SHARON MCIVOR AND JACOB GRISMER v. CANADA
COMMUNICATION NO. 2020/2010

AFFIDAVIT OF GRAND CHIEF STEWART PHILLIP
DECEMBER 14, 2011

Before:

The United Nations Human Rights Committee Petitions Team
Office of the High Commissioner for Human Rights United Nations Office at Geneva
1211 Geneva 10, Switzerland
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Submitted by:

Sharon McIvor and Jacob Grismer Merritt, British Columbia Canada

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AFFIDAVIT OF GRAND CHIEF STEWART PHILLIP

I, Stewart Phillip, President of the Union of B.C. Indian Chiefs of R.R. #2, Site 75, Comp 13, Penticton, British Columbia, V2A 6J7, SWEAR THAT:

1. I am the President of the Union of B.C. Indian Chiefs ("UBCIC"), Chair of the Okanagan Nation Alliance, and former Chief of the Penticton Indian Band, and as such, have personal knowledge of the facts and matters deposed to by me, save and except where such are stated to be on information and belief and as to such facts and matters, I verily believe them to be true.

2. I swear this affidavit in support of the *Communication to the Human Rights Committee of Sharon McIvor and Jacob Grismer* (Communication No. 2020/2010), which alleges that the criteria for status registration under the post-1985 *Indian Act* regime violate the *International Covenant on Civil and Political Rights* (the "Covenant") and seeks a remedy to fully and finally eliminate sex discrimination from the legislative scheme.

3. The UBCIC is an organization of Indigenous Nations in British Columbia, founded in 1969, dedicated to promoting and supporting the efforts of Indigenous peoples to affirm and defend Aboriginal Title, Rights and Treaty Rights. The UBCIC works to develop common strategies to defend Aboriginal Title, Rights and Treaty Rights in legal and political forums, and advocates for the recognition, affirmation and protection of Aboriginal Title, Rights and Treaty Rights at the provincial, national and international levels. The UBCIC has achieved recognition as a non-governmental organization ("NGO") with special consultative status of the Social and Economic Council of the United Nations.

4. The UBCIC is guided by the principle that Indigenous Peoples possess the inherent right and responsibility to care for and protect our traditional lands and resources, to govern ourselves, and to enter into relationships with other Nations of Peoples, guided by our own laws and legal traditions. The UBCIC recognizes that Indigenous peoples' right to determine our own membership - according to our own laws, which respect and honour the role of Indigenous women within Indigenous societies and cultures - is essential to our continued survival as peoples.

5. The UBCIC has long advocated for the elimination of discrimination under the *Indian Act* against Indigenous women and their descendants. The UBICIC has sought to highlight the fact that there is a long history of Canada dividing Indigenous families and communities by means of the status provisions of the *Indian Act* through which the Canadian government forcibly disconnected

Indigenous women and their descendants from their communities and indigenous culture.

6. The UBCIC intervened in the constitutional case of *McIvor v. Canada*[1] in the British Columbia Court of Appeal, as a member of the First Nations Leadership Council to support the decision of the British Columbia Supreme Court in *McIvor v. Canada*[2] in which the Trial Court determined that withholding full s. 6(1)(a) registration status from Indigenous women and their descendants violates the Canadian *Charter of Rights and Freedoms*. The UBCIC agreed with the Trial Court remedy which required that Indian women and their descendants born prior to April 17, 1985, (matrilineal descendants), be placed on the same footing as Indian men and their descendants born prior to April 17, 1985 (patrilineal descendants) who are entitled to registration under s. 6(1)(a) of the *Indian Act.*

7. I am aware that in the *Submissions 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* made on August 22, 2011 ("Canada's submissions") Canada is attempting to excuse its continued discrimination against Indigenous women and their descendants arguing that:

    a) a domestic remedy has been granted through Bill C-3: *Gender Equity in Indian Registration Act*;[3]

    b) "the *Indian Act* provides for only one Indian status; persons either are or are not eligible for Indian status";[4]

    c) "Indian status is not a marker of cultural identity or personal legitimacy"

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[1] *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153. The Petitioners have already provided this Committee with a copy of our factum filed in the British Columbia Court of Appeal (Annex 5(c) to the Petition).
[2] *McIvor v. The Registrar, Indian and Northern Affairs Canada,* 2007 BCSC 827.
[3] Canada's submissions at para. 6.
[4] Canada's submissions, at paras. 26, 87, 95-100 and Executive Summary, see also paras. 82, 88-92.

and that viewing status as linked to cultural identity or personal legitimacy "is a personal perception [of the Petitioners Sharon McIvor and Jacob Grismer], perhaps bolstered by the actions of family and community" but not attributed to the State;[5] and

d) any distinctions at a community level and any negative social or cultural impacts should be "attributed to the authors' family and larger social and cultural communities and not to the State".[6]

8. The UBCIC strongly disagrees with these arguments advanced by the Canada, and opposes Canada's attempt to excuse the continuation of sex discrimination through the *Indian Act* registration scheme. UBCIC wishes to emphasize the following points to assist the Human Rights Committee.

- The historical context for the *McIvor* Petition to this Committee is that the government of Canada has long used legal definitions (defining who is, or is not, an "Indian") and imposed them on Indigenous peoples as a tool of assimilation.

- Canada "statistically exterminated" many Indigenous people (and devastated the populations of many Indigenous Nations) by passing laws stating that people were no longer Indian. Without Indian status, Indigenous women and their descendants found it very difficult (and often impossible) to continue their Indigenous identity and culture.

- This historical pattern is repeated by the failure of Bill C-3 to recognize and confirm the full equality of Indigenous women and their descendants.

9. The position of the UBCIC is that Bill C-3 does not remedy the sex discrimination inherent in the 1985 *Indian Act* status registration regime. The UBCIC expressed its concern about this, before Bill C-3 was passed into law

[5] Canada's submissions, paras. 101-104, Executive Summary.
[6] Canada's submissions, para. 83.

in 2011. Our concern was expressed in Chiefs Council Resolution no. 2010-61 (RE: Further Action on Bill C-3 *Gender Equity in Indian Registration Act*) which states:

> "in its current form, Bill C-3 will not address the many aspects of discrimination against Indigenous women and their descendants that continue to exist in the *Indian Act*"; and
>
> "the UBCIC ... is extremely disappointed in the missed opportunity to substantially correct a very real, hurtful and obvious discrimination towards Indigenous women and their children; in effect, the actions of the federal government and opposition parties indicate an acceptance for continued discrimination";

10. In 2010, UBCIC made a submission to the Senate Committee on Human Rights regarding Bill C-3 ("Submission to the Senate Committee on Human Rights Bill C-3: Gender Equity in Indian Registration Act dated December 6, 2010). We hoped that the government of Canada could be persuaded to totally eliminate sex discrimination against Indigenous women and their descendants from the status registration scheme. UBCIC urged the government of Canada to:

> Adopt a Zero Tolerance policy against discrimination...against descendants of Indigenous women for determining status under the *Indian Act*. There should be no instances where descendants of Indigenous men are entitled to status, where descendants of Indigenous women are denied status....
>
> Bill C-3 is limited and does not address the broader issues of Self Determination, Indigenous Laws and the power to determine our own citizenship as Indigenous Peoples; however, it is important that Parliament not make the problem worse by retrenching and reinforcing discrimination which presently exists under the *Indian Act* regime against Indigenous women and their descendants. Unfortunately, Bill C-3 does not promote Gender Equity in Indian Registration – it continues a history of discrimination against Indigenous women and their descendants by affording status to a limited class of people, while continuing to deny status registration to other descendants of Indigenous women...

11. On December 14, 2010, while the government still had an opportunity to repair Bill C-3 to totally eliminate the sex discrimination from the criteria for determining status eligibility, the UBCIC wrote a letter to Canada's Minister of

Aboriginal Affairs John Duncan ("re: UBCIC Objection to Passage of Bill C-3 without Amendments") drawing to the government's attention:

> "the UBCIC Chiefs Council is extremely concerned that in its current form, Bill C-3 will not address the many aspects of discrimination against Indigenous women and their descendants that continue to exist in the *Indian Act*";

12. Canada ignored our submissions urging it to eliminate sex discrimination against Indigenous women and their descendants from the status scheme in the *Indian Act*. As a result, Bill C-3 perpetuates a history of sex discrimination against Indigenous women and their descendants. Contrary to Canada's submissions the far-reaching detrimental effects of this discrimination are not caused by Indigenous families, cultures or communities, but rather are the continuing effects of discriminatory and divisive regulation imposed on Indigenous Peoples by the Canadian government over a very long period of time, primarily through the *Indian Act*.

13. Bill C-3 addressed a very limited aspect of the sex discrimination embedded in the registration status regime by: granting status to a person whose mother lost Indian status upon marrying a non-Indian man; whose father is a non-Indian; who was born after the mother lost Indian status but before April 17, 1985, unless the individual's parents married each other prior to that date; and who had a child with a non-Indian on or after September 4, 1951. However, Bill C-3 left untouched most of the sex discrimination against Indigenous women and their descendants under the *Indian Act* including the following:

a) Grandchildren of Indigenous women born between September 1951 – April 1985

The grandchildren of Indigenous women who were denied status as a result of marriage to a non-Indian man cannot pass full status to their children born between September 4, 1951- April 17, 1985, while the grandchildren of Indian men who married a non-status woman (who then gained status through that marriage) will be able to transmit 6(1) status. The grandchildren

of Indigenous women in this situation will only be entitled to registration under section 6(2) of the *Indian Act.*

b) Denial of status recognition based on common-law vs. married status of grandparents

Bill C-3 restores status only to those people whose grandmother lost status due to marriage. People whose parents were not married and who lost status because the Indian Registrar deemed them to have a non-status father will not be able to recover status under Bill C-3 – these people will continue to be denied status because their grandmother parented with a non-status man outside of marriage. UBCIC recommended to Canada that status should be restored to all grandchildren of an Indigenous woman who parented with a non-status man (without regard to the marital status of the grandmother).

c) Denying status to people born before September 4, 1951

Bill C-3 continues to deny status to grandchildren of a grandmother who lost status due to marriage if those grandchildren were born before September 4, 1951.

Multi-tiered status provisions

14. I have participated in many public meetings, forums and discussions where Indigenous people have shared stories of the devastating impacts that the operation of the discriminatory status provisions of the *Indian Act* have had on individuals and their families. The denial of status to individuals, or the granting of status under 6(2) (which many Indigenous people refer to as "half-status" because a person registered under that section cannot independently pass status to their children without another status parent) impacts the benefits and services that people are entitled to, and has fundamental and deep-seated emotional and social impact on Indigenous individuals, families, communities and Nations.

15. Contrary to Canada's submissions, there is not only one status under the *Indian Act*. For example, for those registered for status under s. 6(1)(a) the

impact of the "second-generation cut-off rule" is postponed until after April 17, 1985. In contrast descendants of Indigenous women who have been assigned status under s. 6(1)(c) are affected by the second-generation cut-off prior to April 17, 1985. There are matrilineal descendants born prior to April 17, 1985 who are only eligible for s. 6(2) status or who may not be eligible for status solely because their status flows through a matrilineal rather than a patrilineal line.

16. Imposing the second-generation cut-off on descendants of Indigenous women, born prior to April 17, 1985 (which is not imposed on those with s. 6(1)(a) status born prior to April 17, 1985) is demeaning to the inherent equality and dignity of Indigenous women and their descendants. The continuing discrimination embedded in the scheme against matrilineal descendants of Indigenous women broadcasts a powerful and destructive message that Canada does not recognize that Indigenous women, especially those who have married non-status men or had children with non-status men, are equal to Indigenous men in legitimacy and cultural identity. This is expressly contrary to Indigenous laws and cultural values and extremely destructive.

17. The inability to hold and transmit equal registration status to one's descendants can isolate Indigenous women and their descendants from family, community, cultural and social connections, as well as connection to territory.

18. Canada's submissions attempt to defend the ongoing discrimination in its status regime by suggesting that any discrimination that exists is caused by Indigenous families and communities rather than by its own legislation. This is a poorly disguised effort to pit the interests of Indigenous individuals (such as Sharon McIvor and Jacob Grismer) against Indigenous collectives (families, communities, Bands, Nations). This is a distortion of reality that is harmful to both indigenous individuals and collectives. It ignores that it is the government of Canada that has imposed the discrimination of its status

regime on us, over a long period of time, and that the discrimination by Canada continues.

19. The UBCIC views an inclusive approach to membership – and status determinations that does not discriminate against Indigenous women and their descendants – as essential for the survival, cultural integrity and human dignity of Indigenous Peoples.

20. Submissions that the UBCIC participated in making in an intervention in support of Sharon McIvor and Jacob Grismer at the British Columbia Court of Appeal, referred to a paradox created by Canada's discriminatory *Indian Act* legislation: a class of people who are culturally, but not legally, "Indian" – who are recognized within their families and communities but legally disentitled to the same legal status (and therefore denied access to federal programs and services which they do not qualify for). This has destructive and divisive impacts on relationships within Indigenous communities. These divisions impact not only upon individuals, but also upon the collective communities and nations.

21. The UBCIC is concerned that the sex discrimination that Canada has continued in its status registration scheme is part of continuing efforts by Canada to limit its financial obligations to status Indians. The federal government has a fiduciary relationship with "Indians" which has legal and financial consequences. Canada has a financial incentive to limit the number of people to whom it is bound in a fiduciary relationship. Historically, Canada has sought to statistically reduce the number of status Indians through the *Indian Act* by eliminating Indigenous women and their descendants from status eligibility where those women married or parented with non-status men. Bill C-3 continues this historic pattern of exclusion.

22. While there is a cost to the federal government in taking a more inclusive, non-discriminatory, approach to determining status registration (for example, increased health and education costs), the cost of a decision to continue the discrimination against Indigenous women and their descendants is paid

through an attack on the dignity and integrity of Indigenous individuals who will continue to be denied status or accorded a lesser form of status solely because their ancestry flows through an Indigenous woman rather than an Indigenous man.

23. The discrimination challenged by the Petitioners, in addition to violating the rights of Indigenous individuals, implicates the collective rights of Indigenous Peoples. The *United Nations Declaration on the Rights of Indigenous Peoples* requires that Canada recognize Indigenous Peoples' collective and ancestral rights and responsibilities to determine our own identity and membership flowing from our own laws:

> **Article 8:** Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
> States shall provide effective mechanisms for prevention of, and redress for:
> Any form of forced assimilation or integration...
>
> **Article 9:** Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

24. The position of the UBCIC is that continuation of sex discrimination in Canada's status registration regime has the effect of violating these internationally recognized principles, and diminishes the sense of belonging and dignity of Indigenous women and their descendants. Indian status (and the ability to transmit that status to one's children) matters to Indigenous Peoples. It speaks of our historic identity and ongoing relationship with Canada. It also attaches legal and financial obligations, including a fiduciary relationship, which binds the federal government.

Remedy

25. The UBCIC agrees with the Petitioners that the continuing sex discrimination in Canada's status registration regime violates the Covenant on Civil and Political Rights. The UBCIC supports the Petitioners' request for direction from this Committee requiring Canada to totally eliminate the sex discrimination against Indigenous women and their descendants from the status registration scheme.

SWORN BEFORE ME)
in the City of Vancouver,)
in the Province of British Columbia,)
this 14th day of December 2011.)
)
)
)
A Commissioner for taking affidavits)
for British Columbia.)

Grand Chief Stewart Phillip

Name of Commissioner:

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