



**SANTE' MAWI'OMI wjit MIKMAQ**  
**foreign affairs**

10 August 1987

Jakob Th. Möller  
Chief, Communications Unit  
Centre for Human Rights  
United Nations Office at Geneva  
CH-1211 Geneva 10

Ref. G/SO 215/51 CANA (42)  
Case No. 205/1986

Dear Mr. Möller:

Regarding your letter of 6 August, transmitting a copy of the Human Rights Committee's further decision under rule 91 in this matter, I have the honour to submit the following observations, together with copies of relevant materials on Canadian law.

1. The issue in dispute is whether a Canadian court could have directed the Prime Minister of Canada to invite representatives of the Mikmaq people to participate in the discussions of "aboriginal rights" provided by section 37 of the Constitution Act 1982. As we noted in our comments submitted 10 March of this year, section 37(2) of the Constitution Act states that "the Prime Minister of Canada shall invite representatives of those peoples," i.e., of the "aboriginal peoples of Canada, and thus appears to leave the selection of representatives entirely to his discretion as a minister of the Crown.

2. As explained in the enclosed excerpt from Evans et al., Administrative Law, the leading Canadian textbook on the matter, a decision entrusted to a minister by Parliament can be reviewed by the courts only to the extent that, in exercising his discretion, the minister disregards explicit Parliamentary instructions. The reasonableness or fairness of his decision, or his policy in making it, is not reviewable. The minister is subject only to "political accountability" in this regard (Evans, at page 575).

3. This aspect of contemporary Canadian law is confirmed by a number of recent court decisions, which also are enclosed: Whelan v. Minister of Defence (Federal Court of Canada, 1985); MacMillan Bloedel v. Minister of Forests (British Columbia Court of Appeal, 1984); and Meier v. Minister of Justice (Federal Court of Canada, 1983). As stated in MacMillan Bloedel at page 15, judicial review of a decision entrusted to a minister "would be inappropriate because the court would be dictating policy to the policy makers." Canadian courts do not intervene in matters of "a political complexion" (Meier, at page 50). The only exception to this is in the case where the legislation delegating

the matter to a minister contains explicit instructions or guidelines, as in Hui v. Minister of Employment and Immigration (Federal Court of Canada, 1986), which also is enclosed for the Committee's information.

4. As we have submitted previously, the discretion of the Prime Minister in selecting "representatives" of indigenous peoples was not restricted in any way by section 37 of the Constitution Act. It therefore would have been entirely fruitless to ask a Canadian court to review the Prime Minister's decision to exclude the Mikmaq Grand Council from participating in the autonomy negotiations convened under that section of the Act.

5. We submit that the State party is fully aware of its own law in this respect, and that its assertion that we had failed to exhaust domestic remedies was frivolous, and made solely with the intent--which was successful--of delaying any action by the Human Rights Committee until after the last constitutional conference was held in March 1987.

6. We further reiterate the view expressed in our comments of 18 May 1987, that the State party is still obliged to clarify our legal status through direct negotiations and in a manner which reflects the freely-expressed wishes of the Mikmaq people, despite the inconclusive outcome of the final constitutional conference held in March 1987, and regardless of whether such national-level discussions may be resumed in the future.

7. In closing, may we also draw the Committee's attention to a letter sent to the State party's Minister of Indian Affairs and Northern Development on 18 May 1987, renewing our willingness to resolve all outstanding concerns through direct negotiations. I regret to advise the Committee that we have received no response to this offer from the State party.

You may be assured of our continued high regard and favour,

A handwritten signature in cursive script, appearing to read "Russel L. Barsh". The signature is written in dark ink and is positioned above the typed name.

Russel L. Barsh  
for the authors