



**SANTE' MAWI'OMI wjit MIKMAQ**

**foreign affairs**

12 February 1989

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

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

Dear Mr. Moller:

I have the honour to reply to yours of 6 February 1989 regarding Marshall (Mikmaq Tribal Society) v. Canada, communication No.205/1986, on behalf of the authors.

As we see no new matter in the text of the further submission of the State party, we feel it would be inappropriate to further burden the Committee with duplicative argumentation by responding to it. We take the liberty, however, to provide the Committee with a summary of some recent events in Canada, which may be relevant to the procedure the Committee now chooses to follow in our case. We trust you will be able to place this before the Committee at its next session in March, and may draw their attention in particular to our proposal, under Rule 86, to prevent any unnecessary additional hardship for individuals.

With highest regards and favour,

MARSHALL (MIKMAQ TRIBAL SOCIETY) v. CANADA

REPORT OF RELEVANT RECENT DEVELOPMENTS

10 February 1989

1. The following information relates to a number of recent criminal prosecutions of individual Mikmaqs by the Province of Nova Scotia and Canada. Each case involves a question of the validity and effect of the Treaty of Halifax of 1752, and, generally, the right of Mikmaqs to live without interference in their own aboriginal territory. Thus the central legal issue in these cases is essentially the same as has been presented by the authors of *Marshall*: does Canada have authority to regulate the internal affairs of Mikmaq people without their consent?

2. As previously reported to the Committee, the Supreme Court of Canada ruled favourably on the validity of the 1752 Treaty in 1985. Following this decision the authors, in their representative capacity as officers of the Grand Council, proclaimed general Mikmaq hunting and fishing regulations. A copy of these regulations, in Mikmaq and English, is appended. It will be seen that Mikmaqs harvesting fish or wildlife for food will be defended by the Grand Council under the Treaty *only* if they observe Mikmaq laws regarding conservation and safety.

3. Despite the Supreme Court's ruling and subsequent assumption of responsibility by the Grand Council, individual Mikmaqs are now being arrested and prosecuted for harvesting fish and wildlife contrary to Provincial and Federal regulations. One of the authors of *Marshall*, Kji-Sakamou Donald Marshall, is among the individuals who are being prosecuted by the Province.

4. *Moose-hunting.* In 1988, the Province of Nova Scotia distributed 200 licenses to harvest moose on Cape Breton Island, the region where nearly one-third of all Mikmaqs live. These licenses were distributed by a random lottery, without any provision for Mikmaq people who rely on moose-hunting for subsistence. In response, Mikmaq communities on the Island organized their own "Treaty Moose Harvest" to take place a week before the Provincial hunting season. Mikmaq authorities issued a limited number of licenses to Mikmaq hunters, and took a variety of safety precautions, including notifying the Provincial government of the planned date (17 September 1988), place, and size of the Mikmaq harvest.

5. When Mikmaq hunters arrived, they found all roads blockaded by Provincial police vehicles. Fourteen individuals were charged under the Nova Scotia Wildlife Act for hunting or attempting to hunt during a closed season, possession of a firearm, or possession of a moose. When they were arraigned at Baddeck, Nova Scotia, on 27 October 1988, they asked the court to dismiss the charges or stay the proceedings, on the basis that using criminal prosecutions to resolve a question of the interpretation of the 1752 Treaty and 1985 Supreme Court decision was an abuse of process. The judge disagreed, and bound them over for trial.

6. Lawyers for the 14 Mikmaq hunters and the Province appeared in court on 31 January 1989, to seek agreement on the issues of fact and law which would be raised at trial. The hunters asked the judge to exclude any arguments or evidence contesting the *validity* of the 1752 Treaty, since that had already been decided by the Supreme Court. The Province insisted that it had no present plans to reopen the issue of

the Treaty's validity, and the judge ruled that the Mikmaqs' request was premature. It has since been discovered that the Province *does* intend to challenge the validity of the Treaty, despite the Supreme Court's 1985 ruling. Trial in these cases is currently set for 28-29 March 1989.

7. *Fishing.* In these cases, the Federal government is prosecuting Mikmaqs for harvesting or attempting to harvest salmon, codfish, and flounder from the Bras d'Or Lake, which lies in the centre of Cape Breton Island. The 6 Mikmaq fisherman involved had been fishing in waters adjacent to, or flowing through, Indian Reserve lands. Three of them have already been found guilty and have appealed, and their appeals will be heard on 23 May 1989. The remaining three cases are set for trial on 20 February 1989 and 27 April 1989.

8. In prosecuting these cases, the government of Canada has not challenged the validity of the 1752 Treaty, but has argued instead that the Treaty does not apply to Cape Breton Island, even though it is part of the aboriginal territory of the Mikmaq people. It appears that the government will argue that the Treaty only applies to the Mikmaqs who live at the Shubenacadie Indian Reserve. Jean-Baptiste Cope, the Kji-Sakamou who signed the 1752 Treaty on behalf of the Mikmaqs, came from the Shubenacadie area.

9. In the opinion of the authors, these prosecutions constitute an abuse of legal process in violation of Article 9 of the Covenant, in so far as:

(a) the dispute between the authors--in their representative capacity as the officers of the Grand Council--and Canada over the force and effect of the Treaty of 1752 could easily be resolved by civil rather than criminal litigation; and

(b) the matter is already before the Committee.

The Provincial and Federal governments chose to prosecute individuals rather than resolve the question of the interpretation of the Treaty through less punitive means--*i.e.*, this Committee, or a civil action in the courts of Canada.

10. If the Committee does not take a decision promptly on the issue of admissibility, there are likely to be additional prosecutions of individual Mikmaqs for attempting to exercise aboriginal and Treaty rights to subsistence.

11. It would be possible for each of the individuals who have thus far been prosecuted to submit a new communication to the Committee under the Optional Protocol, re-asserting the historical facts and arguments submitted by the authors of *Marshall*. This would involve unnecessary burdens and delay for the Mikmaq people, as well as the Committee.

13. The authors respectfully propose that the Committee:

(a) take a decision on the admissibility of *Marshall* at the earliest opportunity, and

(b) protect the Mikmaq people from arrest and prosecution for subsistence activities, in accordance with Rule 86 of the Interim Rules of Procedure.