RESPONSE OF THE GOVERNMENT OF CANADA TO THE COMMUNICATION DATED JANUARY 30, 1986 OF GRAND CHIEF DONALD MARSHALL, GRAND CAPTAIN ALEXANDER DENNY AND ADVISOR SIMON MARSHALL, AS OFFICERS OF THE GRAND COUNCIL OF THE MIKMAQ TRIBAL SOCIETY

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I. GENERAL

The Secretary General of the United Nations in his note No. G/SO 215/51 CANA (42) 205/1986, dated August 6th, 1986, requested Canada's comments on a communication to the Human Rights Committee dated January 30, 1986, submitted by Grand Chief Donald Marshall, Grand Captain Alexander Denny and Advisor Simon Marshall as officers of the Grand Council of the Mikmaq tribal society. In their communication, the authors allege that as a consequence of the federal government's refusal to allow representatives of the Mikmaq tribe to participate in constitutional discussions, the Government of Canada has breached the right of self-determination in Article 1(1) of the International Covenant on Civil and Political Rights.

The Government of Canada was also requested to inform the Committee as to whether any of Canada's submissions in communication, No. R.19/78, Alexander Denny v. Canada are relevant to the question of admissibility of the present communication and if so, to indicate which parts should be regarded as placed before the Committee in the present case. In this regard, the Government of Canada has indicated under the appropriate subject heading below what portions of its earlier submissions are to be considered in the present communication.

II. INADMISSIBILITY OF COMMUNICATION

The Government of Canada submits that the communication, as it pertains to the right of self-determination, is inadmissible for the following reasons. Firstly, the right of self-determination is inapplicable in the present circumstances because it cannot be invoked to affect the national unity and territorial integrity of Canada. Secondly, the right of self-determination applies to a "peoples" and it is the position of the Government of Canada that the Mikmaq tribal society is not a "people", as that term is used in Article 1 of the Covenant. Thirdly, communications under the Optional Protocol can only be made by individuals and must relate to the breach of a right conferred on individuals. The present communication relates to a collective right and the authors therefore lack standing to bring a communication, pursuant to Articles 1 and 2 of the Optional Protocol. Fourthly, the communication incorrectly asserts that the Halifax Treaty of 1752 confirms the existence of the Mikmaqs as an independent state. Fifthly, the authors have wrongly characterized the constitutional conferences as relating to the right of self-determination. The communication is therefore incompatible ratione materiae with the provisions of the Covenant and as such, should be found inadmissible under Article 3 of the Protocol. Lastly, the authors have failed to exhaust all available domestic remedies, both legal and administrative, as required by Article 5(2)(b) of the Optional Protocol.

1. Article 1 of the International Covenant on Civil and Political Rights cannot affect the national unity and territorial integrity of Canada

Article I of the International Covenant on Civil and Political Rights recognizes the right of self-determination. To the extent that the communicants claim that the Mikmaq tribal society has a right of Statehood, it is the position of the Government of Canada that this right is applicable only to dependent or colonial territories. It cannot be invoked to affect the national unity and territorial integrity of an independent sovereign State, such as Canada.

It is relevant to note that the third paragraph of Article 1 states that all States Parties to the Covenant "shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations". In the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly Resolution 1514 (XV) of 14 December 1960, the General Assembly declared that:

> Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

In the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Resolution 2625 (XXV) of

24 October 1970, the General Assembly stated under the principle of equal rights and self-determination of peoples that:

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

In addition, the Government of Canada refers to its comments on this point in its submission dated May 17, 1982 in No. R.19/78, Alexander Denny v. Canada at pages 2 to 7, and in particular sections 1.a) and b) and section 2.a). (For ease of reference, a copy is attached as Appendix "A").

In summation, the Government of Canada submits that the right of self-determination cannot be invoked in circumstances that would prejudice the territorial integrity or the political unity of a sovereign non-colonial State. The authors' communication should therefore be declared inadmissible pursuant to Article 3 of the Optional Protocol, as incompatible ratione materiae with the provisions of the Covenant.

2. To whom does Article 1 of the Covenant apply

The Government of Canada submits that the Mikmaq tribal society does not, for the purposes of Article 1 of the Covenant, constitute a "people". Therefore, it cannot, under the Protocol,

assert a violation by Canada of the right of self-determination. (This issue was considered in Canada's earlier submission dated May 17, 1982 at p. 5, section 1.c).)

As noted by Aureliu Cristescu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities in The Right to Self-Determination - Historical and Current Development on the Basis of United Nations Instruments (U.N. Doc. No. E/CN.4/Sub. 2/404/Rev. 1) (1981),

> The [United Nations] Charter and other United Nations instruments use the term "people". However, apart from the explanation given for this term in the memorandum prepared by the secretariat of the San Francisco Conference, it will be found that there is no accepted definition of the word "people" and no way of defining it with certainty. The Charter is of little help on this point because it gives no details or explanations of the concept of "peoples". There is no text or recognized definition from which to determine what is a "people" possessing the right in question.
>
> When various United Nations organs have examined the question of a definition of the term "people", widely varying opinions have been expressed.... (para. 269-270)

Even in the absence of an internationally-accepted meaning for "people" in all contexts, the government of Canada submits that a minority group living within the midst of a more numerous population grouping and occupying territory co-extensive with that grouping within a democratic and independent State, cannot claim to be a people within the meaning of Article 1 of the Covenant. This principle has been acknowledged by authors commenting on the right of self-determination. As noted by Cristescu,

> A people should not be confused with ethnic, religious or linguistic minorities, whose existence and rights are recognized in Article 27 of the International Covenant on Civil and Political Rights. (para. 279)

It is noteworthy that the Human Rights Committee in its views adopted on July 30, 1981 under article 5(4) of the Optional Protocol on Communication No. 24/1977 submitted by Sandra Lovelace, a Canadian Maliseet Indian woman, recognized the applicability of Article 27 to the Indians of Canada.

The Government of Canada further submits that "people" within the meaning of Article 1 cannot, in either a legal or a practical sense, apply to a thinly scattered minority dispersed among the majority, like the Mikmaqs. As noted by a distinguished writer, Robert Emerson:

> Where there is such intermingling, no form of self-determination, short of mass migration, can be invoked to satisfy such demands as the minority community may make for recognition of its separate identity.[1]

In their comments relating to who may assert the right of self-determination, the authors have stressed at paragraph 40 of their communication that "Canada refers to the indigenous nations of North America are [sic] 'peoples' in sections 25, 35 and 37 of its Constitution Act, 1982". It is the position of the Government of Canada that the interpretation of a particular word or phrase must

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1. Emerson, R., Self-Determination, (1971) 65 American Journal of International Law 472. See also Jacques Brossard, L'Accession à la souveraineté et le cas du Québec, Montréal, 1976, Presses de l'Université de Montréal, p. 87.

be examined within the context of the document in which it is contained. This view is supported by Article 31 of the Vienna Convention on the Law of Treaties which requires that treaties be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". (emphasis added)

At the outset, it should be noted that the Constitution Act, 1982 (enacted as Schedule B to the Canada Act 1982 (U.K.) 1982, c. 11) refers to the "aboriginal peoples of Canada" (emphasis added), which phrase is clearly incompatible with the notion of granting an independent state to aboriginal peoples. Section 35(2) of the Constitution Act, 1982 defines the phrase "aboriginal peoples of Canada" as including the "Indian, Inuit and Métis peoples of Canada". This phrase was used in the Act to ensure that all of the three main groups of aboriginal peoples were clearly covered by the provisions of the Constitution relating to aboriginal matters. It was intended to correspond to domestic circumstances in Canada.

The above interpretation is clearly not the meaning contemplated by the authors of the International Covenant on Civil and Political Rights, who, according to the travaux préparatoires, envisioned circumstances relevant to the international level.[1] Clearly, a word used in national legislation for domestic purposes and in light of domestic circumstances does not necessarily have

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1. See Rigo Sureda, "The Evolution of the Right of Self-Determination" (Leiden, 1973), p. 103 et seq.

the same meaning or scope as the same word used in an international instrument.

In Canada, based on the 1981 census, there are approximately 98,000 Métis, 28,000 Inuit and 75,000 non-status Indians. Of Indians registered under the Indian Act, R.S.C. 1970, c. 1-6, there are approximately 360,000 and 592 Indian bands in Canada. These bands possess widely diverse linguistic, cultural, social and ethnic traits. The number of Mikmaqs registered under this Act amounts to 14,072 persons. They are geographically scattered throughout the provinces of Nova Scotia, New Brunswick, Prince Edward Island and Quebec. In the same geographical area claimed by the Mikmaq, there live more than 2,000,000 Canadian residents intermingled with the Mikmaq. Therefore, even if the right of self-determination could be applied to a sovereign non-colonial State such as Canada, it has no application in the present circumstances, because in factual and legal terms, the Mikmaq tribal society cannot be considered a "people" within the context of Article 1. The communication is therefore incompatible ratione personae with Article 1 of the Covenant and should be deemed inadmissible pursuant to Article 3 of the Optional Protocol.

3. The effect of collective rights under the Optional Protocol

Article 1 of the Optional Protocol provides that:

> A State Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by

that State Party of any of the rights set forth in the Covenant. (emphasis added)

Further, Article 2 of the Optional Protocol states that "individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies" may submit a communication to the Committee (emphasis added).

Article 1 of the Covenant recognizes that: "all peoples have the right of self-determination" (emphasis added). It is the Government of Canada's view that the right of self-determination, being a collective right, is not in and of itself available to an individual. The Optional Protocol relates to breaches of rights that appertain to individuals, and cannot therefore be invoked by a collectivity. This view is supported by reference to the preparatory work of the Protocol (see the Official Records of the U.N. General Assembly, 21st Session, A/C.3/SR.1441, pp. 383-5, and A/C.3/SR.1446, p. 412). It is also relevant to note J.R.T. and the W.G. Party v. Canada, Communication No. 104/1981, in which the Human Rights Committee dismissed a communication, in part, because the W.G. Party was an association and not an individual, and as such could not submit a communication to the Committee under the Optional Protocol. (See also Case No. 163/1984, Report of the Human Rights Committee, 39 U.N. GAOR Supp. (no. 40) at p. 197.)

The Government of Canada submits that self-determination as contained in Article 1 of the Covenant is not an individual right, but rather provides the necessary contextual background for the

exercise of individual human rights. This view is supported by the following phrase from the Committee's General Comments on Article 1 (CCPR/C/21/Add. 3, 5 October 1984) which provides that the realization of self-determination is:

> an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. (emphasis added)

This document goes on to recognize that the rights embodied in Article 1 are set apart from, and before, all the other rights in the International Covenant on Civil and Political Rights and in the International Covenant on Economic, Social and Cultural Rights. The rights in Article 1, which are contained in Part I of the Covenant are, in the submission of Canada, different in nature and kind from the rights in Part III. The former are collective, the latter individual. Moreover, the inclusion of the same rights at the beginning of the International Covenant on Economic, Social and Cultural Rights, which does not contain an individual complaints mechanism, supports the contention that Article 1 of each instrument is exclusively of the character of a structural provision; it is not, by itself, amenable to allegations of a breach by individual inhabitants of a non-colonial state.

The Government of Canada contends that the Committee's jurisdiction, as defined by the Protocol, cannot be invoked by an individual when the alleged violation concerns a collective right. (This point was also made in Canada's earlier observations dated May 17, 1982 at p. 7, section 2.b).) The Government of Canada

therefore submits that the present communication pertaining to the Mikmaq tribal society should be dismissed.

4. Canadian Indian treaties are not equivalent to international treaties

International law and Canadian domestic law do not recognize Indian treaties as international documents confirming the existence of tribal societies as independent and sovereign states. It is therefore submitted that the authors' assertion (at paragraphs 20 and 24 of their communication), that the Halifax Treaty of 1752 confirms the existence of the Mikmaqs as a separate national entity, is incorrect. The Government of Canada refers to examples of State practice on this point in its submission dated July 21, 1981 in No. R.19/78, Alexander Denny v. Canada at pages 3 to 6, a copy of which is attached as Appendix "B".

In addition, the Government of Canada wishes to add the following comments: the Supreme Court of Canada in Simon v. The Queen, [1985] 2 S.C.R. 387, recently held that, as between the federal government and the Mikmaqs of eastern Nova Scotia, the Halifax Treaty of 1752 remains in force under domestic law, and protects the hunting rights of the descendents of those who signed the treaty. At the same time, the Court stressed that Canadian Indian treaties are not equivalent to international treaties. Specifically, Chief Justice Dickson stated at page 404 that:

> While it may be helpful in some instance to analogize the principles of international treaty law to Indian treaties, these principles are not determinative. An

> Indian treaty is unique; it is an agreement sui generis which is neither created nor terminated according to the rules of international law.

With respect to international law, Lord McNair states in The Law of Treaties that:

> According to the modern doctrine of international law, an agreement made between a State and a native chief or tribe cannot be regarded as a treaty in the international sense of the term; nor can it be said that such an agreement produces the international legal effects commonly produced by a treaty.[1]

He notes that Arbitrator Max Huber in the Award in the Island of Palmas Case (April 4, 1928) (Stuyt No. 366; 11 U.N.R.I.A.A. No. XX, at 831) held that treaties concluded with groups similar to Canada's aboriginal groups, were not international treaties, since the indigenous parties did not possess the international capacity to conclude treaties.

It is clear that the sole effect of the 1985 Simon decision is to clarify that hunting rights under the Halifax Treaty of 1752 continue to exist in Canada. It does not lend credence to any contentions that other rights, of a political or governmental character, are possessed by the Mikmaq tribal society.

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1. Oxford: Clarendon Press (1961), at p. 52.

5. The nature of the constitutional discussions

The authors allege in their communication that the denial of their request to participate in the upcoming constitutional conference, infringes the right of self-determination contained in Article 1 of the Covenant. The Government of Canada contends that, even if the authors could bring a communication on the basis of Article 1, they have wrongly characterized the constitutional conferences as relating to the right of self-determination. Participation in such discussions has no direct connection with the right of self-determination which the Mikmaq tribal society seeks to enjoy. The communication is therefore incompatible ratione materiae with the provisions of the Covenant and should be declared inadmissible, pursuant to Article 3 of the Optional Protocol.

As was indicated above, section 35(2) of the Constitution Act, 1982, defines "aboriginal peoples of Canada" as follows:

> In this Act "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Section 37.1 of the Constitution Act, 1982 states that:

> 37.1 (1) In addition to the constitutional conference convened in March 1983, at least two constitutional conferences composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada, the first within three years after April 17, 1982 and the second within five years after that date.
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> (2) Each conference convened under subsection (1) shall have included in its agenda constitutional matters that directly affect the aboriginal peoples of Canada, and the Prime Minister of Canada shall invite

representatives of those peoples to participate in the discussions on those matters.

(3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of a conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

(4) Nothing in this section shall be construed so as to derogate from subsection 35(1) [which recognizes and affirms existing aboriginal and treaty rights of the aboriginal peoples].

Section 37.1 represents an amendment made to the Constitution Act, 1982, following the first constitutional conference on aboriginal matters held on March 15 and 16, 1983. It entrenches into the constitution a process for further identifying and clarifying the rights of Indian, Inuit and Métis. By virtue of section 37.1, as well as the 1983 Constitutional Accord on Aboriginal Rights, two further constitutional conferences on matters affecting the aboriginal peoples must be held by April 17, 1987 and must include the participation of aboriginal peoples. Two conferences have already been held - one on March 8 and 9, 1984 and one on April 2 and 3, 1985 - and the last will take place in March or April of 1987.

The constitutional conferences have focussed largely on the matter of self-government, an objective to which the federal government is committed. The Prime Minister of Canada, Brian Mulroney, made the federal position clear in his statement at the First Ministers Conference on Aboriginal Constitutional Affairs in April 1985 when he stated that:

> The key to change is self-government for aboriginal peoples within the Canadian federation.... As a Canadian and as a Prime Minister, I fully recognize and agree with the emphasis that the aboriginal peoples place on having their special rights inserted into the highest law of the land, protected from arbitrary legislative action. Constitutional protection for the principle of self-government is an overriding objective....

The large number of different groups of aboriginal peoples in Canada make it impossible for the Prime Minister to invite representatives of each group. (As is indicated above, there are 592 Indian bands alone in Canada, not including Inuit or Métis). As Chairman of a conference of all the first ministers in Canada, the Prime Minister of Canada has to accommodate severe time restraints (a meeting of two days' duration), a large number of delegations (the federal government, the ten provincial governments, two territorial governments and various aboriginal associations) representing different constituents and points of view, and a wide and diversified agenda (i.e. "constitutional matters that directly affect the aboriginal peoples of Canada").

It is therefore not feasible for the Prime Minister to invite representatives of every aboriginal group. Instead, the Prime Minister has invited to the upcoming constitutional conference, four national associations, which represent all categories of aboriginal groups, and the substantial majority of all aboriginal peoples in Canada. These associations are the Assembly of First Nations (representing status Indians), the Native Council of Canada (representing non-status Indians and Métis), the Métis National Council (representing Métis alone) and the Inuit

Committee on National Issues (representing the Inuit). These aboriginal groups are the same four national organizations that represented the aboriginal peoples of Canada at previous constitutional conferences.

Each of the four national associations is allocated two seats at the conference. The Assembly of First Nations and other aboriginal organizations adhere to a "seat rotation" procedure whereby spokespersons representing a variety of interests of both constituent and non-constituent groups, address the conference on topics of special interest.

6. Non-constitutional processes

In addition to the constitutional process, the federal government has adopted other approaches to assist aboriginal groups to attain self-government. On April 15, 1986 the Minister of Indian Affairs and Northern Development released a policy statement outlining several non-constitutional initiatives adopted by the federal government to increase self-reliance and self-sufficiency in Indian communities. (A copy of this statement is attached as Appendix "C".) These initiatives include a community negotiations process, by which Indian and Inuit communities are offered an opportunity to discuss with the federal government, their own self-government proposals. This approach acknowledges the diversity of circumstances in which aboriginal peoples live across Canada and the differences in their respective aspirations. The community negotiations process is open to all Indian bands,

including the band to which the authors of the present communication belong. The Mikmaq tribal society has not, however, initiated any such process with the government. The arrangements which are available under this process include new legislation, changes to administrative policy and flexible funding agreements to increase the political accountability of aboriginal governments to the members of their communities. To support the federal policy of self-government and community level negotiations, a new Indian Self-Government Sector has been created as part of the Department of Indian Affairs and Northern Development.

This Indian Self-Government Sector presently has under consideration over twenty self-government proposals from Indian bands affecting over fifty thousand Indians. Concrete progress has been made on several of these. For example, the Sechelt Indian Band Self-Government Act was passed and proclaimed in force on October 9, 1986. (A copy is attached as Appendix "D".) This legislation provides, among other things, for the transfer of title of band lands to the Sechelt Indian Band in British Columbia, the control and administration by the Sechelt of the resources available to them, and for a band constitution. The legislation also contains a provision for on-going funding arrangements in the form of grants between the Band and the federal government.

Self-government negotiations between non-status Indians and Métis communities with the provincial and federal governments are also underway.

In conclusion on this point, the Government of Canada contends that there are several effective avenues available within the Canadian framework to grant natives greater control over their own lives. One of these avenues, the constitutional process contained in section 37.1 of the Constitution Act, 1982, concerns the definition of the rights of the aboriginal peoples of Canada, and to date, discussions under this section have contemplated the right of self-government. The constitutional process does not, however, relate to a right of self-determination. Accordingly, it is the position of the Government of Canada that the communication is inadmissible ratione materiae with the provisions of the Covenant and as such, should be dismissed by the Committee pursuant to Article 3 of the Optional Protocol.

7. Exhaustion of Domestic Remedies

The Government of Canada contends that the constitutional conferences do not relate to the right of self-determination, but that in any event, the Mikmaq tribal society has not pursued to completion all the domestic remedies that are available to it. Article 5(2)(b) of the Optional Protocol to the International Covenant on Civil and Political Rights provides that the Committee shall not consider a communication from an individual unless all available domestic remedies have been exhausted, although the Committee may consider a communication if "the application of the remedies is unreasonably prolonged."

It is open to the Mikmaq tribal society to bring an application to a Canadian court for an order requiring the Prime Minister to invite the Mikmaq tribal society to participate in the constitutional discussions, or alternatively, for a declaration of their right to participate. Such an action has, in fact, been initiated by other groups on two occasions. In 1983, court proceedings were commenced on behalf of the Métis National Council (which, as indicated above, is an organization representative of Métis people across Canada). The proceedings were ultimately abandoned, because the Prime Minister decided to issue an invitation to the Council.

On March 29, 1985, in the Supreme Court of Ontario, the Prairie Treaty Nations Alliance sought a mandatory order that they be invited by the Prime Minister to the constitutional conference. The judge in that case dismissed the application. Although it was open to the plaintiffs to appeal the judgement, they chose not to do so. Consequently, they did not have a separate seat at the 1985 constitutional conference. Discussions with the federal government on the matter of self-government are however in process with the Alliance.

It is the position of the Government of Canada that the Mikmaq tribal society is obliged to seek redress within the domestic judicial system prior to filing a communication with the Human Rights Committee. The Government of Canada submits that it has a right to have domestic remedies followed to completion prior to the Committee examining this matter. Furthermore, since Canada

has established a mechanism conducive to the development of self-government in complex situations (as described in section 6 of these observations), it is the position of Canada that the Mikmaq tribal society should not have recourse to the procedures under the Optional Protocol without pursuing all types of domestic remedies available to it.

III. CONCLUSION

For the reasons given above, the Government of Canada submits that the present communication should be deemed inadmissible by the Committee. However, if the Committee should reach a contrary conclusion on any of the above submissions, the Government of Canada reserves the right to make further comments at a later date.