2	A “black eye” on Canada’s international reputation.....	20
2.3	The 2003 breakdown in Lubicon-Canada negotiations.....	25
2.4	Oil Extraction on traditional territory.....	30
2.5	“Negotiations cannot take place until...”.....	31
3	Custom Election Codes.....	35
3.1	The <i>Indian Act</i> ’s provisions for First Nations’ leadership selection.....	35
3.2	What constitutes “custom”.....	39
3.3	Lubicon custom election provisions.....	42
3.4	Who holds the power to determine “custom” election provisions.....	45
3.5	INAC’s role in regard to disputed custom election.....	47
4	The Lubicon Leadership Situation.....	50
4.1	Questions of financial accountability.....	50
4.2	The postponed election.....	51
4.3	The role of the Elder’s Council.....	53
4.4	The class of non-status Indians in Canadian-Indian Policy.....	55
4.5	The <i>GLN</i> on membership.....	57
4.6	“Membership is non-negotiable”.....	59
4.7	Bouvette’s decision.....	59
4.8	“What do we do now?”.....	61
4.9	The Special General Meeting.....	63
4.10	The election held June 5, 2009.....	65
4.11	Notifying INAC.....	66
4.12	INAC and Lubicon Lake Nation’s “missed opportunities”.....	68
4.13	The election held June 25, 2009.....	70
4.14	The INAC response.....	72
5	Frames of the Lubicon leadership situation.....	74
5.1	What is it that is going on here?.....	74
5.2	The use of frames as an explanatory principle.....	75
5.2.1	Illustration of set-theory diagrams.....	78

Contents continued

5.3 Delineating the Lubicon frames.....	80
5.3.1 The <i>GLN</i> -upheld frame.....	82
5.3.2 The status-only frame.....	84
5.3.3 The point of difference between Lubicon frames.....	86
5.4 The INAC frame: “the two competing groups”.....	87
5.4.1 INAC’s premise for inclusion.....	88
5.4.2 INAC’s premise for exclusion.....	90
5.5 Pinpointing the impasse.....	91
5.6 “INAC cannot get involved”.....	95
5.7 The paralysis of the impasse.....	98
5.8 The impasse concealed.....	104
6 The intervention: INAC’s imposition of third party financial management...106	
6.1 A transformation of “custom”.....	107
6.2 Erasing the Lubicon terms of reference.....	109
6.3 “The tale of two chiefs”.....	113
6.4 Context becomes cause: Rewriting three years of “missed opportunities”.....	116
6.5 Evoking an origin.....	119
6.6 Responding to the crisis.....	122
6.7 The “last resort” measure.....	125
6.8 A new INAC-favoured measure for bands with disputed leadership?....	129
7 Conclusions.....	131
Bibliography.....	135
Appendices	
Appendix A: Government of Alberta Lubicon Lake Nation Notification Strategy.....	141
Appendix B: <i>Lubicon Lake Indian Nation Order, 1999</i>	146
Appendix C: <i>Election Report 2009</i>	154
Appendix D: Early reporting on the Lubicon leadership situation.....	160
Appendix E: Elder’s Council’s <i>Public Notice</i>	166
Appendix F: Noskey to INAC regarding June 5, 2009.....	168
Appendix G: Letter to Alberta Government regarding the outcome of June 25, 2009.....	171
Appendix H: INAC’s <i>Custom Election Dispute Resolution Policy</i>	173
Appendix I: INAC-Noskey correspondence regarding the imposition of third party management.....	178
Appendix J: October 30, 2009 INAC correspondence.....	187
Appendix K: Later reporting.....	190
Appendix L: Informing the Lubicon that INAC has initiated the intervention.....	198

Chapter 1

Introduction

In December of 2009 the federal department of Indian and Northern Affairs Canada (INAC)¹ placed the Lubicon Lake Nation into receivership. That is, INAC appointed a third party manager to conduct general business and administrative duties on behalf of the Lubicon Lake Nation. By the summer of 2010 it was clear that the Lubicon had no hope of pressuring the federal Canadian government to return to negotiations on the Lubicon land claim, a claim that had been outstanding since 1939 with no negotiations having taken place since 2003. By October of 2010 the Alberta government was instructing oil companies active on traditional Lubicon territory to “adjust consultation activities with the Lubicon” while Government of Alberta staff “determin[e] if [the] Lubicon Lake Nation require[d] project notification” and to whom that notification would be sent.² Within months the Lubicon people experienced a marked shift as Lubicon control over the provision of their basic needs, their means of influencing industry activity on their lands, and their ability to have a say in their own future as a community came increasingly under government control.

1.1 Responding to an unresolved internal leadership dispute

The justification allowing for increased government control in each area was INAC’s position that the Lubicon community was suffering from an unresolved internal leadership dispute. Two equivalent parties, INAC asserted, both claimed to legitimately represent the band as its elected chief and council. The Government of Alberta, after communicating with INAC officials, explained the situation as follows:

¹ The federal department of Indian and Northern Affairs Canada (INAC) is now called Aboriginal Affairs and Northern Development Canada (AANDC). The majority of documentation for this thesis was collected before this name change. For consistency the title Indian and Northern Affairs Canada (INAC) is used in this work. At times the former INAC title DIAND (Department of Indian Affairs and Northern Development) also appears.

² Government of Alberta, Lubicon Lake Nation Notification Strategy, Interim Directive, October 15, 2010. This directive is included in Appendix A of this thesis.

The ongoing Lubicon Lake Nation leadership dispute between Mr. Steve Noskey (June 5, 2009 election) and Mr. Bernard Ominayak (June 25, 2009 election) has led to uncertainty regarding whether either candidate (potential Chief and his related Council) represent the membership of the Lubicon Lake Nation.³ (Parentheses in original.)

As the Alberta government explained, the Lubicon “governance situation... created difficulties for the Government of Alberta, along with a number of industry proponents active in the area” as to how the required “adequate and meaningful consultation with [the] Lubicon Lake Nation” would take place.⁴ The Government of Alberta’s resulting interim directive, the “Lubicon Lake Nation Notification Strategy,” is included in the appendix of this thesis. This Alberta directive would remain in place until such time as the Government of Alberta “receive[d] alternative direction from the Lubicon lake Nation’s duly authorized Chief and Council as recognized by the Government of Canada (INAC).”⁵

While the provincial government focused on ensuring oil company business on Lubicon territory could continue smoothly, the federal government was faced with a different challenge. According to the federal government, the “Government of Canada has a responsibility to ensure that the members of the Lubicon Lake First Nation receive the funding assistance to which they are entitled.”⁶ This type of band funding is to be provided as transfer payments to the band council of a given band for the provision of particular programs and services. If there was no clear Lubicon band council, however, there could be no transfer payments made to the band for provision of these programs and services. Lubicon peoples’ access to these programs and services, therefore, would be in jeopardy. As a result, INAC had to appoint a third party to manage the affairs of the Lubicon Lake Nation.⁷

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Government of Canada to the UN Special Rapporteur on the rights of indigenous people, September 24, 2010, 9, [http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_24.09.10_\(1.2009\).pdf](http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_24.09.10_(1.2009).pdf).

⁷ Ibid., 8.

At the heart of the INAC position lies INAC officials' explanation of the role of INAC when it comes to First Nations that elect their leadership via "the custom of the band," that is via a community-determined means of leadership selection. The Lubicon situation, according to INAC, was an ongoing internal leadership dispute between two parties. Following this line of argument, INAC could not choose to work with either party because to do so would be to choose for the Lubicon people who their band council was, and thus to overstep INAC jurisdiction and to fail to respect the rights of the Lubicon community to follow community-determined means of leadership selection.

Interestingly, the position of the majority of Lubicon electors also appeals to the right of the Lubicon Lake Nation to follow its own community-determined means of leadership selection. Following this Lubicon line of argument, it is precisely *because* the Lubicon follow their own codified custom election rules, both for running elections and for determining band membership, both of which INAC must respect, that INAC must recognize the outcome of the 2009 Lubicon election, not question its validity or offer support to those who wish to unilaterally dismiss the community's election rules. Thus, while INAC argues that INAC recognition of a band council in this situation would be interference in Lubicon internal affairs, the Lubicon argue that for INAC to refuse to recognize the elected band council in this situation is to interfere by refusing to accept the outcome of the custom election process. After all, the band council was elected to, among other things, work with INAC on behalf of the band. INAC is preventing this.

We could, at this point, simply conclude that INAC and the Lubicon fundamentally disagree as to what INAC's role is when it comes to custom elections. This conclusion, however, would be an erroneous.

1.2 The approach

In this work, my thesis for a Masters program in Anthropology at the University of Alberta, I examine the INAC label "leadership dispute" not as a representation of fact, but as a particular INAC diagnosis of the Lubicon leadership situation. The INAC characterization of the Lubicon problem as an ongoing internal

leadership dispute, where the community is apparently split in its support for two opposing candidates for band council, is not accurate. In the spring of 2009 Lubicon leadership certainly was disputed internally. And, indeed, an ongoing internal leadership dispute is a *type* of dispute regarding leadership that a First Nation may encounter. However, INAC's characterization of such a dispute is not the type of situation the Lubicon faced.

The INAC label - or frame, as I refer to it throughout this thesis - not only imposes a particular problem, it also prescribes a particular INAC response to that problem, namely that INAC cannot recognize a band council because to do so would be to interfere in the affairs of the First Nation. This is the glaring concern regarding INAC's role in relation to community-designed means of leadership selection: what happens if INAC officials make an inaccurate diagnosis of the problem? What are the consequences for First Nations communities if INAC refuses to recognize a band council?

1.3 Thesis outline

My research can be delineated into four areas of investigation. First, in what context did INAC officials arrive at their diagnosis of the Lubicon situation as an ongoing internal leadership dispute between two equivalent parties? Second, what are the consequences of this diagnosis for the Lubicon people? Third, how has the INAC interpretation of the Lubicon situation come to be the dominant understanding held by the media and other outside audiences? And fourth, what are the implications of this broadly held interpretation?

The thesis could not, however, jump directly into these four areas of investigation. The reader may not be familiar with the long-term situation of the Lubicon people, nor with their relationship to the Canadian and Alberta governments. Chapter 2, therefore, briefly outlines Lubicon-Canada relations, beginning with the journey made by Canadian authorities into northern Alberta in 1899. Though the Canadian government holds the position that Lubicon land title has been ceded to Canada, the Lubicon have never signed a treaty with Canada, and so argue they retain their inherent Aboriginal rights to their traditional

territory. In the 1950s oil exploration began on these lands, lands which later became the most active conventional oil field in Canada. Several rounds of land claim negotiations have taken place between Lubicon Lake Nation leadership and federal negotiators since 1988, with the last round of negotiation breaking down in 2003. Chapter 2 outlines the factors contributing to that breakdown, with an emphasis on the difference in approach between the negotiating parties, as well as the clashing positions as to how Lubicon traditional lands can be used in the interim. Chapter 2 also addresses the roles of outside organizations, including United Nations human rights bodies, that have influenced Lubicon-Canada relations since the 1980s.

Chapter 3 introduces what is meant by “custom” leadership selection. In this chapter I rely on Canadian case law to describe what generally constitutes “the custom of the band.” I introduce, too, the paradox that arises when federal legislation expressly recognizes the powers of a First Nation over which that legislation is to have no jurisdiction. Chapter 3 also introduces the Lubicon Lake Nation’s constitution, a document entitled the *Government of the Lubicon Nation (GLN)*. In particular, I highlight the *GLN*’s provisions for leadership selection (the electoral code) and band membership selection (the membership code). Throughout this chapter and the Chapter 4 I take time to define key terms that arise later in the thesis, including definitions from the *GLN* and terms from Canadian statute. Often definitions appear in footnotes so as not to interrupt the flow of the text.

Chapter 4 returns to the Lubicon leadership situation, beginning with events held in the Lubicon community of Little Buffalo in the spring of 2009. The Lubicon hold general elections for the Lubicon governing body – their chief and council – every five years. This event was due to take place on April 29, 2009. However, with Lubicon voters waiting for the election to begin, the electoral officer chose to postpone the election. This chapter draws from several sources of documentation to outline the factors that contributed to this postponement and how the Lubicon community responded to the resulting need to reschedule the overdue election. Sources of documentation include video-

recordings created by Lubicon people of the postponed election and subsequent events, articles written by a local journalist who attended these events and interviewed participants, phone interviews with the original electoral officer, officials' reports of events, and correspondence between INAC and Lubicon representatives. Chapter 4 ends by drawing attention to the discrepancy between various accounts of what happened in Little Buffalo in the spring of 2009. In particular, this chapter addresses both the general and immediate context in which INAC officials arrived at their diagnosis of the Lubicon leadership situation as an ongoing internal leadership dispute between two equivalent parties.

Chapter 5 shifts from description of the different accounts of what happened in the spring of 2009 to comparison and examination of these differing accounts. Already in this introduction, to describe the INAC understanding of the Lubicon situation I have used terms such as interpretation, label, account, diagnosis, and so forth. The concept "frame," as I use it, encompasses all of these terms. Although my use of "frame" is explained in detail in Chapter 5, I provide a short explanation here.

In response to any situation different people will have different understandings of what occurred based on what they find meaningful. One person's account of an event may focus on points that went unnoticed by someone else. This phenomenon can be thought of as a way of seeing the world as if through a picture frame, as described by Gregory Bateson. What the viewer finds important is the details of the picture; what is not important is the wallpaper outside the frame. The frame is not something concrete, but something unknowingly constructed by the viewer based on their own interests.

The significance of the frame approach is that it does not consider any given frame of the situation to be accidental, but the product of a particular premise system. There is, thus, a sort of logic determining which details one notices and which details one overlooks, to what is considered reality and what is ignored. Furthermore, a frame of a given situation does not only aid the viewer make sense of that situation. The frame also prescribes how the viewer is to *respond* to the situation. If the situation is understood by the viewer as some type

of problem that requires action, the frame is both the means of diagnosis and the prescription of a remedy.

In Chapter 5, I explore the differing accounts of the Lubicon leadership situation as different frames, each prescribing a particular response. This chapter ends with a discussion of the implications of the INAC frame, a frame that presents the Lubicon as having an unresolved internal leadership dispute and prescribes “do not interfere.”

Chapter 6 examines the effectiveness of the INAC frame as media and other outside audiences adopt the INAC rhetoric, and with it, the INAC understanding of the Lubicon situation. Next, this chapter examines the implications of broad audience acceptance of the INAC frame, especially with respect to INAC’s appointment of a third party to manage band affairs on behalf of the Lubicon people.

Although the focus of this thesis is the INAC response to the Lubicon leadership situation, considerable attention had to be directed to the Lubicon leadership situation itself. In paying attention to a particular situation, I myself am subject to the very same “means of understanding” I outline in the above. That is, I, too, came to understand the Lubicon leadership situation through a particular frame, *my* frame, a frame influenced by the information I found meaningful. Quite simply, this cannot be avoided.

Given my approach, however, the consequences of this realization do not negate the integrity of the thesis. Importantly, I do not assume to declare “the truth” about what happened in Little Buffalo in the spring of 2009. My objective, rather, is to examine the frames that have already been imposed on Lubicon events, including not only INAC’s diagnosis of the leadership situation, but also the frames used by two sets of Lubicon people, those supporting Steve Noskey as Lubicon chief and those supporting Bernard Ominayak. I then discuss what happens to those frames: which have been successful in gaining audience acceptance and which have failed. Furthermore, as I discuss thoroughly in Chapter 5, the nature of the Lubicon leadership situation does not require that I “take a side” in a dispute.

What I have stated in the above paragraph, I must clarify, is not a claim of objectivity. In my thesis I present INAC and Lubicon frames according to *my* research findings and *my* analysis of this data. This cannot be avoided either. What can be clarified, however, is factors which may have influenced this process.

1.4 The starting point

I have been interested in the case of the Lubicon Cree since 2006. My interest began through involvement with the Friends of the Lubicon Alberta, an Alberta Public Interest Research Group at the University of Alberta, which sought to create local public awareness about the outstanding Lubicon land claim and the appalling state of Lubicon living conditions. Later I volunteered for Amnesty International Canada, especially on their international “Demand Dignity” campaign, which included a focus on violations of indigenous land rights. The Lubicon Cree were a featured case.

By 2009, I was contracted by Amnesty International Canada to create educational material on the Lubicon, everything from historic timelines, to an interactive workshop, to summaries of successive United Nations human rights body decisions. I visited the Lubicon community of Little Buffalo multiple times in this role, and at one point traveled with Lubicon youth to United Nations Human Rights Committee meetings in New York. I also collaborated in several instances with other organizations, including KAIROS (Canadian Ecumenical Justice Initiatives), Friends of the Lubicon (based in Ontario, Canada), and Greenpeace Canada. Overall, I am sympathetic to the situation of the Lubicon people, although I note the complexities of Canada’s position regarding the outstanding land claim, as well as the role of factors other than the role of Canadian governments.

During the course of my involvement with the above organizations, I took note of increasing pressure on the Canadian government to change its approach in dealing with the land dispute. Instead of resorting to entrenched legal characterizations of historical events (for instance the concept of

“extinguishment” of rights), Canada was called to approach the goal of advancing human rights flexibly.⁸ As international standards developed, Canada came under increasing pressure to regard the full range of relevant international standards,⁹ including the UN Declaration on the Rights of Indigenous Peoples and the objective of achieving Lubicon *consent* over aspects of projects that affected Lubicon rights or interests.¹⁰

Not only were organizations demanding more of Canada, but there were more and more organizations making demands. They were carefully following the Lubicon situation, criticizing the Canadian and Alberta governments on various counts, documenting the oil activity on Lubicon traditional lands, drawing links Alberta’s oil sands industry and “in situ” extraction on Lubicon lands, drawing comparison with other Aboriginal communities across Canada affected by resource extraction, and so on.

Then, over the period of about a year (2009-2010), the attention paid to the Lubicon situation by these organizations took a considerable downturn. I found this to be quite remarkable. As I illustrate in Chapter 2, Canadian and Alberta governments had been trying for several decades to deflect criticism regarding the Lubicon: the Lubicon had asked for too much, the band was “jacking up its membership,”¹¹ the Lubicon position was based on “greed, not need,”¹² the Lubicon had refused to negotiate, the Lubicon had only limited rights to their traditional territory, the Lubicon were putting on a show, and so on. Despite these previous government arguments the criticism had continued. What was Canada’s new argument now? How was this argument so convincing that long-time Lubicon supporters took up other causes, that organizations put their Lubicon campaigns on hold, that even the United Nations Human Rights Council

⁸ Report of the UN Special Rapporteur on the rights of indigenous people, September 15, 2010, 62; Amnesty International, “From Homeland to Oil Sands,” 4.

⁹ Ibid., 61. At par. 127 UN Special Rapporteur Anaya also notes relevance of the jurisprudence of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, to which Canada should give “due regard.”

¹⁰ Ibid., 131.

¹¹ Goddard, *Last Stand*, 141.

¹² Ibid., 200.

appeared to accept that Canada's efforts to negotiate were frustrated by the Lubicon situation?¹³

The Lubicon have an ongoing internal leadership dispute. This was the Canadian government's argument. Only it did not appear to be an argument. It appeared to be a fact.

By the summer of 2010 I had stopped working for Amnesty International and was busy completing the course work for a Masters program in social-cultural anthropology at the University of Alberta. I had kept up to date with Lubicon developments, though, including developments pertaining to the ongoing internal leadership dispute (as I then understood it). A number of times during that summer I traveled up to Little Buffalo alongside students with the organization Friends of the Lubicon Alberta, some of them quite interested in learning more about the leadership dispute and eager to talk with Lubicon people about their perspectives.

But my interest in the Lubicon leadership situation did not peek until the fall of 2010. In October, INAC called a meeting with the Lubicon community to engage with the community on issues around INAC-imposed third party management. Several community members invited me and I attended.

I sat in the back row of the Cadotte community centre gymnasium for the duration of the meeting, which lasted about three hours. The situation no longer looked how INAC characterized it in the newspaper articles I had read. The Lubicon people in attendance repeatedly challenged the very need for a third party manager. There was no longer a dispute over leadership, they explained. There was one Lubicon band council, the one they elected via Lubicon voter eligibility and membership rules. That the previous chief contested the electoral outcome did not matter; his attempted change of the Lubicon rules had already been

¹³ Report of the UN Special Rapporteur on the rights of indigenous people, September 15, 2010. In paragraph 122 the report states that "[u]ndoubtedly, a complicating factor in any effort to now engage in consultations or negotiations with the Lubicon Lake Nation is the reported emergence of internal divisions among the Lubicon." The report explains "the Special Rapporteur has received information that in 2009 a serious split developed among members of the Lubicon Lake Nation leading to two different groups claiming to constitute the Lubicon Band Council, the governing authority of the Lubicon people."

dismissed by the community as a whole. Why would INAC not respect this community decision?

The INAC response did not address the points raised by the Lubicon people in attendance, but framed the series of events differently. According to INAC, half the community had participated in one election and half in another.¹⁴ Thus the Lubicon situation “put the department into a position of not being able to interfere,” a position of not being able to “take sides.”¹⁵ INAC’s regional director of First Nations Relations explained to the Lubicon people at the meeting the result:

Last summer when the governance dispute was developing, and we recognized that we needed to put something in place to ensure programs were getting to members, we wanted to give time to try and see whether the dispute would resolve itself or come to an impasse. Once it became evident that it wasn’t, over the fall of last year we started making decisions on hiring a [third party manager]. We had to consult with the Department of Justice. We had to consult internally, within the Department, on what process had to be made.¹⁶

Something was amiss. INAC was using their apparent need to *not* get interfere in the internal affairs of the Lubicon Lake Nation as justification for taking over the affairs of the Lubicon Lake Nation. And yet the entire explanation sounded perfectly reasonable, a well-measured and considerate government response to a complex internal problem. How could this be?

My curiosity regarding INAC’s explanation at the October meeting lead me to change my MA thesis topic to focus on INAC’s response to the Lubicon leadership situation. A steep learning curve followed. I knew little about the Lubicon constitution, even less about the nature of First Nations’ “custom codes,” and nothing about jurisdictional issues or historical factors leading to some bands having the ability to determine their own means of leadership selection. I also was not in Little Buffalo for any of the events of spring 2009, and though I had spoken with several Lubicon people about those events, I did not have a clear

¹⁴ Spencer Philipppo, INAC-Lubicon community meeting, October 21, 2010.

¹⁵ Troy Chalifoux, INAC-Lubicon community meeting, October 21, 2010.

¹⁶ Spencer Philipppo, INAC-Lubicon community meeting, October 21, 2010.

understanding of what happened, nor the background to understand the significance.

Luckily, Lubicon people themselves had video-taped the events of spring 2009. I obtained extensive footage from Billy Joe Laboucan, who had video-taped a number of events in the spring of 2009, starting with the postponed Lubicon election (April 29, 2009). He also taped the October Lubicon-INAC meeting I attended, as did Leticia Sawan, who also shared with me her footage. I also obtained interviews that students with Friends of the Lubicon had conducted concerning the impact of third party management in their community.

Upon later visits to Little Buffalo, I conducted my own interviews, some of which were video-recorded. (Whether or not interviews were video-recorded was based on obtaining informed consent from participants). This included interviews with the members of the Noskey council, but did not include Bernard Ominayak, who did not respond to messages I left at the then band office.

From the mixture of event footage, meeting footage and interviews I created the video “Framing the Intervention” to serve as background for my thesis.¹⁷ The video was an attempt to reconstruct the record of events in Little Buffalo in the spring of 2009 and the later imposition of INAC third party management. The goal was to exemplify INAC and community members’ discourse regarding those events, thus serving as a starting point for further analysis.

At this point it would be an oversight not to note that the video itself is a product of framing. In general, in most situations many different things happen simultaneously, things that are related, are unrelated, are causative, are coincident. Even to ask the question “what is going on here?” biases matters in the direction of some unitary exposition and simplicity.¹⁸ All human experiences are understood through conceptual frames, for that is how we organize and

¹⁷ The video “Framing the Intervention” is accessible here:
<http://dl.dropbox.com/u/3921683/Framing%20the%20intervention%20-%20June%202011.mp4>

If you have difficulty viewing this link please contact the author at dbork@ualberta.ca.

¹⁸ Goffman, *Frame Analysis*, 9.

understand our worlds. In this sense the video “Framing the Intervention” is no different: it cannot possibly cover every detail of every meeting and every opinion of every Lubicon person. The question, then, is which details to include and which to leave out in order to talk about the situation. This question places a substantial obligation on the editor to try sift through as much information as possible and to look for corroboration from a number of differently-situated sources. The goal is to document substantiated patterns.

“Framing the Intervention” thus introduces the experience of the Lubicon community given INAC’s refusal to recognize a band council, and the subsequent imposition of third party management, as informed by patterns evident in the footage collected. Footage from community events (events that are described in Chapter 4) serves as the primary source of information. References to the *GLN*, documentation from contemporaneous reports from the *Peace River Record-Gazette*, and interviews with community members help to highlight, contextualize, and explain key points. As I had no access to any video-recordings or meeting minutes from the June 25, 2009 event which selected Bernard Ominayak as Lubicon “chief for life,” I could not include direct visual or written representations of how this outcome was arrived at. In Chapters 4 and 5 of this thesis, however, I try to make up for this with inclusion of media reports interviewing those who ran and participated in that event.

Though the material presented in the video does not express all perspectives on the issues regarding the Lubicon leadership situation and the imposition of third party management, I am certain that the video does not unfairly represent the majority of Lubicon members’ opinions on those issues at the time the video was created.

Chapter 2

An Overview of Lubicon-Canada Relations (1899-2009)

In Canada, Aboriginal Nations were recognized as having the legal title to their traditional lands. In order to obtain that title, the Canadian government sent commissioners to negotiate treaties with the Aboriginal Nations within a government-determined treaty area. That it was, and is, the Canadian government's *exclusive* power to "extinguish" Aboriginal title is well-established.¹⁹ Provincial governments are vested with the power to deal with issues of aboriginal title.²⁰

The "numbered treaties" system covers western Ontario and the prairies. The assumption held by the federal government was that as settlers arrived the Aboriginal lifestyle would cease to exist. While in the initial years Aboriginal people may continue to live off the land, eventually they would settle on reserves set aside for them. The "benefits" of the treaty, such as "annuities" (for some treaties, five dollars paid annually for each person having signed treaty) and other provisions (for instance animals and machinery for the farms that were to be established on reserves) would help in making the transition; some land rights would also be protected under the terms of a given treaty, such as the rights to hunt, trap, and fish.

2.1 "The promised land"²¹

In 1899, federal treaty commissioner David Laird arrived at Lesser Slave Lake, 200 miles northwest of Edmonton, to negotiate Treaty 8 with the Aboriginal peoples of the area.²² The agenda for treaty making in this area was determined not by nation-building projects like earlier treaties, but by the expansion of

¹⁹ Huff, "Resource Development and Human Rights," 165. At note 34 Huff outlines a number of important Canadian legal cases interpreting aboriginal title.

²⁰ *Ibid.*, 166.

²¹ In my visits to Little Buffalo I heard this phrase spoken more than once (usually said with a wry tone) in reference to the yet to be established reserve at Lubicon Lake.

²² Goddard, *Last Stand*, 7-8.

mining and prospecting activity.²³ Government's policy at the time was to gain Aboriginal surrender of as large a tract of land as possible with as little expense and effort as was possible.²⁴ The result of such an approach was that the territory the government claimed had been ceded through treaty negotiations was far greater than the area covered by the actual negotiations.²⁵ Federal negotiators stuck to the main rivers in the area, the Peace and the Athabasca,²⁶ and did not penetrate the interior north of Lesser Slave Lake where the Lubicon Lake people and several other Cree groups lived.²⁷ The Lubicon, and other communities in the regional (later known as the "isolated communities"), were missed.²⁸

The following year a new federal commission, James Macrae, endeavoured to reach some of those who were missed. He brought six new bands into treaty, two of which Ottawa had not known existed.²⁹ Macrae later reported to Ottawa the following:

There yet remains a number of persons leading an Indian life in the country north of Lesser Slave... 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.³⁰

The Lubicon continued to live a traditional lifestyle, described by journalist John Goddard, author of *Last Stand of the Lubicon Cree*, as follows:

²³ Ray, *Bounty and Benevolence*, 148, 152. Historians Ray et al. draw from government correspondence from around the turn of the century to discuss the pressures for Treaty 8, describing the expansion of mining and prospecting activity as the primary catalyst for treaty-making in the region, especially in the context of the changing nature of the fur trade. During this treaty-making era, Aboriginal people asked the government to come to the bargaining table before it was prepared to do so.

²⁴ Smillie, "People Left Out of Treaty 8," 93. In her thesis for a masters degree in history at the University of Saskatchewan, Christine Smillie examines how and why the Canadian government negotiated Treaty 8 with First Nations living in north-western Canada, as well as the government's attitude toward those people it casually left out of treaty.

²⁵ *Ibid.*, 13.

²⁶ Goddard, *Last Stand*, 2.

²⁷ *Ibid.*, 11.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*

Life followed a cyclical pattern set by the changing of the seasons. In the fall, the band dispersed into hunting parties of two or three families each. Moose was the staple food. Hides of fur-bearing animals provided barter for ammunition, tea, flour and other goods. In later spring, people would congregate into local bands at lakes, forming small communities named after the lakes themselves. Lubicon and Loon lakes were the most popular gathering points in the early twentieth century, but elders have identified a total of thirty-nine other camps and semi-permanent settlements in the region that were also in use....³¹

Becoming aware of provisions of treaty benefiting other communities, the Lubicon attempted to obtain a demarcated reserve under Treaty Eight during the 1930s.³² For years, members of the overlooked communities ventured out of the bush almost annually to make contact with the government.³³ As documented by John Goddard, on August 25, 1933 representatives of families living at Lubicon (Prairie) Lake sent a petition to Ottawa:

[We have] resided at or near Prairie Lake all our lives, and being the heads of our respective families, do respectfully ask that we be granted a land reserve here at Prairie Lake, and that our treaty payments be made on the said reserve.³⁴

Other bands in the area, also missed in Treaty 8, made similar appeals.³⁵

In 1939 two government representatives traveled by float plane to meet the Lubicon people on their home ground at Lubicon (Prairie) Lake.³⁶ One government official, Napoleon L'Heureux, later reported to Ottawa the following:

Their leader, Alexis Laboucan,... 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 began well before Treaty was ever mentioned...³⁷

L'Heureux recommended to Ottawa officials that the Lubicon Lake people be recognized as a separate band and that a reserve be established for them at the

³¹ Goddard, *Last Stand*, 12.

³² Huff, "Resource Development and Human Rights," 167.

³³ Goddard, *Last Stand*, 2.

³⁴ *Ibid.*, 17. Goddard notes that the petition was written likely with help from a clergyman or trader in the area.

³⁵ Goddard, *Last Stand*, 17-18.

³⁶ *Ibid.* Goddard includes a more detailed account of this visit.

³⁷ *Ibid.*

west end of Lubicon Lake, as the Lubicon had suggested.³⁸ Ottawa approved the recommendations.³⁹ By early 1940 the Surveyor General ordered that a reserve be staked out at Lubicon Lake.⁴⁰ Had this step of defining reserve boundaries been completed, the next step would have been the signing of the treaty.⁴¹ The surveyors never arrived, however, first owing to budget cuts, then to forest fires, and then, with the onset of World War II, to resources allocated elsewhere.⁴² Though the then minister of Indian Affairs pushed for a survey to go ahead “in order to secure the reserves to which the Indians in this district are entitled,”⁴³ it never took place.

The Lubicon were recognized as an official band under the *Indian Act*, though. The federal government had a list of the Lubicon people who came to meet them in 1939, with the expectation that Lubicon people who had not met with government officials at that time would be added to the band list later. But by 1943 one federal official had begun striking names from the Lubicon band list, rather than making additions.⁴⁴ In an effort to “cut down expenses”⁴⁵ Malcolm McCrimmon, had removed names from many of the bands in the area.⁴⁶ From the Lubicon he cut seventy-two people, splitting the band list at that time nearly in half.⁴⁷

The proposed Lubicon reserve land remained set aside until the 1950s, when oil exploration in the area began. A 1954 letter from the Alberta Regional Supervisor for Indian Affairs to the Indian Agent for the area states:

As you are no doubt aware, the Deputy Minister [for Provincial Land and Forest] had from time to time asked when our Department [of the Interior]

³⁸ Ibid., 19.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid., 20. Under terms of the *Alberta Natural Resources Act of 1930*, federal authorities were required to complete an official ground survey, evidence of which would go to provincial authorities, who then had to transfer the land to the federal Crown in trust for the band.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Aboriginal Rights Coalition, “Lubicon Settlement Commission of Review,” March 1993, 1.

⁴⁶ Ibid.

⁴⁷ Goddard, *Last Stand*, 29.

was likely to make a decision as to *whether or not to take up [the Lubicon Lake] Reserve*. There were so many inquiries from oil companies to explore the area that it was becoming embarrassing to state that it could not be entered.... In approaching the subject with the Indians, I think it would be well to keep in mind that the *mineral rights [at Lubicon Lake] may be very much more valuable than anything else*.⁴⁸ (Emphasis as added by Huff.)

The territory was opened up for resource extraction without the issue of aboriginal title ever having been resolved.⁴⁹ Goddard describes the next decades as follows:

Beginning in 1950, oil-exploration crews passed through Lubicon territory almost every winter. A village with close ties to the Lubicon band was later burned and bulldozed in an area where exploration was most intense; and in the mid-1970s, the Alberta government passed a law retroactively to stop the Lubicon people and several other bands from declaring an aboriginal interest in the region. In 1979, oil development exploded. Without a single environmental or social-impact study, more than a hundred resource companies entered the territory looking for a piece of the action. Work permits hit the highest price in the province, and the region became the most active exploration and drilling field in the country.⁵⁰

As oil extraction exploded, the Lubicon people found it more and more difficult to maintain a traditional lifestyle. According to the Lubicon Settlement Commission of Review:⁵¹

⁴⁸ Alberta Regional Supervisor of Aboriginal Affairs to the Minister of Aboriginal Affairs, February 25, 1954, quoted in Huff's "Resource Development," 168, who cites Ward Churchill, *Struggle for the Land: Contemporary Native Resistance to Genocide, Ecocide and Colonization*, 1998.

⁴⁹ Huff, "Resource Development and Human Rights," 168.

⁵⁰ Goddard, *Last Stand*, 2-3.

⁵¹ The Lubicon Settlement Commission was established in 1992. The commission defined itself as "an independent and non-partisan group... involved to see the negotiations that have been stalled for some time between the Lubicon and the two levels of government move again." Their mandate was "to investigate, compare, assess and report on the presentation of the Lubicons and the two levels of government, and to report to the three parties, but also to the public." Commission hearings began in June of 1992. The commission issued its final report of its findings and recommendations in March of 1993. It supported the 1985 recommendations made by government-appointed special negotiator E. Davie Fulton, declared governments had not been acting in good faith, and recommended that all oil and gas royalties be withheld until the settlement of the claim. The final report can be found online through the Friends of the Lubicon website: <http://tao.ca/~fol/pa/negp/ls930330.htm>.

Resource development began in earnest in 1979. The ability of the Lubicon to continue to their self-sufficient lifestyle was arrested by this development.⁵²

By 1983, the number of moose killed annually by Lubicon hunters dropped from more than 200 a year to less than 20. Dependence on welfare payments jumped from under ten per cent to over 90 per cent.⁵³ In 1983 the World Council of Churches in Geneva studied the Lubicon case and wrote to Canada's Prime Minister at the time that "in the last couple of years, the Alberta Provincial Government and dozens of multi-national oil companies have taken actions which could have genocidal consequences."⁵⁴ The letter states the following:

The situation of the Band and Band members is thus desperate.... They know no other way to live. They have no money, many have never been out of their traditional area. Many speak only Cree. Many neither read nor write. None have completed Grade 12. Those who try to pursue a different lifestyle will both deny their heritage and break their traditional bond with the land, an essential legal requirement of their aboriginal claim. They are literally in a struggle for their very existence as a people.⁵⁵

By this time it was estimated that four hundred oil wells pumped \$1 million worth of oil daily. None of this revenue benefited the Lubicon.⁵⁶

In the late 1980s, Anthropologist Joan Ryan spent time with several Lubicon elders (now deceased) and recorded the following:

Today we drove through the Lubicon traditional territory with Edward and Josephine Laboucan. The old people were silent. It was as if they were grieving. The land has been silenced too except for the swishing of the many pump jacks. The trappers used to walk their lines, healthy and well. Now Edward tells me he hasn't been to where his bulldozed line once was; he says it hurts too much.....

... they don't want to leave their land, injured as it is. Here they had status based on their skills, experience and knowledge. They were self-reliant; they kept themselves fed and clothed, warm and comfortable. They knew

⁵² Goddard, *Last Stand*, 86-87.

⁵³ *Ibid.*

⁵⁴ *Ibid.*, 3.

⁵⁵ *Ibid.*, 86-87

⁵⁶ Aboriginal Rights Coalition, "Lubicon Settlement Commission of Review," March 1993, 1.

the land around for miles; they knew where to get moose, mink, fox, muskrat, beaver, geese and ducks. They knew which plants were edible and what roots and plants heal physical and mental illness.

Now they... are buying spam, hot dogs and kraft dinner. They are ashamed they can no longer provide meat for others. They feel they no longer have a role in life. Those important ties to the land have been broken. They feel broken too.⁵⁷

Though the Lubicon had tried since 1971 to initiate negotiations with Canada to protect their rights, the government considered the Lubicon to be “merely squatters on provincial Crown land with no land rights.”⁵⁸

2.2 A “black eye” on Canada’s international reputation

The Lubicon first brought a complaint before the UN Human Rights Committee (UNHRC) in 1984. They alleged a “denial of the right of self-determination and the right of the members of the Lubicon Lake Band to dispose freely of their natural wealth and resources.”⁵⁹ In a summary of the Lubicon complaint the UN HRC wrote the following:

[The Lubicon] claimed that the rapid destruction of the Band's economic base and aboriginal way of life had already caused irreparable injury. It was further claimed that the Government of Canada had deliberately used the domestic political and legal processes to thwart and delay all the Band's efforts to seek redress, so that the industrial development in the area, accompanied by the destruction of the environmental and economic base of the Band, would make it impossible for the Band to survive as a people.⁶⁰

The summary also clarified that “the Lubicon Lake Band is not seeking from the Committee a territorial rights decision, but only that the Committee assist it in

⁵⁷ Joan Ryan, “Gut a Land, Gut a People,” 37.

⁵⁸ Amnesty International, “Timeline of the land rights struggle of the Lubicon Cree,” 1.

⁵⁹ Decision of the Human Rights Committee, Communication no. 167/1984, U.N. Doc. CCPR/C/38/D/167/1984 (March 26, 1990), par. 29.1, <http://www.unhchr.ch/tbs/doc.nsf/0/c316bb134879a76fc125696f0053d379?OpenDocument>.

⁶⁰ Ibid.

attempting to convince the Government of Canada: (a) that the Band's existence is seriously threatened; and (b) that Canada is responsible for the current state of affairs.”⁶¹

In 1987 the UNHRC requested that Canada take interim measures of protection to avoid irreparable damage to the Lubicon.⁶² After years of further investigation, including requests for information from the Canadian government, the UNHRC found that Canada had violated the International Covenant on Civil and Political Rights in its dealings with the Lubicon.⁶³ In 1990 the UNHRC presented its views that “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 so long as they continue.”⁶⁴

Within Canada, audiences following the Lubicon situation drew from the UN decision. The Lubicon Settlement Commission of Review, for instance, read the report and recorded the following:

The [UN Human Rights] Committee issued an order against Canada to stop any action that would further hinder the status of the Lubicon. They condemned Canada in the strongest possible language.⁶⁵

Within Canada the Lubicon had gained substantial attention in 1988 with a Lubicon-initiated international boycott of one of the main cultural events at the 1988 Calgary Winter Olympics (an Aboriginal art exhibit, *The Spirit Sings*, sponsored by a major oil company active on Lubicon land).⁶⁶ Goddard describes the impact of the actions taken by the Lubicon as follows:

⁶¹ Ibid.

⁶² Ibid., par. 14.

⁶³ Andrew Huff provides a detailed account of Lubicon and government submissions to the United Nations Human Rights Committee (182-184), the Committee’s decision (184-186), and an analysis of that decision (186-191).

⁶⁴ Decision of the Human Rights Committee, Communication no. 167/1984, U.N. Doc. CCPR/C/38/D/167/1984 (March 26, 1990), par. 33.

⁶⁵ Aboriginal Rights Coalition, “Lubicon Settlement Commission of Review,” March 1993, 2.

⁶⁶ Joan Ryan, “Gut a Land, Gut a People,” 39. Ryan describes the government response to the Lubicon blockade as “a paramilitary assault on unarmed adults and children” that “clearly conveyed the goals of the provincial government to protect the interests of multinational companies rather than those of indigenous peoples.”

By the time the Olympic Games opened in Calgary, the Lubicon people were enjoying a kind of zenith. They commanded international support and the means to convert such support into political power.

Later in 1988 the Lubicon erected checkpoints on the four main oil roads into Lubicon territory.⁶⁷ As the checkpoints were coming down and Lubicon people arrested, Alberta's premier Don Getty contacted Lubicon Chief Bernard Ominayak to begin talks.⁶⁸ As outlined earlier in this chapter, land the Lubicon had been promised for their reserve had been set aside only until the 1950s. In order to now establish a reserve, the Government of Canada would have to, in a sense, get those lands back from the province. Ominayak was demanding ninety-five square miles, based on the original treaty formula of 128 acres per person⁶⁹ and the number of Lubicon band members as set by the Lubicon-determined band membership list of 478 band members.⁷⁰ In 1988 Getty agreed to the ninety-five square miles, with some conditions, in what became known as the *Grimshaw Accord*.

Very soon after, the Canadian government began talks with the Lubicon Lake Nation.⁷¹ Issues to be dealt with in negotiations were band membership, reserve size, community construction, economic development and compensation, as agreed to by the Lubicon and a federal government representative in 1984-1985.⁷² Negotiations broke down when federal negotiators tabled what they clarified was a "final, take-it-or-leave-it settlement offer" that was unacceptable to the Lubicon. Author John Goddard described this offer's provisions for economic development as being negligible⁷³ and the band membership issue left unclear (with the then government registrar refusing Indian status to more than one third of the band).⁷⁴ As for compensation, it was entirely missing.⁷⁵ The federal position

⁶⁷ John Goddard, *Last Stand*, 171.

⁶⁸ *Ibid.*, 190.

⁶⁹ *Ibid.*, 177.

⁷⁰ *Ibid.*, 193.

⁷¹ *Ibid.*, 2.

⁷² *Ibid.*, 197.

⁷³ *Ibid.*, 198

⁷⁴ *Ibid.*, 198-199

⁷⁵ *Ibid.*

was that no compensation was due; rather, only a reserve was outstanding.⁷⁶ If the band wished to pursue compensation the band would have to sue the federal government through regular channels.⁷⁷

Although multiple subsequent rounds of negotiation have taken place and agreement was reached on several issues since that time, including how band membership would be determined, there is still no final agreement. The last round of negotiations broke down in 2003. Factors leading to the breakdown are discussed in the next subchapter.

By the year 2000, the Lubicon had gained expressed support from organizations across Canada. A major source of support came from Canadian unions, including the Canadian Labour Congress, the National Union of Public and General Employees, Public Service Alliance of Canada, la Fédération Autonome Collégiale, the Canadian Union of Postal Workers, and the Canadian Autoworkers. A press release⁷⁸ from these organizations stated that it was “important to all of us that negotiations with the Lubicon Nation get back on track and proceed in good faith.” Other organizations and individuals voicing their support for the Lubicon were the Presbyterian Church of Canada, the Canadian Friends Service Committee (Quakers), David Suzuki, the Treaty Chiefs of Alberta, and the Assembly of First Nations.

In 2003 the international human rights organization Amnesty International issued its first public report on the Lubicon situation. The report repeated the 1990 UN finding and highlighted that, although in response to that report “the Canadian government assured the UNHRC that it was seeking a settlement that would protect the rights of the Lubicon...., [to date] no such settlement has been reached.”⁷⁹

Since the first UNHRC decision, other UN human rights bodies and mechanisms have criticized the Canadian government regarding the Lubicon.

⁷⁶ Ibid., 196.

⁷⁷ Ibid., 198.

⁷⁸ Friends of the Lubicon, “Workers back the Lubicon Crees,” press release, August 23, 2000. Text available at <http://www.turtleisland.org/news/news-lubicon.htm>.

⁷⁹ Amnesty International, “‘Time is wasting’: Respect for the land rights of the Lubicon Cree long overdue,” April 2003, 2, <http://www.amnesty.ca/canada/AMR200103.pdf>

This includes the UN Committee on Economic, Social and Cultural Rights; the UN Special Rapporteur on the Right to Adequate Housing; the UN Committee on the Elimination of Racial Discrimination; and most recently the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People.⁸⁰ According to Amnesty International, no other human rights case in Canada has been so frequently criticized.⁸¹ In Canadian media reports this UN criticism has been referred to as “a black eye” on Canada’s international reputation.⁸² In the words of Sharon Venne, a witness before the Settlement Commission:

Most people who are knowledgeable in the area of Human Rights in the UN know about the Lubicon case.... [I]f you look at all the other atrocities in the world, the Lubicon case stands out as a big beacon....

I think that what has happened is that it’s brought attention of the world to the fact that what’s going on in Canada is not very pretty, their relationship to indigenous people. And the Lubicon have done that.⁸³

To Canadian audiences the Canadian government has maintained that Lubicon demands in negotiation are simply too high. For instance, when the journalists reported on a UN decision in 2006, writing “[t]he UN Committee on economic, social and cultural rights, in its report released late last week, ‘strongly recommends’ Canada resume talks with the aboriginal band in order to reach a solution to its claim against the government,” the (then) INAC’s Minister stated, “[w]e have continued to put fair and reasonable positions on the table.” The “Lubicon file is a difficult one,” the minister explained. He then compared the Lubicon case to other cases: “In the time the Lubicon negotiations have been

⁸⁰ Amnesty International, “United Nations Human Rights Bodies on Canada’s Treatment of the Lubicon Cree,” <http://www.amnesty.ca/lubicon/resources/lubicon%20factsheets%20UN.pdf>. (“Special Rapporteur” is a title given to individuals working or behalf of the United Nations to investigate, monitor and recommend solutions to human rights problems related to a specific theme. Special Rapporteurs often conduct fact-finding missions to countries to investigate allegations of human rights violations.)

⁸¹ *Ibid.*, 1.

⁸² Susan Thompson, “‘I will make a difference’: young Lubicon woman after NY trip,” *Peace River Record-Gazette*, March 29, 2010; Steele, “No Deal,” *Alberta Views*, March 2007.

⁸³ Aboriginal Rights Coalition, “Lubicon Settlement Commission of Review,” March 1993, 11.

going on, the government of Canada and the government of Alberta have settled nine other treaty land entitlement cases in the Treaty 8 boundaries.”⁸⁴

2.3 The 2003 breakdown in Lubicon-Canada negotiations

There have been several rounds of negotiation where Lubicon leadership and federal negotiators have reached agreement on various points.⁸⁵ In the following section I note, generally, what areas have been agreed upon. My focus, however, is to provide some background as to where land settlement negotiations were when they last broke down in 2003 and the key issues at the heart of that breakdown.

In addressing factors contributing to negotiation breakdown I refer to a number of sources, including an exchange in 2007-2008 between Bernard Ominayak and the then Minister of INAC regarding the potential of restarting negotiations. To include more information from the Government of Canada’s perspective, I also refer to the Government of Canada’s 2009⁸⁶ and 2010⁸⁷ “follow-up” responses to the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people in respect of the Lubicon Lake First Nation.⁸⁸ As outlined already in this chapter, United Nations human rights bodies have followed the situation of the Lubicon Lake Nation since the 1980s. In particular, Canada’s 2010 response to the United Nations is notable for the degree of attention it pays to the factors contributing to the halt in negotiations between the federal government and the Lubicon Lake Nation.

⁸⁴ *Canadian Press*, “Lubicon treated fairly in talks, Indian Affairs minister says,” *Edmonton Journal*, May 24, 2006.

⁸⁵ For a summary of early rounds of negotiation between the Lubicon and the federal government (including the Fulton Report in 1985) see the Settlement Commission’s final report.

⁸⁶ Government of Canada to the UN Special Rapporteur on the rights of indigenous people, June 3, 2009, [http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_05.06.09_\(1.2009\).pdf](http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_05.06.09_(1.2009).pdf).

⁸⁷ Government of Canada to UN Special Rapporteur, September 24, 2010, [http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_24.09.10_\(1.2009\).pdf](http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_24.09.10_(1.2009).pdf).

⁸⁸ Amnesty International, “United Nations Human Rights Bodies on Canada’s Treatment of the Lubicon Cree,” 1.

Many of the socio-economic and infrastructure issues of Lubicon-Canada negotiations have been agreed upon in previous rounds of negotiation. This view is held by both the Lubicon and the Canadian government, though there are differences. The Canadian government cites, for instance, the 1997 “community construction agreement” addressing areas such as housing, infrastructure, roads, a school, and water.⁸⁹ In its 2009 response to the United Nations the Canadian government explained that Canada had made “substantive process in meeting or exceeding most of the Lubicon’s demands contained in their 1997 proposal.”⁹⁰ The Lubicon position, though also recognizing agreements have been reached on many socio-economic and infrastructure issues, is skeptical as to whether or not Canada will honour points previously agreed upon:

... we’ve said many times – as have some members of the federal negotiating team – that agreement could be achieved in six weeks if both levels of Canadian government would simply honor hard-won agreements made already.⁹¹

Although relevant to the status of Canada-Lubicon negotiations, neither the Lubicon nor the Canadian government cite infrastructure issues as the reason for the breakdown in negotiations. A key issue is, rather, the issue of self-government.

As the Canadian government explained to the UN Special Rapporteur in its 2010 follow-up response, the central factor for the Canadian government’s inability to meet the Lubicon Lake Nation’s outstanding demands is the Lubicon approach to self-government negotiations. The Government of Canada explained the Lubicon approach as follows:

... the Lubicon are asking Canada to acknowledge a broad and undefined Aboriginal right to self-government for the Lubicon at the outset, rather

⁸⁹ Government of Canada to the UN Special Rapporteur on the rights of indigenous people, June 3, 2009, par. 77, [http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_05.06.09_\(1.2009\).pdf](http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_05.06.09_(1.2009).pdf).

⁹⁰ Ibid., par. 73.

⁹¹ Ominayak to Chuck Strahl (INAC Minister), May 19, 2008, <http://www.tao.ca/~fol/Im/080519mailing/080519BO2Strahl.pdf>.

than to negotiate governance powers and authorities that would operate within the context of the Canadian Constitution and federation.⁹²

Canada's 2010 response explained that the Canadian government holds a different position:

While the Government of Canada has acknowledged that self-government is an aspect of Aboriginal rights within the meaning of [section] 35 of the Constitution Act, 1982, Canada's approach to the negotiation of self-government is not a process for the recognition of Aboriginal rights or self-government *of any specific group*.⁹³ (My emphasis.)

The negotiation process, as provided for here, does not acknowledge an Aboriginal right, except generally. Instead, the Canadian government focuses on arriving at "the legal agreements necessary to making governance authority (for the particular Aboriginal group) work within the larger structure of the Canadian constitution."⁹⁴ In particular, Canada's response to the UN explained, the Canadian government is only willing to negotiate within the terms of Canada's *Inherent Right Policy*. Under this policy the Canadian government "generally recognizes an inherent right to self-government, and therefore negotiates practical arrangements for the exercise of self-government powers."⁹⁵ According to the policy, the result is that "government arrangements are tailored to meet the unique needs of Aboriginal groups and are responsive to their political, economic, legal, historical, cultural and social circumstances."⁹⁶ Negotiations are thus limited:

The Government of Canada is not prepared to recognize an undefined or unqualified Aboriginal right of self-government for the Lubicon or for any individual Aboriginal group. It would be impractical, unworkable, and inconsistent both with other ongoing self-government negotiations and with self-government arrangements concluded with other Aboriginal

⁹² Government of Canada to UN Special Rapporteur on the rights of indigenous people, September 24, 2010, 11-12, [http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_24.09.10_\(1.2009\).pdf](http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_24.09.10_(1.2009).pdf).

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ INAC, *Inherent Right Policy*, part 1. Available at http://www.aadnc-aandc.gc.ca/eng/11001_00031843.

groups. It would also not provide certainty, efficiency and clarify for all parties.⁹⁷

Overall, the Canadian government finds issue with “the [Lubicon] insistence on dealing with socio-economic and infrastructure issues in the same negotiational agreement as the land claim and governance issues.”⁹⁸ Canada finds this insistence motivated by “what appear to be purely political reasons”⁹⁹ and describes it as “disappointing.”¹⁰⁰

With Canada under pressure from the United Nations, INAC wrote to the Lubicon in 2007 with the offer of appointing a special representative to help bridge the different approaches to negotiations. Ominayak responded to INAC by questioning the intent behind the government offer:

It depends on the nature of the exercise you’re proposing. The key is whether you’re proposing to have your representative meet with us charged with trying to achieve agreement within a prescribed period of time, or if you’re proposing to have a supposedly uninvolved independent person characterize the positions of the parties and draw conclusions on whether, in that person’s judgment, the positions of the parties are reconcilable.¹⁰¹

As context for this response, the Lubicon negotiating team was contesting the Canadian government’s characterization of the reason for the breakdown in the last round of negotiations. While the Canadian government maintains that self-government was discussed “up to the point where it became clear the federal and provincial mandates were not able to meet the demands of the Lubicon people,” the Lubicon negotiators questioned the difference between “inability” to discuss and “refusal” to discuss. As Bernard Ominayak wrote to the INAC Minister Chuck Strahl in 2008 regarding the government position:

Negotiations didn’t end when it became clear that the federal and provincial mandates were not able to meet the demands of the Lubicon

⁹⁷ Government of Canada to UN Special Rapporteur on the rights of indigenous people, September 24, 2010, 12, [http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_24.09.10_\(1.2009\).pdf](http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_24.09.10_(1.2009).pdf).

⁹⁸ Ibid., 13.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Ominayak to Chuck Strahl (INAC Minister), May 19, 2008, <http://www.tao.ca/~fol/Im/080519mailing/080519BO2Strahl.pdf>.

people. Negotiations ended when federal negotiators refused to discuss self-government as a part of settlement of Lubicon land rights saying it was beyond their mandate...¹⁰²

Ominayak proceeded to differentiate between what he saw to be truly irreconcilable positions and mere “rationalization [for] not even trying to achieve settlement.”

In this last regard we have been told many times, including by departmental officials, that some departmental officials try to attribute lack of settlement to the situation being insoluble rather than to their own attitudes, ineptitudes and intransigence. The last federal negotiator appointed by the previous government, for example – as other members of the federal negotiating team can confirm – caused negotiations to go on interminably by bitterly characterizing each negotiated compromise as a personal defeat and regularly seeking to go back and renegotiate issues previously agreed.¹⁰³

Along with the issue of self-government Ominayak focused on the issue of compensation in his letter, a point not mentioned in Canada’s account of the negotiation breakdown to the United Nations Special Rapporteur. For Lubicon negotiators, the Canadian government’s position on compensation appears to be just as much a concern as is Canada’s position on self-government. Regarding the negotiation breakdown Ominayak wrote the following:

...federal negotiators brought discussions on financial compensation to an end by first asking the Lubicon to table a bottom line figure rather than pursuing discussion of substantive basis for financial compensation, and then insisting on using the requested bottom line as the starting point for negotiation of financial issues.¹⁰⁴

Of both the issues of self-government and compensation, Ominayak wrote regarding the government approach:

That’s not negotiation of the issues. That’s dictating what will and won’t be considered – contrary to what had been agreed in advance – and refusing to discuss anything else.¹⁰⁵

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

2.4 Oil Extraction on traditional territory

While the land issue remains unresolved, oil extraction continues. Though the Lubicon consider the full area of their traditional territory (approximately 10,000 square kilometers) to be unceded – pointing out that they never signed a treaty or otherwise gave up their land to Canada - the Governments of Canada and Alberta present a different understanding. In 2010 the Canadian government explained the following to the United Nations Special Rapporteur:

The Government of Canada and the government of Alberta, contrary to the position adopted by the Lubicon Lake Nation, notes that the disputed area is governed by the provisions of Treaty 8. Moreover, the Lubicon Lake Nation in fact ceded its aboriginal title and related rights in the disputed area in exchange for the rights guaranteed in Treaty 8. Specifically, the Lubicon Lake Nation members enjoy the hunting, fishing, and trapping rights guaranteed by Treaty 8 and the Canadian Constitution. Under Treaty 8, the Lubicon Lake Nation is entitled to Reserve lands, the extent of which is determined based on population size.¹⁰⁶

The discrepancy between the Lubicon and government positions has implications regarding who has the say over how Lubicon land is used. Some resource companies recognize that the jurisdiction of Lubicon traditional territory is disputed. Other companies, however, attempt to develop areas of traditional Lubicon territory citing only their authority to do so under the Alberta government's leases. A recent example is the construction of a natural gas pipeline, TransCanada's North Central Corridor. While the Lubicon assert rights over their entire traditional territory, when the Lubicon applied to participate in a hearing regarding the pipeline application to the Alberta regulatory board, the Lubicon application to participate was denied. When in 2010 the UN questioned Canada on this matter, Canada explained as follows:

¹⁰⁶ Government of Canada to UN Special Rapporteur on the rights of indigenous people, June 3, 2009, par. 31, [http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_05.06.09_\(1.2009\).pdf](http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_05.06.09_(1.2009).pdf). As support for this Treaty-rights-only argument Canada explains that the Lubicon traditional territory (the “disputed area”) lie within the bounds of the Treaty 8 area, and the status of traditional Lubicon land is therefore “governed by the terms of [that] treaty.”

... while the pipeline does cross the land of the Lubicon Lake Nation is claiming, it does not cross the Reserve land that is guaranteed under Treaty 8 nor is it near Lubicon settlements.¹⁰⁷

The Alberta government position, a position shared by the federal government, was that, as the Lubicon have only rights under the terms of Treaty 8, not the full spectrum of Aboriginal rights to the unceded territory, and as the Lubicon did not make their argument against the pipeline in such a way as to prove that specific Treaty rights would be violated, the Alberta regulator determined the Lubicon could not participate in decision-making regarding the pipeline's approval.¹⁰⁸ Though the Lubicon strongly opposed the pipeline, their concerns regarding its approval were dismissed. The Alberta regulator deemed basic consultation conducted by the pipeline company sufficient to deal with any concerns the Lubicon may have had.¹⁰⁹

2.5 “Negotiations cannot take place until...”

2003-2009 saw an increasing amount of pressure on the Canadian government to return to land negotiations with the Lubicon Lake Nation. Though the Canadian government took the position that the Lubicon had “rejected Canada’s proposals” and that was the reason for the breakdown in negotiations,¹¹⁰ organizations and individuals continued to contact Canada with their concern. In 2009, the Canadian Labour Congress, for instance, questioned Canada’s assurances that Canada had “invested a significant amount of time, energy and resources” toward achieving a settlement with the Lubicon, pointing out to the then INAC Minister the following:

... you also assert that the rights of the Lubicon Cree have already been either ‘extinguished’ or rendered secondary to provincial interests through a 19th Century treaty process to which the Lubicon were never a party.

¹⁰⁷ Government of Canada to UN Special Rapporteur on the rights of indigenous people, September 24, 2010, 3, [http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_24.09.10_\(1.2009\).pdf](http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_24.09.10_(1.2009).pdf).

¹⁰⁸ Amnesty International, “From Homeland to Oil Sands,” 10.

¹⁰⁹ Government of Canada to UN Special Rapporteur on the rights of indigenous people, June 3, 2009, par. 35, [http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_05.06.09_\(1.2009\).pdf](http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_05.06.09_(1.2009).pdf).

¹¹⁰ Ibid., par. 73.

Such an assertion runs contrary to national and international norms of justice and calls into question your government's real commitment to reaching a just and fair resolution of the Lubicon land dispute.¹¹¹

In 2007, the UNHRC expressed concern over the continued failure to reach a negotiated solution:

While noting the complexity of the issues raised by both parties, the Committee observes that they are still not in agreement on an appropriate remedy and urges the State party to resume, without further delay, negotiations with a view to finding a solution to the claims in conformity with the Covenant.¹¹²

A year earlier the Special Rapporteur on the Right to Adequate Housing had visited the community, witnessing the lack of access to potable water and sanitation and what he described as “appalling living conditions.”¹¹³ He also noted “the destructive impact of oil extraction activities that continue to lead to loss of lands and the asphyxiation of livelihoods and traditional practices.”¹¹⁴ In his final report he recommended the following:

Until a settlement is reached no actions that could contravene the rights of Aboriginal peoples over these territories should be taken. In that regard, a moratorium should be placed on all oil and extractive activities in the Lubicon region until settlement. Moreover, activities of private companies on Aboriginal lands – regardless of the status of the [land] claim – should be carried out only with consultation and approval of all Aboriginal and concerned communities.¹¹⁵

Organizations internationally and across Canada joined in the call for a moratorium. The call went unheeded by the Canadian and Alberta governments.

As a recent Amnesty International report documents, the Alberta government has issued oil, gas and mineral leases covering almost 70 per cent of Lubicon territory. There are more than 2,600 oil and gas wells, with

¹¹¹ Canadian Labour Congress and Amnesty International Canada to INAC Minister Strahl, April 16, 2009.

¹¹² Report of the UN Special Rapporteur on adequate housing, February 17, 2009, par. 27.

¹¹³ Amnesty International, “United Nations Human Rights Bodies on Canada’s Treatment of the Lubicon Cree,” 3. (This statement was made in October 22, 2007 in Ottawa by UN Special Rapporteur Miloon Kothari.)

¹¹⁴ Ibid.

¹¹⁵ Report of the UN Special Rapporteur on adequate housing, February 17, 2009, par. 27.

approximately 100 new wells drilled each year.¹¹⁶ The traditional hunting and trapping economy has been largely destroyed, plunging the Lubicon into poverty.¹¹⁷ At the same time, according to Amnesty International, “the federal government has treated the delivery of services to the community and any compensation for the harm done to the Lubicon Cree as benefits to be negotiated as part of the resolution of the land dispute.”¹¹⁸

The summer of 2009 saw the addition of a new explanation from the Canadian government as to why negotiations could not restart. As Canada explained to the UN in 2010, “two different groups have emerged from separate elections to claim the leadership of the community.”

The ensuing leadership dispute (which is still ongoing) is currently the single greatest impediment to any progress on reaching a negotiated settlement with the Lubicon. Neither the Government of Canada nor the Province of Alberta can negotiate in good faith with the Lubicon Lake Nation if there is no clearly identifiable leader endorsed by the community.¹¹⁹ (Parenthesis in original.)

In these circumstances, as Canada describes them, not only does there appear to be no opportunity to restart negotiations, but Canada clarifies that any attempt to do so on the part of the government would be inappropriate. Thus, “[u]nfortunately, discussions regarding a return to negotiations cannot take place until the Lubicon people resolve their leadership dispute.”¹²⁰ In the same letter Canada also highlights the potentially negative impact the Lubicon situation may have on consultation regarding resource extraction, a concern highlighted earlier by the UN.

¹¹⁶ Numbers regarding oil extraction on Lubicon traditional territory as documented in 2010 by Amnesty International, “From Homeland to Oil Sands,” 2. Detailed maps showing the extent of oil extraction infrastructure on Lubicon traditional territory are also included in this report (5-7).

¹¹⁷ *Ibid.*, 4.

¹¹⁸ *Ibid.*

¹¹⁹ Government of Canada to UN Special Rapporteur on the rights of indigenous people, September 24, 2010, 8, [http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_24.09.10_\(1.2009\).pdf](http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_24.09.10_(1.2009).pdf).

¹²⁰ *Ibid.*

The dispute and the resulting uncertainty also make it difficult for meaningful consultation with the Lubicon... on resource development activities.¹²¹

While the previous two decades saw increasing national and international attention to Canada-Lubicon relations, as well as growing pressure on the Canadian government to reach a settlement with the Lubicon, once Canada responded to pressure with the explanation regarding an internal Lubicon leadership dispute, that attention declined substantially.

¹²¹ Ibid, 9.

Chapter 3

Custom Election Codes

The following is a helpful clarification by the Standing Senate Committee on Aboriginal Peoples¹²² in regard to the nature of “custom” in relation to First Nations Elections:

There is some confusion with respect to the usage of the term “custom”. Custom under the *Indian Act* and as used by the Department of Indian Affairs and Northern Development does not refer to any traditional method of leadership selection. Rather, it simply serves to distinguish band councils elected pursuant to the *Indian Act* from those elected according to the rules established by the band. These rules, however, may not necessarily be based on traditional methods of choosing leaders.¹²³

In short, “custom” leadership selection means non-*Indian Act* authority over band leadership selection. When “custom election code” is specified, this refers to “community-designed” electoral codes.¹²⁴

3.1 The *Indian Act*’s provisions for First Nations’ leadership selection

The *Indian Act* first assented to in 1876 was a document collecting all prior legislation regarding state management of Indians. *Indian Act* provisions with regard to First Nation elections were first enacted in 1869.¹²⁵ These provisions determined that the Canadian government had the authority to impose a municipal style of leadership selection:

The Governor may order that the Chiefs of any tribe, band or body of Indians shall be elected by the male members of each Indian Settlement of the full age of twenty-one years at such time and place, and in such manner, as the Superintendent General of Indian Affairs may direct, and they shall in such case be elected for a period of three years, unless deposed by the Governor for dishonesty, intemperance, or immorality....

¹²² The Standing Senate Committee on Aboriginal Peoples is authorized to examine and report on the federal government’s constitution, treaty, political and legal responsibilities to First Nations, Inuit and Métis peoples and on other matters general relating to the Aboriginal Peoples of Canada.

¹²³ Standing Senate Committee on Aboriginal Peoples, “First Nations Elections: The Choice is Inherently Theirs,” May 2010, 8, <http://www.parl.gc.ca/Content/SEN/Committee/403/abor/rep/rep03may10-e.pdf>.

¹²⁴ Ibid.

¹²⁵ McNeil, “Challenging Legislative Infringements,” 339.

Various amendments along the same lines were incorporated into different versions of the *Indian Act*, and by *Indian Act* R.S.C. 1985, c1-5 (the current *Indian Act*) they made up section 74:

(74)(1) Whenever he deems it advisable for the good government of a band, the Minister may declare by order that after a day to be named therein the council of the band, consisting of a chief and councilors, shall be selected by elections to be held in accordance with this Act.¹²⁶

Not all First Nations were subjected to the election provisions of the *Indian Act*.¹²⁷ For the first time in 1951 the *Indian Act* recognized that some bands had retained their own systems of governance. In the 1951 *Indian Act* this distinction appeared in section 2(1)(a) in the definition of the “council of the band.” Today the same distinction is present in the definition at 2(1)(c).

“council of the band” means

- (i) in the case of a band to which section seventy-three [the election provision, now s.74] applies, the council established pursuant to that section,
- (ii) in the case of a band to which section seventy-three [the election provision, now s.74] does not apply, the council chosen according to the custom of the band, or, where there is no council, the chief chosen according to the custom of the band.

This difference, in the simplest sense, is that there exist two classes of bands when it comes to elections: there are bands who run their elections according to the *Indian Act*, and there are bands that choose their council “according to the customs of the band.”

It should be noted that a band can be moved between these two classes. INAC may unilaterally determine that a band currently overseeing its own leadership selection should be placed under section 74 of the *Indian Act* (that is, under the election provisions of the *Indian Act* as outlined in the above). For *Indian Act* electoral provisions to apply to a band INAC must declare them to

¹²⁶ For what constitutes an election held “in accordance with this Act” see sections 74-80 (the election provisions) of the *Indian Act* R.S.C. 1985, c1-5. For a discussion of *Indian Act* amendments with respect to the Act’s election provisions see McNeil 335-339.

¹²⁷ Standing Senate Committee on Aboriginal Peoples, “First Nations Elections: The Choice is Inherently Theirs,” May 2010, 8.

apply to that band.¹²⁸ On the other hand, bands that were at one time under the *Indian Act* provisions for leadership selection can “revert” to custom, with fulfillment of certain INAC requirements.¹²⁹ Different bands have different motivations for changing to a custom system. Both First Nations and the federal government have acknowledged that there are many problems with respect to *Indian Act* elections and that it has produced systems often fraught with administrative difficulties and inconsistencies, frequently resulting in appeals.¹³⁰ As the Senate Committee on Aboriginal Peoples stated in its report, “[c]ustom codes, though not without their problems, are generally seen as improvements to the electoral framework provided for by the *Indian Act*.”¹³¹ The details of reversion to custom and of election provisions under the *Indian Act*, however, are beyond the scope of this thesis.

Returning to the definition of custom leadership selection, two points of importance must now be expanded upon. First, the simple distinction that custom elections are run “according to the custom of the band” gives little indication of what custom is or how it is followed. A discussion of what would generally constitute custom leadership selection is therefore helpful for audiences attempting to gain an understanding of what “custom” is, especially regarding the Lubicon-INAC interaction, given that, as shown in the video “Framing the Intervention,” the phrase “the custom code” is used by Lubicon people and INAC officials in different ways.

¹²⁸ McNeil, “Challenging Legislative Infringements,” 339.

¹²⁹ Standing Senate Committee on Aboriginal Peoples, “First Nations Elections: The Choice is Inherently Theirs,” May 2010, 8.

For instance, the Senate Committee report adds that, since 1988, the federal government’s *Conversion to Community Election System Policy* requires that bands wishing to revert to custom elections from the *Indian Act*’s election process develop written codes which provide for, among other things, consistence with the Canadian *Charter of Rights and Freedoms*; provision for the settlement of election appeals; participation of off-reserve members; community approval of the custom code; compliance with principles of natural justice and procedural fairness.

¹³⁰ *Ibid.*, 2.

¹³¹ *Ibid.*, 30.

Second, the fact that custom determination of band leadership is expressly brought within the *Indian Act* definition of “council of the band”¹³² may be more than simple “explicit federal legislative recognition”¹³³ of “a form of Aboriginal customary law.”¹³⁴ Overall, the *Indian Act* functions to confer different statutory powers on various levels of government, mainly the Department of Indian Affairs who administers the *Indian Act*, but including some areas of the band’s government itself. What is not immediately clear is if the *Indian Act*’s very distinction between “section 74 bands” (bands who elect their leaders according to section 74 of the *Indian Act*) and “custom bands” is also a reference to or an assertion of a power the *Indian Act* holds over the custom band’s method of leadership selection.

Some clarification in both areas can be found in Canadian case law, to which we will now turn. First, however, a note about the general manner in which the courts are involved in regard to custom elections and what can be learned in consulting the relevant legal record.

To be clear, the courts have not set out to determine what a given band’s custom electoral code is. Rather, the courts have deemed themselves to have “supervisory jurisdiction” over decisions made according to custom under Section 18 of the *Federal Courts Act*.¹³⁵ Canadian Federal Court can therefore assess if a custom code was in place,¹³⁶ if that custom process was followed in situations of dispute,¹³⁷ and, potentially, if there was interference from the government overstepping its statutory authority.¹³⁸ In making a decision on a given case a judge relies on not only legislation - for instance the band’s own custom rules (codified or established by repeated practice), the *Indian Act*, the *Federal Courts*

¹³² McNeil, “Challenging Legislative Infringements,” 337.

¹³³ *Ratt v. Matchewan* 2010 FC 432 (CanLII) at para. 10.

¹³⁴ *Ibid.*, at para. 11.

¹³⁵ *Ratt v. Matchewan* 2010 FC 432 (CanLII). For instance Justice Mainville states at paragraph 106 that “whether the selection process is carried out by election pursuant to the *Indian Act*, or pursuant to custom, the Federal Court has supervisory jurisdiction over the process, and over those bodies, such as electoral officers, appeals boards or elders councils, purporting to exercise authority under the process.”

¹³⁶ Crane, *First Nations Governance Law*, 182.

¹³⁷ *Ibid.*

¹³⁸ Subchapter 3.5 of this thesis includes an illustration of this type of court decision.

Act - but also on relevant case decisions to have come before, what reasoning was used to arrive at those court decisions, and if the same determinations can be used in the case over which the judge is presiding. In this context considerable jurisprudence has developed on the nature of custom elections.

For the purposes of this chapter, relevant case law serves as a glimpse into the general features of custom election codes, what types of questions are asked when uncertainties arise, and who has the authority to answer those questions. I do not review these legal decisions for the purposes of any type of legal argument.

3.2 What constitutes “custom”

Where a band conducts its elections “according to custom,” the band determines who is eligible to vote, who is eligible to be a candidate, and how and when the council is selected.¹³⁹ The precise determination of what constitutes custom is, for the most part, case specific.¹⁴⁰

What is essential to an understanding of the term “custom” in reference to First Nations leadership selection is that “custom” is determined by the people it governs. Canadian jurisprudence is very clear on this point. In *Macleod Lake Indian Band v. Chingee*, 1998, the presiding Reed J. was asked to decide if the Macleod Lake Indian Band had the authority to determine its custom, “whether electoral, heredity or any other method,” for selection of chief and council. In his discussion Reed J. said the following:

I am persuaded that Parliament intended, when enacting the relevant provisions of the *Indian Act*, that it would be *for the band to determine the custom* that would govern its selection of the "council of the band". This follows from the *nature of custom which is practice established or adopted as a result of the individuals to whom it applies having accepted to be governed in accordance therewith.*¹⁴¹ (My emphasis.)

Following the “nature of custom,” then, different First Nations have different custom practices for leadership selection. As well, what constitutes a given

¹³⁹ Crane, *First Nations Governance Law*, 196.

¹⁴⁰ Ibid.

¹⁴¹ *McLeod Lake Indian Band v. Chingee* 1998 CanLII 7957 (FCA) at para. 8.

band's custom system may change over time. Reed J. emphasized in *Macleod Lake Indian Band v. Chingee*, 1998 the evolutionary nature of custom depending on changing circumstances:

...custom by its nature is not frozen in time. It can and does change in response to changed circumstances. A band may choose to depart from oral tradition and set down its custom in written form. It may move from a hereditary to an electoral system. It may choose to adopt as its customary practices, practices and procedures that resemble the election procedures used to elect municipal or provincial governments. I cannot interpret the reference to "custom of the band" in subsection 2(1) [of the *Indian Act*] as preventing a band from changing the custom according to which it governs itself from time to time in response to changing circumstances.¹⁴²

Though custom may change over time, what constitutes a band's custom code cannot be changed unilaterally. Importantly, band custom is determined by the band, not by the band council.¹⁴³ If custom rules are to be put in place, or if custom rules already in place are to be amended, and if that change is brought to the attention of the courts, the courts look to determine how the change was regarded by the community. In *Bigstone v. Big Eagle* 1992 Justice Strayer is asked to determine the validity of rules adopted to govern a band's election procedure, which was to be in accordance with the band's custom. After noting that the *Indian Act* provided "no guidance as to how that custom is to be identified," he stated:

Unless otherwise defined in respect of a particular band, "custom" must I think include practices for the choice of a council which are generally acceptable to members of the band, upon which there is a broad consensus.¹⁴⁴

This paragraph from *Bigstone v. Big Eagle* has been followed in the court again and again. Importantly, "broad consensus" does not necessarily equate to the will of the majority of the band members attending a meeting. In determining whether a broad consensus exists, the courts have considered other factors, for instance,

¹⁴² Ibid. at para. 10.

¹⁴³ Crane, *First Nations Governance Law*, 196.

¹⁴⁴ *Bigstone v. Big Eagle*, [1993] 1 C.N.L.R. 25 (F.C.T.D.) at page 34.

whether sufficient notice was given for members to attend, whether the time and place were accessible, and so forth.¹⁴⁵

As well, “broad consensus” does not necessarily mean only that which is written down. As Reed J. explains in *Francis v. Mohawk Council of Kanesatake*, it can be “necessary to ascertain how an electoral code has been applied *in practice* in a given situation, for instance *vis-à-vis* the question of who is entitled to vote and who will administer the conduct of the elections.”¹⁴⁶

It is quite common that behaviours arising through attitudes, habits, abstentions, shared understandings and tacit acquiescence often develop alongside a codified rule and may colour, specify, complement and sometimes even limit the text of a particular rule.... In such cases, and bearing in mind the evolutionary nature of custom, one will have to ascertain whether there is a broad consensus in the community at a given time as to the content of a particular rule or the way in which it will be implemented.¹⁴⁷

Reed J. also qualifies “broad consensus” in regard to unforeseen difficulties the band encounters in carrying out provisions of the custom code.

For a rule to become custom, the practice pertaining to a particular issue or situation contemplated by that rule must be firmly established, generalized and followed consistently and conscientiously by a majority of the community, thus evidencing a "broad consensus" as to its applicability. *This would exclude sporadic behaviours which may tentatively arise to remedy certain exceptional difficulties of implementation at a particular moment in time* (my emphasis) as well as other practices which are clearly understood within the community as being followed on a trial basis. If present, such a "broad consensus" will evidence the will of the community at a given time not to consider the adopted electoral code as having an exhaustive and exclusive character.¹⁴⁸

Reed J. here explains an important feature of “broad consensus.” The custom code cannot anticipate every situation the band may face. A situation may develop where a particular provision of the code cannot be implemented given unforeseen developments. In such cases, “sporadic behaviours which may tentatively arise to remedy certain exceptional difficulties of implementation” are

¹⁴⁵ Crane, *First Nations Governance Law*, 197.

¹⁴⁶ *Francis v. Mohawk Council of Kanesatake* 2003 FCT 115 (CanLII) at para.35.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid., at para. 36.

not negated as being non-custom. Rather, the viability of the remedy is based upon “broad consensus” of the community. In Reed J.’s words, “broad consensus” will “evidence the will of the community at a given time *not* to consider the adopted electoral code as having an exhaustive and exclusive character” (my emphasis). Adherence to the details of the code need not be so strict that it paralyzes the band in the face of some unforeseen circumstance.

From *Francis v. Mohawk Council of Kanesatake*, constituent elements of custom may be summarized as follows:¹⁴⁹

- 1) “practices” for the choices of a council;¹⁵⁰
- 2) practices must be “generally acceptable to the members of the band”;
and
- 3) practices upon which there is a “broad consensus.”

Of their own involvement, the courts themselves are quick to stress that the nature of what constitutes custom is determined by custom, not by Canadian judiciary. In *Bigstone v. Big Eagle*¹⁵¹ Justice Strayer finds the following:

The real question as to the validity of the new constitution then seems to be one of political, not legal, legitimacy: is the constitution based on a majority consensus of those who, on the existing evidence, appear to be members of the band? This is a question which a court should not seek to answer in the absence of some discernable legal criteria which it can apply.

3.3 Lubicon custom election provisions

Having ascertained a general idea of what constitutes custom, I return to the Lubicon custom code. As mentioned in Chapter 1 of this thesis, the Lubicon have a constitution called the *Government of the Lubicon Nation (GLN)*.¹⁵² This seventeen-page document includes everything from the regulation of construction and buildings, to the management and administration of band funds, to the

¹⁴⁹ Ibid., at paras. 23-24.

¹⁵⁰ “Practices,” here, may be “either ‘established’ through repetitive acts in time, or through a single act such as the ‘adoption’ of an electoral code.”

¹⁵¹ Crane, *First Nations Governance Law*, 196.

¹⁵² I obtained an electronic copy of this document from Friends of the Lubicon (Toronto) in 2009.

keeping of domestic animals and pets. I have not included a copy of the *GLN* in this thesis. Instead I refer to relevant sections.

The *GLN* includes provisions for both Lubicon elections (custom election code) and band membership (band membership code). Part 8 of the *GLN* pertains to elections and prescribes the following:

8.4 Election of Chief and councillors shall be decided by a simple majority vote of qualified electors at a duly called meeting of qualified electors, notice of which has been posted on the wall of the central administration office of the Lubicon Nation at a point reserved for the posting of public notices not less than twenty clear days before the day on which the election meeting is to be held.

Also included in this section is clarification that each candidate must “be a member of the Lubicon Nation and ordinarily resident on the traditional lands of the Lubicons,”¹⁵³ that voters must also be band members and must be similarly resident on the traditional lands of the Lubicon,¹⁵⁴ that voters must be at least eighteen years of age,¹⁵⁵ that “[n]o person shall be a candidate for election as Chief of Candidate unless that person’s nomination is moved and seconded by persons qualified to vote”¹⁵⁶ and that these nominations “shall be made only at a duly called meeting of qualified electors, notice of which has been posted” as in 8.4 above.¹⁵⁷ Part 8 also prescribes the term for chief as a term of 5 years.¹⁵⁸ For councillors, Part 8 prescribes a shorter term, but in practice councillors were voted in to serve the same five-year term as the chief.¹⁵⁹ Other subsections of Part 8 address how vacancies in the positions of chief and council are to be filled,¹⁶⁰ and how a chief or councillor can be removed from office.¹⁶¹

¹⁵³ *GLN*, section 8.1.

¹⁵⁴ *Ibid.*, section 8.2.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*, section 8.5.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ For instance, that five year terms for both chief and councillors are the custom of the band is mentioned in a Lubicon court case in 2003, *Ominayak v. Returning Officer for the Lubicon Lake Indian Nation Election*, 2003 FCT 596 (CanLII) at paras. 54-55.

¹⁶⁰ *GLN*, sections 8.6, 8.8-8.9.

¹⁶¹ *Ibid.*, section 8.7.

Given that voter eligibility depends on band membership (along with residency and age), Part 7 of the *GLN* regarding Membership is also relevant to Lubicon custom elections. The Lubicon determine their own membership criteria (the Lubicon membership code) and maintain their own band membership list. According to the *GLN* “[c]riteria employed in preparing the initial membership list of the Lubicon Nation are known aboriginal ancestry, family ties to other members of the Lubicon Nation and historic ties to the traditional Lubicon territory.”¹⁶² More information regarding how and when the membership code and membership list were codified, the way in which names can be added to or removed from the membership list, and what happens if an individual’s membership is challenged, are detailed in the next chapter of this thesis.¹⁶³

It is important to note that the *GLN* was not adopted by the Lubicon according to any definition of “custom” put forward by INAC or described by the Canadian courts. In the *GLN* the authority of the Lubicon government is described as follows:

- 3.4 Authority to exercise the power of the Government of the Lubicon Nation is entrusted by the Lubicon People to the Governing Council:
 - .1 to be used only in ways that are consistent with the ways of the Lubicon People and beneficial to their interests;
 - .2 to protect and advance the ways of the Lubicon People, including their spirituality, heredity, culture, traditions, values and law;

¹⁶² Ibid., section 7.3.

¹⁶³ The Lubicon constitution did not always have the name of the *GLN* (*Government of the Lubicon Nation*). There was an earlier version of the document called the *Government of the Lubicon Lake People*. It was codified in the early 1980s. The content of the two documents are almost identical in the area of elections and voter eligibility. In the area of band membership, the earlier document outlines how the initial membership list is *going* to be drawn up and which criteria are to be employed. (The initial membership list was not adopted until 1986.) The membership criteria outlined in the 1980s document and described in the current *GLN* are the same, with exception of the mention of “family ties to other members.” (“Historic ties to the traditional lands” and “known aboriginal ancestry” are present in both).

- .3 to preserve and promote the civic, social, cultural and economic welfare of the Lubicon People; and
- .4 to preserve and promote the rights and interests of the Lubicon People including their rights and interests in their lands, waters and resources

[T]he Governing Council is to be guided in all things by these purposes, goals and objectives.

3.4 Who holds the power to determine “custom” election provisions

The courts have concluded repeatedly that the power of bands to establish their own leadership selection rules through custom is not a power granted by the *Indian Act*.¹⁶⁴ In *Bone v. Sioux Valley* Heald D.J. addresses the very definition of “council of the band” in section 2 of the Act (noted above), clarifying that the definition does not mean the Act holds any jurisdiction over the election process.

It seems clear that this [definition in the Act] is a “definition” provision rather than an “empowering” definition. It simply states that a council of a band is either a council chosen according to the Band’s custom or, if a ministerial order is in effect pursuant to subsection 74(1) of the Act, it is a council that has been elected in accordance with the Indian Act. *It does not confer a power* upon a Band to develop a custom for selecting its council.¹⁶⁵ (My emphasis.)

Instead of conferring a power the role of the *Indian Act* is understood to “recogniz[e] that an Indian Band has customs, developed over decades if not centuries, which may include a custom for selecting the Band's Chief and Councillors.”¹⁶⁶ Thus the definition of “council of a band” acknowledges that, prior to the enactment of the 1951 *Indian Act*, Indian Bands had their own methods for selecting their leadership. The courts have concluded that the power or ability to continue choosing the band council in the customary manner is left intact by the Indian Act.¹⁶⁷ The power for a band to choose its leadership in a

¹⁶⁴ Standing Senate Committee on Aboriginal Peoples, “First Nations Elections: The Choice is Inherently Theirs,” May 2010, 8.

¹⁶⁵ *Bone v. Sioux Valley* [1996] 3 C.N.L.R. 54 (F.C.T.D.) at para. 31.

¹⁶⁶ *Ibid.*, at para. 31.

¹⁶⁷ *Ibid.*

customary manner can therefore be considered the “default” manner of leadership selection.¹⁶⁸ In *Bone v. Sioux Valley*, the power is described as follows:

[It] is an inherent power of the Band; it is a power the Band has always had, which the *Indian Act* only interferes with in limited circumstances, as provided for under section 74 of the Act.¹⁶⁹

Some confusion may result at this point with regard to the inherency of the power.¹⁷⁰ While in some instances a contemporary First Nation corresponds to an Aboriginal nation (governing itself at the time of European colonization), in other instances Aboriginal nations have been split into separate First Nations or Indian bands as a result of colonization, the creation of reserves, and the imposition of the *Indian Act*'s band governance system. As Osgood Hall law professor Kent McNeil points out, the Report of the Royal Commission of Aboriginal Peoples¹⁷¹ took the position that the inherent right of self-government is vested in Aboriginal *nations*, numbering less than a hundred across Canada, rather than local communities.¹⁷² In contrast, Federal Court has accepted that bands have “always had” an “inherent power” to select their leaders by customs that have “developed over decades if not centuries.”¹⁷³ McNeil outlines the paradox arising from this conclusion that Indian *bands*, that is statutorily-defined Aboriginal groups, can hold inherent rights. The difficulty arises, he explains, from the colonial reality that, for over a century, Aboriginal nations have had definitions of who they are imposed on them by the *Indian Act*.¹⁷⁴ As a consequence, today many Aboriginal nations find themselves in a situation where some aspects of their inherent right of

¹⁶⁸ Standing Senate Committee on Aboriginal Peoples, “First Nations Elections: The Choice is Inherently Theirs,” May 2010, 29.

¹⁶⁹ *Bone v. Sioux Valley* [1996] 3 C.N.L.R. 54 (F.C.T.D.) at para. 32.

¹⁷⁰ McNeil, “Challenging Legislative Infringements,” at note 77.

¹⁷¹ A Royal Commission is a panel of experts appointed by Canada’s Governor General to undertake full investigations into what are considered to be specific national problems. The findings of the commission are then reported to cabinet for appropriate action. The Royal Commission on Aboriginal Peoples (RCAP) was established in 1991 and submitted its final five-volume report in 1996, which made over 400 recommendations.

¹⁷² McNeil, “Challenging Legislative Infringements,” at note 77.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

self-government may in fact be exercised as *Indian Act* bands.¹⁷⁵ McNeil states the following:

This would appear to be the case where selection of band councils by custom is concerned. While band councils themselves may not be an expression of the inherent right of self-government of many Aboriginal nations, colonialism has resulted in a situation whereby the selection of band councils by custom *has become an expression of the right of self-government in that context.*¹⁷⁶ (My emphasis.)

In *Campbell et al v. British Columbia* [2000], Justice Williamson observations remind of the distinction:

... not only have Aboriginal peoples retained post-Confederation the power to elect their leaders, and that Aboriginal peoples have the power to determine how they will make those choices, but that the form or method of the exercise of Aboriginal rights may evolve.

Manifestly, the choice of how one's political leaders are to be selected is an exercise in self-government.¹⁷⁷

The *power to choose* how one's political leaders are selected is part of the inherent right to self-government.¹⁷⁸ While that right might have been infringed by Euro-Canadian settlement, and its form of expression perhaps changed,¹⁷⁹ the power itself has not been extinguished.¹⁸⁰

3.5 INAC's role in regard to disputed custom elections

Given that custom code elections are conducted beyond INAC's statutory limitations and that the use of customary selection processes have been "given explicit federal legislative recognition under the *Indian Act*,"¹⁸¹ case law states that INAC and officials representing INAC have "no involvement in the conduct

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ *Campbell v. British Columbia* 2000 BCSC 1123 (CanLII) at paras. 102-103.

¹⁷⁸ Standing Senate Committee on Aboriginal Peoples, "First Nations Elections: The Choice is Inherently Theirs," May 2010, 38.

¹⁷⁹ McNeil, "Challenging Legislative Infringements," at note 77.

¹⁸⁰ Standing Senate Committee on Aboriginal Peoples, "First Nations Elections: The Choice is Inherently Theirs," May 2010, 40.

¹⁸¹ *Ratt v. Matchewan* 2010 FC 432 (CanLII) at para. 101.

of elections held in accordance with ‘the Custom of the Band.’”¹⁸² However in instances of custom election disputes “no involvement” becomes complicated. In order for the band to function INAC must agree to work with the winner of the custom election. If INAC sees the outcome of the election to be disputed then INAC must either make some kind of determination about whom to recognize or refuse to recognize anyone.

In earlier case law, especially in regard to leadership issues at Barrière Lake, this complication surfaced in attempts made by INAC and its representatives to argue that INAC can make “purely administrative” decisions in order to recognize the outcome of a disputed custom election, and that such “purely administrative” decisions did not mean INAC had involved in the custom process.¹⁸³ Furthermore, it was argued, as these “administrative decisions” were not “legal decisions” they were not reviewable by the courts.¹⁸⁴ In *Wawatie v. Canada* 2009, however, Zinn J. does not accept the “purely administrative” characterization, opening the door for bands to take INAC’s role in custom code election process issues to court.¹⁸⁵

The understanding that INAC has “no involvement” in custom elections is thrown into question again, however, when considering INAC’s policy regarding custom election disputes. INAC’s *Custom Election Dispute Resolution Policy*

¹⁸² *Francis v. Mohawk Council of Kanesatake* 2003 FCT 115 (CanLII) at para. 4.

¹⁸³ Examples include *Algonquins of Barrière Lake Band v. Canada (Attorney General)*, [1996] F.C.J. No. 175 and *Wood Mountain First Nation v. Canada (Attorney General)*, [2006] F.C.J. No. 1638. In the former case, two band councils both claimed to be the rightful leadership of the band, and INAC recognized one council to work with as the band council. The argument of the Counsel for the Attorney General of Canada was made “on the basis that the ministerial decision was purely administrative in nature and was made solely for the purpose of permitting the Minister to discharge his duties to the Band.” Counsel for the Attorney General “therefore submitted that the question of the legality of the selection of the [Band Council] according to custom has not been determined.”

¹⁸⁴ *Wawatie v. Canada (Indian Affairs and Northern Development)* 2009 FC 8 (CanLII) at para. 18.

¹⁸⁵ *Ibid.*, at para. 18. In Zinn J.’s view, “it is open to the applicants to argue that the Minister of Indian Affairs and Northern Development, when he decided that in dealing with the [band], he would deal with the Ratt Council, made or purported to make, a decision under the *Indian Act*, R.S.C.1985, c. 1-5 or the *Department of Indian Affairs and Northern Development Act*, R.S.C. 1985, c 1-6, or acted pursuant to a Constitutional authority. Decisions made pursuant to such legislation or pursuant to a prerogative of the Crown are reviewable under section 18.1 of the *Federal Courts Act*.”

provides a range of “tools” for INAC officials to respond to disputes.¹⁸⁶ In some cases an INAC “assessment of the situation may reveal that, although a governance dispute exists, no action is necessary because it is being resolved locally.”¹⁸⁷ This may include, in situations “where there is a clearly written code,” INAC having the ability “to assist in the resolution of a dispute expeditiously by reviewing the code and ensuring that the actions taken by the persons or persons claiming power in the community complied with it.”¹⁸⁸ In other cases INAC is to encourage bands to take part in mediation.¹⁸⁹ In still other cases “INAC has the power to hold a referendum in an election dispute situation.”¹⁹⁰ Even an imposition of the provisions of the *Indian Act* regarding elections can be imposed on the band “as a last resort” in a situation where “a community is in chaos.”¹⁹¹ An overall principle “underlying this policy” is the “encouragement to First Nations to allow them to solve their own problems.”¹⁹² INAC’s statutory limitations are not mentioned.

¹⁸⁶ I obtained a copy of this policy from the INAC library in Ottawa. It is included in Appendix H of this thesis.

¹⁸⁷ INAC, *Custom Election Dispute Resolution Policy*, section 2.1.

¹⁸⁸ *Ibid.*, section 2.2.1.

¹⁸⁹ *Ibid.*, section 2.2.2.

¹⁹⁰ *Ibid.*, section 3.1.

¹⁹¹ *Ibid.*, section 3.2.

¹⁹² *Ibid.*, introduction.

Chapter 4

The Lubicon Leadership Situation

The purpose of this chapter is to provide a chronology of the events in Little Buffalo in the spring of 2009 and to record the differing points of view regarding these events. Sources of documentation include video-recordings created by Lubicon people of the postponed election and subsequent events (some of which is included in the video “Framing the Intervention” described in section 1.4 of this thesis), articles written by a local journalist who attended these events and interviewed participants, phone interviews with the original electoral officer, copies of officials’ notices regarding the outcome of these events, and correspondence between INAC and Lubicon representatives.

Another potential source of information would have been Government of Canada documents. In May of 2011 I submitted Access to Information Requests with both INAC and the Department of Justice asking for materials on an election dispute and/or the imposition of third party management at Lubicon Lake. The Department of Justice responded, informing me that it would take an additional 240 days to fulfill my request. As of October 2011 INAC has not responded.

Throughout this chapter and the following chapter I take time to define relevant terms, including definitions from the GLN and terms from Canadian statute. Often definitions appear in footnotes so as not to interrupt the flow of the text.

4.1 Questions of financial accountability

Since 1978 the position of custom-elected Lubicon chief was held by Bernard Ominayak. For decades Ominayak had substantial support from the Lubicon people. In federal negotiations he and other councillors (including long-time councillors Larry Ominayak and Dwight Gladue, as well as Steve Noskey) had taken a firm position on the outstanding land claim. Ominayak, especially, became well known nationally for his part in the *Grimshaw Accord*, an agreement with the Alberta government that would set aside portions of Lubicon traditional

territory, in total 95 square miles¹⁹³ for a potential Lubicon reserve. Importantly, this was an agreement that respected the band's own determination of its membership.¹⁹⁴ Ominayak and others also traveled internationally, meeting with supporters in Europe and traveling to the United Nations on more than one occasion.

Yet in recent years questions arose within the band as to whether Ominayak and band manager Margaret Whitehead were acting in the interest of the Lubicon community. Many band members suspected that, as community meetings were no longer held, the community was being kept in the dark about decision-making. Many band members alleged misuse of band funding. Many expressed exasperation in regard to their difficulty in dealing with the band manager to gain access to community funding for everything from housing improvements to post-secondary tuition to transportation for hospital visits.

By the winter of 2009 the community learned for certain that public funding for band services from INAC were not reaching the community: the regional school board reported it had not received tuition for primary and secondary school students attendance at the Little Buffalo school;¹⁹⁵ the band's auditors in Edmonton notified band councillors they did not have the financial information from the Lubicon band manager to complete the reporting required by INAC.¹⁹⁶ These developments, if not rectified, would put the band at risk of losing funding.

But the problem could be resolved, concerned community members believed. The Lubicon hold elections for their governing council, one chief and five councillors, every five years.¹⁹⁷ An election was fast approaching.

¹⁹³ Goddard, *Last Stand*, 192.

¹⁹⁴ Ibid.

¹⁹⁵ Dwight Gladue, personal communication, January 14, 2011. Widely corroborated (and discussed publicly) by other community members.

¹⁹⁶ Ibid. This point is discussed further in Chapter 6 of this thesis.

¹⁹⁷ "Governing council" and "band council" both refer to the leadership of a First Nation. As described in the previous chapter, "bands" were the creation of colonial policy and later the *Indian Act*. While INAC officials are more likely to use the phrase "band council" to refer to the chief and council, the Lubicon Lake Nation *GLN* uses the phrase

4.2 The postponed election

The Lubicon election was to take place on April 29, 2009. Councillor Steve Noskey was to run against Bernard Ominayak for the position of chief. Lubicon elections require an independent chair to ensure the election is conducted properly, according to the electoral provisions of the *Government of the Lubicon Nation (GLN)*,¹⁹⁸ a legal document that has served as the band's constitution since the 1980s. Ralph Bouvette who also ran the 2004 election that Bernard Ominayak had won five years earlier, was appointed by Bernard Ominayak to conduct the April 29, 2009 election according to the *GLN*.¹⁹⁹ When Bouvette arrived in the Lubicon community, Little Buffalo, on April 29 he was asked to meet with a group of Elders before conducting the election. The request was irregular, but Bouvette obliged.²⁰⁰

While Bouvette met with the Elders, crowds of Lubicon people waited outside for the election to begin. This can be seen in the video "Framing the Intervention." In a closed meeting with the Elders, Bouvette was presented with a new list of electors.²⁰¹ Instead of using the Lubicon-determined list of band members to run the election, Bouvette was instructed to use the INAC list of band members. Bouvette was taken aback.²⁰² The two lists differed substantially. As I outline in subchapter 4.4 below, the INAC list did not consider non-status Lubicon band members to be band members. First, though, some context is helpful regarding the role of Lubicon Elders.

"governing council." This thesis uses the phrase "band council" generally, regardless of who is speaking (unless a quotation is included which specifies one or the other phrase).

¹⁹⁸ Electoral provisions of the *GLN* are outlined in Chapter 3 of this thesis. For instance, according to section 8.4 of the *GLN*, "[e]lection of Chief and Councillors shall be decided by a simply majority vote of qualified electors at a duly called meeting of qualified electors."

¹⁹⁹ Ralph Bouvette, personal communication, August 1, 2011. Bouvette explained to me he was asked by Bernard Ominayak to chair the election meeting on April 29, 2009 under the same conditions he had conducted the 2004 election.

²⁰⁰ Ibid.

²⁰¹ Ralph Bouvette, personal communication, August 1, 2011.

²⁰² Ibid. Bouvette says as much to those gathered on April 29, 2009, as shown in the video "Framing the Intervention."

4.3 The role of the Elder's Council²⁰³

Elders are highly respected in the Lubicon community, especially for their knowledge and advice. They do not, however, have unilateral decision-making powers.

According to the *GLN*, the “Government of the Lubicon Nation consists of members, electors, Elders and a Governing Council.”²⁰⁴ The Governing Council of the Government of the Lubicon Lake Nation consists of the Chief and Council and this Governing Council is chosen by Lubicon electors. As for any specific role in the governance structure of the band, there are “Council Elders.”

While the band's chief and council are elected, the Council Elders are not. According to subsection 8.10 of the *GLN* “Elders will initially be nominated and elected in the same manner as Chief and Councillors.” Thereafter “Council Elders will themselves be responsible for deciding any questions involving removal of Council Elders, replacing of Council Elders, adding of Council Elders as the result of populations increases or the filling of any vacancies among Council Elders occurring for whatever reason.” Like the chief and councillors, “Elders must each be a member of the Lubicon Nation ordinarily resident on the traditional lands of the Lubicons.”²⁰⁵ In regard to the powers of the Elder's Council, they can vote in Council meetings along with the elected chief and

²⁰³ This section is comprehensive in that it references *every* mention of the words “Elder” or “Council Elders” in the *GLN*. (There is no mention of “Elder's Council” in the *GLN*.) I must also add that my understanding of the *GLN* in regard to Council Elders, as outlined here, is more generous than the positions taken by community members with whom I have spoken regarding the events of April 29 and the role of the Elder's Council. In more than a few instances it was explained that there had been no Elder's Council active in recent years. Frequently I heard the phrase “Bernard's Elders” to describe the Elders who asked Bouvette to make the membership list change, and it was pointed out several times that, of the six Elders constituting this appointed Elder's Council, only two were both band members and lived on Lubicon territory, even though the *GLN* states a Council Elders must be a band member. (Although I was frequently told the *role* this Elder's Council played in 2009 was inappropriate, never was any type of criticism directed toward any of these Elders themselves.)

²⁰⁴ *GLN*, part 1, section 1.1.

²⁰⁵ *Ibid.*, section 8.1.

council: “[a]ll elected Council members and Council Elders shall be entitled to vote at Council meetings.”²⁰⁶

There is some ambiguity in the text of the *GLN* as to whether Council Elders are considered *part of* the Governing Council of the band. For instance, as noted in the above, subsection 1.1 of the *GLN* states that the Government of the Lubicon Nation “consists of members, electors, Elders, and a Governing Council,” and that this “Governing Council consists of the Chief and Council,” where “Electors choose the Governing Council.” In this sense Council Elders could not be part of the Governing Council as the Governing Council is limited to the elected chief and council, although they can still vote in the same manner as the elected council. In contrast, section 3.1 of the *GLN* states that the “Governing Council of the Government of the Lubicon Nation consists of one Chief, one Councillor for each one hundred members of the Lubicon Nation, and one Elder for each one hundred members of the Lubicon Nation” (population when *GLN* was implemented). This section alone would indicate that Council Elders are indeed part of the Governing Council. Either way, however, the authority of Council Elders do not supercede the laws of the Lubicon Lake Nation nor the authority of the Lubicon people. As a reiteration from Chapter 3 of this thesis, the authority of the Lubicon council is described as follows in the Lubicon *GLN*:

- 3.4 Authority to exercise the power of the Government of the Lubicon Nation is entrusted by the Lubicon People to the Governing Council:
 - .1 to be used only in ways that are consistent with the ways of the Lubicon People and beneficial to their interests;
 - .2 to protect and advance the ways of the Lubicon People, including their spirituality, heredity, culture, traditions, values and law;
 - .3 to preserve and promote the civic, social, cultural and economic welfare of the Lubicon People; and

²⁰⁶ Ibid., section 9.6.

- .4 to preserve and promote the rights and interests of the Lubicon People including their rights and interests in their lands, waters and resources.

[T]he Governing Council is to be guided in all things by these purposes, goals and objectives.

4.4 The class of non-status Indians in Canadian-Indian Policy

The INAC differentiation between “status” and “non-status” Aboriginal people was a product of the Canadian government’s attempts to assimilate “Indians,” a legal status according to the Canadian government, into mainstream society starting in 1850.²⁰⁷ The Canadian government kept a list of government-defined “Indians”²⁰⁸ called the Indian Register.²⁰⁹ Aboriginal people the Canadian government deemed not be “Indians”²¹⁰ would have to leave their lands and communities.²¹¹ In 1857 the concept of “enfranchisement” was introduced,

²⁰⁷ Crane, *First Nations Governance Law*, 128. The 1850 *Act for the better protection of the Lands and Properties of Indians in Lower Canada* was statute that empowered colonial government officials to hold reserve lands and to manage those lands for the benefit the Indians living upon them. When reserves were set aside for the use of groups of Indians, it became essential to establish rules to determine the membership of those residing on those lands.

²⁰⁸ *Ibid.*, 129-130. While the more recent versions of the *Indian Act* outline particular government definition of “Indian,” earlier definitions were more reliant on community acknowledgement and self-identification. For instance in 1850 “Indians” were “all persons of Indian blood, reputed to belong to the particular Body or Tribe of Indians interested in such lands” (as were their children and all persons intermarrying with these Indians.)

²⁰⁹ *Ibid.*, 135.

²¹⁰ DeLisle, “White by Definition: status, identity and Aboriginal rights,” 5.

The *Gradual Enfranchisement Act* of 1869, a law giving federal officials control over band membership issues, limited the expansion of band membership through a blood quantum requirement.

²¹¹ The Royal Commission on Aboriginal Peoples provides a useful set of definitions for different aboriginal communities. *Aboriginal nations* are defined as a sizeable body of Aboriginal people with a shared sense of national identity that constitutes the predominant population in a certain territory or collection of territories. (*Aboriginal people* in the singular as used here refers to the indigenous inhabitants of Canada without regard to separate origins or identities.) In contrast to Aboriginal Nations, *First Nations* refers to a relatively small group of Aboriginal people residing in a single locality and forming part of a larger Aboriginal nation. Thus, the distinction between *First Nations* and *Aboriginal nations* is a distinction between local communities and nations, respectively. Altamirano-Jimenez adds that a *band* is also a relatively small group

whereby Indians could choose to give up their legal status,²¹² turn from “Indians” into notional non-Indians,²¹³ which would allow them to join “civilized” mainstream society.²¹⁴ Although “enfranchisement” was to be the choice of the individual in question, it was often done arbitrarily and without the knowledge of the individual in question.²¹⁵ Although status as defined by the *Indian Act* serves as formal recognition of Aboriginal identity, the identity it recognizes has been shown to be restrictive and designated arbitrarily from outside.²¹⁶

A decreasing number of Aboriginal people who were legally-determined “Indians” meant a decreasing number of Aboriginal people with government-recognized Indian land rights. The criteria used to create “non-Indians” (today referred to as non-status Indians, as opposed to status Indians) were abandoned by the *Indian Act* with the coming into affect of the *Canadian Charter of Rights and Freedoms (1982)* in 1985.²¹⁷ The distinction between the government labels, however, still exists, as does the Indian Register and state recognition of only status Indians having Aboriginal rights.

residing in a single locality, but the name is recognized as having strong ties to Canada’s reserve system, as opposed to *First Nation*, a term used in the Canadian Constitution 1982 that recognizes Aboriginal peoples’ prior existence. (Altamirano-Jimenez. “North American First Peoples: Slipping up into Market Citizenship?”, 349.)

²¹² Assembly of First Nations-INAC, “First Nations Registration (STATUS) and Membership,” July, 2008, 4.

²¹³ Crane, *First Nations Governance Law*, 129-130. The enfranchisement policy divided Aboriginal communities into two groups: on the one hand, the members following the traditions of the band and, on the other, the members who were deemed to be sufficiently “advanced” in European ways so as to be able to break their political and social ties with the band.

²¹⁴ Shewell, *Enough to Keep Them Alive*, 15. Shewell states that the government’s idea was to encourage Indians to apply for the franchise, marking the end of “being Indian” and signifying assimilation into mainstream society.

²¹⁵ For instance, Malcolm McCrimmon’s deletions of band members from the lists of northern Alberta bands in the 1940s, as mentioned in Chapter 2. McCrimmon cut seventy-two people from the then government-determined Lubicon band list.

²¹⁶ DeLisle, “White by Definition: status, identity and Aboriginal rights,” 9; Assembly of First Nations-INAC, “First Nations Registration (STATUS) and Membership,” July 2008, 12.

²¹⁷ Kymlicka, “Ethnocultural Diversity in a Liberal State,” 41.

4.5 The *GLN* on membership

In contrast to the *Indian Act*'s pre-1985 provisions for band membership that only status Indians could belong to bands, the Lubicon criteria for band membership allows for both status and non-status people to be band members, as long as those people are attached to the Lubicon territory by family and do not belong to any other Aboriginal band.²¹⁸

According to the *GLN*, the "Membership Code of the Lubicon Nation was considered and ratified at a duly called general meeting of the Lubicons held on March 18, 1986." It was then "further considered, amended and ratified at duly called general meetings held January 4, 1989 and October 16, 1989."

7.3 Criteria employed in preparing the initial membership list of the Lubicon Nation are known aboriginal ancestry, family ties to other members of the Lubicon Nation and historic ties to the traditional Lubicon territory. Persons meeting these criteria were entitled to be enrolled on the initial membership list of the Lubicon Nation, excepting only those who expressly declined to be so enrolled.

According to *GLN* subsection 7.2, the initial list of members was prepared by the duly elected Chief and Council of the Lubicon Nation and was considered and ratified at a duly called general meeting held February 25 and 26, 1986.

7.5 Criteria to be employed in adding people to or deleting them from the initial membership list of the Lubicon Nation are as follows:

- .1 persons eligible for enrollment as members of the Lubicon Nation following establishment of the initial membership list of the Lubicon Nation must qualify under the criteria established in subsection 7.3 and be ordinarily resident in the traditional Lubicon territory as of January 4, 1989;
- .2 persons enrolled as members on the Lubicon Nation membership list but who choose instead to become a member of either another Indian Nation or "Band" under the Indian Act shall be removed from the membership list of the Lubicon Nation and shall not be members of the Lubicon Nation;

²¹⁸ *GLN*, section 7.1, as discussed in the previous chapter of this thesis.

- .3 persons entitled to be added to the membership list of the Lubicon Nation but who choose instead to become a member of either another Indian Nation or "Band" under the Indian Act shall not be added to the membership list of the Lubicon Nation and shall not be members of the Lubicon Nation;
- .4 persons qualifying under sub-section 7.3, but not ordinarily resident in the traditional Lubicon territory may be enrolled as members of the Lubicon Nation after January 4, 1989, for reasons of community or family harmony, as determined by the majority of qualified Lubicon electors in attendance at an open general meeting, notice of which has been posted on the wall of the central administrative office of the Lubicon Nation at a point reserved for the posting of public notices not less than twenty clear days before the day on which said meeting is to be held;
- .5 the child of two members is entitled to be enrolled as a member;
- .6 the child of a member and a non-member is entitled to be enrolled as a member;
- .7 the child of a person described by sub-section 7.5.6 and a non-member will not be entitled to membership but will be entitled to live on reserve and benefit from on-reserve programs and services.

Importantly, and in contrast to the limitation to band-determined membership rules as described in reference to the *Indian Act* above, the Lubicon membership rules have the power to confer legal Indian status. When a land settlement is signed with Canada, all members of the Lubicon band (as determined by the Lubicon membership code) will have status, as will future Lubicon band members determined according to the above membership criteria. Canada has agreed to this. The terms of the membership agreement can be found in a 1999 Order in Council to come into affect seven days after the signing of a final settlement.²¹⁹

²¹⁹ *Lubicon Lake Indian Nation Order*, PC 1973-3571, (1973). I obtained the draft order from Friends of the Lubicon, along with related correspondence. Both are included in Appendix B of this thesis.

4.6 “Membership is non-negotiable”

Even after the *Indian Act* changed with the coming into affect of the *Canadian Charter of Rights and Freedoms (1982)*, the federal government maintained that only status Lubicon band members could be included in a land settlement. Federal negotiator Roger Tassé, for instance, when he visited the community in 1986, maintained that Ottawa would accept only the official band list of 196 status Indians for a reserve of 39.2 square miles.²²⁰ Chief Bernard Ominayak would not yield. “Membership is not negotiable,” Ominayak replied, “I can’t bargain away my own people.”²²¹ Ominayak invited Tassé to “come back to our community when you get a mandate to deal with us as one people.”²²² Though the Lubicon list was repeatedly challenged by INAC in the coming years, by the late 1990s the Canadian government had formally recognized the Lubicon people’s right to determine their own membership.²²³ The *Grimshaw Accord 1988*, (for which Bernard Ominayak gained national attention as the Lubicon Chief, as outlined in sections 2.2 of this thesis) was momentous for the same issue: the provincial government had agreed to set reserve land aside for the whole band, not just the federal government’s list of band members.

4.7 Bouvette’s decision

Returning to April 29, 2009, electoral officer Ralph Bouvette, an outsider well respected by the Lubicon community, knew the Lubicon had long fought to determine their own membership. He had indeed used the Lubicon-determined membership list at the previous election in 2004 when he last served as electoral

²²⁰ Goddard, *Last Stand*, 141.

²²¹ Ibid. Goddard also includes an interview with Councillor Steve Noskey regarding Tassé’s visit. According to Goddard, Tassé approached Noskey as follows:

“Tassé came over to me trying to be friendly and sympathetic,” Noskey recalls. “He mentioned that the federal government was prepared to negotiate immediately with the status people. He was suggesting that I was foolish to let the non-status hold the status people back. He assumed that I was status. I told him, ‘Mr. Tassé I know what you’re trying to do. You’re trying to divide the status and non-status, but that’s not the way it works around here. Status and non-status doesn’t matter.’ I also told him I was non-status. He stared at me and I could tell he was thinking, ‘I’ve just put my mouth where I shouldn’t.’”

²²² Ibid.

²²³ *Lubicon Lake Indian Nation Order*, PC 1973-3571, (1973).

officer, as he mentions in “Framing the Intervention.” The change to the INAC list meant that some Lubicon band members would not be allowed to vote or run in that day’s election. This included Bernard Ominayak’s competition for chief, Councillor Steve Noskey, who would be disqualified from running for being a non-status Lubicon band member.²²⁴

But that was not the only cause for concern. If non-status Lubicon band members were removed from the band, not only would those individuals be disenfranchised, they would lose their community, their identity, their access to band services, and their claim to Lubicon land rights. The latter would mean that there would be overall implications for the outstanding Lubicon land claim. Fewer band members would mean less land set aside for a Lubicon reserve, even though the federal government had long-since given in to Lubicon demands regarding membership determination. If such a fundamental change to the band’s make-up were to take place it would need the Lubicon peoples’ discussion and approval, not take place unilaterally in a closed meeting before an election.

Bouvette concluded that the change to use the INAC list to run the election - a change that came to him, in his words, “ostensibly from the Elders” - was a change that put him in an acutely uncomfortable position. Citing his sincere desire to respect the Lubicon people, his need to adhere to his own morals, and the unexpectedly stressful situation he had been placed in (especially, he noted, given his age and health - he brought with him an oxygen tank), Bouvette declared he would have to postpone the election. He concluded that the Lubicon would have to settle the dispute on their own and find someone else to run their election.

As shown in the video, as Ralph Bouvette excused himself, Lubicon men off camera can be heard saying “ya, let’s go to the school.” Soon after, Larry Ominayak (who has been a Lubicon councillor since 1978 and is also Bernard

²²⁴ Ralph Bouvette later said the following about his experience April 29, 2009: “It was clearly evident to me that there was a serious manipulation of process by Bernard. I wouldn’t buy into it.” Bouvette explained that the new voting list excluded a lot of people he knew were members of the band. “It was an exclusion process to remove any competition.” Ralph Bouvette, personal communication, August 1, 2011.

Ominayak's brother) is heard asking loudly, "while the people are all here, we can decide now, when do we have a membership meeting? Twenty days from now? Thirty days?"

4.8 "What do we do now?"

After Ralph Bouvette's departure the majority of people present at the original election reconvened at the Little Buffalo school gymnasium. "So with us all here together what do we do now?" a young woman asked. Never before had the Lubicon Lake Nation been in such a position. Never before had a scheduled general election failed to take place. According to the *GLN*, general elections must take place every five years. The election was now overdue and needed to be held.

Larry Ominayak, who had moved to the front of the gym, responded. "Maybe [what] we should think about is, we have to have a membership meeting." He explained that "even if we go into an election, the same thing is going to come up: who is a member." The community would, therefore, have to come together to make a decision on the membership issue raised earlier that day. "We need the whole community, all of us," he explained.

Another woman asked, "Are you going to invite them to come to a membership meeting?" When several others asked the woman to clarify whom she was speaking about, she added "Margaret," the name of the then Lubicon band manager. There was considerable laughter. "Bernard and them," the woman clarified further, "are you going to invite them?" Several people commented. "You have to," said one woman. Larry Ominayak added, "well they have to be involved. We've got to try and have everyone's involvement."²²⁵

²²⁵ As I mentioned already, when changes were made to the membership code in the past the changes were, at the least, ratified by the membership. There is no precedent for a proposed change to the Lubicon membership code causing an election to be postponed. The *GLN* does prescribe a process for if an *individual's* membership is in dispute:

7.6 A person whose claim to membership is in dispute is entitled to be heard by the elected Chief and Council of the Lubicon Nation within thirty days or requesting such a hearing. If after being heard by the elected Chief and Council of the Lubicon Nation, that person is still not satisfied with the determination of his or her [membership] status, he or she is entitled to be heard by the qualified

Discussion then turned to what happened if Bernard Ominayak and his supporters would not attend the meeting. It did not matter, the conversation concluded. The key would be that Ominayak and supporters would have the choice to participate in a community determination of the voter eligibility issue. Furthermore, as Bernard Ominayak and his supporters made up only a minority of the community, the community as whole would not be held back if some chose not to attend. The characteristic difference between the approach to membership taken earlier that day and the plans set in motion at this meeting, a meeting attended by the majority of the Lubicon community, was that now the opportunity would exist for everyone to be involved.²²⁶

Although there is nothing in the *GLN* to prescribe a precise response to a challenge against Lubicon membership criteria, since the time the Lubicon first codified their membership rules (that is the membership criteria employed by the band and the membership list) had been a matter that was involved the Lubicon membership. When changes occurred the membership code was ratified at duly called general meetings. This is described in the *GLN* in section 7, as outlined in the above (4.5 of this thesis). Even in instances where *one* person's eligibility was disputed, the *GLN* provides that that person would be "entitled to be heard by the qualified electors of the Lubicon Nation in attendance at an open general meeting" where the "decision of the majority of qualified Lubicon electors shall be final."²²⁷

electors of the Lubicon Nation in attendance at an open general meeting, notice of which has been posted on the wall of the central administrative office of the Lubicon Nation at a point reserved for the posting of public notices not less than twenty clear days before the day on which the meeting is to be held. When a person's [membership] status is determined by the qualified electors of the Lubicon Nation in attendance at such an open general meeting, the decision of the majority of qualified Lubicon electors shall be final.

In the April 29, 2009 challenge to the Lubicon membership it was not just one person whose membership was in dispute, but all non-status band members. None of those band members agreed with their names being cut from the band membership list, especially not when, as they asserted, it was part of a last-minute strategy to prevent them from participating in the election.

²²⁶ This paragraph is my paraphrasing of what is said in the community meeting, shown in the video "Framing the Intervention."

²²⁷ *Ibid.*, 7.6

The membership meeting was set for May 29, thirty days after the postponed election. The now overdue election was scheduled for June 5, 2009, where the outcome of the May 29 meeting regarding membership and voter eligibility criteria would be used to run the election. Dwight Gladue, who had originally suggested Bouvette as the electoral officer for the 2004 election, contacted Bouvette for the recommendation of a new electoral officer. Bouvette provided the name of Clayton Blood, whom Gladue subsequently contacted, asking him to chair the membership meeting and future election.²²⁸

4.9 The Special General Meeting

Clayton Blood, a member of the Blood Tribe in southern Alberta, chaired the May 29 special general meeting.²²⁹ His report²³⁰ describes what was discussed at this meeting:

1. The first issue was to give some details on cancellation of the April 29 2009 election.²³¹
2. The second item discussed was the membership and voter eligibility rules. The rules were once again read out loud but the one that received the most attention was the rule where members have to be normally resident in traditional Lubicon territory. A question was posed as whether to allow a member to vote in the election if they are attending school elsewhere but normally live in the community. Also there were situations where members had to move to other areas because of a shortage of housing or a shortage of jobs. But it was decided not to change the existing rules at this time. The concern was not to make any changes that would jeopardize the validity of the election.
3. There was a discussion on the procedures of the June 5th election. Lubicon members wanted to proceed with the election on the same rules and procedures they have always followed.

Some consideration is helpful regarding point 2. The *GLN* states that only

²²⁸ Ralph Bouvette, personal communication, August 1, 2011; Dwight Gladue, personal communication, January 14, 2011.

²²⁹ Bernard Ominayak did not attend this meeting, despite the meeting being posted over twenty days in advance, including at the then central administration office, and despite plans for the a meeting discussed on April 29 in Ominayak's presence.

²³⁰ Lubicon Lake First Nation, *Election Report 2009*, 2. This report, signed by Clayton Blood, is included in Appendix C of this thesis.

²³¹ Ibid. The report includes further information regarding the originally scheduled April 29 election in the background section of the report.

Lubicon band members who live with Lubicon traditional territory can vote. For many years, as recorded in past electoral reports, issues regarding residency were major topics of concern discussed at elections. Should Lubicon band members who lived outside of the Lubicon traditional territory be able to vote? This is not a band membership issue, but a residence issue, and so is distinct from the issue raised April 29, 2009. Point 2 is worth noting, however, because it shows something about the state of mind of those at the community meeting. Having addressed the uncertainty around membership that had been raised on April 29, attention shifted to discuss voter eligibility of non-residents, as in past elections. Clayton Blood documented some of the discussion:

Many of the members that attended the May 29th Community Meeting expressed their desire to be included in the election. One member stated “once you are a Lubicon, [y]ou should always be a Lubicon.” [A]nother member stated that other First Nations allow their members to vote even if they live in other areas.

From my viewing of Billy Joe Laboucan’s footage of this event, it seemed as if there was general agreement of those present that Lubicon voter eligibility criteria should be changed to allow those band members living outside of the territory to finally be allowed to vote. However, no change to Lubicon voter eligibility criteria took place. As explained by Clayton Blood, “in the end, everyone agree[d] the election should be conducted under the same rules that have always been followed.” The “concern was not to make any changes that would jeopardize the validity of the election.” Keeping all rules the same would ensure no challenge could be brought against the election. The report describes the meeting ended with everyone being reminded to attend the June 5 election.

By this time, news that the original Lubicon election had been postponed had sparked the interest of a journalist for the *Peace River Record-Gazette*, Michelle Huley.²³² “A failed election on April 29 has left the Lubicon Lake First

²³² Peace River is the nearest town to the Lubicon community of Little Buffalo, situated about 100km west of Little Buffalo. Many Lubicon people travel to Peace River often, for instance for groceries, to do laundry, and to attend various events. The drinking water provided to Lubicon homes is currently trucked from Peace River. Some Lubicon people live in Peace River.

Nation without an elected government,” Huley reported.²³³ Although a general membership meeting was held “to determine voter eligibility and call another election,” Huley explained, the “[b]and administrator Margaret Whitehead... said there was no sanctioned general membership meeting, and there will not be a June 5 election, as the group organizing it didn’t have the required authority.” On the issue of who did have the appropriate authority Whitehead deferred to the Elder’s Council.

Huley explained to her readers that “[a]ccording to an advertisement in the May 26 issue of the R-G [*Record-Gazette*], an Elder’s council is now responsible for the First Nation’s administration, including administering the next general election and determining voter eligibility.”²³⁴ The Elder’s Council’s notice stated that voter eligibility requirements include that voters must “be a recognized member of the Lubicon lake Nation as listed on the registered membership list as of April 7, 2009.”²³⁵ This is the same list that the Elder’s Council had asked Ralph Bouvette to use on April 29, the list including only INAC-registered status band members. (While Bouvette and band members with whom I have spoken regarding April 29 referred to the attempted use of the INAC list as a “last-minute” change to the membership list that took place in the hours before the postponed election, according to the Elder’s Council notice, the new list was put in place “as of April 7, 2009.”)

4.10 The election held June 5, 2009

The rescheduled election was held June 5, 2009 without incident. It was video-recorded by several Lubicon people, including Billy Joe Laboucan, some of whose footage appears in the video “Framing the Intervention.” An electoral report, included in Appendix C of this thesis, described how the event took place, how the *GLN* rules were used, who voted, who served as scrutineers and

²³³ Michelle Huley, “Lubicon members reschedule election,” *Peace River Record-Gazette*, May 1, 2009.

²³⁴ Ibid.

²³⁵ Lubicon Lake Nation Elder’s Council, *Public Notice*. This notice is included in Appendix E of this thesis.

secretary, who was nominated and by whom, who gave speeches, and so forth. In total the report recorded that there were 101 Lubicon members who were eligible to vote in attendance.²³⁶ The report, signed by electoral officer Clayton Blood, documented the following regarding the vote for chief:

Steve Noskey was asked if he would give a short speech on his nomination.²³⁷ Steve took the opportunity and gave a speech for approximately five minutes.

The Chief Electoral officer then called for the scrutineers to take their place at the front of the voters, one on each end to *[sic]* the gym. Then the voters were asked to show their hands if they are voting for Steve Noskey. The count was 57 votes on one end of the gym and 43 on the other end for a total of 100 votes. Steve Noskey was then declared the new Chief of the Lubicons.²³⁸

For council the electoral report describes the nomination and election of five councillors: Dwight Sawan, Dwight Gladue, Larry Ominayak, Michael Laboucan, and Vance Laboucan.²³⁹

The reporter for the *Peace River Record-Gazette*, Michelle Huley, can be seen taking notes in community members' footage of the event. She reported that "Noskey [was] elected as Chief of the First Nation earlier this month, ousting 30-year veteran chief Bernard Ominayak.... About 135 people turned out to the election including one hundred eligible voters."²⁴⁰

4.11 Notifying INAC

In previous years the elected Lubicon chief informed INAC of the election results in a letter. On the day after the election Steve Noskey wrote to INAC's Alberta Regional Director General. After outlining how the election was called, who

²³⁶ Lubicon Lake First Nation, *Election Report 2009*, 3. (See Appendix C of this thesis.) For comparison regarding number of voters, in the 2004 election Ralph Bouvette recorded the candidates receiving the highest number of votes (Councillors Dwight Gladue and Larry Ominayak) to have received 96 votes each.

²³⁷ Parts of Noskey's speech are included in both Huley's June 9, 2009 article (Appendix D of this thesis) and the video "Framing the Intervention."

²³⁸ Lubicon Lake First Nation, *Election Report 2009*, 4.

²³⁹ *Ibid.*, 4-5.

²⁴⁰ Michelle Huley, "New chief for Lubicon First Nation." *Peace River Record-Gazette*, June 9, 2009. This article is included in Appendix D of this thesis.

served as the electoral officer, and describing the election in relation to the *GLN*, he addressed the outcome of the election as follows:

I was elected Chief of the Lubicon Indian Nation with 100 votes.
Dwight Jordie Sawan was elected Councilor of the Lubicon Lake Indian Nation with 100 votes.
Dwight Gladue was elected Councilor of the Lubicon Lake Indian Nation with 99 votes.
Michael Laboucan was elected Councilor of the Lubicon Lake Indian Nation with 99 votes.
Vance Laboucan was elected Councilor of the Lubicon Lake Indian Nation with 99 votes.
Larry Ominayak was elected Councilor of the Lubicon Lake Indian Nation with 99 votes.
These pluralities are consistent with the number of votes received by successful candidates in previous Lubicon General Elections for Chief and Council who have generally won with between 80 and 95 votes.²⁴¹

Noskey also commented on the broader situation:

The past Chief has been trying in a variety of ways to change Lubicon election rules at the last minute, postpone the election or avoid contesting an election at all. I am advised that he's still trying. These efforts will not withstand scrutiny. His motivations are a matter of speculation but concern over band fiscal management, including the annual Lubicon audit, have become very controversial among the Lubicon members during recent months and were a major issue in the June 5th Lubicon General Election. I know you are aware of these financial problems as well.

My Council and I are currently reviewing Lubicon financial and other problems and will be contacting you shortly to discuss required remedial action. We look forward to working with you and your officials to better serve the interests of our people.²⁴²

Soon after INAC contacted the Noskey council asking for formal electoral report from Clayton Blood.²⁴³

²⁴¹ Noskey to George Arcand Jr. (Alberta Regional Director General, INAC), June 6, 2009. This letter is included in Appendix F of this thesis.

²⁴² Ibid.

²⁴³ Personal communication, Steve Noskey, February 6, 2011.

4.12 INAC and the Lubicon Lake Nation’s “missed opportunities”

In mid June 2009 the band’s long-time accountants in Edmonton sent the Noskey council correspondence they had received from INAC. Not only did this letter provide the Noskey council, and through them, the broader Lubicon community, with more information regarding the situation of Lubicon finances, it also substantiated concerns of band members regarding financial accountability of the 2004-2009 term’s administration.

This INAC letter was addressed plainly to “Chief and Council” at the address of the then band office, cc’ing the then band administrator Margaret Whitehead. The letter was sent May 13, 2009, which was during the period of time when Lubicon leadership was undetermined. In the letter, INAC expressed concerns with respect to the management and administration of various programs and services. The letter contained a review of the 2007/2008 Audited Financial Statements of the Lubicon Lake Nation, which INAC refers to as “a summary of the analysis completed by INAC” on areas of concern regarding expenditures and accountability at the Lubicon Lake Nation. INAC also included a copy of the Review of the 2006/2007 Audited Financial Statements.

Throughout the letter, INAC noted the failure of the Lubicon Lake Nation administration to provide the financial information required on time, including noting in several instances that it was not provided at all. INAC focused attention on a number of different areas where funds intended for Lubicon programs and services had gone unspent by the Lubicon administration, despite INAC’s expectation that the funding was indeed needed by the Lubicon community.

Regarding funding for education, for instance, INAC wrote that over \$50,000 of post secondary funding transferred by INAC for Lubicon students in 2007-2008 was unspent on education. INAC, therefore, had expected to have the \$50,000 of unaccounted-for funding returned to INAC. This had not yet happened. Similarly, in the area of youth employment for 2006-2007, INAC wrote that the unspent funding would be recovered, adding that the situation had “created concerns that the [First] Nation’s educational program is not being

responsive to the needs of Lubicon members.”²⁴⁴ Regarding operations and maintenance (for areas such as housing and renovation projects, as well as fire protection), INAC noted that Lubicon financial statements for 2007-2008 showed expenditures of over \$100,000 (of the total possible \$140,000).²⁴⁵ However, INAC wrote, “substantiation by way of invoices have not been provided.”²⁴⁶ As the INAC official stated in his letter to the band administration, “refusal to comply with these requirements places these programs at risk and represents lost opportunities to provide urgently needed housing and renovations.”²⁴⁷ In the area of fire protection INAC noted that, although the Lubicon Lake Nation received funds in 2007-2008, no related expenditures were shown in the Lubicon’s audited financial statements, and so funding would be recovered by INAC.²⁴⁸ Regarding social development programs such as the Income Support Program and the National Child Benefit program, INAC described the need for recoveries of funds unspent by the Lubicon administration, noting that “these programs are funded to provide support to community members in need and there is a concern that a failure to fully utilize the available programs and initiatives will lead to further lost opportunities.”²⁴⁹

Overall, the trend was that unsubstantiated expenditures by the Lubicon administration lead INAC to question where government monies had been spent over a period of years, and, subsequently, lead INAC to recover or withhold funding. As INAC explained, “missed opportunities have negatively impacted the community in core program areas, including housing, renovations, economic development and social programming... all of which are intended to enhance the lives of First Nation members.”²⁵⁰ Such developments, the letter warned, could

²⁴⁴ Philippo to Lubicon Chief and Council, review of 2007/2008 Audited Financial Statements, May 13, 2009, 2.

²⁴⁵ Ibid., 3.

²⁴⁶ Ibid. As background, INAC provides funding for eligible housing and renovations projects to First Nations with whom INAC has funding agreements when project plans are provided and expenditures substantiated with invoices.

²⁴⁷ Ibid.

²⁴⁸ Ibid.

²⁴⁹ Ibid., 4.

²⁵⁰ Ibid., 1.

result in formal intervention from INAC, an implementation of INAC's *Intervention Policy*. In this case, the author of the letter, INAC's then Acting Director of First Nations Relations for Treaty 8, Spencer Philippo, wrote to the Lubicon administration that, "[i]n order to avoid formal program intervention I would encourage you to meet with the Department and work with your Field Service Officer on a financial recovery and management plan."²⁵¹

Despite the urgency of INAC's earlier letter in calling attention to a band deficit and asking to meet with band representatives as soon as possible, INAC did not respond to Noskey's attempts to engage with INAC on the topic of remedial action. Noskey wrote multiple letters. On June 22, 2009, for instance, Noskey concluded a letter as follows:

Indian Affairs should stop playing political games with internal Lubicon problems and meet with duly elected Lubicon leaders so together we can start resolving those problems and delivering the programs and services the Lubicon people need and deserve.²⁵²

As described in the same letter, band members had been calling INAC officials to urge them to meet with the Noskey council and to avoid making the financial situation any more serious. INAC did not respond.

4.13 The election held June 25, 2009

By June 23, 2009 an article regarding the Lubicon leadership situation again appeared in the *Peace River Record-Gazette*. This time Michelle Huley informed her readers that the Elder's Council had called an election for June 25, 2009. As Reine Jobin, a member of the Elder's Council, explained regarding the earlier June 5 election, "[a]ll of the people that came there [were] not Lubicons."

Huley now referred to the Lubicon situation as the "election controversy." She linked the more recent developments to the originally postponed April 29 election, which she added was "called off due to disruptions and a dispute over

²⁵¹ Ibid., 4.

²⁵² Noskey to George Arcand Jr. (Alberta Regional Director General, INAC), June 22, 2009.

eligibility.”²⁵³

Huley attempted to attend the June 25, 2009 election called by the Elder’s Council, but her requests to attend went unanswered.²⁵⁴ After the election she reported the following:

A second, contentious election this month at Lubicon Lake has, possibly, drastically changed the political landscape at the First Nation with Bernard Ominayak elected chief for life and an Elder’s Council given all-encompassing powers that supersede the chief and council.²⁵⁵

Regarding the issue of membership, Reine Jobin of the Elder’s Council explained, “[w]ith us not signing a treaty, we’re going back to a lot of the old ways and we went under the Indian Affairs list to vote” and “the only people eligible to vote were those that are status Indians.”²⁵⁶ Regarding how the election was to have taken place the electoral officer, a man known as Stee-Mass, is quoted in saying “[t]here was no vote.”²⁵⁷ Stee-Mas is also quoted in the *Record-Gazette* explaining that there had been “a resolution that the Elder’s Council are now the rulers. They supersede anybody...”²⁵⁸ According to the *Record-Gazette*, Stee-mas also “confirmed Ominayak’s position is no longer for the five-year term stipulated in the band’s governance legislation for election chief and council.” Rather Ominayak was elected chief for life.²⁵⁹

Formal notice of the outcome of June 25, 2009 was submitted in a letter addressed to the Alberta government. The letter, included in Appendix G of this thesis, states that on “June 25, 2009 the Lubicon Cree Nation’s custom election was conducted under First Nation jurisdiction and law.” Listed as chief is Bernard Ominayak. Five “headmen” are also listed: Walter Whitehead, Alphonse Ominayak, Bryan Laboucan, Troy Laboucan, and George Laboucan. The letter is signed by Reine Jobin for the “Elders Tribunal” and Stee-Mass as electoral

²⁵³ Michelle Huley, “Lubicon election controversy continues: Elder’s Council calls vote for June 25.” *Peace River Record-Gazette*, June 23, 2009.

²⁵⁴ Michelle Huley, “Elders Take Control.” *Peace River Record-Gazette*, June 30, 2009. This article is included in Appendix D of this thesis.

²⁵⁵ Ibid.

²⁵⁶ Ibid.

²⁵⁷ Ibid.

²⁵⁸ Ibid.

²⁵⁹ Ibid.

officer. What looks to be Stee-Mass' thumbprint also appears, alongside a stamp of "UCC 1-207 WITH PREJUDICE" and another stamp certifying the copy as "SOVRAN VERIFIED." The letter ends specifying that "[t]his letter is providing Indian Affairs and Northern Development with formal notice of our election results and the Chief and Council are the lawful representatives of the Lubicon Cree Nation."

4.14 The INAC response

The first response from INAC to the Lubicon Lake Nation came almost two months after the June 5 election. The regional director of First Nation Relations, addressing *both* the Noskey council and the Ominayak headmen as recipients of the letter, wrote the following:

The Alberta Regional Office of the Department of Indian Affairs and Northern Development has received election reports from two separate parties each purporting to have conducted an election under the Lubicon Lake First Nation's custom election code.

Given the conflicting information the Department has received concerning electoral processes, it is not possible to make a determination as to the legitimately elected leadership in the Lubicon Lake First Nation. As your First Nation selects its leadership under its own community election system, the Department has neither the statutory power, nor a role to play, in making a determination as to the legitimacy of one electoral process over another. Any disputes arising from these election processes must be resolved within the community. Failing that, the community must turn to the courts for a judicial determination of the issue.

The purpose of my letter is to offer assistance of the Department in resolving the leadership issue. I attach for your information the Department's policy with respect to conflict resolution in First Nations experiencing election disputes.²⁶⁰ One of the options available under the policy involves mediation. I would therefore like to offer you the services of a mediator to assist you in resolving the leadership dispute. Either myself or my staff would be happy to meet with you to choose a mediator satisfactory to all parties and we are prepared to provide assistance to the mediator and the two competing groups to bring these matters to a resolution.

²⁶⁰ INAC's *Custom Election Dispute Resolution Policy*, already outlined in Chapter 3 of this thesis, is discussed further in Chapters 5, 6, and 7 and is included in Appendix H.

Whether or not the offer of mediation is met favourably by the parties, at the minimum, the Department would like to facilitate a discussion amongst you on the delivery of essential programs and services to residents of the Lubicon Lake First Nation pending resolution of the election dispute. If the Department is unable to confirm a legitimate administration acceptable to all parties for a protracted period of time, alternative service delivery options and/or the *Intervention Policy* may be implemented to ensure delivery and continuity of essential programs and services.

I look forward to hearing from all parties regarding my offer of assistance.²⁶¹

²⁶¹ Spencer Filippo (Direct, First Nations Relations Treaty 8, INAC) to Noskey council and Ominayak headmen, July 30, 2009.

Chapter 5

Frames of the Lubicon leadership situation

Lubicon woman:

I don't understand why you don't respect our democracy [*sic*]. The authority lies within the majority of the Lubicon peoples' votes. We tried on the 29th and then, well you know what happened. So we went on the 5th. We sent you our signatures, all the documentation. Plus you got the professional chief electoral officer, and he sent you the report. But you guys are just using us.

INAC lawyer:

I understand. I do understand your frustration. We are respecting your rights. You, as a community.²⁶²

5.1 What is it that is going on here?

Again and again - at meetings between Lubicon people and INAC officials,²⁶³ in correspondence between the Lubicon Lake Nation and INAC,²⁶⁴ in the media,²⁶⁵ in correspondence to international observers²⁶⁶ - the same two positions arise. On the one hand, Lubicon positions argue that the leadership had

²⁶² This excerpt is the opening exchange of the video created as part of this MA thesis, "Framing the Intervention." The original video-recording was made by Billy Joe Laboucan at the INAC-Lubicon community meeting which took place October 21, 2010.

²⁶³ Three INAC-Lubicon community meetings have taken place thus far to address developments relating to the Lubicon leadership situation. The meetings average about one meeting per year. The first was November 26, 2009, the second was October 21, 2010, and the third, September 8, 2011. I attended the 2010 and 2011 meetings. Several exchanges characteristic of these meetings are included in the video "Framing the Intervention."

²⁶⁴ See, for instance the series of three letters from December and January 2010-2011 between INAC's regional office and Noskey (included in Appendix I of this thesis).

²⁶⁵ Media coverage of the Lubicon leadership situation and INAC response are central topics of Chapter 6 of this thesis.

²⁶⁶ For example, the Government of Canada response to the concern expressed by the United Nations Special Rapporteur, which is discussed in this chapter and in chapter 6.

been determined via the Lubicon people according to the long-standing Lubicon custom code. On the other hand, INAC asserts that there is an ongoing dispute between two parties vying for band leadership, and so INAC cannot become involved, thus cannot recognize one side of the dispute over the other. In short, for INAC, the understanding that the Lubicon held two elections triggered INAC's removal from the process.²⁶⁷ As such, the Lubicon leadership situation is defined in different ways.

Different understandings of a situation, or “frames” as they are commonly called, do not exist on their own. As sociologist Irving Goffman writes, it is obvious that in most situations many different things are happening simultaneously – things that are likely to have begun at different moments and may terminate dissynchronously.²⁶⁸ When individuals attend to any current situation, then, they face the initial question: “What is it that’s going on here?”²⁶⁹

According to Goffman, this question is considerably suspect.²⁷⁰ Any event can be described in terms of a focus that includes a wide swath or a narrow one, a close-up view or a distant one. Who is to say what particular span and level will come to be the view employed?²⁷¹

To clarify Goffman’s point, I turn to Gregory Bateson’s simple analogy of the picture frame to describe what he calls “psychological frames.”²⁷² Bateson, an anthropologist, psychologist, and cybernetic theorist, understood frames as being our conceptual views of particular situations. The frame around a picture, if we consider this frame to be a message intended to organize the perception of the viewer,²⁷³ says, “attend to what is within and do not attend to what is outside.”²⁷⁴ Whatever is seen within this picture frame shapes for the viewer the answer to the

²⁶⁷ This is precisely how INAC lawyer Troy Chalifoux explained INAC’s response to the Lubicon leadership situation at the INAC-Lubicon community meeting held October 21, 2010: “You had two elections. That triggered our removal from the process.”

²⁶⁸ Goffman, *Frame Analysis*, 9.

²⁶⁹ Ibid.

²⁷⁰ Ibid., 8.

²⁷¹ Ibid.

²⁷² Bateson, *Ecology of Mind*, 186.

²⁷³ Ibid., 187.

²⁷⁴ Ibid.

question, “what is it that is going on here?” When multiple participants’ roles in an activity are differentiated – which Goffman notes is a common circumstance – the view that one person has of what is going on is likely to be quite different from that of another.²⁷⁵ Different interests generate different motivational relevancies.²⁷⁶ Furthermore, different perspectives of the “same” events are likely to employ different spans and levels of focus.²⁷⁷ In short, to return to Bateson’s analogy, there are multiple, incongruent frames, all which say “attend to what is within and do not attend to what is outside.”

Furthermore, the answer to the question “what is it that’s going on here?” is not simply a description of events. Whether this question is asked explicitly, for instance in times of confusion or doubt, or asked tacitly, as during occasions of certitude, “the question is put and the answer to it is presumed by the way the individuals then proceed to get on with the affairs at hand.”²⁷⁸ In political scientist Murray Edelman’s terms, such definitions of what is to have happened are just as much explanations as they are recipes for action,²⁷⁹ interventions into the scene they purport to explain.²⁸⁰

In reference to the Lubicon leadership situation, multiple parties have come forward to answer the question “what is it that is going on here?” Each group to answer this question imposes a particular frame on developments within the Lubicon Lake Nation in the spring of 2009. In all cases, each description of “what happened” answers the question “what should happen next?”

The approach taken in this thesis to delineate the multiple frames different interested parties use to understand events might be understood as an approach grounded in relativistic epistemology. That is, as opposed to a more positivist epistemology that expects a world of facts that have a determinable meaning and a world of people who react to those facts,²⁸¹ my consideration of the Lubicon

²⁷⁵ Goffman, *Frame Analysis*, 8.

²⁷⁶ Ibid.

²⁷⁷ Ibid.

²⁷⁸ Ibid.

²⁷⁹ Edelman, *Political Spectacle*, 121.

²⁸⁰ Ibid.

²⁸¹ Ibid., 1.

leadership situation reveals a more relativist approach. As Edelman describes, the “realities people experience... are not the same for every person or for all time, but rather are relative to social situations and to the signifiers to which observers pay attention.”²⁸² Both INAC and the Lubicon present the relationship between events in their respective frame to be the facts of the situation. Multiple understandings of reality therefore result. It is the clash between these understandings where I am able to pinpoint the impasse between INAC and the Lubicon Lake Nation regarding the leadership situation.

It is important to note, however, that the delineation of the different frames of the Lubicon leadership situation, though it affords a considerable amount of insight into the root of the impasse, is not an argument that those different frames have equal merit. All frames, all constructions of reality, are not created equal.²⁸³

A common criticism of relativist approaches is that anyone who believes that realities are constructed and multiple must also believe that those constructions are equally valid.²⁸⁴ Edelman, is quick to challenge this assumption, arguing:

On the contrary, the notion of reality construction implies that some are valid and others not... [Reality construction] can be done well or badly and be right or wrong. To understand that multiple realities are prevalent is liberating, but such understanding in no way suggests that every construction is as good as every other...²⁸⁵ Social scientists who deny that there are many worlds cut themselves off from vital modes of observation and interpretation; but they reject their intellectual and moral obligations and their capabilities if they do not also recognize some realities as more valid than others...²⁸⁶

5.2 The use of frames as an explanatory principle

While Bateson’s physical analogy of the picture frame is helpful in illustrating, generally, how the notion of framing serves as an explanatory principle,²⁸⁷ this

²⁸² Ibid., 4.

²⁸³ Ibid., 6.

²⁸⁴ Ibid.

²⁸⁵ Ibid.

²⁸⁶ Ibid.

²⁸⁷ Bateson, *Ecology of Mind*, 187.

analogy is limited when it comes to multiple, overlapping frames. In order to examine the various understandings that come about as products of different premises, Bateson makes use of another, more abstract, analogy: the analogy of the mathematical set. This analogy is particularly helpful, in that it allows for set-theoretical diagrams to depict the relationship between frames, a feature that makes set theory an appropriate tool for examining the competing frames relevant to the Lubicon leadership situation. Before proceeding to analyze the competing INAC and Lubicon frames using set-theory diagrams, an illustration of the analogy and the diagrams it enables is needed.

5.2.1 Illustration of set-theory diagrams

Relationships between frames can be simply illustrated by set-theory diagrams. The class of “all events” (of everything that happens) is represented by a row of dots, as below. A smaller “set” of dots is delimited by a pair of lines. These are the “members of each set,”²⁸⁸ where membership is dependent on a particular principle of selection, that is, a particular organizational premise. The content included between the pair of imaginary lines is equivalent to what is included within Bateson’s picture frame.



Illustration 1: Illustration of Bateson’s set-theory diagram. Vertical lines show parameters of the conceptual frame.

For the purposes of illustration in regard to the Lubicon leadership situation, I consider the class of all events to refer to all events in the spring of 2009, as this is the timeframe broadly understood to have been when the leadership dispute arose.

However, what am I to include within the frame? I did not attend any Lubicon events in the spring of 2009, so cannot base my selection upon personal experience. I might consider, however, that as I am interested in learning about the Lubicon leadership situation, and as this is purported to be a dispute over who

²⁸⁸ Bateson, *Ecology of Mind*, 186.

was rightfully *elected* as the Lubicon band council, that all events called “elections” would be relevant. This would reasonably include three events: the event held on April 29, 2009 (the postponed election), the event held on June 5 that selected the Noskey council, and the event held on June 25 that selected the Ominayak headmen. Given these parameters, the set-theory diagram would appear as follows:

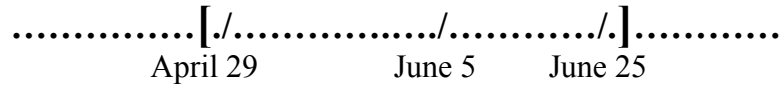


Illustration 2: Demonstrative set-theory diagram of the frame of all events referred to as elections in Little Buffalo in the spring of 2009.

In the above paragraph “given these parameters” is the operative phrase, a phrase that should be immediately problematic. As outlined in this chapter’s introduction, when individuals attend to any situation, they face the question: “What is it that’s going on here?” The mere asking of this question is considerably suspect.²⁸⁹ Any situation can be described in terms of a focus that includes a wide swath or a narrow one, a close-up view or a distant one.²⁹⁰ In the above illustration, I set a rule for my frame of the situation when I determined there was some kind of equivalent relevance between three events. That is, I noticed the three events had the name “election” and I assumed this was important. My frame, therefore, is involved in whatever assessment I may carry out regarding the Lubicon situation, for this frame tells me that certain events are worth examining while other events outside the frame, though potentially just as important, may be ignored.²⁹¹ Although I set the parameters of my frame in a simple attempt to start to comprehend what happened, whatever I find to answer my question “what is it that is going on here?” would be not some objective finding, but a finding influenced by my frame.

²⁸⁹ Goffman, *Frame Analysis*, 8.

²⁹⁰ Ibid.

²⁹¹ Bateson, *Ecology of Mind*, 188.

To come to this realization is not to throw ones hands up in despair that we can never learn what “really” happened. The realization, rather, serves as a reminder to pay attention to the different frames that are used to understand situations and, in particular, to note that the parameters of each frame are not random, but organized by a particular premise system.²⁹² Through set-theory diagrams, frames can be documented and examined, and the relationship between different frames – and their respective premises - can be examined.

For illustrative purposes the above example is considerably overdone. Unlike my three-elections frame, which was based upon premises I explicitly chose, usually organizational premises are something cognition somehow arrives at, not something cognition creates or generates.²⁹³ That is, given their understanding of what it is that is going on, individuals fit their actions to a particular understanding and ordinarily find that the ongoing world supports this fitting.²⁹⁴ Put another way, although the frame is not pre-determined, once the parameters are set, everything else will be interpreted through this field of view, usually in such a way that this frame is reaffirmed and sustained.

In what follows I will delineate two prominent Lubicon frames of the Lubicon leadership situation and the one INAC frame.

5.3 Delineating the Lubicon frames

The course of events in the spring of 2009, as Lubicon people understand it, can be depicted using the method outlined in the above. For all Lubicon people, regardless of political affiliation - though excluding any who have no interest in band politics - they paid close attention to the events of April 29, 2009.

²⁹² Ibid., 187; Along similar lines as Bateson, Goffman speaks in terms of “organizational premises” and “principles of selection.” (Goffman, *Frame Analysis*, 15).

²⁹³ Goffman, *Frame Analysis*, 247.

²⁹⁴ Ibid.

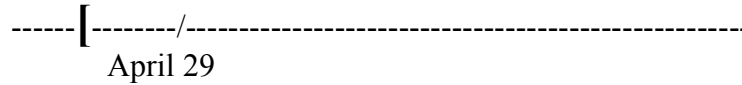


Illustration 3: General Lubicon frame depicted beginning April 29, 2009.²⁹⁵

April 29 was the date of the regularly scheduled Lubicon election, a general election for Lubicon band council that happens every five years. That this event was postponed by Electoral Officer Ralph Bouvette was a matter that required resolution. How that resolution was to have happened differs depending on individual interests and how the events of April 29 were viewed.

Everyone who attended the event knew that Ralph Bouvette was asked by one party (the Elder’s Council) to use the status-only membership list instead of the *GLN*-determined list. As shown in the video “Framing the Intervention,” Ralph Bouvette clearly repeats his dilemma aloud to those in attendance: run the election using the Indian Affairs list or run the election under the traditional Lubicon rules. As well, red signs had been posted on the doors of the building where the election was to take place: “[o]nly registered Lubicon members listed on Lubicon Lake Nation DIAND²⁹⁶ Indian register list can vote or run in this election.”²⁹⁷

As also shown in the video “Framing the Intervention,” some opposed the replacement of one list with another and some supported it. Bernard Ominayak, for instance, deemed it was a necessary move, stating, “What I’ve done, since what we found out that you guys are doing what you’re doing now, is I’ve asked the Elders to get involved.”²⁹⁸ In addition to Elders council support (which is not

²⁹⁵ This diagram is only half a frame, as it highlights the common starting point between the two Lubicon frames. As well I have intentionally left some space before April 29, 2009. The events of April 29 did not occur in a vacuum. Occurrences leading up to April 29 will be discussed further later in this chapter.

²⁹⁶ DIAND (Department of Indian Affairs and North Development) is simply a former, and often still used, name for INAC (Indian and Northern Affairs Canada).

²⁹⁷ Long-time councillor Larry Ominayak obtained these signs at some point on or after April 29, 2009. Footage of him holding the signs and reading them is now part of the video “Framing the Intervention.”

²⁹⁸ As context, four councillors (including Larry Ominayak, Dwight Gladue and Steve Noskey) understood from the band’s auditors that there were concerns with the band’s

shown in the video, but understood from what is said), a group of young men is seen in the video standing behind Ominayak voicing their support.

Some of the opinions of those who opposed the replacement of the Lubicon list with the INAC list can be heard behind the cameraman during Ralph Bouvette's deliberations. For instance, one woman standing nearby can be heard stating "it's a different list and different rules" to which Bouvette announces "that's the part that bothers me." Steve Noskey and Larry Ominayak, both band councillors on Bernard Ominayak's council (2004-2009 term), are seen along with others to the left. They are arguing that the change would disenfranchise many Lubicon band members.

Ralph Bouvette eventually announced he would postpone the election and that the community would have to "find someone else to run your election" after the community had sorted out the dispute over band membership influencing voter eligibility.

From this point onward an individual's understanding of what happened depended on how the developments of April 29 were perceived and which events they chose to attend. Two main frames result. I refer to them as the "*GLN*-upheld frame" and the "status-only frame."

5.3.1 The *GLN*-upheld frame

Councillor Larry Ominayak's question regarding when the membership meeting would occur stems from the Lubicon custom in regard to membership. As outlined in the previous chapter, the *GLN* indicates that since the time the Lubicon first codified their membership rules, membership criteria employed by the band, including the membership list, had been a matter that was ratified by the membership at general meetings of the Lubicon.

finances. These councillors requested information from the auditors, reviewed information, and shared it with community members at a community meeting called for this purpose. With a general election approaching, Ominayak is to have "asked the Elders to get involved." This resulted in the Elder's Council asking the Electoral Officer to use the INAC list of band membership to conduct the election.

The April 2009 change to the membership list was not ratified by at a general meeting of band members. Rather, those who came to vote at and observe the April 29 election learned of the attempted change to the membership list from the red posters on the doors where the event was to be held. When Bouvette postponed the election, the majority of people present spontaneously reconvened at Little Buffalo school to discuss what happened and what was to be done. Another meeting of band membership was scheduled for a month later, and at this meeting the attempted list change was dismissed and the *GLN* list reaffirmed. The election, rescheduled for June 5, would therefore take place using the *GLN* membership list.²⁹⁹ The *Peace River Record-Gazette* quotes replacement Electoral Officer Clayton Blood in summarizing the progression of events as follows at the June 5 election:

According to your rules, a new election must be called, must be given 20 days notice, and in that time you must also have a community meeting to discuss that election. Last week, on May 29, that meeting was held and the community came together to review today’s election and voter eligibility rules.³⁰⁰

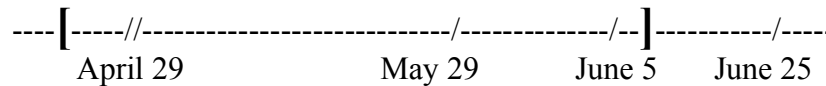


Illustration 4: Set-theory diagram depicting the “*GLN*-upheld frame.”

In the above diagram, then, the relevant record of events includes an attempted change to the *GLN* membership list by one small party and Bouvette’s refusal to run the Lubicon election under this change list, resulting in a postponed election (April 29); a spontaneous community meeting on how to proceed in light of this challenge to the *GLN*-determined membership (April 29); a resulting membership meeting, which re-affirmed the *GLN* membership list (May 29); and a rescheduled

²⁹⁹ The way in which Lubicon elections are to be held according to the *GLN* is covered in Chapters 3.

³⁰⁰ Michelle Huley, “New chief for Lubicon First Nation.” *Peace River Record-Gazette*, June 9, 2009.

election using the *GLN* list (June 5), thus the resolution of the leadership matter under the *GLN* provisions for elections, the completion of the election carried out according to the *GLN*, with the Noskey council nominated and elected according to *GLN* election provisions (June 5).

The later event on June 25 was unilaterally scheduled by one party, a party that Bernard Ominayak had put in place, which he had stated to those in attendance on April 29, 2009. Furthermore, June 25 was held according to rules that were already dismissed at a general meeting attended by the majority of the community. Finally, a chief and council had already been elected on June 5, almost three weeks before June 25. June 25, therefore, had no bearing on the outcome of the Lubicon electoral process.

5.3.2 The status-only frame

One key challenge against the June 5 election was that the INAC list of band members was not used. As expressed by a member of the Elders council, Reine Jobin, when referring to eligibility of the list used at the June 5 election, “[a]ll of the people that came there are not Lubicons. We would love to get ahold [*sic*] of their membership list so we can scrutinize it.” According to the *Peace River Record-Gazette*, Bernard Ominayak “told the Record-Gazette he wouldn’t run for the position against Nosky [*sic*],” as “there were questions over eligibility, both of voters and those running for positions, including Nosky [*sic*].”³⁰¹ In contrast, the election held June 25 “was closed to all but those deemed to be eligible to vote.”³⁰² A member of the Elders council, Reinie Jobin, stated to the *Peace River Record-Gazette* after the event on June 25 that, “we went under the Indian Affairs list to vote” and “[t]he only people eligible to vote were those that are status Indians.”³⁰³

To be precise, uncertainty arose as to whether or not a vote was actually

³⁰¹ Michelle Huley, “Lubicon election controversy continues: Elder’s Council calls vote for June 25.” *Peace River Record-Gazette*, June 23, 2009.

³⁰² Michelle Huley, “Elders Take Control.” *Peace River Record-Gazette*, June 30, 2009.

³⁰³ Ibid. Huley notes that Jobin, who was in attendance, “was unable to vote himself as he is not a Lubicon band member.”

held. For instance, the man serving as the electoral officer, Stee-Mas, stated “there was no vote.”³⁰⁴ Rather he informed the *Record-Gazette* journalist after the event that Ominayak was proclaimed chief for life by those who attended (though he did not know the number of those who attended).³⁰⁵ Nonetheless, regardless of several unknowns - how the election was to have taken place, what process was followed, if the event was announced ahead of time, who attended - what *is* clear is that the status-only list of membership was firmly upheld as the authority as to who could and could not attend, the same as the red signs posted on April 29.

The second challenge made against the June 5 election was regarding the role of the Elder’s Council. As Bernard Ominayak explains to the *Record-Gazette*, the June 5 election wasn’t sanctioned by the Elder’s Council.³⁰⁶ Stee-Mas is quoted in the *Record-Gazette* explaining that there had been “a resolution that the Elder’s Council are now the rulers. They supersede anybody....”³⁰⁷ As explained in the Elder’s Council’s notice placed in the *Peace River Record-Gazette* the month before, as the “current governing body of the Lubicon Lake Nation until such time as [they] call an election” the Elder’s Council reviewed and supported voter eligibility guidelines that specified voters must “[b]e a recognized members of the Lubicon Lake Nation as listed on the registered membership list as of April 7, 2009.”³⁰⁸

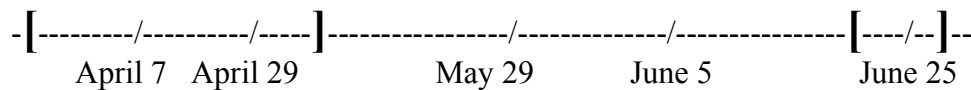


Illustration 5: Set-theory diagram depicting the “status-only frame.”

³⁰⁴ Ibid.

³⁰⁵ Ibid.

³⁰⁶ Ibid.

³⁰⁷ Ibid.

³⁰⁸ Lubicon Lake Nation Elder’s Council, *Public Notice*. This notice is included in Appendix E of this thesis.

For the status-only frame, then, the series of events are as follows: The Elder's Council reviewed and announced support for the voter eligibility guidelines where only status band members can vote (April 7, 2009); the Elder's Council asked Ralph Bouvette run the regularly-scheduled Lubicon election using the INAC (status-only) list, but Bouvette postponed the election (April 29, 2009); the overdue election is rescheduled by the Elder's Council and the status-only list is used, thus the leadership matter is resolved with Ominayak and five headmen acclaimed by those in attendance (June 25, 2009). Indeed Ominayak is named "chief for life" through this process. Other events held in the community were irrelevant because they were not sanctioned by the Elder's Council.

5.3.3 The point of difference between Lubicon frames

What is key to the Lubicon leadership situation is that no matter which frame is held and no matter where an individual's political allegiance lies, the issue from April 29 onward was which band membership list was to be used for the Lubicon election, the decades-old *GLN* list or the never-before used status-only list? Put simply, the discrepancy between the premise of each frame differ on the point of whether or not the *GLN* membership list can be replaced by the status-only membership list.

As illustrated in previous chapters of this thesis (subchapters 3.3 and 4.5), the provisions of the Lubicon *GLN* are such that membership criteria and the membership list are determined by the Lubicon band members at general meetings.³⁰⁹ In the spring of 2009 Lubicon band members did not approve the changing of the *GLN* at such a meeting. The key question in regard to the Lubicon leadership situation is, then, could the Lubicon custom code have been changed in such a way that the criteria for band membership were no longer controlled by Lubicon band members? Furthermore, could this change have been made without the knowledge or participation of the majority of band members?

³⁰⁹ More broadly, the Lubicon peoples' ability to determine their own membership list is the product of a long struggle with INAC (as discussed in section 4.6 of this chapter), which the Lubicon eventually won in the 1990s when Canada formally recognized the Lubicon ability to determine their own membership.

Such questions can only be answered by the Lubicon community according to the means of decision-making set out in the Lubicon custom code. And these questions indeed were answered. On May 29, 2009 the majority of band members came together at an open general membership meeting, dismissed the attempted change, and affirmed the *GLN* voter eligibility and membership rules.

As might be expected, which of the two frames any given Lubicon person favoured for the outcome of the spring 2009 events is likely influenced by the interests of that individual. Some strong Ominayak supporters seem to have wanted Ominayak to stay in power even if that meant dismissing the *GLN* membership criteria. Those who considered the *GLN* rules to be the highest authority, or maybe simply those who opposed Ominayak and wanted to see him removed from office, participated in reaffirming the *GLN* rules. Irrespective of personal interest, however, if the *GLN* were to be changed, the changes would have to have been conducted according to means laid out in the *GLN*, or, alternatively, a new *GLN* would have to be created that would confer upon the Elders' Council powers to "supercede everybody." As the *GLN* exists now, however, "[a]uthority to exercise the power of the Government of the Lubicon Nation is entrusted by the Lubicon People to the Governing Council... to be used only in ways that are consistent with the ways of the Lubicon people."³¹⁰

5.4 The INAC frame: "the two competing groups"

Just as differently-situated Lubicon people, INAC officials, too, must answer the question "what is it that is going on here?" in responding to the Lubicon situation. Whether INAC recognizes a council or responds to the situation as a leadership dispute, INAC's officials' interpretations of the situation are involved in the answering of this question.

³¹⁰ *GLN*, section 3.4.

The INAC diagnosis is that the Lubicon have an unresolved leadership dispute. Because there are “two competing groups,”³¹¹ the Ominayak contingent and the Noskey contingent,³¹² the “Department will not take sides in these governance issues”³¹³ and “any disputes arising from these election processes must be resolved within the community”³¹⁴

5.4.1 INAC’s premise for inclusion

As already discussed, frames instruct the viewer to “[a]ttend to what is within and [to] not attend to what is outside.”³¹⁵ Inside the INAC frame are the two elections of June 5 and June 25. INAC’s grouping of these two events together gives the impression that these events are mutually relevant.³¹⁶ As expressed by an INAC official at the October 2010 community meeting:

Well, according to the correspondence Canada received, at that time... within the same timeframe, we received correspondence stating that there were two elections, and that both elections were run under the custom code, and that there were two different decisions made under the custom election code supporting two different chief and councils.³¹⁷

Not only does Philippo speak of the two events as “the two elections,” INAC officials create the perception that the two events are objectively equivalent by implying that these events happened at the same time and that INAC had no involvement between events, and by asserting that both elections used the *GLN*, that the *GLN* supported both outcomes, and that those two outcomes created two

³¹¹ Spencer Philippo (Direct, First Nations Relations Treaty 8, INAC) to Noskey, January 14, 2010. This letter is included in Appendix I of this thesis.

³¹² George Arcand Jr. (Alberta Regional Director General, INAC) to Noskey, October 30, 2009. This letter is included in Appendix J of this thesis.

³¹³ Ibid.

³¹⁴ Spencer Philippo (Direct, First Nations Relations Treaty 8, INAC) to Noskey council and Ominayak headmen, July 30, 2009. The full text of this letter is included in section 4.14 of the previous chapter.

³¹⁵ Bateson, *Ecology of Mind*, 188.

³¹⁶ Ibid.

³¹⁷ Spencer Philippo, INAC-Lubicon community meeting, October 21, 2010, as shown in the video “Framing the Intervention.” This excerpt was Philippo’s response to the following question asked by a Lubicon woman: “We had elected our new chief and council on June 5, and they’re all here. We followed the Custom Code rules and still there’s people opposed to that. What’s up with that?”

separate, yet equally relevant, councils.³¹⁸ Even the way INAC is to have found out about both elections is the same: through correspondence, implying that that correspondence is in some way equal³¹⁹ or that correspondence conveying the respective election outcomes was the only correspondence to be received. At the same meeting INAC officials also attempted to explain to the Lubicon people that “half of the community” supports one side and “half the community” supports the other side.³²⁰ Every commonality that could be claimed to exist between these two events and these two groups is presented by INAC as if they are observations of fact.

Having already reviewed the difference between the two Lubicon frames, it is noteworthy that INAC characterizes these two events as being equivalent. According to Bateson in terms of his set-theory analogy, the messages enclosed within the imaginary lines are defined as members of a class by virtue of their sharing common premises or mutual relevance.³²¹ But frames do not only serve to include. Given the nature of conceptual framing, when certain information is included, other information is excluded.³²² In foregrounding only the two elections, INAC excludes the attempted use of the INAC membership list on

³¹⁸ INAC’s characterization of the two sides as equivalent is prevalent in INAC correspondence, in INAC officials’ speech at community meetings, and in statements made by INAC officials to Canadian media. Throughout this chapter and Chapter 6 there are numerous examples. It should be noted, however, that in some contexts INAC officials include information that show the two sides are not as symmetrical as first characterized. For instance, under persistent questioning from Lubicon band members INAC officials explained that they refused to recognize the June 5 election not because of a two sets of correspondence received “within the same timeframe,” but because INAC received a phone call from Ominayak supporters after the June 5 election contesting the validity of that election. Indeed INAC had publicly taken the position that the Lubicon had an internal leadership dispute *before* the June 25 election. For instance, INAC spokesperson Glenn Luff is quoted in the *Peace River Record-Gazette* in a June 23 article as follows:

We understand there currently is a dispute over election results. For all intents and purposes (INAC) has no involvement in their elections. We’re closely monitoring the situation to see if there is a resolution.

³¹⁹ Notices of the outcomes from both June 5 (signed by Clayton Blood) and June 25 (signed by Stee-Mas and Reine Jobin) are included in Appendices C and G, respectively.

³²⁰ This characterization of the leadership situation was abandoned when Philipppo was interrupted by a Lubicon woman stating bluntly, “It’s not half, it’s like 90-10.”

³²¹ Bateson, *Ecology of Mind*, 188.

³²² *Ibid.*, 187.

April 29. The INAC frame is too narrow to include the context in which the *GLN* membership list was brought into question. This is represented by the following diagram.

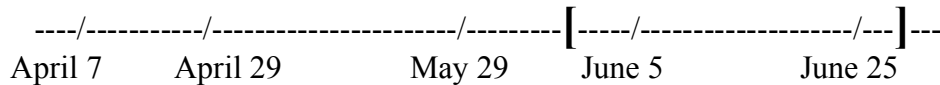


Illustration 6: Set-theory diagram depicting the “INAC frame.”

Inside the INAC frame is INAC’s focus, the pair of equal, competing elections; outside the INAC frame there is, to return to Bateson’s picture frame analogy, only wallpaper. Wallpaper does not figure into the frame. It may be ignored. In an INAC official’s terms at an INAC-Lubicon community meeting in 2010, “[y]ou had two elections. That triggered our removal from the process.”³²³ INAC need not consider anything else that happened because, according to the INAC frame, nothing else is significant enough to matter.

5.4.2 INAC’s premise for exclusion

To be precise, INAC does not declare that the full context of the Lubicon leadership situation *may* be ignored. Rather INAC officials speak of this context as though it *must* be ignored. INAC’s refusal to discuss anything outside of the two June events is couched repeatedly in terms of “INAC can’t interfere in the internal affairs of the Lubicon.”³²⁴ INAC’s treatment of the April-May events, in comparison to INAC’s treatment of the June events, suggests INAC’s interpretation of Lubicon events is based on two separate premise systems. That is, INAC talks about Lubicon events as though there are two classes of events: those that happened in June of 2009 are talked about as if they are “INAC’s business” while all other events are constructed as “Lubicon-only business.” The organizational premise used to interpret the June events is a different

³²³ Troy Chalifoux, INAC-Lubicon community meeting, October 21, 2010.

³²⁴ George Arcand Jr. (Alberta Regional Director General, INAC) to Noskey, October 30, 2009. This letter is included in Appendix J of this thesis.

organizational premise from the one used to interpret all preceding Lubicon events. To delve into “Lubicon-only business” is characterized by INAC as if it would be a severely inappropriate intrusion into Lubicon internal affairs and the forbidden realm of the “sacred” custom code.³²⁵ To return to Bateson’s picture frame analogy, the frame tells the viewer that “he is not to use the same sort of thinking in interpreting the picture that he might use in interpreting the wallpaper behind it.”³²⁶

5.5 Pinpointing the impasse

INAC’s treatment of a series of Lubicon affairs as two different classes of Lubicon events produces some noteworthy results. The following letter, written from INAC to Steve Noskey, is one example characteristic of INAC’s position on the leadership situation:

The Lubicon nation determines their Membership according to the Nation’s established rules and traditions. Leadership selection is also according to established tradition and Rules (Customary Election Code). Lubicon membership rules and Custom Election do not fall under the jurisdiction of the Indian Act. The ability to accurately interpret the membership rules lie with the Nation and are not determined by the Indian Act registration criteria.³²⁷

In this excerpt INAC is stating that membership is determined according to the Lubicon’s “established rules and traditions” and not under INAC’s registration criteria. As outlined above regarding the *GLN*-upheld frame and the status-only frame, what is in dispute is indeed this very point: which list is used for elections? The *GLN*-upheld frame holds that the attempted use of the INAC list was dismissed by the Lubicon membership according to the process laid out in the *GLN*. The status-only frame holds that the INAC list is the appropriate list.

Interestingly, both INAC officials and those Lubicon people who understand the *GLN*-upheld frame (that is, those who participated in the *GLN*

³²⁵ INAC invocation of the sacredness of custom and the implications of this invocation in the context of the INAC-Lubicon impasse are discussed further in Chapter 6.

³²⁶ Bateson, *Ecology of Mind*, 187-188.

³²⁷ George Arcand Jr. (Alberta Regional Director General, INAC) to Noskey council, December 11, 2009. This letter is included in Appendix J of this thesis.

process), then, have precisely the same basis for their arguments regarding the Lubicon leadership situation: the Lubicon Lake Nation uses a custom membership list rather than an INAC list. The only difference between the use of these arguments is that, while those Lubicon people who participated in the *GLN* process pay attention to the full context in which the membership list became an issue, INAC considers only the events within its narrow conceptual frame, a frame which presupposes there are two equal Lubicon contingents. INAC ends the above letter to Noskey as follows:

If INAC honours the demands from you or the Ominayak contingent, it would in effect be a direct interference in the internal affairs of the Lubicon Lake Indian Nation. The authority to deal with this issue, as you have correctly stated, lies with the Lubicon Lake Indian Nation..... The decision rests with you and Mr. Ominayak.³²⁸

Thus, while the Lubicon use points such as “Lubicon membership does not and cannot follow the INAC list” as grounds to pressure INAC to recognize the outcome of the *GLN* process, INAC uses the same point as evidence that “INAC cannot get involved” and cannot recognize the outcome of any process. Furthermore, INAC appears to be expecting another event to take place to determine the issue. As Canadian government representatives explained to the United Nations Special Rapporteur in September 2010,³²⁹ Canada is awaiting just such an event:

“Canada has encouraged the community to try to resolve its own internal election issues, consistent with the Lubicon community’s right to elect leaders according to their own customs, and with Canada’s commitment to respect the exercise of that right and not to interfere in the process.”³³⁰

INAC is placing the onus to hold such an event on the Lubicon people, the majority of whom understand it to have already been held. In other instances

³²⁸ Ibid.

³²⁹ The UN Special Rapporteur had requested more information from the Canadian government regarding the Lubicon leadership situation. This is discussed in more detail in Chapter 6.

³³⁰ Government of Canada to UN Special Rapporteur on the rights of indigenous people, September 24, 2010, 8, [http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_24.09.10_\(1.2009\).pdf](http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_24.09.10_(1.2009).pdf).

where INAC is on record regarding the possibility of internal resolution, it appears INAC may not believe Lubicon custom has a means for internal resolution of the dispute at all. This can be seen in the statement of an INAC official to the *Edmonton Journal*:

Like the majority of bands in Alberta, the Lubicon are governed by a custom election code, written and upheld by the band. Many custom codes include clear avenues for appeal, said Arcand [INAC's regional director], but outside that, serious disputes often land in court.³³¹

The Lubicon people are quite familiar with such INAC arguments as they are recurring points of contestation at INAC-community meetings. Lubicon people I have spoken with on this topic have expressed exasperation at what they see as INAC's disregard for Lubicon rules, some perceiving INAC officials to be willfully ignorant of the facts of the situation, while others understanding INAC to be deliberately manipulating band affairs. For the latter opinion, which is more common, INAC's motivation is understood to be that, if INAC does not recognize a band council, then INAC can avoid dealing with the Lubicon Lake Nation (as a political unit).³³²

A particularly frustrating reoccurrence for Lubicon people attending these INAC-communiting meetings is that while INAC speaks of the two elections as being equally legitimate during the meetings, in conversations with individuals in after the meetings or in other contexts INAC officials comment on the strangeness of Ominayak's position on membership, noting that he is attempting to use the Indian Affairs list of band membership. Another frequent contradiction is INAC officials' justification of their refusal to recognize a council with both the claim of INAC's inability to comment on custom elections *and* the assertion that neither

³³¹ Elise Stolte, "Who's the Chief of Lubicon Lake?," *Edmonton Journal*, July 27, 2009. This article is included in Appendix K of this thesis.

³³² Of those Lubicon people who assert deliberate INAC manipulation, the accusations usually include suspicion as to what INAC's motivation must be, ranging from statements such as "INAC is delaying a land claim – they never want to settle with us" to "INAC is attempting to shorten our membership list so that, via the INAC land-quantum formula, the Lubicon Lake Nation receives less land come settlement. (Including only status Indians in the Indian Register was a clearly stated objective of INAC in the 1980s, as mentioned in Chapter 4 of this thesis.)

election was held according to Lubicon custom, which in itself is a comment on custom elections.³³³

From an outsider's perspective, INAC's position is particularly perplexing when reviewing INAC policy regarding the role of INAC's Regional Office in response to custom election issues. When INAC officials first wrote to the Lubicon regarding the leadership situation in the summer of 2009, INAC referred to INAC's resolution policy when it came to custom election disputes. INAC's *Custom Election Dispute Resolution Policy*, included in Appendix H of this thesis, focuses on INAC's "provision of encouragement to First Nations to allow them to solve their own problems," not to mention "timely resolution of election disputes," and the "resumption of day to day business of the Band Council." This INAC policy provides regional INAC officials with a range of "tools to assist First Nations in their resolution of their governance disputes." Regarding INAC regional officials response to a leadership situation the policy states the following:

It is presumed that some event will alert the region to the possibility that a governance problem exists within a Band. Once this event has occurred and comes to the attention of the region, [INAC regional directors general] would initiate an assessment of the situation by regional staff. If the assessment reveals that a problem does not exist, then no action needs *[sic]* be taken. The region's assessment of the situation may reveal that, although a governance dispute exists, no action is necessary because it is being resolved locally.³³⁴

In cases where the region determines that a dispute does exist, the policy also guides INAC regional officials in responding:

In situations where there is a *clearly written code*, the region may be able to assist in the resolution of a dispute expeditiously *by reviewing the code*

³³³ This point can be seen in a several news articles. As reported by Elise Stolte of the *Edmonton Journal* in her December 4, 2009 article, "Arcand said from what he can see, both sides did not flawlessly follow their own election code, but because it is a custom election, the department has no jurisdiction." In another article spokesperson Glen Luff is quoted in saying, "[a]fter looking at results from both elections and the reports filed by the respective electoral officers, the Department of Justice declared that the Lubicon Lake First Nation did not follow its own code in either election." (Shari Narine for Sweetgrass, August 1, 2010.) Both articles are discussed further in chapter 6 of this thesis and are included in Appendix K.

³³⁴ INAC, *Custom Election Dispute Resolution Policy*, section 2.1. This policy is included in Appendix H of this thesis.

and ensuring that the actions taken by the person or persons claiming power in the community complied with it.³³⁵ (My emphasis.)

Neither provision was followed in INAC regional officials' response to the Lubicon leadership situation.

5.6 “INAC cannot get involved”

To assert that the INAC stance is highly suspect is not necessarily to claim the INAC response is somehow contrived. As Goffman notes, when participants' roles in an activity are differentiated, the view that one person (or group, in this case) has of what is going on is likely to be quite different from that of another.³³⁶ This is to be expected. The different “realities” that people experience are relative to social situations and to the signifiers to which they pay attention.³³⁷ This theoretical framework holds that the premise that organizes the understanding of “what is happening” is something cognition arrives at, not something cognition creates or generates.³³⁸ For INAC, then, we must ask, what is the political significance of contested Lubicon leadership *for INAC*? To what is INAC paying attention?

The political significance for INAC may very well be the fear of unwanted attention, both unwanted attention from concerned publics and from other First Nations. If INAC were to recognize a Lubicon council when it is clear that the political opponents of that council will likely challenge that INAC recognition, the result could be complaints directed toward INAC. Recognition of the Noskey council, for instance, could be challenged by Bernard Ominayak, someone whose past criticism of INAC has garnered substantial attention from the media, human rights organizations, labour organizations, the United Nations, and so on.³³⁹ Criticism from within the Lubicon band may also generate interest from members

³³⁵ Ibid., section 2.2.1.

³³⁶ Goffman, *Frame Analysis*, 8.

³³⁷ Edelman, *Political Spectacle*, 4.

³³⁸ Goffman, *Frame Analysis*, 247.

³³⁹ Support for the Lubicon during rounds of land-claim negotiations, including the role of Ominayak, are the topic of Chapter 2.

of other bands, either to question INAC's apparent involvement in the Lubicon case, or to contact INAC as a potential intervenor in their own band's leadership affairs. As noted in the previous section (4.5), the nature of the challenge to the GLN and its dismissal on May 29 may be within INAC's field of view, but they are not INAC's focus. If INAC's main interest is to avoid any complaint regarding whom INAC recognizes as the Lubicon council, especially a complaint that might accuse INAC officials of meddling in Lubicon affairs, then, to INAC, there really are two factions within the community, not because the facts of the situation determined it to be so (as INAC argues), but because INAC officials are motivated by their fear of criticism from the side whom INAC does not recognize. INAC's preferred course of action in response to the Lubicon leadership situation, then, is a course of action that treats "both sides" in the same manner. "Squawk not," INAC might as well be saying to each, "we're not playing favourites."³⁴⁰ Rather, INAC is balancing the two groups who may generate criticism, therefore refusing to recognize anyone. In this view, the premise "INAC cannot get involved" is not so much an indication of INAC's respect for the First Nation's inherent right to choose and to exercise their method of leadership selection (or, in many Lubicon peoples' opinions, INAC's lack of respect for that inherent right), as it is an INAC act to guarantee the department's own political refuge from criticism. In Goffman's words, different interests will generate different motivational relevancies.³⁴¹ The question "what is it that is going on here?" is asked tacitly and the answer to it is presumed by the way INAC wishes to proceed,³⁴² that is, by displaying political neutrality between two groups of potential complainants. As long as this display remains the preeminent goal of INAC's involvement in the Lubicon situation, the INAC position cannot change. As an INAC spokesperson told the media even *before* the election acclaiming

³⁴⁰ Jay Rosen, "We Have No Idea Who's Right: Criticizing "he said, she said" journalism at NPR," *PressThink* (blog), <http://pressthink.org/2011/09/we-have-no-idea-whos-right-criticizing-he-said-she-said-journalism-at-npr/>.

Rosen's ideas regarding "he said, she said" reporting are discussed further in Chapter 6 of this thesis, especially in regard to journalists who wrote on the Lubicon leadership situation.

³⁴¹ Goffman, *Frame Analysis*, 8.

³⁴² *Ibid.*

Bernard Ominayak ever took place, “INAC is waiting for the dust to settle before determining who the players will be...”³⁴³

The complication of this INAC role arises given the relationship between INAC and First Nations that choose their leaders according to custom. Even with custom elections INAC is the body to whom election reports are sent. Thus, even though these are *custom code bands*, INAC is the body who validates the outcome by working with and supplying band funding to the elected party. While it is, of course, true that INAC should not be “playing favourites” regarding who constitutes the band leadership, each voting Lubicon band member certainly must play favourites. It is, after all, an election: each voter must select their preferred candidate according to a pre-determined set of rules, the custom code. In the Lubicon case, INAC pays more attention to “not getting involved” than it does to what the events of spring 2009 mean according to Lubicon custom. While the Lubicon operate, as would be expected, by their *GLN* rules – rules that, it is important to note, indeed provided a means to resolve the spring 2009 dispute over membership - INAC operates according to another premise, a set of INAC-set rules outlining how INAC officials can avoid any grounds for complaint. What the majority of Lubicon band members have every right to understand to be an internally-resolved dispute has not been accepted by the external INAC. The consequence is that the meaning the events held according to the Lubicon is negated as INAC imposes new meaning onto Lubicon events based on INAC’s self-interest. This is the foundation of the Lubicon leadership impasse. It is the impasse between INAC and the Lubicon over what the events in Little Buffalo in 2009 mean.

³⁴³ Michelle Huley, “Lubicon election controversy continues: Elder’s Council calls vote for June 25.” *Peace River Record-Gazette*, June 23, 2009.

5.7 The paralysis of the impasse³⁴⁴

There may be an ongoing impasse over what the events of spring 2009 mean to the Lubicon and to INAC, but, given the power INAC holds over the band, the INAC understanding has, in many ways, been experienced by the Lubicon people as reality. To illustrate, INAC officials desire an electoral process where no complaints surface against the department for their recognition of the outcome. However, INAC officials also assert that they must respect the custom code. The result puts the Lubicon in a double-bind situation.³⁴⁵ More precisely, INAC repeatedly provides the Lubicon with two sets of instructions regarding how to have their band council recognized. The first INAC instruction is “you have to follow your own custom code;” the second instruction is that “*everyone* has to agree to this” (my emphasis) because “INAC cannot choose sides.” The problem is that the two INAC requirements are mutually exclusive. When the Lubicon follow their own *GLN* rules the result is not unanimity. Given the Lubicon situation – where one party continually ignores community dismissal of an attempted change to the *GLN* rules - only one of the INAC requirements can be fulfilled. *Either* the attempted status-only change is followed, which dismisses the *GLN*, *or* the *GLN* is upheld, which dismisses the change to a status-only list. INAC appears to offer the Lubicon the choice to resolve the leadership matter, but the Lubicon are trapped by that choice itself.

I will note, however, that the double-bind situation imposed by the INAC position is only experienced as a double bind if the Lubicon band members attempt to adhere to INAC’s instructions. The Lubicon need not attempt to

³⁴⁴ My use of the word paralysis comes, in part, from the INAC use of this word at the October 2010, as included in the video “Framing the Intervention.” The full context is as follows. As INAC lawyer Troy Chalifoux states: “We’re incredibly sympathetic that you’re now in this position. It’s paralysis, we understand that. We can’t fix that. Legally we’re prohibited from fixing that. Anywhere in the country, if we were to step into a custom code election to do what some of you are asking us to do there would be a revolt. We are respecting the custom code. Now you guys have, have come to us asking us to accept one of the victors of two different processes. That’s not up to us.”

³⁴⁵ Watzlawick, *Pragmatics of Human Communication*, 212, 217-218. Watzlawick et al. describe a double bind as a message having two parts, where the two parts are mutually exclusive. That is, the message commands “do this” and “don’t do this” at the same time. The message must therefore be disobeyed to be obeyed.

adhere to these instructions at all. INAC's everyone-must-agree requirement is not a *GLN* requirement. Lubicon leadership is to be determined by democratic vote, as prescribed in the *GLN*, not to mention as it has been carried out for decades.³⁴⁶ The Lubicon have an obligation to fulfill their *GLN*, not an obligation to meet INAC requirements regarding a custom code election. Indeed, that INAC officials demand a certain outcome from the custom code system is to interfere in the custom process. Custom codes are outside of INAC's jurisdiction, as explained in detail in Chapter 3. The words of INAC officials, "we cannot interfere in your custom code" and "we respect your custom code" are thus being said at the same time INAC officials are imposing INAC requirements as to which types of electoral outcomes are acceptable and which are not.

The INAC requirements do not only challenge the authority of the *GLN*. INAC's requirements also challenge the very principles of democracy. Democratic systems function according to majority rule. When an election takes place it is the party receiving the most support of the voters who wins the election. What is determined to be "the most support" varies from system to system, for instance, proportional representation, representation by population, and so on. But always there is a predetermined system for voting that is used to determine who votes in and who wins the election. For some external body to create a new requirement stating that the outcome of the democratic election must also be a unanimous outcome would be to cripple the democratic process. It would award veto power over the electoral outcome to any opposition party, no matter how little support that party had. The winner of the majority of the peoples' support would never be able to take office as long as any opposition existed. The opposition party, in turn, would gain a platform to challenge any authority asserted by the winners of the election, the explanation being that, because they have *some* degree of support, these opponents are just as much the elected leaders as are the winners of the official democratic process.

³⁴⁶ The *GLN* election provisions and membership code are described and discussed in Chapters 3 and 4 of this thesis.

Despite the fact that the INAC requirements are both outside the *GLN* and contradict the fundamental nature of democracy, the Lubicon have no way to force INAC to recognize the *GLN* outcome without fulfilling INAC's requirements. Starting in the summer of 2009 INAC began to treat "both sides" equally,³⁴⁷ sending correspondence to the Lubicon Lake Nation to both. In late 2009 INAC imposed a third party manager because "there was no clearly identifiable leadership or Council to which funding could be directed."³⁴⁸ There can be no land-claim negotiations, "for resuming negotiations have also been complicated by the fact that the Lubicon are currently engaged in a leadership dispute."³⁴⁹ The Alberta government has informed oil companies of a leadership dispute and asked that companies work more closely with government officials on project consultation, while consultation notifications sent to the Lubicon Lake Nation are to be sent to Bernard Ominayak's office only.³⁵⁰ At the same time, any options INAC provides for the Lubicon people so that a council may be recognized by INAC present the same double bind again and again.

The first option the Lubicon have has already been discussed in this chapter (4.5). According to INAC "any disputes arising from these election process must be resolved within the community."³⁵¹ But the May 29, 2009 community meeting is INAC-determined wallpaper, an event belonging to the class INAC implies is "Lubicon-only business." As INAC has written to the UN,

³⁴⁷ For instance, in the October 30, 2009 letter to the Noskey council (which is included in Appendix I of this thesis) INAC states the following:

I will again reiterate that the Department will not take sides in these governance issues. I will, however, meet with you and your supporters, as Band Members.

This offer also applies to Bernard Ominayak and his supporters.

³⁴⁸ Government of Canada to the UN Special Rapporteur on the rights of indigenous people, September 24, 2010, 9, [http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_24.09.10_\(1.2009\).pdf](http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_24.09.10_(1.2009).pdf).

³⁴⁹ *Ibid.*, 10.

³⁵⁰ The Alberta Government's Lubicon Lake Nation Notification Strategy is included in Appendix A of this thesis. As highlighted on the cover page for this appendix, while the directive states the "Government of Alberta does not have jurisdiction over First Nation's governance matters" and has "no involvement" in such matters, the directive instructs companies to send notices to the mailing address of Ominayak exclusively.

³⁵¹ Spencer Philipppo (Direct, First Nations Relations Treaty 8, INAC) to Noskey council and Ominayak headmen, July 30, 2009. This text of this letter is included in section 4.14 of this thesis.

and as appears in statements INAC officials have made to Canadian media,³⁵² such a community resolution has not yet occurred.

The second INAC offer is to pay for the services of a mediator who will work with the “two competing groups”³⁵³ to come to a resolution. The INAC letter to both the Noskey council and Ominayak headmen on July 30, 2010 stated:

The purpose of my letter is to offer assistance of the Department in resolving the leadership issue.... I would therefore like to offer you the services of a mediator to assist you in resolving the leadership dispute. Either myself or my staff would be happy to meet with you to choose a mediator *satisfactory to all parties* (my emphasis) and we are prepared to provide assistance to the mediator and the two competing groups to bring these matters to resolution.³⁵⁴

Again the community is paralyzed by a double bind: INAC-defined mediation must include one party who will not agree to participate in mediation. Only Noskey has agreed to mediation. As the Government of Canada wrote to the United Nations on the issue:

[T]he Government of Canada recently offered mediation services to assist the Lubicon in resolving their internal election dispute. While the Lubicon have rejected this offer, the Government of Canada remains willing to offer such services.³⁵⁵

The last option INAC provides for the band to go to the courts to determine who is the rightful band council. INAC wrote to the Noskey council and the Ominayak headmen on July 30, 2009 the following:

Any disputes arising from [custom] electoral processes must be resolved within the community. Failing that, the community must turn to the courts for a judicial determination of the issue.³⁵⁶

³⁵² Michelle Huley, “Lubicon election controversy continues.” *Peace River Record-Gazette*, June 23, 2009. INAC spokesperson Glenn Luff states: “We’re closely monitoring the situation to see if there is a resolution.” (Appendix D of this thesis).

³⁵³ Filippo to Noskey council and Ominayak headmen, July 30, 2009.

³⁵⁴ *Ibid.*

³⁵⁵ Government of Canada to the UN Special Rapporteur on the rights of indigenous people, September 24, 2010, 9, [http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_24.09.10_\(1.2009\).pdf](http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_24.09.10_(1.2009).pdf).

³⁵⁶ Filippo to Noskey council and Ominayak headmen, July 30, 2009.

Decisions made under custom leadership selection processes are legal decisions. However, as explained in Chapter 3, custom codes also change. At times there is division within the band on what changes should take place or how they should occur. If a band's custom code does not prescribe the way in which particular changes are to be made, there is little opportunity for the division in the community to be resolved by the community. If different groups are polarized on a particular change, a charged dispute may develop. At this point one party would apply, if they so chose, to the federal court for a determination. The court would then act in on its "supervisory jurisdiction" and would use the definitions outlined in Chapter 3, as they applied to the case before them, in making a decision that would end the dispute.

The difficulty with turning to the courts for a judicial determination in the Lubicon case, however, is that it is only the *INAC position* that the dispute regarding leadership was not resolved internally. Lubicon people do not hold this position. The broadly held understanding of the leadership situation in Little Buffalo is that the events in the spring of 2009 included the dismissal of the Elder's Council's challenge against the *GLN*, and finally ended with the completion of the rescheduled *GLN* election June 5.³⁵⁷ Those who hold this understanding – which is the majority of band members, as they were in attendance on April 29, 2009 and chose to participate in the subsequent *GLN* process – understand the leadership dispute issue to be long-since resolved. To initiate legal action would be to allow the Canadian judiciary to determine a matter that had already been decided according to the *GLN*. *INAC* would gain *de facto* the jurisdiction to overrule a determination made by the Lubicon people according to their own custom code. The inherent right that the Lubicon have to determine their leadership selection process would not be exercised by the Lubicon, but would instead be handed over to the jurisdiction to the Canadian

³⁵⁷ As shown in this chapter, even those who *support* Ominayak as the new "chief for life" explain that the Lubicon membership list was dismissed, and the *INAC* list used, to run the June 25, 2009 election.

courts.³⁵⁸ INAC's decision not to recognize the council elected according to custom would defeat the very purpose of the custom code, for a key reason to have a custom system is as defense against the Canadian government's involvement in band affairs.

Though this view is widely held by Lubicon people, different perspectives have arisen as to what to do next, as would be expected in any community. The question has become one of "how much are we going to give up in order to finally have a band council recognized?" Some Lubicon people lean toward the position that it might be worth giving into the INAC position, for this would allow the band to escape outside control of band finances³⁵⁹ and allow for land-claim negotiations to restart.³⁶⁰ On the other end of the spectrum of opinions, others see INAC's actions to be malevolent, an excuse for INAC to control Lubicon affairs, especially in such a way that land-claim negotiations would favor the federal government.

In regard to the Canadian legal system itself there is also much distrust.³⁶¹ Some Lubicon people suspect that INAC's insistence on unnecessary court involvement is simply a way for INAC to use the courts to achieve their long-term

³⁵⁸ Some judges also comment on the role of the courts in custom leadership situations. For instance, in *Paktayken v. Oakes*, 2009 FC 134 (CanLII) Russell J. expressed hesitation before deciding between two "notionally separate" band councils of the Nekaneet First Nation. Though reluctant, he proceeded with his decision, noting at paragraph 87 that his involvement had support from both sides and was, in that case, "the only viable way."

I render judgment in this case with some reluctance because I am, in effect, pronouncing on the collective will of the Nekaneet First Nation as expressed in a broad consensus vote. That feels presumptuous to me, to say the least. The will of the Nekaneet people, in my view, is a matter for the Nekaneet First Nation. However, counsel for both sides have informed me that the present application is the only viable way of resolving the impasse at Nekaneet over governance in a timely way.

³⁵⁹ The imposition of third party management is discussed in Chapter 6.

³⁶⁰ The outstanding land-claim was a topic in Chapter 2.

³⁶¹ Chapter 2 of this thesis outlines the first UN decision noting that "the Lubicon could not achieve effective legal address within Canada." For a discussion on legal rulings made by Canadian courts in regard to the Lubicon Lake Nation see Huff's "Resource Development and Human Rights: A Look at the Case of the Lubicon Cree Indian Nation of Canada" and John Goddard *Last Stand of the Lubicon Cree*.

goals: impose the *Indian Act* electoral system and membership rules onto the band.

5.8 The impasse concealed

Consideration of the impact of the Lubicon-INAC impasse leads to a number of important questions. INAC frequently excuses its refusal to “pick a side” as respect for the custom process. Yet, in refusing to consider the meaning events hold according to the custom code, regardless of motivation, might INAC’s actions be better described as intervention in the custom process? That is, is INAC actually playing a *de facto* role as an appeals board in entertaining challenges brought against the custom process, challenges that were already dismissed according to the band’s use of its custom process? Would acting on those challenges be accurately described as overriding decisions made according to custom? Furthermore, what role does INAC have in sustaining a challenge against the custom code? For should it not be expected that some band members might target INAC with their challenges, knowing that INAC has the power to effectively prevent a custom council from taking office? Finally, what opportunity do First Nations in such situations have to challenge INAC officials’ non-recognition of custom process? For the Lubicon, there has been no such opportunity, given the INAC position “the Lubicon have an unresolved leadership dispute” is characterized by INAC as fact, not as INAC’s political stance.

These are the types of concerns that should have come to the attention of the media and various concerned publics in response to the Lubicon leadership situation. The summer of 2009 should have sparked examination as to the role of INAC in response to custom code elections, perhaps fueling a move to a different structure, one that escapes the inherent flaw of INAC involvement in the recognizing the outcome of custom code elections.

But no such discussion ever came to the fore. Because INAC was successfully able to frame the Lubicon leadership situation as an unresolved internal dispute, the INAC-Lubicon impasse surfaced (in Canadian news media and in concerned public commentary) as an *internal* Lubicon problem (which

INAC later characterized as a problem the Lubicon could not handle on their own). At the same time, INAC officials have depicted themselves to concerned outside audiences not as participants in Lubicon-INAC political developments, but as observers, that, if necessary, could intervene to help the Lubicon people. The next chapter examines what constitutes *necessity* for outside intervention.

Chapter 6

The intervention: INAC's imposition of third party financial management

What is it that happened in Little Buffalo in the spring of 2009? The answer to this question not only defines the Lubicon situation as a particular problem, it also determines the recipe for action, the solution.

Solutions are not put forward on their own. Edelman refers to the process as a competition between claimants, each constructing a different problem to explain a political development and proposing their favoured course of action as the solution.³⁶²

Competing explanations of “what happened” can be considered vying bids for the say of “what should be done.”³⁶³ Who wins the bid is determined by a number of factors. Language that constructs a problem and provides an origin for it gives the rationale for vesting authority in the bidders, those people claiming some kind of competence to deal with it.³⁶⁴ The definition of the problem thus generates authority, status, control, and support while denying the benefits to competing claimants.³⁶⁵ Either directly or implicitly, the winning bid constructs a particular problem as crucial, while denigrating the problems presented by others.³⁶⁶ Thus, the winning construction of the problem that gains audience acceptance, whether that audience be news media journalists or concerned publics.³⁶⁷ This chapter focuses on how INAC achieved audience acceptance of its framing of the Lubicon leadership situation, and how this audience acceptance resulted in INAC's augmented control over the Lubicon Lake Nation.

³⁶² Edelman, *Political Spectacle*, 20.

³⁶³ Ibid.

³⁶⁴ Ibid.

³⁶⁵ Ibid.

³⁶⁶ Ibid.

³⁶⁷ Ibid., 32.

6.1 A transformation of “custom”

The interpretation of the problem according to the INAC frame presents an unresolved internal impasse. Two rival councils each participated in two symmetrical elections. There is no trace of any tangible rule system that the Lubicon people may have used, and so no indication of which election was valid and which was not. This construction presents a custom code election system that is inherently inadequate to a unilateral attempt to dismiss it. The Lubicon people, thus trapped by their own system, must emerge to accept the ready help of competent outsiders in order to resolve the problem that they, and particularly their leaders, have created. As outlined in the previous chapter, this help could come in the form of mediation or from a decision by the Canadian courts.

INAC’s characterization of the *GLN* is misleading. As I discuss in previous chapters of this thesis, the Lubicon *GLN* indeed does have a means to deal with proposed changes, especially changes to provisions for membership and to what is accepted as democratic process. Lubicon custom code, which was for many years a protection from the involvement of INAC, has been enveloped into INAC discourse, returned with a new meaning.

At the INAC-Lubicon community meeting in 2010, for instance, INAC officials rely on the INAC meaning of “custom code” for their authority in refusing to engage on the nature of the membership challenge and the way in which it was dismissed:

All of your questions are valid. The problem is you’re asking us to in some way to measure or evaluate the custom code. The very existence of the custom code, according to what you have been telling us for decades, is a sacred thing.³⁶⁸

In actual content INAC’s use of “custom” has no substance. It does, however, connote the message “this should not be talked about.” In Chapter 5 I described this treatment of the term “custom” as INAC’s “Lubicon-only” argument that protects the INAC frame. That is, to discuss the nature of the challenge to membership and its dismissal is, to INAC, descend into a “Lubicon-only” area, an

³⁶⁸ These are the words of INAC lawyer Troy Chalifoux at the Lubicon community-INAC meeting held October 21, 2010.

act INAC characterizes as a severely inappropriate intrusion into Lubicon internal affairs.

.... It's not up to us to measure, to say well, that doesn't make sense, that's not correct, did you follow your code? That's not up to us.... If we were to step in and pick sides, any [*sic*], in any election, we're violating that trust that you've given us to respect that custom code. And that's been proven throughout negotiations that we have respected that.³⁶⁹

While it is true that the custom code should be respected, refusal to engage on the topic of custom is, in the Lubicon situation, not about respect for the *GLN*.³⁷⁰ It is a tactic to escape topics that may lead to any comparison of the “two sides.”

Though Lubicon person after Lubicon person spoke out into the echoing auditorium in an attempt to invoke the authority of their *GLN* – that Ominayak (who was absent at this meeting) had acted to prevent others from voting, that the community had “dealt with the membership issue,” that the *GLN* prescribes a democratic process and not a dictatorship, that it cannot be unilaterally changed, that a Lubicon election cannot be an event where there is no vote held or where many in the community did not know it was scheduled³⁷¹ – INAC responded with invocations of the sacred that-which-cannot-be-talked-about.³⁷² Though INAC

³⁶⁹ Ibid.

³⁷⁰ Respect for a band's custom code does not necessitate refusing to engage on the topic of custom with band members. Even INAC's *Custom Election Dispute Resolution Policy*, for instance, discussed in Chapters 3-6 of this thesis, provides for INAC to assess custom disputes and make decisions as to whether or not custom was followed or if a dispute was resolved internally. Both of these “tools” are to help INAC's regional directors “assist First Nations in their resolution of their governance disputes” and “manage the disputes at a regional level.” This policy is included in Appendix H of this thesis.

³⁷¹ Each of these points were raised by Lubicon people to INAC officials at the October 21, 2010 meeting. Some points are included in the video “Framing the Intervention.”

³⁷² Ominayak did not attend this meeting, or any INAC-Lubicon community meetings. As a note, I do not mean to imply that everyone at this Lubicon community-INAC meeting opposed Ominayak. There were at least three supporters of Ominayak present, two of them headmen. One spoke. His points were directed to INAC and at times to other community members. His main assertion was that Noskey was not a band member. At one point an INAC official, Troy Chalifoux, responded to these assertions asking, “Well why was he [Noskey] on council then?” to which the gymnasium erupted in applause. (It was understood by the context that the INAC official's point was made in reference to Noskey's previous terms in office as a band councillor on Ominayak's previous band councils, including 2004-2009. Noskey could not have been a councillor if he was not a band member.)

ostensibly holds “custom” up as the highest authority, the *GLN* is belittled and invalidated.

6.2 Erasing the Lubicon terms of reference

References to the Lubicon custom in the media are just as empty. With the exception of the reporting of one *Peace River Record-Gazette* journalist who attended the events of spring 2009,³⁷³ the Lubicon story is told in a manner that supports the INAC frame. The following are examples of several journalists accounts of the leadership dispute around the time INAC officials announced the Lubicon Lake Nation was to be placed under outside financial management.³⁷⁴

Bernard Ominayak has been the public face of the Lubicon since the early 70s. A former councillor and school board chairman, Steve Noskey, was elected chief on June 5, but Ominayak's supporters refused to recognize that election. They elected Ominayak chief-for-life on June 25.

- *Sweetgrass*³⁷⁵

Since June, two men, Bernard Ominayak and Steve Noskey, have claimed to be chief of the First Nation. Noskey was elected chief on June 5, but Ominayak's supporters disputed the results. Ominayak won a second election on June 25 with a restricted voting list and was acclaimed chief for life.

- *Peace River Record-Gazette*³⁷⁶

The aboriginal community has been embroiled in a leadership dispute since May, with two brothers-in-law both claiming to be chief. Each has asked Ottawa to recognize their claim and do business with their side, but the Department of Northern and Indian Affairs refuses.

- *Edmonton Journal*³⁷⁷

³⁷³ This includes four articles written in the spring of 2009. All are mentioned in Chapter 4 of this thesis and are included in Appendix D.

³⁷⁴ The full text of each article is included in Appendix K of this thesis.

³⁷⁵ Shari Narine, “Third party manager continues at Lubicon Lake,” *Sweetgrass*, August 1, 2010. <http://www.ammsa.com/publications/alberta-sweetgrass/third-party-manager-continues-lubicon-lake>

³⁷⁶ Kristjanna Grimmelt, “Third-party manager to handle Lubicon Lake services.” *Peace River Record-Gazette*, Dec 1, 2009.

<http://www.precordgazette.com/ArticleDisplay.aspx?e=2203519&&archive=true>

³⁷⁷ Elise Stolte, “Outside administrator assigned to Lubicon community.” *Edmonton Journal*, December 4, 2009, <http://www.edmontonjournal.com/Outside+administrator+assigned+Lubicon+community/2299317/story.html>.

In every case the article was informing readers that INAC was placing the band in third party management. In every case the leadership dispute was presented as the reason for this INAC action.

Notably, what is not done in every article is an assessment of the competing claims, even though journalists recognize this is the heart of the matter. As reported by the *Edmonton Journal*, for instance, “[u]ntil the community can decide who the elected leader is, the department will appoint an outside accountant or management consultant to sign the cheques and ensure essential services such as education and social assistance continue to be provided.”³⁷⁸ Why is there no investigation into such a central issue? Why adopt the INAC frame of the Lubicon leadership situation? This is a question in need of some consideration. How developments are reported by media are key to how those developments are understood as social reality.³⁷⁹

For comparison, I review some of the articles written by Michelle Huley of the *Peace River Record-Gazette*. Huley, too, reports on two different groups who make conflicting claims. However, unlike the articles in the above, Huley’s articles also provide the reader with a means to assess those claims. At the June 25 election, for example, Huley interviews Reine Jobin, a member of the Elders council and a supporter of Ominayak. “With us not signing a treaty,” Huley quotes Jobin, “we’re going back to a lot of the old ways and we went under the Indian Affairs list to vote.” Huley then includes some background helpful to her readers: “[t]raditionally, Lubicon voter eligibility was determined by band membership and a stipulation that voters live on Lubicon traditional land.”³⁸⁰ The reader is exposed to both Jobin’s argument (that using the Indian Affairs list was a Lubicon tradition) and the basic nature of Lubicon custom (voter eligibility was traditionally based on Lubicon-determined membership and residence).

Like Huley, at least two of the reporters of the articles listed above (Grimmelt of the *Peace River Record-Gazette* and Stolte of the *Edmonton Journal*) visited the Lubicon community of Little Buffalo to interview community

³⁷⁸ Ibid.

³⁷⁹ Edelman, *Political Spectacle*, 32.

³⁸⁰ Michelle Huley, “Elders Take Control.” *Peace River Record-Gazette*, June 30, 2009.

members. Like Huley, both would have had access to a copy of the *GLN*. Like Huley, both showed an interest in reporting on Lubicon matters, each having published multiple articles regarding different Lubicon developments, and each writing more than one article on the Lubicon leadership situation.

One notable difference between Huley and other journalists is the time period in which they wrote. Huley attended the events in Little Buffalo and wrote before INAC had taken a position on the Lubicon situation. The other articles were written later, after INAC officials had developed their “two competing groups” frame. It is because of observations such as these that I suggest the INAC frame resonates particularly strongly with a common present-day approach to journalism.

As PressThink writer Jay Rosen notes, the role of journalism is often seen as one of two extremes.³⁸¹ Either the journalist covers the story in a manner that is bias-free, or the journalist takes a position. When the latter approach is taken the article is considered an editorial, and therefore not considered to be reporting on the facts.

There is, however, a middle ground. As Rosen points out, to shed light on conflicting truth claims put forward by different interest groups is not equivalent to taking a position.³⁸² It is checking the facts, giving the reader the background needed to come to understand the issue.³⁸³ It is, indeed, *reporting* on the issue.³⁸⁴ In contrast, when the approach taken by the journalist is simply to cover the positions of different interest groups, the issue itself is neglected.³⁸⁵ There is no real attempt made to assess the clashing truth claims, even through they are in

³⁸¹ Jay Rosen, “We Have No Idea Who’s Right: Criticizing “he said, she said” journalism at NPR,” *PressThink* (blog), <http://pressthink.org/2011/09/we-have-no-idea-whos-right-criticizing-he-said-she-said-journalism-at-npr/>

Rosen, an American press critic, describes himself an observer of journalism’s habits. He examines the ideas about journalism that journalists work within, those they feel they can work without, and the broader consequences.

³⁸² Ibid.

³⁸³ Ibid.

³⁸⁴ Ibid.

³⁸⁵ Ibid.

some sense the reason for the story.³⁸⁶ The means for the reader to assess the conflicting claims, then, do not exist.³⁸⁷ The journalist's position is "I have no idea who's right" and the journalist passes that helplessness on to the reader.³⁸⁸ This, Rosen writes, is "he said, she said" journalism.³⁸⁹

When the majority of journalists arrive on the Lubicon leadership scene, INAC has already done the work of creating the ideal bias-free story. The Noskey council and the Ominayak headmen have been prepackaged into two competing contingents. The journalists take up the two sides as two competing interest groups. These interest groups are inserted into a journalistic formula that pits them against each other. While one might expect, at this point, the journalist to wonder about the nature of an electoral system that would apparently allow for two elections, this is not the journalists' focus (with the exception of Huley). There is no need to assess the conflicting truth claims because the need for "bias-free" reporting has already been met. The two sides, cast as symmetrical interest groups, are balanced against each other. Furthermore, as I will discuss later in this chapter, all Lubicon people are treated as part of either one interest group or the other, not as participants in a given democratic process. The issue becomes the existence of a split community, not the issue of an unrecognized band council.

The consequence of this bias-free treatment of the "two sides" is that the majority of journalists reporting on the Lubicon situation treat INAC officials as an outside authority on the situation. Because journalists have taken up the INAC frame of "two competing groups," INAC cannot be identified as an interested party. INAC officials appear, in Rosen's words, to be "hit from both sides, which suggests that [their] reporting is straight down the middle." INAC's political stance on the Lubicon situation is accepted as fact. The task of journalists, then, becomes to endeavor to account for the "facts," where these "facts" are products of INAC framing.

³⁸⁶ Ibid.

³⁸⁷ Ibid.

³⁸⁸ Ibid.

³⁸⁹ Ibid.

6.3 “The tale of two chiefs”

In a December 4, 2009 article, INAC’s then regional director George Arcand informs the *Edmonton Journal* that he has offered mediation to the community, but neither side seemed interested when he visited the community last week.³⁹⁰

“People are really entrenched,” Arcand is quoted in saying in referring to the dueling chiefs’ refusal of his offer.³⁹¹ Rather the Lubicon are seen to be repeatedly demanding that INAC judge the winner of their internal dispute.

“We were pretty clear,” said George Arcand, regional director for the department. “For many years, (I told them), you’ve told us get out of your way. You’re going to determine your own governance and how you elect your people. Now that you have a problem, you want the government to come in?... Well, it doesn’t quite work that way.”³⁹² (Parenthesis in original.)

Here INAC’s regional director portrays Lubicon leadership as children fighting for independence one minute and pleading for help the next, not able to handle their own affairs when the situation becomes difficult. In contrast, the INAC official casts himself as the firm parent, holding to his promise to not interfere, truly frustrated with the apparent proclivities of the contending sides. Again the INAC role is cast as INAC non-interference, where “interference” is defined as INAC choosing between two equal factions. Rather than the Lubicon leadership situation coming across as INAC’s refusal to recognize the outcome of the Lubicon custom process, the rhetoric centers on non-intervention in Lubicon affairs.

And if the cause of the ongoing internal problem is not INAC interference, then what is it? This is the question the media struggles to answer. How can a First Nation have two chiefs? Why can the Lubicon not decide?

One journalists’ explanation is the apparent battle between Steve Noskey and Bernard Ominayak. In her July 27, 2009 article Elise Stolte of the *Edmonton Journal* shares with her readers her story “Who’s the chief of Lubicon Lake?”

³⁹⁰ Elise Stolte, “Outside administrator assigned to Lubicon community.” *Edmonton Journal*, December 4, 2009. The full text of this article is included in Appendix K of this thesis.

³⁹¹ Ibid.

³⁹² Ibid.

Two chiefs, brothers-in-law, are fighting for control of the Lubicon Lake First Nation --one an iconic image of a shy Woodland Cree leader, the other a symbol of modernity.³⁹³

Bernard Ominayak, the article continues, who has been the chief since 1978, went hunting recently. “He shot a moose and brought home meat for family and supporters to smoke outside.” Steve Noskey “the son of an Alliance minister,... spent the week working nine-to-five as a battery operator for an oil and gas separation plant a 10 minute-drive from the community.”

Given that the article is about an ongoing leadership dispute, the differences Stolte highlights between the two men seem to account for the community support that is split between them. The article suggests that the community has a choice between tradition or modernity, moose meat or oil and gas, Ominayak or Noskey. Here, Stolte implies, is where the Lubicon people have arrived at their internal impasse.

A supporter of Noskey, a mother bathing her children outside in a plastic tub in sight of the outhouse, is interviewed next. The family digs a new hole each fall to make sure it does not overflow, Stolte informs her readers. ““Who’s stupid enough to go back and accept (Ominayak) as chief when there’s no funding given to graduates in our community?”” the mother is quoted in saying. To balance the mother’s opinion, next a supporter of Bernard is interviewed. ““Everybody’s treated fair here,’ [he] says. Blood from Ominayak’s dead moose stains his shirt. Noskey’s supporters ‘lose sight of what we’re fighting for,’ he says.”³⁹⁴ The featured characters play their roles admirably, for they are cast to help portray the balance between two sides. In this way, the article recasts INAC’s frame of the internal leadership dispute. That is, “modernity versus tradition” is Stolte’s way of providing an explanation as to why the dispute between the two sides prevails, her way of conceptually anchoring the apparent difference between the two men

³⁹³ Elise Stolte, “Who’s the Chief of Lubicon Lake?,” *Edmonton Journal*, July 27, 2009. This article is included in Appendix K of this thesis. A version of this Stolte article was printed in the *Calgary Herald* with the title “The tale of two chiefs” a few days later on August 1, 2009.

³⁹⁴ Ibid. The phrase “what we’re fighting for” is understood in the article to be the Lubicon land claim.

so that it accounts for the band's ongoing internal impasse and, at the same time, makes sense to her readers.

Though casting the “two chiefs” in such a manner is misleading in regard to the Lubicon situation,³⁹⁵ “modernity versus tradition” is a dichotomy that broader Canadian society often uses, and has historically used, to talk about issues facing First Nations. Goffman describes such reporting as having undergone “the editorial violence routinely employed by gentle writers.”³⁹⁶

Our understanding of the world precedes these stories, determining which ones reporters will select and how the ones that are selected will be told... The design of these reported events is fully responsive to our demands – which are not for facts but for typifications.³⁹⁷

The versions of the Lubicon situation that reach public audiences, then, are interpretations of the original INAC interpretation, created as journalists strive to account for why the Lubicon community is seemingly trapped in its choice between two sides. Every retelling of the INAC story helps to rationalize the INAC position. Because no one can “intervene” the situation continues perpetually.

³⁹⁵ Stolte's article, included in Appendix K of this thesis, casts Noskey's political stance as pro-industry and Ominayak's as anti-industry, especially in the context of the land claim. At the last round of negotiations both men held the same stance on the land claim and negotiated as part of the same negotiation team. Both men also oppose the water pipeline mentioned in the article, both believing it to be a means for the Alberta government and regional county to assert jurisdiction over unceded Lubicon lands and to increase oil extraction in the area. The dichotomy (tradition versus modernity) the article presents is also unrealistic. As described in Chapter 2 of this thesis, the Alberta government has issued oil, gas and mineral leases covering almost 70 per cent of Lubicon territory. There are more than 2,600 oil and gas wells, with approximately 100 new wells drilled each year. The traditional hunting and trapping economy has been largely destroyed. Many people work for oil companies or in activities related to oil extraction while still engaging in traditional practices, often while being opposed to development. This includes both Noskey and Ominayak. Furthermore the article implies the land claim was a major factor of the 2009 leadership issue. While obtaining a fair land claim is certainly an area of concern for Lubicon people in general, and while not everyone holds the same position of how to best achieve a settlement or how urgently a settlement is needed, the land-claim issue did not figure in the events of 2009 as the reader is lead to believe.

³⁹⁶ Goffman, *Frame Analysis*, 14.

³⁹⁷ *Ibid.*

6.4 Context becomes cause: Rewriting three years of “missed opportunities”

Chapter 4 of this thesis notes INAC’s response to the Lubicon financial situation before the dispute over Lubicon leadership developed. In a letter to the then band council and administration INAC stated that “missed opportunities have negatively impacted the community in core program areas, including housing, renovations, economic development and social programming... all of which are intended to enhance the lives of First Nation members.”³⁹⁸ Similarly, in the early part of 2009 (and before Ominayak’s 2004-2009 term of office ended) the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, wrote to Canada regarding Lubicon living conditions. In particular the Special Rapporteur asked that Canada supply information and observations regarding the following:

The measures that Canada has taken, or intends to take, to comply with the recommendations of the Human Rights Committee, the Committee on Economic, Social and Cultural Rights and the United Nations Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, regarding the Lubicon situation.³⁹⁹

Canada responded that “Canada continues to take positive measures in order to improve the housing and living conditions of the Lubicon Lake Nation.”⁴⁰⁰ More specifically, the Canadian government explains the following:

The Government of Canada provides annual funding to the Lubicon Lake Nation for community development and infrastructure (including housing), economic development, social development, registration, First Nation Government (including operating of the Band Council), health care and promotion, old age security and employment insurance.⁴⁰¹

Particular to housing, Canada’s letter to the UN Special Rapporteur also explained that the Government of Canada Minor Capital Housing Allocation, which is available to other First Nations in Canada, was also available to the Lubicon Lake

³⁹⁸ Government of Canada to the UN Special Rapporteur on the rights of indigenous people, June 3, 2009, par. 1, [http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_24.09.10_\(1.2009\).pdf](http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_24.09.10_(1.2009).pdf).

³⁹⁹ Ibid.

⁴⁰⁰ Ibid., par. 64.

⁴⁰¹ Ibid., par. 93.

Nation, as it has been since the mid 1980s.⁴⁰² Through this fund the Lubicon are eligible for up to \$140,100 per year for their community.⁴⁰³ In order to secure this funding, the band would first have to make project descriptions available to the Canadian government, with reimbursement based on the provision of Lubicon invoices.⁴⁰⁴ In this area the Government of Canada is quick to point out the following to the UN Special Rapporteur:

It should be noted that the Lubicon Lake Nation missed opportunities to improve housing conditions in the past three years due to failure to provide project descriptions and the associated proof of expenditures (invoices). Further opportunities were missed in the two preceding fiscal periods when the funds allocated and paid to the Lubicon were not fully utilized and became subject to recovery under the terms of the funding agreements between the Lubicon Lake Nation and Canada.⁴⁰⁵

In short, in a context where Canada was under the UN's critical eye in regard to the inadequate housing conditions of the Lubicon, Canada made sure to highlight for the United Nations the Lubicon Lake Nation administration's failure: the Lubicon Lake Nation itself has missed the opportunities the Canadian government has created for them. "These are not instances of mere administrative or technical non-compliance," Canada clarified regarding these "missed opportunities," but are "basic requirements with respect to transparency and accountability that must be respected in order to ensure effective results and the proper operation of the program in question."⁴⁰⁶ For three years this included failure to provide proof of

⁴⁰² Ibid., par. 94.

⁴⁰³ Ibid. For comparison, housing condition inspection reports of Lubicon homes conducted in 2010 by an INAC-hired inspector assessed the costs for repairs and replacements (replacing moldy walls, insecure floor beams, flooring, doors, electrical work, ceiling due to moisture damage, and so on) for *one* Lubicon home at over \$128,000. For another home the costs were estimated by the inspector at over \$134,000.

⁴⁰⁴ Ibid.

⁴⁰⁵ Ibid.

⁴⁰⁶ Government of Canada to UN Special Rapporteur on the rights of indigenous people, September 24, 2010, 14, [http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_24.09.10_\(1.2009\).pdf](http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_24.09.10_(1.2009).pdf).

expenditures in some areas leading to Canada having to recover funds, while in other areas funding available had not been requested by the Lubicon Lake Nation at all.⁴⁰⁷

A year and a half later Canada wrote quite a different letter to the UN Special Rapporteur. This time the Canadian government's letter addressed, among other things, the Special Rapporteur's description of INAC's intervention in the Lubicon leadership situation. The Special Rapporteur had reported the following:

... the federal Government has taken over and assigned to a private sector manager delivery of essential programs and services provided to the Lubicon people with federal Government funding, and that this federal intervention has had a further debilitating effect on Lubicon society and leadership capacity.⁴⁰⁸

Canada responded that, “[c]ontrary to the information received by the Special Rapporteur... , the appointment of a third-party manager has not had ‘a further debilitating effect on Lubicon society and leadership capacity’.”⁴⁰⁹ While Canada recognized government action “represents a ‘high-level’ intervention,” it was “deemed a necessary step in this case in order to ensure that essential government-funded services would continue.”⁴¹⁰ To support this point Canada highlighted the lack of access to funding for basic services is attributed directly to the leadership dispute: “basic services were not being delivered *because* (my emphasis) of the instability created by the leadership dispute.”⁴¹¹ In particular Canada noted that “[t]here were multiple events of default under the 2009-2010 Funding Agreement, including failure to maintain fire protection, overdue financial statements, and multiple recoveries for uncompleted or unsubstantiated programs.” While Canada's 2009 letter, a letter written before INAC took a

⁴⁰⁷ Filippo to Lubicon Chief and Council, review of 2007/2008 Audited Financial Statements, May 13, 2009.

⁴⁰⁸ Report of the UN Special Rapporteur on the rights of indigenous people, September 15, 2010, 61.

⁴⁰⁹ Government of Canada to the UN Special Rapporteur on the rights of indigenous people, September 24, 2010, 11, [http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_24.09.10_\(1.2009\).pdf](http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_24.09.10_(1.2009).pdf).

⁴¹⁰ *Ibid.*, 10.

⁴¹¹ *Ibid.*, 9.

position on the Lubicon leadership situation, attributed the lack of funding to the (then) Lubicon administrations' failure to meet "basic requirements with respect to transparency and accountability," Canada's response to the UN in 2010 attributes the lack of access to the funding solely to the ongoing internal leadership dispute. Three years of INAC-documented "missed opportunities" were thus displaced, any negative impacts of those three years reattributed to the leadership dispute alone.

6.5 Evoking an origin

The Canadian government's act of editing out factors relevant to the Lubicon leadership situation is significant for a number of reasons. The first is in regard to the development of the leadership situation itself. Many Lubicon people cite as their reason for voting for a new chief their inability to access band funding.⁴¹² Many also assert that Ominayak knew before the regularly scheduled April 29 election that he would be voted out of office. It is in this context that the more exclusive membership list first appears in relation to Lubicon custom elections, a list that would have disenfranchised, among other band members, Ominayak's competitor for the position of Lubicon chief.

INAC officials, however, portray themselves as arriving on the Lubicon scene in the summer of 2009, as if they were never aware of the previous financial situation. Though INAC officials had written letters to urge Lubicon representatives to meet with INAC as soon as possible to work out the financial issue together, after June 2009 INAC refused to address how INAC and the newly elected council could address the financial issues. With the three years of "missed opportunities" removed from the context in which the leadership situation arose, the well-documented context that would have done a lot to inform outside audiences as to the nature of Ominayak's challenge to the *GLN* was concealed. Furthermore, the "missed opportunities" band members experienced during those three years were negated, an erasure completed even though INAC had earlier

⁴¹² This topic was repeatedly raised by a range of Lubicon people at INAC-Lubicon community meetings, in particular the meeting held October 21, 2010.

drawn attention to the failure “with respect to transparency and accountability”⁴¹³ and written to Ominayak’s administration regarding concerns that band programming was “not being responsive to the needs of Lubicon members.”⁴¹⁴ The result is that Lubicon band members’ own desires to change their leadership appear to have no basis. In media reports, concerns raised by band members about band accountability before 2009 take a back seat to INAC’s “two competing groups” frame, if mentioned at all.⁴¹⁵

Another point of significance, then, is also in regard to origins. To evoke a particular origin for a problem is to reduce the issue to a particular perspective and to minimize or eliminate other perspectives.⁴¹⁶ As INAC explained to the UN in 2010, “basic services were not being delivered because of the instability *created by the leadership dispute*”⁴¹⁷ (my emphasis). The Canadian government substantiated this point with a more detailed account:

[T]he election dispute arose during the term of the 2009-2010 Lubicon Funding Agreement in place at the time. There was no clearly identifiable leadership or Council to which funding could be directed. Nor was there anyone who could be held accountable for the delivery of goods and

⁴¹³ Government of Canada to the UN Special Rapporteur on the rights of indigenous people, September 24, 2010, 14, [http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_24.09.10_\(1.2009\).pdf](http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_24.09.10_(1.2009).pdf).

⁴¹⁴ Filippo to Lubicon Chief and Council, Review of 2007/2008 Audited Financial Statements, May 13, 2009.

⁴¹⁵ One instance where financial concerns of band members are addressed by media is in the *Edmonton Journal* article examined already in this chapter, Stolte’s “Who’s the chief of Lubicon Lake?” (Appendix K). Though the article focuses primarily on the “iconic image of a shy Woodland Cree leader” and “the symbol of modernity,” the article ends by mentioning a link between financial accountability and the leadership issue:

The band is behind on its school payments, late on audits and ran a 7.4-per-cent deficit last year, just shy of the eight per cent Indian Affairs considers the threshold to get involved.

Even as a councillor, Gladue says, he wasn't told how the band's approximately \$5 million in revenue from reclamation and road building work last year was spent.

When he checked the bank account a couple days after the June 5 election, he says \$1,390 was left. Some new equipment was bought, but "that's supposed to be discussed at the community level, period. Or at the very least with the council," Gladue said.

⁴¹⁶ Edelman, *Political Spectacle*, 17.

⁴¹⁷ Government of Canada to the UN Special Rapporteur on the rights of indigenous people, September 24, 2010, 9, [http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_24.09.10_\(1.2009\).pdf](http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_24.09.10_(1.2009).pdf).

services as well as the financial reporting requirements. Once the 2009-2010 Funding Agreement expired, there was no duly appointed leadership of the Lubicon Lake Nation to sign the 2010-2011 Funding Agreement. Agreements are required by federal legislation to govern the disbursement of funds to First Nations governments.

Third-party management of funding and services was therefore deemed to be a necessary and appropriate level of intervention in the circumstances.⁴¹⁸

This perspective leaves out the role of INAC. Chapter 5 of this thesis focuses on the role of INAC officials' interpretation of the Lubicon leadership situation, an interpretation framed according to INAC officials' self-interest. INAC's refusal to recognize a Lubicon band council was not simply something that happened. It was a consequence of INAC's perspective of the Lubicon leadership situation. In Canada's above explication of the intervention, INAC's role is omitted. Instead of acknowledging that INAC determined there to be no clearly identifiable leadership Canada writes, simply, "[t]here was no clearly identifiable leadership." Importantly, the assertion that there is "no clearly identifiable leadership" is the basis for INAC refusing to fund the band: there was no one "who could be held accountable for the delivery of goods and services as well as the financial reporting."

Precisely the same argument was made to the Lubicon when INAC imposed third party management on the Lubicon Lake Nation. For instance, in January of 2010 INAC contacted the band, writing to both the Noskey council and the Ominayak headmen, informing the Lubicon Lake Nation that "[a]ll funding to the Nation has been halted" and INAC "was initiating alternative delivery of programs and services."⁴¹⁹ The INAC regional office explained that "INAC [was] unable to recognize a duly elected Chief and Council, and therefore does not have the ability to continue to provide programs and services."⁴²⁰ The INAC

⁴¹⁸ Ibid., 10.

⁴¹⁹ Spencer Philippon (Director, First Nations Relations Treaty 8, INAC) to Noskey council and Ominayak headmen, January 5, 2010. This letter is included in Appendix L of this thesis.

⁴²⁰ Ibid.

letter also highlights the Lubicon's "missed opportunities," but instead refers to them as "specific defaults." In particular INAC explained that "specific defaults" from the 2007-2008 fiscal year "have not been addressed" and Audited Financial Statements for the 2008-2009 fiscal year "have not been received."⁴²¹ INAC then explains that "[a]s a result of these defaults, INAC has initiated Third Party Management." What is left out of the INAC telling of the story is that INAC's position precluded any way in which the Noskey council could have addressed the financial situation, a financial situation they were elected in 2009 to fix.

Overall, to the Lubicon and to national and international audiences alike, INAC's actions are rationalized as a "necessary and appropriate level of intervention in the circumstances"⁴²² where the definition of those "circumstances" is controlled by INAC. INAC's characterization of the problem justifies INAC's response to that problem. At the same time other occurrences - occurrences that could be considered just as problematic - go unseen and unheard.

6.6 Responding to the crisis

In addition to the Canadian government's ability to disguise relevant factors that lead to the INAC's intervention and to displace the "missed opportunities" experienced by the Lubicon people, it also romanticizes the grounds for INAC action.

The problem of the internal Lubicon leadership dispute, as presented by INAC and to a large extent the media, is certainly serious. Characterized as a fundamental disagreement regarding a sacred system of governance, tainted by the divisiveness of mutual rivalry, partly grounded in family feud, partly the manifestation of ideological differences, this leadership dispute demands to be left alone. With a focus upon institutional weakness and unrelenting character flaws, the issues at the heart of this problem appear to be chronic. As *Peace River*

⁴²¹ Ibid.

⁴²² Government of Canada to UN Special Rapporteur on the rights of indigenous people, September 24, 2010, 9, [http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_24.09.10_\(1.2009\).pdf](http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_24.09.10_(1.2009).pdf).

Record-Gazette editor Scott Fitzpatrick wrote, “[t]he muddy waters stirred up by two separate Lubicon elections held over the past month are still a long ways from clearing.”⁴²³

This sort of problem is the type Murray Edelman refers to as “problems as political spectacle.”⁴²⁴ Such a “problem” is the creation of the language used to depict it; its appearance is a political act, not recognition of a fact or of a rare situation,⁴²⁵ for many conditions may be just as harmful, just as problematic, yet not become targeted as “problems.” Problems as political spectacles focus on entrenched features of a society, encouraging audiences to acquiesce in the inevitable.⁴²⁶ While such problems may be curable in principle, there appears to be no solution in the foreseeable future.⁴²⁷ Problems as political spectacle, though they do require attention, they do not demand an immediate response.⁴²⁸

Crises, on the other hand, do require a response. “Crises,” according to Edelman, are constructed in the same way “problems” are. However, unlike problems, crises are understood as acute,⁴²⁹ the sudden outcome of some adverse event or development.

Edelman’s distinction is a helpful one in considering the INAC imposition of third party management. Though INAC characterized the apparent fact that the Lubicon were trapped in an internal dispute as a problem, INAC did not intervene in Lubicon affairs as a reaction to that dispute. Rather, INAC officials intervened in response to their assertion that basic services were not being delivered. The Government of Canada explained to the Special Rapporteur in 2010, the intervention was “prompted” by ongoing complaints from community

⁴²³ Scott Fitzpatrick, “Too many Chiefs – not enough democracy.” *Peace River Record-Gazette*, August 3, 2009. This article is included in Appendix K of this thesis.

⁴²⁴ Edelman, *Political Spectacle*, 96. Edelman defines the political spectacle as “a partly illusory parade of threats and reassurances, most of which have little bearing upon the successes and ordeals people encounter in their everyday lives, and some of which create problems that would not otherwise occur. The political spectacle does not promote accurate expectations or understanding, but rather evokes a drama that objectifies hopes and fears.”

⁴²⁵ *Ibid.*, 30.

⁴²⁶ *Ibid.*, 35.

⁴²⁷ *Ibid.*, 30.

⁴²⁸ *Ibid.*

⁴²⁹ *Ibid.*

members⁴³⁰ that basic services were not being delivered “because of the instability created by the leadership dispute” and INAC’s “resulting concerns for the health and safety of community members.” Thus the Lubicon leadership problem became more urgent, more distressing. INAC was no longer addressing a mere leadership issue; it was addressing the denial of basic needs. As the *Edmonton Journal* reported, INAC would take over until the issue was resolved.

Until the community can decide who the elected leader is, the department will appoint an outside accountant or management consultant to sign the cheques and ensure essential services such as education and social assistance continue to be provided. Several furnaces need to be fixed before the cold really sets in.⁴³¹

Because the need appears to be desperate – provision for essential services, even indoor heating before January – there is no focus on the nature of the intervention itself. One might ask, for instance, given that third party management is the most invasive type of INAC financial intervention, what makes this the appropriate INAC response to the Lubicon situation?

Over the last decade in Canada there has been increasing criticism of third party management. In 2003 Canada’s Auditor General targeted INAC’s *Intervention Policy* and *Third Party Management Policy* for audit and identified various deficiencies: lack of openness and transparency in selection of the third party manager (especially given the lack of public tendering); hundreds of thousands of dollars paid from First Nations funding with little First Nations input into how that funding would be spent; lack of accountability frameworks for third

⁴³⁰ Some of the Lubicon community members with whom I have spoken clarify that they called INAC officials to demand recognition of the Noskey council, giving examples of the deterioration in living conditions and the lack of access to services to substantiate why a new council was needed and had been elected. Some Lubicon people also wrote letters to INAC. INAC Minister Chuck Strahl answered the letter written to him from one Lubicon woman on August 14, 2009 stating that the “allegations with respect to the failure to provide essential services to First Nations members will be investigated and a response provided by the Alberta regional office.”

⁴³¹ Elise Stolte, "Outside administrator assigned to Lubicon community." *Edmonton Journal*, December 4, 2009. Appendix K.

party managers; few measures taken to prevent full-scale intervention; lack of the means in place for First Nations to end third party management.⁴³²

6.7 The “last resort” measure

In 2010 Canada described to the UN Special Rapporteur the nature of Canada’s funding relationship to the Lubicon Lake Nation.

The Government of Canada has the responsibility to ensure that the members of the Lubicon Lake First Nation receive the funding assistance to which they are entitled pursuant to Funding Agreements that have been negotiated between the Government of Canada and the Lubicon government. This funding assistance provides for the transfer of money to the Lubicon government for the delivery of programs and services that would ordinarily be provided by other levels of government, including social assistance, education and infrastructure expenditures. Canada enters into funding agreements with many Aboriginal groups.⁴³³

Furthermore, funding agreements have certain reporting requirements.⁴³⁴ If there is a default on the part of the First Nation, INAC can intervene in such a way to ensure funding continues to reach band members. The nature of the intervention depends on the nature of a given band’s default of the funding agreement. In some cases intervention may be as simple as the band creating a plan to remediate financial accountability. In other cases, the band may have very few skills to remediate its situation without assistance. In such cases, an outside party, approved by INAC, would enter into co-management with the band to assist band administration with fulfilling its obligations under the funding agreement.⁴³⁵ Finally, third party management represents the highest level of intervention under

⁴³² Office of the Auditor General of Canada. *2003 November Report of the Auditor General of Canada*, sections 10.19-10.48.

⁴³³ Government of Canada to the UN Special Rapporteur on the rights of indigenous people, September 24, 2010, 8, [http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_24.09.10_\(1.2009\).pdf](http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_24.09.10_(1.2009).pdf).

⁴³⁴ Ibid.

⁴³⁵ INAC, “Report by Region on List of Recipients with Intervention Under Way,” <http://www.ainc-inac.gc.ca/ai/arp/trp/apc-eng.asp>.

INAC policy, allegedly reserved for cases where the band council is unwilling to remedy the default.⁴³⁶

In short, the decision as to what degree of intervention is used is, allegedly, determined by the nature of the defaults and the willingness and abilities of the band council and staff to remediate those defaults.⁴³⁷ In the Lubicon case, however, INAC did not consider the abilities of any Lubicon people. INAC also did not accept the agreement of the Noskey council to work with INAC to outside manager.⁴³⁸ Rather, as INAC explained to the Special Rapporteur, “there was no clearly identifiable leadership or Council to which funding could be directed.” Third party management was “therefore deemed to be a necessary and appropriate level of intervention.”⁴³⁹ The third party manager, then, who was appointed by INAC with no input from any Lubicon people, was not hired by INAC to work *with* a band council, but was hired *in place* of a band council.

⁴³⁶ INAC’s Spencer Philipppo outlined the main points at the Lubicon meeting, October 21, 2010:

Generally the difference between a co-management agreement and a third party management agreement is with a co-manager agreement you have the same level of expertise that has to come in, but there’s a willingness of chief and council to bring that expertise in and go into a contract with that professional group directly. When there isn’t a willingness of the chief and council to do that, then we usually need to go right up to third party.... So the direction things were going it was likely going to require a level of intervention at co-management, and dependent on the willingness of the chief and council at that time of accepting a co-manager, that would have dictated whether we would move into TPM.

⁴³⁷ INAC, Special Study on INAC’s Funding Agreements, Dec 22, 2008:

...when the recipient is willing and has the capacity to remedy the problem, a Remedial Management Plan is drawn up and implementation of the RMP is monitored; when the recipient is willing but lacks the capacity to address or remedy the problem, a co-manager is appointed; when the recipient is high risk and/or is unwilling to address or remedy the default, a Third Party Manager (TPM) is appointed by [INAC].

⁴³⁸ Noskey to Arcand, January 4, 2010, 3. (Appendix I).

⁴³⁹ Government of Canada to the UN Special Rapporteur on the rights of indigenous people, September 24, 2010, 9, [http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_24.09.10_\(1.2009\).pdf](http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_24.09.10_(1.2009).pdf).

In 2010 the Canadian government wrote to the Special Rapporteur the following:

This intervention in no way represents interference in the internal affairs of the Lubicon or a threat to their right to a custom election system. It is an administrative procedure that was undertaken as a “last resort” measure, pursuant to the Intervention Policy.⁴⁴⁰

As Edelman asserts, the drama invoked by the characterization of some development as a “crisis” heralds instability; it usually means that people must endure new forms of deprivation for a time.⁴⁴¹ The Lubicon have lost the ability to influence how their funding for basic programs and services is spent and how those programs and services are delivered. Rather a non-Aboriginal accountant from one of the largest chartered accountancy and business advisory firms in Canada (Meyers Norris Penny, LLP) makes these decisions on their behalf while adhering closely to the mandate INAC has set for him.⁴⁴² INAC brought in third party management to return stability to the lives of Lubicon community members, stability allegedly lost *because* of the leadership dispute, not because INAC had decided to withdraw funding, not because of the three years of “missed opportunities,” and certainly not because of long-term Canada-Lubicon relations, nor a range of other relevant factors. INAC’s “Lubicon leadership dispute” justifies INAC’s intervention, reinforcing the structural hierarchy inherent in INAC-Lubicon Lake Nation relations, as well as increasing the control INAC officials are able to assert over the lives of the Lubicon people.

A major point of disagreement between the Lubicon people and INAC is regarding home replacement and repair. While it seems the majority of Lubicon people want to spend Lubicon housing funding on the gradual replacement of homes, INAC will only allow a set of specific repairs to take place each year. This is often a topic at Lubicon community-INAC meetings. The video “Framing

⁴⁴⁰ Ibid., 10.

⁴⁴¹ Edelman, *Political Spectacle*, 30.

⁴⁴² At Lubicon community meetings with the third party manager I have attended, the third party manager and his colleagues are very clear about what they have been told to do by INAC officials. In situations where Lubicon people are unhappy with the managers’ decisions, which is often (although not always), the third party managers frequently defer to INAC representatives, who are not present at the majority of these meetings.

the Intervention” includes some discussion from Lubicon people (including leadership) regarding the third-party changes to indoor heating and access to water that were introduced in 2010-2011. As well, many Lubicon people were critical that INAC officials chose to spend tens of thousands of dollars of limited Lubicon funding on contracting a housing inspector to assess Lubicon homes. The Lubicon argued that the inadequacy of their living conditions were known already, pointing, for instance, to visible mold, their coughing children, and crumbling foundations (or, in some cases, no foundations). The inspector conducted housing inspections in the fall of 2010 and the findings were provided to community members in the fall of 2011, a year later. The inspections found many Lubicon homes (both the exteriors and interiors of the buildings) are rated “repair/replace immediately.” The inspections often noted extensive moisture and mold damage throughout homes.⁴⁴³

As of fall 2011 the Lubicon have been under third party management for almost two years. And third party management will continue. Though branded by INAC as a “temporary” response to financial default, in the Lubicon case it is not the financial situation that is ensuring third party management continues. In 2010 Alberta Sweetgrass reported the following, quoting INAC spokesperson:

The initial appointment... was to carry through until March 31, 2010, but it’s now a “fairly open-ended contract. There’s no imminent resolution to the governance dispute,” said Luff.⁴⁴⁴

⁴⁴³ A series of Lubicon people read their housing inspection reports aloud at a October 2011 community meeting with the third party manager that I attended. Others made copies of their inspections to share with me.

⁴⁴⁴ Shari Narine, “Third party manager continues at Lubicon Lake,” *Sweetgrass* 2000, August 1, 2010.

6.8 A new INAC-favoured measure for bands with disputed leadership?

INAC imposition of third-party management is only one “last resort measure” to custom election disputes. INAC’s *Custom Election Dispute Resolution Policy* outlines the two other types of INAC intervention: referendum and ministerial order. The latter forces the band under *Indian Act* election provisions. Regarding ministerial orders the policy states the following:

If mediation and/or arbitration fail, or the disputants do not agree to either of these processes, then the [Regional Director Generals] may want to recommend to the Deputy Minister that the department intervene in the dispute to resolve the situation....

... As a last resort, in a situation where a community is in chaos and it is impossible to get agreement to mediation or arbitration from the parties, the option exists to bring the First Nation under the *Indian Act* for election purposes through the use of a ministerial order under subsection 74(1).⁴⁴⁵

In the Lubicon situation INAC has been unable to get “the parties,” as INAC has defined them, to agree to mediation. The dispute has also *caused*, according to INAC, the loss of basic services and disrupting the lives of band members. Why not, then, follow the “last resort” measure laid out in INAC policy and bring the First Nation under the *Indian Act* for election purposes?⁴⁴⁶

The answer to this question is alluded to in INAC policy itself. As the *Dispute Resolution Policy* states regarding the ministerial order, “[s]uch an action by the Minister is the antithesis of self-government and would be viewed very negatively as an intrusion into the affairs of the First Nation.”⁴⁴⁷ In contrast, from

⁴⁴⁵ See Appendix H of this thesis for the full context of this excerpt.

⁴⁴⁶ The *Custom Election Dispute Resolution Policy* was used in 2010 to justify bringing the Algonquins of Barrière Lake under *Indian Act* election provisions. An INAC statement appearing alongside the order read: “Invoking subsection 74(1) of the *Indian Act* after having explored other solutions and approaches with the Algonquins of Barrière Lake First Nation, including mediation or arbitration, is consistent with INAC’s policy.” *Amending the Indian Bands Council Elections Order*, SOR/2010-77, <http://www.gazette.gc.ca/rp-pr/p2/2010/2010-04-14/html/sor-dors77-eng.html>.

⁴⁴⁷ In the case of Barrière Lake, there was substantial backlash to the ministerial order. A community spokesperson is quoted in a press release in August of 2010 stating that the “decision to impose section 74 band elections is an attack not only on our traditional system of government, but on our culture, language and way of life, which are all

INAC's response to the Lubicon situation it appears that the other "last resort" measure (that is INAC's refusal to fund the band via the band council elected according to custom, which in turn has justified INAC's intervention) cannot be considered such an "antithesis of self-government." The understanding of the INAC imposition of third party management held by INAC officials, the majority of journalists following the Lubicon situation, and, via these journalists, concerned organizations and public audiences, is that INAC did nothing to intrude on the affairs of the Lubicon. INAC's "non-intervention" has resulted in a takeover of Lubicon affairs, yet INAC officials could not have done anything wrong, for INAC officials are seen to have done nothing at all.

connected to our traditional system of government." There were also broader calls for INAC to rescind its order, including from the National Chief of the Assembly of First Nations. (August 17, 2010 press release available through Indigenous Peoples Solidarity Movement Ottawa, <http://ipsmo.wordpress.com/tag/algonquins-of-barriere-lake/>).

Chapter 7

Conclusions

Examination of the Lubicon leadership situation and INAC's role in regard to this situation reveal that the term "respect," as INAC uses it, is ambiguous. Does "respecting the custom code" mean upholding the use of a given code, or does it mean a complete hands-off approach? The sources I have examined are contradictory. INAC officials speak constantly of having "no involvement" and of statutory limitations preventing involvement, while the INAC *Custom Election Dispute Resolution Policy* appears to focus on INAC's "provision of encouragement to First Nations to allow them to solve their own problems," not to mention "timely resolution of election disputes," and "resumption of day to day business of the Band Council." This INAC policy provides regional INAC officials with a range of "tools to assist First Nations in their resolution of their governance disputes." In some cases an INAC "assessment of the situation may reveal that, although a governance dispute exists, no action is necessary because it is being resolved locally." In other cases INAC is to encourage bands to take part in mediation. In still other cases "INAC has the power to hold a referendum in an election dispute situation." Even an imposition of an *Indian Act* election can be imposed on the band "as a last resort" in a situation where "a community is in chaos." For every one of these INAC responses, however, it is INAC's *assessment of the situation* that determines how INAC will respond. Thus, whether INAC's intended role is to promote custom codes or to have no involvement whatsoever, neither is possible. INAC cannot help being an interested party to the outcome of the leadership situation. As the Lubicon case shows, it is INAC's interpretation of band events and of the custom process - an interpretation guided by INAC bureaucrats' political, and perhaps personal, interests - that influences how INAC defines what the problem is and what the response should be. Throughout this process there is no transparency, nor accountability, nor any opportunity for appeal, for INAC's definition of the band's situation is never treated as an assessment, but as observation of fact.

Those who favour a particular course of governmental action, Edelman writes, are likely to cast about for a problem to which to attach it,⁴⁴⁸ an ideal type.⁴⁴⁹ INAC's assessment of the Lubicon leadership situation has found that ideal type. There were two elections at the same time, two competing groups each with half the community's support, and there apparently exists no way to distinguish between these two sides, not even for the Lubicon people. INAC's Lubicon dispute, then, is not only unresolved, but it is perfectly irresolvable. INAC's definition of this problem announces to media and to the public that there can be no place for any outside involvement. Though such a construction may not be necessarily consciously created or deliberately deceptive, it excuses, even defends, INAC's takeover of the Lubicon affairs to outside audiences who otherwise may have been critical of this response.

Finally, the complication arises here because INAC has *defined* what is needed for the outcome of the leadership process beyond INAC's jurisdiction to have any say over the outcome. That is, INAC officials themselves cannot make the judgment to dismiss the membership challenge. INAC officials could have respected the community's dismissal of membership challenge (which would have been an option according to INAC policy⁴⁵⁰), but they did not. Instead INAC officials have concluded that the outcome of the custom election cannot be accepted as a custom electoral outcome. INAC officials have therefore involved themselves sufficiently enough to negate the custom process. Once that custom process is displaced, INAC has no jurisdiction to exercise the decision-making power needed to either dismiss or affirm challenge to the *GLN*. In short, INAC officials have given themselves the powers to make a judgment they cannot make. The situation is one of perpetual uncertainty as INAC claims to defer back to Lubicon custom authority, an authority INAC has already dismissed. It is, therefore, not only the Lubicon who are trapped by INAC's position. INAC, too,

⁴⁴⁸ Edelman, *Political Spectacle*, 22.

⁴⁴⁹ *Ibid.*, 40.

⁴⁵⁰ From the *Custom Election Dispute Resolution Policy* (section 2.1), INAC regional officials' "assessment of the situation may reveal that, although a governance dispute exists, no action is necessary because it is being resolved locally."

is paralyzed by its own position. Each side, both the Lubicon people and INAC officials, remain convinced of the inappropriateness of the other's position, that the other does not understand or is deliberately acting inappropriately.

But in this state of paralysis it is INAC who benefits. INAC officials have voided all responsibility they have to the band in terms of upholding the outcome of a custom election. INAC has appointed a third party manager to run the band's affairs, an accounting firm that operates under INAC regional officials' watchful eyes. INAC can now easily deflect any national and internal criticism regarding the lack of land claim negotiations or lack of consultation for, in the Government of Canada's words, "[n]either the Government of Canada nor the Province of Alberta can negotiate in good faith with the Lubicon Lake Nation if there is no clearly identifiable leader endorsed by the community."⁴⁵¹

The Lubicon situation worsens with each of INAC positions regarding outside management, the outstanding land claim, and land use. At the same time, there are a series of other negative implications. The election of June 5, 2009 was widely anticipated with hope. Many Lubicon people I have spoken with expressed relief when electoral officer Clayton Blood announced the 2009 election to be complete and the band to have a new chief. This relief turned to dismay at INAC's refusal to recognize the band council. Fast forward two years and dismay has, for some, turned to resentment. The Noskey council has little ability to be responsive to the demands of the Lubicon people, whether these are demands to resolve the land claim, to improve living conditions, or to curtail increasing oil extraction from Lubicon lands. Some Lubicon people assume that, as the Noskey council clearly had majority support, and as the Noskey council was clearly elected according to Lubicon custom, it must be through some kind of fault of the Noskey council that they are unable to be recognized by INAC, a recognition that is usually automatic.

⁴⁵¹ Government of Canada to the UN Special Rapporteur on the rights of indigenous people, September 24, 2010, 8, [http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_24.09.10_\(1.2009\).pdf](http://spcomms.ohchr.org/Docs/01ComRepSep2011/Rep/toHRC18coms/PR_Canada_24.09.10_(1.2009).pdf).

Other Lubicon people assume INAC's refusal to recognize the Noskey council must represent covert INAC support for Ominayak's position on Lubicon membership. After all, Lubicon people understand INAC to have given no substantive reason to refuse to recognize the custom-dismissal of Ominayak's challenge and the resulting custom-elected band council. At the same time, that band council has non-status Lubicon band members. The assumption some Lubicon people arrive at as a result of these two observations is that the all-powerful INAC must now deem non-status band members unworthy to hold office, despite the fact that these band members have held office in the past. In this way INAC's position regarding the outcome of Lubicon custom has begun to impose new meaning to the categories of status and non-status. While what was historically, under the *Indian Act*, a Canadian government attempt to remove the legal class of "Indians" from Canadian society (and with it remove Aboriginal rights), INAC's continued refusal to recognize the Noskey council gives the impression that non-status band members are somehow second-class Lubicon people⁴⁵² when, formerly, Lubicon status and non-status band members considered themselves equal.⁴⁵³ This development has serious implications for the future of the Lubicon Lake Nation, not as a threat from the outside like other INAC actions, but as a foundation upon which new internal divisions could form.

⁴⁵² This is an understanding encouraged by the actions of the third party manager. For example, the third party manager makes the band's financial information available to status band members only, as prescribed by INAC. This differential treatment between non-status and status band members denies access to band information from a select group of Lubicon people.

⁴⁵³ As reviewed in Chapter 4, Lubicon band membership, which is determined by the Lubicon people themselves, has the power to confer Indian status once a land-claim settlement with Canada is achieved. This is confirmed by the Government of Canada in the 1999 draft Order-in-Council, which is included in Appendix B of this thesis.

Bibliography

- Aboriginal Rights Coalition (Project North). *The Lubicon Settlement Commission of Review: Final Report*. Ottawa, Ontario: Aboriginal Rights Coalition, March 1993. Also available at <http://tao.ca/~fol/pa/negp/ls930330.htm>.
- Altamirano-Jimenez, Isabel. "North American First Peoples: Slipping up into Market Citizenship?" *Citizenship Studies* 8, no. 4 (2004): 349-365.
- Amnesty International, "From Homeland to Oil Sands: The impact of oil and gas development on the Lubicon Cree of Canada, Index: AMR 20/002/2010, June 2010. http://www.amnesty.ca/lubicon/wp-content/uploads/2010/06/Lubicon_Cree_Amnesty_Report_2010.pdf.
- Amnesty International, "Lubicon campaign factsheet #1: Timeline of the land rights struggle of the Lubicon Cree," November 2009. <http://www.amnesty.ca/lubicon/resources/lubicon%20factsheet%20timeline.pdf>.
- Amnesty International, "Lubicon campaign factsheet #2: United Nations Human Rights Bodies on Canada's Treatment of the Lubicon Cree," November 2009. <http://www.amnesty.ca/lubicon/resources/lubicon%20factsheets%20UN.pdf>.
- Amnesty International, "'Time is wasting': Respect for the land rights of the Lubicon Cree long overdue," April 2003. <http://www.amnesty.ca/canada/AMR200103.pdf>.
- Assembly of First Nations - Indian and Northern Affairs Canada, Joint Technical Working Group. "First Nations Registration (STATUS) and Membership," Research Report, July, 2008. http://www.fngovernance.org/resources_docs/First_Nations_Registration_and_Membership_Research_Report.pdf.
- Bateson, Gregory. *Steps to an Ecology of Mind*. Northvale, New Jersey: Jaron Aronson Inc., 1987.
- Brodie, Janine. "Introduction: Globalization and Citizenship Beyond the National State." *Citizenship Studies* 8, no.4 (2004): 323-332.
- Canada. Royal Commission on Aboriginal Peoples. *Vol 1: Looking forward, looking back*. Ottawa, Ontario: Ministry of Supply and Services Canada, 1996.
- Canada. Royal Commission on Aboriginal Peoples. *Vol 2: Restructuring the Relationship*. Ottawa, Ontario: Ministry of Supply and Services Canada, 1996.

- Canada, Standing Senate Committee on Aboriginal Peoples. "First Nations Elections: The Choice is Inherently Theirs." Report to the Senate, May 2010. <http://www.parl.gc.ca/Content/SEN/Committee/403/abor/rep/rep03may10-e.pdf>.
- Crane, Brian A., Robert Mainville, and Martin W. Mason. *First Nations Governance Law*. Markham, Ontario: LexisNexis, 2006.
- Delisle, Susan. "White by Definition, Status, Identity and Aboriginal Rights," a paper prepared for The Ardoch Algonquin First Nation & Allies, Ardoch, Ontario, January 1998. <http://www.lynngehl.com/uploads/5/0/0/4/5004954/29.pdf>.
- Edelman, Murray. *Constructing the Political Spectacle*. Chicago: University of Chicago Press, 1988.
- Goddard, John. *Last Stand of the Lubicon Cree*. Vancouver, British Columbia: Douglas & McIntyre Ltd., 1991.
- Goffman, Erving. *Frame Analysis: An Essay on the Organization of Experience*. Cambridge, Massachusetts: Harvard University Press, 1974.
- Huff, Andrew. "Resource Development and Human Rights: A Look at the Case of the Lubicon Cree Indian Nation of Canada." *Colorado Journal of International Environmental Law and Policy*, 10 (1999): 161-194.
- Indian and Northern Affairs Canada. "Custom Election Dispute Resolution Policy" In *First Nations Governance Law*, edited by Brian A. Crane, Robert Mainville, and Martin W. Mason, 695-698. Markham, Ontario: LexisNexis, 2006.
- Indian and Northern Affairs Canada. *Special Study on INAC's Funding Agreements*. Dec 22, 2008. <http://www.aadnc-aandc.gc.ca/eng/1100100011584>.
- Indian and Northern Affairs Canada, Treaties and Historical Research Centre. *Treaty Research Report: Treaty Eight (1899)*. By Dennis Madill. Ottawa, Ontario: Indian and Northern Affairs Canada, 1986. http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/tre8_1100100028810_eng.pdf.
- Indian and Northern Affairs Canada. *Report by Region on List of Recipients with Intervention Under Way*, January 2010. <http://www.ainc-inac.gc.ca/ai/arp/trp/apc-eng.asp>.
- Kymlicka, Will. "Ethnocultural Diversity in a Liberal State: Making Sense of the Canadian Model(s)," In *The Art of the State III: Belonging? Diversity*,

Recognition and Shared Citizenship in Canada, edited by Keith Banting, Thomas J. Courchene and F. Leslie Seidle, 39-86. Montreal, Quebec: The Institute for Research on Public Policy, 2007.

Lakoff, George. *The Political Mind: Why You Can't Understand 21st-Century Politics with an 18th-Century Brain*. New York, NY: Penguin Group (USA) Inc., 2008.

Lakoff, George and Mark Johnson. *Metaphors We Live By*. Chicago, Illinois: University of Chicago Press, 1980.

McDougall, Allan K. "Maintaining First Nation Identity in the Face of Statist Discourse." *Papers of the 29th Algonquian Conference*, 29 (1998): 192-201.

McNeil, Kent. "Challenging Legislative Infringements of the Inherent Aboriginal Right of Self-Government." *Windsor Yearbook of Access to Justice* 22 (2003): 329-361. Available online at:
[http://osgoode.yorku.ca/osgmedia.nsf/0/8BD8FB2AED65F9C8852571B10071E672/\\$FILE/Challenging%20Legislative%20Infringements.pdf](http://osgoode.yorku.ca/osgmedia.nsf/0/8BD8FB2AED65F9C8852571B10071E672/$FILE/Challenging%20Legislative%20Infringements.pdf).

Morris, Alexander. *The Treaties of Canada with the Indians of Manitoba and the North-West Territories*. Toronto: Belfords, Clarke & Co., Publishers, 1880.

Narine, Shari. "Third party manager continues at Lubicon Lake," *Alberta Sweetgrass*, August 2010. <http://www.ammsa.com/publications/alberta-sweetgrass/third-party-manager-continues-lubicon-lake>.

Office of the Auditor General of Canada, Reports to Parliament. *Status Report of the Auditor General of Canada May 2006*, by Ronnie Campbell and others. Ottawa: Office of the Auditor General of Canada, 2006.
http://www.oag-bvg.gc.ca/internet/English/parl_oag_200605_05_e_14962.html.

Office of the Auditor General of Canada. *2003 November Report of the Auditor General of Canada*, section 10.19-10.48. Ottawa: Office of the Auditor General of Canada, 2003. http://www.oag-bvg.gc.ca/internet/English/parl_oag_200311_10_e_12933.html.

Ray, Arthur, Jim Miller and Frank Tough. *Bounty and Benevolence: A History of Saskatchewan Treaties*. Montreal, Quebec: McGill-Queen's University Press, 2000.

Ryan, Joan. "Gut a Land, Gut a People," *Alberta Views*, Summer 1999, 37, <http://albertaviews.ab.ca/issues/1999/summer99/summer99social.pdf>.

- Shewell, Hugh. *'Enough to Keep Them Alive': Indian Welfare in Canada, 1873-1965*. Toronto, Ontario: University of Toronto Press, 2004.
- Smillie, Christine. "The People Left Out of Treaty 8" (Master's thesis), University of Saskatchewan, 2005. http://library.usask.ca/theses/available/etd-07102007-091310/unrestricted/Smillie_christine_2005.pdf.
- Steele, Amy. "No Deal," *Alberta Views*, March 2007, 39.
- Strong, Pauline. *Captive Selves, Captivating Others: The Politics and Poetics of Colonial American Captivity Narratives*. Boulder, Colorado: Westview Press, 1999.
- Treaty and Aboriginal Rights Research. "Land Rights of the Isolated Communities of Northern Alberta," by Richard Daniel. Prepared for the Isolated Communities Advisory Board and the Lubicon Lake Band, January 1975.
- United Nations General Assembly, 2010, Human Rights Council, 15th session, agenda item 3, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, September 15, 2010 (A/HRC/15/37/Add.1). <http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.37.Add.1.pdf>.
- United Nations General Assembly, 2009, Human Rights Council, 10th session, agenda item 3. *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Miloon Kothari*, February 17, 2009 (A/HRC/10/7/Add.3). <http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.7.Add.3.pdf>.
- United Nations General Assembly, 1990, Human Rights Council, 38th session. Communication no. 167/1984 (*Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*), Decisions of the Human Rights Committee, U.N. Doc. CCPR/C/38/D/167/1984 (March 26, 1990). <http://www.unhchr.ch/tbs/doc.nsf/0/c316bb134879a76fc125696f0053d379?OpenDocument>.
- Watzlawick, Paul. *How Real Is Real?* Toronto, Ontario: Random House, 1976.
- Watzlawick, Paul, Janet Helmick Beavin, and Don D. Jackson. *Pragmatics of Human Communication: A Study of Interactional Patterns, Pathologies, and Paradoxes*. Palo Alto, California: Norton, 1967.

Appendices

Appendix A

Government of Alberta Lubicon Lake Nation Notification Strategy

The Government of Alberta (Aboriginal Relations) notification to oil companies active on lands claimed as traditional territory of the Lubicon contained three parts. They are included in this appendix as follows:

- A1. Alberta Aboriginal Relations' October 15, 2010 letter to oil companies addressing the Lubicon leadership situation, the impact on government and industry, and introducing the new directive
- A2. The Lubicon Lake Nation Notification Strategy (Government of Alberta Interim Directive), which provided a number of steps for companies to follow
- A3. A copy of the April 13, 2010 communication regarding the provincial strategy posted in Little Buffalo by Alberta Aboriginal Relations

The Alberta directive informed oil companies of the potential impact of the Lubicon governance situation on the Alberta government and oil companies, explaining that companies should follow certain new steps in fulfilling consultation obligations.

Notably, the mailing address to which oil companies were directed to send consultation notifications is the address used by Bernard Ominayak as chief. Thus, while the directive states the "Government of Alberta does not have jurisdiction over First Nation's governance matters" and has "no involvement" in such matters, the directive instructs companies to send notices to the address of Ominayak exclusively (as opposed to the sending notices to the central Lubicon administration office, or as opposed to sending notices to each of the two councils). Alberta's approach continued even after the Noskey council informed the Alberta government that the government was, in effect, instructing companies to consult with Ominayak only.

Over time, most companies chose to send notices to the Noskey council exclusively, understanding that council to be the elected Lubicon representatives.

Government of Alberta ■
Aboriginal Relations

Office of the Executive Director
19th Floor, Commerce Place
10155 102 Street
Edmonton, Alberta T5J 4G8
Website: www.aboriginal.alberta.ca
Email: cole.pederson@gov.ab.ca
Phone: 780-427-8441

October 15, 2010

Re: Consultation with Lubicon Lake Nation (Lubicon)

An ongoing governance issue is occurring within the Lubicon Lake Nation (Lubicon) community. This situation has created difficulties for industry when consulting with Lubicon on resource development and land management activities. To assist industry, which may be required to consult with Lubicon in accordance with the *Government of Alberta's First Nations Consultation Policy on Resource Development and Land Management* and associated guidelines, the Government of Alberta has approved an interim directive for all affected stakeholders (attached). Specific details, including Alberta's jurisdiction to resolve Lubicon's governance issue, are addressed in the interim directive.

I would encourage your organization to familiarize itself with this interim directive and adjust any consultation activities with Lubicon accordingly. Aboriginal Relations will update you should the requirements to consult with Lubicon change. Thank you for your time and attention to this matter and please do not hesitate to contact the Government of Alberta as outlined in the interim directive should you have any questions.

Sincerely,



Cole Pederson
Executive Director

Enclosures

61-70-2010



**LUBICON LAKE NATION NOTIFICATION STRATEGY
GOVERNMENT OF ALBERTA INTERIM DIRECTIVE**

BACKGROUND

The ongoing Lubicon Lake Nation leadership dispute between Mr. Steve Noskey (June 5, 2009 election) and Mr. Bernard Ominayak (June 25, 2009 election) has led to uncertainty regarding whether either candidate (potential Chief and his related Council) represent the membership of Lubicon Lake Nation.

CURRENT LUBICON LAKE NATION GOVERNANCE SITUATION

Lubicon Lake Nation's current governance situation has created difficulties for the Government of Alberta (GoA), along with a number of industry proponents active in the area, as to whom and where notifications should be sent in order to carry out adequate and meaningful consultation with Lubicon Lake Nation. As it stands, the GoA does not have jurisdiction over the First Nation's governance matters and it is currently unknown if or when the governance situation will be resolved.

The GoA has communicated to INAC officials its concerns regarding the impact the leadership dispute has on the GoA's consultation efforts with the Lubicon. INAC officials have informed the GoA that they are carefully monitoring the situation and have offered the services of a mediator to help resolve the situation. To date, the First Nation has declined this offer. Since December 1, 2009, INAC has appointed a third party manager to conduct general business and administrative duties on behalf of Lubicon Lake Nation. INAC further advises that Lubicon Lake Nation conducts its elections in accordance with a "Custom Code" practice, which sets out the rules for a First Nations electoral process. According to INAC, Lubicon Lake Nation does not fall under the provision of s. 74 of the *Indian Act* and as a result, the Federal Government has no involvement in Lubicon Lake Nation's electoral process.

Until Lubicon Lake Nation's governance situation is resolved, the GoA, led by the Aboriginal Consultation Coordination Group (ACCG), has developed this interim directive on how to engage with the First Nation regarding notification for consultation on land management and resource development activities.

CONSULTATION NOTIFICATIONS

To help ensure meaningful consultation is carried out with Lubicon Lake Nation when necessary, the following steps should be followed.

1. On August 13, 2010 Aboriginal Relations posted the attached notice in the Community of Little Buffalo where the Lubicon Lake Nation office is located.
2. When considering proposed projects, industry proponents are to request advice and direction from the appropriate GoA Ministry (dependent on the nature of the proposed project) regarding their consultation obligations with Lubicon Lake Nation.
3. GoA staff from the appropriate Ministry determines if Lubicon Lake Nation requires project notification.
4. GoA staff from the appropriate Ministry direct proponents to notify the Lubicon Lake Nation Band office in accordance with the August 13, 2010 Notice.
5. Responses to notifications originating from the Lubicon Lake Nation Band office will be considered. GoA staff will verify the responses as per their Ministry's guidelines.
6. The proponent completes their consultation work and provides a consultation summary to both the Lubicon Lake Nation Band office and the appropriate GoA Ministry.
7. All consultation involving the Lubicon Lake Nation Band office is to be well-documented.
8. This interim directive ends upon the declaration of a Lubicon Lake Nation Chief and Council or by Court Order.

CONTACT INFORMATION

For more information regarding this matter please contact:

Cory Enns
Director, Aboriginal Consultation
Consultation and Land Claims
Aboriginal Relations
Phone: 780-644-1055
Fax: 780-427-0401
Email: cory.enns@gov.ab.ca

August 13, 2010

COMMUNICATION TO LUBICON LAKE NATION

RE: Government of Alberta First Nation Consultation Notifications

The Government of Alberta (GoA) is committed to consult with First Nations where land management and resource development have the potential to adversely impact First Nations rights and traditional uses of Crown lands within the province of Alberta. The GoA (or industry proponents) begins the consultation process by sending notifications to the potentially impacted First Nation's Chief and Council (or to a representative designated by Chief and Council).

The Lubicon Lake Nation's current governance situation has created difficulties for the GoA (and industry proponents) to send notifications to the Lubicon Lake Nation and carry out a meaningful consultation process. The GoA does not have jurisdiction over the Nation's governance matters and it is currently unknown if or when the governance situation will be resolved by parties who do have jurisdiction.

Please be advised that until the Lubicon Lake Nation's governance situation is resolved, the GoA (and industry proponents) will be sending all future consultation notifications to the Lubicon Lake Nation's band office mailing address, which is as follows:

Lubicon Lake Nation
P.O. Box 6731
Peace River AB T8S 1S5

Telephone: 780-629-3945
Fax: 780-629-3939

This decision is an interim approach that the GoA will reconsider should the GoA receive alternative direction from the Lubicon Lake Nation's duly authorized Chief and Council as recognized by the Government of Canada (INAC).



Dennis Bell, A/Executive Director
Aboriginal Relations

cc. Indian and Northern Affairs Canada

Appendix B
Lubicon Lake Indian Nation Order, 1999

The following three documents are included in this appendix:

- B1. April 23, 1999 letter from (then) Chief Federal Negotiator Brad Morse to Lubicon Chief Bernard Ominayak
- B2. INAC minister Jane Stewart to Lubicon Chief Bernard Ominayak
- B3. Enclosed in Stewart's letter, the *Lubicon Lake Indian Nation Order*

As the letter from (then) Chief Federal Negotiator Morse to Lubicon Chief Ominayak states, effort was being made to document the progress on specific issues in order to move toward a final settlement. In this context Morse acknowledges the recent Canada-Lubicon agreement on the form and content of an Order in Council.

Enclosed within (then) INAC Minister Stewart's letter is the Order in Council. Section 3(1) of this Order in Council addresses Lubicon membership. Section 3(1)(a) addresses the Lubicon-determined list of band members that is to be provided by the Lubicon Lake Nation at settlement (Schedule 1 of the Lubicon Final Agreement), and section 3(1)(b) addresses band membership criteria.

In her letter Minister Stewart states that the text of the Order in Council has been approved by all the appropriate legal and legislative drafting branches of government, as well as stamped as approved by the Legislative Services Branch of the Department of Justice.

Note that the Order in Council is not legally effective at the moment, but only in the context of an overall agreement. It does, however, represent an agreement at the highest levels of Canadian government regarding how the Lubicon membership issue would be dealt with. The Order would ensure that the issue of membership could not be revisited later in the negotiations, as it was clearly agreed to at the top levels of Canadian government.



Indian and Northern
Affairs Canada

Affaires indiennes
et du Nord Canada

Your file / Votre référence

Our file / Notre référence

APR 23 1999

Chief Bernard Ominayak
Lubicon Lake Indian Nation
PO Box 6731
Peace River, AB
T8S 1S5

Dear Chief Ominayak:

As noted in our August 27, 1998 Process Protocol, we both agreed that progress toward a final agreement would be enhanced by documenting the progress on specific issues as reached.

In keeping with this Protocol I wish to acknowledge our recent agreement on the issue of the Lubicon First Nation band re-declaration pursuant to s. 2(1)(a) of the Indian Act. As agreed, within seven days of the signing of the Lubicon Final Agreement the attached (OIC) will be recommended to the Governor-in-Council for consideration to be passed.

I am also pleased that agreement was reached on March 23rd among our respective legal advisors on the wording of a draft letter that we are to recommend to Minister Stewart for her consideration regarding this matter.

In keeping with clause 2. of the Protocol it is further acknowledged that the issue of the form and content of the OIC has now been finalized and needs no further review by either the Lubicon Lake First Nation or Canada.

I also hereby reconfirm our agreement that the membership issue, including the agreed upon federal OIC and issues regarding its implementation is a matter between the Government of the Lubicon Lake Indian Nation and the Government of Canada.

.../2

-2-

I believe that we both share the view that resolution of this issue constitutes a truly significant achievement. I will look forward to similar progress on all outstanding issues as we sustain the spirit of joint work through our negotiations.

Sincerely,

A handwritten signature in black ink, appearing to read "Brad Morse", with a long horizontal flourish extending to the right.

Brad Morse
Chief Federal Negotiator

Minister of Indian Affairs
and Northern Development



Ministre des Affaires
indiennes et du Nord canadien

Ottawa, Canada K1A 0H4

Chief Bernard Ominayak and
Members of the Lubicon Lake
Indian Nation
P.O. Box No. 6731
PEACE RIVER ALTA T8S 1S5

Dear Chief Ominayak:

I am pleased that an agreement has now been reached on the Lubicon membership provisions between the federal negotiating team, led by Mr. Bradford Morse and the Lubicon Lake negotiating team led by yourself.

I am pleased to confirm the following components of this agreement:

1. The Lubicon Final Agreement will contain the following clause:

"The Minister of Indian Affairs and Northern Development undertakes within seven (7) days of the signing of this Lubicon Final Agreement to recommend to the Governor-in-Council for their consideration that an Order-in-Council be passed in the form and content as specified in Schedule 1. hereto."

2. The text for the Order-in-Council to be included in Schedule 1 of the Lubicon Final Agreement has now been finalized and approved by all the appropriate legal and legislative drafting branches of government. A copy of the text stamped as approved by the Legislative Services Branch of the federal Department of Justice is attached and is marked as an enclosure to this letter.

3. For the purposes of 3(1)(a) of the Order-in-Council, the list of persons to be named in Schedule 1 of the Lubicon Final Agreement shall be supplied by the Lubicon Lake First Nation.

-2-

I would also like to point out that my signing of the Lubicon Final Agreement and the subsequent declaration of the Order-in-Council is predicated on obtaining the requisite Cabinet authority.

I am pleased that this agreement has been reached regarding the Lubicon Lake Indian Nation Order, and I trust that the other components of the Lubicon Final Agreement will be negotiated fairly and expeditiously.

Yours sincerely,


Jane Stewart, P.C., M.P.

Encl.

*Congratulations on your
re-election Chief Amoyal -
I look forward to a continued
strong working relationship
JL*

JUS-600758
(SOR/DORS)

Whereas the Lubicon Lake Indian Nation was previously declared to be a band by Order in Council P.C. 1973-3571, of November 13, 1973;

Whereas the governments of Canada and Alberta and the Lubicon Lake Indian Nation have agreed on a land settlement, the recognition and provision by Canada and Alberta of certain other rights and benefits, and the matter of the relationship of the Lubicon Lake Indian Nation to Treaty No. 8;

Whereas the majority of members of the Lubicon Lake Indian Nation currently reside in the community of Little Buffalo, Alberta, but will be relocating to a new community site at Lubicon Lake, Alberta, pursuant to the terms of the settlement agreement;

Whereas the settlement agreement provides for setting apart reserve land for the Lubicon Lake Indian Nation in fulfilment by Canada of an outstanding promise pursuant to Treaty No. 8;

Whereas the Government of Canada and the Lubicon Lake Indian Nation agree to clarify the charter membership of the Lubicon Lake Indian Nation for whom reserve lands will be set apart;

And whereas the parties agree that the Lubicon Lake Indian Nation should be declared to be a band for the purposes of the *Indian Act*, so as to define the class of beneficiaries who are entitled to share in the benefits of the settlement agreement;

Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Indian Affairs and Northern Development, pursuant to paragraph (c) of the definition "band" in subsection 2(1) and subsection 73(3) of the *Indian Act*, hereby makes the annexed *Lubicon Lake Indian Nation Order*.

JUS-600758
(SOR/DORS)

LUBICON LAKE INDIAN NATION ORDER

INTERPRETATION

1. The following definitions apply in this Order.

"family ties" means a common ancestry. (*version anglaise seulement*)

"historic ties" means a connection to the traditional Lubicon territory. (*lien historique*)

"Lubicon Final Agreement" means the agreement between the governments of Canada and Alberta and the Lubicon Lake Indian Nation, dated _____, _____. (*accord définitif Lubicon*)

"traditional Lubicon territory" means an area bounded on the north by the northern slopes of the Buffalo Head Hills, on the west by the Peace River, on the east by the Wabasca and Loon rivers, and on the south by Heart Lake in Township 82, Range 14, west of the fifth meridian. (*territoire traditionnel Lubicon*)

"treaty land entitlement settlement agreement" means a final, ratified settlement agreement between the Government of Canada and a band in Canada relating to the provision of land to the band pursuant to an obligation arising out of a treaty. (*accord de règlement*)

DECLARATION

2. The body of Indians described in section 3 is hereby declared to be a band for the purposes of the Indian Act, to be known as the Lubicon Lake Indian Nation.

3. (1) The Lubicon Lake Indian Nation is the body of Indians comprised of

(a) every person of Canadian Indian ancestry named in Schedule 1 to the Lubicon Final Agreement who has not chosen to be a member of another band; and

(b) every person of Canadian Indian ancestry who

(i) has family ties to a person referred to in paragraph (a),

(ii) has historic ties to the traditional Lubicon territory,

- 2 -

(iii) is ordinarily resident in traditional Lubicon territory as at the date of the Lubicon Final Agreement, and

(iv) has not chosen to be a member of another band.

(2) For the purposes of subsection (1), a person is considered to have chosen to be a member of another band if, prior to the date of the Lubicon Final Settlement, that person

(a) signed a statutory declaration authorizing a release pursuant to a treaty land entitlement settlement agreement with any other band, or accepted land in severalty under Treaty No. 8;

(b) signed a receipt acknowledging acceptance of a per capita distribution made as part of a treaty land entitlement settlement agreement with any other band; or

(c) signed an application for membership in another band, and was entered on that band's membership list.

(3) For the purposes of subsection (1), a person who is otherwise ordinarily resident in the traditional Lubicon territory but who at the time of the signing of the Lubicon Final Agreement

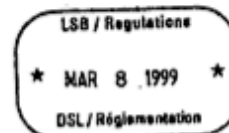
(a) is absent from the traditional Lubicon territory for reasons of health, education, employment, or

(b) has been absent from the traditional Lubicon territory for any other personal or family reason for a period not exceeding 12 months,

is considered to have been ordinarily resident at the time of the signing of the Lubicon Final Agreement.

COMING INTO FORCE

4. This Order comes into force on the day on which it is registered.



Appendix C
Election Report 2009

This five-page report is signed by electoral officer Clayton Blood. It includes as background a description of the April 29 postponed election, followed by a description of the general meeting (May 29), and of the process and outcome of the election held June 5, 2009.

LUBICON LAKE FIRST NATION

ELECTION REPORT 2009

The Lubicon Lake First Nation has elected a new Chief. Steve Noskey a former band council member was elected Chief of the Lubicon Lake First Nation on June 5th in Little Buffalo. Also elected were two members of the previous council, Dwight Gladue and Larry Ominayak, along with three new council members, Dwight Sawan, Michael Laboucan and Vance laboucan. The election was conducted in accordance with the Lubicon Lake First Nation Custom Election Procedures...

BACKGROUND

The election was originally scheduled to be held on April 29th and Mr. Ralph Bouvette was appointed Chief Electoral Officer. On the day of the election, Mr. Bouvette was asked to conduct the election under new rules which had not been properly discussed and approved by the Lubicon membership. He therefore refused to conduct the election under the new rules. This action then brought the election process to a halt, which prompted the majority of the community members in attendance to call for and proceeded to hold a community meeting. The purpose of the meeting was to set a new election date. June 5, 2009 was set with a duly posted special general meeting of Lubicon members to be held May 29th.

It was decided to consult with previous Chief Electoral Officers about appointment of new Chief Electoral Officer. Ralph Bouvette and Gregg Smith were consulted and recommended Clayton Blood. Clayton Blood was contacted and agreed to serve as Chief Electoral Officer of the June 5th election and also to chair the special general meeting of Lubicon member on May 29th. The Special general meeting was convened at 7:00pm at the school gymnasium. More than 100 community members were in attendance and an agenda was circulated to give the members a list of matters to be discussed.

1. The first issue was to give some details on cancellation of the April 29th 2009 election.
2. The second item discussed was the membership and voter eligibility rules. The rules were once again read out loud but the one that received the most attention was the rule where members have to be normally resident in traditional Lubicon territory. A question was posed as whether to allow a member to vote in the election if they are attending school elsewhere but normally live in the community. Also there were situations where members had to move to other areas because of a shortage of housing or a shortage of jobs. But it was decided not to change the existing rules at this time. The concern was not to make any changes that would jeopardize the validity of the election.
3. There was a discussion on the procedures of the June 5th election. Lubicon members wanted to proceed with the election on the same rules and procedures they have always followed.

Many of the members that attended the May 29th Community Meeting expressed their desire to be included in the election. One member stated "once you are a Lubicon, You should always be a Lubicon." another member stated that other First Nations allow their members to vote even if they live in other areas. But in the end, everyone agree the election should be conducted under the same rules that have always been followed.

The community meeting was adjourned and everyone was reminded of the election on June 5th,

Election Day

On Friday June 5th, the election was called to order at 4:20pm by Chief Electoral Officer, Clayton Blood. It was held at the school gymnasium with 134 Lubicon members in attendance plus some members of the community who don't qualify under Lubicon membership or voter eligibility rules. Only Lubicon members who qualify under Lubicon voter eligibility rules participated in the vote. There was also a reporter from the Peace River newspaper and four members of the RCMP in attendance. The first item was an opening prayer offered by Mr. Blood. He gave special prayers for Lubicon Elder, Elise Seeseequon who had just lost her son Joe Seeseequon on Tuesday June 2nd. Then Mr. Blood introduced himself to the

community.

As Chief Electoral Officer, Mr. Blood once again read the rules of the election. The first rule was that a member had to be 18 years of age or older and is normally resident of Lubicon territory. Rule 2 was that a member must be of aboriginal ancestry with family ties to other Lubicon members and historic ties to Lubicon Territory. Rule 3 stated that a Lubicon member cannot have chosen to be a member of another Indian Nation or Band under the Indian Act. These rules were also posted around the community 20 days prior to the election as a requirement of the election procedures.

There was a clarification offered by Steve Noskey when resident of the community was discussed. The rule is that the person has to be normally resident in Lubicon territory to be eligible to vote.

People who did not qualify to vote in the election were asked to stand aside so the voter count could be conducted in an orderly fashion.

Election Officers

The Chief Electoral Officer recruited the assistance of Lubicon member Maggie Auger and two people who didn't qualify to vote to assist in the election. Maggie Auger served as recording secretary. Rose Ominayak and Marina Gladue served as scrutineers. Rose Ominayak is a Lubicon member who didn't qualify to vote because she is not normally resident in Lubicon territory. Marina Gladue is a community member but didn't qualify to vote because she is a member of the Sucker Creek Band.

Maggie Auger Recording Secretary

Rose Ominayak Scrutineer

Marina Gladue Scrutineer

At least two people in attendance were recording the election on their camcorders.

Election of Chief

The Chief Electoral Officer then opened the floor for nominations for the

position of Chief and the nominations are as follows:

For Chief Steve Noskey Nominated by Larry Ominayak

Seconded by Virginia Laboucan

Steve Noskey was asked if he accepted the nomination. Steve replied he accepts.

Dwight Gladue Nominated by Gloria Letendre.

Before a Secunder could be found, Dwight declined the nomination for Chief.

After no more nominations were made, nominations were closed for the position of Chief.

Steve Noskey was asked if he would give a speech on his nomination. Steve took the opportunity and gave a speech for approximately five minutes.

The Chief Electoral officer then called for the scrutineers to take their place at the front of the voters, one on each end to the gym. Then the voters were asked to show their hands if they are voting for Steve Noskey. The count was 57 on one end of the gym and 43 on the other end for a total of 100 votes. Steve Noskey was then declared the new Chief of the Lubicons.

For Council

The Chief Electoral Officer then called for the nomination of 5 Councillors and they were as follows:

Dwight Sawan,

Dwight Gladue

Larry Ominayak

Michael Laboucan

Vance Laboucan

Dwight Sawan nominated by Jonathan Sawan and seconded Floyd Gladue. Vance Laboucan, Dwight Gladue, Larry Ominayak and Michael Laboucan were nominated as a group by Virginia Ominayak and seconded by Lisa Ominayak. It was explained by Larry Ominayak the nominees could be nominated together as in previous elections.

The Chief Electoral Officer then called for any other nominations but no more were made. Each of the nominees was asked if they accepted the nominations and each one accepted. Then the nominees were asked to give a speech and each one gave a short speech.

Again the Scrutineers were called to take their place and the vote for council was called again by a show of hands. Since Dwight Sawan was nominated separately, he was first voted for and the count for Dwight was 44 on one end of the gym and 56 for a total of 100 votes.

Then the vote for the other four candidates was called for and the count was 44 on one end of the gym and 55 on the other end for a total of 99 votes. The candidates were declared the new council.

There were 101 Lubicon members who were eligible to vote in attendance. Rosie Whitehead was eligible to vote but didn't.

Kieth Carifelle was eligible to vote but left the hall after voting for Steve Noskey and Dwight Sawan.

The Chief Electoral Officer then declared the election closed.

Signed *ORIGINAL SIGNED BY CLAYTON BLOOD*

Appendix D

Early reporting on the Lubicon leadership situation

Michelle Huley of the *Peace River Record-Gazette* wrote several articles on the Lubicon leadership situation in the spring of 2009. Four are included in this appendix:

- D1. “Lubicon members reschedule election; Administrator says meeting unsanctioned,” May 1, 2009
- D2. “New chief for Lubicon First Nation,” June 9, 2009
- D3. “Lubicon election controversy continues: Elder’s Council calls vote for June 25,” June 23, 2009.
- D4. “Elders Take Control,” June 30, 2009.

Lubicon members reschedule election

Administrator says meeting unsanctioned

By Michelle Huley

A failed election on April 29 has left the Lubicon Lake First Nation without an elected government, and amid controversy over who has the authority to now call another.

"It went really, really good," said former band councillor Dwight Gladue of a general band membership meeting Friday night held to determine voter eligibility and call another election, which was scheduled for this Friday.

Band administrator Margaret Whitehead, however, said there was no sanctioned general membership meeting, and there will not be a June 5 election, as the group organizing it didn't have required authority. She declined to comment to the R-G on who does have authority, deferring to Elder's Council member Rene Jobin. Jobin didn't return the call by the R-G press deadline yesterday.

Gladue, and fellow former councillors Larry Ominayak and Steve Noskey organized the meeting and the upcoming election.

Elected terms of the band council and that of chief Bernard Ominayak expired as of the failed April election.

According to an advertisement in the May 26 issue of the R-G, an Elder's council is now responsible for the First Nation's administration, including administering the next general election and determining voter eligibility.

According to Gladue, the previously scheduled election was cancelled after a chief electoral officer hired by the band to conduct the election refused to make last minute changes to voter eligibility. The ad states eligible voters must be at least 18 years old, be a recognized and registered member of the Lubicon Lake Nation, and must reside within Lubicon traditional territory.

"No one on another band's General List or Membership List will be eligible to vote or run for office in a Lubicon Lake Nation General Election," states the advertisement.

The band's governing document, the Government of the Lubicon People, states if the chief is removed for whatever reason, and if the first or second vice chairman of the governing council is unable to fulfill that role, then a special meeting will be called at once to nominate and elect a new chief. Such a notice must be posted "20 clear days" before the meeting.

The document defines Elders' roles, and replacement, but those does not include administrative or any powers similar to elected council representatives.

Indian and Northern Affairs Canada spokesperson Glenn Luff said the Lubicon, as with most Alberta First Nations, have a custom election code, determining their own rules, which, he says, are not dissimilar to Alberta municipal elections.

"This way, they have gone through a process, at some point approved by the minister, and we're out of it completely," Luff sated. When we start to kick in is when it might be a problem with delivery of services we fund. As far as I know, here we've not reached that point."

Gladue said the June 5 election will go ahead as planned, however, emphasizing it's up to the membership to elect their chief and council.

New chief for Lubicon First Nation

Michelle Huley

After more than 30 years, Bernard Ominayak was ousted as chief of the Lubicon Lake First Nation in a controversial election last week.

Steve Noskey was elected as chief in an election June 5. The validity of that election, however is in question as it was unsanctioned by the band's elder council. The election came on the heels of another, scheduled for April 29, which was cancelled following controversy over voter eligibility.

The June 5 election was called by a group of former Lubicon band councillors.

[continued]

Continued from Page A1

According to chief electoral officer Clayton Blood, however, the election was held according to appropriate rules established in the Lubicon governance structure, and 100 eligible voters elected Steve Nosky by acclamation as their new chief last week.

"According to your rules," Blood explained, "a new election must be called, must be given 20 days notice, and in that time you must also have a community meeting to discuss that election. Last week, on May 29, that meeting was held and the community came together to review today's election and voter eligibility rules."

The majority of the 132 members attending Friday's election at Little Buffalo School were young, texting on cell phones as they waited for the meeting to start, a few with young children on their laps. A toddler in a plaid dress and with her dark hair done up in bright clips played a hand game with her mother as she sat in the young woman's lap. A few elders were scattered among the younger generation.

The Lubicon number about 500, with the population being quite young. The 100 voting members gathered in the school gym were a consistent number with past elections.

None challenged Nosky for the position, but a resounding roar of cheers and applause filled the gymnasium as Blood proclaimed him the new chief of the Lubicon

It's hard for me to do this, but we need a change.

— Steve Nosky

past dozen years was not utilized, adding the new council will set up an office in the band office to ensure fair distribution of those funds.

"It's hard for me to do this, but we need a change. When the vote was postponed five weeks ago, the membership had a meeting. We did everything by what we had approved by the late 80s. The membership is important. You are important. I will be accessible. Your council will be accessible."

"The torch needs to be relit and this afternoon it's going to be relit. We're going to change direction of our community. We're going to have hope."

"Let's get this thing on the right track and work in our community first. We're not going to do it alone. You have a council that's going to help, but most importantly, we need your voice."

A voice heard many times on the national and world stage over the past 30 years was that of Ominayak.

surrounds us. We can still be proud of who we are and what we believe in. We were always a proud nation and we're still a proud nation today, irregardless of what surrounds us."

While they're proud, the Lubicon have little else, and successive governments have failed to come to a settlement with the First Nation. Since 2005, negotiations have been at an impasse.

"The governments know what we'd like in the way of a settlement," Ominayak stated, adding taking crumbs such as a house, won't provide the foundation the first nation's younger generation needs to build a life for their community.

"We can't afford to give up our rights for the benefit of any house. I cannot find it in myself to accept that, not when our young people are put under these conditions. We have no running water, no nothing. For the last four years we've been arguing at least put water and sewer in for our elderly people."

He's steadfastly refused any settlements that didn't adequately compensate the band for resource royalties since development began in the 1970s. When aboriginal first nations signed treaties with the federal government in 1899, the Lubicon, living in a remote and largely inaccessible area of Alberta, were left out.

"As long as the governments don't deal with us by way of treaty, those resources are ours. The money should be coming to rightful owners. There's absolutely

[each column of this article continues on the next page of this appendix]

None challenged Nosky for the position, but a resounding roar of cheers and applause filled the gymnasium as Blood proclaimed him the new chief of the Lubicon Lake Nation.

Members also voted in councillors Dwight Jordie Sawan, Dwight Gladue, Michael Laboucan, Vance Laboucan, and Larry Ominayak, all of whom received 100 per cent of eligible votes.

Nosky said he and the new council would work for change and stressed inclusive governance. He told members many of the issues the first nation is wrestling with include adequate housing, health, education and economic development. He stressed the new council wants to include the membership in the decision making process.

"We want to include you and we want you to be a part of the community. Your council wants to be inclusive, wants to work with you," Nosky said. "We will seek advise from the membership."

Nosky said much of the funding provided for band members' post secondary education over the

need your voice."

A voice heard many times on the national and world stage over the past 30 years was that of Ominayak.

He's spent 30 years, first being elected chief of the Lubicon in 1978, trying to reach a deal with government that would benefit his people, gaining the support of Amnesty International and the United Nations. He wants his people to have access to the financial benefits of the oil and gas rich resources surrounding the small community of Little Buffalo.

"It's been quite some time," Ominayak said of the time he's been chief, adding while he was first elected in 1978, the elders had been asking him for a long time prior to get involved.

Ominayak emphasized the elders have been a guiding influence for him from the start. "A lot of them are gone now. We were told to try and never let our land die, and to try and do the best for our people."

"We've done what we've can. We've had many battles with government, with oil and gas (companies), and everybody that

"As long as the governments don't deal with us by way of treaty, those resources are ours. The money should be coming to rightful owners. There's absolutely no reason our people should be subject to our natural resources (going to oil and gas companies, and provincial and federal governments).

"Over and above that (provincial and federal governments) have tried to undermine (the Lubicon efforts at settlement) and did everything under the sun they could to short change us," Ominayak stressed, and then laughed sardonically, adding the white governments would likely be happy to see the band implode as a result of the current controversy from within its ranks.

"Everybody profits from what our lands contain and yet we're put in these conditions."

"I tried my honest best to do what I can. I cannot do any more than what I've done. All I asked for is to be honest and fair about things."

Peace River RECORD-GAZETTE



Lubicon

News

A scrutineer from the community, also responsible for ensuring people are eligible to vote by being Lubicon residents, counts members' votes on Friday at the Little Buffalo School.

Peace River RECORD-GAZETTE

News

Lubicon election controversy continues*Elder's Council calls vote for June 25*

By Michelle Huley

An election this Thursday at the Lubicon Lake First Nation is the official once, according to one of the band's elders.

Reine Jobin said the June 25 election is sanctioned by the Lubicon Lake Elder's Council, and a separate election called by a group of former councillors and band members in early June was not. He questioned the validity of that election.

"All of the people that came there are not Lubicons," he said. "Even before, our elections, we had right around 100 or less (eligible voters).

"I don't know where these people are coming from. We would love to get ahold of their membership list so we can scrutinize it."

Earlier in June, about 135 band members, including about 100 determined to be eligible by local scrutineers and chief electoral officer Clayton Blood, elected Steve Nosky as their new chief and councillors Dwight Jordie Sawan, Dwight Gladue, Michael Laboucan, Vance Laboucan, and Larry Ominayak, all of whom were voted in by acclamation and received 100 per cent of eligible votes.

Bernard Ominayak, who has been chief of the First Nation since 1978, told the Record-Gazette he wouldn't run for the position against Nosky, as the election wasn't sanctioned by the Elder's Council, and there were questions over eligibility, both of voters and those running for positions, including Nosky.

The election controversy stems from an April 29 election, which was called off due to disruptions and a dispute over eligibility.

According to Blood, however, the election earlier in June was held according to appropriate rules established in the Lubicon governance structure.

"According to your rules," Blood explained, "a new election must be called, must be given 20 days notice, and in that time you must also have a community

meeting to discuss that election. On May 29, that meeting was held and the community came together to review today's election and voter eligibility rules."

According to Indian and Northern Affairs Canada spokesperson Glenn Luff, the Lubicon have a custom election code, which the federal department doesn't have anything to do with.

INAC, he said, is waiting for the dust to settle before determining who the players will be in the future and if they'll eventually sit back down at the negotiating table.

"It would be our preference for the First Nation to work out its own problems," Luff said. "The department is monitoring the situation very closely.

"We understand there currently is a dispute over election results. For all intents and purposes (INAC) has no involvement in their elections. We're closely monitoring the situation to see if there is a resolution."

Luff said Indian Affairs will only become involved if there are funds not going to their intended recipients, and programs suffer as a result. An allegedly misdirected \$600,000 intended for band members' education, however, hasn't prompted that involvement yet.

Luff said the Lubicon receive about \$3 million annually for essential services. "There was an audit, there were some problems and I don't believe it was delivered at the required time.

"I heard about the misdirection (of funds) - doesn't necessarily dictate INAC steps in. \$600,000 being misdirected doesn't mean we're going to jump in and make a major change."

The Lubicon were never included in the treaties signed by other First Nations in the late 1800s, being somehow missed by government officials. The Lubicon have made national and international headlines over the past three decades in their struggle to negotiate a settlement with the federal government, at an impasse since 2005.

All of the people that came there are not Lubicons.

— Lubicon Elder's Council member Reine Jobin on voter eligibility at an election earlier in June

Elders take control

By Michelle Huley

A second, contentious election this month at Lubicon Lake has, possibly, drastically changed the political landscape at the First Nation with Bernard Ominyak elected chief for life and an Elder's Council given all-encompassing powers that supersede the chief and council.

The Lubicon have a custom election code, explained elder Reine Jobin, which means the Federal Department of Indian and Northern Affairs has no authority over how the elections are run.

"With us not signing a treaty, we're going back to a lot of the old ways and we went under the Indian Affairs list to vote," said Jobin.

Traditionally, Lubicon voter eligibility was determined by band membership and a stipulation that voters live on Lubicon traditional land.

This is the second election held at the First Nation over the past month, with 100 band members voting Steve Nosky as chief at a June 5 election, which was held using a traditional list of voters and adhered to the Lubicon's governance legislation.

"The only people eligible to vote were those that are status Indians," said Jobin, who was unable to vote himself as he is not a Lubicon band member, of last week's election.

He couldn't confirm how many eligible voters attended, or how many votes each councillor received.

The electoral officer hired to conduct the election, Stee-Mas, who uses a traditional aboriginal name meaning tobacco, couldn't confirm the number of voters either, as an actual vote wasn't held. He estimated about 80.

"There was no vote," Stee-Mas confirmed, adding each of the chief and en masse councillor nominations was by acclamation.

While councillors, or headmen as they're now called, were elected for five-year terms, Stee-Mas confirmed Ominyak's position is no longer for the five-year term stipulated in the band's governance legislation for elected chief and council.

Continued on Page A3

Editorial/People lose out ... Page A4
Opinion/Nosky responds to 'election' ... Page A6

Peace River RECORD-GAZETTE

Lubicon

Continued from Page A1

Ominyak has been chief of the First Nation since 1978, until April 29 when a previous election was called off due to a dispute over voter eligibility, and the band left with effectively no governing council.

"There was a resolution," Stee-Mas added, "that the Elder's Council are now the rulers. They supersede anybody, the chief as well."

He explained future elections are up to the elders. "If councillors are to be changed, the elders will. After five years, the elders can step in and say, 'You're nominated.'"

A copy of the custom election results, addressed to Alberta Minister of Aboriginal Relations Gene Zwozdesky and indicating it is official notice to Indian Affairs and Northern Development, states it is formal notice of the election results.

Walter Whitehead, Alphonse

Ominyak, Bryan Laboucan, Troy Laboucan and George Whitehead are listed as headmen.

The election last Thursday was closed to all but those deemed to be eligible to vote. A request by the Record-Gazette to cover the proceedings was not answered. Calls to band administrator Margaret Whitehead for confirmation of the number of eligible voters were not returned.

michelle@prrecordgazette.com

News

Appendix E

Elder's Council's *Public Notice*

This notice from the Lubicon Lake Nation Elder's Council describes the powers held by the Elder's Council as the governing body of the Lubicon Lake Nation (of which INAC has been notified), including sole jurisdiction to call or authorize general meetings or any general elections.

Specific to voter eligibility, the Elder's Council notice states that “[w]e the Lubicon Lake Nation Elder's Council reviewed and support the current voter eligibility guidelines for the Lubicon lake Nation general elections as of April 7, 2009.” Three eligibility requirements are specified, including membership, where membership is qualified as “registered membership.” “Registered members” are those band members who are status Indians (included by INAC on the Indian Register).

The notice has something written by hand along the bottom, however only the tops of a few letters can be made out. Presumably it would be the signature of a member of the Elder's Council.

The notice does not have a visible date. Huley's article included in Appendix D1 notes an advertisement from the Elder's Council in the May 26 issue of the *Peace River Record-Gazette*.

PUBLIC NOTICE

Attention: Lubicon Lake Nation Registered Membership

We the Lubicon Lake Nation Elder's Council are the current governing body of the Lubicon Lake Nation until such time as we call an election and duly elected Chief and Council are able to resume their responsibilities. As the governing body of the Lubicon Lake Nation we retain the sole jurisdiction to call or authorize any general meetings of the Lubicon registered membership and any general election for the Lubicon lake Nation. All other special general meetings, general meetings, general elections, or elections called without the authorization of the Lubicon Lake Nation Elder's Council are invalid and of no force and effect.

We the Lubicon Lake Nation Elder's Council reviewed and support the current voter eligibility guidelines for Lubicon lake Nation general elections as of April 7, 2009. These guidelines remain in force and effect. Lubicon Lake Nation General Election voter eligibility requirements are as follows:

- 1) 18 years of age or older (25 years of age to run for office as Chief or Councillor)
- 2) Be a recognized member of the Lubicon Lake Nation as listed on the registered membership list as of April 7, 2009
- 3) Must reside within the Lubicon Lake Nation Traditional Territory

As the governing body of the Lubicon Lake Nation, the Elder's Council will administer the next General Election and make the final decision regarding voter eligibility. No one on another band's General List or Membership List will be eligible to vote or run for office in a Lubicon Lake Nation General Election.

We the Elder's Council of the Lubicon Lake Nation assure our membership that all programs and services currently delivered by the Lubicon Lake Nation government as of April 29, 2009 will continue uninterrupted under our guidance.

The Department of Indian and Northern Affairs Canada has been notified that the Lubicon Lake Nation Elder's Council is the current governing body for the Lubicon lake Nation and that all programs and services will continue uninterrupted.

Lubicon Lake Nation Elder's Council

Appendix F
Noskey to INAC regarding June 5, 2009

In a June 6, 2009 letter Noskey provides George Arcand Jr. (Alberta Regional Director General, INAC) with the outcome of the June 5, 2009 election, including references to the roles of past and present electoral officers and a number of provisions under the *GLN*. He includes the number of votes each winning candidate received on June 5, and compares those numbers to the numbers at previous elections. At the end of the letter Noskey outlines what he refers to as efforts of the past chief to change Lubicon election rules. Noskey concludes by notifying INAC of steps he and his council were taking to begin to remediate the band's financial problems.

June 6, 2009

Steve Noskey
Chief, Lubicon Lake Indian Nation
Little Buffalo Lake, Alberta
Ph: 780-629-3891
Fax: 780-629-3892

George Arcand Jr.
Alberta Regional Director General
Department of Indian Affairs and Northern Development
630 Canada Place
9700 Jasper Avenue
Edmonton, Alberta T5J 4G2
Fax: 780-495-4088

Dear Mr. Arcand:

On June 5, 2009 the Lubicon Indian Nation had a General Election for Chief and Council. Notice of the June 5th Lubicon General Election was posted 20 clear days in advance consistent with Lubicon self-government policies, practices and procedures.

The June 5th Lubicon General Election was held consistent with Lubicon membership and voter eligibility rules which were reaffirmed in a Special General Meeting of Lubicon members held on May 29, 2009. Notice of the May 29, 2009 Special Meeting of Lubicon members was also posted 20 clear days in advance consistent with Lubicon self-government policies, practices and procedures.

Lubicon membership rules, voter eligibility rules and self-government policies, practices and procedures are well known to the Government of Canada and have been before the Government of Canada in writing since 1985.

As has been the Lubicon practice since 1989, the June 5, 2009 Lubicon General Election was conducted by an outside, independent Chief Electoral Office. The name of the outside, independent Chief Electoral Officer who conducted the June 5th Lubicon General Election is Clayton Blood. I am sure you know Clayton Blood.

Clayton Blood was recommended for the job of Lubicon Chief Electoral Office by two previous Lubicon Chief Electoral Officers, Ralph Bouvette and Greg Smith. I am sure you know both Ralph Bouvette and Greg Smith.

One hundred and thirty two Lubicon members attended the June 5, 2009 Lubicon General Election, 100 of whom were certified eligible to vote in the election by Lubicon Chief Electoral Office Clayton Blood. Those numbers are consistent with the number of Lubicon members who have participated in previous Lubicon General Elections and who have been certified eligible to vote.

I was elected Chief of the Lubicon Lake Indian Nation with 100 votes.

Dwight Jordie Sawan was elected Councilor of the Lubicon Lake Indian Nation with 100 votes.

Dwight Gladue was elected Councilor of the Lubicon Lake Indian Nation with 99 votes.

Michael Laboucan was elected Councilor of the Lubicon Lake Indian Nation with 99 votes.

Vance Laboucan was elected Councilor of the Lubicon Lake Indian Nation with 99 votes.

Larry Ominayak was elected Councilor of the Lubicon Lake Indian Nation with 99 votes.

These pluralities are consistent with the number of votes received by successful candidates in previous Lubicon General Elections for Chief and Council who have generally won with between 80 to 95 votes. The two highest vote getters in the last 2004 Lubicon election each won with 96 votes.

The past Chief has been trying in a variety of ways to change Lubicon election rules at the last minute, postpone the election or avoid contesting an election at all. I am advised that he's still trying. These efforts will not withstand scrutiny. His motivations are a matter of speculation but concern over band fiscal management, including the annual Lubicon audit, have become very controversial among Lubicon members during recent months and were a major issue in the June 5th Lubicon General Election. I know you are aware of these financial problems as well.

My Council and I are currently reviewing Lubicon financial and other problems and will be contacting you shortly to discuss required remedial action. We look forward to working with you and your officials to better serve the interests of our people.

Sincerely,

Steve Noskey
Chief, Lubicon Lake Indian Nation

Cc: Lubicon Council Members

Appendix G

Letter to Alberta Government regarding the outcome of June 25, 2009

Correspondence to Alberta's Aboriginal Relations Minister (Gene Zwosdesky) states the results of the June 25, 2009 election "conducted under First Nation jurisdiction and law." The letter specifies that it is providing INAC with formal notice of the election results. The names of one chief and five headmen are provided.

Three signatures appear: one of Reine Jobin for the "Elders Tribunal," one of Stee-Mass as electoral officer, and one of Stee-Mass certifying the document with a stamp and finger prints.

INAC officials refer to this document as the second election report.

002

UCC 3-419
Lubicon Lake Nation

Box 5731 Peace River, AB T8S 1S5

Phone (780) 629-3945 Fax (780) 629-3935

UCC B

June 25, 2009

Honourable Gene Zwozdesky
Minister of Aboriginal Relations
Deputy Government House Leader
MLA, Edmonton Mill Creek
203 Legislature Building
Edmonton, Alberta
T5K-2B6

Honourable Gene Zwozdesky

Re: The custom election results conducted the Lubicon Lake Nation election act on June 25, 2009.

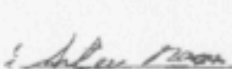
On June 25, 2009 the Lubicon Cree Nation's custom election was conducted under First Nation jurisdiction and law.

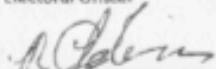
The lawful results of the election include the following:

1. Chief —Bernard Ominayak
2. Headman —Walter Whitehead
3. Headman —Alphonse Ominayak
4. Headman —Bryan Laboucan
5. Headman— Troy Laboucan
6. Headman— George Whitehead

The results of this election provides for the lawful election of the Chief and council of Lubicon Cree Nation.

This letter is providing Indian Affairs and Northern Development with formal notice of our election results and the Chief and Council are the lawful representatives of the Lubicon Cree Nation.


Electoral Officer


Representative of the Elders Tribunal

SOVEREIGN VERIFIED.

CERTIFIED TRUE COPY THIS
DAY OF _____, 2009



UCC 1-207
WITH PREJUDICE

Appendix H

INAC's *Custom Election Dispute Resolution Policy*

This policy outlines the range of ways in which INAC regional officials are to respond to disputed custom elections.

Although I obtained this policy by requesting it from INAC's library in Ottawa, I could not learn anything about the policy, for instance, when it was implemented, the context in which the policy came into being, the volume where it can be found, and so on. (The INAC library did not answer my emails with questions about the policy. Attempts I made to learn more from other sources wherein I had seen the policy reproduced were fruitless.) I also could not find any reference to the policy in relevant case law.

In online searches I found general reference to the policy as a means for INAC to impose *Indian Act* election provisions on custom bands,⁴⁵⁴ but these findings did not allow me to gain any understanding of other provisions of the policy, for instance, the role of INAC's assessment of the band's situation or the way in which a "tool" is chosen for INAC's response.

⁴⁵⁴ For instance, I found reference to the policy in the ministerial order imposing *Indian Act* provisions for elections on the Algonquins of Barrière Lake on April 1, 2010: "The *Custom Election Dispute Resolution Policy* set out INAC's response to custom election disputes. Invoking subsection 74(1) of the *Indian Act* after having explored other solutions and approaches with the Algonquins of Barrière Lake First Nation, including mediation or arbitration, is consistent with INAC's policy."

Order Amending the Indian Bands Council Elections Order, SOR/2010-77 April 1, 2010, CG Vol. 144, No. 8.

<http://www.gazette.gc.ca/rp-pr/p2/2010/2010-04-14/html/sor-dors77-eng.html>.

CUSTOM ELECTION DISPUTE RESOLUTION POLICY

The Senior Management Committee (SMC) approved a new policy direction in order to facilitate and support First Nations in their resolution of governance disputes. The following policy statement is adopted:

It is the policy of the Department of Indian Affairs and Northern Development (INAC) to encourage First Nations in their resolution of internal governance disputes.

This policy is supported by proactive preventative measures and a framework, with accompanying tools, to assist the Regional Directors General (RDG) to apply the policy.

The principles underlying this policy are:

- provision of encouragement to First Nations to allow them to solve their own problems;
- timely resolution of election disputes;
- resumption of day to day business by the Band Council where the dispute has resulted in the appointment of a third party administrator; and
- the laying of a strong foundation for the inherent right to self-government policy and the accountability framework.

1. Promotion of Community Election System Codes

The regions should encourage the adoption of election codes by those Bands that do not currently have one and that are experiencing governance disputes.

Headquarters has prepared a sample leadership selection code. Regions can provide a copy to those First Nations that request them. The sample code will have a disclaimer on them similar to that used on sample by-laws. In no case should they be guaranteed or warranted to work in all circumstances.

2. Dispute Resolution Framework

The following framework has been approved by SMC to provide the Regional Director Generals (RDGs) with the tools to assist First Nations in the resolution of their governance disputes. RDGs will thus be able to manage the disputes at the regional level without the necessity of involving senior management at headquarters in the day to day decision-making processes.

2.1 Assessment of the Situation

It is presumed that some event will alert the region to the possibility that a governance problem exists within a Band.

Once this event has occurred and comes to the attention of the region, the RDG would initiate an assessment of the situation by regional staff. If the assessment reveals that a problem does not exist, then no action needs be taken. The region's assessment of the situation may reveal that, although a governance dispute exists, no action is necessary because it is being resolved locally. This resolution may involve assistance from a third party, such as a tribal council or a First Nation organization, or litigation. As long as the community appears to be making progress in resolving the problem, then the region would not need to assist the First Nation in any way.

If a problem does exist that is not being resolved locally, then the RDG and regional staff would choose the appropriate tool from the following to assist the Band in whatever way is necessary to resolve the problem.

2.2 Tools for Supporting First Nations

The following tools are available to the RDGs to allow them to support First Nations as they work toward resolution of their election disputes. Although they are listed from the least to the most intrusive, it is not being suggested that they be used in any particular order. The tool or tools selected to address the situation will depend upon the particular circumstances as revealed by the assessment. It is assumed that the region will continuously monitor disputes and adapt its response to any changes in conditions.

2.2.1 Ensure Compliance with Election Code

In situations where there is a clearly written code, the region may be able to assist in the resolution of a dispute expeditiously by reviewing the code and ensuring that the actions taken by the person or persons claiming power in the community complied with it. This would be particularly useful in situations where frequent elections are being held.

2.2.2 Mediation/Conciliation

Mediation is a dispute resolution process by which the parties voluntarily attempt, with the assistance of an impartial, neutral, trained person, to negotiate and formulate their own consensual resolution of the matters at issue. The mediator manages the process but retains no independent decision making power respecting the substantive outcome of the negotiation.

By its definition, mediation is a voluntary process. Therefore, it could not be imposed by INAC. All parties to a governance dispute would have to agree to the mediation process and to the selection of a mediator. In most provinces, there are professional mediation associations and corporations available to assist in the selection of a trained mediator.

2.2.3 Arbitration

In situations where mediation either fails or is inappropriate, then arbitration may be an option. Arbitration is a dispute resolution process in which the parties agree to allow an impartial, neutral, trained person or persons to decide the matters at issue. The parties present their view of the facts and their arguments to the arbitrator who then makes a decision.

Arbitrations are generally handled either by a single arbitrator or by an arbitration panel, in which case each side usually picks an arbitrator and then the two arbitrators choose a third. Arbitration is a formal process covered by federal and provincial laws, however, the parties can design many of its structural elements, including the rules of procedure, time limits and number of arbitrators. Although arbitrations are less formal and may be more abridged than court

Arbitration can be binding or non-binding. However, in custom election disputes, the parties must agree, formally and in writing, to be bound by the arbitrator's or panel's decision.

3. Intervention

If mediation and/or arbitration fail, or the disputants do not agree to either of these processes, then the RDG may want to recommend to the Deputy Minister that the department intervene in the dispute to resolve the situation. This would be particularly true in situations where a real crisis has developed. Two options for intervention when all else fails are proposed here.

3.1 Referendum

It is clear from the case law that the Minister of INAC has the power to hold a referendum in an election dispute situation.¹ The actual question to be asked in the referendum would depend upon the individual circumstances. In one circumstance it may be appropriate to ask whether or not the community wants to continue to hold its elections under custom or to be subject to the election provisions of the *Indian Act*. In another, the community might be asked to choose between two customs.

3.2 Ministerial Order under Subsection 74(1)

As a last resort, in a situation where a community is in chaos and it is impossible to get agreement to mediation or arbitration from the parties, the option exists to bring the First Nation under the *Indian Act* for election purposes through the use of a ministerial order under subsection 74(1). Such an action by the Minister is the antithesis of self-government and would be viewed very negatively as an intrusion into the affairs of the First Nation. However, there may be situations where the dispute is so volatile that no other option is viable.

¹ *Six Nations Traditional Hereditary Chiefs v. Canada (Minister of Indian and Northern Affairs)*, [1992] 3 C.N.L.R. 156.

Appendix I

INAC-Noskey correspondence regarding the imposition of third party management

This appendix includes a series of three letters between INAC officials and Steve Noskey (Noskey council) regarding INAC's refusal to recognize a Lubicon council and the imposition of third party management.

- I1. Arcand (Alberta Regional Director General) to Noskey council, December 11, 2009
- I2. Noskey to Arcand, January 4, 2010
- I3. Filippo (on behalf of Arcand) to Noskey, January 14, 2010



Indian and Northern Affairs Canada
 Affaires indiennes et du Nord Canada
 www.inac.gc.ca www.aio.gc.ca

Dec 11, 2009

Via Fax
Votre fax - Votre référence

Attention	Steve Noskey Dwight Gladue Larry Ominayak Michael Laboucan Vance Laboucan Dwight Sawan	<small>Qui-à - Adresse</small>
-----------	---	--------------------------------

Lubicon Lake Nation

Fax (780) 629 - 3262
 Fax (250) 342 - 2996

Re: Meeting at Little Buffalo School

Meeting you and the many Lubicon Band Members at the school was a great opportunity for me and my colleagues to hear the concerns in the community directly from your members. Hopefully the continued involvement and concern from community members will help us all move forward in dealing with the difficult issues facing the Nation.

While I understand that the messages presented by INAC may not be popular, I feel that the position being taken by the Department was clearly understood after our meeting. I just want to summarize once again the issues we discussed and insure that we communicate the steps that are being taken subsequent to the meeting.

Indian and Northern Affairs Canada (INAC) are able to record the results of an election when there has been an Electoral Officer duly appointed by a sitting Chief and Council and the results of the vote are not disputed. If disputed, the results can be accepted if an appeals process or a court of competent jurisdiction determines the final outcome. The Lubicon Nation determines their Membership according to the Nation's established rules and traditions. Leadership selection is also according to established tradition and Rules (Customary Election Code). Lubicon membership rules and Custom Election codes do not fall under the Indian Act. The ability to accurately interpret the membership rules lie with the Nation and are not determined by the Indian Act registration criteria. The Department does not exercise jurisdiction with respect to Custom election codes. NAC has offered funding for a facilitator, independent of INAC, to assist in



resolving the election dispute. This offer still stands.

Funding is entrusted to Chiefs and Councils to provide services to Band Members living on reserve (Little Buffalo) utilizing a Comprehensive Funding Agreement (CFA). Under the CFA, services are to be provided in a fair and transparent manner and councils are required to be accountable for their decision making processes and provide full financial disclosure to band members. This contribution agreement is subject to meeting eligibility requirements under the Financial Administration Act and complying with Treasury Board policy. Without a recognized Chief and Council the Lubicon Nation is not eligible for a funding agreement.

In the absence of a funding agreement the responsibility to provide services to Lubicon members rests with INAC. Funding set aside for services to Lubicon members will be utilized by INAC to provide essential services directly to Lubicon Members or through alternative service providers such as Third Party Managers.

It would be beneficial for the community and band members to have someone available to them in Little Buffalo who Band Members can talk to about concerns and to receive services. This individual in the short term will insure the following essential INAC funded services are provided:

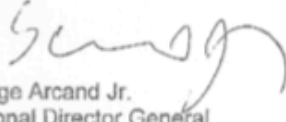
- Social development programs
- Availability of drinking water
- Roads cleared and garbage pick up, fire protection
- Emergency housing repairs (Furnaces, Doors/Windows)

Subsequent to our meeting, a Request for Proposal has been issued to qualified Third Party Managers to administer funding at the Nation and provide essential services. Appointment of a Third Party Manager is expected to occur in the next two weeks and you will be provided with further details upon appointment. Cooperation with the Third Party Manager would be beneficial to your members to insure there is no disruption to services at Little Buffalo. If in place over a longer period, this individual will also help to develop capacity at the Nation and train administration staff. The goal is to return the funding and service delivery to the Nation in the shortest time period possible.

Until a Third Party Manager is appointed, my staff will continue to work to insure there are no significant service disruptions and emergency situations are dealt with. In this regard, a contractor should be in your community now to complete service work on heating systems and to start the installation of furnaces in situations where they cannot be repaired. This would not have been possible without your assistance and cooperation with INAC staff. In closing I would like to thank you again for your understanding and continued cooperation in providing assistance to Lubicon Members.

If you have any questions surrounding appointment of a Third party manager, please contact Spencer Philppo, Director – First Nations Relations Treaty 8 at (780) 495-3396.

Sincerely,



George Arcand Jr.
Regional Director General
Alberta Region
Indian & Northern Affairs Canada
#630, 9700 Jasper Avenue
Edmonton, AB T5J 4G2

c.c.:

Spencer Philppo, Director First Nations Relation, Treaty 8, INAC
Cynthia Rain, Field Service Officer, Indian and Northern Affairs Canada
G LaRose, A/Field Manager, FNR T8, Indian and Northern Affairs Canada

January 4, 2010

Steve Noskey
Chief, Lubicon Lake Indian Nation
Little Buffalo Lake, Alberta
Ph: 780-629-3891
Cell: 780-618-8793
Fax: 780-629-3892

George Arcand Jr.
Alberta Regional Director General
Department of Indian Affairs and Northern Development
630 Canada Place
9700 Jasper Avenue
Edmonton, Alberta T5J 4G2
Phone: 780-495-4365
Fax: 780-495-4088

Dear Mr. Arcand:

RE: Your December 11, 2009 letter on our November 26th meeting in Little Buffalo

The overwhelming majority of qualified Lubicon voters elected a new Chief and Council on June 5, 2009 under long standing Lubicon membership criteria and voter eligibility rules. Even though these Lubicon membership criteria and voter eligibility rules "do not fall under the Indian Act", and their interpretation "lies with the Lubicon Lake Indian Nation and are not determined by Indian Act registration criteria", Indian Affairs is very well aware what these long standing Lubicon membership criteria and voter eligibility rules are, and Indian Affairs officials know very well that these Lubicon membership criteria and voter eligibility rules were followed at the June 5th election.

You suggest that any internal Lubicon electoral disputes must be settled by "an appeals process or a court of competent jurisdiction". We've done that. Our membership and voter eligibility rules and their interpretation were challenged by a small group of Bernard Ominayak's supporters at the time of the normally scheduled Lubicon election on April 29, 2009. That created a dispute over Lubicon membership and voter eligibility rules and how they are to be determined. That dispute was settled on May 29, 2009 by an overwhelming majority of Lubicon members qualified to vote under long standing Lubicon voter eligibility rules at a Special General Meeting of Lubicon Members called expressly to resolve this dispute so the Lubicon election for Chief and Council could proceed. That's how the Lubicon people have always determined and interpreted Lubicon membership criteria and voter eligibility rules and resolved any disputes about them -- by a majority of Lubicon members meeting in assembly at a duly called General Meeting of Lubicon members qualified to vote under Lubicon voter eligibility rules. Just because a minority of Lubicon members don't like the decision of the majority made properly under Lubicon rules doesn't mean the dispute hasn't been settled.

Our internal political disputes have never been resolved through the dubious services of an outsider hired by Indian Affairs or through appeal to courts created by the Canadian government. To suggest that our internal political disputes should now be settled by reference to outsiders flagrantly contradicts the recognized right of the Lubicon Lake Indian Nation to govern our own affairs -- to which you yourself refer -- including the determination and interpretation of Lubicon membership criteria and voter eligibility rules.

"Without a recognized Chief and Council", you say, "the Lubicon Nation is not eligible for a (program) funding agreement", and, "in the absence of a funding agreement, the responsibility to provide (essential) services (to Lubicon members) rests with (Indian Affairs)". In fact we have a Chief and Council elected by the overwhelming majority of qualified Lubicon electors at a duly called Lubicon General Election for Chief and Council. We resolved the election dispute through our own traditional Lubicon means. The problem is not that the Lubicon people cannot resolve an election dispute so the Department has to step in and take over delivery of essential services to the Lubicon people. The problem is transparent Departmental use of this obviously frivolous election challenge by a small group of Bernard Ominayak's supporters as an excuse to undermine Lubicon self-government and to take over the delivery of essential services to the Lubicon people.

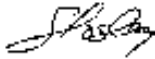
You say "It would be beneficial for the community and band members to have someone available to them in Little Buffalo who Band members can talk to about concerns and to receive services". The person you are talking about here is a "Third Party Manager" appointed by the Indian Affairs -- a classic great white colonial father -- to whom our people would be required to go to "talk about concerns and to receive services". Our valuable unceded lands and resources have been exploited without consultation or compensation. Our once self-reliant traditional economy has been destroyed and our people forced onto welfare in order to survive. You are now talking about taking the last little bit of control over our lives we still retain -- the ability to at least provide our people with basic subsistence services ourselves. While our people now sadly need those essential services to survive, and we may have limited ability to fight back, don't expect willing and grateful cooperation with your cynical and deliberate destruction of our society.

If the "Third Party Manager...is in place over a longer period of time", you say, "this individual will also need help to develop capacity at the Lubicon Nation and train administrative staff". You say "The goal is to return the funding and service delivery to the Lubicon Nation in the shortest time period possible". In fact we have been offering since our June 5th election to meet with your officials to deal with the serious problems created by the previous administration including the training of new administrative staff. But that's not what we're talking about here. What we're talking about here is training our people to work with and for a "Third Party Manager" appointed by the Department to ensure Canadian government control of our affairs. Who do you propose to "return the funding and service delivery" to if you are not prepared to work with the leaders we ourselves select by our own traditional means. The answer is obvious. One need only look to colonial history. You are seeking to establish a puppet regime under your control that does not challenge unrestricted Canadian government access to valuable unceded Lubicon lands and resources.

Lastly your letter suggests that our November 26th meeting was amiable and that we achieved agreement that "will help us all move forward in dealing with the difficult issues facing the Lubicon Nation". In fact you came to the meeting with a pre-school level slide show consisting of six windows each making couple of arguable declarations in simple sentences with large letters. Our people told you they didn't want to dignify such an offensive, condescending slide presentation with a viewing. They demanded that you immediately meet with our duly elected Chief and Council to begin working together to solve the difficult financial and other problems created by the last Lubicon administration. Despite the misleading impression you seek to create in your December 11th letter -- and whatever we need to do for our people to be able to survive -- that remains the firm position of the Lubicon people.

In the end, as I said in my letters of November 10th and 22nd, officials of the Regional Office know very well that the previous Chief's efforts to hold onto power despite having lost the confidence of the overwhelming majority of the Lubicon people has no basis in Lubicon tradition and culture. On June 5th the Lubicon people elected a new Chief and Council under our own traditions and long-standing electoral policies. The new duly elected Lubicon Chief and Council do not ask Indian Affairs to take sides in a supposed Lubicon "governance dispute". The Lubicon people settled that dispute ~~ourselves~~ through our own traditional means. We ask only that Indian Affairs respect the inherent right of the Lubicon people to choose our own leaders by our own traditional means and to stop using a transparently frivolous election challenge by the previous Chief as an excuse to undermine Lubicon self-government and take over the delivery of essential services to the Lubicon people.

We remain willing and available to meet with you and your officials to begin work on the many difficult financial and other problems created by the previous Lubicon administration -- problems which, as we both know, predated the last Lubicon election by several years, caused a serious deterioration of essential Lubicon programs and services that predated the last Lubicon election by several years, contributed significantly to the previous Chief losing the confidence of the majority of the Lubicon people, and which were knowingly allowed by Indian Affairs officials to fester and grow to the very serious magnitude we now face.



Steve Noskey
Chief
Lubicon Lake Indian Nation

cc: Lubicon Councilors
Lubicon Members



Indian and Northern
Affairs Canada

www.inac.gc.ca

Affaires Indiennes
et du Nord Canada

www.airc.gc.ca

JAN 14 2010

Lubicon Lake Cree Nation

leur file - votre référence

our file - votre référence

30-0007-09.10 UNC

Fax (780) 629 - 3892

Dear Mr. Noskey:

This is in response to your January 4, 2010 letter addressed to Mr. George Arcand Jr., Regional Director General, Alberta Region. I have been asked to respond on Mr. Arcand's behalf.

Please be informed that there will be no change in the position of Indian and Northern Affairs Canada (INAC) has taken with respect to the Election dispute(s) and interpretation of the Lubicon Lake Indian Nation membership rules/code. As noted during our discussions and in previous correspondence, INAC will not interfere in the internal governance issues of the Lubicon Lake Indian Nation, however, it will continue to extend its offer of arranging and funding mediation. The custom election dispute is a matter for the Nation or the Courts to resolve. Further, as previously noted, custom elections do not fall under the *Indian Act*.

INAC is a funding agency and relies on funding agreements to provide services and programs to First Nation members. In the absence of a funding agreement duly signed by an elected Chief and Council, to manage and implement an agreement, Third Party Managers (TPM) are used to insure essential programs and services are available to First Nation members. This is a provision in the Lubicon Lake Indian Nation Comprehensive Funding Arrangement, to which you were a signatory. The significant defaults which created the requirement for a TPM, under the funding agreement, stem from issues that have been developing prior to the election dispute. Many examples of these issues were raised by community members during the November 28, 2009 meeting, which included housing, fuel, and social services. Your wish to remedy these defaults is appreciated and you can assist in this process through cooperation with the TPM.

TPMs are professionals who must adhere to a professional code of ethics. Their only involvement is to manage funding for INAC programs and ensure there is fairness, transparency and accountability in how these funds are administered. The TPM will remain in place for the shortest time period possible, and will take an active role in implementing systems, policies and controls around the

.../2


Canada

-2-

Implementation of essential programs and services, so the need for intervention can be avoided in the future. Training for staff in financial and administrative functions will benefit the Nation, as the goal is a sound administration, providing maximum benefits to its members. INAC and Meyers, Norris, Penny LLP, will meet with you and the Lubicon Lake Indian Nation Members once all arrangements are finalized.

Should you wish to discuss this matter further, please contact me at (780) 495-3398.

Sincerely,


for Spencer Phillppo
Director, First Nations Relations, Treaty 8
Indian and Northern Affairs Canada
Alberta Region
#630, 9700 Jasper Avenue
EDMONTON AB T5J 4G2

Appendix J
October 30, 2009 INAC correspondence

In his October 30, 2009 letter to Noskey, Arcand (Alberta Regional Director General, INAC) explains that, given INAC's receipt of two election reports, to "honour the demands" of either "contingent" (the Noskey contingent or the Ominayak contingent) would be to directly interfere in internal Lubicon affairs. Arcand also addresses the role of the courts in such situations, as well as the need for an alternate means of providing essential programs and services.



Indian and Northern
Affairs Canada

www.inac.gc.ca

Affaires indiennes
et du Nord Canada

www.ainc.gc.ca

UL 13 0 2009

Your file - votre référence

Our file - notre référence

4200-1

Mr. Steve Noskey
Lubicon Lake Indian Nation
FAX (780) 629-3892

Dear Mr. Noskey:

I acknowledge receipt of your September 27, 2009 letter concerning various issues. I will again reiterate that the Department will not take sides in these governance issues. I will, however, meet with you and your supporters, as Band Members. This offer also applies to Bernard Ominayak and his supporters. I believe that it would be beneficial to have a meeting you you and Mr. Ominayak to identify strategies that will ensure access to and delivery of essential programs and services to Lubicon Lake Indian Nation members.

As you note in your letter, Indian and Northern Affairs Canada (INAC) has received an Electoral Officer's report for an election held on June 5, 2009, showing you to be elected as the Chief of Lubicon Lake Indian Nation. INAC also received an Electoral Officer's report for an election held June 25, 2009, showing Mr. Ominayak as the Chief elect. In both elections statements are being made that the custom election code and membership rules of the Nation are being followed. Lubicon Lake Indian Nation does not fall under the *Indian Act* for its elections or membership rules. If INAC honours the demands from your or the Ominayak contingent, it would in effect be a direct interference in the internal affairs of the Lubicon Lake Indian Nation. The authority to deal with this issue, as you have correctly stated, lies with the Lubicon Lake Indian Nation, or in the alternative, with the Federal Courts. The decision rests with you and Mr. Ominayak.

As you discussed, on October 2, 2009 with Mr. Spencer Philipppo, Director, First Nations Relations, Treaty 8, I hope to meet with you to talk about the challenges that the Lubicon Lake Indian Nation faces, and to meet with the community to communicate how they can access essential programs and services in the coming months.

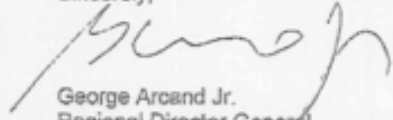
Sincerely,

Canada

-2-

As you discussed, on October 2, 2009 with Mr. Spencer Philippo, Director, First Nations Relations, Treaty 8, I hope to meet with you to talk about the challenges that the Lubicon Lake Indian Nation faces, and to meet with the community to communicate how they can access essential programs and services in the coming months.

Sincerely,



George Arcand Jr.
Regional Director General
Indian and Northern Affairs Canada
Alberta Region
630 Canada Place
9700 Jasper Avenue
EDMONTON AB T5J 4G2

cc : Dwight Gladue FAX (780) 629-3892
Larry Ominayak FAX (780) 629-3892
Michael Laboucan FAX (780) 629-3892
Vance Laboucan FAX (780) 629-3892
Dwight Sawan FAX (780) 629-3892

Appendix K

Later reporting: Newspaper and magazine articles written during or after the summer of 2009 regarding the Lubicon leadership situation and INAC's response.

- K1. Elise Stolte, "Who's the Chief of Lubicon Lake?," *Edmonton Journal*, July 27, 2009.
- K2. Elise Stolte, "Outside administrator assigned to Lubicon community," *Edmonton Journal*, December 4, 2009.
- K3. Shari Narine, "Third party manager continues at Lubicon Lake," *Alberta Sweetgrass*, August 2010.
- K4. Kristjanna Grimmelt, "Third-party manager to handle Lubicon Lake services." *Peace River Record-Gazette*, Dec 1, 2009.
- K5. Scott Fitzpatrick, "Too many Chiefs – not enough democracy," *Peace River Record-Gazette*, August 3, 2009.

Who's the chief of Lubicon Lake? Bernard ominayak says he's chief for life, but brother-in-law Steve Noskey won an election

BY ELISE STOLTE, EDMONTON JOURNAL

JULY 27, 2009

Two chiefs, brothers-in-law, are fighting for control of the Lubicon Lake First Nation--one an iconic image of a shy Woodland Cree leader, the other a symbol of modernity.

Bernard Ominayak, chief since 1978, went hunting Tuesday evening. He shot a moose and brought home meat for family and supporters to smoke outside, and cut up on kitchen tables to freeze for the winter.

Steve Noskey, the son of a Christian Alliance minister, spent the week working nine-to-five as a battery operator for an oil and gas separation plant a 10-minute drive from the community.

He earns shares in the company, builds up his RRSP, and went camping this weekend in his new fifth-wheel motorhome.

"The world changes and we change," says Noskey, who was chosen June 5 in an election boycotted by Ominayak and his supporters. "Things evolve. Who knows, maybe our own people will start an oil company." Oil and gas development has changed the landscape, he says. "But we've got to move on. It's just like the residential (school) issue. An apology was made last year and people have moved on. We start a new era with my leadership."

Noskey wants Indian Affairs to recognize him as chief. Spokesman Glenn Luff says the federal government won't get involved in band conflicts as long as essential services, in this case welfare payments and education, are maintained.

Supporters from Amnesty International and Friends of the Lubicon Alberta say they won't get involved.

"We often work with communities where there are significant divisions," says Amnesty's Craig Benjamin. "We don't take sides. "Obviously, we're concerned this could be used (by Ottawa) as an excuse for inaction."

The small northern Alberta band and its 70-year-old land claim, Alberta's most controversial, made headlines from New York to London and Geneva in the run-up to the 1988 Winter Olympics in Calgary. Band members set up roadblocks later that year and supporters boycotted pulp-and-paper company Daishowa, which held timber rights near their community.

But since then, federal and provincial negotiations have stalled. The roughly 400 people in the hamlet continue to live mainly on welfare, use outhouses and truck in water. The health centre is a trailer with broken windows. Vandalism closed down the recreation centre.

Noskey supporters say a change in leadership is the answer. "We're at a stage of survival," says Veronica Okemow, 40. She's raising five children plus a cousin's two-year-old son. She washes the kids in a plastic toy bin with water warmed on the stove. They dig a new hole for the outhouse every fall to make sure it doesn't overflow in winter. "Who's stupid enough to go back and accept (Ominayak) as chief when there's no funding given to graduates in our community?" she asks.

The county plans to pump water from a new treatment centre on the Peace River to a local fill station, but "even that's at a standstill, because Bernard wouldn't allow them in, still believing he's going to get Lubicon land," she says. "It no longer has to be this way." Ominayak's side says the personal attacks deflect blame from the real culprits--the provincial and federal governments.

Appendix K1

"They haven't seen the big picture," says Hector Whitehead, 37. His father, Walter Whitehead, was chief in 1975 until he stepped aside for Ominayak.

"Everybody's treated fair here," Hector says. Blood from Ominayak's dead moose stains his shirt. Noskey's supporters "lose sight of what we're fighting for," he says.

Against the odds, Ominayak still believes, he says. "We can't give up now." After boycotting the June 5 election, Ominayak's side called a separate election for June 25. They restricted access to those on a limited voting list and acclaimed Ominayak chief for life. Ominayak says the elders asked him years ago to accept a position of chief for life, saying it would give more stability, especially important in a world where oil executives and federal ministers change constantly, he says, sitting in his office, a room cluttered with plaques and photos collected through a decades-long fight. The phone constantly rings.

The elders "asked me numerous times, but I wasn't ready for that kind of commitment," he says, pointing to their pictures on the wall. "Maybe I should have listened. They knew that we were in a big fight."

Ominayak grew up in the bush country north of Lesser Slave Lake, living in a cabin during the summer on nearby Lubicon Lake and travelling north during the winter to trap. He was one of the first from the community to venture outside, to Grouard, for high school. He became chief at 28, appearing young and shy on the world stage, with his black ball cap on his head and hands stuck in jean pockets.

Water is a central issue in the community. Noskey says he's willing to sit down and negotiate with the county. But Ominayak says people don't realize the water pipeline is just one part of a larger plan to run a major utility corridor past their community. Construction on the Trans-Canada pipeline is underway, and, tied in with a proposal for a Peace River nuclear plant, are dreams of twinning the highway past Little Buffalo to connect Peace River and Fort McMurray, he says. He believes it would overwhelm the community.

"We can't give up our aboriginal title for water and sewage," Ominayak says.

"We're trying to survive.

"All we can do is try to do the best we can and put something in place for the long term. I've got nothing to settle with (Noskey). I'll represent the people who want me to be in place for as long as they will support me."

The community has split before. The Woodland Cree, whose 900-member band includes many former Lubicon members, signed a separate land claim in 1992.

In 1995, a group claiming to have as many as 263 former Lubicon members called itself the Little Buffalo Cree and fought unsuccessfully in court for its own place at the negotiating table.

Many of the same people are involved in the current uprising, says Ominayak.

But at least two councillors who fought on his side last time now support his rival.

That includes Dwight Gladue, who says the issue is accountability. He was also drying thin sheets of moose meat Wednesday, an animal shot by his son. Smoke from a smouldering log filled the tarp-covered shed, keeping away the horseflies.

The band is behind on its school payments, late on audits and ran a 7.4-per-cent deficit last year, just shy of the eight per cent Indian Affairs considers the threshold to get involved.

Even as a councillor, Gladue says, he wasn't told how the band's approximately \$5 million in revenue from reclamation and road building work last year was spent.

When he checked the bank account a couple days after the June 5 election, he says \$1,390 was left. Some new equipment was bought, but "that's supposed to be discussed at the community level, period. Or at the very least with the council," Gladue said.

Other cheques are written to individuals with no written explanation why.

"We're trying to put a stop to that," says Gladue.

Who's Outside administrator assigned to Lubicon community

BY ELISE STOLTE, EDMONTON JOURNAL

DECEMBER 4, 2009

EDMONTON — Management of the northern Alberta Lubicon Lake Cree Nation is expected to be handed over to a third-party administrator within weeks, destroying hopes for settlement on a decades-old land claim.

The aboriginal community has been embroiled in a leadership dispute since May, with two brothers-in-law both claiming to be chief.

Each has asked Ottawa to recognize their claim and do business with their side, but the Department of Northern and Indian Affairs refuses.

"We were pretty clear," said George Arcand, regional director for the department. "For many years, (I told them), you've told us get out of your way. You're going to determine your own governance and how you elect your people. Now that you have a problem, you want the government to come in?"

"Well, it doesn't quite work that way."

Until the community can decide who the elected leader is, the department will appoint an outside accountant or management consultant to sign the cheques and ensure essential services such as education and social assistance continue to be provided. Several furnaces need to be fixed before the cold really sets in.

The small band north of Lesser Slave Lake has been publicly fighting for recognition since at least the 1970s. They gained international attention, but still live on what is officially classified as Crown land, in overcrowded houses and without running water, digging new holes for outhouses before the ground freezes each winter.

The band of several hundred was missed when treaty negotiators passed through in the late 1800s.

They continued to live a mainly traditional lifestyle deep in the woods until oil and gas became interested in the area in the 1970s. Now the land is cross-marked with access roads, a 600-person camp is under construction for a pipeline just north of them, and the latest round of land-claim negotiations broke down in 2003.

The band won the right to decide their own membership, but the two sides still disagreed on compensation and self-government.

The band has support groups across Canada and Europe who in the past mounted letter campaigns and boycotts on their behalf, but many don't know how to help now, unwilling to choose sides either, said longtime supporter Ed Bianchi.

"Their strength was always in their united stance," said Bianchi, who has been working with the Lubicon for various advocacy groups for 20 years.

"But it's not surprising things have unfolded the way they have," he said. "The Lubicon have tried for generations to reach a settlement."

Now it has been six years since any negotiations. "Imagine yourself in the community. Imagine yourself in those circumstances and it's not too much of a stretch that you would lose hope. If you consistently deny people their rights, it's not surprising that it leads to breakdowns in the communities."

Bernard Ominayak has been the public face of the Lubicon since the early 70s. A former councillor and school board chairman, Steve Noskey, was elected chief on June 5, but Ominayak's supporters refused to recognize that election. They elected Ominayak chief-for-

life on June 25.

The previous chief and administration have continued to work out of the office until this point. The third-party manager will hopefully be on the job before Christmas, Arcand said.

He or she would work in the office on at least a part-time basis but those negotiations are still ongoing. Control of funding for education--a school in the community and grants for post-secondary education -- was taken over by the department last September. Representatives of Health Canada have met with both sides and have already appointed an outsider to look after health care.

Like the majority of bands in Alberta, the Lubicon are governed by a custom election code, written and upheld by the band. Many custom codes include clear avenues for appeal, said Arcand, but outside that, serious disputes often land in court. Arcand said from what he can see, both sides did not flawlessly follow their own election codes, but because it is a custom election, the department has no jurisdiction.

He has offered mediation, but neither side seemed interested when he visited the community last week. "People are really entrenched."

Third party manager continues at Lubicon Lake

By Shari Narine Sweetgrass Writer

Until the governance issue is settled on the Lubicon Lake Cree First Nation there will be no moving ahead with the land claims issue.

"The land claim is on the back burner. It's hard to proceed with a land claim when you don't have a duly recognized chief and council," said Glenn Luff, spokesman for Indian and Northern Affairs Canada, Alberta regional office.

Luff said offers by the department for mediation services have been rebuffed by both Bernard Ominayak and Steve Noskey. Both men claim to have won legitimate elections and to be chief of the Lubicon Lake.

The accounting firm of Meyers Norris Penny will continue as third party manager of the First Nation, distributing INAC's funding of \$2.5 million annually. The initial appointment of the firm was to carry through until March 31, 2010, but it's now a "fairly open-ended contract. There's no imminent resolution to the governance dispute," said Luff.

Lubicon Lake First Nation carries out its election according to its custom code, which limits the role the federal government can play if a dispute arises. Just over half of Canada's 615 First Nations have custom elections. The status of Lubicon Lake First Nation's government has been unclear for a year. An election held June 5, 2009, saw Noskey acclaimed as chief. However, those results were declared invalid by supporters of incumbent Chief Bernard Ominayak, who called an election June 25, 2009, in which he was acclaimed in his position. In an earlier interview with Sweetgrass, Ominayak said he was asked by the Elder council to take on the position of chief for life and accepted the offer.

But with Ominayak's election, Noskey didn't step down. Both men and their supporters are claiming that they are the legitimate leaders of the First Nation.

After looking at the results from both elections and the reports filed by the respective electoral officers, the Department of Justice declared that the Lubicon Lake First Nation did not follow its own code in either election.

Luff said all indications are that "things are getting done" through the third party manager. "The general sense I've got is that (delivery of services) has improved."

Third-party manager to handle Lubicon Lake services

By Kristjanna Grimmelt

SATURDAY, JULY 23, 2011

Within the next few weeks, a third-party manager will handle delivery of Lubicon Lake First Nation funding for all services offered by Indian and Northern Affairs Canada (INAC). These services include social assistance, education and some basic maintenance.

The third-party manager will work on-site in Little Buffalo at least part-time, said Glenn Luff, spokesperson for INAC.

Luff confirmed that third-party management will be implemented because the leadership dispute is still not resolved, and also because INAC has heard complaints from residents regarding need for operational maintenance such as garbage pickup and furnace repair. He stressed that the government has never taken sides in the First Nation's current leadership dispute.

The decision was announced last Thursday in Red Earth to about 80 band members and a group of elders by George Arcand, INAC Regional Director General for the Alberta Region.

In September of this year, INAC took over management of the band's education funding due to the ongoing leadership dispute and concerns over service delivery. Since June, two men, Bernard Ominayak and Steve Noskey, have claimed to be chief of the First Nation. Noskey was elected chief on June 5, but Ominayak's supporters disputed the results. Ominayak won a second election on June 25 with a restricted voting list and was acclaimed chief for life.

Many of the people in Little Buffalo, the small First Nation's community about 100 kilometres from Peace River, live in poverty and without running water. The First Nation has never settled a federal land claim.

Too many Chiefs – not enough democracy

Scott Fitzpatrick, Peace River Record-Gazette publisher

The muddy waters stirred up by two separate Lubicon elections held over the past month are still a long ways from clearing.

In the first election Steve Nosky was elected chief by acclamation using a list of qualified voters that was ratified at an earlier band meeting. A few weeks later a second election was called and longtime chief Bernard Ominayak was re-elected chief using a different voters' list.

So there it sits. Both chiefs claiming they are duly elected and maybe they both are, but clearly the Lubicon First Nation cannot have two chiefs. It's also obvious that neither side is going to capitulate and if this situation continues to fester mistakes are going to be made and people might get hurt.

Who is the duly elected chief? Who will make this decision and when will they decide? And will the band members live with the decision?

After all the Lubicon are the forgotten people, never having signed a treaty with the federal government, and their governance has always been dubious at best.

However, Indian and Northern Affairs Canada (INAC) funds the Lubicon First Nation and it falls on them to step in and sort things out.

It appears INAC will not recognize neither chief and quite likely third election will be held under the guidelines set by them in conjunction with the Lubicon elders.

If the elders are setting eligible voter guidelines it is bound to be of great concern to Chief Nosky. These elders is the same group that even though not one of them has received a single vote from any Lubicon, declared themselves the ultimate Lubicon authority. They then promptly declared Chief Ominayak chief for life. Hard to see how any democratic process is working here.

Chief Nosky on the other hand advertised a meeting to have the community decide who was eligible to vote, advertised the election, and had a large turnout of voters.

Chief Ominayak's election involved far fewer people as the voters' list was severely trimmed and the results are being viewed with a skeptical eye.

So INAC has got to get moving and get moving quickly. The implications of their decision will span generations, but most importantly they must ensure that each and every Lubicon's right to self-determination is not denied.

Election of the chief and deciding on who is an eligible voter should be a fair and open democratic process and not entrusted to the elders, a non-elected group with questionable biases.

Appendix L
Informing the Lubicon that INAC has initiated the intervention

In this December 5, 2009 letter Philippo (First Nations Relations Director) wrote to the Noskey council and Ominayak headmen, outlining the steps taken by INAC in response to the Lubicon situation in winter 2010-2011. One step included INAC's initiation of alternate delivery of programs and services through third party management. Philippo explains the need for third party management as a result of the Lubicon Lake Nation's financial defaults.

www.inac.gc.ca
Jan 05, 2010

www.aifnc.gc.ca

Via Fax

Attention Steve Noskey
Dwight Gladue
Larry Ominayak
Michael Laboucan
Vance Laboucan
Dwight Sawan

Bernard Ominayak
Walter Whitehead
Alphonse Ominayak
Troy Laboucan
Brian Lacoucan
George Whitehead

Lubicon Lake Nation

Fax (780) 629 - 3892

Fax (250) 342 - 2996

Fax (780) 629 - 3939

Re: Lubicon First Nation Governance Issues

This letter is a follow up to previous correspondence, and the meetings held in Lubicon Lake Nation on November 26, 2009. As discussed the Nation was advised that *Indian and Northern Affairs Canada* (INAC) had initiated the following steps:

- All funding to the Nation has been halted, with the exception of Income Assistance which has continued to be funded as an essential service until alternate arrangements could be made.
- Funding provided for Provincial school tuition will be paid directly to the Northland School Division.
- Funding for post secondary education is being utilized to contract with *Freemorse Family Wellness Society* to provide services to Lubicon members in accordance with the terms and conditions of the post secondary funding policy.
- The *Technical Services Advisory Group* (TSAG) was contracted to complete emergency repairs to houses for furnaces and heating systems. Tradesmen have been present at the Nation since early December and to date have completed 9 furnace installations, 3 furnace rebuilds and will complete an additional 40 service calls to insure heat is available as soon as possible.

In addition to the above, we also informed you that INAC was initiating alternative delivery of programs and services, covered under the Comprehensive Funding Arrangement (CFA), through Third Party Management under the Intervention

Canada

Policy. This is based on defaults under your CFA which states in *Part B, clause 4.1(a)* that:

"The Council shall be in default of the arrangement in the event:

(a) the terms and conditions of this Arrangement, or any other Arrangement between the Council and the Minister, are not met by the Council."

As stated at the November 26th meeting, INAC is unable to recognize a duly elected Chief and Council, and therefore does not have the ability to continue to provide programs and services under the CFA. There are also specific defaults detailed in the 2007-2008 Audit Letter, which have not been addressed. In addition the Audited Financial Statements for Fiscal year 2008-2009 have not been received; these Statements are in excess of 100 days late which represents a further default under the CFA.

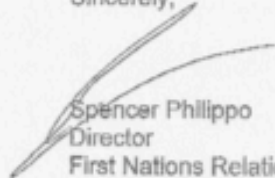
As a result of these defaults, INAC has initiated Third Party Management. Meyers Norris Penny LLP (MNP) has been selected as a Third Party Manager for the Nation utilizing a competitive process among qualified service providers. Further information, including contact numbers will be provided once all arrangements are completed, and a contract is in place.

MNP is being appointed to manage essential programs and services funded by Indian and Northern Affairs Canada and will not be mandated to resolve the governance dispute that exists at the Nation. Meyers Norris Penny LLP will seek cooperation from the parties to this dispute and will endeavour to employ Lubicon members where possible.

Further updates will be provided in the coming weeks. The welfare of Lubicon members is our first priority and we encourage you to work with MNP to insure the needs of your members are met.

Should you wish to discuss this matter further, please contact me at (780) 495-3396.

Sincerely,



Spencer Philippo
Director
First Nations Relations – Treaty 8
Alberta Regional Office
Indian & Northern Affairs Canada
#630, 9700 Jasper Avenue
Edmonton, AB T5J 4G2

