May 17, 1982

RESPONSE OF THE GOVERNMENT OF CANADA RESPECTING TWO FURTHER COMMUNICATIONS DATED OCTOBER 3, 1981 AND NOVEMBER 11, 1981 FROM MR. ALEXANDER DENNY TO THE HUMAN RIGHTS COMMITTEE

## I - GENERAL

The Secretary General of the United Nations, in his note No G/SO 215/51 CANA (18) R. 19/78 dated May 28, 1981, requested Canada's comments on a communication submitted on September 30, 1980 to the Human Rights Committee by Mr. Alexander Denny. In his communication, Mr. Denny alleged that Canada was in breach of Article 1, paragraph 1 of the International Covenant on Civil and Political Rights because of its alleged denial of the right of self-determination to the Mi'kmaq Indian tribe. Following Canada's response of July 21, 1981 in which the Government of Canada asked that the communication be found inadmissible, the Secretary General of the United Nations, in notes dated October 13 and November 25, 1981, sent Mr. Denny's October 3 and November 11, 1981 replies to Canada's response.

## II - INADMISSIBILITY OF MR. DENNY'S COMMUNICATIONS

The communicant indicated in his reply of October 3, 1981 that the Government of Canada had limited its response to the question of self-determination and had not dealt with other issues raised in his complaint.[1] The Government of Canada notes that, in his original communication, Mr. Denny limited his claim to self-determination: "free association with an independent State ... is the basis of our Treaty of 1752 and of the grievances contained in this communication". In its decision of October 29, 1980, the Human Rights Committee asked Mr. Denny to clarify whether, besides Article 1 of the International Covenant on Civil and Political Rights articles 23 or 27 or any other articles were allegedly violated. In his answering letter of December 9, 1980, the communicant indicated that: "No, Article 1 is our goal, our vision". Nevertheless, the Government of Canada considers it useful to deal with other issues raised by the communicant in his reply of October 3, 1981 and responds accordingly.

In his communication, Mr. Denny raised issues relating to the right of self-determination, to the right of self-government (including control over band membership and education) and to the right of property. Save for the part pertaining to the status of Indian women who have married non-Indians, the Government of Canada considers that the communication of Mr. Denny is inadmissible.

1. Mr. Denny's letter of October 3, 1981, p. 6.

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A. RIGHT TO SELF-DETERMINATION

The Government of Canada submits that Mr. Denny's communication, as it pertains to the right of self-determination is inadmissible and this for three reasons. First, the right of self-determination, as recognized by Article 1 of the Covenant, is not applicable in the present case. The communication is, therefore, incompatible ratione materiae with the provisions of the Covenant and, therefore, should be found inadmissible under Article 3 of the Optional Protocol to the International Covenant on Civil and Political Rights which requires the Human Rights Committee to find inadmissible any communication incompatible with the provisions of the Covenant. Secondly, communications under the Optional Protocol can only be made by individuals and must relate to the breach of a right conferred on individuals. The present communication relating as it does to a collective right should, therefore, be found inadmissible because it is contrary to Articles 1 and 2 of the ~~Covenant~~ Protocol. Finally, the Committee, under the Protocol, can only give its views as to breaches of the rights protected by the Covenant. By asking it to pronounce itself on the statehood of the Mi'kmaq tribe, the communicant is asking the Committee to exceed its jurisdiction, something which it has no authority to do. For the communicant to make such a request constitutes an abuse of process which should result in his communication being found inadmissible, as regards allegations pertaining to a breach of the right to self-determination, under Article 3 of the Optional Protocol.

1. Incompatibility ratione materiae

The Government of Canada reiterates entirely the argument it made in its response of July 21, 1981 to the effect that the right of self-determination as recognized in Article 1 of the Covenant cannot be invoked to justify secession (or quasi-secession) from a sovereign non-colonial State.[1] The United Nations has invariably applied the right of self-determination to dependent or colonial territories. That right has never been endorsed in support of secessionist or separatist movements within individual sovereign States.[2] The Government of Canada is of the view that neither Article 1 of the Covenant nor the Declaration on the Granting of Independence to Colonial Countries and Peoples nor the Declaration

1. Government of Canada, Reply of July 21, 1981, pp. 2-3.

2. S.A. Williams and A.L.C. de Mestral, An Introduction to International Law, Toronto, 1979, Butterworths, pp. 48-49; J.F. Guilhaudis, Le droit des peuples à disposer d'eux-mêmes, Grenoble, 1976, Presse Universitaire de Grenoble, pp. 54-67 (in particular pp. 56, 66 and 67); Lee C. Buchheit, Secession: The legitimacy of Self-Determination, New Haven, Conn., 1978, Yale University Press, p. 87; R. Emerson, Self-Determination, (1971) 65 American Journal of International Law, pp. 462-464.

on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations[1] justify an attack on the territorial integrity of a sovereign non-colonial State such as Canada.

In addition, the Government of Canada would like to stress three points:

a) Recognition in the Covenant of the right of self-determination should not be seen as an encouragement to secessionist tendencies.

The Secretary General of the United Nations, in his "Annotation on the text of the draft International Covenant on Human Rights", indicated that the rights of minorities are dealt with in Article 25 (now 27) of the draft Covenant on Civil and Political Rights. During discussions on Articles 1 and 27 of the Covenant, it was stressed that these Articles could not justify attempts to undermine the national unity of any State. It was clearly understood that the aim of these Articles was not to encourage separatist or irredentist movements and bring about a multiplication of barriers and frontiers.[2]

In addition, reference can be made to a statement by Secretary General U Thant when asked at a press conference on January 4, 1970 how he could reconcile the United Nations support for "self-determination" with its attitude towards the Biafran secession in Nigeria.

1. Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly Resolution 2514 (XV) of December 14, 1960; Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, General Assembly Resolution 2625 (XXV) of October 24, 1970. In particular, see section 6 of the 1960 Declaration and paragraph 7 of the principle of equal rights and self-determination of people found in the 1970 Declaration which recongize the right to the territorial integrity of States.

2. Secretary General of the United Nations, "Annotations on the text of the draft International Covenant on Human Rights" in United Nations General Assembly Official Records, Agenda Item 28 (Part II) Annexes, Tenth Session, New York, 1955, Document A/2929, page 15, paragraph 22. See also p. 63, paragraph 188.

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"The Secretary General's reply, which included a reference to the United Nations' successful effort to prevent Katanga's secession, affirmed that when a State joins the United Nations, there is an implied acceptance by the entire membership of its territorial integrity and sovereignty. He continued to say:

> So, as far as the question of secession of a particular section of a Member State is concerned, the United Nations' attitude is unequivocal. As an international organization, the United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its Member States".[1]

Therefore, the Government of Canada is of the view that the principle of self-determination is not applicable to the case of ethnic, religious or linguistic minorities in non-colonial States. It is only applicable in a colonial situation. The protection of the rights of the minorities in non-colonial States, such as Canada, rests on other provisions of treaties or customary international law, such as Article 27 of the Covenant.

b) Paragraph 7 of the principles of equal rights and self-determination of people in The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations recognizes the right of self-determination to peoples in States where the government does not represent all the people. In Canada, Indians, like other citizens, may avail themselves, at the federal and provincial levels, of the political rights recognized in Article 25 of the Covenant. They enjoy the same protection in respect of human rights as do all other citizens of Canada. In this respect, Canada now has in its Constitution an entrenched Charter of Rights and Freedoms which assures protection of human rights in Canada.[2]

1. R. Emerson, op.cit., p. 464.

2. Infra, pp. 14-15. For the Text of the Constitutional Amendment see Schedule I.

Therefore, whether or not the principle of self-determination applies in non-colonial situations, (and in Canada's view it does not), the Government of Canada considers that since Canada is a "State possessed of a government representing the whole people belonging to (its) territory without distinction as to race, creed or colour and respectful of human rights,"[1] the Mi'kmaq cannot claim the right to self-determination or in any way seek to impair Canada's territorial integrity or sovereignty.

c) In the present state of international law, a thinly scattered minority group living within the midst of a more numerous population grouping and occupying territory co-extensive with that grouping cannot claim self-determination. This principle has been acknowledged by authors commenting on the right of self-determination. Thus, Emerson indicates that:

> "Where there is such intermingling, no form of self-determination, short of mass migration, can be invoked to satisfy such demands as the minority community may make for recognition of its separate identity".[2]

The number of Mi'kmaq registered under the Indian Act, R.S.C. 1970, c. 1-6, does not exceed 18,000 persons scattered throughout Nova Scotia, New Brunswick, Prince Edward Island and Quebec.[3] The area claimed by the Mi'kmaq is inhabited by more than 2,000,000 Canadian citizens including the Mi'kmaq. Even if otherwise applicable, the right of self-determination has, therefore, no application in such circumstances.

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1. Buckhert, op. cit., p. 94. For an example of how Canada protects human rights, see the Report of Canada on Implementation of the Provisions of the Covenant submitted to the Committee in 1979.

2. Emerson, op. cit., p. 472. See also, Jacques Brossard, L'Accession à la souveraineté et le cas du Québec, Montréal, 1976, Presses de l'Université de Montréal, p. 87

3. The Mi'kmaq live in bands, each of which is politically independent from the others. Band membership is governed by the provisions of the Indian Act. The above quoted number of Mi'kmaq is that of registered Indians.

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Further, the Government of Canada considers that the Committee should not be put in a position where it can be seen as pronouncing itself on such a fundamental issue to States as their territorial integrity. This is a political matter better left to each sovereign State and to the decolonisation mechanisms created by the United Nations.

2. Inadmissibility resulting from communicant's incompetence to submit a communication relating to self-determination.

Article 1 of the Optional Protocol states that:

"A State Party to the Covenant that becomes a party to the present protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant."

Further, Article 2 of the Optional Protocol provides that:

"individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhaused all available domestic remedies" may complain to the Committee.

a) State communications under the Optional Protocol.

Under Articles 1 and 2 of the Optional Protocol, only individuals, not States or non-governmental organizations,[1] have a right to submit a communication. A communication made by or on behalf of a State would be inadmissible. It is, therefore, submitted that, under the provisions of the Protocol, a communication cannot be made on behalf of an "alleged Mi'kmaq State".[2]

If the Mi'kmaq society is and always has been a State, an allegation which the Government of Canada completely denies, then Mr. Denny is addressing himself to the wrong forum. The Committee does not have the mandate to hear disputes between States regarding the existence or the extent of their sovereignty. This is a question beyond its jurisdiction.

1. Erik Mose and Torkel Ospahl, The Optional Protocol to the International Covenant on Civil and Political Rights, (1981) 21 Santa Clara Law Review, p. 299, 301, 302; M.E. Tardu, Human Rights, The International Petition System: Complaint Procedures of the United Nations Organization, Dobbs Ferry, N.Y., 1980, Oceana Publications Inc., Vol. 2, pp. 29-33.

2. In paragraph 52 of his September 30, 1980 communication, Mr. Denny alleged that "the Mi'kmaq Nationimouw was a State in 1752 when it treated with Great Britain and remains a State today".

The only section in the Covenant which allows a State to make a complaint against another State is Article 41. The "alleged Mi'kmaq State" is not a party to the Covenant and therefore cannot avail itself of this Article. The Government of Canada therefore, submits that the Human Rights Committee has no jurisdiction to consider Mr. Denny's communication if it is submitted on behalf of a "State".

b) Collective rights and individual communications under the Optional Protocol.

Article 1(1) of the Covenant recognizes that: "all peoples have the right of self-determination". The Government of Canada is of the view that an individual cannot invoke a breach of this collective right under the Optional Protocol. The Protocol relates to breaches of rights given to individuals, not to a collectivity. In the present case, Mr. Denny does not invoke a breach of an individual right. Rather, he claims that Canada is denying the Mi'kmaq the collective right of a people to self-determination. Since an individual is not a people and since the Optional Protocol only confers a right of communication on individuals for a breach of their rights, the Government of Canada submits that the Committee's jurisdiction, as defined by the Protocol, cannot be invoked by or on behalf of a people. Therefore, consideration of Mr. Denny's allegations pertaining to self-determination for the Mi'kmaq are not within the jurisdiction of the Committee as conferred by the Protocol.

3. Jurisdiction of the Committee to award remedy requested by the communicant.

The remedy which Mr. Denny is seeking from the Committee under the Optional Protocol is, in effect, a pronouncement that the Mi'kmaq society is a State. Such a remedy is beyond the jurisdiction of the Committee. Under the Optional Protocol, it can only ascertain if a State Party has violated any of the rights protected by the Covenant. It cannot pronounce itself, as Mr. Denny would like it to do, on whether the Mi'kmaq constitute a State. For the communicant to ask the Committee to exceed its jurisdiction can be considered an abuse of process which would render the communication, as it relates to self-determination, inadmissible under Article 3 of the Optional Protocol.

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B. RIGHT TO SELF-GOVERNMENT

Mr. Denny made a general claim to the right of self-government. He also makes specific claims to control over band membership and education, two issues which are related to the question of self-government. Save for the allegation pertaining to membership of Indian women who have married non-Indian men, the Government considers that these allegations should be found inadmissible.

1. Inadmissibility of Allegations Pertaining to Self-Government

The allegation made by Mr. Denny in his communication namely that Canada is interfering "with ancient institutions of self-government", should be found incompatible ratione materiae under Article 3 of the Optional Protocol since it has no basis under the Covenant:

a) For the reasons previously indicated, Article 1 of the Covenant has no application in the present case. The communicant cannot, therefore, claim on behalf of the Mi'kmaq one of the prerogatives of self-determination, i.e. the right to establish their own form of self-government outside the framework of Canadian institutions.

b) No other provision of the Covenant confers upon minorities the right to establish their own form of government, including Article 27.[1]

The Government of Canada is of the view that each country should protect the interests of national minorities pursuant to the Covenant. In so doing, it must, if it is a party to the Covenant, ensure that its provisions will be respected. The Government of Canada has enacted legislation applying to status Indians, such as the Mi'kmaq.[2] This legislation provides for limited self-government by Indian bands, including the Mi'kmaq. Band government may be exercised by the band council or chief, according to band custom.

Only three out of the twenty-six Mi'kmaq bands have chosen to elect their council according to the custom of the band. The remaining twenty-three bands elect their council in conformity with the applicable provisions of the Indian Act.

1. Secretary General of the United Nations, Annotations on the text of the draft International Covenants on Human Rights, op. cit., p. 63, paragraph 188. See also p.15, paragraph 22.

2. Indian Act, R.S.C. 1970, C. 1-6.

Mi'kmaq bands are now performing many of the functions falling within the jurisdiction of municipal governments. Band powers are principally those given by section 81 of the Indian Act.

Further, the Government of Canada considers that the arguments it previously made regarding the competence of the communicant to raise the question of self-determination apply mutatis mutandi as regard the issue of self-government since it is merely a modality of the right of self-determination.

2. Inadmissibility of allegation pertaining to control of band membership and education.

The Government of Canada does not contest the first part of the communicant's third allegation pertaining to band membership of an Indian woman who marries a non-Indian. It is aware of the Committee's views in Lovelace v. Canada and is taking steps to see that effect is given to that decision. Therefore, the Government of Canada considers this matter to have been already dealt with.

As regards enfranchisement, the Government of Canada considers that Mr. Denny's allegations should be found inadmissible ratione temporis. It is aware that in the Lovelace case, one of the elements of the Committee's decision was that loss of Indian status for an Indian woman who had married a non-Indian before the coming into force of the Covenant in Canada had continuing effect resulting in a breach of Article 27. However, in the present case, the acts complained of would have taken place more than twenty years ago at the earliest. The right to vote was given to Indians who were members of the armed forces of Canada during the First World War by the Military Voters Act, S.C. 1917, c. 34, as well as to Indians who were members of the armed forces during World War II by An Act to Amend the Dominion Elections Act, S.C. 1950, c. 35, but there is nothing in those Acts concerning their enfranchisement for the purposes of the Indian Act. In addition, the Government of Canada found no provisions requiring enfranchisement of Indians taking temporary employment outside of their reserve of origin. Legal authority to enfranchise Indians can only derive from the provisions of the Indian Act. Since the turn of the century, there were two periods of time during which involuntary enfranchisement of Indians could have occurred. The first period is from 1919 to 1922, when section 3 of An Act to Amend the Indian Act, S.C. 1919-1920, c. 50, allowed such enfranchisement. This section is written in a permissive form rather than in an imperative one; it allows for the appointment by the Superintendent General of a Board to enquire and report as to fitness of Indians to be enfranchised. This provision

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was repealed by section 1 of An Act to Amend the Indian Act, S.C. 1922, c. 26. From 1932 to 1961, the Indian Act had a new provision allowing a Board of Enquiry to report as to the fitness of an Indian or Indians to be enfranchised without a request by the Indian if the enfranchisement "would not be made in violation of the terms of any treaty, agreement or undertaking that may have been entered into or made between or by the Crown and the Indians of the band in question".[1] Mr. Denny does not relate his general allegation to any specific case of compulsive enfranchisement of Indians. It is, therefore, impossible to ascertain if the Government of Canada actually enfranchised any Mi'kmaq Indians between 1919 and 1922 or between 1932 and 1961 under the "involuntary" enfranchisement procedure. In addition, the Government of Canada notes that at the time the acts of enfranchisement could have occurred, enfranchisement was considered a positive act benefiting the Indians by allowing their full participation in society. Therefore, the Government of Canada believes that the part of Mr. Denny's communication pertaining to enfranchisement should be found inadmissible because of its lack of specificity.

As regards the second element of this alleged violation, i.e. that the Mi'kmaq should control their education, the Government of Canada considers it inadmissible ratione materiae. The Covenant does not make any provision with respect to the right to education. Rights of children are protected under the Covenant by Article 24. However, this Article does not confer a right to education. Rather, it would seem to refer to the obligation of State parties to offer special protection to children who are neglected, ill-treated, abandoned or orphaned.[2] As for Article 27, it does recognize, as previously mentioned, certain rights of minorities. However, these rights do not imply that minorities in Canada must have control of the educational system. Rather, the State must not interfere with the exercise by minorities of the rights given them by Article 27.[3]

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1. It should be noted that the provisions pertaining to "involuntary" enfranchisement of Indians which were enacted by An Act to Amend the Indian Act, S.C. 1932-33, c.42, s. 7 (repealed by An Act to Amend the Indian Act, S.C. 1960-61, c.9) provided for an inquiry to be conducted by a superior or county court judge, an officer of the Department of Citizenship and Immigration and a member of the band selected by the band or, if it failed to do so, by the Superintendent General of Indian Affairs.

2. "Document A/5655: Report of Third Committee in Official Records of the General Assembly of the United Nations, Agenda, item 48, Annexes, 18th session, New York, 1963, p. 20, paragraph 71.

3. Secretary General of the United Nations, Annotation on the text of the draft International Covenant on Human Rights, op. cit., p. 15, paragraph 22 and p. 63, paragraph 188.

Thus, a State party to the Covenant more than meets any obligation it might have under Article 27 if it provides a means by which members of a minority group can gain a knowledge of their language, culture and religion.

Although a right to education is recognized by Article 2 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms, the European Court of Human Rights in the Belgian Linguistic Case (No. 2) rejected allegations made by French speaking parents to the effect that certain provisions of the Belgian educational legislation were infringing their rights. In that case, the Court held that a right to education did not require the Contracting Parties to establish at their own expense nor to subsidize education of any particular type or at any particular level, but merely guaranteed a right of access to educational institutions existing at a given time as well as the right to obtain in conformity with the rules in force in each State, official recognition of the studies completed. [1]

Thus, even if the Covenant recognized a right to education (which it does not), responsibility for ensuring compliance with this right would rest with the States parties, not with individuals or groups of individuals such as the Mi'kmaq. [2] A State party would meet its obligations if it set up public schools or allowed individuals to attend unsubsidized private schools conforming to the minimum educational standards set by the State. Further, it would not be required to provide minorities instruction in their language. Examining the second sentence of Article 2 of the First Protocol to European Convention on Human Rights and Fundamental Freedoms which provides that:

> "a State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions",

the European Court of Human Rights decided that such a provision did not require States to respect parents' linguistic preferences. The Court concluded that the aim of Article 2:

> "was in no way to secure respect by the State of a right for parents to have education conducted in a language other than that of the country in question". [3]

1. Belgian Linguistic Case (No. 2), (1980) 1 European Human Rights Report 252, at p. 281, paragraph 4.
2. The Government of Canada possesses full sovereignty over its territories and, therefore, complete legislative authority over its inhabitants, including the Mi'kmaq.
3. Belgian Linguistic Case, op. cit., p. 282, paragraph 6.

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Thus the Court denied the right of a parent or of a child to obtain instruction in a language of his choice "for it would be open to anyone to claim any language of instruction in any of the territories of the Contracting Parties".[1]

Even if, indirectly, the right of education were protected by Articles 24 or 27 or any other provision of the Covenant, the Government of Canada submits that the general principles enunciated in the Belgian Linguistic case ought to be applied by the Committee.

Nevertheless, the Government of Canada is aware of the need to protect the culture of Indian groups.[2] To that end, its Indian education policy provides the Mi'kmaq students attending federal or band schools, whenever possible, a curriculum which includes Indian-related content relevant to the background of the Indian students.

As for the Mi'kmaq students attending provincial schools, they follow the curriculum provided by the province, but the Government of Canada endeavours to have the Provincial School Boards include, where possible, Indian-related curriculum content. Canada considers that this policy allows Indians to participate in Canadian society while at the same time it protects their language and culture.

Further, the Government of Canada states that a federal law which purported to restrict or prohibit the use by Indians of their religion, culture and language might well be found inoperative as being contrary to the provisions of the Canadian Bill of Rights guaranteeing freedom of religion, speech, association, assembly and press (sections 1 (c), (d), (e), (f) and 2). The Canadian Charter of Rights and Freedoms also enshrines such protections in the Constitution (sections 2(a), (b), (c) and (d), 24 (1) and 52 (1)). Section 25 applies more particularly to Indians:

> "The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including:

1. Ibid, p. 285, paragraph 11.

2. In Canada, education is a provincial responsibility; however, because of its jurisdiction over Indians, the federal government is responsible for their education (British North America Act, 1867, 30 & 31 Vict., c. 3 (U.K.), sections 91(27) and 93). In the exercise of its jurisdiction, it has enacted various provisions governing their education (Indian Act, op. cit., sections 114-123).

a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement."

C. RIGHT TO PROPERTY

The International Covenant on Civil and Political Rights does not make any provision for the right to property. Therefore, an individual cannot avail himself of such a right under the Optional Protocol. Any attempt to invoke this right would be incompatible ratione materiae with the provisions of the Covenant and must be found inadmissible under the provisions of Article 3 of the Protocol.

In addition, the Government of Canada considers that the communicant cannot avail himself of the right of self-determination to claim property on behalf of the Mi'kmaq tribe. As previously indicated, he cannot avail himself of Article 1 of the Covenant since the claim of the Mi'kmaq tribe does not fall within the ambit of this provision and because individuals cannot seek enforcement of collective rights under Article 1 and 2 of the Optional Protocol. In addition, since the Mi'kmaq claim to property as stated by Mr. Denny would entail the Committee recognizing the existence of a Mi'kmaq State, the Government of Canada considers that the communicant is requesting the Committee to pronounce itself on a matter other than an alleged breach of the right of self-determination, something which in its view constitutes an abuse of process prohibited under Article 3 of the Optional Protocol.

Further, the Government of Canada would like to emphasize that Indians, under Canadian law, can seek from the Courts recognition of Indian title to lands. For example, an Indian tribe can seek a declaration from the Courts recognizing the existence of an aboriginal title. Again, it can seek to file a caveat against land; this would prevent registration of patents, grants or similar interests on title in the area under caution until the caveator has the opportunity to oppose such registration. These remedies exist notwithstanding the fact than an Indian tribe is seeking or has sought recognition of its rights through the Office of Native Claims. Consequently, if the Mi'kmaq have any interest in the lands in question, they could and should have sought its recognition from the Courts. This they have not done. If the right of property had been recognized by the Covenant, this failure to exhaust local remedies would have rendered their communication inadmissible under Articles 2 and 5(2)(b) of the Optional Protocol.

III - CANADA'S CONSTITUTION AND THE ADMISSIBILITY OF THE PRESENT COMMUNICATION

Mr. Denny's reply of November 11, 1981 is irrelevant because the three sections mentioned in Canada's response of July 1981, are still part of the Constitution Act, 1982. Section 34 is now section 35, although it has been amended to provide that "existing" rights would be protected. Section 36 is now section 37 and was amended in its form not in its substance.[1]

In The Queen v. The Secretary of State for Foreign and Commonwealth Affairs, Lord Denning commented on the provisions of the Canada Act, 1982 pertaining to Indians. He was of the view that:

> "the Canada Bill itself does all that can be done to protect the rights and freedoms of the aboriginal peoples of Canada. It entrenches them as part of the Constitution so that they cannot be diminished or reduced except by the prescribed procedure and by the prescribed majorities. In addition, it provides for a conference at the highest level to be held so as to settle exactly what their rights are. That is most important, for they are very ill-defined at the moment."[2]

In its July 21, 1981 response, the Government of Canada referred to proposed amendments to the Canadian Constitution. These amendments have now been adopted and are in force. Nonetheless, the Government of Canada would like to clarify its reference to what was at the time only a proposal. The communicant claims that a State cannot invoke laws not yet enacted as a bar to the admissibility of a complaint under the Optional Protocol to the International Covenant on Civil and Political Rights.[3] The Government of Canada agrees with this argument. Rather, in its earlier response, it referred to proposed amendments to the Canadian Constitution, albeit perhaps not too clearly, in the light of its commitment to human rights. The above mentioned provisions of the Constitution Act, 1982 as well as sections 1 to 34 (Canadian Charter of Rights and Freedoms) of the Act must be considered in relation to its continued commitment to human rights. This commitment must be seen in light of paragraph 7 of the principle of equal rights and self-determination of people in the Declaration on Principles of

1. For a copy of the text of the Constitution Act, 1982, see Schedule I.

2. The Queen v. The Secretary of State for Foreign and Commonwealth Affairs, Court of Appeal of the United Kingdom, January 28, 1982, pp. 18-19.

3. Mr. Denny. Letter of October 3, 1981, op.cit., p. 5

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International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations[1] pertaining to the principle of equal rights and self-determination of people. This paragaaph provides 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 people 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".

The amendments made to the Canadian Constitution are but one reason why the communicant's claim to self-determination for the Mi'kmaq must fail. The Government of Canada examined the impact of human rights protection on such a claim earlier in this text.[2]

IV - OTHER ISSUES RAISED BY MR. DENNY'S REPLY OF OCTOBER 3, 1981.

In his letter of October 3, 1981, Mr. Denny raised certain other issues or alleged issues to which Canada would like to reply, namely:

a. Whether Canada is an independent State or merely a "creature" of the United Kingdom of Great Britain and Northern Ireland;

b. whether the Mi'kmaq tribe's territory was ever lawfully incorporated into Canada; and

c. whether treaties concluded with Indian tribes implied their recognition as States as understood in international law.

1. General Assembly, Resolution 2625 (XXV) of October 24, 1970.

2. Supra, pp. 2-6.

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The Government of Canada does not consider that the relationship between the United Kingdom or Indian tribes on one hand and Canada (or its predecessors in title, i.e. France, the United Kingdom and Newfoundland) on the other is a relevant issue in the context of the present communication. The independence of Canada, the extent of its territory and its sovereignty over it are matters which are accepted internationally. Since the part of Mr. Denny's communication relating to the right of the Mi'kmaqs to self-determination is inadmissible, discussion of these questions is not relevant to the issue of the present case. As previously indicated, these questions are beyond the Committee's jurisdiction and as such are not pertinent to the matter in issue in the present case.

## V - CONCLUSION

For the reasons mentioned above, as well as those mentioned in its response of July 21, 1981, the Government of Canada submits that Mr. Denny's communication as formulated in his letters of September 30, 1980, October 3, 1981 and November 11, 1981 should, with the exception of the part pertaining to membership in Indian bands of Indian women who marry non-Indians, be considered inadmissible by the Committee. As regards the question of band membership, the Government of Canada considers that the matter has been dealt with in the Lovelace case and it is presently discussing with Indian bands how best to give effect to the Committee's decision in that case. This being the case, the Government of Canada does not wish to contest the merits of that part of Mr. Denny's communication.