SUBMISSION OF THE GOVERNMENT OF CANADA ON THE ADMISSIBILITY AND MERITS OF THE COMMUNICATION TO THE HUMAN RIGHTS COMMITTEE OF SHARON McIVOR AND JACOB GRISMER

COMMUNICATION NO.2020/2010

August 22, 2011

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EXECUTIVE SUMMARY

This communication, brought under the *Optional Protocol to the International Covenant on Civil and Political Rights* (Optional Protocol) on behalf of Sharon McIvor and her son Jacob Grismer, concerns the criteria for the determination of eligibility for status as an Indian under the *Indian Act*. The authors allege violations of the *International Covenant on Civil and Political Rights* (Covenant). They allege that they have been discriminated against on the basis of sex (article 26 of the Covenant) as a result of the eligibility criteria set out in the *Indian Act* and that they are not able to enjoy their culture on an equal basis (article 27 read together with article 2(1) and article 3) because of this alleged discrimination. The authors also claim that they have not had access to an effective domestic remedy (article 2(3)) for the alleged violations of Covenant rights.

Canada asks the Human Rights Committee, on the basis of the facts and law contained in this submission, to find the authors' communication to be inadmissible in its entirety and, in the alternative, to find it to be wholly without merit.

Canada argues that the communication is inadmissible in whole or in part because the authors cannot demonstrate that they are the victims of a violation of the Covenant. The authors have successfully pursued their allegations of discrimination before Canadian tribunals and have received a remedy that effectively answers their allegations. Canada further submits that certain aspects of the authors' allegations involve facts that pre-date the coming into force of the Covenant and the Optional Protocol for Canada. In addition, certain aspects of the authors' allegations do not apply to the personal situations of the authors and, moreover, are currently put at issue in Canadian courts by others who are directly affected. Furthermore, some aspects of the authors' allegations involve harm not attributable to State actors. Canada is also of the view that the authors have completely failed to substantiate their claim regarding access to an effective remedy.

In this submission, Canada also argues that the communication is without merit. The authors have failed to substantiate a violation of either article 26 or article 27 (read together with article 2(1) and article 3).

There is no discriminatory distinction in the current eligibility criteria under the *Indian Act*. The distinctions that exist in the drafting language used to describe the various bases for eligibility within s.6 of the *Indian Act* are reasonable and objective in nature. Canada emphasizes the fact that the *Indian Act* provides for only one Indian status; persons either are or are not eligible for

Indian status. The 1985 and 2011 amendments to the *Indian Act* criteria for eligibility do not create degrees of status or degrees of "Indianness." Canada contends that "transmitting Indian status" is a mischaracterization in law and cannot be considered as either a tangible or intangible benefit. Moreover, Canada contends that Indian status is not a marker of cultural identity or personal legitimacy.

Canada submits that the authors have failed to substantiate a violation of article 27 read together with article 2(1) and article 3. The authors have failed to demonstrate any significant interference by the government with their right to enjoy their culture. The current impacts on the complainant's ability to enjoy their culture result from the actions of private actors and cannot be attributed to the government.

Finally, Canada contends that the authors have failed to substantiate a violation of article 2(3). The right to an effective remedy is dependent on the finding of a violation of a Covenant right; as already noted the authors have failed to substantiate a violation of equality or of cultural rights. Even if the authors could substantiate a violation of article 26 or 27, which is denied, they are not able to demonstrate the lack of remedial processes in Canada by which to address their allegations. The authors successfully raised their allegations, to the extent the allegations relate to their factual situations, before Canadian tribunals and received a full remedy.

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I. INTRODUCTION

1. By letter dated 23 December 2010, the Secretary-General of the United Nations requested that Canada submit to the Human Rights Committee (Committee) information and observations with respect to the communication received by the Committee under the *Optional Protocol to the International Covenant on Civil and Political Rights* (Optional Protocol) on behalf of Ms. Sharon McIvor and Mr. Jacob Grismer (authors).

2. In this submission, Canada argues that the authors' communication, which alleges violations of Articles 2, 3, 26 and 27 of the *International Covenant on Civil and Political Rights* (Covenant) is inadmissible, in whole or in part, on various grounds.

3. The authors have litigated their allegations of discrimination in Canadian courts and won. Through a combination of litigation pursuant to the Canadian constitutional right to equality and the Government of Canada's legislative response to the final judicial decision, the authors have been given an effective and appropriate remedy. The legislative response to the Canadian court decision has also given an effective remedy to all others in the same situation as the authors.

4. Further, Canada argues that aspects of the authors' communication are inadmissible either for failure to exhaust domestic remedies pursuant to Article 5(b) of the Optional Protocol and Rule 96(f) of the Committee's Rules of Procedure[1] or because the authors are not victims of certain aspects of the alleged violations as required by Article 1 of the Optional Protocol and Rule 96(b).

5. In addition, Canada notes that the authors' allegations that Canada has violated their right to an effective remedy as guaranteed by Article 2(3) of the Covenant is inadmissible on the ground of non-substantiation and should be dismissed pursuant to Rule 96(b) of the Rules of Procedure.

6. This submission also sets out Canada's preliminary arguments on the merits of the authors' allegations. Should the Committee find some aspects of the communication to be admissible, Canada asks the Committee to find the communication to be without merit. Canada emphasizes the fact that with the coming into force of recent amendments to the *Indian Act*, there is no difference between the authors' situation with respect to eligibility for status and that of other individuals in comparable situations who base their eligibility for status on a male ancestor; any legislative distinction between the criteria for eligibility in the various paragraphs of subsection 6(1) of the *Indian Act* is not discriminatory. Further, Canada submits that the authors are not being impeded in the enjoyment of their culture by any laws or actions of the government and

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[1] *Rules of Procedure of the Human Rights Committee*, CCPR/C/3/Rev.9, 13 January 2011

any continuing barriers that may exist are not attributable to Canada. Finally, the authors have completely failed to substantiate their allegations of a lack of an effective remedy in Canada.

7. The authors' allegations focus on discrimination and the impacts of discrimination on their ability to participate in the culture of their indigenous community. The authors' allegations of violations by Canada of their rights to equality and to participation in their culture rely in large part on historical discrimination, that is, on the discriminatory treatment generally of First Nations women under successive versions of the eligibility criteria in the *Indian Act* governing registration as a status Indian prior to 1985. Canada contends that the general allegations and those allegations relating to the application of the pre-1985 criteria to the authors are outside the competence of the Committee under the Optional Protocol. Canada submits that any residual discrimination affecting the authors, which resulted from the 1985 amendments to the eligibility criteria, has been corrected by the 2011 amendments now in force.

8. As this communication raises the issue of discrimination on the basis of sex, it is necessary to compare the situations of the authors, and more particularly that of Sharon McIvor (and her descendents), relative to a man otherwise in her position (and his descendents). Throughout the materials provided in support of the submissions of the parties, the Committee will note that Sharon McIvor's situation is at times compared to that of her brother, at other times to that of her "hypothetical brother" and also to a "hypothetical man." In this submission, Canada takes the last approach and attempts to explain the situations of Ms. McIvor and Mr. Grismer by examining the application over time of the *Indian Act* criteria for eligibility for status based on whether a person with Ms. McIvor's family history was eligible for Indian status – depending on whether the ancestor in the place of Ms. McIvor is a woman or a man. The comparator will be described in short as the "comparable man".

II. FACTUAL BACKGROUND

9. At its core, this communication concerns the criteria for the determination of who is eligible to be registered as an Indian under the *Indian Act*.[2]

10. This part of the submission addresses the historical roots of the *Indian Act*, the 1951, 1985 and 2011 amendments to the criteria for eligibility for Indian status, the domestic litigation by which the authors' challenged the application of the 1985 eligibility criteria to their situations and the application of the eligibility criteria to the authors over time. As the Court of Appeal for British Columbia (Court of Appeal or BCCA) noted in *McIvor v. Canada*,[3] "the analysis of the issue is made more difficult by the fact that the provisions governing Indian status are complex."[4]

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[2] *Indian Act*, R.S.C. 1985, c. I-5, as amended

[3] *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153 (McIvor BCCA); reversing in part *McIvor v. The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 827 (McIvor BCSC)

[4] McIvor BCCA at para.13

A. Historical Context

11. The term **"Indian"** [5] is only one of many terms used to describe indigenous people in Canada. The indigenous or Aboriginal peoples of Canada include Indian, Inuit and Metis peoples[6] who have their own names to describe their various communities, cultures and governments. Individuals identified as members of the Aboriginal peoples in Canada are treated differently by government and have been historically by both successive colonial and later Canadian administrations. Historically, Indians, often now collectively referred to as First Nations people, were subject both to special disqualifications and to special entitlements vis-à-vis non-Aboriginals as well as the Inuit & the Metis. Even prior to the creation of Canada, as treaties and other arrangements were concluded and reserves (lands set aside or reserved for First Nations) were established, it was necessary to enact legislation setting out who was and who was not identified as a First Nations person. This was necessary in order to clearly identify the relationship between the individual First Nations person and the government (individual-government relationships). The government also has relationships with Bands which are defined under the *Indian Act* as well as other Aboriginal communities and governments (group-government and government-government relationships).

12. The *Constitution Act, 1867*, the document which created Canada and which determines the division of powers between the federal and provincial orders of government, gives the Government of Canada (the federal level) jurisdiction over "Indians, and Lands reserved for the Indians".[7] The Government of Canada first defined "Indian" by statute in 1868, the year after the union of various British colonies into the new State which in its current expanded form is called Canada. From that time onwards, the Government of Canada has utilized a legislated definition of Indian - statutory criteria that determine eligibility for the status of "Indian." The *Indian Act*, first enacted in 1876, consolidated various earlier laws dealing with Indians; eligibility criteria for defining who has the status of "Indian" under the *Indian Act* have existed ever since.

13. Although the *Indian Act* has been in existence since 1876 and has been amended many times, the iterations of the Act that are central to this communication are those from 1951, 1985 and 2011.

B. The 1951 Indian Act

14. The 1951 version of the *Indian Act* created the Indian Register, which contained both Band lists as well as a general list of all persons with Indian status who had no Band affiliation and it created the position of Registrar, an officer of the government charged with determining entitlement to registration. In addition, the 1951 *Indian Act* introduced what is popularly called the "Double Mother Rule". The eligibility criteria in the 1951 *Indian Act* remained essentially

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[5] In this submission, the term "Indian" means a person eligible to be registered under the *Indian Act* and "non-Indian" means a person not entitled to registration.

[6] For example, s.35 of the *Constitution Act, 1982* provides that the Aboriginal peoples of Canada include "Indian, Inuit and Metis peoples."

[7] See s.91(24) of the *Constitution Act, 1867*.

unchanged until 1985; these criteria were in force at the time of the *Lovelace* communication.[8]

15. As described by the Court of Appeal, there were three significant features[9] of the 1951 eligibility criteria:

- "First, a woman lost her status as an Indian if she married a non-Indian. On the other hand, an Indian man retained his status if he married a non-Indian, and his wife also became entitled to status."
- "Second, a child born of a marriage between an Indian and a non-Indian was an Indian only if his or her father was an Indian. The rules for illegitimate children were more complex – if both parents were Indians, the child was an Indian. If only the father was an Indian, the child was non-Indian, and if only the mother was an Indian, the child was an Indian, but subject to being excluded if a protest was made." **Note** that the underlined text in this quote of paragraph 22 of the reasons of the Court of Appeal contains an error. The correct statement is: 'if only the father was an Indian, the illegitimate child was also an Indian.' **Note also** that the illegitimate child of an Indian woman was registered unless it was established that the father was not an Indian and that exclusion by protest only came into effect in 1956.
- "Finally, from 1951 onward, where an Indian man married a non-Indian woman, any child that they had was an Indian. If, however, the Indian man's mother was also non-Indian prior to marriage, the child would cease to have Indian status upon attaining the age of 21 under the **Double Mother Rule**."[10]

16. Until amendments in 1985, the statutory rules which governed eligibility for registration as an Indian favoured Indian men and their male descendents, took status away from Indian women who married non-Indian men and denied status to children who traced their First Nations' descent through those women.

C. The 1985 *Indian Act* - Bill C-31 amendments to the eligibility criteria

17. By the 1970s and into the 1980s, successive federal governments recognized the need to reform the provisions dealing with eligibility for registration as an Indian (status). A number of factors, not least being the numerous calls for legislative reform by individuals and groups, fuelled the push to amend the *Indian Act*:

- In 1976, Canada acceded to the *International Covenant on Civil and Political Rights* (the Covenant).

- In 1981, the Human Rights Committee found that Canada was violating the right of Sandra Lovelace under Article 27 of the Covenant because the removal of her Indian

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[8] *Lovelace v. Canada,* Communication No.24/1977 (1981)

[9] McIvor BCCA at paras.21-23

[10] Two details not reflected in this description are provided under s.12(1)(1)(iv) of the 1951 *Indian Act*: firstly, the initial mixed union need not have been a marriage; secondly, the initial mixed union could have pre-dated the 1951 *Indian Act*.

status upon her marriage to a non-Indian man meant that she could no longer live on the reserve lands of her birth community and, therefore, effectively deprived her of access to participation in her culture, her religion and the use of her language.[11]

- In 1982, the *Constitution Act, 1982* became part of the Canadian Constitution. It added not only the *Canadian Charter of Rights and Freedoms* (Charter), which guarantees a wide range of human rights, but also s.35, which guarantees Aboriginal rights. Section 35(1) provides:

> The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

- On April 17, 1985, the equality rights provision of the Charter, s.15,[12] came into force (three years after the rest of the Charter[13]). It provides:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

An infringement of Charter rights, including s.15 equality rights, may be justified in certain circumstances. Section 1 of the Charter guarantees the rights and freedoms in it subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." That is, a government measure that infringes s.15 may be justifiable if it pursues a pressing and substantial objective and it meets a test of proportionality.

18. Despite the recognition of the clear need to amend the *Indian Act*, the process leading up to the 1985 amendments (Bill C-31) – which is discussed at length in the decision of the trial judge in *McIvor*[14] and referenced in the Court of Appeal judgment[15] – was a lengthy one. The protracted nature of the process can be understood in part as owing to the complexity of finding a solution that would resolve calls both for the equal treatment of women and for greater control by Aboriginal groups over membership in their communities.

19. The Canadian government engaged Aboriginal groups and individuals as well as other Canadians, on the best way to amend the *Indian Act*. This engagement process included special hearings with First Nations associations. Various reports and discussion papers were prepared for the Department of Indian Affairs and Northern Development.[16] As noted by the Court of

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[11] *Lovelace v. Canada*, Communication No.24/1977 (1981)

[12] See also s.28 of the Charter, a provision similar to Article 3 of the Covenant, which guarantees the rights and freedoms in the Charter equally to men and women.

[13] The coming into force of s.15 of the Charter was put off for three years to allow federal and other orders of government additional time to bring their laws and practices into conformity with equality rights.

[14] McIvor BCSC at paras.35-77

[15] McIvor BCCA at para.28

[16] The Department of Indian Affairs and Northern Development ("DIAND") has been known by various names over

Appeal, "[t]here was simply no consensus among First Nations Groups as to who should be reinstated to Indian status, and as to what the future rules governing status should be."[17]

20. After many studies, reports and discussions, in 1984 the government introduced Bill C-47, aimed at the elimination of the discriminatory treatment of women in the eligibility criteria, and companion legislation, Bill C-52, in order to increase self-governance within Indian Bands. Due to an election call in June of 1984, these bills were never passed into law. The new government introduced Bill C-31, a legislative proposal that combined both aspects of the 1984 Bills, into the House of Commons in February of 1985.

21. During Second Reading of Bill C-31 in the House of Commons, the Minister of Indian Affairs and Northern Development, David Crombie, indicated that the proposed amendments to the *Indian Act* were based upon the following principles:

- That discrimination based on sex should be removed from the Act
- That status and Band membership should be restored to those whose status and band membership were lost as a result of prior discriminatory criteria
- That no one should gain or lose status as a result of marriage
- That persons who have acquired rights under earlier versions of the Act should not lose those rights
- That Indian Bands which desire to do so should be able to determine their own membership[18]

22. In April of 1985, Bill C-31 came into force.[19] It amended the *Indian Act* to include new registration provisions in sections 6 and 7 and new band membership provisions in sections 8 through 14. The Court of Appeal in *McIvor* found that the 1985 legislation was a *bona fide* attempt to eliminate discrimination on the basis of sex and that the Government of Canada acted in good faith in enacting the legislation.[20]

23. Section 6 of the *1985 Act,* entitles four categories of individuals to status as an Indian:

(1) Persons eligible for status immediately prior to April 17, 1985 - s.6(1)(a) preserves previously acquired or vested rights;

(2) Persons who are members of new bands - s.6(1)(b) provides status to members of Indian bands created after April 17, 1985;

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time. Until recently it has been known for some years as Indian and Northern Affairs Canada ("INAC"), and currently is called Aboriginal Affairs and Northern Development Canada ("AANDC").

[17] McIvor BCCA at para.27

[18] See the House of Commons Debates on Second Reading of Bill C-31, March 1, 1985 at p.2645, cited in McIvor BCSC at para.304

[19] *An Act to Amend the Indian Act,* S.C. 1985, c.27

[20] McIvor BCCA at paras.10 and 124

(3) Persons whose status was restored by the 1985 amendments – those previously removed or omitted from the status list (Indian Register) or, prior to September 4, 1951,[21] from a Band list because they were:

i. S.6(1)(c)
   - women who had married non-Indians,
   - men and women whose mothers and paternal grandmothers were non-Indians prior to marriage (the Double Mother Rule)[22]
   - illegitimate children of Indian women who had lost status because of non-Indian paternity, and
   - women who married Indians who lost status through enfranchisement and any children of those women

ii. S.6(1)(d)
   - men or women who were enfranchised by application

iii. S.6(1)(e)
   - persons enfranchised after spending five years out of Canada without permission or by reason of their profession or education

and

(4) Persons who have one or more parents who are eligible for status:

i. s.6(1)(f)
   - women or men with two parents eligible for status under either subsection of s.6 (subsection (1) or (2))

ii. s.6(2)
   - men or women with one parent eligible for status under any paragraph of subsection.6(1).

24. The 1985 amendments changed the criteria for eligibility in a number of key ways:

- Perhaps most importantly, the amendments re-instated (restoration of status) women and men who had lost or been denied eligibility for status due to the earlier criteria that discriminated on the basis of sex.

- Moreover, since 1985, no one gains or loses eligibility for status as a result of marriage.

- No one lost eligibility for status where that eligibility existed before the 1985 amendments, including non-Indian women who became eligible for status upon

[21] As noted above, the Indian Register was introduced on September 4, 1951; prior to that date, any removals would have been from a Band list.

[22] Where the second marriage in question occurred after September 4, 1951

marriage to an Indian man prior to the 1985 amendments. That is, any pre-1985 entitlements to eligibility for status were preserved in the 1985 amendments by s.6(1)(a).

- The 1985 amendments accorded eligibility for status to those persons who had had status but lost it under the Double Mother Rule upon reaching the age of 21 prior to 1985. After 1985, any child who had lost status because of the Double Mother Rule regained status under s.6(1)(c).

- The 1985 amendments created what is popularly known as the **Second Generation Cut-off.** Since 1985, there has been, and continues to be, a difference between those eligible for status under s.6(1) and those eligible under s.6(2). The effect of s.6(2) is the ineligibility for status of certain persons; this can occur after two generations of Indians parenting with non-Indians (parenting-out) within a line of descent. The effect of s.6(1)(f) is to ensure that the grandchildren of the first generation of parenting-out – the third generation – are eligible for status if both their parents – the second generation – are eligible for status. This Second Generation Cut-off replaces the previous gender-biased Double Mother Rule with a gender-neutral scheme. Like the Double Mother Rule before it, the Second Generation Cut-off is designed to ensure that those who are eligible for Indian status have a sufficient degree of descent from – are sufficiently connected to – the historical First Nations peoples with which previous governments entered into a treaty and / or for whom reserves were created. It is to individuals with this sufficient level of descent / connection that the current government continues to provide certain specific benefits.[23]

25. The 1985 amendments also gave Indian Bands the opportunity to gain greater control over their membership lists:

- The 1985 amendments gave Indian Bands the ability to take over control of their membership lists and, subject only to the protection of acquired rights, to determine the criteria for membership in their Band. Prior to the 1985 amendments, only persons registered as having Indian status could be the member of an Indian Band; registration and Band membership were synonymous, with the limited exception of a small number of persons on the 'General List'.

- Since 1985, Bands can choose to take control of their membership list under s.10 of the *Indian Act*.[24] Bands that choose not to control their membership list (s. 11 Bands) have their membership determined by the criteria for eligibility for status in s. 6. Section 10 Bands, even though they control their own membership list, can choose to replicate the eligibility rules in s.6 of the *Indian Act* in their membership codes, Of the approximately 615 Indian Bands in Canada, 240 have taken control of their

[23] As noted by both levels of the Court in *McIvor*, these benefits include extended health benefits, financial assistance with post-secondary education (and extracurricular programs) and exemptions from certain taxes.
[24] Under s.10 of the *1985 Act,* Bands who assume control of their own membership lists must comply with certain membership requirements for the protection of acquired rights.

membership.

26. Canada emphasizes the fact that the *Indian Act* provides for only one Indian status; persons either are or are not eligible for Indian status. The 1985 amendments to the *Indian Act* did not create degrees of status or degrees of "Indianness." Since the 1985 amendments, the rules governing eligibility for status as an Indian are found in s.6 of the *Indian Act*. The paragraphs of subsection 6(1) (particularly (a), (c), (d) and (e)) are essentially transitional provisions which indicate, for persons born before 1985, how the eligibility criteria move from the 1951 *Indian Act* registration regime to the 1985 *Indian Act* regime. For everyone born after 1985, the most relevant provisions are s.6(1)(f) and s.6(2).

D. Initial application of the 1985 amendments to the authors and related litigation

27. On September 25, 1985, Sharon McIvor applied on her own behalf and on the behalf of her children, including Jacob Grismer, to be registered as Indians pursuant to s.6(1) of the 1985 Act. On February 12, 1987, the Registrar informed Sharon McIvor that she was eligible to be registered under s.6(2), as a person with one status parent (her mother) but her children were not eligible as their other parent was a non-Indian. On February 28, 1989, the Registrar confirmed his earlier decision.

28. On July 28, 1989, the authors appealed (statutory appeal) the Registrar's decision regarding the basis for their eligibility (and ineligibility in the case of the children). Ms. McIvor sought an order that she be registered under s.6(1)(c) of the 1985 Act and Mr. Grismer sought an order that he be registered under s.6(2) of the 1985 Act. As noted by the Court of Appeal, Ms. McIvor contributed to the length of time it took to resolve the basis for her eligibility by first discontinuing and then later reinstating her statutory appeal.[25]

29. Canada observes that it took many years to sort out the correct application of the 1985 eligibility criteria to Sharon McIvor. Her personal situation was complicated factually; it was not initially clear to the Registrar on the application of the 1985 criteria whether she had one or two parents entitled to status. This complication is an illustration of both the importance of personal history of descent as well as the impact of amendments over time to the growing complexity in the application of the criteria governing eligibility. The subsequent history of the interaction between the Registrar and the authors can be found in some detail in the decision of the British Columbia Supreme Court (the trial decision) in *McIvor*.[26]

30. In 1994, the authors filed a Statement of Claim in the British Columbia Supreme Court, challenging the constitutionality of the 1985 amendments to the *Indian Act* on the basis that they violated their equality rights protected by s.15 of the Charter. The resulting litigation combined the statutory appeal from the Registrar's 1989 decision with the action seeking remedies under the *Charter*.

31. Eight years later, the authors filed notices of constitutional question dated January 28, 2003

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[25] BCCA at para.40

[26] McIvor BCSC at paras.88-122

and January 3, 2006 which were then heard before the British Columbia Supreme Court. The delay between the filing of the Statement of Defence by the Government of Canada in 1995 and the filing of the required Notice of Constitutional Question by the authors in 2003 (and then in 2006) was not due to any action, or inaction, on the part of the Government.

32. In their domestic litigation, the authors challenged the impact of the 1985 amendments on their extended family. More particularly, the authors claimed that the 1985 eligibility criteria created a discriminatory distinction between matrilineal descendents and patrilineal descendents born prior to April 17, 1985; that is: between descendents born prior to April 17, 1985 of Indian women who married non-Indian men and descendents born prior to April 17, 1985 of Indian men who married non-Indian women. This distinction is popularly called the **Cousins Issue.**

Decision of the Trial Judge

33. The trial judge found that eligibility for Indian status (eligibility to be registered as an Indian) and the ability to transmit status to one's children were benefits of the law. The trial judge focussed on the impact of the 1985 eligibility criteria on those born before 1985 and newly eligible for registration under it. The Court compared the situation of Sharon McIvor under the 1985 amendments to a man who at April 17, 1985 had Indian status, was married to a person who did not have Indian status (prior to marriage) and who had children. The circumstances of this hypothetical man mirror Ms. McIvor's circumstances in every way relevant to registration under the 1985 amendments except for their gender (the comparable man). The situation of Jacob Grismer was compared to the child of a man who at April 17, 1985 had Indian status, was married to a person who did not have Indian status (prior to marriage) and who had children; this hypothetical child mirrors Mr. Grismer's circumstances in every way relevant to registration (under the 1985 amendments) except for the gender of the line of descent (matrilineal compared to patrilineal).

34. By decision of the trial judge dated July 8, 2007, the British Columbia Supreme Court declared that s.6 of the 1985 *Indian Act* violated the Charter because it discriminated, on the grounds of sex and marital status, against Indian women who married non-Indian men prior to April 17, 1985, and their descendants with respect to eligibility to status; the infringement of the equality provisions (ss.15 and 28) was held not to be justified under s.1 of the Charter.[27]

35. The trial judge found that the 1985 eligibility criteria discriminated by preferring descendents (born before 1985) who trace their Indian ancestry along the paternal line over those who trace their Indian ancestry along the maternal line and continue to prefer male Indians who married non-Indians (prior to 1985) and their descendents, over female Indians who married non-Indians and their descendents.[28]

36. The Government of Canada appealed the trial decision to the Court of Appeal.

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[27] *McIvor v. The Registrar (Indian and Northern Affairs, Canada,* 2007 BCSC 1732; note that this is a separate decision

[28] McIvor BCSC at para.7

Decision of the Court of Appeal for British Columbia

37. The Court of Appeal focused on the issue of discrimination on the basis of sex and took a different approach to the facts. The Court of Appeal found that had the 1985 eligibility criteria always been in existence, there could be no claim that the criteria discriminated on the basis of sex.[29] It found that the difficulty arose in the 1985 transition from a regime that had discriminated on the basis of sex to one that does not. Moreover, the Court of Appeal recognized the simple fact that each individual is descended from both a woman and a man and can trace their descent along matrilineal and patrilineal lines;[30] the Court expressed doubt that "matrilineal descent" qualifies as a prohibited ground of discrimination where the descendants in question are generations removed from a remote ancestor disadvantaged long before the Charter's introduction.[31] It concluded that the government was not obligated to correct historical discrimination but rather was obligated to correct both any current discrimination and any discriminatory effects of past discrimination affecting persons seeking registration.

38. The Court of Appeal also found that both tangible and intangible benefits flow from Indian status. It identified the tangible benefits of Indian status to include extended health benefits, financial assistance with post-secondary education (and extracurricular programs) and exemptions from certain taxes. Although the Court of Appeal disagreed with the trial judge's failure to distinguish between Indian status and Band membership, it did accept that intangible benefits also flow from eligibility for status. The Court of Appeal found that the ability to transmit Indian status to one's offspring can be of significant spiritual and cultural value.[32]

39. The Court of Appeal focused on the fact that s. 6 of the 1985 *Indian Act* accorded eligibility for status – under s. 6(1) – to children who otherwise would have lost it pursuant to the Double Mother Rule prior to April 17, 1985. Under the Double Mother Rule, in force from 1951 to 1985, a person lost eligibility for status at age 21 if that person's mother and paternal grandmother did not have a right to Indian status other than by virtue of having married Indian men. In the view of Court of Appeal, by according eligibility to status "for life" under s.6(2) to persons affected by the Double Mother Rule (third generation) but not taking the same approach (eligibility under s.6(2)) to persons like Mr. Grismer's children (third generation after re-instatement of maternal grandmother), the 1985 *Indian Act* created new inequalities.

40. The Court of Appeal found that with the 1985 amendments – with the extraordinary exception of the enhanced treatment of persons previously denied status at age 21 under the Double Mother Rule – all children with only a single Indian grandparent are not eligible for Indian status. The Court of Appeal found that the 1985 legislation, for reasons of preserving existing rights, postponed the Second Generation Cut-off by one generation for those who had

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[29] McIvor BCCA at para.9

[30] McIvor BCCA at para.99; Canada notes that Sharon McIvor eventually was found to have been eligible for status under the 1951 amendments (prior to her marriage to a non-Indian in 1970) on the basis of the status of both her mother, Susan Blankinship, and her father, Ernest McIvor: McIvor BCSC at paras.116-120. Either route (matrilineal or patrilineal) was sufficient.

[31] McIvor BCCA at para.99

[32] McIvor BCCA at paras.70-71

Indian status at the date of its enactment – essentially for men in a situation comparable to Sharon McIvor. It was this new inequality – what it called the echo of discrimination – that the Court of Appeal found to infringe s. 15 (equality) of the Charter.

41. The Court of Appeal held that this infringement of s.15 (equality rights) was not justifiable under s.1 of the Charter because it failed to minimally impair the rights of the claimants and others in their situation. While the Court of Appeal found the objectives of preserving rights previously acquired (i.e., not removing existing rights of men and their descendants)[33] and avoiding a situation which would overwhelm Indian Band communities to be reasonable and acceptable,[34] it found that one aspect of the 1985 amendments could not be attributed to these objectives – the enhancement of the status of individuals who would have lost entitlement at age 21 under the Double Mother Rule. The fact that the counterparts of Sharon McIvor's grandchildren were entitled under the new legislation to status "for life" (when previously they would have lost status at age 21) was found to be unjustified as it went beyond the mere preservation of existing rights.[35] The Court did not find any intention to discriminate and indicated that other aspects of Bill C-31 (which were not properly before the Court) might well be justifiable under s.1. The Court of Appeal struck down s.6(1)(a) and s.6(1)(c) of the *Indian Act* and gave the government one year to amend the scheme. No damages were awarded.

42. The Court of Appeal disagreed with the scope of the trial judge's remedy, saying "this gave Indian status to all persons who have at least one female Indian ancestor who lost status through marriage, no matter how many generations have intervened between that ancestor and a person claiming status."[36] The Court of Appeal's more tailored analysis focused on the Double Mother Rule dating from the 1951 *Indian Act* and what it saw as the problematic way in which the 1985 amendments provided enhanced treatment for these descendents of Indian men.

Leave to appeal to the Supreme Court of Canada denied

43. The authors were not satisfied with the ruling of the Court of Appeal, despite the finding of discrimination at that level, and sought leave to appeal to the Supreme Court of Canada. The Supreme Court did not grant the authors leave to appeal the decision of the Court of Appeal.

44. Canada notes that the Supreme Court of Canada, as is its custom, did not give reasons for denying leave to appeal. Canada further notes that in the absence of reasons, it is not possible to ascribe reasons to the Court. Canada also notes, however, that in Canadian law it is not possible for the side that wins a case, as the appellants did at the Court of Appeal, to appeal the reasons. It is for the losing side to appeal the decision. Canada observes that the authors succeeded in establishing discrimination in Canadian law and that the Court of Appeal ordered a remedy that ultimately resulted in the 2011 amendments to the *Indian Act* criteria for eligibility for status.

45. Although the Government of Canada does not agree with all aspects of the reasoning of the

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[33] McIvor BCCA at paras.126-27
[34] McIvor BCCA at para.129
[35] McIvor BCCA at paras.137, 151 and 155
[36] McIvor BCCA at para.95

Court of Appeal, it accepts the Court of Appeal's decision concerning the discriminatory impact of the 1985 amendments on the children of women who lost status on marriage (under pre-1985 criteria) and their extended families (the Cousins Issue). Given its analysis of the Court of Appeal's decision and reasoning, the Government of Canada chose not to appeal the decision. However, Canada did seek leave to cross-appeal in order to preserve its ability to present a full argument on the constitutionality of the 1985 amendments and their impact on status within extended families in the event that the Supreme Court had decided to grant the authors' application for leave to appeal.

E. The 2011 *Indian Act* - Bill C-3 amendments to the eligibility criteria

46. Following the decision of the Court of Appeal, the Government of Canada undertook an extensive engagement process on proposed amendments to the registration provisions. In August 2009, the Government released a discussion paper setting out the background to the *McIvor* case, the proposed legislative amendments to certain registration provisions of the *Indian Act* and the likely impact of such amendments.[37] Officials from the Department of Indian and Northern Affairs travelled throughout Canada to participate in engagement sessions with various Aboriginal organizations, including Aboriginal women's groups and regional organizations in order to seek their input. During this time, technical briefings were held with a variety of Aboriginal organizations and national and regional engagement sessions were also held with First Nations' leadership, Aboriginal women's organizations and other Aboriginal organizations. Over 150 written submissions were received.[38]

47. In March 2010, the Government of Canada introduced Bill C-3, its legislative response to the decision of the Court of Appeal in *McIvor* in order to directly address the issues raised by the authors in their case before the Canadian courts and remedy the discriminatory impact identified by the Court in its reasons.

48. Bill C-3 came into force on January 31, 2011.[39] The focus of the 2011 amendments is the situation of the authors and the Cousins Issue, which is described above. That is, Bill C-3 addressed the eligibility for status of the grandchildren of Sharon McIvor and other women who had lost status prior to 1985 upon marrying a non-Indian. Under the 2011 amendments, individuals are eligible for status under s.6(1)(c.1) where:

- their mother lost Indian status upon marrying a non-Indian man;
- their father is a non-Indian;
- they were born after the mother lost Indian status and, if the individual's parents did not marry each other before April 17, 1985, were born before that date;
  and

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[37] Discussion Paper on needed Changes to the *Indian Act* affecting Indian Registration and Band Membership: *McIvor v. Canada* at www.ainc-inac.gc.ca/br/is/bll/exp/dpnc-eng.asp (accessed on August 22, 2011)

[38] See the Report on the Engagement Process - August to November 2009 at www.ainc-inac.gc.ca/br/is/bll/egmt/rep-eng.asp (accessed on August 22, 2011)

[39] *Gender Equity in Indian Registration Act*, S.C. 2010, c.18; see http://laws-lois.justice.gc.ca/eng/AnnualStatutes/2010_18/index.html (accessed on August 22, 2011)

- they had or adopted a child on or after September 4, 1951 with a person not eligible for status.

F. Authors' changing eligibility over time

The 1985 amendments

49. The authors have set out their family history in their submission. To summarize briefly, Sharon McIvor was previously entitled to registration under s.11(e) of the 1951 *Indian Act* as the illegitimate child of a Band member. However, she lost that entitlement in 1970, under s.12(1)(b) of the 1951 *Indian Act*, when she married the late Terry Grismer, a person who was a non-Indian. Having lost eligibility upon marriage to a non-Indian, Sharon McIvor was therefore eligible for status under s.6(1)(c) pursuant to the 1985 *Indian Act*. The events leading to the recognition in 2006 / 2007 of this basis for her eligibility are described in the trial decision.[40]

50. Pursuant to the 1985 amendments, Jacob Grismer was registered under s.6(2) of the *Indian Act*, as the child of a person registered under s.6(1) (Sharon McIvor) and a person not entitled to registration (his father). Jacob Grismer married Deneen Simon, a non-Indian in 1999; he has two children born in 1991 and 1993. Pursuant to the 1985 amendments, Jacob Grismer's children were not entitled to registration. Sharon McIvor has three other grandchildren who are registered under s.6(1)(f) of the *Indian Act* because Sharon McIvor's daughter parented with a person who is eligible for status.

51. Ms. McIvor and Mr. Grismer are members of the Lower Nicola Indian Band. Whether or not a person is a member of an Indian Band (indigenous community) is largely a matter for decision by the Band. The Lower Nicola Indian Band has taken control of its membership list and uses the criteria for eligibility for status under the *Indian Act* to determine its members.

The 2011 amendments

52. With the coming into force of the 2011 amendments to the *Indian Act*, Sharon McIvor still is eligible for status under the criteria set out in s.6(1)(c). Her son, Jacob Grismer, now is eligibile for status according to the new criteria set out in s.6(1)(c.1); that is Jacob Grismer, and other persons in his situation, fall within the criteria in s.6(1) rather than s.6(2). Because Jacob Grismer is now eligible under s.6(1), his children are now eligible under s.6(2). This is the same basis for eligibility that their cousins would have if those cousins are eligible for status based on having one male Indian grandparent instead of one female Indian grandparent.

53. As already discussed, the children of a person eligible for status under s. 6(1) are eligible for status regardless of the eligibility of their other parent. If a person eligible for status under s.6(1) has a child with a non-Indian, the child is eligible under s.6(2) – which sets up the possibility for the operation of the Second Generation Cut-off since the child of a person eligible under s.6(2) and a non-Indian is not eligible for status, regardless of the sex of the eligible grandparent or the

[40] McIvor BCSC at paras.88-122

sex of the parent. Status as an Indian is lost upon two successive generations of parenting out.

The application of the amendments in chart form

Generation	1951 Indian Act Criteria	
1	**Sharon McIvor** Status under s.11(e) prior to marriage Loses status under s.12(1(b) on marriage to non-Indian	**Comparable Man** Status under s.11(e) prior to marriage Retains status despite marriage to a non-Indian
2	**Jacob Grismer** No eligibility under 1951 Act	**Child** Status under s.11(c) or (d)
	1985 Indian Act Criteria	
1	**Sharon McIvor** Status reinstated under s.6(1)(c)	**Comparable Man** Status maintained under s.6(1)(a)
2	**Jacob Grismer** Gained status under s.6(2)	**Child of Comparable Man** Status maintained under s.(6)(1)(a)
3	**Child of Jacob & non-Indian Grandchild of Sharon** No eligibility due to 2nd Generation Cut-off	**Child of Indian and non-Indian Grandchild of Comparable Man** Eligible for status under s.6(2)
	2011 Indian Act Criteria	
1	**Sharon McIvor** Status reinstated under s.6(1)(c)	**Comparable Man** Status maintained under s.6(1)(a)
2	**Jacob Grismer** Eligibility now under s.6(1)(c.1)	**Child of Comparable Man** Status maintained under s.(6)(1)(a)
3	**Child of Jacob & non-Indian Grandchild of Sharon** Eligible for status under s.6(2)	**Child of Indian and non-Indian Grandchild of Comparable Man** Eligible for status under s.6(2)
4	**Great Grandchildren of Sharon McIvor** Eligibility under s.6(1)(f) if other parent eligible under s.6	**Great Grandchildren of Comparable Man** Eligibility under s.6(1)(f) if other parent eligible under s.6

54. Any subsisting discriminatory treatment of the authors relative to persons who stand in a comparable situation (where the person in the same place in the family tree as Ms. McIvor is a man rather than a woman) has been remedied by the 2011 amendments to the *Indian Act*. The negative impact of the 1985 eligibility criteria on persons with the particular family history / factual situation of the authors, Sharon McIvor and Jacob Grismer, was removed by placing eligibility of the children of re-instatees such as Ms. McIvor (i.e. Jacob Grismer) under criteria in s.6(1) thereby postponing the Second Generation Cut-off one generation in those families. This has placed the grandchildren of Sharon McIvor on par with their counterparts who also have only one eligible grandparent – and that grandparent is a man.

III. The Author's Allegations

55. The authors allege that Canada has violated their rights, as set out in the Covenant, to equality (article 26 and article 27 (read in conjunction with article 2(1) and article 3)) and to an effective remedy (article 2(3)).

56. The communication alleges discrimination based on those aspects of the 1985 criteria determining eligibility for status as an Indian under the *Indian Act* which applied the Second Generation Cut-off rule differently (alleged distinction on the basis of sex) to persons born prior to their coming into force as law. The authors rely on article 26 of the Covenant (to equality before the law) as well as article 27 read in conjunction with article 2(1) and article 3 (to participation in their culture without discrimination based on sex) in support of their allegations of discrimination. In addition, the authors allege a violation of article 2(3) of the Covenant, which requires States parties to ensure access to an effective remedy for victims of violations of Covenant rights.

57. It is important to note not only what this communication is about but also what it is not about. By the authors' own admissions, the communication is <u>not</u> about eligibility to membership in any particular Indian Band;[41] it is <u>not</u> a challenge to the Second Generation Cut-off *per se*;[42] it is <u>not</u> about historic (pre-1985 amendments) discrimination,[43] and it is <u>not</u> about entitlement to social or economic benefits.[44]

IV. ARGUMENTS ON ADMISSIBILITY

58. In this part of its submission, Canada argues that the authors have successfully pursued their allegations of discrimination before Canadian tribunals and have received a remedy that effectively answers their allegations. Canada further submits that aspects of the allegations do not apply to the personal situations of the authors and, moreover, are currently put at issue in Canadian courts by others who are directly affected. Some aspects of the authors' allegations involve harm not attributable to the State. Canada is also of the view that the authors have completely failed to substantiate their claim regarding access to an effective remedy.

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[41] Authors' communication at para.30
[42] Authors' communication at para.31
[43] Authors' communication at para.30
[44] Authors' communication at para.32

59. The question of non-substantiation of the allegations is also addressed in the argument on the merits, which is found in part V.

A. Any distinction which previously affected the authors has been removed

60. This Committee has issued views in a number of communications[45] stating that where an alleged inconsistency with the Covenant has been remedied by the State party, individuals cannot claim to be victims of a violation of the Covenant within the meaning of article 1 of the Optional Protocol.

61. The authors challenged the 1985 eligibility criteria in Canadian courts alleging that the criteria discriminated against them on the basis of sex. They were successful. As a result of the decision of the Court of Appeal, the Government of Canada amended the *Indian Act*. The 2011 amendments directly addressed the harm identified by the Court of Appeal such that the authors now are eligible for status in the same way as comparable persons who base their eligibility on the status of a male ancestor.[46]

62. With the coming into force of the 2011 amendments to the eligibility criteria, the difference in the application of the eligibility criteria between Jacob Grismer and any of his cousins (Cousins Issue) which existed under the 1985 amendments has now been removed; Jacob Grismer is also eligible under s.6(1). Except for the legislative description of the historical basis for eligibility (found in the various paragraphs of subsection 6(1)), there is no distinction between s.6(1)(c.1) (Jacob Grismer) and s.6(1)(a) (the comparable cousin). Both are in the same legal position vis-à-vis the government and – more importantly for the allegations of the authors in this communication – vis-à-vis the Second Generation Cut-off.

63. With respect to the next generation, with the coming into force of the 2011 amendments, Jacob Grismer's children are eligible for status under s.6(2). There is therefore no difference in the application of the eligibility criteria to the grandchildren of Sharon McIvor as compared with the grandchildren of a man with a similar family history (comparable man).

64. Canada submits, in light of the 2011 amendments, that the authors are not able to substantiate the claim that they are victims of discrimination due to distinctions in the criteria for eligibility for Indian status and, therefore, that the communication is inadmissible in under article 1 of the Optional Protocol[47] in respect of the allegations of discrimination based on articles 2(1), 3, 26 and 27 of the Covenant.

65. Canada further submits, given that the authors cannot claim to be victims of discrimination,

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[45] *J.H.W. v. Netherlands*, Communication No.501/1992 (1993); *A.P.L.-v.d.M. v. Netherlands,* Communication No.478/1991 (1993); *Dranichnikov. v. Australia*, Communication No.1291/2004 (2007). This approach is also taken by the European Court of Human Rights. See, for example, *Case of Kuric et al. v. Slovenia*, Application No.26828/06, decision of Third Section dated 13 July 2010.

[46] The legislative amendments apply to everyone in a similar situation to the authors.

[47] *A.P.L.-v.d.M. v. Netherlands,* Communication No.478/1991 (1993) at paras.6.3

their allegations under article 2(3) with respect to access to an effective remedy are not well-founded and are inadmissible under article 2 of the Optional Protocol.[48]

66. Canada accordingly contends that the communication is inadmissible in its entirety. In the segments that follow in this part, Canada submits, in the alternative, that various aspects of the communication are inadmissible on other grounds.

B. Some aspects of the communication are inadmissible *ratione temporis*

67. Canada notes that Sharon McIvor did not apply for status until after the 1985 amendments came into force. Justice Ross, at paragraph 92 of her British Columbia Supreme Court decision, indicated that Ms. McIvor testified that she did not think she was eligible for status under the 1951 amendments. More importantly, for the purpose of this communication, Sharon McIvor, even if it had been known that she was eligible for status prior to the 1985 amendments, would have lost status in 1970 – well before the Covenant and Optional Protocol came into force for Canada – upon her marriage in that year to a non-Indian. Her son, Jacob Grismer, was born in 1971; his ineligibility for status under the 1951 amendments was determinable at his birth. Based on the 1951 amendments he was not eligible for status because his only parent with First Nations' ancestry, his mother Sharon McIvor, had lost her eligibility for status the year before his birth.

Eligibility pre-1985

68. Canada submits that allegations under article 26 of the Covenant that relate to the eligibility for status of Sharon McIvor and Jacob Grismer under the 1951 amendments are not admissible *ratione temporis*. As the Committee noted in *Lovelace*, the provision under which Sharon McIvor would have lost status (s.12(1) of the 1951 amendments) was

> "a distinction *de jure* on the ground of sex. However, neither its application to her marriage as the cause of her loss of Indian status nor its effects could at that time amount to a violation of the Covenant because this instrument did not come into force for Canada until 19 August 1976. Moreover, the Committee is not competent, as a rule, to examine allegations relating to events having taken place before the entry into force of the Covenant and the Optional Protocol. Therefore as regards Canada it can only consider alleged violations of human rights occurring on or after 19 August 1976. In the case of a particular individual claiming to be a victim of a violation, it cannot express its view on the law in the abstract, without regard to the date on which this law was applied to the alleged victim. In the case of Sandra Lovelace it follows that the Committee is not competent to express any view on the original cause of her loss of Indian status, i.e. the Indian Act as applied to her at the time of her marriage in 1970."[49]

69. The Committee is not competent, *ratione temporis*, to consider whether the ineligibility for

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[48] *Goyet v. France,* Communication No.1746/2008 (2009) at para.6.4; *Picq v. France,* Communication No.1632/2007 (2009) at para.6.4

[49] *Lovelace* (1981) at para.10

status of Sharon McIvor (in 1970) and Jacob Grismer (in 1971) prior to the 1985 amendments is a violation of article 26. The implications of the Committee's views with respect to article 26 in the *Lovelace* communication is that loss of a legal status under legislation occurs at a point in time and is not in and of itself a continuing violation.

70. Moreover, the authors had indicated that they are not alleging violations based on the eligibility criteria pre-1985, and Canada further observes that to have done so would have been an abuse of the right of submission given the length of time that has passed since the 1985 amendments came into force.

Eligibility after the 1985 amendments

71. In the alternative to its arguments in segment A above, Canada acknowledges that the Committee is competent, *ratione temporis*, to determine whether the 1985 amendments, by which Sharon McIvor became eligible for status, had a discriminatory impact on the authors.

72. However, Canada contends that any discriminatory impact only became an issue for the authors in 2006 when the basis for their eligibility under the 1985 amendments became apparent. The 1985 amendments, initially (by 1987) led to the re-instatement of Sharon McIvor under s.6(2) with no apparent eligibility for Jacob Grismer at that time. It was not until 2006 (concession by the government) or at the latest 2007 (order of the British Columbia Supreme Court)[50] that Sharon MvIvor was recognized as eligible under s.6(1)(c) and, therefore, the eligibility for status of Jacob Grismer was recognized under s.6(2).

73. Canada submits that the length of time and the difficulties in arriving at the (as of 2006) understanding of the best basis for the authors' eligibility for status under the 1985 amendments is due in no small part to the complex – vis à vis the changing eligibility rules – history of Sharon McIvor's ancestors, the fact that the Registrar and others were focusing on the eligibility for status of Sharon's mother and not her father or Sharon McIvor herself and the fact that Sharon McIvor abandoned her statutory appeal of the Registrar's rulings for many years.

74. Canada contends that the Committee should consider whether there is any discriminatory impact from the 1985 amendments on the authors (the application of the Second Generation Cut-off to Jacob Grismer) only as of 2006. It was only in 2006, at the time of the government's concession in the course of litigation, that it became apparent that the Second Generation Cut-Off would become applicable to the children of Jacob Grismer (any children born to a non-Indian mother). Before 2006, at which time the best basis for the eligibility of his mother became clear in law, Jacob Grismer had no apparent eligibility for status and his apparent lack of eligibility flowed from the 1951 amendments, a matter which is outside the competence of the Committee, *ratione temporis*.

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[50] *McIvor et al. v. The Registrar, Indian and Northern Affairs Canada et. al*, 2007 BCSC 26, January 9, 2007 decision of Justice Ross of the British Columbia Supreme Court on the statutory appeal from the decision of the Registrar

C. The communication contains allegations that do not arise on the authors' facts

75. Canada further submits that certain aspects of the communication are inadmissible as the authors cannot demonstrate that they are the victims of the harm alleged. The authors point to a series of perceived problems with the eligibility criteria in the 1985 amendments which have no application to them.

76. As the Committee has noted on several occasions,[51] no individual or group of individuals can in the abstract, by way of *actio popularis*, challenge a law or practice as being contrary to the Covenant; individuals can only claim to be victims in the sense of article 1 of the Optional Protocol if they are actually affected. Canada submits that those aspects of the communication involving allegations of violations which do not arise for the authors on the facts are inadmissible under article 1 of the Optional Protocol.

77. More specifically, the authors allege that the 2011 amendments do not address three factual scenarios which raise discrimination on the basis of sex.

- The first scenario raised by the authors is the exclusion from eligibility of grandchildren born prior to September 4, 1951 (the date the Double Mother Rule took effect) who are descendants of a status woman who married out.[52] Jacob Grismer and his children were all born after 1951 so this scenario does not affect the authors. As discussed above, Bill C-3 was intended to remedy the situation of the authors and all others in their situation. The new provision, s.6(1)(c.1)(iv), requiring that the person "had or adopted a child, on or after September 4, 1951, with a person who was not entitled to be registered on the day on which the child was born or adopted", is intended to mirror the Double Mother Rule introduced in 1951 which applied to those in the male line.

- The second scenario raised by the authors involves descendants of Indian women who parented in common-law unions with non-Indian men. This scenario does not apply so as to affect the eligibility of the authors as Sharon McIvor is eligible for status as a person re-instated after having lost eligibility for status due to marriage prior to 1985.

  Moreover, this allegation of discrimination is not substantiated. The reason that the 2011 amendments use marriage and the date of marriage as part of the conditions for eligibility under s.6(1)(c.1) is due to the historical trigger of marriage for gaining or losing Indian status. If an Indian woman was in a common law relationship with a non-Indian man prior to 1985, she would not have lost Indian status. Therefore, any child born prior to 1985 to a common law union between an Indian woman and non-Indian man has been entitled to s.6(1) status since 1985 and there was no distinction to remove in the 2011 amendments. As with any children from a married relationship between a s.6(1) Indian,

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[51] *Goyet v. France,* Communication No.1746/2008 (2009) at para.6.3; *Picq v. France,* Communication No.1632/2007 (2009) at para.6.3; *Dranichnikov v. Australia,* Communication No.1291/2004 (2007) at para.6.4; *E.P. et al. v. Coloumbia,* Communication No.318/1988 (1990) at para.8.2; *Aumeeruddy-Cziffra et al. v. Mauritius,* Communication No.35/1978 (1981) at para.9.2

[52] Authors' communication at para.141

whether male or female, and a non-Indian, if an Indian woman was in a common law relationship with a non-Indian man after 1985, their child would receive s.6(2) status. This is due to the Second Generation Cut-off rule which applies after 1985 and is gender-neutral.

- The third scenario raised by the authors involves the illegitimate female children of male Indians. Although Sharon McIvor is a child born to a common law union and, by 2006, it was realized that her father was eligible, pre-1985, to status, her eligibility under the 1985 amendments and the eligibility of both authors under the 2011 amendments is based on the fact that Sharon McIvor would have lost status, pre-1985, through marriage to a non-Indian. This third scenario, therefore, does not apply so as to affect the eligibility of the authors.

  Moreover, the distinction between illegitimate female children of male Indians and illegitimate male children of male Indians born before 1985 is the subject of ongoing domestic litigation.[53]

78. Canada observes that the Optional Protocol established an individual complaints process. This means that any allegations of violations of Covenant rights must be brought by or on behalf of alleged victims and must be examined in relation to the particular fact situation of the alleged victims. Allegations of harm flowing to others, where the facts pertaining to those unnamed and unrepresented others are different from the facts pertaining to the authors, are irrelevant as they are outside the competence of the Committee under the particular communication before it. While the individual complaints process may by implication resolve issues that affect all others in the same situation as an author, the process is not designed to be and cannot function as a class action process; nor can the Committee hope to address issues related to persons and facts not before them.

79. Canada further observes that a number of the alleged problems with the eligibility criteria, which do not apply to the authors, are currently being examined through domestic litigation. Moreover, these allegations were not properly before the British Columbia Supreme Court (at trial), the Court of Appeal or the Supreme Court of Canada (in the application for leave to appeal) for the simple reason that they did not arise on the authors' facts. These aspects of the communication, therefore, are also inadmissible for non-exhaustion of domestic remedies pursuant to articles 2 and 5(2)(b) of the Optional Protocol and Rule 90(f) of the Rules of Procedure. The requirement to exhaust domestic remedies ensures that a State party has an opportunity to correct any wrong through its internal processes before its international responsibility is subjected to consideration under an international complaint process.

D. Some aspects of the communication relate to the actions of non-governmental actors

80. Canada further submits that certain aspects of the communication are inadmissible as the authors cannot demonstrate that the alleged harms are attributable to the government. Actions of

[53] *Nolett v. AG Canada:* the plaintiffs in this case have indicated that they would like to amend their pleadings further to challenge the 2011 amendments

private persons or entities which are not attributable to the State party cannot found a communication as the author cannot claim to be a victim of a violation within the meaning of article 1 of the Optional Protocol.[54]

81. On the facts of this communication, the Government of Canada has acted in good faith and as expeditiously as possible to remove sex discrimination from the eligibility criteria in the *Indian Act*. Moreover, the 1985 amendments removed the link between eligibility for status and Band membership and to a large degree ensured that re-instatees would be able to be recognized as members of their Indian Band. On the facts, the authors are now both members of the Lower Nicola Indian Band.

82. Allegations of the authors regarding their treatment by their Indian Band (the community) or individuals who are either members of their Band or their family or are other First Nations persons eligible for status as Indians are not attributable to the State. Canada contends that there is only one status under the *Indian Act* and that all individuals with Indian status are treated equally vis-à-vis the government.

83. Canada also notes that the extent of the social and cultural impacts of eligibility for Indian status, particularly after the 1985 amendments which are the subject of this communication, most likely depend to a large degree on the given community. Canada submits, on the evidence of the authors, that the impacts on their social and cultural relationships that the authors perceive or in fact suffer because of the provisions under which they are eligible for status (under the 1985 and 2011 eligibility criteria) should be attributed to the authors' family and larger social and cultural communities and not to the State.

V. ARGUMENT ON THE MERITS

84. In the event that the Committee finds some aspects of the communication to be admissible, Canada submits that there is no violation of the Covenant.

85. In its argument on the merits, Canada focuses on the situation of the authors. Canada maintains that the Committee should assess the merits of the authors' claims based on the current situation of the authors and in light of the 2011 amendments to the *Indian Act*.

A. Article 26 – No discrimination based on sex

The authors allege a violation of article 26 of the Covenant; they allege that the eligibility criteria for status under the *Indian Act* discriminate against them on the basis of sex. They also raise issues of discrimination in their allegations under article 27 by reading that article in conjunction with article 2(1) and article 3.

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[54] *Picq v. France*, Communication No.1632/2007 (2009) at para.6.3

Article 26 of the Covenant states:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 2(1) states:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 3 states:

> The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Canada's argument on the question of whether the authors suffered or continue to suffer discrimination in relation to their eligibility for status under the *Indian Act* will focus on article 26, which contains the substantive right to equality. Canada acknowledges however, that all substantive provisions of the Covenant must be read in conjunction with articles 2 and 3 of the Covenant. To the extent possible, all questions of the equality will be addressed together in this segment of the submission.

a) The eligibility criteria in s.6 are not discriminatory

86. As noted above, the Court of Appeal for British Columbia found that the 1985 amendments to the *Indian Act*, while replacing the 1951 eligibility criteria with a gender neutral eligibility scheme, resulted in a distinction in the application of the Second Generation Cut-off between individuals who traced their First Nations' ancestry through a woman and individuals who traced their First Nations' ancestry through a man. As discussed in Part IV of this submission regarding admissibility, this distinction was removed and any impact it had on the authors was remedied by the 2011 amendments. Canada contends that there is, therefore, no violation of article 26 of the Covenant.

87. The authors, however, allege that even taking the 2011 amendments into account, there is a distinction between s.6(1)(a) and s.6(1)(c) which is discriminatory on the basis of sex. Canada submits that there is no discrimination in fact or law. All persons eligible for status under section 6 of the *Indian Act* have the same legal rights.

No Differentiation Exists

88. The Government of Canada submits that there is no significant legal distinction between paragraphs 6(1)(a) and 6(1)(c) or between paragraphs 6(1)(a) and 6(1)(c.1), contrary to the allegations of the authors. The authors' communication, which was filed after Royal Assent but before the 2011 amendments came into force on January 31, 2011, fails to fully consider the impact of the 2011 amendments on their situation and how the eligibility criteria have removed any distinction between them and their counterparts descended from a comparable man.

89. The authors' communication uses phrases such as "full s.6(1)(a) registration status" and expresses the view that the eligibility criteria set out in paragraphs 6(1)(c) and 6(1)(c.1) are somehow less important or less "full" than those in paragraph 6(1)(a).

90. Canada emphatically does not agree with the complainants' characterization of section 6 of the *Indian Act*. Canada does not agree that only persons registered under s.6(1)(a) have "full status." Individuals are either eligible to be registered as an Indian (Indian status) under the *Indian Act* or they are not. There is no "sub-class" of persons with some lesser form of Indian status. Canada also rejects, as completely incorrect, the complainants' claim that s.6(1) "embodies the sexist stereotype of female inferiority" or "perpetuates the notion of women as property."[55]

91. The various subsections and paragraphs of s.6 identify the various bases on which individuals are eligible for status. As noted in the factual background, the paragraphs of subsection 6(1) (particularly (a), (c), (d) and (e)) are essentially transitional provisions which indicate, for persons born before 1985, how the eligibility criteria move from the 1951 *Indian Act* eligibility criteria to the 1985, and now the 2011, criteria. For everyone born after 1985, the most relevant provisions are s.6(1)(f) and s.6(2).

92. Everyone eligible for status receives the same status and the Government of Canada makes no distinctions – either in the treatment of any person or in the provision of any benefits for which status is required – based on the provision of s.6 on which their eligibility for status is founded. There is only one status.

Status has its benefits

93. Canada agrees with the authors' position that this is not a benefits case since there is no differentiation that can be demonstrated by the authors – either within the paragraphs of subsection 6(1) or as between the criteria in subsections 6(1) and 6(2) – in respect to the provision of tangible benefits such as extended health benefits, financial assistance with post-secondary education (and extracurricular programs) and exemptions from certain taxes.

94. The authors however allege discrimination based on what they describe as intangible benefits, including the ability to "transmit status" to subsequent generations and their perception

[55] Authors' communication at para.178

of the personal legitimacy that status connotes. The Government of Canada notes that the British Columbia Supreme Court and to some extent the Court of Appeal accepted the authors arguments with respect to these intangible benefits. However, in what follows, the Committee will appreciate that Canada does not.

Eligibility of successive generations

95. Canada observes that it is a mischaracterization to speak in terms of the "transmittal" of Indian status from a parent to a child. Indian status is a legal status conveyed by statute. The criteria in the *Indian Act* use degrees of First Nations' ancestry to determine the eligibility of an individual for Indian status. In the view of the government, individuals, separately or as couples, cannot transmit status. What individuals can do is make life choices that will affect the degree of First Nations' ancestry of any given child born to them. In other words, individuals help transmit degrees of ancestry to their children; the *Indian Act* conveys status based on the degree of ancestry required.

96. Canada acknowledges that human beings naturally think in terms of transmittal of status but this is not the legal reality when status is based on statute rather than custom or some other determinant that is not subject to legislation. Canada contends that an individual's eligibility for any status conveyed by legislation does not necessarily include a right or privilege to convey that status to others. In the case of status under the *Indian Act*, eligibility for status is limited by the criteria in the Act. There is not presently, and there never has been, a statutory right in any individual to transmit Indian status to other individuals.

97. In legal terms, the *Indian Act* does not covey "an ability to transmit status" to one's descendents; the Act determines whether or not one's descendents will be entitled to status based on the number of their grandparents who are / were eligible for status. The eligibility criteria can mean that an individual (Indian or non-Indian) can have children who may be eligible for status, depending on the status mix of the child's parents and grandparents. Canada submits that the mischaracterized "ability to transmit status" cannot be seen as either a tangible or intangible benefit.

98. Moreover, and regardless of whether the "ability to transmit status" can properly be viewed as a tangible or intangible benefit, all differential impact on the authors vis-à-vis comparable others was removed by the 2011 amendments to the eligibility criteria. As has already been noted, since the decision of the Court of Appeal and the entry into force of the 2011 amendments, anyone eligible for status under s.6(1)(c), including Sharon McIvor, has an equal capacity to persons eligible for status under s.6(1)(a) to "transmit status" to their children and grandchildren. As can been seen in the chart at page 15 above, contrary to the authors' allegations, there is no difference in the ability of women with s.6(1)(c) status to transmit Indian status to their descendants, as compared to the ability of their male counterparts, whether eligible for status under paragraphs 6(1)(a) or some other paragraph of 6(1).

99. In the case of Jacob Grismer, with the 2011 amendments he now has eligibility for status under s.6(1) on the basis of paragraph 6(1)(c.1). Both Jacob and a comparable cousin (the child

of a man in a position comparable to Sharon McIvor and a non-Indian partner) are eligible for status under s.6(1). Again, there is no distinction between eligibility under paragraphs 6(1)(a), 6(1)(c) and s.6(1)(c.1) vis-à-vis the application of the Second Generation Cut-off.

100. The difference which remains in the eligibility criteria, with the 2011 amendments, is the difference between s. 6(1) and s.6(2). This is the Second Generation Cut-off. Canada notes that the Second Generation Cut-off has not been challenged by the authors and is therefore not at issue in this communication. The authors only challenge what they say is the differential impact of the eligibility criteria on them as opposed to others in their extended family and other First Nations individuals in a situation comparable to them. Canada further notes that the Second Generation Cut-off does not distinguish between persons on the basis of sex. Finally, Canada maintains that the difference in the criteria governing the Second Generation Cut-off does not otherwise affect the nature of the status conferred. There is only one status even though there are various criteria by which one may be eligible for it.

Personal legitimacy

101. The Government of Canada is aware that eligibility for, and status as, an Indian under the *Indian Act* has itself become a significant source of personal identity for many First Nations persons. While Canada acknowledges that Indian status is one facet of the identity of those who are eligible, it notes that there are many facets to any person's identity.

102. Canada observes as well, however, that despite the creation and continuing use of a statutory regime for identifying those individuals with sufficient hereditary attachment to the original First Nations to be (in the view of the government) entitled to certain benefits, the sense of culture and cultural identity of most if not all First Nations in Canada have survived and remain powerful. Canada refers the Committee to the website for the Lower Nicola Indian Band,[56] to which the authors belong, as only one illustration of the importance that membership in their particular community and culture gives to the sense of personal identity of First Nations individuals.

103. While there seems little doubt that eligibility for Indian status is an element of personal identity, Canada observes that the significance of this aspect of personal identity, while important from the perspective of the claimants, may vary in importance for other First Nations individuals. Canada further submits that the legislated scheme for determining eligibility for status, which exists to identify those individuals eligible for certain government-provided benefits (individual-government relationship), does not and cannot confer personal dignity. Human dignity is inherent. Similarly, Canada submits that eligibility for status generally or under any of the paragraphs of s.6 is not a marker for legitimacy, whether personal or cultural, except in the perception of the complainants.

104. Canada submits that the authors' perception that the eligibility criteria in the *Indian Act*

[56] www.lnib.net

create or support personal legitimacy does not find support in either the text of the *Indian Act* or in the actions of the government. While the authors' perception of the factors determining their legitimacy as persons may well include eligibility for Indian status and even eligibility based on specific provisions within section 6 of the *Indian Act*, this is a personal perception, perhaps bolstered by the actions of family and community. It cannot be attributed to the government.

Cultural identity

105. Canada further submits that Indian status is not a marker of cultural identity. Canada submits that the authors conflate cultural identity and Indian status to too great a degree. There are many First Nations in Canada and each has its own cultural identity, including cultural practices, language and religion. Indian status is a not a legislated approximation of any First Nation culture; it is a determinant of eligibility for a range of specific benefits provided by the Government of Canada to individuals. Canada rejects, as erroneous, the authors' statement at paragraph 101 of their communication that "[R]egistration status is the official indication of State recognition of an individual's Aboriginal cultural identity."

106. Canada notes that, since the 1985 amendments, status as an Indian and membership in an Indian Band have been separated. Band membership and not Indian status is more closely aligned with cultural identity as Bands are communities of persons sharing the same culture.

107. Canada also notes that the extent of the social and cultural impacts of Indian status, particularly after the 1985 amendments which are the subject of this communication, varies within any given First Nations community. On the evidence in the communication, the current impacts that the authors' perceive or in fact suffer because of the eligibility criteria under which they have been registered as having Indian status should be attributed to the claimant's family and larger cultural community and not to the State.

108. The authors have pointed to a 'stigma' and 'difference in the degree of esteem' by their community as between s.6(1)(a) and s.6(1)(c) Indians. To the extent that they have been seen differently by their community as "Bill C-31" Indians, this is a matter between private actors.

b) Any distinction is based on reasonable and objective criteria

109. In the alternative, should the Committee consider that there is a distinction as between paragraph 6(1)(a) and paragraphs 6(1)(c) and (c.1), Canada submits that this distinction is not discriminatory. The Committee has said in its General Comment No. 18 that "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant."[57]

110. As already described above, the only distinction between paragraph 6(1)(a) and the other

[57] CCPR General Comment 18, 10/11/89. See also *Derksen v. Netherlands,* Communication No. 976/2001 (2004); *Love et al. v. Australia,* Communication No. 983/2001 (2003); *Haraldsson and Sveinsson v. Iceland,* Communication No. 1306/2004 (2007).

paragraphs of subsection 6(1) is one of legislative drafting. Each provision describes a different historical route to the obtaining of status – the 1985 / 2011 eligibility criteria – under the *Indian Act*. Canada contends that distinctions in legislative drafting that are required in order to bring clarity, but do not otherwise create a negative impact on individuals on any listed or analogous personal characteristic, are not discriminatory. This is a question of *de minimus*, a distinction without harm.

111. Paragraph 6(1)(a), as described above, includes everyone who had status prior to 1985 when the *Indian Act* was amended. At the time, the government's policy choice included not only the principle that discrimination against women should be removed from the eligibility criteria going forward but also, *inter alia*, that no one should lose status acquired under previous eligibility criteria. Paragraph (6)(1)(c) describes those who had previously been deprived of Indian status for a variety of reasons, including women who lost status through marriage to a non-Indian, who were re-instated under the 1985 criteria.

112. Canada contends that the preservation of acquired rights is a legitimate aim in Covenant terms and that the use of separate paragraphs within subsection 6(1) in order to clearly elaborate the various bases for eligibility for persons born prior to 1985 was a reasonable drafting approach.

113. Canada observes that the authors seek a result equivalent to the order of the trial judge of the British Columbia Supreme Court. The authors seek criteria which would base eligibility on "matrilineal descent" without regard for how many generations the individual was from the female ancestor in question. Canada submits that the allegation that there is a distinction in the current eligibility criteria based on "matrilineal descent" is not a discriminatory distinction as there is no close connection (remoteness) between the original woman who suffered historic discrimination and the living descendent. Canada also contends that, regardless, this allegation of a discriminatory distinction does not have any impact on the authors' factual situation as their eligibility for status is based on the re-instatement of Sharon McIvor herself and not on the reinstatement of any of her distant ancestors – male or female. Arguably, it was the earlier emphasis on the eligibility of Ms. McIvor's mother and grandmother that led to the initial confusion over the best basis for her eligibility under the 1985 criteria.

114. Canada notes that what the authors seek – given that Indian status has existed since the late 1800s – would potentially involve descendants many generations removed from the female ancestor who initially suffered discrimination based on sex. Canada submits that it is not obligated, under the Covenant, to rectify discriminatory acts (such as the removal of eligibility for status) that pre-dated the coming into force of the Covenant. Canada further submits that apart from the uneven application of the Second Generation Cut-off, the impact of which on the authors was corrected by the 2011 amendments, the 1985 amendments did – to a very large degree – go back in time so as to deem ancestors of living persons eligible for re-instatement in order to rectify the problem in their line of descent.

115. Canada contends that discrimination on the basis of sex has been removed from the current eligibility criteria in the *Indian Act*. Canada further contends that the impacts of historic

discrimination on the authors' current eligibility have also been removed.

B. Article 27 is not violated

116. The authors allege a violation of article 27 of the Covenant read in conjunction with article 2(3) and article 3. In essence, their claim is that Canada has discriminated against them in relation to their ability to enjoy their culture on an equal basis with other members of their minority indigenous culture.

117. Canada submits that the authors' claim in respect of cultural rights is essentially an equality rights claim. The question of equality is addressed in segment A above. Canada notes that apart from the equality rights aspect of the authors' allegations in respect of their minority cultural rights, the authors have not claimed or substantiated a violation of their right to enjoy their culture.

118. Article 27 of the Covenant states:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

119. The authors are members of the Lower Nicola Indian Band. Therefore, having reference to the website of the Lower Nicola Indian Band, the authors are ethnically part of the Nlaka'pamux Nation, one of the Interior Salish peoples residing in British Columbia, the westernmost province in Canada.[58] At issue in this communication is the authors' ability to enjoy the Nlaka'pamux or Interior Salish culture as practiced by the Lower Nicola Indian Band.[59]

120. Canada argues that it has not violated the right of the authors to enjoy the particular culture of their indigenous group. The authors point to no essential aspect of their indigenous culture which is being substantially impacted by government actions or measures. Rather, the authors claim that they have not been able to enjoy that culture (in a general sense) to the same extent as other members of their extended family and other members of their culture. The equality rights aspect of their claim under article 27 is largely addressed in segment A, above.

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[58] The Lower Nicola Indian Band belongs to the Swxexmx ("People of the Creeks") branch of the Nlaka'pamux Nation of the Interior Salish peoples of British Columbia. The Band has ten reserves surrounding the town of Merritt. The majority of the on-reserve population lives in the community of Shulus, some 8 km west of Merritt. See the Band website at: http://www.Inib.net//communityprofile.htm
The Band has ten reserves (totaling 17,500+ acres) surrounding the town of Merritt.

[59] Canada notes that Sharon McIvor was and Jacob Grismer is married to a non-Indian. As such, their extended family encompasses cultures other than that of the Nlaka'pamux Nation.

a) The authors have not demonstrated that they are denied the right to enjoy their culture

121. The Committee has recognized that State actions or measures whose impact amounts to a denial of the right of individuals to enjoy their culture in community with others are incompatible with article 27, whereas actions or measures with only a limited impact do not necessarily violate article 27. Not every interference is a denial of rights within the meaning of article 27.[60]

122. The focus of the analysis of the Committee should be the current situation of the authors, following the 2011 amendments to the *Indian Act*. But, even if the Committee looks back to the 1985 amendments, the authors cannot sufficiently substantiate their article 27 claim. With the 1985 amendments, given the approach taken by the Lower Nicola Band to their membership list, both authors were entitled to membership in their First Nations community. Canada recalls that as of 1985, Sharon McIvor was eligible under s.6(1) and Jacob Grismer was eligible under s.6(2). By 1987, the Registrar recognized Sharon McIvor as eligible for status (but on the basis of s.6(2)). Jacob Grismer was recognized as eligible under s.6(2) only in 2006 when his mother was finally recognized as eligible under s.6(1)(c). Canada reiterates that the time lapse in sorting out the basis for eligibility of Jacob Grismer under the 1985 amendments (s.6(2)) is not in large measure attributable to the government as the authors did not actively pursue their statutory appeal of the Registrar's decision of 1989 for many years.

123. Canada further submits that the current *Indian Act* imposes no substantial impact on the authors' ability to enjoy their culture in community with other members of their group. The authors' status under s.6(1) of the *Indian Act* means that there is no distinction between them and any other s.6(1) status Indian with respect to the benefits given to them by the government. The government does not impose limits on their ability to enjoy their own culture, to practice their religion or to speak their language.

124. Pursuant to the Committee's views on this issue as set out in earlier communications, the question is whether the impact of a measure adopted by the State is "so substantial" that it effectively denies the authors the right to enjoy their culture. In *Poma Poma v. Peru*, the Committee asked itself whether the measure at issue had a "substantial negative impact" on the author's right to enjoy the cultural life of the community to which he or she belongs.[61] The views of the Committee under article 27 all refer to tangible detrimental impacts established by solid proof.

125. Canada agrees with the authors that their claim is distinguishable from the *Lovelace* communication. The authors, quite rightly, do not allege that they have no right to live on the reserve lands of their Band. The question of who lives on the reserves of the Lower Nicola Indian Band is a decision of the Band (based on Band's decisions regarding its membership list) and not the government. As previously discussed, as of 1985, Indian Bands gained the ability to

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[60] *Poma Poma v. Peru*, Communication No.1457/2006 (2009); *Prince v. South Africa*, Communication No.1474/2006 (2007) at para.7.4; *Lânsman et al. v. Finland*, Communication No.511/1992 (1994); *Lovelace v. Canada*, Communication No.24/1977 (1981) at para.15

[61] *Poma Poma v. Peru*

take control of their membership lists.

126. There are other significant factual differences between the situation of the authors and that of Sandra Lovelace. The Committee's views in *Lovelace* were based in no small part on the fact that here was "no place outside the Tobique Reserve" where her cultural community (the Maliseet Indians) existed. If she could not live on the Reserve – which was the effect of the eligibility criteria in the 1951 amendments – she had no way to effectively participate in her culture.[62]

127. Canada observes that the culture of the authors' First Nation is more extensive and prevalent in the relevant area of Canada than was the case on the facts before the Committee in *Lovelace* regarding the Maliseet. The Lower Nicola Indian Band belongs to the Swxexmx ("People of the Creeks") branch of the Nlaka'pamux Nation of the Interior Salish peoples of British Columbia. Therefore, the Lower Nicola Indian Band is only one of a number of Indian Bands in the area that share a common culture. The reserve lands of the Lower Nicola Indian Band are clustered around the town of Merritt in British Columbia. Moreover, not all members of this First Nations culture live on its reserves.

128. Canada submits that the authors provide no evidence to show that they can only participate in their culture by living on a particular reserve, as was the case with Sandra Lovelace. More importantly, the authors do not detail how the government is denying them the ability to speak their language, practice their religion and otherwise participate in the customs and activities of their indigenous culture. The focus of their claim is on the ways in which they have felt their community has not included them.

b) ***The impacts on the authors' ability to enjoy their culture result from private actors***

129. In the authors' submissions, their allegations concerning their ability to enjoy their culture in community with others focus on the difference they perceive in the level of esteem accorded to members within the community depending on the basis for an individual's eligibility for Indian status. As discussed above under article 26, this is not a function of ongoing actions by the Government of Canada. The 1985 amendments were the government's attempt to address previous discrimination on the basis of sex in the *Indian Act*. The authors' eligibility for status is a result of that remedial law.

130. Canada observes that the 1985 amendments, which re-instated First Nations women and gave Indian status to descendents of women who previously lost status, did not place the individuals who newly became eligible for status in any different legal category. As already noted, one either is eligible for status or one is not; there is only one status. Canada further observes that, given the relatively small populations of many First Nations communities, including that of the Lower Nicola Indian Band, everyone would have known who was re-instated or had newly acquired eligibility for status – regardless of what provision determined their eligibility. Regardless of whether or not Sharon McIvor was "s.6(1)(a)" or "s.6(1)(c)", her

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[62] *Lovelace* at para.15

family and her community and indeed First Nations individuals generally would know – one way or another – that she had been re-instated.

C. Article 2(3) – Right to an Effective Domestic Remedy

a) Article 2(3) cannot found a separate claim

131. Canada refers the Committee to its views in recent communications in which it indicates that the provisions of article 2 of the Covenant, which lay down general obligations for States parties, cannot, in and of themselves, give rise to a claim under the Optional Protocol.[63]

132. Article 2(3) obligates States parties to ensure individuals have effective remedies for violations of individual rights which the *Covenant* guarantees; it states:

> Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

133. Canada refers to the views adopted by this Committee in *S.E. v. Argentina* and *R.A.V.N. v. Argentina,*[64] where it stated that under article 2(3) the right to a remedy arises only after a violation of a Covenant right has been established. Since the allegations of violations of article 26 and article 27 (read togetherwith article 2(1) and article 3) have not been substantiated, Canada submits that there is no foundation on which to find a breach of article 2(3).[65]

b) The authors pursued and obtained effective domestic remedies

134. Canada further submits, on the basis of the facts discussed previously, that the authors pursued their allegations of discrimination before domestic courts in Canada. They challenged the Registrar's ruling on the basis for the eligibility of Sharon McIvor (and therefor of Jacob Grismer) through a statutory appeal process. They brought a constitutional challenge under s.15 of the Charter (equality rights) to the uneven application within their extended family of the

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[63] *Juan Peirano Basso v. Uruguay*, Communication No.1887/2009 (2010) at para.9.4; *Rogerson v. Australia*, Communication No. 802/1998 (2002) at para.7.9

[64] *S.E. v. Argentina,* Communication No. 275/1988 at para.5.3, and *R.A.V.N. v. Argentina,* Communication Nos. 343, 344 and 345/1988 (1990) at para.5.3

[65] *K.L. v. Denmark* Communication No.59/1979

Second Generation Cut-off (the Cousins Issue). In both cases they were successful. The basis for eligibility of the authors was adjusted and the government changed the eligibility criteria through the 2011 amendments as a direct result of the decision of the Court of Appeal in their favour.

135. Canada submits that the facts do not support a violation of article 2(3). Rather, they demonstrate that the authors have not only had access to effective remedies they have succeeded in their cases. This situation is one where the laws, the legal system and the government have all operated to give the authors an appropriate and effective remedy for the discrimination.

136. Canada observes that the authors are not satisfied with their success before the Canadian courts. As Canada has attempted to explain in this submission, the authors want remedies for allegations that do not apply to their situations. They have turned to this Committee seeking this remedy. As already noted, the Committee is not competent in this communication to address allegations which do not arise on the facts affecting the authors.

VI. IN CONCLUSION

137. Canada asks the Committee to find this communication inadmissible. Should the Committee find some aspects of the communication admissible, Canada asks that those aspects be found to be wholly without merit.

138. Canada would be pleased to provide additional argument on either admissibility or merits should that assist the Committee in resolving the complex factual and legal questions that arise on the allegations of the authors.

August 22, 2011