21 July 1981

Response of the Government of Canada respecting Communication submitted by Mr. Alexander Denny on behalf of the people of the Mi'kmak tribal society on September 30, 1980 (date of initial letter)

1. General

The Secretary-General of the United Nations in his note No. G/SO 215/51 CANA (18) Reference R. 19/78, dated May 22, 1981, has requested from the Canadian Government, information and observations concerning a communication dated September 30, 1980 (date of initial letter) which was submitted by Alexander Denny to the Human Rights Committee. The communication was submitted under the Optional Protocol to the International Covenant on Civil and Political Rights and Canada was requested by the Committee to submit "information and observations relevant to the question of admissibility of the communication, particularly in so far as it may raise issues under article I of the Covenant".

In his communication, Mr. Alexander Denny alleges that:

> "Canada has violated our rights as a State, as a people, and as individuals by depriving us of our territory, our destiny, and our families under colour of colonial laws (prior to 1867), Provincial legislation, and federal legislation such as the 'Indian Act'. Great Britain has violated our rights by failing to defend us from the unlawful actions of Canada, as provided by our Treaty of 1752." (p.21 of Mr. Denny's communication of 30 September, 1980)

In the same communication, Mr. A. Denny is requesting the following remedies:

a) obtaining answers to questions supposedly not answered by Canada regarding their existence as a separate government, the possession by Canadian citizens of unceded territory, their deprivation of subsistence, educational opportunity, security of inalienable and essential rights to all peoples, and of remaking their children in a Canadian way without their consent.

b) a declaration to the effect that their tribal society is a parallel State to Canada, because the two States have their own distinct treaty of protection with Great Britain. Nevertheless Canada could represent them in the arena of foreign affairs;

c) a declaration to the effect that they are sole possessors of the lands not settled by British subjects prior to 1752 in conformity to a treaty passed with Great Britain in 1752;

d) an order to be given to Canada for executing fully its responsibilities of protection and defense in respect of the treaty of 1752 as well as for assisting the tribal society to restore its self sufficiency and enjoy a reasonable standard of health and education, and/or that responsibility for their tribal society be transferred to the United Nations Trusteeship Council.

Mr. Alexander Denny alleges that Canada has violated article I of the International Covenant on Civil and Political Rights.

2. Admissibility of Communication

On the question of admissibility, the Government of Canada submits that the communication from Alexander Denny is not admissible for the following reasons:

a) Article 1 of the International Covenant on Civil and Political Rights cannot affect the national unity and territorial integrity of Canada.

Article I of the International Covenant on Civil and Political Rights recognizes the right of self-determination. In particular, the third paragraph of this article states that all States Parties to the Covenant "shall promote the realization of the right of self-determination and shall respect that right, in conformity with the provisions of the Charter of the United Nations".

In the Declaration on the granting of independence to colonial countries and peoples, General Assembly Resolution 1514 (XV) of 14 December 1960, the General Assembly declared that:

> "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."

In the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, Resolution 2625 (XXV) of 24 October 1970, the General Assembly stated under the principle of equal rights and self-determination of peoples that:

> "Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."

This right of self-determination was therefore not endorsed to support secessionist movements within individual sovereign states.

It is, therefore, clear that under article I, paragraph 3 of the Covenant, Mr. A. Denny cannot seek a declaration of independent nationhood for his tribal society that could affect the national unity and territorial integrity of Canada.

b) International, American and Canadian law do not recognize treaties with North American Native People as international documents confirming the existence of these tribal societies as independent and sovereign States.

International, American and Canadian law do not recognize treaties with North American Native People as international documents confirming the existence of these tribal societies as independent and sovereign States. These treaties are merely considered to be nothing more than contracts between a sovereign and a group of its subjects. The following jurisprudence will illustrate this legal concept:

i) In the American case of CHEROKEE NATION v. GEORGIA, 30 U.S. (5 Pet) 1 (1831), Chief Justice Marshall at page 17 makes the following statement regarding Indian tribes:

> "They look to our government for protection; rely upon its kindness and its power, appeal to it for relief to their wants; and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility."

Justice Johnson added at page 26:

> "When this country was first appropriated or conquered by the crown of Great Britain, they certainly were not known as members of the community of nations; and if they had been, Great Britain from that time blotted them among the race of sovereigns. From that time Great Britain considered them as her subjects whenever she chose to claim their allegiance; and their country as hers, both in soil and sovereignty. All the forbearance exercised towards them was considered as voluntary; and as their trade was more valuable to her than their territory, for that reason, and not from any supposed want of right to extend her laws over them, did she abstain from doing so."

ii) Reference is also made to the matter of the Cayuga Indians who moved from the United States to Canada subsequently to their becoming a party to a treaty with the New York State between 1789 and 1795. An Arbitral Tribunal examined the effect of the said treaties: Cayuga Indians Claim (GREAT BRITAIN v. UNITED STATES), Arbitral Tribunal, 6 U.N.R.I.A.A. 173 (1926).

At page 176 the Tribunal states that "the tribe had never constituted a unit under international law and had always been treated as under the protection of the power occupying its land".

At page 177 the Tribunal adds: "the Cayuga Nation with which the State of New York contracted in 1789, 1790 and 1795, so far as it was a legal unit, was a legal unit of New York law".

At page 187, it is said "that the 1789 treaty was made at a time when New York had authority to make it, as successor to the Colony of New York and to the British Crown".

The same reasoning was applied to the position of Canada:

> "Canadian Cayugas were and are dependent upon Great Britain or later upon Canada, as the New York Cayugas were dependent on and were wards of New York". (p.177)

It was decided by the Tribunal that "the treaty was in the nature of a contract between New York and the Cayugas and was within New York's competence". (p.189)

The case of the Legal Status of Eastern Greenland, (1933) P.C.I.J. ser. A/B No.53 demonstrates clearly that these Native Peoples are not recognized as a sovereign State in the community of nations.

In this particular case, Eskimos (Inuit) had succeeded in exterminating settlers and in destroying settlements, but nevertheless the Court decided that this did not destroy the title of the settling power.

The Permanent Court of International Justice held that:

> "Conquest only operates as a cause of loss of sovereignty when there is war between two States and by reason of the defeat of one of them sovereignty over territory passes from the loser to the victorious State. The principle does not apply in a case where a settlement has been established in a distant country and its inhabitants are massacred by the aboriginal population. (p.47)

iii) In Canadian law the treaty of 1752 was the subject of a judgment by a County Court of Nova Scotia in REX v. SYLIBOY (1929) 1 D.L.R. 307.

Patterson (Acting) Co. Ct. J. states at p. 313 that:

> "Treaties are unconstrained Acts of independent power. But the Indians were never regarded as an independent power...
>
> Indeed the very fact that certain Indians sought from the Governor the privilege or right to hunt in Nova Scotia as usual shows that they did not claim to be an independent nation owning or possessing their lands. If they were, why go to another nation asking this privilege or right and giving promise of good behaviour that they might obtain it? In my judgment the Treaty of 1752 is not a treaty at all and is not to be treated as such; it is at best a mere agreement made by the Governor and council with a handful of Indians giving them in return for good behaviour food, presents, and the right to hunt and fish as usual - an agreement that... was very shortly after broken (by Indian raids)".

c) Representatives of the Indians, Inuit and Metis people are assured to be involved in the present constitutional review process.

Canada is a federal country composed of eleven governments, one federal and ten provincial, and of two territories which are not autonomous governments but which come under the legislative jurisdiction of the Parliament of Canada. The federal government and the provinces have discussed, intermittently, constitutional reform over the years. On this point the Government of Canada would like to reiterate the position taken by its Ambassador and Permanent representative to the United Nations in Geneva, in a letter dated 9 April, 1980 to the Director, Official Records Editing section, which must be considered as an integral part, i.e. paragraph 10 of document CCPR/C/SR 211 of April 2, 1980 and which contains the summary record of the intervention the Ambassador made before the Human Rights Committee on March 28, 1980. The following is an extract from this paragraph:

> "With respect to the possibilities of change in our system, Canada has a constitution which is now 113 years old and there is widespread feeling in the country that it needs modification. Processes exist by which elected representatives, federal and provincial, can bring about constitutional change. Discussions have been going on intermittently for many years for this purpose and constitutional change is at the moment a subject of widespread and lively debate. While the constitution makes provision for the addition or creation of new territories and provinces, it makes no provision for the severance of provinces, territories, or peoples from Canada or for major variations in their constitutional status. Such changes would have to be the subject of constitutional amendment. Thus, the system permits the free advocacy of any constitutional change, as long as it does not involve the use of unlawful force, and there are mechanisms by which freely elected governments can bring about such change."....

In the paper entitled "A Time for Action", published in 1978, the Prime Minister of Canada gave a high priority to the involvement of Indian, Inuit and Metis representatives in the process of constitutional reform.

At the First Ministers Conference on the Constitution in February 1979, the Prime Minister of Canada succeeded in having placed on the agenda a discussion item entitled: "Natives and the Constitution". It was agreed that Native representatives would meet with the First Ministers on that subject.

The Conservative government carried forward that initiative by inviting Native representatives to a meeting on December 1979 of the Steering Committee of the Continuing Committee of Ministers on the Constitution.

On April 29, 1980, at a Native Conference of Indian Chiefs and Elders held in Ottawa, the Prime Minister of Canada reaffirmed that the Native representatives would continue to be involved in the discussion of constitutional changes which directly affect them. Copy of the press release issued at this occasion is attached as schedule "A".

Again in October 30, 1980, in a letter to Mr. Del Riley, President, National Indian Brotherhood, (attached as schedule "B") the Prime Minister reiterated his commitment and that of the Government of Canada to working with the Native Peoples towards constitutional changes which will make Canada a better place for them and all Canadians. He then stated:

> "In the 'Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada' you will note that under section 24 any rights or freedoms that pertain to the Native Peoples of Canada shall not be abrogated by the introduction of a guarantee in the "Charter of Rights and Freedoms' of certain rights and freedoms for all Canadians. This section is meant to safeguard any special rights which Native Peoples may have and leaves open the possibility of future entrenchment of such rights in the Constitution."

Section 24 to which the Prime Minister referred to is now Section 25 of the proposed Constitutional Resolution tabled by the Minister of Justice in the House of Commons on February 13, 1981 with the amendments approved by the House of Commons on April 24, 1981. Copy of this Resolution is attached as schedule "C". The Resolution also contains the following sections 34, 36, 55(C) and 59.

34. (1) The aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

36. (1) Until Part VI comes into force, a constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada at least once in every year.

(2) A conference convened under subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item.

(3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of a conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

55(C) The text of which is to be found in schedule C (Attachment to our reply).

59. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

(2) The Constitution of Canada includes

(a) the Canada Act;

(b) the Acts and orders referred to in Schedule I; and

(c) any amendment to any Act or order referred to in paragraph (a) or (b).

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

This Resolution is presently before the Supreme Court of Canada on a reference case. The decision of the Court is expected in the near future. The Government of Canada therefore cannot comment further on this matter.

Conclusion

The Government of Canada submits that the communication dated September 30, 1980 (date of initial letter), of Mr. Alexander Denny to the Human Rights Committee should be considered inadmissible by the Committee since it cannot be the basis for a communication under article I of the International Covenant on Civil and Political Rights for the reasons given above.