



**International covenant  
on civil and  
political rights**

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HUMAN RIGHTS COMMITTEE  
Eighty-fourth session  
11 – 29 July 2005

**VIEWS**

**Communication No. 879/1999**

<u>Submitted by:</u>	George Howard (represented by counsel, Peter Hutchins of Hutchins, Soroka & Dionne)
<u>Alleged victim:</u>	The author
<u>State Party:</u>	Canada
<u>Date of communication:</u>	9 October 1998 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 97 decision, transmitted to the State party on 25 October 1999 (not issued in document form)
<u>Date of adoption of Views:</u>	26 July 2005

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

*Subject matter:* Limitation of the author's right to fish and its impact on his right to enjoy his own culture, in community with other members of his group.

*Procedural issues:* Determination of the scope of the Committee's decision on admissibility

*Substantive issues:* Right to enjoy one's own culture in community with others

*Articles of the Covenant:* 27

*Articles of the Optional Protocol:* n.a.

On 26 July 2005, the Human Rights Committee adopted the annexed draft as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 879/1999. 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

Eighty-fourth session

concerning

**Communication No. 879/1999\***

Submitted by: George Howard (represented by counsel, Peter Hutchins of Hutchins, Soroka & Dionne)

Alleged victim: The author

State Party: Canada

Date of communication: 9 October 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 July 2005,

Having concluded its consideration of communication No. 879/1999, submitted to the Human Rights Committee on behalf of George Howard 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 author of the communication, and the State party,

Adopts the following:

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

1. The author of the communication, dated 9 October 1998, is Mr George Howard, born 5 June 1946, a member of the Hiawatha First Nation which is recognized under the law of the State party as an Aboriginal people of Canada. He claims to be a victim of a violation by Canada of his rights under articles 2, paragraph 2, and 27 of the Covenant. He is represented by counsel. The Optional Protocol entered into force for Canada on 19 August 1976.

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

### The facts as presented

2.1 The author's Hiawatha community forms part of the Mississauga First Nations. These First Nations, among others, are parties to treaties concluded with the Crown, including a 1923 treaty ("the 1923 Williams treaty") dealing, *inter alia*, with indigenous hunting and fishing rights. It provided, in return for compensation of \$500,000, that the Mississauga First Nations "cede, release, surrender, and yield up" their interests in specific described lands, and further, "all the right, title interest, claim demand and privileges whatsoever of the said Indians in, to, upon or in respect of all other lands situated in the Province of Ontario to which they ever had, now have, or now claim to have any right, title, interest, demand or privileges, except such reserves as have been set apart for them by His Majesty the King."<sup>1</sup>

2.2 On 18 January 1985, the author took some fish from a river close to, but not on, his First Nation's reserve. He was fined after having been summarily convicted in the Ontario Provincial Court for unlawfully fishing out of season. The court rejected arguments of a constitutional right to fish based on the protection in section 35 of the Constitution Act 1982 concerning "existing aboriginal and treaty rights of the aboriginal peoples of Canada". It held that the author's First Nations ancestors had surrendered fishing rights in the 1923 treaties and that no such rights subsisted thereafter. On 9 March 1987, the Ontario District Court rejected the author's appeal.

2.3 On 13 March 1992, the Ontario Court of Appeal dismissed the author's appeal from the District Court, holding that the 1923 treaty had extinguished the fishing rights previously held by the author's First Nation, and that the First Nation's representatives had known and understood the treaty and its terms. On 12 May 1994, the Supreme Court rejected the author's further appeal, holding that by "clear terms" the First Nations surrendered any remaining special right to fish.

2.4 In 1990, the Canadian Supreme Court held in another case that "existing rights" within the meaning of section 35 of the Constitution Act were satisfied by evidence of continuity of the exercise of a right, even if scanty at times, unless there was evidence of a clear and plain intention by the Crown to extinguish the right.<sup>2</sup> Thereafter, the Ontario government committed itself to negotiate arrangements with indigenous people as soon as possible on the issue of hunting, fishing, gathering and trapping.

2.5 On 7 March 1995, the so-called "Community Harvest Conservation Agreements" (CHCAs) were signed by the Ontario Government and the Williams Treaties First Nations, allowing for the exercise of certain hunting and fishing rights. Under these agreements, which were renewable yearly, First Nations were permitted to hunt and fish outside the reserves, for subsistence, as well as for ceremonial and spiritual purposes, and barter in kind.

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<sup>1</sup> In the first preambular paragraph to the treaty, it reads: "WHEREAS, the Mississauga Tribe above described, having claimed to be entitled to certain interests in the lands of the Province of Ontario, hereinafter described, such interests being the Indian Title of the said Tribe to fishing, hunting and trapping rights over the said lands, of which said rights His Majesty, through His said Commissioners, is desirous of obtaining a surrender...."

<sup>2</sup> R v. Sparrow [1990] 1 SCR 1075 (SCC).

2.6 On 30 August 1995, the newly elected Ontario government exercised its right to terminate the CHCAs, wishing “to act in a manner consistent with” the Supreme Court’s decision in the author’s case.

2.7 In September 1995, the First Nations affected by the termination sought interim and permanent injunctions against the Ontario government. The Ontario Court of Justice rejected the claims, holding that the government had properly exercised its right, under the agreements, to terminate them with notice of 30 days. The author contends that the Court made it “very clear” that the outcome of further proceedings would go against the applicants, and that it was therefore pointless to pursue further costly remedies.

2.8 On 16 January 1997, the Supreme Court rejected the author’s motion for a rehearing of his case. The author had argued that developments in the Supreme Court’s jurisprudence to the effect that a clear intent to extinguish fishing rights had to accompany a surrender of interest in land in order to be valid<sup>3</sup> warranted a re-examination of his case.

### **The complaint**

3.1 The author complains generally that he and all other members of his First Nation are being deprived of the ability to exercise their aboriginal fishing rights individually and in community with each other and that this threatens their cultural, spiritual and social survival. He contends that hunting, fishing, gathering and trapping are essential components of his culture, and that denial of the ability to exercise it imperils transmission of the culture to other persons and to later generations.

3.2 Specifically, the author considers that the Supreme Court judgement in his case is incompatible with article 27 of the Covenant. Referring to the Committee’s General Comment 23, he argues that the federal government of Canada failed in its duty to take positive measures of protection by not intervening in his favour in the judicial proceedings. Neither the Covenant nor other applicable international law were referred to or considered in the proceedings. The decision, moreover, has resulted in the denial of essential elements of culture, spiritual welfare, health, social survival and development, and education of children. The author argues that the Williams Treaties are the only treaties that fail to protect indigenous hunting and fishing rights, but instead aim at explicitly extinguishing them, and that the Supreme Court’s decision in this case is an anomaly in its case law. Referring to the Committee’s decision in Kitok v. Sweden,<sup>4</sup> the author argues that, far from being “necessary for the continued visibility and welfare of the minority as a whole”, the restrictions in question imperil the very cultural and spiritual survival of the minority.

3.3 The author contends that the unilateral abrogation of the CHCAs violates article 27 of the Covenant. The author submits that article 27 imposes “an obligation to restore fundamental rights on which cultural and spiritual survival of a First Nations depends, to a sufficient degree to ensure the survival and the development of the First Nation’s culture through the survival and development of the rights of its individual members”. Although providing some relief, the contractual nature of the CHCAs, and the facility for unilateral

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<sup>3</sup> R v. Adams [1996] 3 SCR 101 (SCC).

<sup>4</sup> Case No. 197/1985, Views adopted on 27 July 1988.

termination, failed to provide adequate measures of protection for the author and the precarious culture of the minority of which he is a member.

3.4 The author also alleges violations of article 27 and article 2, paragraph 2, of the Covenant in that the federal and provincial governments are only prepared to consider monetary compensation for loss of the aboriginal rights, rather than restore the rights themselves. Payment of money is not an appropriate “positive measure” of protection, deemed to be required by article 2, paragraph 2.

3.5 The author adds that his claim as described above should be interpreted in the light of article 1, paragraph 2, of the Covenant, as the status of First Nations as “peoples” has been recognized at the domestic level. He contends that article 5, paragraph 2, of the Covenant precludes the State party from contending that First Nations do not, in international law, have such status, for it has been conferred on them by domestic law.

3.6 As a consequence of the above, the author requests the Committee to urge the State party to take effective steps to implement the appropriate measures to recognize and ensure the exercise of their hunting, fishing, trapping and gathering rights, through a new treaty process.

3.7 The author states that the same matter has not been submitted for examination under any other procedure of international investigation or settlement.

#### **Videotape submission by the author**

4. In his original communication of 9 October 1998, the author, referring to the oral tradition of the Mississauga First Nations, requested the Committee to take into account, in addition to written materials submitted by the parties, oral evidence reproduced in the form of a videotape containing an interview with the author and two other members of the Mississauga First Nations on the importance of fishing for their identity, culture and way of life. On 12 January 2000 the Committee, acting through its Special Rapporteur on New Communications, decided not to accept videotape evidence, with reference to the Optional Protocol’s provision for a written procedure only (article 5, paragraph 1, of the Optional Protocol). By letter dated 7 February 2000, the author furnished the Committee with a transcript of the videotaped testimony in question. The Committee expresses its appreciation for the author's willingness to assist the Committee by submitting the transcript.

#### **The State party’s submissions on the admissibility of the communication**

5.1 By submission of 28 July 2000, the State party argues that the communication is inadmissible for failure to exhaust domestic remedies. The State party points out that current laws regulate, but do not prohibit, hunting and fishing activities. The regulations, dealing with licensing requirements, catch and hunting limits, and seasonal restrictions, are intended to advance objectives of conservation, safety and ethical hunting practices. The author, as anyone else, is able to exercise his traditional practices within these confines.

5.2 The State party observes that the Williams Treaties First Nations have an action currently pending in the Federal Court, alleging a breach of fiduciary duty by the federal and Ontario governments. They seek, *inter alia*, a remedy that would restore their hunting and

fishing rights outside the reserves. The parties have currently stayed this action by agreement, while negotiations are continuing.

5.3 The State party further observes that the Williams Treaties First Nations did not avail themselves of the possibilities to challenge the termination of the CHCAs. While the initial action was dismissed on grounds of procedural defect, the Court made clear that it was open to them to bring a fresh application. They did not do so. The State party notes that, while the author contends that to do so would have been “pointless”, it has been the Committee’s constant approach that doubts about the effectiveness of remedies is not sufficient reason not to exhaust them.

5.4 Thirdly, the State party observes that it would be open to the Williams Treaties First Nations to seek the assistance of the independent advisory Indian Claims Commission in resolving a dispute in their claims negotiations with the federal government. This settlement procedure has not been exercised.

### **The author’s comments**

6.1 By submission of 21 December 2000, the author rejects the State party’s observations, arguing that domestic remedies have been exhausted, for the Supreme Court’s binding decision in his case confirmed the extinguishment of his aboriginal rights.

6.2 The author argues that the current proceedings before the Federal Court raise different issues and cannot grant him the remedy he seeks. The current proceedings concern breach of fiduciary duty, rather than the restoration of aboriginal harvesting rights, and seek (in current form) a corresponding declaration with “a remedy in fulfilment of the Defendant Crown’s obligation to set aside reserves, or damages in lieu thereof”. In any event, the Federal Court is bound to follow the Supreme Court’s decision to the extent that it held that the aboriginal rights in question had been extinguished by the Williams Treaties. The author notes that while the Federal Court proceedings may allow his community to acquire additional lands and fair compensation for the 1923 surrender, they will not restore his harvesting rights, since the Supreme Court’s decision has held they were extinguished at that time.

6.3 As to the proceedings to challenge the abrogation of the CHCAs, the author argues that the outcome of further proceedings was “clearly predictable”. The judge stated that he had “determined that on the factual merits there is no support for the granting of any declaratory or injunctive relief”. Referring to the Committee’s jurisprudence,<sup>5</sup> the author notes that the Supreme Court in his case had already “substantially decided the same question in issue” and that therefore there was no need for recourse to further litigation. Moreover, the Supreme Court had denied his own application to revisit its decision in his case, which therefore remained binding on the lower courts.

6.4 To the extent that the State party suggests that negotiations should be pursued, the author argues that these are not “remedies” in terms of the Optional Protocol, and, in any event, that the State party has not shown they would effectively restore the harvesting rights. On 16 May 2000, the First Nations were informed that negotiations would not resume without the presence of the Ontario government as a party. Moreover, the Indian Claims

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<sup>5</sup> Lovelace v. Canada Case No. 24/1977, Views adopted on 19 September 1979.

Commission is an advisory body whose recommendations are not binding upon the federal government. Additionally, the Commission may only facilitate certain categories of dispute, and the federal government has already characterized the issue of restoration of harvesting rights as falling outside those categories.

### **Subsequent submissions of the parties**

7.1 By submission of 12 July 2001, the State party responded to the author's comments, arguing that while the author claims not to be acting as a representative of the Williams Treaties, but on his own behalf, he is in fact clearly acting on their behalf<sup>6</sup> and requesting a collective remedy.

7.2 In terms of current Federal Court proceedings, the State party argues that it is highly relevant that the First Nations are seeking a remedy for breach of fiduciary duty arising from the surrender of their aboriginal rights, including hunting and fishing rights. While they currently seek compensation, they sought a remedy of restoration at an earlier point and of their own accord modified those pleadings to omit this aspect of remedy. The State party points out that it would be open to seek a remedy of restoration of hunting and fishing rights in the appropriate provincial jurisdiction. Indeed, the First Nations have initiated an action in the Ontario Superior Court of Justice.

7.3 The State party points out that the Supreme Court's decision in the author's case was essentially limited to the factual question of whether he had an existing right to fish in the area where he was caught fishing and charged. It did not address questions of breach of fiduciary duties, and remedies available for such a breach, and accordingly these questions remain open before the courts.

7.4 On 5 September 2001, the author further responded, arguing that he satisfies all conditions of admissibility: in particular, he is a victim within the meaning of article 1 of the Optional Protocol, being denied the ability by highest judicial decision to practice fishing as a member of a "minority" within the meaning of article 27. Referring to previous cases decided by the Committee,<sup>7</sup> he argues that it is of no relevance that a remedy he might obtain under the Optional Protocol might benefit others in his community. He alleges specific violations of his rights under the Covenant. Finally, he has exhausted all legal remedies open to him. He submits that it would be unjust to be deprived of his right to present an individual petition based on the Covenant to the Committee simply because his First Nation is pursuing other remedies before Canadian courts under domestic law, along with other First Nation parties to the Williams Treaties.

7.5 The author argues that, under the current state of Canadian law, it is not possible for courts to restore extinguished aboriginal rights.<sup>8</sup> All the courts, including the Supreme Court of Canada, are bound by the constitutional recognition in 1982 of "existing" aboriginal rights

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<sup>6</sup> The State party provides documentation in the form of an application for funding identifying work on "United Nations petition" as part of a First Nations' workplan.

<sup>7</sup> Davidson v. Canada Case No. 359/1989, Views adopted 31 March 1993, and Länsman v. Finland Case No. 671/1995, Views adopted on 30 October 1996.

<sup>8</sup> The author refers to Ontario (Attorney-General) v. Bear Island Foundation [1991] 2 SCR 570 (SCC).



only. He contends that it is irrelevant that the Supreme Court in his case did not address the fiduciary breach question - even if it had, the outcome would have remained unaltered. Similarly, in terms of further action on the abrogation of the CHCAs, the courts would have been bound by the Supreme Court's determination that no aboriginal right existed in the author's case.

7.6 On 15 January 2003, the State party made further submissions, disputing that the current state of its law makes restoration of extinguished rights impossible. The State party points out that in the Supreme Court decision cited to this effect, the Court did not rule on what, if any, would be the Crown's fiduciary obligations to the First Nation in the process of surrender/extinguishment of the First Nation's rights, whether there had been a breach of any such obligations, and, if so, what remedies might be available. However, precisely these issues are either raised in the proceedings pending in the Federal Court by the Williams Treaties First Nations, or could be raised in the action before the Ontario Superior Court of Justice.

7.7 The State party further states that the federal government has not refused to negotiate hunting, fishing, trapping and gathering rights with the Williams Treaties First Nations. The federal government however considers that the restoration of such rights would require the participation of the Ontario State government, as Ontario alone possesses constitutional jurisdiction over provincial Crown lands and the right to pursue harvesting thereon. The Ontario government is reviewing the First Nations' claims and has not yet made a determination as to whether to accept the claim for negotiations.

### **The Committee's decision on admissibility**

8.1 At its 77<sup>th</sup> session, the Committee considered the admissibility of the communication.

8.2 The Committee ascertained that the same matter was not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

8.3 As to the State party's argument that the author is acting on behalf of third parties, the Committee noted that the author claimed personally to be a victim, within the meaning of article 1 of the Optional Protocol, of an alleged violation of his rights under the Covenant, by virtue of the Supreme Court's decision affirming his conviction for unlawful fishing. As to the position of further individuals, the Committee recalled its jurisprudence that there is, in principle, no objection to a group of individuals, who claim to be similarly affected, collectively to submit a communication about alleged breaches of their rights.<sup>9</sup> In the present case, however, to the extent that the communication could be understood to have been brought on behalf of other individuals or groups of individuals, the Committee noted that the author had provided neither authorization by such persons nor any arguments to the effect that he would be in the position to represent before the Committee other persons without their authorization. Consequently, the Committee found the communication inadmissible under article 1 of the Optional Protocol, to the extent it could be understood to have been submitted on behalf of other persons than the author personally.

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<sup>9</sup> See Ominayak et al. v. Canada Case No. 167/1984, Views adopted on 26 March 1990, at paragraph 32.1.

8.4 Concerning the State party's arguments that on-going negotiations might provide an effective remedy, the Committee referred to its jurisprudence that remedies that must be exhausted for the purposes of the Optional Protocol are, primarily, judicial remedies. Negotiations proceeding on the basis of, *inter alia*, extralegal considerations including political factors cannot generally be regarded as being of analogous nature to these remedies. Even if such negotiations were to be regarded as an additional effective remedy to be exhausted in specific circumstances,<sup>10</sup> the Committee recalled, with reference to article 50 of the Covenant, that the State party is responsible, in terms of the Covenant, for the acts of provincial authorities as much as federal authorities. In the light of the absence of a decision, to date, by the provincial authorities, on whether to accept the First Nations' claim for negotiations, the Committee would in any event regard this remedy as being unreasonably prolonged. Accordingly, on the current state of negotiations, the Committee did not, on either view, regard its competence to consider the communication excluded by virtue of article 5, paragraph 2 (b), of the Optional Protocol.

8.5 The same applied in relation to the argument that actions are pending in the Federal Court and in the Ontario Superior Court of Justice. Besides the fact that these actions were brought by First Nations parties rather than the author and that their outcome would have no bearing on the author's conviction in 1985 for unlawful fishing, the Committee considered that insofar as the author might individually benefit from such a remedy, the remedy was unreasonably prolonged in relation to him. The Committee was therefore satisfied that the author, in pursuing his own case through to the Supreme Court, exhausted domestic remedies in respect of the claimed aboriginal rights to fish, which are an integral part of his culture.

8.6 On 1 April 2003, the Committee therefore decided that the communication was admissible to the extent that the author was being deprived, under the sanction of criminal law, of the ability to exercise, individually and in community with other members of his aboriginal community, his aboriginal fishing rights which are an integral part of his culture.

### **The Committee's consideration of the merits of the communication**

#### **State party's submission on the merits**

9.1 By submission of 23 March 2004, the State party comments on the merits of the communication. Contesting the author's claims of violations of articles 2(2) and 27 of the Covenant in his case, the State party submits that the author is able to enjoy, individually and in community with the other members of the Hiawatha First Nation, the aspects of his culture related to fishing.

9.2 The State party recalls that in the 1923 Williams Treaty, the author's First Nation agreed to give up its aboriginal rights to fish, except for a treaty right to fish in the reserves set aside for them. The Ontario Court has held that this treaty right to fish extends to the waters that are adjacent to the reserves and the Government has interpreted this to mean up to 100 yards from shore in waters fronting the reserve boundaries. In these waters the members of the Hiawatha First Nation do not have to comply with Ontario's normal fishing restrictions, such as closed seasons and catch limits and have a right to fish year-round for food, ceremonial and social purposes. In this context, the State party points out that neither

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<sup>10</sup> See Jonassen et al. v. Norway Case No. 942/2000, Decision adopted on 25 October 2002.

the author nor the Hiawatha First Nation depends on fishing for their livelihood. It is said that the members of the Hiawatha First Nation (of whom 184 members live on the reserve and 232 outside) have tourism as their main source of income and that recreational fishing is a significant attraction for tourists to the area. The fish of Rice Lake, on the shores of which the Hiawatha First Nation lives, are said to be among the most abundant in the area.

9.3 The State party further states that in addition the author can obtain a recreational fishing licence enabling him to fish in the lakes and rivers of the Kawartha Lakes region surrounding the Hiawatha First Nation reserve from May to November. The limited restrictions placed on the fishery are targeted and specific to particular fish species and are intended to ensure that the particular vulnerability of each species is duly considered, and that all persons using the resource, including the author and the other members of the Hiawatha First Nation, benefit there from. Limits are imposed on what species of fish may be caught, when each species may be caught and how many may be caught<sup>11</sup>. When the waters bordering the Hiawatha Reserve are closed from 16 November to late April for conservation purposes, the author can fish for most species in other lakes and rivers further away from January to March and from May to December.

9.4 The State party thus argues that, since the author is able to fish all year round, share his catch with his family and show his children and grandchildren how to fish, his right to enjoy the fishing rights belonging to his culture has not been denied to him. The State party submits that the author's assertion that there is not enough fish where he is allowed to fish cannot be reconciled with the fact that he can fish adjacent to the Hiawatha First Nation reserve in the Otonabee river, a short distance downstream from where he was fishing on 18 January 1985 and is also inconsistent with fishery surveys and with public statements made by the Hiawatha First Nation in order to attract tourists. Lawful fishing opportunities exist for the author also in the winter season when the waters next to the Hiawatha reserve are closed for fishing.

9.5 As to the author's argument that the Supreme Court's decision in his case is inconsistent with the State party's obligations under article 27 of the Covenant, the State party recalls the issues and arguments presented to the courts and their decisions. The author was charged for unlawfully fishing during a closed period, because he had taken some pickerel fish from the Otonabee river near but not on the Hiawatha First Nation reserve. At trial before the Provincial Court of Ontario, the author pleaded not guilty and argued that he had a right to fish as a member of the Hiawatha First Nation, that this right was not extinguished by the 1923 Williams Treaty and that this right should not be abrogated by the fishing regulations. The trial judge, having been provided with hundreds of pages of documentary evidence, concluded that the lands where the offence was alleged to have occurred were in fact ceded by the 1923 Treaty, and that any special rights as to fishing were included in that. On appeal in the District Court of Ontario, the judge found that he could not conclude that the Indians were misled at the time of the 1923 Treaty, and that section 35 of the Constitution Act 1982, recognizing and confirming the existence of aboriginal treaty rights of the aboriginal people of Canada, did not create new rights or reconstitute the rights

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<sup>11</sup> The State party indicates that with a resident sport fishing licence, the author can daily catch and possess : 6 walleye, 6 mouth bass, 6 northern pike, 5 trout or salmon, 1 muskellunge, 25 whitefish and unlimited yellow perch, crappie, carp and catfish.

that had been contracted away. In the Ontario Court of Appeal, the central issue was whether the rights of the Hiawatha First Nation members to fish on the Otanabee river had been surrendered by the 1923 Williams Treaty. The author argued that the Treaty should not be interpreted so as to extinguish the rights, or alternatively that the Rice Lake Band (as the Hiawatha First Nation was then called) did not have sufficient knowledge and understanding of the Treaty's terms to bind the Band to it. The Court found that the language of the 1923 Treaty clearly and without ambiguity showed that the Band surrendered its fishing rights throughout Ontario when it entered into that Treaty and concluded that the Crown had satisfied its onus of establishing that the representatives of the Band knew and understood the treaty and its terms. On appeal to the Supreme Court, the central issue was whether the signatories to the 1923 Williams Treaty had surrendered their treaty right to fish. The Supreme Court after having carefully reviewed the lower courts' assessment of the evidence, endorsed their findings and concluded that the historical context did not provide any basis for concluding that the terms of the 1923 Treaty were ambiguous or that they would not have been understood by the Hiawatha signatories. In this context, the Court pointed out that the Hiawatha signatories were businessmen and a civil servant and that they all were literate and active participants of the economy and society of their province.

9.6 The State party argues that the author's attempt to undermine the courts' findings of fact goes against the Committee's principle that it is for the courts of the States parties and not for the Committee to evaluate facts and evidence in a particular case. The State party also takes issue with the author's suggestion that the Supreme Court's decision in his case reversed a long held understanding of the Hiawatha First Nation that after 1923 they maintained their aboriginal right to fish and were not subject to Ontario's fishing laws. According to the State party this proposition was not supported by any evidence during the court hearings and in fact, the evidence was to the contrary.

9.7 Finally, the State party argues that article 27 must allow for a minority to make a choice to agree to the limitation of its rights to pursue its traditional means of livelihood over a certain territory in exchange for other rights and benefits. This choice was made by the Hiawatha First Nation in 1923 and, in the State party's opinion, article 27 does not permit the author to undo his community's choice over 80 years later. The State party notes that the author did not raise any argument related to Canada's international obligations, including article 27 of the Covenant, during the court proceedings.

#### **Author's comments on the State party's submission**

10.1 On 30 August 2004, the author comments on the State party's submission and reiterates that the Williams Treaties are the only treaties in Canada which do not protect Aboriginal hunting, fishing, trapping and gathering rights, but rather are held to have explicitly extinguished these rights. As a consequence, the author claims that he does not enjoy the same special legal and constitutional status as all other Aboriginal peoples of Canada enjoying Aboriginal or treaty rights. The author considers that monetary compensation for these rights is no substitute for the necessary measures of protection of the minority's culture within the meaning of article 27 of the Covenant.

10.2 The author argues that as a member of a minority group, he is entitled to the protection of economic activities that comprise an essential element of his culture<sup>12</sup>. The exercise of cultural rights by members of indigenous communities is closely associated with territory and the use of its resources<sup>13</sup>. The author notes that the State party does not deny that fishing is an essential element of the culture of the minority to which he belongs, but rather focuses on its assertion that the author is in a position to exercise this right to fish. The author states, however, that the State party does not identify whether he is able to exercise his cultural right to fish as distinct from, and additional to, any statutory privileges to fish that are available to all persons, indigenous and non-indigenous, upon obtaining through payment a licence from the Government.

10.3 The author further challenges the State party's focus on fishing only and submits that this is based on an excessively narrow reading of the Committee's admissibility decision. According to the author, his communication also includes his rights to hunting, trapping and gathering since these are an equally integral part of his culture which is being denied.

10.4 The author emphasizes that it is the cultural and societal importance of the right to fish, hunt, trap and gather which are at the heart of his communication, not its economic aspect. The fact that the members of the Hiawatha First Nation participate in the general Canadian economy cannot and should not diminish the importance of their cultural and societal traditions and way of life.

10.5 Referring to the size of the Hiawatha First Nation reserve (790.4 hectares) and the reserve shared with two other First Nations (a number of islands), the author argues that it is unreasonable to suggest that he is able to meaningfully exercise together with members of his community his inherent rights to fish and hunt within the confines of the reserves and the waters immediately adjacent to them. These rights are meaningless without sufficient land over which to exercise them. In this context, the author reiterates that with the exception of the First Nations parties to the Williams Treaties, all other First Nations in Canada who have concluded treaties with the Crown have had their harvesting rights recognized far beyond the limits of their reserves – throughout their traditional territories.

10.6 As to the State party's argument that he can fish with a recreational licence, the author asserts that he is not a recreational fisher. In his opinion, the regulations governing recreational fishing are designed to enhance sports fishing and make clear that all fishing is done as a privilege and not a right. The general rule is prohibition of fishing activities, except as provided for in the regulations and pursuant to a licence. The regulations make exceptions to the general rule for persons in possession of a licence issued under the Aboriginal Communal Fishing Licence Regulations, but the author states that he has been denied the benefit of this provision because of the Court's decision that his aboriginal rights had been extinguished by the Williams Treaty.

10.7 The author observes that by equating his fishing activities with those of a recreational fisher, the State party deems his access to fishing a privilege not a right. His fishing activities

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<sup>12</sup> Kitok v. Sweden, communication No. 197/1985, adopted on 27 July 1998, CCPR/C/33/D/197/1985

<sup>13</sup> See the Human Rights Committee's General Comment No.23 The rights of minorities to enjoy, profess and practice their own culture, 1994

are thus not granted priority over the activities of sport fishers and can be unilaterally curtailed by the State without any obligation to consult the author or the leaders of his First Nation. According to the author, this treatment is contrary to that afforded to other aboriginal persons in Canada for whom the Constitution Act 1982 provides that aboriginal and treaty rights have priority over all other uses except for conservation.

10.8 The author argues that the State party has an obligation to take positive measures to protect his fishing and hunting rights, and that to allow him to fish under recreational regulations is not a positive measure of protection required by article 2(2) of the Covenant.

10.9 He further submits that he is prohibited from fishing in the traditional territory of the Hiawatha First Nation from 16 November to late April every year. According to the author, the State party's argument that he can fish in lakes and rivers further away from the Hiawatha reserve fails to take into account the concepts of aboriginal territory as these lakes are not within the traditional territory of the Hiawatha First Nation. The author further argues that the Regulations give priority to fishing by way of angling and that traditional fishing methods (gill netting, spearing, bait-fish traps, seines, dip-nets etc) are restricted. As a result, many of the fish traditionally caught by Mississauga people cannot be fished by traditional netting and trapping methods. The author also mentions that he cannot ice-fish in the traditional grounds of his First Nation. He refers to a judgement of the Supreme Court (*R. v. Sparrow*, 1990) where the court directed that prohibiting aboriginal peoples from exercising their aboriginal rights by traditional methods constitutes an infringement of those rights, since it is impossible to distinguish clearly between the right to fish and the method of fishing. Finally, the author argues that the catch limits imposed by the Regulations effectively restrict him to fishing for personal consumption only.

10.10 For the above reasons, the author maintains that his rights under article 27 and 2(2) of the Covenant have been violated and requests the Committee to urge the State party to take effective steps to implement the necessary measures to recognize and ensure the exercise of constitutionally protected hunting, fishing, trapping and gathering rights through a treaty process.

#### **Further submissions of the parties<sup>14</sup>**

11.1 By submission of 15 December 2004, the State party takes issue with the author's assertion that the scope of the Committee's admissibility decision includes hunting, trapping and gathering rights. It states that the text of the admissibility decision is clear and that the issue before the Committee only concerns "fishing rights which are integral to" the author's culture. If the author does not agree to this limitation, he is free to request the Committee to review its decision on admissibility, in which case the State party reserves its right to make further submissions on this issue.

11.2 The State party also submits that the 1923 Williams Treaty was negotiated upon request by the First Nations themselves, who were looking for recognition of their claims to rights in the traditional hunting territories in Ontario lying north of the 45<sup>th</sup> parallel. After inquiring

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<sup>14</sup> A further State party's submission dated 2 June 2005 was received by the Committee. This submission, however, was considered by the Committee to contain no new elements.

into the claims, treaties were concluded by which the First Nations gave up their rights over the territories in Ontario in exchange for compensation. The Rice Lake Band was familiar with the treaty process and as examined by the Court of Appeal in the author's case, the minutes of the meeting of the Band in Council show that the draft treaty was read, interpreted and explained before it was unanimously approved.

11.3 As to the author's claims with respect to the restrictions on what species he can fish, and by what method, the State party argues that these claims under article 27 should have been raised before. The State party notes in this respect that the author's original communication focused on the seasonal restrictions of his ability to fish and raised further arguments concerning his ability to transmit his knowledge to his children, participate with his community and fish for subsistence. He raised no claims in respect to being prevented from fishing for traditional fish or with traditional methods and the State party has thus not been requested to make submissions in respect of the admissibility and merits of these claims. The State party further notes that the evidence presented by the author in respect to these claims is very general and not specific to the Hiawatha First Nation, calling into question its reliability. For these reasons, the State party requests the Committee not to address these claims.

11.4 With regard to the author's assertion that the State party has an obligation to take positive measures to protect his fishing rights and that it has failed to do so, the State party submits that the author has a constitutionally protected treaty right to fish within his Nations' reserve and the waters adjacent to it. In the reserve that the author's First Nation shares with the Mississaugas of Curve Lake and of Scugog Island (Trent Reserve No. 36A) the author's treaty right to fish is also protected. The State party points out that the shared reserve is made up of over one hundred islands spread throughout twelve lakes and rivers in the Kawarthas and that the waters adjacent to these islands provide significant fishing opportunities to the author and members of the Hiawatha First Nation. In these waters, the author may fish at any time of the year, using his community's traditional techniques. The State party submits that the above constitutional protection does constitute a positive measure.

11.5 The State party further explains that under the major land cession treaties of Canada, including the Williams treaties, what were once aboriginal rights to hunt and fish were redefined and reshaped through the treaties. The terms of the treaties varied depending on the purpose of the treaty and the circumstances of the parties. According to the State party, treaties in remote areas with sparse population and little urban development protect the pursuit of fish and wildlife for subsistence as appropriate in the context. The Williams treaties concerned however lands in close proximity of urbanization and protection of these rights for subsistence were not an issue.

11.6 As to the author's argument that a recreational fishing licence is a mere privilege and not a right, the State party observes that article 27 does not require that a cultural activity be protected by way of right<sup>15</sup>. In the State party's opinion, licensing in and of itself does not violate article 27. The State party further explains that under an Ontario recreational fishing licence, a person may choose to fish not for recreational purposes but for food, social, educational or ceremonial purposes.

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<sup>15</sup> The State party refers to the Committee's Views in Kitok v. Sweden, communication No. 197/1985, CCPR/C/33/D/197/1985, para. 9.8

11.7 The State party contests the author's argument that the catch limits under the regulations limit him to fishing for personal consumption only. It explains that there are no limits on the number of fish he can catch in the waters on and adjacent to the reserves, and that in the waters beyond this area in open season he can catch unlimited yellow perch and panfish, as well as daily 6 walleye, 6 bass, 6 northern pike, 5 trout or salmon, 1 muskellunge and 25 whitefish. The State party concludes that it is thus untenable to suggest that the author can fish for personal consumption only. It further notes that the author has not presented any evidence as to the needs of his extended family and why they cannot be met.

11.8 The State party also contests the author's statement that he is prohibited from fishing in the traditional territory of the Hiawatha First Nation from 16 November to late April every year and reiterates that the author can fish year round in the waters of Rice Lake and the Otonabee river adjacent to the Hiawatha First Nation reserve, as well as in the waters adjacent to the islands in the Trent reserve. With a recreational licence, he can also fish in Scugog Lake in January and February, as well as in lakes and rivers of neighbouring fishing divisions. In this context, the State party notes that the author has presented no evidence that would support his assertion that these waters are outside the traditional territory and fishing grounds of the Hiawatha Nation. According to the State party evidence shows on the contrary that the seven Williams Treaties First Nations shared their traditional territory.

11.9 Finally, the State party reiterates that the author's requests for findings and remedies on behalf of others than himself are beyond the scope of the admissibility decision in the present case. The State party recalls that the Hiawatha First Nation and the other Williams Treaties First Nations are in the midst of litigation with the Crown on behalf of their members, as they are seeking a judicial remedy for an alleged breach of the Crown's fiduciary duty with respect of the surrender of certain hunting, fishing and trapping rights in the Williams Treaties. It would therefore be inappropriate for the author to seek findings and remedies on behalf of the First Nations when they are not properly before the Committee, and these findings would presuppose the result in the Williams Treaties First Nations' domestic litigation. If the Committee, contrary to the State party, were to find that the author's article 27 rights as they relate to fishing had been infringed, legislative and regulatory mechanisms exist by which the State could provide increased fishing opportunities to the author and his community.

11.10 In his reply to the State party's further submission, the author, in a submission dated 5 April 2005, submits that the islands in the shared Trent Waters Reserve, although numerous, are extremely small, many constituting groups of bare rocks and that the fishing opportunities are thus insignificant. The average size of the islands is said to be 1.68 acre or 0.68 hectare.

11.11 The author further reiterates that the comparison with modern treaties is useful and shows that notwithstanding urban and economic development and non reliance by some Aboriginal persons on traditional activities for subsistence, all treaties except for the Williams treaties recognize and protect hunting, fishing and trapping rights as well as their exercise over a reasonable part of the indigenous' community's traditional territory.

11.12 In reply to the State party's assertion that the author has not provided evidence that Lake Scugog and other lakes and rivers of neighbouring fishing divisions are outside the traditional fishing grounds of the Hiawatha First Nation, the author refers to a map indicating Mississauga family hunting territories, based on the description of these territories made during testimony to the Williams Treaty Commissioners in 1923. According to the author the



map shows that Hiawatha traditional hunting territory was located near Rice Lake and did not include Lake Scugog.

11.13 The author also takes issue with the State party's statement that the Williams treaty was properly negotiated with the author's First Nation, and argues that there was only one day of hearing in the community and that the communities' legal counsel was not allowed to participate. No attention was paid to the cultural and religious significance of fishing for the Mississauga and traditional non-commercial fishing rights were almost extinguished. Accordingly, the author reiterates his argument that the State party has not implemented the Williams Treaties in a way to ensure that the author is able to enjoy his culture.

11.14 In reply to the State party's argument that the article 27 does not require that a cultural activity be protected by way of right, the author argues that his situation is distinguishable from the situation of the author in the case referred to by the State party. In that case, the Committee found that the legislation affecting the author's rights had a reasonable and objective justification and was necessary for the continued viability and welfare of the minority as a whole. The same cannot be said of the fishing regulations applied to the author in the present case.

11.15 The author rejects the State party's argument that he has raised new claims by bringing up the issue of fishing methods as it would be artificial to distinguish between his right to fish and the particular manner in which that right is exercised. He emphasizes that this is not a new claim but that it is the same claim that he has brought under article 27 before the admissibility decision of the Committee.

11.16 The author rejects the State party's argument that he is requesting an inappropriate remedy. He states that no substantive negotiations have taken place between the First Nations and Ontario, but only preparatory meetings. The author further argues that during these meetings it had been agreed that the fact that discussions were occurring would not be interpreted or put forward as an admission of fact, law or other acknowledgement contrary to the position of the parties in the present communication, and that the State party's argument thus breaches this agreement. The author reiterates that the only sufficient remedy is the negotiation in good faith on a timely basis of an agreement that would, on a secure and long-term basis, enable the author to enjoy his culture, and that the tools best suited for this task in Canadian domestic law are treaty protected rights.

### **The Committee's consideration of the merits of the communication**

12.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol.

12.2 In relation to the scope of the decision on admissibility in the present case, the Committee observes that at the time of the admissibility decision, the author had presented no elements in substantiation of his claim concerning the right to hunt, trap and gather or concerning the exhaustion of domestic remedies in this respect. The Committee also notes that the author has raised claims concerning the denial of the use of traditional fishing methods and catch limits only after the communication was declared admissible. In the Committee's opinion, nothing would have stopped the author from making these claims in due time, when submitting his communication, if he had so wished. Since the State party had

not been requested to make submissions on the admissibility of these aspects of the author's claim and the domestic remedies which the author exhausted only dealt with his conviction for fishing out of season, these aspects of the author's claim were not encompassed in the Committee's admissibility decision and the Committee will therefore not consider these issues.

12.3 Both the author and the State party have made frequent reference to the 1923 Williams treaty which was concluded between the Crown and the Hiawatha First Nation and which according to the Courts of the State party extinguished the author's Nation's right to fish outside their reserves or their adjacent waters. This matter, however, is not for the Committee to determine.

12.4 The Committee notes that it is undisputed that the author is a member of a minority enjoying the protection of article 27 of the Covenant and that he is thus entitled to the right, in community with the other members of his group, to enjoy his own culture. It is not disputed that fishing forms an integral part of the author's culture.

12.5 The question before the Committee, as determined by its admissibility decision, is thus whether Ontario's Fishing Regulations as applied to the author by the courts have deprived him, in violation of article 27 of the Covenant, of the ability to exercise, individually and in community with other members of his group, his aboriginal fishing rights which are an integral part of his culture.

12.6 The State party has submitted that the author has the right to fish throughout the year on and adjacent to his Nation's reserves and that, with a fishing licence, he can also fish in other areas in the region which are open for fishing when the area surrounding the reserves is closed. The author has argued that there is not enough fish on and adjacent to the reserves to render the right meaningful and that the other areas indicated by the State party do not belong to his Nation's traditional fishing grounds. He has moreover argued that fishing with a licence constitutes a privilege, whereas he claims to fish as of right.

12.7 Referring to its earlier jurisprudence, the Committee considers that States parties to the Covenant may regulate activities that constitute an essential element in the culture of a minority, provided that the regulation does not amount to a de facto denial of this right<sup>16</sup>. The Committee must therefore reject the author's argument that the requirement of obtaining a fishing licence would in itself violate his rights under article 27.

12.8 The Committee notes that the evidence and arguments presented by the State party show that the author has the possibility to fish, either pursuant to a treaty right on and adjacent to the reserves or based on a licence outside the reserves. The question whether or not this right is sufficient to allow the author to enjoy this element of his culture in community with the other members of his group, depends on a number of factual considerations.

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<sup>16</sup> See inter alia *Kitok v. Sweden*, communication No. 197/1985, Views adopted on 27 July 1988, CCPR/C/33/D/197/1985 and *Länsmann v. Finland*, communication No. 511/1992, Views adopted on 26 October 1994, CCPR/C/52/D/511/1992 and communication No. 671/1995, Views adopted on 30 October 1996, CCPR/C/58/D/671/1995.

12.9 The Committee notes that, with regard to the potential catch of fish on and adjacent to the reserves, the State party and the author have given different views. The State party has provided detailed statistics purporting to show that the fish in the waters on and adjacent to the reserves are sufficiently abundant so as to make the author's right to fish meaningful and the author has denied this. Similarly, the parties disagree on the extent of the traditional fishing grounds of the Hiawatha First Nation.

12.10 The Committee notes in this respect that these questions of fact have not been brought before the domestic courts of the State party. It recalls that the evaluation of facts and evidence is primarily a matter for the domestic courts of a State party, and in the absence of such evaluation in the present case the Committee's task is greatly impeded.

12.11 The Committee considers that it is not in a position to draw independent conclusions on the factual circumstances in which the author can exercise his right to fish and their consequences for his enjoyment of the right to his own culture. While the Committee understands the author's concerns, especially bearing in mind the relatively small size of the reserves in question and the limitations imposed on fishing outside the reserves, and without prejudice to any legal proceedings or negotiations between the Williams Treaties First Nations and the Government, the Committee is of the opinion that the information before it is not sufficient to justify the finding of a violation of article 27 of the Covenant.

13. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it do not disclose a violation of the International Covenant on Civil and Political Rights.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

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