Marshall v. Canada, Communication No. 205/l986, U.N. Doc. CCPR/C/43/D/205/l986 at 40 (1991).

HUMAN RIGHTS COMMITTEE
Forty-third sessionDECISIONS
Communication No. 205/l986

Submitted by:

Grand Chief Donald Marshall, Grand Captain Alexander Denny and Adviser Simon Marshall, as officers of the Grand Council of the Mikmaq tribal society (assisted by counsel)

Alleged victims:

The authors and the Mikmaq tribal society

State party:

Canada

Date of communication: 30 January 1986 (initial submission)
Documentation references:

Prior decisions

CCPR/C/28/D/205/1986 (Rule 91 decision, dated 17 July 1986)
CCPR/C/WG/30/D/205/1986 (Further Working Group decision under rule 91, dated 20 July 1987)
CCPR/C/39/D/205/1986 (decision on admissibility, dated 20 July 1990)

Date of adoption of Views under article 5(4), of the Optional Protocol: 4 November 1991

On 4 November 1991, the Human Rights Committee adopted its Views under article 5, paragraph 4, of

the Optional Protocol in respect of communication No. 205/1986. The text of the Views is appended to the present document. [Annex]

ANNEX

Views of the Human Rights Committee under article 5, paragraph 4,of the Optional Protocol to the International Covenant on Civil and Political Rights
- Fortythird session -

concerning

Communication No. 205/1986

Submitted by:

Grand Chief Donald Marshall, Grand Captain Alexander Denny and Adviser Simon Marshall, as officers of the Grand Council of the Mikmaq tribal society (assisted by counsel)

Alleged victims:

The authors and the Mikmaq tribal society

State party:

Canada

Date of communication:

30 January 1986 (initial submission)

Date of the decision on admissibility:

25 July 1990

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights, **Meeting** on 4 November 1991,

Having considered communication No. 205/1986, submitted to the Committee by the late Grand Chief Donald Marshall, Grand Captain Alexander Denny and Adviser Simon Marshall, as officers of the Grand Council of the Mikmaq tribal society (assisted by counsel) under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication and by the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

The authors:

1. The authors of the communication (initial letter of 30 January 1986 and subsequent correspondence) are Grand Chief Donald Marshall, Grand Captain Alexander Denny and Adviser Simon Marshall, the officers of the Grand Council of the Mikmaq tribal society in Canada. They submit the communication both as individually affected alleged victims and as trustees for the welfare and the rights of the Mikmaq people as a whole. Grand Chief Donald Marshall passed away in August 1991. The communication is, however, maintained by the other authors, who continue to be responsible for the conduct of the affairs of the Mikmaq Grand Council. They are represented by counsel.

The background:

2.1 The authors state that the Mikmaqs are a people who have lived in Mikmakik, their traditional territories in North America, since time immemorial and that they, as a free and independent nation, concluded treaties with the French and British colonial authorities, which guaranteed their separate national identity and rights of hunting, fishing and trading throughout Nova Scotia. It is further stated that for more than 100 years Mikmaq territorial and political rights have been in dispute with the Government of Canada, which claimed absolute sovereignty over Mikmakik by virtue of its independence from the United Kingdom in 1867. It is claimed, however, that the Mikmaqs' right of self-determination has never been surrendered and that their land, Mikmakik, must be considered as a non-self-governing territory within the meaning of the Charter of the United Nations.

2.2 By Constitution Act, 1982, the Government of Canada "recognized and affirmed" the "existing aboriginal and treaty rights of the aboriginal peoples of Canada" (art. 35(1)), comprising the Indian, Inuit and Métis peoples of Canada (art. 35(2)). With a view to further identifying and clarifying these rights, the Constitution Act envisaged a process which would include a constitutional conference to be convened by the Prime Minister of Canada and attended by the first ministers of the provinces and invited "representatives of the aboriginal peoples of Canada". The Government of Canada and the provincial governments committed themselves to the principle that discussions would take place at such a conference before any constitutional amendments would be made and included in the Constitution of Canada in respect of matters that directly affect the aboriginal peoples, includingthe identification and the definition of the rights of those peoples (articles 35(1) and 37(1) and (2)). In fact, several such conferences were convened by the Prime Minister of Canada in the following years, to which he invited representatives of four national associations to represent the interest of approximately 600 aboriginal groups. These national associations were: the Assembly of First Nations (invited to represent primarily non-status Indians), the Métis National Council (invited to represent the Métis) and the Inuit Committee on National Issues (invited to represent the Inuit). As a general rule, constitutional conferences in Canada are attended only by elected leaders of the federal and provincial governments. The conferences on aboriginal matters constituted an exception to that rule. They focused on the matter of aboriginal self-government and whether and in what form, a general aboriginal right to self-government should be entrenched in the Constitution of Canada. The conferences were inconclusive. No consensus was reached on any proposal and no constitutional amendments have as a result been placed before the federal and provincial legislatures for debate and vote.

2.3 While the State party indicated (on 20 February 1991) that no further constitutional conferences on aboriginal matters were scheduled, the authors point out (in comments dated 1 June 1991) that the State party's Minister of Constitutional Affairs announced, during the last week of May 1991, that a fresh round of constitutional deliberations, to which a "panel" of up to 10 aboriginal leaders would be invited, would take place later that year (1991).

The complaint:

3.1 The authors sought, unsuccessfully, to be invited to attend the constitutional conferences as representatives of the Mikmaq people. The refusal of the State party to permit specific representation for the Mikmaqs at the constitutional conferences is the basis of the complaint.

3.2 Initially, the authors claimed that the refusal to grant a seat at the constitutional conferences to representatives of the Mikmaq tribal society denied them the right of self-determination, in violation of article 1 of the International Covenant on Civil and Political Rights. They subsequently revised that claim and argued that the refusal also infringed their right to take part in the conduct of public affairs, in violation of article 25(a) of the Covenant.

The State party's observations and authors' comments:

4.1 The State party argues that the restrictions on participation in the constitutional conferences were not unreasonable, and that the conferences were not conducted in a way that was contrary to the right to participate in "the conduct of public affairs". In particular, the State party argues that "the right of citizens to participate in 'the conduct of public affairs' does not ... require direct input into the duties and responsibilities of a government properly elected. Rather, this right is fulfilled ... when 'freely chosen representatives' conduct and make decisions on the affairs with which they are entrusted by the constitution." The State party submits that the circumstances of the instant case "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 required that all citizens of a country be invited to a constitutional conference."

4.2 The authors contend, *inter alia*, that the restrictions were unreasonable and that their interests were not properly represented at the constitutional conferences. First, they stress that they could not choose which of the "national associations" would represent them, and, furthermore, that they did not confer on the Assembly of First Nations (AFN) any right to represent them. Secondly, when the Mikmaqs were not allowed direct representation, they attempted, without success, to influence the AFN. In particular, they refer to a 1987 hearing conducted jointly by the AFN and several Canadian Government departments, at which Mikmaq leaders submitted a package of constitutional proposals and protested "in the strongest terms any discussion of Mikmaq treaties at the constitutional conferences in the absence of direct Mikmaq representation". The AFN, however, did not submit any of the Mikmaq position papers to the constitutional conferences nor incorporated them in its own positions.

Issues and proceedings before the Committee:

5.1 The communication was declared admissible on 25 July 1990, in so far as it may raise issues under article 25(a) of the Covenant. The Committee had earlier determined, in respect of another communication, that a claim of an alleged violation of article 1 of the Covenant cannot be brought under the Optional Protocol. 1

5.2 Article 25 of the Covenant stipulates that:

> "every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a)to take part in the conduct of public affairs, directly or through freely chosen representatives;

(b)to vote and to be elected in genuine periodic elections...;

(c)to have access, on general terms of equality, to public service...."

At issue in the present case is whether the constitutional conferences constituted a "conduct of public affairs" and if so, whether the authors, or any other representatives chosen for that purpose by the Mikmaq tribal society, had the right, by virtue of article 25(a), to attend the conferences.

5.3 The State party has informed the Committee that, as a general rule, constitutional conferences in Canada are attended only by the elected leaders of the federal and 10 provincial governments. In the light of the composition, nature and scope of activities of constitutional conferences in Canada, as explained by the State party, the Committee cannot but conclude that they do indeed constitute a conduct of public affairs. The fact that an exception was made, by inviting representatives of aboriginal peoples in addition to elected representatives to take part in the deliberations of the constitutional conferences on aboriginal matters, cannot change this conclusion.

5.4 It remains to be determined what is the scope of the right of every citizen, without unreasonable restrictions, to take part in the conduct of public affairs, directly or through freely chosen representatives. Surely, it cannot be the meaning of article 25(a) of the Covenant that every citizen may determine either to take part directly in the conduct of public affairs or to leave it to freely chosen representatives. It is for the legal and constitutional system of the State party to provide for the modalities of such participation.

5.5 It must be beyond dispute that the conduct of public affairs in a democratic State is the task of representatives of the people, elected for that purpose, and public officials appointed in accordance with the law. Invariably, the conduct of public affairs affects the interest of large segments of the population or even the population as a whole, while in other instances it affects moredirectly 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. That, in fact, would be an extrapolation of the right to direct participation by the citizens, far beyond the scope of article 25(a).

6. Notwithstanding the right of every citizen to take part in the conduct of public affairs without discrimination and without unreasonable restrictions, the Committee concludes that, in the specific circumstances of the present case, the failure of the State party to invite representatives of the Mikmaq tribal society to the constitutional conferences on aboriginal matters, which constituted conduct of public affairs, did not infringe that right of the authors or other members of the Mikmaq tribal society. Moreover, in the view of the Committee, the participation and representation at these conferences have not been subjected to unreasonable restrictions. Accordingly, the Committee is of the view that the communication does not disclose a violation of article 25 or any other provisions of the Covenant.

footnotes

*/ Made public by decision of the Human Rights Committee.

1. See Views of the Committee in communication No. 167/1984 (Lubicon Lake Band v. Canada), adopted on 26 March 1990, paragraph 32.1.]

[Done in English, French, Russian and Spanish, the English text being the original version.]

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