SHARON MCIVOR AND JACOB GRISMER v. CANADA

PETITIONER COMMENTS IN RESPONSE TO STATE PARTY'S SUBMISSION ON THE ADMISSIBILITY AND MERITS OF THE APPLICANTS' PETITION TO THE HUMAN RIGHTS COMMITTEE

COMMUNICATION NO. 2020/2010

Before:

The United Nations Human Rights Committee
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Petitioner Comments in Response to State Party's Submission on the Admissibility and Merits of the Applicants' Petition to the Human Rights Committee

COMMUNICATION NO. 2020/2010

Summary of Applicants' Comments

The Director of the Human Rights Treaty Division has provided the Applicants with a copy of Canada's August 25, 2011 submission on the admissibility and merits of the Applicants' claim and by letter dated August 29, 2011 invited the Applicants to comment.

The Applicants Sharon McIvor and Jacob Grismer seek confirmation of: 1) the entitlement of female status Indians to hold and to transmit equal registration status to their descendants, without discrimination based on sex; and 2) the entitlement of matrilineal descendants to equal registration status without discrimination based on the sex of their status Indian ancestor. The Applicants submit that the only adequate and effective remedy for the sex discrimination embedded in the State Party's status registration regime will be one which places Indian women and their descendants born prior to April 17, 1985, (matrilineal descendants), 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.*

The Applicants present the following summary of their comments on the State Party's arguments seeking to excuse the sex discrimination in the State Party's registration regime.

Admissibility

The Applicants have demonstrated the admissibility of their claims with regard to all requirements of the First Optional Protocol to the Covenant. The Applicants are personally and directly affected by the sex discrimination in the State Party's registration regime; the operative period of their claim is post April 17, 1985; and the Applicants have exhausted all available domestic remedies.

However, the State Party contends that the Applicants' claim is inadmissible in whole or part because the 2011 amendments to the 1985 *Indian Act* ("Bill C-3") have afforded them an adequate remedy.

- ***The 2011 amendments do not afford the Applicants a remedy that answers their allegations.***

While the British Columbia Supreme Court (the Trial Court) dealt with the full scope of the Applicants' allegations, the British Columbia Court of Appeal radically narrowed the analysis of the sex discrimination in the 1985 *Act* and consequently narrowed the scope of the declaratory relief.

In particular, the Court of Appeal found that much of the sex discrimination was justified based on the Government's stated objective of "preserving acquired rights." The only discrimination recognized by the Court of Appeal as unjustified was the preferential treatment of a small sub-set of descendants of male Indians affected by the "double mother rule" whose rights acquired prior to 1985 were not only preserved by the 1985 *Act*, but improved. The Bill C-3 amendments are tailored to the Court of Appeal decision.

As a result, the 1985 *Act* as amended by Bill C-3 ("1985 *Act* as amended") is failed remedial legislation. Bill C-3 left untouched the bulk of the sex discrimination embedded in the scheme, of which the Applicants successfully complained in the Trial Court.

Bill C-3 did not eliminate the sex discrimination from the status registration scheme, but rather re-enacted and re-entrenched the sex-based hierarchy inherent in s. 6(1)(a) and s. 6(1)(c).).

Bill C-3 made no change to the criteria for eligibility for full s. 6(1)(a) status. The 1985 as amended still preserves entitlement to s. 6(1)(a) status for those who were entitled to be registered under the pre-1985 regime. Bill C-3 merely extended inferior s. 6(1)(c) status to some individuals, if they can satisfy various restrictive qualifications that continue to favour male Indians and patrilineal descendants.

The effect of the restrictive qualifications in Bill C-3 is that the 1985 *Act* as amended still excludes from eligibility for registration status Aboriginal women and their descendants who would be entitled to register if sex discrimination were completely eradicated from the scheme. Still excluded are:

- grandchildren born prior to September 4, 1951 who are descendants of status women who married out;

- grandchildren of Indian women who parented in common-law unions with non-status men; and
- the illegitimate female children of male Indians.

In contrast, the regime recognizes the s. 6(1)(a) registration entitlement of:

- grandchildren born prior to September 4, 1951 who are descendants of status men who married out;
- grandchildren of Indian men who parented in common-law unions with non-status women; and
- illegitimate male children of male Indians.

Further, under the 1985*Act* as amended the second generation cut-off is applied unequally to grandchildren of Indian women who married out as compared to grandchildren of Indian men who married out. The 1985 *Act* as amended only grants s. 6(2) status, and never s. 6(1)(a) status, to the grandchildren born prior to April 17, 1985 of Aboriginal women who married out and whose children married out, notwithstanding the fact that grandchildren born prior to April 17, 1985 of status men who married out and whose children married out *are* eligible for s. 6(1)(a) status. The second generation cut-off is thereby postponed for the male lineage grandchildren until at least the following generation. Therefore the 1985 *Act* as amended still does not even place Indian women who married out and their descendants on the same footing as Indian men who married out and their descendants, and it has the effect of excluding subsequent generations because of the sex of their Aboriginal ancestor. The principle of equality requires that descendants on the female line receive nothing less than the registration status to which their male line counterparts are entitled.

As anticipated in the Applicants' Initial Submission, Bill C-3 improved the registration entitlement of Jacob Grismer, making him eligible for s. 6(1*)(c.1*) status, and thereby able to transmit status to his children, (Sharon's grandchildren) born after April 17, 1985.

However, this does not accord the Applicants equality. In particular, the statutory regime does not recognize the eligibility of Sharon McIvor and Jacob Grismer for full s. 6(1)(a) registration status. In contrast, Sharon McIvor's brother and all his children have full s. 6(1)(a) status. This difference is based solely on sex, as Sharon McIvor's brother has the same lineage as Sharon McIvor, and the same pattern of marriage and parenting. Sharon's McIvor's brother can hold and transmit s. 6(1)(a)

status to his children born prior to April 17, 1985. Sharon McIvor, who continues to be confined to inferior and stigmatized s. 6(1)(c) status, can neither hold nor transmit s. 6(1)(a) status to her child. Although the Applicants have the tangible benefits of status for themselves, the Applicants still do not enjoy all the intangible benefits of status on a basis of equality with their peers. In particular, they are denied the legitimacy and social standing that full s. 6(1)(a) status confers.

- ***Other Admissibility Issues***

The State Party also contends that certain aspects of the Applicants' claims are inadmissible because: the facts predate the coming into force of the Covenant and the Optional Protocol for Canada; the sex discrimination challenged by the Applicants does not apply to the Applicants; and sex discrimination in the impugned legislation is the subject of other ongoing domestic cases.

The Applicants' claims are solely concerned with the effects of the post-1985 registration regime. The only reason that it may appear otherwise is that the post-1985 scheme incorporated and carried forward the discrimination embedded in prior regimes.

The Applicants' claims do not constitute an *actio popularis* challenge to the legislation. The Applicants have shown that the sex-based hierarchy embedded in the 1985 *Act* affects them personally and directly and that the discrimination they suffer – their continuing ineligibility for s. 6(1)(a) status – has not been remedied by the 2011 amendments.

The Applicants have provided illustrations of various ways in which the scheme's ongoing preference for the male Indian, marriage to a male Indian and descent from a male Indian discriminates based on sex. These are essential to clarify the operation of what is a factually complex scheme. The record shows that Sharon McIvor has been personally and directly affected by the scheme's sex discrimination *both* as a woman who married out and as a matrilineal descendant of Aboriginal women who did not marry their children's non-status fathers. As noted above, the discrimination against Aboriginal women who partnered in common-law relationship, as did Sharon's mother and grandmother, has not been eliminated by Bill C-3. The fact that there is additional domestic litigation pending, initiated by other victims of discrimination, is not a bar to the Applicants' claim. The facts on which the claims presented in this petition rest are part of the record of the domestic proceeding. The State Party has had an ample opportunity through domestic processes to address the defects in the scheme.

The State Party also argues that it has no responsibility for the effects that status categories have had on the Applicants within their communities. The Applicants have addressed the substance of the State Party's arguments regarding non-state actors in their comments on the merits. With regard to the relevance of this issue to the admissibility of the petition, the Applicants emphasize that there is no requirement to prove the alleged violation at the admissibility stage. The Applicants have clearly submitted sufficient material substantiating their claims for the purpose of admissibility.

Merits

- ***Rights to Equality and Non-Discrimination***

The State Party maintains that the Applicants' Article 26 Covenant claim is without merit because: there is no discriminatory distinction; the difference between s. 6(1)(a) and s. 6(1)(c) is merely one of formal drafting; the *Act* only provides for one status, not degrees of status; the capacity to transmit status is not a benefit of the legislation; and Indian status is not a marker of cultural identity or legitimacy.

As explained above, the State Party's registration regime continues to privilege male Indian progenitors and patrilineal descendants through the vehicle of s. 6(1)(a). The argument that there is only one status, and that there is no significant legal distinction between s. 6(1)(a) status and s. 6(1)(c) status is inaccurate and misleading. Section 6(1)(a) status is still superior in terms of ability to transmit status to descendants born prior to April 17, 1985. Characterizing the capacity to transmit status as a benefit of the status regime is consistent with settled law and ordinary reasoning.

Section 6(1)(a) status is also superior in terms of the legitimacy and social standing that it connotes and confers. The 1985 *Act* instead of eliminating sex discrimination, as was intended, transferred and incorporated the pre-existing and long-standing preference for male Indians and patrilineal descent, by means of s. 6(1)(a). Section 6(1)(a) preserved full status for male Indians born prior to April, 17, 1985, whether or not they married out, and for descendants who claim entitlement to registration through the male line of descent. Women who were denied status under the former "marrying out rule" were granted a lesser status under a new s. 6(1)(c). These women who became eligible for status because of Bill C-31 – which is the Bill that introduced s. 6(1)(c) - are often referred to as "Bill C-

31 women", implying that they are not "real Indians" like the Indian men and their descendants who have s. 6(1)(a) status.

The Applicants' evidence demonstrates that it is their experience that status and status categories are markers of legitimacy and cultural identity, and that the continuing denial of full s. 6(1)(a) status to female Indian progenitors and their descendants connotes the inferiority and deficiency of Aboriginal women and maternal lineage.

To the extent that the effects of the legislation implicate the conduct of non-state *Act*ors, that conduct is the product of the State Party's registration regime and the State's historical role in regulating most aspects of the life of Aboriginal communities.

It would be surprising if, after more than a century of living under a State-imposed regime that defines who is an Indian, Aboriginal people themselves had not come to view entitlement to registration status as confirmation or validation of their "Indianness", as a matter separate from the capacity to transmit status and access certain tangible benefits which are conferred by status.

It should also be noted that even though the 1985 *Indian Act* severed membership from status, the ability of the bands to accept and provide for non-status members is constrained by the financial reality that federal government funding to bands depends on the number of registered Indians they include.

For Sharon McIvor and Jacob Grismer, as Aboriginal individuals, personal identity is inextricably intertwined with cultural identity. In these factual circumstances it would be completely unreasonable to absolve the State Party of responsibility for the discriminatory effects of the registration scheme on the Applicants within their communities.

The State Party contends that the distinction between s. 6(1)(a) status and s. 6(1)(c) status is based on reasonable and objective criteria. The State Party claims that the sex-based differential treatment is justified because it preserves "acquired rights." On the facts, preservation of acquired rights is not a legitimate goal for the differential treatment in the registration regime, since previously acquired rights were conferred under a sex-based status hierarchy created by the State Party. This cannot be reconciled with the object and purpose of the Covenant and the fundamental character of the guarantees of equality and equal protection. If the Committee were to accept the preservation of acquired rights for a group whose

enjoyment of historical privilege stemmed from systemic legislated discrimination against another group, this rationale could be advanced to justify a great many infringements of rights under the Covenant.

Furthermore, as a matter of fact, previously acquired rights would not be diminished by extending full s. 6(1)(a) status to Aboriginal women, including women who married out, and to matrilineal descendants, including descendants of married and unmarried status women, who were previously excluded from status based on non-Indian paternity.

Right to Equal Exercise and Enjoyment of Culture

The State Party argues that the Applicants' Article 27 Covenant claim is without merit because the Applicants have not experienced significant interference with the enjoyment of their culture, and that the current effects of status categories on the Applicants' ability to enjoy their culture result from the actions of non-state actors. The Applicants have demonstrated significant interference with their right to the equal exercise and enjoyment of their culture, in particular their right to the full enjoyment of their Aboriginal cultural identity. A foundational aspect of an individual's right to enjoy his or her culture is the formation of a sense of identity and belonging to a group, and recognition of that identity and belonging by others in the group. The capacity to transmit one's cultural identity is also a key component of cultural identity.

The State Party's attempt to avoid responsibility for the impact of its legislated sex discrimination within Aboriginal communities has no credibility. Given the role that Canada has played in superimposing a patriarchal definition of Indian on First Nations communities, and the fact that Canada's status registration scheme *continues* to prefer male Indians and their descendents, it would be unreasonable to exempt Canada from responsibility for the full extent of the harm of its ongoing sex discrimination.

This is not a claim regarding violations by non-state actors. The Applicants challenge the conduct of the State Party in enacting and maintaining the legislative scheme which discriminates on the basis of sex, that the Applicants contend violates the Covenant. In any event, the Covenant requires the State Party to *ensure* as well as respect the rights of Aboriginal women to the equal exercise and enjoyment of First Nations culture on and off reserve, in their local communities, and in the broader community of First Nations and individuals of First Nations descent, across Canada.

The Applicants wish to bring to this Committee's attention yet again, the failures of the State Party to take effective remedial action and the Government's intransigence in eliminating the sex discrimination of which it has been aware over a prolonged period of time, at least since this Committee's decision in *Lovelace v. Canada*. Within this context, the Applicants stress the desirability of specific guidance from this Committee regarding the nature of the remedy to be provided by the State Party.

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I. Introductory Information

A. Review of Applicants' Initial Submission

1. The Committee is referred to the Applicants' Initial Submission which explains that:

- The Applicants Sharon McIvor and her son Jacob Grismer seek confirmation of: 1) the entitlement of female status Indians to hold and transmit equal registration status to their descendants, without discrimination based on sex, and 2) the entitlement of matrilineal descendants to equal registration status without discrimination based on the sex of their status Indian ancestor.

- The Applicants' claim is that the sex-based criteria for the determination of Indian registration status violate Articles 26; 2(1), 3, and 27; and 2(3)(a) of the Covenant;[1]

- The State Party has long been aware of the sex discrimination in its regime for status registration, which has been the subject of extensive public criticism, including, but not limited to, the 1981 decision of this Committee in *Lovelace v. Canada*;[2]

- The 1985 *Indian Act* is failed remedial legislation. Instead of eliminating sex discrimination as was intended, the 1985 *Indian Act*, transferred and incorporated the pre-existing and longstanding legislative preference for male Indians and patrilineal descent, by means of s. 6(1)(a). Section 6(1)(a) preserved full status for male Indians born prior to April 17, 1985, whether or not they married out, and for descendants who claim entitlement to registration through the male line of descent;[3]

- Registration status confers significant tangible and intangible benefits. The tangible benefits of status include: entitlement to apply for extended health benefits, post-secondary education funding, and certain tax exemptions. The intangible benefits of status relate to

[1] See Applicants' Initial Submission paras. 6, 23, 24-29, 34, 73, 126, 147-184, 198, 208, 209-235, 236-244, 249
[2] Applicants' Initial Submission paras. 9, 38-46 ; see also *Sandra Lovelace v. Canada*, Communication No. 24/1977, Views of 30 July 1981
[3] Applicants' Initial Submission paras. 35, 45, 47-58, 139, 179, 200, 208, 239, 244

cultural identity. They include the ability to transmit status and a sense of cultural identity and belonging;[4]

- Section 6(1)(a) status is superior to s. 6(1)(c) and s. 6(2) status in terms of the ability to transmit status to descendants born prior to April 17, 1985, and in the social standing and legitimacy that s. 6(1)(a) confers.[5]

- The operative period of the claims is from April 17, 1985, the date when the 1985 *Indian Act* took effect, and therefore the claims are admissible *ratione temporis*.[6]

- The Applicants, who are personally and directly affected, have exhausted domestic remedies, through constitutional litigation in the British Columbia Supreme Court, the British Columbia Court of Appeal and an application for leave to appeal to the Supreme Court of Canada, which was refused.[7]

- The Trial Court granted declaratory relief to the Applicants, the effect of which would have been to entitle them to registration under s. 6(1)(a) of the 1985 *Act*. However, their success in the Trial Court was rolled back by the Court of Appeal.[8]

- The Court of Appeal focused on a narrow and discrete aspect of the sex discrimination which the Applicants successfully challenged in the Trial Court, and referred back to Parliament the question of how to remedy the discrimination.[9]

B. Update Regarding the 2011 Amendments

2. As anticipated by the Applicants' Initial Submission, at the time of filing, amendments to s. 6 of the 1985 *Indian Act* were pending ("Bill C-3"). As the Applicants advised the Committee, it was apparent that Bill C-3 would not eliminate the discrimination entrenched in s. 6 of

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[4] Applicants' Initial Submission paras. 21-22, 32, 95-101, 104, 114, 144 - 146, 170, 176, 180 - 184, 245
[5] Applicants' Initial Submission paras. 15, 19, 22, 60, 92, 96,101, 114, 141, 146, 183, 212, 234
[6] Applicants' Initial Submission paras. 118 - 124
[7] Applicants' Initial Submission paras. 28, 87, 115, 125-130
[8] Applicants' Initial Submission paras. 28, 74 -76, 77- 87, 125, 185 - 194, 198, 236, 245 - 246
[9] Applicants' Initial Submission paras. 77-86, 237 - 243, 246

the 1985 *Indian Act*.[10] Soon thereafter Bill C-3 was passed into law, and came into force in 2011.[11]

3. Bill C-3 did not eliminate the discrimination entrenched in s. 6 of the 1985 *Indian Act*. Nor did it purport to do so. The Government's name for the *Act* is telling: *An Act to promote gender equity in Indian registration by responding to the Court of Appeal for British Columbia decision in McIvor v. Canada (Registrar of Indian and Northern Affairs).* The Government's legislative response attempted to deal specifically with the discrete facet of the sex discrimination which the Court of Appeal found to be unjustified, leaving untouched the bulk of the sex discrimination of which the Applicants successfully complained in the British Columbia Supreme Court, and for which they now seek an effective remedy from this Committee.

4. Bill C-3 *re-enacted* the s. 6(1)(a) and s. 6(1)(c) sex-based hierarchy (clause 2(2),(3)). Bill C-3 made no change to the criteria for eligibility for full s. 6(1)(a) status. The 1985 *Act*, amended by Bill C-3 ("1985 *Act* as amended"), preserves entitlement to s. 6(1)(a) status for those who were entitled to be registered under the pre-1985 regime. Bill C-3 expressly recognizes entitlements to be registered that existed under s. 6(1)(a) or (c), prior to Bill C-3 (clause 5 and 6). Bill C-3 merely extends inferior s. 6(1)(c) status, to some individuals, if and only if, they can satisfy various restrictive qualifications set out in s. 6(1)(c) *(c.1)*:

   (i) The registrant's mother must have lost status as a result of marriage under provisions related to marrying out dating from the 1951 *Act* through 1985, or under former provisions of the *Act* related to the same subject matter.

   (ii) The registrant's father must be or have been, if deceased, not entitled to be registered under the *Act* in effect since the creation of the Indian Registry in 1951, or was not an Indian as defined in the pre-1951 *Act*.

[10] Applicants' Initial Submission paras. 89, 141-143

[11] *An Act to promote gender equity in Indian registration by responding to the Court of Appeal for British Columbia decision in McIvor v. Canada (Registrar of Indian and Northern Affairs)* also known as the *Gender Equity in Indian Registration Act*, R.S.C, 2010, c. I-5, Assented to 15th December, 2010, in force January 31st, 2011

(iii) The registrant must have been born after the marriage referred to in (i) and prior to April 17, 1985, when Bill C-31 came into force; persons born after that date are entitled to registration only if their parents married prior to it.

(iv) The registrant must have had or adopted a child on or after September 4, 1951, with a person not entitled to be registered.

5. In the result, as anticipated in the Applicants' Initial Submission, the 1985 *Act* as amended continues to exclude from eligibility for registration status Aboriginal women and their descendants who would be entitled to register if sex discrimination were completely eradicated from the scheme. Illustrations include:

- grandchildren born prior to September 4, 1951 who are descendants of status women who married out;
- grandchildren of Indian women who parented in common-law unions with non-status men; and
- the illegitimate female children of male Indians.

6. In contrast, the regime recognizes the s. 6(1)(a) registration entitlement of:

- grandchildren born prior to September 4, 1951 who are descendants of status men who married out;[12]
- grandchildren of Indian men who parented in common-law unions with non-status women; and
- illegitimate male children of male Indians.

[12] As noted in the Applicants' Initial Submission (fn.9), included among those eligible for s. 6(1)(a) status are descendants of men who married out, including descendants of two generations of men who married out, who did not lose status under a rule referred to as the "double mother rule", either because they had not yet turned 21 in 1985, or their bands had obtained exemptions from the double mother rule. As explained in paras. 81 and 82 of the Initial Submission, under the double mother rule, introduced in 1951, a legitimate child of a status Indian father, whose mother and grandmother only had status because of their marriages to status men, would lose status at the age of 21. The double mother rule is exceptional in *Indian Act* history. It was the first and only occasion when a male Indian claiming Indian ancestry along the male line could lose status. The Trial Judge noted that only 2,000 individuals were affected by the double mother rule (TC Decision para 246).

7. Further, the 1985 *Act* as amended only grants s. 6(2) status, and never s. 6(1)(a) status, to the grandchildren born prior to April 17, 1985 of Aboriginal women who married out and whose children married out, notwithstanding the fact that grandchildren born prior to April 17, 1985 of status men who married out and whose children married out *are* eligible for s. 6(1)(a) status. The second generation cut-off is thereby postponed for the male lineage grandchildren until at least the following generation. This is yet another way in which the 1985 *Act* as amended still does not even place Indian women who married out and their descendants on the same footing as Indian men who married out and their descendants, and it has the effect of excluding subsequent generations because of the sex of their Aboriginal ancestor. The principle of equality requires that descendants on the female line receive nothing less than registration status to which their male line counterparts are entitled.

8. As anticipated in the Applicants' Initial Submission, the 1985 *Act* as amended improves the registration entitlement of Jacob Grismer, making him eligible for s. 6(1)(c) status, and thereby able to transmit status to his children, (Sharon's grandchildren) born after April 17, 1985. However, this does not accord the Applicants equality. In particular, the 1985 *Indian Act* as amended does not recognize the eligibility of Sharon McIvor and Jacob Grismer for full s. 6(1)(a) registration status. In contrast, Sharon McIvor's brother and all his children born prior to April 17, 1985 have full s. 6(1)(a) status.

9. Even when Jacob Grismer is compared to the second generation of men who married out under the double mother rule, and Sharon McIvor is compared to the first generation of men who married out under the double mother rule, equality requires they have s. 6(1)(a) status. Thus, despite their long journey, Sharon McIvor and Jacob Grismer are left without official recognition of their inherent equality. Notwithstanding the 2011 amendments, Sharon McIvor and Jacob Grismer remain consigned to the s. 6(1)(c) sub-class whereas Sharon McIvor's brother and all his children born prior to April 17, 1985 are entitled to s. 6(1)(a) status.

10. Although the Applicants have the tangible benefits of status for themselves, and Jacob is able to transmit 6(2) status to his children born after April 17, 1985 (Sharon's grandchildren), the Applicants do

not enjoy all the intangible benefits of status on a basis of equality with their peers. In particular, they are denied the legitimacy and social standing that full s. 6(1)(a) status confers.

11. The Applicants' claims therefore remain as stated in the Initial Submission: Canada has failed to eliminate discrimination and ensure an adequate and effective remedy. The sex discrimination embedded in s. 6 of the 1985 *Act* is ongoing. Furthermore, the discrimination has not been eliminated in the new s. 6 of the 1985 *Act* as amended. In short, the 1985 *Act* as amended is another piece of failed remedial legislation.

C. Remedy Requested for Violations of the Applicants' Covenant Rights

12. The only adequate and effective remedy will be one which places all Indian women and their descendants (matrilineal descendants), on the same footing as Indian men and their descendants (patrilineal descendants) who are entitled to register under s. 6(1)(a). The only difference between the pre- and post-Bill C-3 situation, with regard to the complaint to this Committee, is that a narrow and discrete facet of the sex discrimination has been partially removed from the scheme.[13]

13. The Applicants reiterate that their petition is necessitated by the longstanding failure of the State Party to fully and finally eliminate the sex discrimination from the legislative regime for registration as a status Indian. This reality is underscored by the fact that, through Bill C-3, the State Party has persisted in its piecemeal and inadequate approach to eliminating sex discrimination.[14]

14. In light of the State Party's continuing failure to correct fully the sex discrimination entrenched in its legislative scheme for determining Indian status, the Applicants respectfully urge the Committee to request Canada to take timely measures to ensure that s. 6(1)(a) of the status registration regime, introduced by the 1985 *Indian Act*, and *re-enacted* by Bill C-3, is interpreted or amended so as to entitle to registration under s. 6(1)(a) those persons who were previously not entitled to be registered under s. 6(1)(a) solely as a result of the preferential treatment accorded to Indian men over Indian women born prior to April 17,

[13] Applicants' Initial Submission para. 247
[14] Applicants' Initial Submission paras. 88- 92, 116, 127, 141-143

1985, and to patrilineal descendants over matrilineal descendants, born prior to April 17, 1985.[15]

15. In their Initial Submission the Applicants requested that the Committee find that Sharon McIvor is entitled to be registered under s. 6(1)(a) of the 1985 *Indian Act* and that the Applicant Jacob Grismer is entitled to be registered as an Indian under s. 6(1)(a) of the 1985 *Indian Act* or s. 6(1)(a) of the 1985 *Indian Act*. *For greater certainty, the Applicants hereby request the Committee to find that Sharon McIvor is entitled to be registered under either s. 6(1)(a) of the 1985 Indian Act or s. 6(1)(a) of the 1985 Indian Act as amended and that the applicant Jacob Grismer is entitled to be registered as an Indian under either s. 6(1)(a) of the 1985 Indian Act or s. 6(1)(a) of the 1985 Indian Act as amended.*

II. Applicants' Comments on the State Party's Submission Regarding the Facts (State Party Submission (paras. 9 – 48))

A. Male Children of Unmarried Non-status Male Indians

16. The State Party submission that under the pre-1985 legislation, 'if only the father was an Indian, the illegitimate child was also an Indian"[16] is incorrect. The correct characterization of this provision of the legislation is "if only the father was an Indian, the illegitimate child, *if male*, was also an Indian." Illegitimate female children of male Indians did not have status. This was finally and unequivocally determined by Canada's highest Court, purely as a matter of statutory interpretation, in *Martin v. Chapman,* [1983] 1 S.C.R. 365 at p. 370, cited at footnote 10 of the Initial Submission.

B. Pre-1985 Legislative Process

17. The State Party submits that in the process leading up to the 1985 *Indian Act* there was no consensus among First Nations as to what the future rules governing status should be.[17] This statement is misleading when presented in isolation from the historic context. As the Trial Judge found, the historic context was "the existing legislation in which

[15] Applicants' Initial Submission para. 35
[16] Submission of State Party para. 15
[17] Submission of State Party para. 19

entitlement to registration or status was linked to band membership and entitlement to live on a reserve." First Nations groups did not oppose the elimination of sex discrimination in registration status, which under the 1985 *Act* was severed from band membership.[18] Any concerns raised were with regard to incidents of band membership that are distinct from, and not affected by the claims presented in this petition.

C. Section 6(1)(a) Status

18. The State Party submits that s. 6(1)(a) merely preserves pre-1985 entitlements to eligibility.[19] The Applicants emphasize two points. As stated in the Initial Submission, included among those eligible for s. 6(1)(a) status are descendants of men who married out, including the descendants of two generations of men who married out who did not lose status under the double mother rule, either because they had not yet turned 21 in 1985 or their bands had obtained exemptions from the double mother rule. (See also footnote 12 above.)

19. Furthermore, s. 6(1)(a) did not merely preserve pre-1985 entitlements, it enhanced the ability of non-status wives of status men to transmit status. Under the *1985 Act* the non-Indian wife of a male Indian married prior to 1985 acquired for the first time the ability to transmit status. Even if she and her status Indian husband divorced prior to April 17, 1985 under the *1985 Act* she may be eligible for s. 6(1)(a) registration status and able to transmit status. In contrast, the status Indian women in Sharon McIvor's generation who married out can never obtain s. 6(1)(a) status. As stated in the Applicants' Initial Submission, this feature of the scheme is an additional illustration of the flaws in the opinion of the Court of Appeal that the preservation of existing rights constitutes a legitimate objective justifying the discrimination in the legislation.[20]

D. Hierarchy of Status Categories

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[18] *McIvor v. The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 827, paras. 44-45. The "TC Decision" is Annex 2 to the Applicants' Initial Submission.
[19] Submission of State Party para. 24
[20] Applicants' Initial Submission para. 242

20. The State Party submits that the 1985 *Act* provides for only one Indian status.[21] This is incorrect as a matter of fact. As explained above, s. 6(1)(a) status is superior. The intangible benefits associated with s. 6(1)(a) status are unquestionably superior to those associated with s. 6(1)(c) and s. 6(2) status. Although the tangible benefits (access to social programs and tax exemptions) are the same, the intangible benefits (the ability to transmit status and the legitimacy conferred by status) is greatest for full s. 6(1)(a) status. Furthermore, s. 6(1)(c) status (the category of status accorded to "Bill C-31 women") is stigmatized within Aboriginal communities.

E. Transitional Category of Status

21. The State Party submits that s. 6(1)(c) status is merely "transitional" in nature.[22] Characterizing s. 6(1)(c) status as transitional, and therefore acceptable, obscures the fact that for those affected by the scheme the effects of the discrimination is not transitional. It will continue to affect them for all their lives and their families for generations to come. The fact is that the *McIvor* petition pertains exclusively to sex discrimination against Indian women and their descendants *born prior to April 17, 1985*. The longer Canada delays, the more likely it is that people born prior to April 17, 1985 who are affected by the discrimination challenged in this petition will be dead. That fact does not constitute a justification for discrimination.

F. The Applicants' Statutory Appeal

22. The State Party submits that Sharon McIvor contributed to the length of time required to resolve her statutory appeal.[23] This argument is misleading and unfair to the Applicants. The Applicants reject both the premise and the Government's conclusions.[24] The Applicants also contend that the Government's attempt to draw support on this point from the Court of Appeal's decision depends on an unreasonable interpretation of the Court's comments on the matter. The Government

[21] State Party's Submission para. 26 It should also be noted that the State Party's chart following para. 53 of the State Party Submission shows, correctly, that there is differential treatment between Sharon McIvor and her male counterpart, and Jacob Grismer and his counterpart: Sharon McIvor and Jacob Grismer are not entitled to s. 6(1)(a) status, and that in contrast the "comparable man," and the child of the "comparable man" are entitled to s. 6(1)(a) registration status, under either the 1985 *Act* or the 2011 *Act*.
[22] State Party's Submission para. 26
[23] State Party's Submission para. 28
[24] Submission of State Party paras. 73, 122

was in control of the timetable for the statutory appeal. The Government earlier objected to the combining of the statutory appeal with an action seeking constitutional remedies. Prior to 2006, when the Government conceded that the Registrar's application of the *Act* to the Applicants could not stand, Sharon McIvor reasonably believed that it was only by seeking a constitutional remedy that she could obtain status for her son. It must be emphasized that the Government's concession that Sharon could advance beyond s. 6(2) status, *was based on a technicality*, that is, that there had been no formal declarations of non-Indian paternity with regard to Sharon, or her mother *who was unmarried and the child of an unmarried status woman*. The systemic discrimination against matrilineal descendants of unmarried Indian women has not been eliminated from the scheme. For a description of the litigation process and delay by the Government, the Committee is referred to: paras. 71 and 93 of the Applicants' Initial Submission, paras. 16-19 of the Trial Judge's 2007 decision on the statutory appeal,[25] and paras. 103-115 and 346-350 of the Trial Judge's decision on the merits.[26] At paras. 346-350 of the Trial Judge's decision on the merits, the Court states:

> [346] Further delay for these plaintiffs must be measured against the backdrop of the delays that they have already experienced. The record discloses that from the late 1970's forward, successive governments recognized that the registration provisions discriminated on the basis of sex. It was not until 1985 that legislation was passed to remedy this discrimination, legislation that I have found continued to perpetuate the problem.
>
> [347] Ms. McIvor applied for registration pursuant to the 1985 *Act* on September 23, 1985. The Registrar responded some sixteen months later by letter dated February 12, 1987, granting her registration under s. 6(2) and denying registration to Jacob. Ms. McIvor protested the decision by letter dated May 29, 1987. The Registrar confirmed his decision some twenty-one months later by letter dated February 28, 1989. These proceedings were then initiated.

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[25] *McIvor v. The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 26. Annex 3 to the Applicants' Initial Submission.

[26] The TC Decision, Annex 2 to the Applicants' Initial Submission

> [348] At the time these proceeds came under case management in April 2005, the defendant's [sic] position was, and continued to be, that a substantial adjournment was required to afford the Crown sufficient time to prepare. This position was maintained notwithstanding the fact that the statutory appeal had been commenced in 1989 and the claim under the *Charter* in 1994. The defendants also asserted at that time that up to six months would be required for the trial of this action.
>
> [349] The defendant's [sic] concession with respect to the plaintiffs' registration status, was made shortly before trial. It was based on an interpretation of the legislation and in my view could have been advanced at any time following the 1989 Decision of the Registrar. Having made the concession, the defendants immediately applied to strike the plaintiffs' claim.
>
> [350] Against this backdrop, I conclude that the plaintiffs should not be told to wait two more years for their remedy.

23. The State Party submits that the Applicants challenged the unequal treatment of descendants of Indian women who married non-Indian men as compared with descendants of Indian men who married non-Indian women.[27] The Applicants' constitutional challenge was broader than is acknowledged by the State Party. The Applicants' challenge was not confined to the unequal treatment of descendants of women who *married out*. It included the descendants of Indian women who parented with non-Indian men in common-law relationships. Nor was it confined to descendants; it also included progenitors. The Applicants challenged the registration provisions to the extent that they prefer descendants who trace their ancestry along the patrilineal line over those who trace their ancestry along the matrilineal line, and male Indians who married non-Indians and their descendants, over female Indian who married non-Indians and their descendants.

24. For confirmation of the breadth of their constitutional challenge, the Applicants refer the Committee to paragraphs 4 and 5 of the Trial Court decision, in which the Court notes that "the plaintiffs submit that the registration provisions continue to prefer descendants who trace

[27] Submission of State Party para. 32

their ancestry along the paternal line over those who trace their ancestry along the maternal line. The plaintiffs submit further that the provisions prefer male Indians who married non-Indians and their descendants, over female Indians who married non-Indians and their descendants."[28]

25. The Applicants also refer the Committee to paragraph 5 of the Trial Court Decision which, in points 1 and 2, sets out the relief sought by the Applicants at trial in a way that makes it clear that the Trial Court understood that the challenge to discrimination against matrilineal descendants included the descendants of women who married out, but was *not limited to descendants of Indian women who were married.*

26. It must be borne in mind that the record underlying this complaint fully documents Sharon McIvor's experience of discrimination under the 1985 *Act*, not only as a woman who married out, but also as a matrilineal descendant of a mother and a grandmother who were never married, and that the treatment of Sharon McIvor as a matrilineal descendant of unmarried women was extensively considered by the Trial Court.

27. Finally, the Committee is referred to paragraph 343 of the Trial Court decision, in which, the Court states: "I have concluded that s. 6 of the 1985 *Act* violates s. 15(1) of the *Charter* in that it discriminates between matrilineal and patrilineal descendants born prior to April 17, 1985, in the conferring of Indian status, *and* discriminates between descendants born prior to April 17, 1985, of Indian women who married non-Indian men, and the descendants of Indian men who married non-Indian women."[29] [emphasis added]

G. Leave Denied by Supreme Court of Canada

28. The State Party attempts to interpret the Supreme Court of Canada's refusal of leave in the *McIvor* constitutional case as due to the Applicants' success in the court below.[30] This is wholly unpersuasive. It is impossible to know why leave to appeal was refused in the Applicants' case or why leave is ever refused. Statistics demonstrate

[28] TC Decision para. 4
[29] TC Decision para. 343
[30] Submission of State Party paras. 43-45

that most applications for leave to the Supreme Court of Canada are denied. In 2009, the year that leave to appeal was sought in *McIvor*, only 11% of the 518 such applications were accepted by the Court. This is consistent with statistics for the last ten years.[31]

H. Process Leading up to Bill C-3 Amendments

29. The State Party submits that the Government sought input on Bill C-3 from Aboriginal organizations, including Aboriginal women's groups and regional organizations.[32] However, the State Party ignored input calling for the elimination of sex discrimination from its status registration regime. Throughout the parliamentary reform process culminating in the 2011 amendments, there were repeated calls by individuals, groups, and members of Canada's Parliament and Senate to amend Bill C-3 to eliminate the sex discrimination from the *Indian Act* registration scheme. The comments of Anita Neville, Member of Parliament, and member of the Standing Committee on Aboriginal Affairs and Northern Development are illustrative. On May 25, 2010, at the stage of the Committee's report on Bill C-3 to the House of Commons, and following days of public hearings on Bill C-3, Member Neville stated,

> …for generation after generation individual Aboriginal women, like Sandra Lovelace, Jeanette Corbiere Lavell and Sharon McIvor, have had to take the Government to court to gain entitlement to their status, status that was denied them only because they descended from a status woman rather than a status man. We know that gender discrimination has existed in the *Indian Act* since its enactment.
>
> The Conservative Government introduced the legislation that we are looking at here today, *Bill C-3, that would continue to leave residual gender discrimination in the Indian Act, forcing another generation of Aboriginal women to fight for their rights and, as my colleague from the Bloc said, to fight for their rights without having the opportunities of the court challenges program.*

[31] *Bulletin of Proceedings: Special Edition, Statistics 2000 to 2010*, (Ottawa: Supreme Court of Canada, 2011)
[32] Submission of State Party para. 46

We have heard a near unanimous call from Aboriginal women's organizations, individual Aboriginal women, including Sharon McIvor, Aboriginal governments and chiefs, academics and national organizations, such as the Canadian Bar Association and LEAF [Women's Legal Education and Action Fund], to amend or otherwise rewrite Bill C-3 to comprehensively and meaningfully end sex discrimination under the *Indian Act*.

We have heard a lot of conversation about the deadline but we have also heard that the courts allowed for the deadline to be extended further than the date that we are currently dealing with. For whatever reason, the Government has chosen not to go back to them to extend that deadline. The Government has chosen instead to deny repeated attempts to introduce comprehensive legislation that would, once and for all, end gender discrimination by the *Indian Act*. It has appealed the 2007 decision of the B.C. Supreme Court in the case of *McIvor v. Canada*. It voted against a debate on a motion that would broaden the scope of Bill. It voted against amendments in Committee that would guarantee full gender equality. It challenged these amendments in the House, despite the testimony of witnesses and the unanimous support of the opposition parties….

We actually heard poignant testimony at Committee from women who talked about the personal impact it had on them, their children and their families.

Bill C-3 leaves intact significant areas of sex discrimination. It continues to perpetuate sex-based hierarchy for the transmission of status. Grandchildren who trace their Aboriginal descent through the maternal line would continue to be denied status if they were born prior to September 1951…. The proposed amendment is restricted to the grandchildren of women who lost their status due to marrying non-Indian men but it does not deal with situations where marriage is not involved in cases of unconfirmed paternity or where Indian women co-parented with non-status men. It continues to perpetuate the discrimination. (40th Parliament, 3rd Session

Edited Hansard, Number 48, Tuesday, May 25, 2010) [emphasis added]

30. On December 8, 2010, during the Debates of the Senate, Senator Sandra Nicholas Lovelace, who was the petitioner in *Lovelace v. Canada*,[33] apologized to Aboriginal women and their descendants for the fact that Bill C-3 was going to pass without amendments to fully eliminate the sex discrimination, and expressed regret that Sharon McIvor would be forced to seek redress under the Covenant. She stated:

> It is 25 years since Bill C-31 was passed, and we have another "take it or leave it" bill from the Government with no amendments. Bill C-3 does not address all aspects of gender discrimination. It is unjust and irresponsible, and it is a bandage solution to an old existing problem for Aboriginal women in Canada. It will create dissension and chaos in our communities.
>
> The problem will not go away. It will cause inevitable consequences for the next generation and for the Government.
>
> Honourable senators, if Bill C-3 is passed, then Sharon McIvor will be forced to walk down the same long and lonely path that I once travelled. Sharon McIvor said at the Standing Senate Committee on Human Rights on Monday: "The bill . . . is a piece of garbage."
>
> As an Aboriginal woman, I experienced the injustice of living in my own community without full recognition of my status, which is my birthright.
>
> Under the *Canadian Charter of Rights and Freedoms*, Canada recognizes human rights for its people in all walks of life and even for our new immigrants from around the world. Canada is a country that ensures that the rights of a woman are equal to those of a man. However, where is the equality and justice for Canada's First People, Aboriginal women?

[33] *Supra* note 2

> Honourable senators, I apologize to my people and their descendants that the Government of Canada will let Bill C-3 pass without amendments. As far as I can remember, honourable senators, all Aboriginal women and their issues are always at the bottom of the totem pole. (Debates of the Senate (Hansard), 40th Parliament, 3rd Session, Volume 147, Issue 75, Wednesday, December 8, 2010)

I. The 1985 Amendments

31. The State Party submits that Sharon McIvor *lost* eligibility for status registration when she married a non-Indian in 1970 and that she was previously entitled to Indian status.[34] This submission is misleading, and is addressed by the Applicants below at paras. 47–52.

J. 2011 Amendments

32. The State Party describes the operation of the 2011 amendments, and argues that any subsisting discrimination against the Applicants has been remedied.[35] The Applicants emphasize that the State Party's argument is not supported by the facts. The discrimination of which the Applicants complain is continuing. The State Party's submission ignores the evidence submitted by the Applicants regarding the superior legitimacy and social standing conferred by s. 6(1)(a) status. The State Party's characterization of the law and the facts also obscures at least three critical features of the regime as amended:

(i) The 2011 amendments do not treat Sharon McIvor and her brother equally. She is ineligible for s. 6(1)(a) status. He is eligible for s. 6(1)(a) status.

(ii) The 2011 amendments do not treat Jacob Grismer and his cousins equally. He is ineligible for s. 6(1)(a) status. The cousins are eligible for s. 6(1)(a) status.

(iii)The State Party fails to acknowledge that the 1985 *Indian Act* as amended grants s. 6(1)(a) status to the male line grandchildren born prior to April 17, 1985, which, in turn is transmissible to great grandchildren born prior to April 17, 1985. The Applicants reiterate

[34] Submission of State Party para. 49
[35] Submission of State Party paras. 52-54

that under the 1985 *Act* as amended, for male-line grandchildren born prior to April 17, 1985, the impact of the second generation cut-off is postponed for at least a generation. This is explained in paragraph 7 above, to which the Committee is referred.

III. Applicants' Comments on the State Party's Submission Regarding Admissibility of the Claims Presented

A. Overview of Issues Related to Admissibility

33. The State Party contends that the petition is inadmissible *ratione personae*, *ratione materiae*, and *ratione temporis*.[36] In their Initial Submission, the Applicants demonstrated the admissibility of their claims with regard to all the requirements of the First Optional Protocol to the Covenant: the Applicants are personally and directly affected by the sex discrimination in the legislative scheme; the operative period of the claims is post-April 17, 1985; and the Applicants have exhausted all available domestic remedies.[37]

34. The Applicants submit that their petition remains admissible. Bill C-3 has not eliminated the sex-based hierarchy from the registration scheme, and the Applicants are personally and directly affected by the *Act*'s failure to extend s. 6(1)(a) eligibility to women who married out and to matrilineal descendants. None of the State Party's objections to admissibility have merit.

B. Admissibility Ratione Personae

35. The State Party submits that through a combination of litigation and legislation the Applicants have obtained an effective remedy.[38] This argument is without merit. As explained at paras. 72-87 of the Initial Submission, the Applicants were entirely successful in the British Columbia Supreme Court, which held that the registration provisions of the 1985 *Indian Act* should be interpreted so as to entitle persons to registration under s. 6(1)(a) who were previously not entitled to full s. 6(1)(a) status solely as a result of the preferential treatment accorded to

[36] Submission of State Party paras. 58-83
[37] Applicants' Initial Submission paras. 112-131
[38] Submission of State Party paras. 3, 58, 61, 134

Indian men over Indian women born prior to April 17, 1985 and to patrilineal descendants over matrilineal descendants, born prior to April 17, 1985. The Trial Court decision required that sex discrimination be totally eliminated from the registration scheme, and by necessary implication that the Applicants be granted full s. 6(1)(a) status, to place them on the same footing as others to whom status had been accorded under the previous discriminatory regime, on a going forward basis.[39]

36. However, the scope of the declaratory relief ordered by the Trial Court was radically reduced by the Court of Appeal, which reversed the Trial Decision in part, and granted only partial relief for the discrimination the Applicants had challenged. To contend, as the State Party does, that the Court of Appeal "took a different approach to the facts" glosses over the legal significance of the approach taken by the Court of Appeal. The Court of Appeal accepted the preservation of acquired rights as a rationale for the continuation of longstanding sex discrimination in the legislation and failed to address the systemic dimensions of this discrimination. By doing so, the Court undermined the future realization of the rights guaranteed by the Covenant, as well as denying effective relief to the Applicants. Both the "preservation of acquired rights" rationale, and the extreme degree to which the Applicants' systemic challenge was rejected are devastating defeats for the Applicants and for future respect of Covenant rights in Canada.[40]

37. The Court of Appeal sanctioned the continuation of a discriminatory hierarchy of rights, a reality that the Government's reference to preservation of rights seeks to obscure.[41]

38. Nor have the Applicants received an effective remedy from the State Party's 2011 legislative response, which merely implements the Court of Appeal's decision rather than totally eliminating the sex discrimination embedded in the scheme. As explained in the Applicants' update above, the 1985 *Indian Act* as amended leaves intact most of the sex discrimination embedded in the registration provisions, of which the Applicants successfully complained in the British Columbia Supreme Court, and categorically excludes Sharon McIvor and Jacob Grismer from eligibility for full s. 6(1)(a) status.

[39] Applicants' Initial Submission para. 75
[40] Applicants' Initial Submission paras. 79-81, 85
[41] State Party Submission paras. 23, 24, 41 112.

39. If the State Party's argument is accepted, the implication would be that the Government is only required to comply with its Covenant obligations in incremental steps when forced to do so through litigation undertaken by a succession of victims. Since this Committee's decision in *Lovelace*, the State Party has understood that the Covenant requires the elimination of sex discrimination from Canada's status registration regime. Rather than responding as required by the Covenant, the State Party has approached its obligations under the Covenant as narrow concessions. In this factual and historical context, the Government's incremental approach suggests to a lack of good faith in implementing its Covenant obligations.

C. Applicants' Comments on Government's Submission Regarding Actio Popularis

40. The State Party submits that the Applicants are attempting to raise allegations that do not arise on their facts.[42] Canada focuses on the fact that Applicants have noted in their Initial Submission that the registration scheme as amended continues to exclude from eligibility: grandchildren born prior to September 1951, who are the descendants of women who married out; the previously excluded grandchildren of a status woman and non-status man who were unmarried; and the previously excluded female children of a status man and a non-status woman who were unmarried.[43]

41. This line of argumentation by the State Party obfuscates the nature of the claim. Fundamentally, the Applicants' claim is that full s. 6(1)(a) status is reserved for those who can establish their entitlement to registration under the prior discriminatory regime.

42. This is not an *actio popularis*. Sharon McIvor and Jacob Grismer have shown that the sex-based hierarchy embedded in the 1985 *Act* affects them personally and directly, and that the discrimination they suffer – their continuing ineligibility for s. 6(1)(a) status – has not been remedied by the 2011 amendments.

[42] Submission of State Party paras. 75-79
[43] Applicants' Initial Submission paras. 89, 141

43. The Applicants have illustrated the consequences for Indian women and their descendants of the State Party's failure to totally eliminate the sex discrimination from the scheme. These illustrations clarify how this factually complex scheme and the ongoing sex discrimination actually work. Under the Government's approach, no one could ever invoke the Covenant to require a State Party to totally eliminate sex discrimination in a law. It would always be possible to sever examples of diverse impacts that differ in some respects from those experienced by a particular victim. In this respect, a challenge to sex discrimination in *a law* of broad application is different from a challenge to an *isolated discriminatory act*.

44. Particularly with a complex legislative scheme, if the basis of the scheme as a whole is discriminatory, any single part of it is going to be discriminatory. The object and purpose of the Covenant, which is to the protection of the rights of individuals, requires that the discrimination at the root of the statutory regime be addressed, rather than requiring that a long succession of individuals come forward and challenge individual aspects of the regime.

45. It must be borne in mind that the Applicants' challenge *only* pertains to the unequal treatment of Aboriginal women and their descendants born prior to April 17, 1985. The Applicants reiterate, as this group ages, each additional year of delay in fully and finally correcting the discrimination to which they have been subjected means that fewer and fewer victims of the discrimination will be alive to benefit from a remedy. Canada's approach to the issue of standing threatens to permanently immunize the State Party from answering for the consequences of its legislated sex discrimination against Aboriginal women and their descendants born prior to April 17, 1985. To perceive and remedy the sex discrimination in the State Party's registration scheme does not depend on evidence that must be adduced on a case-by-case basis. It is simply a fact that the 2011 amendments only partially ameliorate the sex discrimination of which the Applicants complain, and which they have experienced directly.

46. Because of the broad based nature of the discrimination involved it is necessarily the case that the Applicants are not the only individuals affected. It is not in the interests of justice that their claims be excluded for this reason.

47. In any case, the State Party's submission that the Applicants' allegations with respect to the continuing discrimination against descendants of unmarried Indian women do not arise on the authors' facts, is misleading. The State Party submits that Sharon McIvor was eligible for registration under the 1951 *Indian Act*, but lost that entitlement in 1970 when she married a non-Indian.[44] This is inaccurate. The proposition that Sharon McIvor was actually eligible for status prior to 1985 is a fiction. When she applied for registration under the 1985 *Act*, the Registrar determined that she was only entitled to inferior s. 6(2) status and her son, Jacob Grismer, was ineligible for status because neither Jacob Blankinship, Susan Blankinship's father - Sharon's maternal grandfather - or Ernest McIvor - Sharon McIvor's father - were recognized as Indians.

48. As the Trial Judge explained, if they [Sharon McIvor or her mother] had applied [for status] prior to 1985 they almost certainly would have been refused because of their non-Indian paternity.[45] (See para. 70 of the Applicants' Initial Submission quoting the Trial Court in full.)

49. However, since the 1985 *Indian Act* eliminated the mechanism for excluding illegitimate children on grounds of non-Indian paternity, Sharon McIvor and her children could apply for registration without risk of being excluded on that ground after April 17, 1985.

50. This is the argument that Sharon McIvor made in her applications to the Registrar for status for herself and her children. *The argument was <u>only</u> available, however, after the 1985 Indian Act came into effect and the authority to exclude illegitimate children on grounds of non-Indian paternity was eliminated.*

51. The Applicants reiterate Sharon McIvor did not *actually* lose her eligibility for status in 1971 when she married Terry Grismer. She could not have gained status prior to 1985. Therefore, in 1970 she had no status eligibility to lose. It was only after 1985 that was it possible to say, and only notionally, that Sharon McIvor "lost" her entitlement to status under the 1951 *Act* when she married Mr. Grismer.

[44] Submission of State Party paras. 49, 77
[45] TC Decision para. 122

52. Sharon McIvor only became entitled to registration in 1985 because of two changes in the 1985 *Indian Act*: the elimination of the authority to exclude illegitimate children for non-Indian paternity and the elimination of the disqualification of marriage to a non-Indian under section 6(1)(c).

53. The State Party argues further that the allegation with regard to the scheme's continuing discrimination against illegitimate children of Indian women is not substantiated because a child born prior to 1985 to a common-law union between an Indian woman and a non-Indian man has been entitled to status since 1985.[46] This argument misses the point. Prior to April 17, 1985, children of unmarried Indian women were subject to disqualification from status because of non-Indian paternity. Under the 1985 legislation such children were consigned to the s. 6(1)(c) or s. 6(2) subclasses, never to full s. 6(1)(a) status. In contrast, under the 1985 *Act*, the male child of a male Indian and a non-status woman who were unmarried is entitled to s. 6(1)(a) status. Moreover, that unequal treatment of matrilineal descendants is not corrected by the 2011 amendments.

54. This is exactly how the Registrar disposed of Sharon McIvor's application for status when she applied initially. Her unmarried mother was consigned to s. 6(1)(c) status because of her non-Indian paternity. In turn, Sharon McIvor was consigned to s. 6(2) status and her children were, therefore, excluded from status.

D. Exhaustion of Remedies

55. Canada notes that there is ongoing litigation by other plaintiffs, and argues in the alternative that aspects of the Applicants' claim are therefore inadmissible for non-exhaustion of domestic remedies.[47] As established in the Initial Submission, the facts on which the claims presented to the Committee rest are part of the record in the domestic litigation.

56. The Committee is referred to paras. 125-129 of the Initial Submission. The Applicants reiterate that further exhaustion of domestic remedies should not be required in relation to a challenge by them to s. 6 of the

[46] Submission of State Part para. 77
[47] Submission of State Party para 79

1985 *Act* as amended. Because the Bill C-3 amendment is tailored to the decision of the Court of Appeal and the Supreme Court denied leave to appeal that decision, the matter is settled in domestic law and it would be futile to seek further judicial redress.

57. The Applicants also reiterate that it is well-established in the Committee's jurisprudence that the exhaustion of domestic remedies is not required "if the jurisprudence of the highest domestic tribunal has decided the matter at issue, thereby eliminating any prospect of success of an appeal to the domestic courts."[48] No doubt Canada is relying on the Court of Appeal decision in *McIvor* to resist any pending challenges to s. 6 of the registration scheme as amended.

58. The State Party has had ample opportunity through domestic processes to correct the defects in the scheme.

E. Admissibility Ratione Temporis

59. The State Party submits that allegations relating to the eligibility for status of Sharon McIvor and Jacob Grismer under the 1951 amendments are inadmissible *ratione temporis*.[49] This argument does not assist Canada since the Applicants are not raising allegations under the 1951 amendments. Their *Charter* challenge and now their petition to this Committee are solely concerned with the discriminatory effects of the post-1985 regime. The only reason that it may appear otherwise is that the post 1985 scheme incorporated the discrimination of prior regimes. That is a structural feature of the legislation. It is does not render the petition inadmissible *ratione temporis*.

60. The Committee is referred to the Applicants' arguments on admissibility *ratione temporis*, contained at paras. 117 to 124 of their Initial Submission.

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[48] *Tillman v. Australia*, Communication No. 1635/2007, Views of 18 March 2010, para. 6.3 (citing *Ondracka and Ondracka v. Czech Republic*, Communication No. 1533/2006, Views of 31 October 2007, para. 6.3; *Gomariz Valera v. Spain*, Communication No. 1095/2002, Views of 22 July 2005, para. 6.4; *Lànsman et al. v. Finland*, Communication No. 511/1992, Views adopted on 14 October 1993, para. 6.3). See also *Castaño López v. Spain*, Communicatio.n No. 1313/2004, Views of 25 July 2006, para. 6.3; *De Dios Prieto v. Spain*, Communication No. 1293/2004, Views of 25 July 2006, para. 6.3.

[49] Submission of State Party paras. 67-70.

61. The State Party argues in the alternative that any discriminatory impact on the Applicants did not become an issue for the Applicants until 2006 or 2007.[50] This is inaccurate and misleading**.** *If Sharon McIvor had been male, she and her son Jacob would both have become eligible for s. 6(1)(a) registration status as of 1985. It is only because of the sex discrimination embedded in the 1985 Act, which continues to this day, that Sharon McIvor does not have s. 6(1)(a) status and is unable to transmit s. 6(1)(a) status to her son Jacob Grismer.*

F. Ratione Materiae

62. The State Party submits that certain aspects of the communication are inadmissible because the alleged harms are not attributable to the Government.[51] This Committee has repeatedly stated that an applicant does not need to prove the alleged violation at the admissibility stage. The Applicants have clearly submitted sufficient material substantiating their claims, for the purposes of admissibility.

63. The substance of the State Party's argument regarding the responsibility of the Government for the effects of its discriminatory legislation on the Applicants' enjoyment of their Covenant rights within First Nation communities goes to the merits of the Applicants' claim. Therefore, the substance of State Party's argument is addressed below.

IV. Applicants' Comments on the State Party's Submissions Regarding The Merits of Their Claims

A. Existence of Differential Treatment

64. The State Party argues that there is no is differential treatment under the *Act*.[52]The Applicants maintain and have demonstrated in their presentation of the facts, that the 1985 *Act* as amended treats female Indians and their descendants differently than male Indians and their descendants. The continuing preference embodied by the registration regime for male Indians and their descendants affects the equal enjoyment of both the tangible and intangible benefits of status. The

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[50] Submission of State Party paras. 71-74
[51] Submission of State Party paras. 80-83
[52] Submission of State Party paras. 52-54; 88-92

effects of the registration scheme on the enjoyment of the intangible benefits of status—including the sense of cultural identity and belonging associated with status recognition—are no less a matter of Government responsibility than the effects on the enjoyment of tangible benefits. The Government created the link between status and cultural identity through its promulgation of a legislative regime defining "Indianness". Historically, the Government has extensively regulated virtually all aspects of Aboriginal life. The State Party itself acknowledges that eligibility for, and status as, an Indian has become "a significant source of personal identity for many First Nations persons," and that status is important to the Applicants.[53] The Government cannot now claim that it should not be held responsible for the effects of the status registration regime as experienced by individuals and perceived by their communities. In any case, the Covenant requires the Government to ensure as well as respect the rights guaranteed and therefore the State Party cannot disclaim all responsibility for discrimination by non-state actors.

65. The discriminatory denial of full s. 6(1)(a) status, and the enhanced sense of cultural identity that full status connotes and confers, directly and significantly impacts the Applicants' Covenant rights to the equal exercise and enjoyment of cultural rights as First Nations individuals.

Different Categories of Status

66. The Applicants' Initial Submission explains that the 1985 *Indian Act* created three categories of status[54]:

(i) it accords full s. 6(1)(a) status to those who were entitled to status under the previous patriarchal regime, including men who married non-status women, their wives and their children.[55]

(ii) it grants lesser status (s.6(1)(c)) to women who were previously disqualified from status because of the marrying out rule; and

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[53] Submission of State Party paras. 101, 103

[54] See Applicants' Initial Submission paras. 47-60, 163-166.

[55] The Applicants reiterate that included among those eligible for s. 6(1)(a) status are descendants of men who married out, including descendants of two generations of men who married out, who did not lose status under a rule referred to as the "double mother rule", either because they had not yet turned 21 in 1985, or their bands had obtained exemptions from the double mother rule. The double mother rule is explained in paras. 81 and 82 of the Initial Submission.

(iii) it establishes a new second generation cut-off rule through the operation of s. 6(2).

67. The 2011 amendment does not eliminate the distinctions between the three categories of status. The Applicants reiterate that s. 6(1)(a) is superior to s. 6(1)(c) and s. 6(2) status in terms of ability to transmit status and in the importance and legitimacy that s. 6(1)(a) status connotes and confers.

68. Bill C-3 merely extended s. 6(1)(c) status to individuals who can satisfy various exclusionary criteria. Sex discrimination is thereby perpetuated, by withholding s. 6(1)(a) status from Indian women who married out and matrilineal descendants.

Substantive Discrimination

69. The State Party's submission that there is only one status, and that there is no significant legal distinction between ss. 6(1)(a) status and s. 6(1)(c) status is inaccurate and misleading.[56] The Committee is referred to paragraphs 174 – 184 of the Applicants' Initial Submission, in which it is explained that the sex-based denial of s. 6(1)(a) status to women who married out and matrilineal descendants imposes substantive discrimination, based on the following indicia:

- The effects on the enjoyment of the benefits of status. Section s. 6(1)(a) status and s. 6(1)(c) confer the same tangible benefits. They do not confer the same intangible benefits;

- The perpetuation of historic denials of women's equality; and

- The importance of the benefits at stake, including: the ability to transmit status and the legitimacy that s. 6(1)(a) status confers (intangible benefits).

Superiority of 6(1)(a) Status with Regard to Transmission of Status

[56] Submission of State Party paras. 26, 82, 92, 100, 130

70. The Applicants reiterate that s. 6(1)(a) status is superior to s. 6(1)(c) status in terms of ability to transmit status to descendants born prior to April 17, 1985. (See paragraph 7 above)

71. As noted above, the Government itself concedes that under the 1985 *Act* as amended, there is differential treatment of Sharon McIvor.[57] According to the Government's chart Sharon McIvor can never be eligible for s. 6(1)(a) status, whereas from 1985 onwards, the Government's "comparable man" and his children born prior to April 17, 1985 are eligible for s. 6(1)(a) status. However, Canada's chart[58] fails to show that the grandchild born *prior* to April 17, 1985 to a man who is comparable to Sharon McIvor is eligible for s. 6(1)(a) status. Canada's chart erroneously shows the grandchild of the Government's "comparable man" to be eligible for s. 6(2) status. This is not accurate with regard to the grandchild born *prior* to April 17, 1985 of the "comparable man". The grandchild born *prior* to April 17, 1985 of the Government's comparable man is eligible for s. 6(1)(a) status.

72. As will be apparent to this Committee, the formalistic analysis of comparator groups presented by the State Party obscures the operation of the scheme. The fact that Sharon McIvor and her brother Ernie happen not to have grandchildren born prior to April 17, 1985, does not alter the operation of the legislative scheme. The indisputable fact concerning the operation of the legislative scheme is that under the 1985 *Act* as amended, s. 6(1)(a) status is superior to s. 6(1)(c) status in terms of ability to transmit status to grandchildren born prior to April 17, 1985. For the grandchildren on the male line born prior to April 17, 1985, the operation of the second generation cut-off is postponed for at least a generation.

73. Although the Applicants do not challenge the second-generation cut-off *per se*, they do challenge the continuing unequal application of the second-generation cut-off to female line descendants born prior to April 17, 1985. The unequal application of the second-generation cut-off exemplifies the continuing sex discrimination of the scheme.

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[57] See chart in Submission of State Party para. 53 showing that Sharon McIvor is not eligible for s. 6(1)(a) status whereas the Government's "comparable man" is eligible for s. 6(1)(a) status.
[58] Submission of State Party para. 53

74. Canada submits that the *Indian Act* does not confer the ability to "transmit" status, since the *Indian Act* merely conveys status based on the degree of ancestry required.[59] The Applicants contest this characterization of the operation of the *Indian Act* on several grounds. First, as explained in the Applicants' Initial Submission at paras. 158 – 162, it is well established under international human rights jurisprudence that the ability to "transmit" nationality to a child is properly characterized as transmission.[60] As the Trial Court observed, status under the *Indian Act* is a concept that is closely akin to the concepts of nationality and citizenship.[61] The State Party's argument that the transmission of status is not a benefit of the registration scheme was exhaustively considered and properly rejected in the domestic court proceedings.[62]

75. The Trial Court found that "numerous publications that emanate from government ministries make use of the language of transmission of status in discussions of registration provisions under the 1985 *Act* and its previous versions."[63]

76. The Trial Court found that Canada's submission with regard to "transmission" of status was "a strained and unnatural construct that ignores the significance of the concept of Indian as an aspect of cultural identity."[64]

77. The Trial Court found further that, the State Party's "approach would treat status as an Indian as if it were simply a statutory definition pertaining to eligibility for some program or benefit. However, having created and then imposed this identity upon First Nations peoples, with the result that it has become a central aspect of identity, the Government cannot now treat it in that way, ignoring the true essence or significance of the concept."[65]

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[59] Submission of State Party paras. 94-100

[60] See for example Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Algeria (January 27, 1999) at para. 83; Concluding Observations of the Committee on the Rights of the Child: Kuwait (October 26, 1998) at para. 20; Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Iraq (June 14, 2000) at para. 187; Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Jordan (January 27, 2000) at para. 172; Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Morocco (August 12, 1997) at para. 64.

[61] TC Decision para. 192

[62] TC Decision paras. 176-198

[63] TC Decision para. 187

[64] TC Decision para. 193

[65] *Ibid*.

78. The Applicants urge this Committee to rely on the well-supported conclusions of the Trial Court on this point. The Applicants also point out that the Court of Appeal agreed that "the right to transmit status to one's offspring can be of significant spiritual and cultural value."[66]

Stereotyping and Perpetuation of Historic Inequality of Women: Legitimacy and Cultural Identity

79. The State Party disputes that the status hierarchy embedded in s. 6 that prevents women who married out and matrilineal descendants from holding full s. 6(1)(a) status embodies a sexist stereotype of female inferiority or perpetuates the notion of women as property.[67] Canada's submission fails to take into account the history of Canada's treatment of Aboriginal people, and Aboriginal *women* in particular, under successive versions of the *Indian Act* regime for determining entitlement to Indian status.

80. The Trial Court found that the sex-based hierarchy embedded in s. 6 of the 1985 *Act* perpetuates a sexist stereotype of Aboriginal women as inferior. In this regard the Committee is referred to paragraphs 255-262 of the Trial Court decision and paras. 178-179 of the Initial Submission.

81. The Applicants emphasize that the Trial Court expressly agreed with their submission in the domestic proceeding to the effect that "the perpetuation of sexist stereotypes of Aboriginal women as incapable of transmitting Indian culture and heritage to their children has discriminatory effects on Aboriginal women, and their descendants. The invidious message of this stereotype is that neither Aboriginal women nor their descendants are deserving of equal concern and respect. This message…is particularly damaging to Aboriginal women who are ineligible for s. 6(1)(a) status under the 1985 *Act* because they embody the sexist stereotype of female inferiority."[68]

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[66] *McIvor v. Canada (Registrar, Indian and Northern Affairs)*, 2009 BCCA 153. The "CA Decision" Annex 6 to the Applicants' Initial Submission, para. 71.
[67] Submission of State Party para. 90
[68] TC Decision paras. 257, 262

82. The Applicants also highlight their own evidence that the continuing denial of full s. 6(1)(a) status to Indian women who married out and their descendants connotes the inferiority and deficiency of Aboriginal women, and that "Bill C-31 women" who have 6(1)(c) status, rather than full 6(1)(a) status under the 1985 *Act*, are seen to be "less Indian" than their male counterparts.[69]

83. The State Party submits that the importance of status as an element of identity may vary among First Nations individuals.[70] To establish their claim it is not necessary for the Applicants to demonstrate that there is no variation in the importance that Indian status or different categories of status may hold for various First Nations individuals.[71] The Applicants' evidence concerning the legitimacy associated with s. 6(1)(a) status in their communities is convincing,[72] in light of the historical context of sex discrimination in the registration regime, combined with the fact that 6(1)(a) status is still superior in terms of ability to transmit status.

84. The State Party contends that status is not a marker for legitimacy or cultural identity, except in the personal perception of the Applicants. The State Party also argues that the Applicants have conflated cultural identity and status to too great a degree.[73] In response, the Applicants submit that characterizing the distinctions in status categories as merely a matter of the Applicants' idiosyncratic perceptions trivializes the nature of the rights affected, and ignores the evidence that have presented. This evidence indicates that there is a perception within First Nations communities that "real" Indians are those individuals who have s. 6(1)(a) status, and that s. 6(1)(a) status is regarded as superior, and that 6(1)(c) status is regarded as inferior and is stigmatized.[74]

85. The Applicants reiterate that within their communities there are differences in the degree of esteem and legitimacy associated with status categories. These differences are not merely a matter of the Applicants' personal perceptions. The Applicants advise the Committee that it is a widely held view in First Nation communities

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[69] Applicants' Initial Submission paras. 107-111, 178-179
[70] Submission of State Party para. 103
[71] Submission of State Party para. 103
[72] Applicants' Initial Submission paras. 15, 19, 22, 60, 92, 96, 101, 114, 141, 146, 183, 212, 235
[73] Submission of State Party paras. 101-105.
[74] Applicants' Initial Submission para. 108; see also TC Decision paras. 136-137

that "real Indians" have s. 6(1)(a) status and that s. 6(1)(c) status is inferior.

86. The State Party's suggestion that status is not a marker for legitimacy or cultural identity, except in the personal perception of the Applicants, is contradicted by the finding of the Trial Court. The Trial Court concluded that "Ms. McIvor's observations about the importance of registration with respect to a sense of identity were echoed in the *Royal Commission Report* [*on the Rights of Aboriginal Peoples*] at pp. 22-24, which reported that the Department of Indian and Northern Affairs conducted a survey of 2,000 *Bill C-31* registrants, and almost two-thirds of those canvassed reported that they had applied for Indian status for reasons of identity or because of the culture and sense of belonging that it implied."[75]

87. The State Party's claim that status is not a marker for legitimacy and cultural identity fails to acknowledge that for First Nations women living under the *Indian Act* regime, there is a long history of the State Party's denial of their right to equality being intertwined with the denial of the right to the equal enjoyment of their culture. The testimony of Jane Gottriedson, President of the Native Women's Association of Canada, given before the Standing Committee of Indian Affairs and Northern Development, on September 9, 1982, and quoted by the Trial Court, show this intertwining of the State Party's systemic discrimination against Aboriginal women, and restrictions on their full enjoyment of their First Nations cultural identity:

> Discrimination based on sex is, of course, contrary to the *Canadian Bill of Rights* and now contrary to the *Charter* contained in the *Canadian Constitution Act, 1981*. Discrimination based on sex goes against international covenants which Canada has signed. It is therefore within the realm of human rights protection. This is the Federal Government's primary interest, and one which has caused this nation so much embarrassment. If a denial of Indian rights to a certain segment of Indian women were not contrary to the human rights principle of equality of the sexes, there would be no keen interest in this issue….

[75] TC Decision para. 138

> The first concern of Indian women is that they have been denied their birthright. They have been denied the right to call themselves Indian. They have been denied their nationality. By birth and by blood, Indian women are a part of the First Nations of Canada. It is not so important how or in what manner they have been denied their nationality; what is important is that they have been denied this right. It so happens that Indian women have been systematically discriminated against on the basis of their sex in federal *Indian Act*s since 1869.
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> However, Indian women are not merely saying that they do not want to be discriminated against on the basis of sex; what they have been saying is that they do not want to be denied their birthright for any reason. Indian women are as aware as Indian men that Indians are specifically mentioned in the *British North America Act*, now called the *Canada Act*. Indian women are as aware as Indian men that certain rights flow to Indians in Canada because of the Constitution of this country. They will not accept any recommendation which continues to deny Indian women the same rights enjoyed by Indian men. Equality of the sexes is an issue here because the Federal Government, through the *Indian Act*, chose to discriminate against Indian women and deny them their heritage because they married non-Indians. The bottom line for Indian women in the country is that by birth and by blood they are Indians and will not accept any proposal which continues to deny Indian women this recognition. (Trial Court decision para. 135; Standing Committee of Indian Affairs and Northern Development, September 9, 1982; pp. 2:37-2:38.)

Dignity

88. The State Party submits that the status regime does not and cannot confer human dignity because human dignity is inherent.[76] This misses the point. The State Party has an obligation to respect human dignity. By maintaining a discriminatory statutory regime the State Party has undermined respect for the Applicants' dignity. The State Party's comments regarding human dignity also fail to acknowledge the

[76] Submission of State Party para. 103

significance of Indian status as an aspect of identity, and the esteem and legitimacy associated with s. 6(1)(a) status in particular.

89. The State Party contends that the effects of the registration scheme on the perceptions of cultural identity held by the Applicants or others in their community are not a matter of its responsibility under the Covenant.[77] In their Initial Submission, the Applicants described the detrimental effects of the sex discrimination in the post-1985 registration scheme.[78] The Applicants draw to Committee's attention Sharon McIvor's evidence that her experience has been that within Aboriginal communities there is a significant difference in the degree of esteem that is associated with s. 6(1)(a) status and that there is stigma that is associated with being an Aboriginal woman assigned to the s. 6(1)(c) sub-class. Aboriginal women, consigned to the s. 6(1)(c) status are thus inferior to, and less Indian than, their male counterparts.[79] The Applicants also highlight Jacob Grismer's evidence that the implication of being denied s. 6(1)(a) status is that his Indian lineage is deficient and inferior, and that the hurt of not being eligible for full s. 6(1)(a) status from 1985 onwards is profound.[80]

90. To the extent that the effects of the legislation implicate the conduct of non-state actors, that conduct is the product of the State Party's registration regime and the State's historical role in extensively regulating most aspects of the life of Aboriginal communities.

91. The Applicants reiterate that it would be surprising if, after more than a century of living under a State-imposed regime that defines who is an Indian, Aboriginal people themselves had not come to view entitlement to registration status as confirmation or validation of their "Indianness", as a matter separate from the capacity to transmit status and access certain tangible benefits which are conferred by status.[81]

92. The State Party attempts to establish a dichotomy between the cultural identify of "First Nations" and status as a source of personal identity.[82] This is a false dichotomy. As the Trial Court found "the concept of

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[77] Submission of State Party paras. 80-81; 104-108
[78] Applicants' Initial Submission paras. 102-111
[79] Applicants' Initial Submission para. 108
[80] Applicants' Initial Submission paras. 110-111
[81] Applicants' Initial Submission para. 176
[82] Submission of State Party paras. 105-107

Indian, has come to exist as a cultural identity alongside traditional concepts."[83]

93. The State Party submits that band membership rather than Indian status is more closely associated with cultural identity.[84] This argument fails to acknowledge the extent to which, over a very long period of time, Canada superimposed, by law, the definition of *both* band membership and status, and treated them as one and the same. The Trial Court found as a matter of fact that "in Aboriginal communities registration status continues to carry significance that is independent of membership in a particular band."[85]

94. The State Party points out that the sense of cultural identity of First Nations is strong.[86] This fact is in no way inconsistent with the Applicants' claim that status and different categories of status affect Aboriginal individuals' cultural identity and belonging in their communities.

95. To suggest that in the present individuals and communities should have suddenly ceased to associate cultural identity with Indian status, beggars reality, especially given the fact that the State Party's registration regime continues to deny equal registration status to Aboriginal women and their descendants.

96. Canada submits that status is not official recognition of State recognition of an individual's cultural identity.[87] It is immaterial whether or not Canada *intends* that registration status function as an official indication of state recognition of an individual's Aboriginal cultural identity. That is its *effect*. Under Canada's approach, the harmful effects of its discriminatory status regime could be ignored. Under the Covenant, the guarantee of equality and non-discrimination extends to both direct and indirect effects of the State Party's conduct in promulgating and maintaining the registration regime.

Impact of the Registration Regime on the Ability of the Bands to Provide for Non-Status Members

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[83] TC Decision para. 133
[84] Submission of State Party para. 106
[85] TC Decision para. 142
[86] Submission of State Party para. 102
[87] Submission of State Party para. 105

97. The State Party emphasizes that the 1985 *Act* severed status from band membership.[88] It is true that by formally severing band membership from status the 1985 *Act* created the possibility that a band could grant membership to a person who lacked status. The Applicants advise the Committee that an overwhelming majority of bands do not grant membership to anyone who is not eligible for registration status. In addition, when a band admits to membership a person not eligible for registration, the band suffers financially: Canada's funding for bands depends on the number of registered Indians they include.

98. For Sharon McIvor and Jacob Grismer, as Aboriginal individuals, personal identity is inextricably intertwined with cultural identity. In these factual circumstances would be completely unreasonable to absolve the State Party of responsibility for the discriminatory effects of the registration scheme on the Applicants within their communities.

B. Absence of Reasonable and Objective Criteria

99. The State Party submits as an alternative argument that if any differential treatment does exist between the s. 6(1)(a) and s. 6(1)(c) categories for status registration, it is based on reasonable and objective criteria. The State Party depends on the "preservation of acquired rights" as its rationale for the distinction.[89] The Applicants submit that preservation of acquired rights is not a legitimate goal for the differential treatment in the registration regime, since previously acquired rights were conferred under a sex-based status hierarchy created by the State Party. The Applicants refer the Committee to their Initial Submission at paragraphs 185 – 208 arguing that:

- On the facts of the complaint, preservation of acquired rights is not a legitimate goal because it does not preserve acquired rights—it preserves the *privileged position* of those who acquired registration under discriminatory provisions of previous *Indian Acts*, *carrying forward* past legislated discrimination. Preserving a hierarchy of sex-based rights is a blatantly discriminatory goal, and as such must always be regarded as inconsistent with the Covenant;

[88] Submission of State Party paras. 25,81,106
[89] Submission of State Party para. 109, 112

- The preservation of a sex-based hierarchy for status registration as a justification for the perpetuation of discrimination against Aboriginal women and their descendants cannot be reconciled with the Covenant guarantees of equality and non-discrimination or the State Party's obligations to ensure the full and equal enjoyment of Covenant rights and the equal protection of the law;

- If the Committee were to accept the preservation of acquired rights for a group whose enjoyment of historical privilege stemmed from systemic legislated discrimination against another group, this rationale could be advanced to justify a great many infringements of rights under the Covenant;

- There is no rational connection between the stated goal and the means. As the Trial Court found, preservation of the full status of those registered under s. 6(1)(a) would in no way be diminished by extending that same registration entitlement to others.

100. The State Party submits that the only distinction between entitlement to s. 6(1)(a) status and s. 6(1)(c) status is merely one of legislative drafting.[90] This position of the State Party ignores that: the intangible benefits conferred by s. 6(1)(a) status are superior; and that the criteria for s. 6(1)(a) status registration eligibility prefer patrilineal descent. As the Trial Court found, to view s. 6 as sex-neutral on the theory that it treats all reinstatees the same, and/or that Sharon Mclvor is treated the same as other reinstatees, would reduce equality analysis to a "shell game."[91]

101. The State Party submits that the Applicants propose criteria that would base eligibility on matrilineal descent without regard to how many generations an Aboriginal individual is removed from the female Indian ancestor in question, and that this approach would raise an issue of "remoteness."[92] The implication of this argument is that the legislative scheme should impose a barrier to eligibility for female line descendants that it does not impose on male line descendants. The Trial Court recognized, correctly, that under s. 6(1)(a), a current

[90] Submission of State Party paras. 111-112
[91] TC Decision para. 213
[92] Submission of State Party para. 113

applicant can obtain registration by establishing direct ascent along the male line to an Indian ancestor without regard to how many generations stand between them and that ancestor.[93]

102. The State Party wrongly attempts to confine the protection afforded by the guarantees of equality and non-discrimination to parent-child relationships, and to immunize sex discrimination against grandmothers. Once transmission is acknowledged as a benefit, equality requires that progenitors of both sexes have an equal capacity to transmit status. Logically, discrimination against an Aboriginal grandmother because of her sex is discrimination based on sex. Stated another way, discrimination based on the sex of an Aboriginal ancestor is sex discrimination, for both the progenitor and the descendant, whether that discrimination occurs between parent and child or between grandparent and grandchild.

103. The State Party submits that it is not required to rectify discriminatory acts that pre-date the Covenant.[94] The Applicants reiterate that their claims do not pre-date the Covenant, but rather concern the carrying forward of discrimination into the post-1985 registration regime.

104. The State Party submits further that the uneven application of the second generation cut-off was rectified by the 2011 amendments.[95] The Applicants reiterate that even after the 2011 amendments, the second generation cut-off is applied unevenly to grandchildren born prior to April 17, 1985 of grandmothers who married out.

105. The State Party also contends that the allegation that the registration scheme discriminates against matrilineal descendants is unrelated to the Applicants' factual situation.[96] This argument seeks to prevent the Committee from addressing the ongoing discrimination against matrilineal descendants of status mothers and grandmothers who partnered with non-status men in common-law relationships. An extensive record was established in domestic proceedings documenting the discrimination against matrilineal descendants—of

[93] TC Decision para. 240
[94] Submission of State Party para. 114
[95] *Ibid*.
[96] Submission of State Party paras. 77-79, 114

whom Sharon McIvor is one—of Aboriginal women who did not marry. This record, and the lengthy and burdensome nature Applicants' efforts, spanning more than two decades, to rectify the discrimination entrenched in the legislation argue in favour of specific guidance from this Committee to the State Party regarding the total elimination of sex discrimination from the legislation.

106. The State Party submits that with the adoption of Bill C-3 discrimination has been removed from the status eligibility criteria, and that the effects of historic discrimination on the Applicants' eligibility have been removed.[97] This is a merely a reiteration of the State Party's arguments in the context of its challenge to admissibility. The Applicants in turn reiterate that the continuing denial of s. 6(1)(a) status to Aboriginal women and their descendants discriminates based on sex. The Applicants also reiterate that they are personally and directly affected by the denial of s. 6(1)(a) status to them.

107. It must be concluded that the registration provisions embodied in s. 6 of the 1985 *Act*, *which are only narrowly modified in the 1985 Act as amended* continue the very sex discrimination that the 1985 *Indian Act* was intended to eliminate and, as such, violate Article 26. The State Party has been aware for a long time that the Covenant requires the elimination of sex discrimination from its registration regime. In these circumstances, the goal of ensuring respect for the Covenant would be well served by specific guidance from the Committee to the State Party concerning the total elimination of sex discrimination from the legislation.

C. Applicants' Rights to the Equal Exercise and Enjoyment of Their Culture

108. The Applicants have challenged s. 6 of the 1985 *Indian Act* as a violation of Article 27, in conjunction with Articles 2 and 3, based on its effects on the equal enjoyment of cultural identity.[98]

109. In particular, the Applicants have submitted that by withholding full s. 6(1)(a) status from women who married out and matrilineal

[97] Submission of State Party para. 115
[98] Applicants' Initial Submission paras. 27-29, 212–235

descendants, and perpetuating the preferential treatment historically accorded to paternal lineage, s. 6 of the 1985 *Indian Act* denies female progenitors and their descendants the equal right to full enjoyment of their cultural identity. It denies their capacity to transmit their cultural identity to the following generations on a basis of the equality of men and women, and deprives them of the legitimacy conferred by full status.[99] The Applicants' position is that this analysis also applies to the 1985 *Act* as amended, which continues to withhold full s. 6(1)(a) status from women who married out and matrilineal descendants. The Applicants submit that these are essential aspects of their rights as Aboriginal individuals to enjoy the right to culture guaranteed by Article 27.

Significant Interference

110. The State Party submits the Applicants have failed to demonstrate any significant interference with their right to enjoy their culture.[100] The Applicants reiterate that a foundational aspect or essential aspect of an individual's right to enjoy his or her culture is the formation of a sense of identity and belonging to a group, and recognition of that belonging by others in the group.[101] The Applicants also reiterate that capacity to transmit cultural identity is a key component of cultural identity itself.[102]

Bands, Geographic Areas

111. The State Party argues that the Applicants' rights to culture are confined to the practices of the bands in the Merritt area. This reductionist approach is misleading, since the right to the equal exercise and enjoyment of indigenous culture cannot be defined exclusively with reference to the practices of Indian bands and reserve life in a small geographic area of the Province. The *Indian Act* registration system and its impacts are not geographically confined in this way. The *Indian Act* is federal legislation. It applies to persons of First Nations descent throughout Canada. The scope of application of Article 27 is not restricted to territories defined by the State Party as

[99] Applicants' Initial Submission para. 212.
[100] Submission of State Party paras. 121-128.
[101] Applicants' Initial Submission para. 215
[102] Applicants' Initial Submission para. 27

indigenous reserves and the right of Aboriginal individuals to the equal enjoyment of their indigenous cultures identity is not restricted to a particular geographic region within the State Party. The equal ability to transmit status and the equal enjoyment of First Nations identity is not a right that can be circumscribed by the territory of any single First Nation. Sharon McIvor testified that she has had the experience of her identity as an Indian being accepted in the territory of a First Nation that is not her own because she had a status card.[103] This experience demonstrates that the State Party's approach is inconsistent with the reality of how indigenous culture and identity function.[104]

Lovelace v. Canada

112. The State Party attempts to circumscribe the meaning of the right to indigenous culture to the specific facts at issue in *Lovelace v. Canada*.[105] The *Lovelace* case revolved around the loss of cultural benefits of associated with residence on an Indian reserve. However, the Committee's views in *Lovelace* in no way suggest that the Covenant permits sex discrimination with regard to an indigenous woman's rights to enjoy cultural life beyond the boundaries of a reserve. The Covenant requires the State Party to respect and ensure the rights of Aboriginal women to the equal exercise and enjoyment of First Nations culture *both* on and off reserve, within their local communities, and within the broader community of First Nations and individuals of First Nations descent across Canada.

Substantial Negative Impact

113. The State Party submits that the Applicants have not demonstrated "substantial negative impact" on their rights to culture under Article 27.[106] The record shows that under the 1985 *Indian Act* regime the Applicants have suffered substantial interferences with their equal

[103] TC Decision para. 143
[104] The State party submission could be interpreted as suggesting that Jacob was eligible for status and band membership as of 1985. (Submission of State Party para. 122) That is not the case. Jacob was not able to establish his eligibility for status or band membership until 2006 when the Government conceded that the Registrar's earlier decisions regarding status could not stand. The State party submits that the Applicants did not pursue their statutory appeal for many years. (Submission of State Party para. 122). This is unfair and misleading, for the reasons set out at para. 22, above.
[105] Submission of State Party paras. 125-128.
[106] Submission of State Party para. 123

enjoyment of Aboriginal cultural identity, and their ability to transmit Aboriginal cultural identity to their descendants.[107] The Applicants also refer the Committee to paras. 126 – 131 of the Trial Court decision. The Trial Court decision details the exclusion from the Aboriginal community that Jacob felt when the 1985 *Act* precluded Sharon McIvor from passing status to him. He describes the pain of being treated by members of the Aboriginal community as though he was not a "real Indian" because he did not have status.[108]

114. The Trial Court decision also details Sharon McIvor's testimony regarding the stigma she felt as a mother of non-status children when there were no presents under the communal Christmas tree in her community, and no recognition ceremonies upon her children's graduation, because they were non-status. These experiences of exclusion directly impact the sense of cultural belonging and are examples of how the denial of equal registration status has had a substantial negative impact on the Applicants' ability to participate fully in the cultural life of their community.[109]

2011 Amendments

115. The 1985 *Indian Act* as amended does not remedy the unequal enjoyment of the right to culture because it maintains a sex-based hierarchy between s. 6(1)(a) status and s. 6(1)(c) status.

116. The Applicants reiterate after so many decades of State-imposed sex discrimination, s. 6(1)(a) is understood to be the class of status that 'real Indians' hold, whereas the women who are assigned to the s. 6(1)(c) subclass are stigmatized. Section 6(1)(c) denotes inferiority and 'less Indian.' Sharon McIvor's evidence is that she has experienced stigma that is associated with being a "Bill C-31 woman." To experience such stigma amounts to a substantial negative impact.[110]

117. The Applicants reiterate that it is for these reasons that that the only effective remedy will be one which grants s. 6(1)(a) status to Indian women and all their descendants born prior to April 17, 1985, on the

[107] Applicants' Initial Submission paras. 102-111
[108] TC Decision para. 137
[109] TC Decision paras. 128-129
[110] Applicants' Initial Submission para. 108.

same basis as s. 6(1)(a) status is granted to Indian men and their descendants born prior to April 17, 1985.

D. Applicants Challenge Conduct by the State Party

118. The State Party submits that the impact of status categories on the Applicants' ability to enjoy their culture in community with others is not a matter of State conduct for which the Government can be held responsible under international law.[111] This argument is largely addressed above at paras. 89-98.

Not a Claim Regarding Violations by Non-State Actors

119. This petition does not allege violations by non-state actors. Although the Applicants have referred to the influence of legislation on the conduct of non-state actors, it is the conduct of the State Party in enacting and maintaining the legislative scheme which discriminates on the basis of sex, that the Applicants contend is incompatible with the Covenant.

120. Furthermore, it is important not to overstate the extent to which the Applicants have described the effects of the State Party's registration regime on non-state actors. For example, when Jacob Grismer speaks of not being allowed to participate in traditional fishing activities because he lacked a status card, it must be borne in mind that it is the lack of a status card, not the actions by the Aboriginal community, that caused these restrictions on his enjoyment of these aspects of cultural life.[112]

The Invidious Message

121. The continuing denial of s. 6(1)(a) status to First Nation women and their descendants under s. 6(1) of the 1985 *Act* and the 1985 *Act* as amended sends an invidious message that it is acceptable for First Nations communities to treat First Nations women and their descendants as though they are not equal, do not belong and are not 'real Indians.'

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[111] Submission of State Party paras. 129-130.
[112] TC Decision para 131; Applicants' Initial Submission para. 110

The State Party's Role

122. Given the historical role of the State Party in regulating the life of First Nations peoples and the consequent link between status and cultural identity, it is to be expected that the exclusionary attitudes embedded in the status regime would be reflected in the attitudes adopted by non-state actors.

Obligation to Ensure the Equal Exercise and Enjoyment of the Right to Culture

123. Finally, Canada's approach is unconvincing because it ignores the positive dimensions of its obligations under the Covenant. Article 2 not only requires the State Party to respect, but also to ensure, the rights guaranteed by the Covenant. The State Party therefore has positive obligations regarding the conditions necessary for the de facto enjoyment and exercise of Covenant rights, in addition to its negative obligations to refrain from infringing those rights. The discriminatory status registration scheme maintained by the State Party is incompatible with the State Party's obligations to respect and ensure the right to the equal exercise and enjoyment of indigenous culture.

E. No Effective Remedy

124. The State Party submits that the Applicants have received an adequate remedy.[113] The Applicants reiterate that they have not received an adequate remedy and refer the Committee to paras. 236 – 251 of their Initial Submission, as supplemented by the comments in the present submission, which explain that the 2011 amendments have not eliminated the sex discrimination for which the Applicants seek a remedy.

F. The Applicants' Remedial Request

125. The Applicants' argument with regard to the remedy that they seek from this Committee is contained at paras. 245- 251 of their Initial Submission. As stated in para. 15 above, the Applicants respectfully urge the Committee to:

(a) *direct Canada to take timely measures to ensure that s. 6(1)(a) of the status registration regime, introduced by the 1985 Indian Act,*

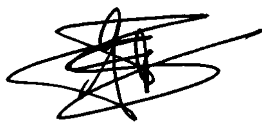
[113] Submission of State Party paras. 134-138.

and re-enacted by Bill C-3, is interpreted or amended so as to entitle to registration under s. 6(1)(a) those persons who were previously not entitled to be registered under s. 6(1)(a) solely as a result of the preferential treatment accorded to Indian men over Indian women born prior to April 17, 1985, and to patrilineal descendants over matrilineal descendants, born prior to April 17, 1985, and

(b) *find that Sharon McIvor is entitled to be registered under either s. 6(1)(a) of the 1985 Indian Act or s. 6(1)(a) of the 1985 Indian Act as amended and that the applicant Jacob Grismer is entitled to be registered as an Indian under s. 6(1)(a) of the 1985 Indian Act or s. 6(1)(a) of the 1985 Indian Act as amended.*

126. The Applicants wish to re-emphasize that the State Party has failed to take effective remedial action over an excessively prolonged period of time. In light of the State Party's history of intransigence in correcting the sex discrimination of which it has long been aware the Applicants stress the desirability of specific guidance from this Committee regarding the nature of the remedy to be provided by the State Party.

All of which is respectfully submitted by:



Gwen Brodsky on behalf of Sharon McIvor and Jacob Grismer
December 5, 2011