July 26, 1989

RESPONSE OF THE GOVERNMENT OF CANADA TO THE COMMUNICATION DATED FEBRUARY 10, 1989 OF THE MIKMAQ TRIBAL SOCIETY

I. Introduction

The Secretary-General of the United Nations in his note no. G/SO 215/51 CANA (42) 205/1986, dated February 14, 1989, transmitted to the Government of Canada the further submission of the complainant dated February 10, 1989. In that submission, the complainant alleged, for the first time, violations by the Government of Canada of article 9 of the Covenant. In reply, the Government of Canada submits that the communication is inadmissible on three bases. Firstly, the communicants have failed to exhaust all available domestic remedies as required by article 5(2)(b) of the Optional Protocol. Secondly, the nominal author - Kji-Sakamou Donald Marshall - is not charged with any of the offences which form the basis of the complaint. The communication is therefore inadmissible ratione personae with article 1 of the Optional Protocol. Thirdly, article 9 of the Covenant does not oblige a state party to employ one means of enforcement of its laws over another. The communication is therefore also inconsistent ratione materiae with the terms of the Covenant and should be declared inadmissible pursuant to article 3 of the Optional Protocol.

II. Background

a) Moose Hunting

By virtue of the Constitution Act, 1867, the provinces have jurisdiction over lands and resources, including regulation of hunting. In Nova Scotia, there is a relatively small moose population which is isolated largely in two geographic regions: the Cobequid Mountains on the mainland of Nova Scotia, and the Highlands on Cape Breton Island. For conservation purposes, the province of Nova Scotia limits the periods during which hunting of moose is permitted, and requires that individuals obtain licences prior to hunting.

In 1988, the Mikmaq of Nova Scotia asserted a right to hunt without a license and outside the season established by the province. Attempts were made by the province and Mikmaq leaders to reach an agreement respecting Mikmaq rights with respect to the hunting of moose. Despite several months of negotiations, no agreement was reached.

On September 16, 1988, the Mikmaq advised the province that they intended to conduct their own hunt commencing September 17, 1988, one week prior to the moose hunting season established by the province. On that date, 14 Mikmaq Indians were caught hunting

moose by provincial officials and charged with violations under the Wildlife Act and related regulations. (The relevant sections of the Act and regulations are attached as Appendix 1.) A hearing date in respect of the charges has been set for August 28, 1989.

b) Fishing

The federal government has jurisdiction over inland fisheries by virtue of the Constitution Act, 1867. For conservation purposes, the federal government, in the Fisheries Act and related regulations, limits the methods by and seasons during which fishing is allowed, and requires that individuals wishing to fish obtain prior authorization by way of a licence. (A copy of the provisions relevant to this communication are attached as Appendix 2).

On October 15, 1987, David Denny and Lawrence John Paul were charged with offences relating to fishing without a licence or permit. As well, Mr. Denny was charged with possession of salmon during spawning season, when all fishing of salmon is prohibited. Both these persons were charged on Cape Breton Island, a part of the province of Nova Scotia. They were tried and convicted before the Nova Scotia Provincial Court and on August 29, 1988, Mr. Denny was fined a total of $700 and Mr. Paul was fined $100.

An appeal was filed on September 28, 1988, and a hearing date has been set for September 21, 1989 before the Nova Scotia Supreme Court - Appeal Division.

On December 14, 1987, Thomas Frank Sylliboy was charged with fishing by means of a snare in the Afton River on the mainland of Nova Scotia, contrary to the Fisheries Act. He was tried before the Provincial Court of Nova Scotia on April 26, 1988 and on September 27, 1988, convicted and fined $10. On October 21, 1988, Mr. Sylliboy appealed his conviction to the Nova Scotia Supreme Court - Appeal Division. His hearing date has been set for September 21, 1989, in conjunction with Mr. Denny and Mr. Paul.

Stephen Lewis Christmas, Barry Paul Bernard and Joseph Alex were also charged with similar fishing offences on Cape Breton Island. Because their cases involve issues virtually identical to those which will be addressed by the Supreme Court - Appeal Division in Denny, Paul and Sylliboy, the Crown and defence counsel have agreed that these cases should be adjourned until the courts have had a chance to finally resolve the matters at issue.

III. Exhaustion of domestic Remedies

It is submitted that the communicants have not exhausted all available domestic remedies, as they are required to do pursuant to article 5(2)(b) of the Optional Protocol. The allegations made by the communicants largely concern a dispute over the application of the Treaty of Halifax of 1752 outside of the Shubenacadie Reserve on the mainland of Nova Scotia.

The communicants suggest that as a consequence of the Supreme Court of Canada's interpretation of the Treaty of 1752 in Simon v. The Queen, [1985] 2 S.C.R. 387 (attached as Appendix 3, they are exempt from provincial hunting and fishing laws governing all of Nova Scotia. In that case, the Supreme Court determined that at a minimum, the Treaty of 1752 recognizes some hunting rights on the Shubenacadie Reserve, located on the mainland of the province of Nova Scotia. The Court went on to hold that Mr. Simon, a native Micmac Nova Scotian, who was attempting to hunt on the Shubenacadie Reserve, was exempt from prosecution under s.150(1) of the provincial Lands and Forests Act as a result of

the Treaty. The Court did not have before it the issue of the application of the Treaty of 1752 to the mainland of Nova Scotia outside of the Shubenacadie Reserve, nor to Cape Breton Island (also a part of Nova Scotia).

In 1752, at the time of the signing of the Treaty between the Mikmaq and the British, only the mainland of Nova Scotia was under British authority. Cape Breton Island was under French control. It was not until 1763, after the signing of the Treaty of Utrecht between the British and the French, that Cape Breton Island came under British control. With the exception of Mr. Sylliboy, the activities for which the persons referred to herein were charged, all took place on Cape Breton Island.

Based on the above, Canada is of the view, that the decision of the Supreme Court of Canada in Simon on the effect of the Treaty of 1752, does not apply outside of the Shubenacadie Reserve and in particular, it does not determine the application of the treaty to Cape Breton Island, which was not at the time of the signing of the Treaty, under British control. The communicants contest this interpretation, and consequently, the validity of the charges laid against them.

It is open to the communicants to put this question of interpretation into issue in the trials under the Wildlife Act

and the Fisheries Act. In fact, in the Denny, Paul and Sylliboy cases, discussed above, the accuse argue in their court materials that they enjoy an "aboriginal right" to hunt and to fish for food in all of Nova Scotia, and that by virtue of that right and s.35(1) of the Constitution Act, 1982[1], they are immune from prosecution. This argument will be addressed by the Nova Scotia Supreme Court - Appeals Division on September 21, 1989.

As well, it is open to the communicants to challenge the validity of the charges or the actions of the Crown under the Canadian Charter of Rights and Freedoms (attached as Appendix 4). Included among the rights and freedoms guaranteed by the Charter, are the right not to be deprived of liberty or security of the person except in accordance with the principles of fundamental justice (s.7), the right not to be arbitrarily detained or imprisoned (s.9), the right to a fair trial (s.11), and as well, the right to equality "before and under the law and ... the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability" (s.15). These rights are guaranteed to individuals in relation to federal and provincial

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[1]. Section 35(1) of the Constitution Act, 1982 provides that: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

governments (s.32). Anyone whose Charter rights have been infringed may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just within the circumstances (s.24(1)).

The communicants could also make an independent application to the Nova Scotia Supreme Court seeking a declaration on the validity of the Treaty of 1752, and its applicability to fishing and hunting by Mikmaq on Cape Breton Island.

Finally, as regards the moose hunt, it should be noted that negotiations between the province of Nova Scotia and Mikmaq representatives on an interim hunting agreement, have been re-commenced. These discussions are currently underway, and an early resolution of the matter is hoped for.

In conclusion on this point, it is the position of the Government of Canada that the communicants are obliged to follow to completion remedies available to them within the Canadian judicial and political system, prior to filing a communication with the Human Rights Committee. The communication should therefore be declared inadmissible pursuant to article 5(2)(b) of the Optional Protocol for failure to exhaust domestic remedies.

IV. Incompatibility Ratione Personae

Article 1 of the Optional Protocol recognizes the competence of the Human Rights Committee to receive communications from individuals who claim to be victims of a violation of Covenant rights. "A person can only claim to be a victim in the sense of Article 1 of the Optional Protocol if he or she is actually affected". (S. Aumeeruddy-Cziffra et al. v. Mauritius, Communication no. 35/1978). Thus, in J.H. v. Canada, (Communication No. 187/1985), the Committee declared inadmissible a communication alleging discriminatory promotion policies by the Canadian Armed Forces, because there was no evidence that the author had himself been adversely affected by the policy in question.

In the current circumstances, the communicants state that: "One of the authors of Marshall, Kji-Sakamou Donald Marshall, is among the individuals who are being prosecuted by the Province" (para. 3). In fact, Mr. Marshall is not being prosecuted under either the province's moose hunting laws or the federal government's fishing laws. Consequently, he cannot be a victim of the Covenant violation alleged in the communication. It is therefore submitted that the communication is incompatible ratione personae with article 1 of the Optional Protocol and should be declared inadmissible by the Committee.

V. No Evidence of a Breach of Article 9

The communicants allege an abuse of legal process by Canada in violation of article 9 of the Covenant, on the basis, firstly, that charges were laid by the Government under the Wildlife Act, and the Fisheries Act, rather than employing some other civil means, and secondly, on the basis that the matter is already before the Human Rights Committee. The Government of Canada submits that the communicants' allegations do not fall within the scope of article 9 or any other article of the Covenant, and that the communication is therefore inadmissible ratione materiae with the provisions of the Covenant.

In regard to the first basis alleged by the communicants, it is submitted that article 9 of the Covenant in no way obliges a State Party to prefer one means of enforcement of its laws over another, provided that the safeguards and procedures mandated by the Covenant are met. The communicants in this case do not allege that they have been arbitrarily arrested, nor that they have been deprived of fundamental legal rights in the procedures employed by the provincial and federal governments. None of the persons charged are being detained. The communicants allege only that the province and Canada are obliged, pursuant to article 9 of the Covenant, to use a means other than the Wildlife Act and

the Fisheries Act to enforce animal and fish protection laws, and in turn, to address the application of the Treaty of 1752 to Nova Scotia territory outside of the Shubenacadie Reserve. It is submitted that there is no basis for concluding that such an obligation is encompassed by the Covenant.

The communicants also allege that the prosecutions under the Wildlife Act and the Fisheries Act breach article 9 of the Covenant, because the matters in issue in these prosecutions are already before the Human Rights Committee. This allegation raises two points. Firstly, it is the position of the Government of Canada, that the previous submissions of the communicants do not have any direct connection with the position they now advance in respect of article 9 of the Covenant. Secondly, the communicants' suggestion that Canada should not prosecute a matter that is before the Human Rights Committee, directly contradicts the procedure for admissibility of communications stipulated in the Optional Protocol. As is indicated above, article 5(2)(b) of the Optional Protocol obliges individuals to exhaust all recourses available domestically before seeking redress in the international forum. State parties are not obliged to withhold prosecution until a matter has been determined by the Committee. The communicant's interpretation of

article 9 would conflict with the provisions of the Optional Protocol, and the well-established principle of exhaustion of domestic remedies underlying international complaints mechanisms.

Based on the above, it is submitted that the communicants' allegation of a breach of article 9 of the Covenant by Canada, is incompatible ratione materiae with the provisions of the Covenant, and should be declared inadmissible pursuant to article 3 of the Optional Protocol.

VI. Conclusion

The communicants state that "[i]t would be possible for each of the individuals who have thus far been prosecuted to submit a new communication ... re-asserting the historical facts and arguments submitted by the authors of Marshall. This would involve unnecessary burdens and delay ...". The Government of Canada expresses concern about the fact that the communicant's most recent submission, which alleges a violation of article 9 of the Covenant in relation to state hunting and fishing laws, differs significantly from earlier submissions which sought, on the basis of article 1 of the Covenant, a seat at the 1987 Constitutional Conference on Aboriginal Rights. The allegations made by the communicants in respect of article 9 concern different domestic laws, facts, international standards and people. The position

suggested by the communicants could make every past and future dealing between the government and the Mikmaq Tribal Society part of the original communication.

For the reasons given above and in previous submissions, the Government of Canada submits that the present communication should be deemed inadmissible by the Committee. However, if the Committe 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.