

## **Lubicon Court Actions, 1973-1988**

Marine Le Puloch  
University of Paris 7-Diderot

The Lubicon Nation, a small band of approximately 500 members living in northern Alberta, Canada, has never recognized that Euro-Canadian governments have any title to their territory or that Euro-Canadian courts have any right to legislate on the matter. However, from 1973 on, they entered into court proceedings in an effort to compel the Canadian government to obey its own laws by recognizing the Lubicon Nation's aboriginal rights. This article deals with the issue of aboriginal rights in Euro-Canadian law in the context of the court actions undertaken by the Lubicon.

### ***Lubicon Court Actions and Aboriginal Rights in Euro-Canadian Law***

#### *An Overview of Lubicon Court Actions*

In 1975, the Lubicon tried to file a caveat, a device for putting outsiders on notice that title to their territory was contested. The idea was to try and stop the activities of oil and gas companies, but because of provincial legislative maneuvers, retroactive legislation passed to defeat the caveat, it came to nothing. In 1980, the Lubicon filed a second legal action, in federal court, asking for recognition of their rights or, if the court found that Lubicon land rights had been extinguished, for treaty rights and compensation. They named both levels of the Canadian government and a number of oil companies as respondents.<sup>1</sup>

At the time, Alberta argued that the Lubicon had brought the case before the wrong court and should be suing the province in provincial court. The Lubicon therefore initiated another court action. In 1982, two legal actions were run before the courts: one against the provincial government and various offending oil companies in the Alberta Court of Queen's Bench, and another against the federal government and federally-owned Petro-Canada in the Federal Court of Canada. Both these parallel legal actions carried on until the fall of 1986, when the Supreme Court of Canada declared the Lubicon court action against the federal government inadmissible in federal court. The Alberta Court of Queen's Bench, however, refused to add the federal government to Lubicon action against the province, so that by the time the Lubicon asserted their own jurisdiction on their territory in October 1988, there was not a single court in Canada prepared to hear their case against the federal government. The main question raised here is that of the constitutional responsibility of the

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<sup>1</sup> Boyce Richardson, "Wrestling with the Canadian System: A Decade of Lubicon Frustration", in: Boyce Richardson (ed.), *Drumbeat: Anger and Renewal in Indian Country*, (Toronto: Summerhill Press, 1989), pp. 229-264; Lubicon Lake Indian Nation, "Historical Overview", Little Buffalo Lake, Alta., June 1989.

federal government for settling Lubicon land rights, a matter which is under their exclusive jurisdiction, as explained below.

*Aboriginal Rights and Euro-Canadian Law: the Royal Prerogative, the Common Law, and the Constitution*

The concept of aboriginal rights in Euro-Canadian law raises a number of questions, including that of the legal status of aboriginal title, the content of the rights derived from aboriginal title, the legality, if any, of the termination or restriction of these rights, and the legal obligation of the government to pay compensation for termination or restriction of the said rights. The fact that Aboriginal People were there first is at the core of the notion of aboriginal rights. Indian people define these as property rights they retain on their territories as the result of their original use and occupancy from time immemorial.<sup>2</sup> There are a number of common themes running through the concept of aboriginal rights expressed by Indian leaders, spokesmen and women, and writers. The Assembly of First Nations, representing more than one hundred and sixty Indian Nations, including the Lubicon Nation, and other representatives of the Aboriginal People in Canada, emphasize the importance of the land and its resources to their traditional way of life.

Before European influx, as well as after, the Indians have had a close relation with the land. They describe this relationship as different from standard European concepts of ownership or title, stressing its traditional communal character, but insist it is no less important to them. Although the traditional systems of occupation and use have been as distinct and patterned as the English common law notion of property, over the past two centuries it has been the English system of law that has been imposed over an area now comprising Canada. The English system recognizes three sources of law, statutes,<sup>3</sup> including constitutional enactments and subordinate legislation, the royal prerogative, and common law.

The most significant prerogative instrument is the Royal Proclamation of October, 7, 1763.<sup>4</sup> The English expressly recognized the validity of native property rights in the Royal Proclamation, acknowledging that it gave rise to a legally recognized interest in land.<sup>5</sup> Today in Canada, that part of the Proclamation which deals specifically with Indian people has the force of statute, because it has never been repealed by Parliament. As a result, First Nations have regarded the Proclamation as a major support for the contention that occupancy-based aboriginal rights have a legal status in the Euro-Canadian system.

The second major direct source of law is common law. Canadian courts have viewed aboriginal title as rooted within the strict sense of the Royal Proclamation,

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<sup>2</sup> David W. Elliot, "Aboriginal Title," in Bradford W. Morse, ed., *Aboriginal Peoples and The Law: Indian, Métis and Inuit Rights in Canada*, rev. 1st ed. (Ottawa: Carleton University Press, 1989), pp. 48-121.

<sup>3</sup> Statutes are written law passed by Parliament, that is the House of Commons and the Senate.

<sup>4</sup> The Royal Proclamation of October 7, 1763, Issued by King George III of Britain with Respect to the Governing of British North America.

<sup>5</sup> Elliot, pp. 52-56.

subject to geographical uncertainties.<sup>6</sup> In 1973 the federal government took the position, that all agreements on aboriginal rights would "be enshrined in legislation, enacted by Parliament, so that they will have the finality and binding force of law."<sup>7</sup> In 1978, the Canadian government, under Prime Minister Trudeau, initiated a process to bring the *British North America Act* of 1867, which so far had been under the jurisdiction of the British Parliament, under the control of the Canadian Parliament. It was to become the *Canadian Constitution Act*.<sup>8</sup>

On the one hand, First Nations in Canada were aware that any constitutional change might adversely affect the treaties their forbears had signed with the Crown before Canadian Confederation. On the other hand, they were hoping that the inclusion of aboriginal rights in the Constitution would, for the first time, signal their place in the Confederation. First Nations organized a lobby (with the support of political and human rights groups, demonstrations, letter campaigns, and information networks both in Canada and in Europe) in an effort to ensure that their rights would be protected when the Constitution was "brought home." In 1982 the *Constitution Act* was passed, acknowledging aboriginal rights and title but without defining them. Section 35 recognized and affirmed "existing" aboriginal rights, a term which by itself restricted the meaning of the clause. Also included was an amendment stipulating that the details and definition of aboriginal rights would be resolved through a conference involving federal and provincial Premiers and First Nations leaders:

35. (1) The existing aboriginal and Treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis people of Canada.

37. (1) A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within one year after this part comes into force.

(2) The conference convened under Subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item.<sup>9</sup>

To this day, "existing aboriginal rights" have not yet been defined.

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<sup>6</sup> Elliot, pp. 56-84

<sup>7</sup> Jean Chrétien (Minister of Indian Affairs and Northern Development), "Claims of Indian and Inuit People", August 8, 1973.

<sup>8</sup> *Constitution Act, 1982*, enacted by the *Canada Act, 1982* (UK), c. 11, sched. B.

<sup>9</sup> *Constitution Act, 1982*.

*The Extinguishment and Abridgment of Aboriginal Rights and Compensation*

The recognition of Indian original ownership of land resulted in the purchase of land. Under the 1763 Proclamation, procedures were provided for the surrender of aboriginal property rights. The main form of surrender has been by land cession treaty. Such treaties included the concept of aboriginal right to the land in question using the language of purchase and transfer of property rights.<sup>10</sup> There has been considerable uncertainty in Canadian common law regarding the scope of extinguishment or abridgment<sup>11</sup> of aboriginal rights effected by treaty. Indians who signed treaties had and have many reasons for complaint, as many of the promises made in the treaties have not been kept or were never initially fulfilled.

One important matter relative to common law is the effect of a waiver or defect on the capacity of an Indian treaty to effect extinguishment or abridgment. Can a treaty, once signed, be consequently held as ineffective because the federal government did not meet with its application, or because it is ambiguous and contains misunderstanding or errors? If this is the case, the question of claims based on aboriginal title should remain open in the area covered by the said treaty, for the people who signed such treaty and for their descendants. One of the main questions raised since the *Constitution Act* was passed is how section 35 will affect extinguishment and abridgment of aboriginal rights and title to land. In Canada, although many statutes provide for compensation for expropriation of property, there is no general constitutional right to compensation where property has been taken.

The general position of Canadian common law regarding compensation for the taking of private property interests is simple to state but difficult to apply. On the one hand, common law imposes no automatic, overriding obligation on government to provide compensation for taking private property. On the other hand, there is a common law presumption that the government will provide compensation for the expropriation or taking of private property, unless the relevant legislation or other enactment clearly indicates the contrary. Since no agreement has yet been reached between First Nations and both levels of the Canadian government on the meaning of section 35, it has given rise to broadly different interpretations of its significance and of its consequences on federal and provincial legislation. Do the words "existing aboriginal rights" confirm and extend to all registered Indians the benefits the treaties provide in exchange for the lands surrendered to the Crown, namely reserved land with surface and sub-surface rights, assistance in the social, economic and cultural development of the communities living on reserves, free health and education services on and off the reserve and the right of the Indian people to hunt, trap and fish on their traditional territory? The Supreme Court of Canada has yet to make a definitive statement on the impact of this section, to whom the responsibility to define aboriginal rights reverts to, and whether section 35 gives aboriginal rights more than common law status, making them immune to statutory change.

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<sup>10</sup> Elliot, pp. 111-120.

<sup>11</sup> Extinguishment is Canadian government action that terminates Aboriginal title to land. Abridgment is Canadian government action that restricts Aboriginal rights, but falls short of terminating Aboriginal title.

*The Basis of Lubicon Court Actions**The Nature of the Lubicon Claim in Euro-Canadian Law*

The Imperial and Canadian governments have neglected to complete the process of land acquisition. The provinces of Saskatchewan and Alberta were created in 1905. On July 12, 1906, the Superintendent General of Indian Affairs issued a report stating that aboriginal title to land had not been extinguished in the greater portion of that part of Saskatchewan which lies north of the 54th parallel of latitude and in the adjoining area in Alberta which includes Lubicon territory.<sup>12</sup> The treaty-making period ended barely sixty years ago and only about one third of Canada was dealt with. As a result, another fundamental and controversial issue has been to decide whether a treaty terminates or restricts aboriginal rights of all Indians in regard to a given area of land, or leaves open the question for the Indians, whose ancestors were not parties to the treaty, but have traditionally used and occupied the land in question.

This is the case with the Lubicon Lake Indian Nation; although Canada considers that Treaty Number Eight covers their territory, they maintain that they did not surrender their land and that their aboriginal rights, therefore, are not extinguished. Lubicon court actions not only involve land rights, but also related rights such as sub-surface rights and hunting, fishing, and trapping rights. The basis of these rights in Euro-Canadian law and their implications are discussed below.

*Land Rights and the Law*

The Lubicon claim rights over 4,000 square miles of land which was never ceded to the Crown in the right of Canada, either by or under the provision of Treaty Number Eight, or by any subsequent parliamentary action, including the *Constitution Act* of 1930,<sup>13</sup> which includes the *Alberta Natural Resources Agreement*.<sup>14</sup> They also claim rights arising under the provisions of Section 35 of the *Canadian Act* of 1982. If the courts decide that their aboriginal rights had been somehow extinguished, the Lubicon ask for a declaration that they have treaty rights. Regarding land rights, they claim that there, in fact, exists within the area of land in question a reserve of some 25 square miles at and around the west end of Lubicon Lake. In addition, by virtue of the number of Band members, they claim an entitlement, pursuant to the provisions of Treaty Number Eight to an additional 35 square-mile reserve, to be set out of an area of around 900 square miles centered on Lubicon Lake. Regarding other treaty rights, they claim compensation for lost treaty annuities and for damages, educational and medical services, and mineral rights within the initial 25 square-mile reserve, with compensation for lost revenues.

*Mineral Rights and the Law*

The question of Lubicon ownership of minerals located on their territory is subject to provincial interests and to the *Indian Act*,<sup>15</sup> which determines all aspects

<sup>12</sup> Superintendent General of Indian Affairs, *Report to the Minister of Indian Affairs*, July 12, 1906.

<sup>13</sup> *Constitution Act, 1930*, RSC 1970, app. II, no. 25, formerly *British North America Act, 1930*, c. 26 (U.K.) 20-21 George V.

<sup>14</sup> *Alberta Natural Resources Agreement*, Alberta SC 1930, c. 21.

<sup>15</sup> *Indian Act*, RSC 1970.

pertaining to Indian people and their rights. The determination of Indian mineral rights is simply another aspect of the larger question of Indian interest in reserve lands.<sup>16</sup> The *Alberta Natural Resources Act* of 1930 asserted, that with respect to reserves: "neither the said lands nor the proceeds of the disposition thereof shall in any circumstances become administrable by or be paid to the Province." The province therefore, is not entitled to share any consideration arising from mineral deposits on Indian reserves. Management and control of mineral development on reserves is subject to the *Indian Act* and the *Indian Oil and Gas Act*.<sup>17</sup>

According to the *Alberta Natural Resources Agreement* of 1930, only those persons authorized under provincial mining legislation may prospect or exploit minerals on Indian reserves, but such persons must first obtain permission from the federal government. The federal government, therefore, possesses a veto. The *Agreement* also provides that the federal government shall administer and dispose of minerals on reserves.

Under sections 37-39 of the *Indian Act*, minerals on reserves must be surrendered before sale. The *Indian Oil and Gas Act* provides for the disposition of Indian oil and gas rights and for royalties at levels similar to those established by the provinces. To be valid, any such surrender requires the assent of the majority of the Band and the agreement of the Governor in Council. The fact that a surrender is required prior to the disposition of mineral rights confers an absolute veto on Band members.

There are two possibilities arising from the Lubicon case. On the one hand, if the courts rule that Lubicon rights are not extinguished, then the province has sold and leased unsurrendered minerals. On the other hand, if the courts rule and prove that Lubicon rights are extinguished, then the Lubicon have never received any royalties on oil and gas production from wells on their reserve. In both cases, Alberta is in the wrong according to Canadian law, as is the federal government – both as owner of Petro-Canada which likewise exploits oil in Lubicon territory, and in its capacity as trustee for Indian mineral rights and other interests. That is why the federal government is accused by the Lubicon of conflict of interest.

### *Hunting, Trapping and Fishing Rights and the Law*

The Lubicon also claim hunting, trapping and fishing rights over the entire 4,000 square miles by right of the *Alberta Natural Resources Agreement* of 1930, which recognized these rights of the Indians.<sup>18</sup> The Indians' right to hunt and fish for food on unoccupied Crown land has always been recognized in Canada and originates from the Royal Proclamation, which declared that the Indians

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<sup>16</sup> Richard H. Bartlett, "Reserve Lands: Mineral Rights on Reserve Lands," in Bradford W. Morse, ed., *Aboriginal Peoples and The Law* (Ottawa: Carleton University Press, 1989), pp. 536-545; Richard H. Bartlett, "Indian and Native Rights in Uranium Development in Northern Saskatchewan", *Saskatchewan Law Review* 13 (45): 1980.

<sup>17</sup> *Indian Oil and Gas Act*, SC 1974-75-76, c. 15.

<sup>18</sup> Norman K. Zlotkin, "Post-Confederation Treaties: Treaty Hunting and Fishing Rights," in Morse, *Aboriginal Peoples*, pp. 328-390.

should not be molested or disturbed in the possession of such parts of the Our Dominion and Territories as, not having been ceded to or purchased by Us are reserved to them or any of them as their hunting grounds.<sup>19</sup>

Historically, hunting, fishing and the gathering of wild plants constituted the primary source of food for the Indians in Canada. This mode of food gathering was directly related to their social organization and religion. In many areas, hunting and fishing continue to fulfill this historical role.<sup>20</sup> In the 1960s the *Indian Act* still dominated Indian Affairs in Canada. Nevertheless, since the end of the Second World War, the Indians began to be affected by federal and provincial legislation, such as hunting and fishing regulations, which is totally unrelated to the Native way of life and is passed without regard to its effect on the Indians. Restrictions imposed on Indian hunting and fishing rights have contributed to the nutritional deprivation of the Indians. There is strong medical evidence that malnutrition and its effects were, and still are, all too prevalent in the Indian population.<sup>21</sup> Such conditions are, in part, the result of disruption of traditional yields from hunting and fishing and in part the result of a shift toward those European dietary patterns which are associated with poverty. Although the strict protection of Indian hunting and fishing rights cannot provide a comprehensive solution to the problem, in certain cases the restriction of such rights has imposed dire hardship upon the Indians. The profound concern of the Indians – that their historic rights to hunt and fish remain undisturbed – cannot be over-emphasized. The issue constantly reappears in current writing by and about Indians,<sup>22</sup> and there can be no doubt that the preservation of their hunting and fishing rights was a major concern for the Indians when treaties were negotiated.

In the region surrounding the Lubicon's traditional territory, the importance given to hunting and fishing rights is well illustrated by the following passage from the report of the Commissioners representing the Canadian government at the signing of Treaty Number Eight:

Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it.<sup>23</sup>

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<sup>19</sup> The Royal Proclamation of October 1763.

<sup>20</sup> Harold Driver, *Indians of North America*, rev. 2d ed. (Chicago: University of Chicago Press, 1961), pp. 84-85.

<sup>21</sup> See Heather Robertson, *Reservations Are For Indians* (Toronto, Lewis & Samuel, 1970).

<sup>22</sup> See Harold Cardinal, *The Unjust Society* (Edmonton.: M. G. Hurtig, 1969).

These Indians, as well as all others, would, indeed, have been surprised if, in the face of such assurances, a clause such as this which purported to continue their rights to hunt and fish could be used to restrict their right to shoot game birds to one and one-half months each year. Indian people hunt and fish for food, not for sport; and conservation measures are necessary only because of the White man's practices. While the Indians have continued to hunt, trap, and fish all year round for food, it is only recently that any attempt has been made to enforce some form of special status. The question of whether special status is to prevail over the *Natural Resources Agreement* is a false question, since the Canadian government has guaranteed Indians the following rights: "hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown land,"<sup>24</sup> and declared that this agreement should "have the force of law notwithstanding anything in the *British North America Act* ... or any Act of the Parliament of Canada."<sup>25</sup>

Land rights and such related rights as mineral, hunting, fishing, and trapping rights do not cover all aboriginal rights, but they are essential to self-sufficiency and eventually to the complete autonomy of the Indians. Land is the key issue, even if the term "aboriginal rights" has a much broader meaning. The Lubicon have been pleading these rights since 1980, but they started to seek redress in Canadian courts back in the early 1970s, when developers began invading their territory.

### ***The Lubicon Nation v. Euro-Canadian Courts***

#### *The Lubicon File a Caveat (1975)*

In 1973 the Lubicon Nation was associated with other isolated communities. Lawyers for the Indian Association of Alberta advised them to file a caveat with the Registrar of the Alberta Provincial Land Registration District. Such a caveat has no force in law, being only a procedural device. Its effect, if accepted, would have been to create a safeguard against potential development in Lubicon territory, to preserve Lubicon title to land while any court action was being argued and to increase pressure to resolve outstanding ownership and jurisdictional issues<sup>26</sup>. The caveat was filed in October 1975. The province contested the caveat and refused to file it, as required by Alberta law, claiming that aboriginal rights had not been proved. The Lubicon then took the province to court, asking that Alberta be ordered to obey provincial law. However, the Lubicon had no money for court actions. They asked the federal government, in its capacity as trustee of Indian interests in Canada, constitutionally responsible for ensuring that aboriginal rights in Canada are respected and enforced, to support and assist them in prosecuting their case against the provincial government. The federal government, however, stepped in, but not in Lubicon defense, arguing that the caveat should not be allowed.

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<sup>23</sup> *Treaty Number Eight Made June 21, 1899 and Adhesions and Reports* (Ottawa: Queen's Printer, 1964).

<sup>24</sup> *Alberta Natural Resources Agreement*.

<sup>25</sup> *Constitution Act, 1930*.

<sup>26</sup> Lubicon Lake Indian Nation, Communication No. 167/1984 of Chief Bernard Ominayak and the Lubicon Lake Band to the Human Rights Committee, New York, February 14, 1984; Fred Lennarson (Political Adviser of the Lubicon Nation), "Information Package," The Mimir Corporation: Edmonton, Alta., January 28, 1985; Lubicon Lake Indian Nation, "Historical Overview," pp. 9-11.

In September 1976, the Provincial Attorney General filed an application with the Supreme Court of Alberta to postpone a hearing of the case pending the outcome of a similar case in the Northwest Territories, called the *Paulette Case*,<sup>27</sup> argued before the Supreme Court of Canada. The application was granted. In 1973 the *Paulette Case* had raised, for the first time, the fundamental question of whether the literal words of the treaties – the treaty in question being Treaty Number Eleven – are in fact representative of the true understanding of the Indian Nations at the time of treaty-making. The Supreme Court of Canada dealt with the issue as a technicality, leaving unresolved the outstanding issue of whether there truly was a legally effective surrender of Native Title by Treaty Number Eleven. The case went against the Indians, but the decision stated that the court would have held for the Indians and ordered the government to file the caveat had the land registration law in the Territories been written the same in Alberta as in Saskatchewan.

The specific mention of Alberta in the *Paulette* judgment made it clear that caveats could be entered in that province against unpatented Crown land. As Lubicon territory is of this type, the only issue that would have to be decided now was whether aboriginal title was of the kind that could be registered in the form of a caveat. Following the *Paulette* decision, Alberta went back to court and asked that the hearing of the case be postponed again. The court agreed and in the meantime the province changed legislation that could have worked to the advantage of the isolated suing communities, making its effect retroactive to before the time the Indians tried to file the caveat. The province, therefore, took away rights which were currently the subject of a case before the Canadian courts. In 1977 at hearing on the acceptability of caveat, the judge dismissed the case as "moot," meaning that it no longer had any basis in law. It could be said that from that date the Lubicon entered the modern era of judicial bad faith, which eventually led them to withdraw from all legal actions before Canadian courts.

*Lubicon Application for an Injunction Against Provincial Government and Norcen et al. (September 1982)*

In 1982 the Lubicon Nation asked the courts for an immediate interim injunction to stop drilling and exploration in order to prevent the oil companies from perpetrating further damage to wildlife resources and to their way of life. The Lubicon filed the application in September 1982, claiming that their traditional lands and way of life were being irreparably damaged by development activities and arguing that their way of life depended upon hunting and trapping – essential and determining factors not only with regard to how they fed and clothed their families, but also with regard to how they organized their time, how they related to one another, and how they educated their young. In other words, with regard to how they dealt with basic questions of life and death.<sup>28</sup>

They argued that what was being destroyed by development activities was a whole way of life, which could never be compensated for or replaced by money. The application was supported by the sworn affidavits of knowledgeable Indian Elders and

<sup>27</sup> *Paulette et al. v. The Queen*, [173], 6 W. W. R. 97, 115.

<sup>28</sup> *Ominayak et al v. Norcen Ltd. et al: Reasons for Judgment*, Alta. C.Q.B., November 17, 1983; Fred Lennarson, November 24, 1983.

qualified scientific experts. A motion was made shortly thereafter to proceed with the application on the basis of both filed affidavit evidence and live testimony. This application was opposed by Alberta and the oil companies on the basis that it would be too time consuming. Their objections were sustained and the application was directed to proceed on affidavit evidence only. A judgment was rendered in November 1982 on the first set first set of preliminary issues in favor of the Lubicon and dismissing the objections of the province and the oil companies, which argued that the Crown was immune from injunction.<sup>29</sup>

From November to December 1982, the second set of preliminary objections were argued. Provincial and oil company lawyers claimed that the injunction application should not be heard, arguing that the damage was not irreparable because the trees would grow back; if not, damage could still be compensated for by money, while an injunction would have an irreparably detrimental effect on provincial economy. Finally, they argued that even if the plea relative to the destruction of Lubicon economy and way of life was accepted, the Lubicon might still lose the main action calling for recognition of aboriginal rights. If they did, they would never be able to repay the province and the oil companies for lost revenues through the application of an injunction.

The Lubicon viewed such procedural arguments as designed to preclude judicial determination of the ownership question until they would no longer be able to fight for their rights, in which case the province would win by default. As judgment had not been received on the second set of preliminary objections by late February 1982, and as the winter months had seen much oil exploration activity in Lubicon Lake area with a drastic decline in the animal population, the Lubicon filed an application in February 1983 to place further evidence of the changed circumstances on the record.<sup>30</sup> This application, however, was adjourned and a judgment was rendered on the second set of preliminary arguments in March 1983, by which the court dismissed the remaining preliminary objections. The Lubicon had beaten the provincial procedural arguments and were granted a hearing of their application for an emergency injunction, but the application was not heard until September 1983. Another drilling season had come and gone.

While the application for an Interim Injunction was still pending, Alberta proposed to sell mineral rights under the very lands which the Lubicon claimed as the reserve established for their benefit in 1940 and unilaterally dissolved by Alberta in 1954. The application for an Interim Injunction commenced in September, 1983, a year after it was filed. The case was argued for about five weeks, probably the longest Interim Injunction Application in the history of Alberta. All together, the Lubicon filed twenty affidavits to support the application. Seven affidavits by Chief Bernard Ominayak described his people and their history, hunting and trapping in the area and recent development activities and their effects on hunting and trapping. Seven other affidavits by prominent community Elders described, in Cree, their traditional lands and way of life and the effect of recent development activities on their way of life; all of them have hunted and trapped for a living since at least their teens and as long as sixty years in some cases. These Elders are the people upon whom the rest of the

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<sup>29</sup> *Ominayak et al v. Norcen Ltd. et al*, [1982] 23 A.L.R. 284, no. 1, (1983), (Alta. C.Q.B.).

<sup>30</sup> Fred Lennarson, January 3, 1985.

Lubicon depend for information and advice regarding hunting, trapping, life, death, marriage, and childbirth. In other words, their whole way of life. In many cases they are the patriarchs of large families, encompassing as many as eighty brothers, sisters, children, grandchildren, nieces, and nephews. In addition, the Indians submitted six affidavits from technical experts.

In response to these various affidavits submitted by the Indians, the province and the oil companies filed affidavits challenging the Lubicon's contentions that development activities were having an adverse effect on wildlife. They argued that decreasing takes of animals were not due to extensive development activities, but to the natural cycles of the animals, to an infestation of ticks adversely affecting the moose population, to over-trapping and to decreases in the efforts made by trappers. Regarding the Lubicon way of life, provincial, and oil company lawyers argued, that the idea of an Indian way of life was "nebulous" and had not been demonstrated, that "any aboriginal way of life has already been unalterably affected by the encroachment of modern life" and that "the Indians and Inuit have abandoned their ancestral way of life and adopted white man's ways." They concluded that it was impossible to do irreparable damage to something which does not exist<sup>31</sup>. The application was dismissed in November 1983, and the province was allowed to continue its action by selling the very land which the Lubicon Nation claimed as an Indian reserve.

The effect of the judgment was as follows: the legal rights claimed by the Lubicon constituted a serious issue to be judged by the courts. Therefore, Alberta could not claim immunity from injunctive relief. However, the fact that aboriginal rights were now constitutionally recognized did not, in practice, protect such rights from damage or destruction. According to the judgment, contact between native groups and twentieth-century white society superseded and eliminated their Indian way of life, and the evidence of Elders as to the way of life of their extended family and community was insufficient or inadequate. While loss of way of life was deemed potentially remedial in money damages, loss of oil company profit was not; thus, the Indians would not suffer irreparable harm if no injunction was granted, but oil companies would. Furthermore, the Indians, being poor and thus unable to provide a financial undertaking to the oil companies for damages, were regarded as not entitled to an injunction.

In January 1984 the court rendered its decision concerning costs for the proceedings described above. In essence, the judge decreed that the Lubicon were liable for all costs associated with the hearing, whatever might be the result of Lubicon action calling for recognition of their aboriginal rights. The Lubicon appealed this judgment to the Alberta Court of Appeal and in January 1985, the court argued that the Lubicon would be able to restore the wilderness with money paid in damages if they won their action calling for recognition of their aboriginal rights.<sup>32</sup>

The Lubicon appealed to the Supreme Court of Canada in February 1985, but in March the application was dismissed, with costs. The court declined to hear the

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<sup>31</sup> *Ominayak et al v. Norcen Ltd. et al.*

<sup>32</sup> *Appeal from the Judgment of the Forsyth, J.: Appeal No 16057, Court of Appeal of Alberta: Calgary Civil Sittings, January 11, 1985; Fred Lennarson, January 3, 1985.*

case, arguing first that no irreparable damage had been done. Secondly, that the "balance of principle" should prevail – in other words that the interests of the majority, or development companies, overcame those of the minority, or the Lubicon people and, finally, that the Lubicon could not prove that they owned the land.<sup>33</sup> Generally speaking, criteria for granting leave to appeal are threefold: whether the questions presented are of public importance, whether the case contains important issues of law, or whether the proceedings are, for any reason, of such a nature or significance as to warrant a decision by the Supreme Court of Canada. The issues presented by the Lubicon Nation involved questions not yet adjudicated by the Supreme Court of Canada, such as the interpretation of the constitutional rights of Aboriginal People, the remedies available to them, their right to carry out traditional subsistence activities, and the legal regime applicable to a large area of land in Northern Alberta. These questions incontrovertibly fall within the criteria set out for granting leave to appeal. By its decision, the Supreme Court of Canada provided a clear signal to Alberta that it may, with impunity, dispose of land even though a dispute over title to the said land had been before the courts for the past five years.

*Lubicon Aboriginal Rights Case Against the Federal Government, Alberta and Major Developers (1980)*

The Lubicon did not view destruction of their economy and way of life as the unfortunate result of contact between their traditional aboriginal society and a modern industrial state, but as the calculated result of a deliberate provincial legal strategy, by which the lower courts have held that anyone asserting un-extinguished aboriginal rights must be able to prove that they continue to pursue a traditional way of life. Processing of the Lubicon's application for an injunction had lasted four years, during which time Alberta had deliberately destroyed Lubicon territory (and still continues to do so). Ironically, this means that their lawyers can argue that since the Lubicon no longer depended upon their traditional economy – which Alberta had a hand in destroying – they no longer had aboriginal rights.<sup>34</sup>

In April 1980 the Lubicon Nation filed an action in the Federal Court of Canada against the Federal Government, the province of Alberta and several oil companies.<sup>35</sup> In 1982 the Federal Court dismissed the claim on jurisdictional grounds, holding that it had no jurisdiction over the province and oil companies. The Lubicon then took the matter to the Federal Court of Appeal, which allowed the action to stand in the Federal Court of Canada with the federal government and federally owned Petro-Canada as defendants. However, in October 1986 the Supreme Court of Canada rendered Lubicon action for the recognition of their aboriginal rights moot, with a decision to the effect that one cannot sue the federal government in federal court regarding aboriginal land rights within provincial borders. The court argued that aboriginal land rights within Provincial borders involve Provincial land rights and must therefore be adjudicated before provincial courts. The Lubicon therefore moved to add the federal government to their court action against the province, starting in

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<sup>33</sup> Supplement to Communication No. 167/1984 of Chief Bernard Ominayak and the Lubicon Lake Band to the Human Rights Committee, New York, March 27, 1985.

<sup>34</sup> Lubicon Lake Indian Nation, "Historical Overview."

<sup>35</sup> *Ominayak v. Norcen et al*, 1980, Trial Division of the Federal Court of Canada; Lubicon Lake Indian Nation, Communication to the Human Rights Committee, 1984, pp. 11-12.

February 1982. However, federal government lawyers opposed the idea, arguing that the federal government retained no interest in Lubicon territory since the *Land Transfer Agreement* was passed in 1930. The federal government thus flouted both sections 10 and 11 of the *Alberta Natural Resources Transfer Agreement*, which stipulates that aboriginal interests remained subject to the Crown, and sections 35 and 37 of the *Constitution Act* which state that responsibility for settling aboriginal rights is a matter of exclusive federal government jurisdiction.

### ***Conclusion***

Since the courts considered Lubicon land as within provincial jurisdiction, they implied that once exploration permits are issued on Crown land, the land is considered occupied and therefore unavailable as an Indian reserve. Such a suggestion would stifle the Lubicon land claim and violate both the *Natural Resources Land Transfer Agreement* and the Constitution.<sup>36</sup> In October 1988 the Lubicon were to appear before the Alberta Court of Appeal in Calgary to continue the eight-year long debate over whether any court in Canada has jurisdiction over the federal government with regard to the question of aboriginal land rights within the province of Alberta; but the Lubicon announced instead that they were withdrawing from all legal actions.

If, instead of rulings from different lower courts, the Supreme Court had ruled that the Lubicon Nation never ceded its aboriginal rights, then their claim would by now be settled. However, in 1985 and again in the fall of 1986, the highest court in Canada ruled against the Lubicon Nation, thus denying them fundamental justice, equality before the law, and the right to equal protection and benefit of the law. In light of these decisions is the court the appropriate forum for dealing with aboriginal title? Litigation is expensive, time-consuming and abounds with technical uncertainties. Supposing the Lubicon were successful in their court actions, further litigation would have been necessary.

Regarding the Lubicon legal action seeking a declaration that aboriginal title exists, the question of the precise incidents of aboriginal title would have to be answered since the problem of its legal content does not fall within the competence of Canadian courts. In those instances where aboriginal title existed, but had been declared extinguished, there would have been litigation anon to determine if compensation was payable. Furthermore, new conflicts might have arisen between the Lubicon and competing land developers and litigation would again have ensued. It seems obvious that these issues are best determined and resolved by constitutional legislation rather than by litigation. Such questions cannot be answered by a yes or no, which is the only approach a court can take. The issues are such that they only can be resolved to the reasonable satisfaction of all through a negotiated settlement. To accomplish this, the Canadian government must now define aboriginal rights in the Canadian Constitution and provide for a legislated settlement. The Lubicon, however, cannot afford to wait. They have come to the conclusion that their claim should not be dealt with before courts established by the Canadian government or before judges appointed by the Canadian government and within the context of a body of law

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<sup>36</sup> R. H. Bartlett, "Indian and Native Rights in Uranium Development in Northern Saskatchewan", *Saskatchewan Law Review* 13 (1980): 45.

created by the Canadian government. The issue should rather be argued before Lubicon courts and Lubicon judges, within the context of Lubicon laws.