February 20, 1991

RESPONSE OF THE GOVERNMENT OF CANADA TO THE COMMUNICATIONS OF THE MIKMAQ TRIBAL SOCIETY

I. INTRODUCTION

The Secretary-General of the United Nations, by note No. G/SO 215/51 CANA (42) 205/1986, dated August 21 1990, transmitted to the Government of Canada a decision declaring the author's communication admissible in so far as it may raise issues under article 25(a) of the Covenant. In relation to Canada's submission on the merits, the Committee asked for information on: (i) the precise legal nature and scope of competence given to the constitutional conferences, as well as the criteria for participation therein; (ii) whether article 25(a) is available only to individual citizens, or to groups or representatives of groups also; and (iii) whether the constitutional conferences constituted a "conduct of public affairs". Each of these issues and related matters are discussed below.

II. THE NATURE OF THE CONSTITUTIONAL CONFERENCES

At the outset, it is necessary to outline the nature of a constitutional conference. As a general rule, constitutional conferences in Canada involve only the elected leaders of the federal and ten provincial governments. Consistent with international standards, these leaders represent the whole population of the political and geographical subdivisions of Canada which elected these leaders.

An exception to the usual structure of a constitutional conference was made for the constitutional conferences on aboriginal matters, which were mandated by Part II and Part IV.1 of the Constitution Act, 1982 (attached as Appendix A). The constitutional conferences on aboriginal matters represented a process which sought to further identify and clarify the rights of the aboriginal peoples, including existing aboriginal and treaty rights of Indians, Inuit and Métis. This process provided aboriginal groups in Canada a unique opportunity to address these issues directly with politicians, as well as with senior officials in the numerous preparatory meetings which were held prior to the constitutional conferences.

In particular, the conferences focused on the matter of aboriginal self-government within the Canadian federation. The debate was essentially over whether, and in what form, a general aboriginal right to self-government should be entrenched in the Constitution of Canada. At the 1987 First Ministers Conference, the Government of Canada put forward a proposal for constitutional amendment which would have recognized the right of the aboriginal people of Canada to self-government within the Canadian federation, subject to the detailed content of that right being spelled out in agreements negotiated between the various aboriginal communities and the federal and provincial governments. No consensus was reached among First Ministers and aboriginal representatives on either this federal proposal or any of the other proposals submitted by provincial governments or aboriginal representatives. No other constitutional conferences on aboriginal matters are currently scheduled.

It is important to note that constitutional conferences do not themselves result in amendments to Canada's constitution. Amendments to the Constitution Act, 1982 can only be made in accordance with s. 38 (see Appendix A), which requires the agreement of at least two-thirds of the provinces that have, in the aggregate, at least fifty per cent of the population of all the provinces. This necessarily implies, subsequent to a constitutional conference, debate in federal and provincial legislatures by elected representatives, followed by a vote on the proposed amendment. During this process, many opportunities are available to all elected representatives (not just the leaders who attended the conference), members of the public and groups to make their views known. Often, legislatures hold public hearings on proposed amendments. As is always the case, the public can employ influencing techniques such as the use of petitions, assembly, media reporting, etc.

As regards the constitutional conferences on aboriginal matters, Part II and Part IV.1 of the Constitution Act, 1982 required that the Prime Minister of Canada convene three conferences, and invite the Premiers of each of Canada's ten provinces, representatives of Canada's two territorial governments, and representatives of the aboriginal peoples of Canada. The 1985 conference on aboriginal matters was not required by the constitution; it was held at the instigation of the Prime Minister. As of 1991, there are 603 Indian bands alone in Canada, each representing anywhere from 2 people to nearly 13,000 people. (During the time of the constitutional conferences, there were approximately 590 Indian bands in Canada.) These bands do not include Inuit, Métis, nor non-status Indians, whose

views it was also important to have included at the conferences. The large number of aboriginal groups made it impossible for the Prime Minister to invite representatives from each group, nor was he required to do so under the relevant constitutional provisions.

As well, the Prime Minister had to accommodate severe time restraints (complex meetings of approximately 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"). In order to deal with these constraints, and at the same time ensure that the views of the over 600 aboriginal groups in Canada were properly represented, the Prime Minister invited four national associations, which represent all categories of aboriginal peoples in Canada, 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 primarily non-status Indians), the Métis National Council (representing Métis alone) and the Inuit Committee on National Issues (representing the Inuit). These national organizations represented the aboriginal peoples of Canada at the constitutional conferences.

Each of the four national associations was allocated two seats at the conference. The Assembly of First Nations (AFN) and other aboriginal organizations permitted 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. For example, the position of the Prairie Treaty Nations Alliance could not be reconciled with that of the AFN. Thus, the Prairie Treaty Nations Alliance was given one of the two seats of the AFN for a period of time to allow it to express its views.

The Mikmaq Tribal Society could also have participated through the AFN, either by input into meetings where the Assembly of First Nations developed its position on constitutional issues or through the rotational seat arrangement. This was in fact suggested by the Prime Minister in his response to the request of the communicants for a seat at the conference. He stated that: "...I would encourage you to work out arrangements with the Assembly of First Nations so that your particular interests will be addressed". (See Appendix B).

The request of the Mikmaq Tribal Society to have their own exclusive representative at the 1987 constitutional conference was clearly inconsistent with the framework of the conference, which had to bring the nationally representative aboriginal associations together with representatives of the governments to discuss constitutional amendment.

III. THE RIGHT TO PARTICIPATE IN THE CONDUCT OF PUBLIC AFFAIRS IS CONFINED TO INDIVIDUALS

The Committee has asked for comments on "whether the right under article 25(a) is available only to individual citizens, or to groups or representatives of groups also."

The preparatory work[1] and wording[2] of the Covenant on Civil and Political Rights and its Optional Protocol indicate that the rights in these documents are confined to those which apply to individuals. The Committee has on several occasions confirmed this interpretation, including in its admissibility decision in this communication:

---

[1] See the Official Records of the UN General Assembly, 21st Session, A/C.3/SR.1441, pp. 383-5, and A/C.3/SR.1446. p. 412. See also Bossuyt, M.J., Guide to the "Travaux Préparatoires" of the Int'l Cov. on Civil and Political Rights 657, 660 and 797 (1987). This interpretation has also been expressed by the European Human Rights Commission in respect of the European Convention on Human Rights and Fundamental Freedoms. In W., X., Y., and Z., v. Belgium, (6745/74 and 6746/74) DR 2, 110 (May 30, 1975), in the context of interpreting the right to vote and to stand for election in art. 3, Protocol 1, the Commission stated that: "...whatever the wording of Article 3, the right it confers is in the nature of an individual right, since this quality constitutes the very foundation of the whole Convention."

[2] In its decisions in communication nos. 167/1984 and 197/1985, the Committee statement that art. 1 of the Optional Protocol which refers to "...communications from individuals subject to [a State Party's] jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant" makes clear that the Optional Protocol refers only to breaches of rights that appertain to individuals.

> ...as observed by the Committee in earlier cases (communications 167/1984 and 197/1985), individuals cannot claim under the Optional Protocol to be a victim of a violation of the right of self-determination, which is a right conferred upon peoples, as such. Secondly, as the Committee has also observed in its views on communication No. 167/1984, the Optional Protocol does not constitute a machinery through which peoples can assert their rights. It provides a procedure under which individuals can claim that their individual rights, as set out in Part III of the Covenant (articles 6 to 27, inclusive) have been violated.[3] (emphasis added)

Moreover, article 25 expressly applies to "every citizen" - a term that connotes a personal attribute and a singular, rather than group, entitlement. To interpret article 25 as applying to groups or representatives of groups could lead to absurd results; it would require that every member of the group be proven to be a citizen. It would also imply that groups have a right to vote and access to the public service. Clearly, article 25 was not intended to have these results and it is therefore submitted that only individuals can claim the benefit of the rights in article 25.

As regards the constitutional conferences on aboriginal matters, the Prime Minister invited four national associations who were representative of the various aboriginal groups in Canada, to attend. He made no determination in respect of the individuals that would be invited. Any individual who wanted to participate in the conferences could have sought to do so either in a personal or representative capacity through the national associations.

The communicants, in alleging that the Mikmaq Tribal Society were denied a seat at the 1987 constitutional conference on aboriginal matters, are wrongly claiming the benefit of article 25 for a group. This is a right which pertains to individuals. It is therefore submitted that the communication is incompatible with the Covenant and the Optional Protocol, and as a consequence, inadmissible.

IV. RIGHT TO PARTICIPATE IN THE CONDUCT OF PUBLIC AFFAIRS

---

[3] Communication no. 205/1986, Mikmaq Tribal Society v. Canada (July 25, 1990).

In its decision of July 25, 1990, the Committee requested information on whether the constitutional conferences on aboriginal matters constituted a "conduct of public affairs", as that term is used in article 25 of the Covenant. There is virtually no information on the meaning of this term in the travaux préparatoires to the Covenant or in related materials.

However, it is submitted that the interpretation of this term must take into account the jurisprudence of the Committee which states that the Covenant rights apply to individuals. Therefore, the activities encompassed by the "conduct of public affairs" must necessarily be ones that can be exercised by individual citizens. This interpretation is in fact supported by the subparagraphs of article 25. For example, the right to vote and to be elected in subparagraph (b) and the right to have access to the public service in subparagraph (c) are actions that may be exercised only by individual citizens.

Similarly, the phrase in subparagraph (a) "through freely chosen representatives" indicates the way in which individuals shall participate in "the conduct of public affairs". Clearly, this subparagraph does not contemplate that individuals must have a personal say in all decisions of government.[4] So, for example, article 25 would not impose on states party an obligation to consult the population before the conclusion of an international treaty[5], nor would it confer a right on citizens to decide on

---

[4] The Study of Discrimination in the Matter of Political Rights by the Sub Commission supports this position. It states at p. 7 that: "direct participation in government is almost impossible nowadays ... . It is still possible for the masses of people, however, to express their collective will either by voting on questions of broad government policy, by approving or disapproving texts placed before them, or - as is more often the case - by electing representatives who will be responsible to them."

[5] See X. v. Federal Republic of Germany, (6742/74) DR 3, 103 (10 July 75). The European Commission on Human Rights dismissed a complaint by a Sudeten German alleging that his rights under art. 3, Protocol 1 had been violated because the state party had concluded the Treaty of Prague with Czechoslovakia without prior consultation with members of the public.

public matters by referendum.[6] Rather, individuals exercise the right to participate in the conduct of public affairs by reliance on the representatives that a majority of citizens have elected (and of course, through related rights such as the exercise of the freedoms of expression, assembly and association to criticize government actions[7]).

In contrast, the exclusion of a properly elected representative from a governmental decision-making or similar process that that representative is constitutionally and legally entitled to participate in, could violate article 25(a). It is equally arguable that a citizen who exercises his or her right to participate in the conduct of public affairs through such a representative, could allege a violation of article 25(a) in such circumstances.

It is the Government of Canada's position that the conduct of the constitutional conferences on aboriginal matters was part of the responsibilities of the properly elected representatives of the Canadian people, and as such, an internal arrangement which did not fall within the realm of article 25(a) of the Covenant. The conferences were a process that the Prime Minister, as an elected representative of the people, was mandated to undertake by virtue of the Canadian Constitution. He was also mandated to invite "representatives of the aboriginal peoples of Canada", and in fulfilment of this he invited to the constitutional conferences on aboriginal matters the properly elected representatives of national aboriginal associations. Neither the constitution nor, it is submitted, article 25, could be reasonably interpreted to require any particular form of representation in what was effectively a medium for negotiating constitutional change, provided that the representation of aboriginal people was real and effective. A constructive discussion could not have been had with representatives from each of the over 600 aboriginal groups in Canada, nor did the constitution require this. Moreover, the

---

[6] Partsch, Karl Josef, in Henkin, L. (ed.), The International Bill of Rights 239 (1981).

[7] The Sub-Commission's Study of Discrimination in the Matter of Political Rights states at p. 8 that: "There are also indirect methods by which the people participate in the process of government, such as the expression of their opinion by means of mass meetings or petitions, or through the use of various media of communication."

communicants had an opportunity to participate in the conference through one of the national aboriginal associations (see page 3). Additionally, nothing prevented the communicants from submitting their views on various aboriginal constitutional matters directly to governments.

In summation, the right of citizens to participate in "the conduct of public affairs" does not, it is submitted, require direct input into the duties and responsibilities of a government properly elected. Rather, this right is fulfilled, as article 25 expressly recognizes, when "freely chosen representatives" conduct and make decisions on the affairs with which they are entrusted by the constitution.[8] It is submitted that the current circumstances do not fall within the scope of activities which individuals are entitled to undertake by virtue of article 25 of the Covenant. This article could not possibly require that all citizens of a country be invited to a constitutional conference. Consequently, it is submitted that the communication of the Mikmaq Tribal Society is incompatible ratione materiae with the terms of the Covenant.

V. ABORIGINAL RIGHTS

As a related matter, the Government of Canada wishes to advise the Committee of developments in the cases on which the communicants relied in their earlier submission (of February 10, 1989) concerning article 9 of the Covenant. These cases, as well as a recent Supreme Court of Canada decision, are particularly important as they relate to aboriginal rights - a matter which was the subject of the constitutional conferences.

At issue in the cases referred to in the communicants' earlier submission was whether the accused Mikmaq Indians had an existing aboriginal right under s.35 of the Canadian Constitution Act, 1982 to fish for food in the waters concerned, or to hunt for food. Section 35 of the Act states that: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

In the prosecutions under the Fisheries Act, the Nova Scotia Court of Appeal, the highest level court in the province, unanimously held that there are unextinguished aboriginal rights

---

[8] Ibid

to fish in Nova Scotia and that these rights extend to the waters incidental and adjacent to Indian reserves. The Mikmaq accused were therefore not in violation of the Act. The government has decided not to appeal this judgment in light of the recent release of R. v. Sparrow (discussed below), a Supreme Court of Canada judgment of major significance.

Following the decision of the Nova Scotia Court of Appeal, the accused charged with hunting violations under the Wildlife Act brought a motion to dismiss the charges against them on the basis that the Court of Appeal's decision had altered the law. Crown counsel agreed with this assertion and therefore did not contest the motion. The Court therefore dismissed the charges, but did not make a finding of fact or law on the existence of aboriginal rights to hunt on Cape Breton Island.

Moreover, in September 1990, the Mikmaq chiefs and the province of Nova Scotia signed an agreement stating that the province "recognizes and affirms that the Mikmaq have an existing aboriginal right to harvest outside of reserves wildlife for food and fur, subject only to the needs of conservation and public safety". This agreement also includes mutually agreed upon dates for the Mikmaq hunting season.

Since the time of these decisions, the Supreme Court of Canada has handed down several significant judgments which have strengthened the legal rights of the indigenous peoples of Canada. In the case of R. v. Sparrow (copy attached as Appendix C), the Court clarified the meaning and application of the "aboriginal rights" referred to in section 35 of the Constitution Act, 1982. The Court indicated, firstly, that section 35 reflects the fiduciary role of the Crown towards aboriginal peoples, and secondly, that governments must meet an onerous standard before their actions can infringe upon the enjoyment of existing aboriginal and treaty rights. As regards fishing, which was the subject matter of this case, the Court stated that after conservation and management concerns have been addressed, priority must be given to indigenous food fishing and fishing for ceremonial purposes. Only then will non-native fishing be accorded its share. The Court also stated that indigenous people should be consulted on any proposed legislative changes which would adversely affect their aboriginal right to fish.

The above cases, apart from indicating that effective recourse is available to aboriginal groups in the Canadian courts, have

significantly developed the concept of aboriginal rights in Canada.

VI. CONCLUSION

For the reasons given above and in earlier submissions, the Government of Canada submits that the present communication should be deemed inadmissible by the Committee because, article 25 cannot be claimed on behalf of a group, nor were the constitutional conferences on aboriginal matters conducted in a way that was contrary to the right to participate in "the conduct of public affairs".