



SANTE' MAWI'OMI  
wjit MIKMAQ

Mikmaq Grand Council  
Foreign Affairs

5 January 1992

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

Re: Marshall (Mikmaq Tribal Society) v. Canada, No. 205/1986

Dear Mr. Möller:

We are in receipt of the Human Rights Committee's views in this case, dated 4 November 1991, under your letter of transmittal of 12 December 1991. With respect, the authors and officers of the Grand Council are unable to interpret the decision or understand how it applies to their circumstances, and they wish the Committee to provide them with formal clarification of its views.

In particular, the authors and other members of the Grand Council note the following--

1. The Committee's previous decision on admissibility of 25 July 1990 (CCPR/C/39/D/205/1986), stated in paragraph 14.6 that:

The Committee believes that there are certain questions of law and facts relating to article 25(a) of the Covenant that can only be determined on the merits. The Committee will have to address the issue whether or not the constitutional conference constituted a "conduct of public affairs" and whether the right under article 25(a) is available only to individual citizens, or to groups or representatives of groups also. In this context, the Committee would wish to know, in particular, the precise legal nature and scope of competence given to the constitutional conferences, as well as the criteria for participation therein.

Thus the Committee ruled that the scope of the Mikmaq people's rights to participate in Canada's constitutional negotiations "can only be determined on the merits," that is, on the basis of the actual facts in this case.

2. The authors responded by documenting three main facts: the Mikmaq are recognized as a distinct nation and people by a treaty which the Supreme Court of Canada held in 1985 to be valid, and still in force; the proposed changes in the Canadian constitution would have affected the property and personal rights of Mikmaq people; representatives of the Mikmaq nation requested a seat in the constitutional negotiations but were denied. The State Party has never denied these facts, except to differ on the interpretation to be given to the treaty in question.

3. In its 4 November 1991 decision, the Committee stated as a general principle of law the following (paragraph 5.5):

Invariably, the conduct of public affairs affects the interests of large segments of the population or even the population as a whole, while in other instances it affects more directly the interest of more specific groups of society. Although prior consultations, such as public hearings or consultations with the most interested groups may often be envisaged by law or have evolved as public policy in the conduct of public affairs, article 25(a) of the Covenant cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs.

The Committee then concluded (in paragraph 6) that Canada's refusal to admit Mikmaq representatives to its constitutional conferences did not constitute either "discrimination" or an "unreasonable restriction" on the right of Mikmaq people to participate in public affairs.

4. The Committee's views therefore appear to be inconsistent with its prior decision on admissibility, which stated that the right of groups to be represented in public decisionmaking is a question of fact to be determined in each case. The Committee now appears to think that such rights do not exist under article 25 in any case, as a matter of law. We wish the Committee to clarify whether, in its view, there are facts under which collective rights of participation do exist.

5. The Committee's views also appear to be internally inconsistent in that paragraph 5.5 denies the existence of any general right of groups to collective representation, while paragraph 6 implies that there is a right to be free from "discrimination" or "unreasonable restriction" in the exercise of the right to participate in the conduct of public affairs. Do these two statements, read together, mean that the Mikmaq (and other groups) have a "conditional" right to participate directly in the conduct of public affairs, the conditions being that the manner of their participation be "discriminatory" or "unreasonable"? We wish the Committee to clarify this.

7. If a State Party organizes the modalities of participation in such a way that certain groups, although affected, have no meaningful voice in the decision, is this not "discrimination"? Or if the State Party arranges consultations so that some of the affected groups are invited but others are excluded, is this not "discrimination"? We wish the Committee to clarify the circumstances under which the modalities of participation would constitute discrimination, and thus a violation of the Covenant, as a matter of law and fact.

8. We wish the Committee to clarify the phrase, "unconditional right to choose the modalities of participation." Does this mean that, when a group does have the right to participate in public decisionmaking in its collective capacity, it is the State and not the group itself that has the right to choose the group's representatives?

9. The Committee's views moreover appear to be inconsistent with the facts in this case. Canada's constitutional conferences were aimed at redefining the "aboriginal and treaty rights" of indigenous peoples in Canada, thus they directly affected the authors, not in their capacity as citizens (if such they are), but as an indigenous people in treaty relations with Canada. The conferences thus constituted, in practical effect, a renegotiation of the treaty which governs the relationships between Mikmaq people and Canada. Is it "reasonable," in the light of these undisputed facts, to exclude Mikmaq from these negotiations? We wish the Committee to clarify the circumstances, given the fact of the treaty, under which it would not be reasonable for Canada to infringe upon the rights of Mikmaq people without consulting them?

10. The Committee's views could be interpreted as leaving the specific processes or "modalities" of participation entirely to the discretion of State Parties. This, we believe, would be tantamount in effect to deleting article 25(a) from the Covenant. If we are incorrect in this interpretation of the effect of the Committee's views, we should like this clarified formally by the Committee.

11. Insofar as the Committee's views imply that indigenous people have no rights to public representation, participation, or self-government, other than those rights generally enjoyed by citizens, the Committee's decision appears to be incompatible with the Convention on Indigenous and Tribal Peoples in Independent Countries, 1989 (No. 169), and with the recognition of the special and collective character of indigenous peoples' rights by the General Assembly. The Committee did not refer to the Convention, nor recognize that the rights of indigenous peoples may depend upon whether a State has ratified the Convention. In this respect, the Committee's decision could have the effect of undermining the application of the Convention, and this should be clarified.

We believe it is fundamental, for the benefit of both the authors and the State Party in this case, and to avoid the unnecessary formality of submitting a fresh communication, for the Committee to clarify its views on article 25, in particular what is meant by "discrimination" and "unreasonable restrictions" in the context of this article, and if possible to provide examples for our future guidance.

We await, with great concern, the Committee's clarification of these points, which will determine whether we shall be obliged to resubmit our concerns in the form of a fresh communication under the Optional Protocol, or seek alternative international remedies.

With respect,

A handwritten signature in black ink, appearing to read "Ram Bab". The signature is written in a cursive, flowing style with a long horizontal tail stroke.