SHARON MCIVOR AND JACOB GRISMER v. CANADA

COMMUNICATION SUBMITTED FOR CONSIDERATION UNDER
THE FIRST OPTIONAL PROTOCOL TO THE
INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Before:

The United Nations Human Rights Committee
Petitions Team
Office of the High Commissioner for Human Rights
United Nations Office at Geneva
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By:

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I. INTRODUCTORY INFORMATION

A. Information Concerning the Applicants

1. The petition to the United Nations Human Rights Committee is brought by Sharon McIvor and Jacob Grismer, with the assistance of Gwen Brodsky, Legal Counsel to the applicants (See the Applicants' signed Authorization Form, acknowledging that Gwen Brodsky is acting with their knowledge and consent (*Annex 1*, Authorization Form). The address for any confidential communication regarding this matter is:

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2. The applicant Sharon McIvor is a First Nations woman and a lawyer residing in Merritt, British Columbia, her ancestral home. She is the mother of Jacob Grismer. Sharon McIvor was born in Merritt on October 9, 1948.

3. The applicant Jacob Grismer is a First Nations man residing in Merritt, British Columbia, his ancestral home. Jacob Grismer is the son of Sharon McIvor. He was born in Merritt on June 3, 1971. His occupation is heavy equipment operator.

4. Both applicants hold Canadian citizenship.

B. Name of the State Party

5. This communication arises in relation to acts by Canada, a State party to the *International Covenant on Civil and Political Rights* (ICCPR). The ICCPR and the First Optional Protocol entered into force for Canada on August 19, 1976.

C. Articles of ICCPR Violated

6. The applicants claim that the sex-based criteria for the determination of entitlement to Indian registration status as set out in s. 6 of the 1985 *Indian Act* violate the following provisions of the ICCPR:

- Article 26, which enshrines the right of all persons to equality before the law and to the equal protection of the law without any discrimination on the basis of sex.

- Articles 2(1), 3 and 27, which together guarantee the equal right of men and women to the enjoyment of their culture, without discrimination based on sex.

- Article 2(3)(a), which guarantees the right to an effective remedy for violations of rights recognized in the ICCPR.

II. SUMMARY OF THE COMPLAINT

7. Indian status is a legal construct of the State party, created and applied to regulate wide-ranging facets of the lives of the Aboriginal peoples of Canada. The denial of equal Indian status to Aboriginal women and their descendants has a long history. From at least 1906 Indian status was defined on the basis of patrilineal descent. Status followed paternal lines to the exclusion of maternal lines. It was conveyed by male Indians as fathers and not by female Indians as mothers. Although there was some variation in successive versions of the *Indian Act* (1906, 1927, 1951, 1956, 1970) State party recognition of Indian status was dependent on being a male Indian, the child of a male Indian, or the wife of a male Indian.

8. For decades Aboriginal women in Canada have sought justice in the courts and remedial action by legislators in an effort to bring an end to the sex discrimination in the status registration provisions of the *Indian Act*, but they have not yet succeeded in securing full recognition of their rights. Sex discrimination in the registration provisions

has continued to affect Aboriginal women and their descendants in generation after generation.

9. The Human Rights Committee ("the Committee") has previously considered the effects on Article 27 rights of sex discrimination in the State party's legislative scheme regulating Indian status. In *Sandra Lovelace v. Canada*, the Committee found that the revocation of an Indian woman's status pursuant to s. 12(1)(b) of the 1951 *Indian Act*, because she had married a non-Indian, violated Sandra Lovelace's right to the enjoyment of cultural life under Article 27.[1]

10. By the 1970s and 80s Canada had itself acknowledged that the *Indian Act*'s registration scheme was discriminatory. In 1985 it passed *An Act to Amend the Indian Act*, often referred to as Bill C-31, in an attempt to deal with the discriminatory effects of previous *Indian Acts*. This legislation carried forward earlier provisions and incorporated various amendments. The 1985 *Indian Act* came into effect April 17, 1985. It now governs entitlement to registration status and determines the class of registration status assigned to Indian women and their descendants.

11. Although the *1985 Act* was intended to eliminate sex discrimination, it did not achieve this goal. The *1985 Act* is failed remedial legislation. Instead of eliminating discrimination, it transferred and incorporated into the new regime the existing preference for male Indians and patrilineal descent.

12. This petition is necessitated by the longstanding failure of Canada to fully and finally eliminate the sex discrimination from the legislative regime for registration as a status Indian.

13. Sharon McIvor, and her son Jacob Grismer, challenge the sex-based criteria for determining who can be registered as an Aboriginal person (an "Indian") under s. 6 of the

[1] *Sandra Lovelace v. Canada*, Communication No. 24/1977, Views of 30 July 1981, para. 17.

1985 *Indian Act*. They 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 parent.

14. The status registration provisions of the 1985 *Indian Act* discriminate against matrilineal descendants and against Aboriginal women who married non-status men. The applicants are among thousands of First Nations women and matrilineal descendants who have been deprived of equal registration status because of the ongoing sex discrimination in the State party's legislative scheme.

15. Pursuant to s. 6 of the *1985 Act*, although Sharon McIvor has a form of Indian status, she does not have equal registration status, solely because she is a woman. Sharon McIvor is ineligible for full Indian status under s. 6(1)(a) of the 1985 *Indian Act*, and is therefore denied the legitimacy that full status confers. In addition, under the s. 6 (1)(c) registration to which she is now entitled, she is only able to transmit partial status to her son Jacob Grismer, and is unable to transmit Indian status to her grandchildren, who currently have no status.

16. In contrast, under the *1985 Act* Sharon McIvor's brother is eligible for full s. 6(1)(a) registration status for himself, he can transmit full status to children and he can transmit status to his grandchildren. 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.

17. If Sharon McIvor were a male Indian, rather than a female Indian she could pass status to her grandchildren, and both she and her son would have full s. 6(1)(a) registration status.

18. Jacob Grismer, Sharon McIvor's son, cannot pass status to his children, and is ineligible for full s. 6(1)(a) registration status because his entitlement to status is based on maternal descent and the 1985 *Indian Act* discriminates against matrilineal descendants. If Jacob Grismer's father, rather than his mother, were a status Indian, his children (Sharon McIvor's grandchildren) would have status. Jacob Grismer would also have full s. 6(1)(a) status for himself.

19. Sharon McIvor seeks to establish her entitlement under the ICCPR to transmit full status to her son, and to transmit status to her grandchildren. She also seeks to establish her entitlement to full s. 6(1)(a) registration status for herself. Having full s. 6(1)(a) status would permit Sharon McIvor to benefit from the legitimacy that is associated with s. 6(1)(a) status, to transmit full status to her son, Jacob Grismer, and to transmit status to her grandchildren.

20. Jacob Grismer seeks to establish his entitlement to transmit status to his children and his entitlement to full s. 6(1)(a) registration status for himself.

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

22. The intangible benefits of status relate to cultural identity. They include: the ability to transmit status; and a sense of identity and belonging. Full s. 6(1)(a) status is superior in the ability to transmit status and the legitimacy that it confers.

23. The applicants challenge the sex-based criteria for the determination of entitlement to Indian registration status contained in s. 6 of the 1985 *Indian Act*, which determines eligibility for Indian registration status, as a violation of the following provisions of the ICCPR:

- Article 26, which establishes the right of all persons to equality before the law and to the equal protection of the law without any discrimination on the basis of sex;

- Articles 2(1), 3 and 27, which together guarantee the equal right of men and women to the enjoyment of their culture, without discrimination based on sex.

- Article 2(3)(a), which guarantees the right to an effective remedy for violations of rights recognized in the ICCPR.

A. Article 26

24. Section 6 of the *1985 Act* discriminates on the basis of sex contrary to Article 26 in that it confers full s. 6(1)(a) registration status on male Indians who married out, and on their descendants born prior to April 17, 1985, whereas women who married out are consigned to the s. 6(1)(c) subclass, and their children born prior to April 17, 1985 are relegated to the s. 6(2) subclass. This consignment limits the ability of the women and their children to transmit status to subsequent generations.

25. The *Act* also continues to differentiate between maternal and paternal descendants of people of Indian ancestry who parented in common-law relationships. In particular, under the *1985 Act*, different results may obtain for the descendants along the female line who were denied status because they were descendants of Indian women who parented in common law relationships: a) they may be consigned to the s. 6(1)(c) subclass; b) they may be relegated to the s. 6(2) subclass; or c) they may not be entitled to status at all. In all of these instances, matrilineal descendants born prior to April 17, 1985 are denied status on an equal footing with the male descendants born prior to April 17, 1985 to a status Indian father who parented in a common-law relationship with a non-status woman. To these male children of male Indians the *1985 Act* accords full s. 6(1)(a) status.

26. The sex-based denial of full s. 6(1)(a) status to the applicants has deprived the applicants of tangible and intangible benefits of status, in violation of Article 26.

B. Articles 2(1), 3 and 27

27. Section 6 of the 1985 *Indian Act* violates Articles 2(1), 3 and 27 of the *Covenant* by depriving individuals of the equal enjoyment of their culture, based on their sex or the sex of their forebear. In particular, the withholding of full s. 6(1)(a) status from Indian women who married out and from matrilineal descendants, deprives them of the aforementioned intangible benefits of status that relate to their full and equal enjoyment of cultural identity.

C. Article 2(3)(a)

28. For over twenty years Sharon McIvor and Jacob Grismer have sought an adequate and effective remedy in Canada's courts for the discrimination they have suffered. On December 3, 2007 they successfully secured from the British Columbia Supreme Court (hereinafter the "Trial Court") the relief they sought. The Trial Court granted their request for declaratory relief, the effect of which would have been to ensure the entitlement of female status Indians to hold and to transmit equal registration status to their descendants without discrimination based on sex, as well as to ensure the entitlement of matrilineal descendants to equal registration status, without discrimination based on the female sex of their status Indian parent. The effect of the declaratory relief would also have been to entitle the applicants themselves to s. 6(1)(a) registration status. However, on April 6, 2009 the British Columbia Court of Appeal (hereinafter "Court of Appeal") reversed the trial decision in part and prescribed a partial remedy that was not an adequate and effective remedy for the discrimination from which the applicants sought relief. Leave to appeal to the Supreme Court of Canada was refused on November 5, 2009.

29. In contravention of Article 2(3)(a) of the ICCPR, the State party has failed to provide an adequate and effective remedy for the tangible and intangible effects of the sex discrimination experienced by the applicants and thousands of other First Nations women and their descendants.

D. Scope of the Applicants' Claims under the ICCPR

30. The applicants' petition is confined to the status registration provisions of the 1985 *Indian Act*. The applicants do not challenge the legality of any other provisions of the *1985 Act*, and, in particular, do not challenge the provisions relating to entitlement to membership in an Indian band. Nor does this petition seek to rectify pre-1985 discrimination.

31. Further, in this complaint the applicants do not challenge the "second generation cut-off," except as it applies unequally to persons born prior to April 17, 1985, on the basis of sex.

32. This is not a benefits case. The applicants' claims are not directed at securing an entitlement to social or economic benefits. Sharon McIvor and Jacob Grismer do not assert a right to any of the tangible benefits of status *per se*. Although status does carry with it certain tangible benefits, such as extended health care, those benefits are subject to control by the State party. The right that is asserted is the right to equal registration status, including the equal right to transmit status, and, incidentally, access to whatever programs the Government chooses to associate with status.

33. The relief sought by applicants would not entail diminishing the rights of any individual or group of individuals. In particular, eliminating sex discrimination from the status registration regime does not entail any diminishment of rights previously acquired by status Indian men, their wives, or their descendants.

34. The applicants request the Committee to find that the sex-based hierarchy for the determination of entitlement to Indian registration status contained in s. 6 of the 1985 *Indian Act* violates Article 26 and Article 27, in conjunction with Articles 2(1) and 3, of the ICCPR in that it discriminates on the ground of sex against matrilineal descendants born prior to April 17, 1985, and against Indian women born prior to April 17, 1985 who

married non-Indian men. They further request the Committee to find that the State party has failed to provide an effective remedy for these violations of Article 2(1), 3, 26 and 27, in breach of its obligation under Article 2(3)(a).

35. 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 request 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*, 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.

36. The applicants also request that the Committee find that Sharon McIvor is entitled to be registered under s. 6(1)(a) of the *Indian Act* and that the applicant Jacob Grismer is entitled to be registered as an Indian under s. 6(1)(a) of the *Indian Act*.

III. FACTS OF THE CLAIM

A. Introduction

37. The following statement of facts is taken largely from the findings of fact made by the Trial Court (*Annex 2,* British Columbia Supreme Court Decision on the Merits, dated June 8, 2007, referred to as ("TC Decision"). The findings of fact made by the Trial Court, which were not questioned or disturbed by the Court of Appeal, reflect the opportunity afforded the Trial Court to review extensive evidence and assess its credibility. Applicants therefore refer the Committee to the TC Decision for a more lengthy exposition of the facts, particularly as they relate to such issues as the operation of the status registration regime, its history, and its effects, and present below a summary of the essential elements.

B. Context for the Applicants' Claims

38. The State party's denial of equal Indian status to Aboriginal women has a long history. From 1857, when *An Act to Encourage the gradual Civilization of Indian Tribes in the Province and to amend the Laws respecting Indians* was passed, women were treated disadvantageously as compared to men. Under that law, if an Indian man "enfranchised" or ceased to be Indian, his wife also ceased to be Indian.

39. The preference for the male was also manifest in the treatment of identity upon marriage. The "marrying out rule" was first introduced in 1869. When an Indian woman married a non-status man her status was revoked, and her children were not entitled to status. This was known as the "marrying out" rule. By contrast, when an Indian man married a non-status woman, both his wife and his children were entitled to status.

40. Since the early 20th century, federal law has explicitly defined who can be a status Indian based on a patriarchal definition: a male Indian, the child of a male Indian, or the wife of a male Indian. The legislative history is summarized in the decision of the Trial Court.[2] Under successive versions of the *Indian Act* from 1906 onwards, status exclusively followed the paternal line, transmitted by male Indians as fathers and husbands, not by female Indians as mothers and wives. Indian women were permitted to have status but for the most part could not transmit their status. There was a one-parent rule for transmitting status to children and under that rule, that parent was male.

41. The bias for male Indians and male descent was also demonstrated by the preferential treatment of the male descendants of male Indians. Under the law in force immediately prior to April 17, 1985, the sons of unmarried male Indians would always be Indian, whereas the children of unmarried female Indians were subject to disqualification on the grounds of non-Indian paternity.[3]

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[2] TC Decision, paras. 8 – 34.
[3] TC Decision, paras. 26, 33; *Martin v. Chapman*, [1983] 1 S.C.R. 365.

42. Aboriginal organizations protested the differential treatment of women from the outset. In 1872, the Grand Council of Ontario and Quebec Indians wrote to the Minister of Indian Affairs to ask that the law be amended so that Indian women's status was not contingent upon whom they chose to marry. Both the discrimination and objections to it have continued ever since.[4]

43. Highlights of the public criticism of the *Indian Act*'s discrimination against women in the 1970s and 1980s include:

- calls for reform in the 1970 Report of the Royal Commission on the Status of Women;
- judicial recognition of the equality rights violation by Laskin J., of the Supreme Court of Canada, dissenting, in *Canada (AG) v. Lavell* in 1973;
- the Government of Canada's own 1978 report titled "*Indian Act Discrimination Against Sex*" prepared for the Department of Indian Affairs and Northern Development, acknowledging the sex discrimination in the marrying out rule and other provisions of the *Indian Act;*
- the 1981 decision by the Committee finding that the revocation of Indian women's status pursuant to s. 12(1)(b) of the 1951 *Indian Act* violated the right to enjoy cultural life under the *International Covenant on Civil and Political Rights* in *Lovelace v. Canada*;[5]

44. In answer to this public criticism, in 1985 Canada made amendments to the *Indian Act* which were intended to ensure that henceforth status would be determined on a "totally non-discriminatory basis," and that sex and marital status would no longer affect an individual's entitlement to registration.[6]

45. However, as further explained below, the 1985 amendments did not eliminate discrimination from the status registration scheme. The 1985 *Indian Act* continues to

[4] TC Decision, paras. 13, 23.

[5] TC Decision, paras. 32, 35, 37-38, 53; *Canada (AG) v. Lavell*, [1974] S.C.R. 1349; *Sandra Lovelace v. Canada*, Communication No. 24/1977, Views of 30 July 1981.

[6] TC Decision, paras. 77, 78.

prefer descendants who trace their Indian ancestry along the paternal line over those who trace their ancestry along the maternal line. The *1985 Act* also continues to prefer male Indians who married non-Indians and their descendants, over female Indians who married non-Indians and their descendants.

46. Public criticism arose again soon after the *1985 Act* came into effect because it did not eliminate discrimination against Aboriginal women and their descendants in the status registration scheme. In 1996, the Royal Commission on Aboriginal Peoples criticized the *1985 Act*'s continuation of sex discrimination.[7] UN human rights treaty bodies - including this Committee, the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Discrimination Against Women - have criticized Canada for continuing discrimination against Aboriginal women with respect to registration status under the *1985 Act*. This criticism was considered by the trial judge.[8]

C. The Registration Scheme of the 1985 *Indian Act*

47. As noted, Parliament's express purpose in introducing the amendments to the *Indian Act* in 1985, which were known as Bill C-31, was to eliminate sex discrimination from the criteria for determining registration status. However, the 1985 amendments did not achieve this goal. The *1985 Act* is failed remedial legislation. Rather than eliminating sex discrimination, the *1985 Act* incorporated it into the new law and carried it forward.

48. The *Act*'s registration scheme is complex. For purposes of the applicants' claims under the ICCPR the following aspects of the 1985 *Indian Act* are of central relevance:

> (i) it preserves entitlements to full status that existed prior to April 17, 1985 for those who were registered or entitled to be registered under the prior scheme;[9]

[7] TC Decision, paras. 22, 187-190.

[8] TC Decision, paras. 278-279, 282. The Concluding Observations of the treaty bodies are set out in para. 136 below.

[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

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

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

49. The *1985 Act* creates three categories of status. First, s. 6(1)(a) accords full 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.

50. Second, women who were denied status under the former marrying out rule are entitled to register but are granted a lesser status under a new s. 6(1)(c) than those registered under s. 6(1)(a). These women are often referred to as "Bill C-31 women".

51. Finally, s. 6(2) accords partial status to persons who have only one parent registered under s. 6(1). This effectively creates a "two-parent rule" because a child who has only one parent with s. 6(2) status is not entitled to any Indian status at all. This feature of the new scheme is known as the "second generation cut-off", as the second generation of children with only one status parent lose all entitlement to status. Once status is lost, it can never be regained.

52. The children of Bill C-31 women will generally have status under s. 6(2) rather than s. 6(1) even though they were born before April 17, 1985. These children are consigned to s. 6(2) because their mothers married non-status men and under the *1985 Act* the children are considered to have only one Indian parent (unlike the children of Indian men who married non-status women and conferred their Indian status on their wives. Those children are considered to have two Indian parents.)

53. By contrast, the children, born before April 17, 1985, to Indian men who married non-status women were entitled to status under the old discriminatory law and have that

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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 below.

right preserved under the *1985 Act*. They are registered under s. 6(1)(a). Even if, as adults, they marry non-status persons, their children will have status. The second generation cut-off is therefore postponed for this group until at least the following generation.

54. The lesser status accorded to women registered under s. 6(1)(c) as compared to those registered under s. 6(1)(a) therefore imposes a legislated disadvantage on their ability to transmit status to their descendants, based on their sex.

55. The discriminatory operation of the *1985 Act* is illustrated by the different treatment it accords to Sharon McIvor, her child, Jacob Grismer (who was born before April 17, 1985), and her grandchildren, as compared to her brother, Ernie McIvor, his child (who was also born before April 17, 1985), and his grandchildren. Although their lineages are identical, the *1985 Act* treats Sharon McIvor and Ernie McIvor differently based on their sex. Sharon was ineligible for status under the former law as a female Indian who married a non-status man. The *1985 Act* grants Sharon McIvor a registration status that is not equal to that of her brother in that she is only able to transmit partial status to her child, Jacob. Since Jacob married a non-status person, Sharon's grandchild is not entitled to any status at all because of the second generation cut-off. However, the *1985 Act* treats Sharon's brother Ernie, who married a non-status person and whose child also married a non-status person, differently. The *1985 Act* accords full 6(1)(a) status to both Ernie and his child. This means Ernie's grandchild is entitled to status. Thus, Sharon cannot transmit any Indian status to her grandchild while Ernie can transmit status to his grandchild.

56. The following chart demonstrates the operation of the second generation cut-off. and its effect on women who married out and their descendants.

<table>
<tr><td colspan="2">Indian man marries non-Indian woman</td><td colspan="2">Indian woman marries non-Indian man</td></tr>
<tr><td>Man</td><td>Woman [gains status]</td><td>Man [no status]</td><td>Woman [loses status]</td></tr>
<tr><td colspan="2">Child #1 born status</td><td colspan="2">Child #1 born [no status] (Jacob's position)</td></tr>
<tr><td colspan="4">---------- 1985 Act comes into force ----------</td></tr>
<tr><td>Man [6(1)(a)]</td><td>Woman [6(1)(a)]</td><td>Man [no status]</td><td>Woman [regains status, 6(1)(c)]</td></tr>
<tr><td colspan="2">Child #1 [6(1)(a)]
Child #2 born after 1985 Act
came into force [6(1)(f)]</td><td colspan="2">Child #1 [6(2)]
Child #2 born after 1985 Act
came into force [6(2)]</td></tr>
<tr><td colspan="4">----------Assume all children marry non-Indians----------</td></tr>
<tr><td colspan="2">Grandchild under Child #1 [6(2)]
Grandchild under Child #2 [6(2)]</td><td colspan="2">Grandchild under Child #1 [no status]
Grandchild under Child #2 [no status]</td></tr>
<tr><td colspan="4">----------Assume all grandchildren marry non-Indians----------</td></tr>
<tr><td colspan="2">Great grandchild under Child #1 [no status]
Great grandchild under Child #2 [no status]</td><td colspan="2">Great grandchild under Child #1 [no status]
Great grandchild under Child #2 [no status]</td></tr>
</table>

57. The *1985 Act* also discriminates against the descendants of status Indian mothers who, like Sharon's mother and grandmother, lived in and parented in common-law relationships with the non-status fathers of their children, and accords preferential treatment to male descendants of status Indian fathers who parented in common-law relationships with non-status women. The *1985 Act* grants full s. 6(1)(a) status to the

male children of a status Indian father who parented in a common-law relationship with a non-status woman. In contrast, under the *1985 Act*, children of a status Indian mother who parented in a common-law relationship with a non-status man whom the Registrar previously disqualified from status, never became eligible for s. 6(1)(a) status.[10]

58. In summary, there are various ways in which the continuing preference of the *1985 Act* for male Indians and patrilineal descent carries forward discrimination based on the ground of sex. These are illustrated by the situation of Sharon McIvor, as will be shown below. All of these aspects of sex discrimination must be addressed in order to make the status registration scheme non-discriminatory.

59. It should be noted that the *1985 Act* severed band membership from Indian status. Section 10 of the *Act* gives bands the ability to assume control of their own membership. Section 11 provides a separate default scheme for bands who elect not to assume control over their membership. Rules governing the entitlement to status are set out separately in s. 6. Bands that elected to assume control of their membership between April 17, 1985 and June 28, 1987, were not required to accept as band members all those entitled to registration under s. 6(2) of the *Act*. Today, bands remain free to adopt any membership rules, except that no existing band member, or person currently entitled to be a band member, may be denied band membership.[11]

60. There are significant tangible and intangible benefits associated with registration status. With regard to the intangible benefits of status, not all categories of status are the same. In particular, s. 6(1)(a) status is superior to s. 6(1)(c) and 6(2) status in terms of ability to transmit status and the importance and legitimacy that s. 6(1)(a) status confers.

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[10] TC Decision, para. 33. The Court of Appeal decision mistakenly states that the illegitimate child of a male Indian was non-Indian. Pursuant to Supreme Court of Canada jurisprudence (*Martin v. Chapman*, *supra* note 3, and s. 11 of the 1951 *Indian Act*, the male child of a male Indian would always be an Indian.

[11] TC Decision, paras. 84-85; *Indian Act* 1985, ss. 10 and 11.

D. The Applicants and the Legal Proceedings

i. The Applicants' Genealogy

61. Because the *Indian Act* is a code for the determination of Indian status based on ancestry, it is appropriate to summarize the lineage of the applicants.

62. Sharon McIvor and Jacob Grismer are the descendants of Mary Tom, born in 1888 as a First Nations woman and a member of the Lower Nicola Band. Mary Tom's daughter, Susan Blankinship, is Sharon McIvor's mother. Susan Blankinship's father, Jacob Blankinship, was a man of Dutch descent with no First Nations ancestors.

63. Susan Blankinship was born in 1925, and under the *Indian Act* of the day was not eligible for status because status was transmitted through the male line, and her claim to status would have been based on Indian matrilineal descent.

64. Sharon McIvor's father, Ernest McIvor, was born in 1925, and although of First Nations descent, was not eligible for status in his lifetime. Susan Blankinship and Ernest McIvor were never married. Prior to 1985 Sharon McIvor was not registered as an Indian pursuant to any *Indian Act*.

65. From birth, neither Sharon McIvor nor her siblings were eligible for status, because under the *Indian Act* of the day, status was transmitted through the male line, and their claim to status would have been based on matrilineal descent. On February 14, 1970 Sharon McIvor married Charles Terry Grismer, a man with no First Nations heritage, and had three children, one of whom is Jacob Grismer.

66. On April 2, 1999, Jacob Grismer married Deneen Joy Simon, a woman with no First Nations ancestry. They are raising two children, Jason, born November 9, 1993,

and Christopher, born November 15, 1991. Jason and Christopher are Sharon McIvor's grandchildren. The following chart is a summary of the plaintiffs' family tree.[12]

<table>
<tr><th colspan="2">Paternal side</th><th colspan="2">Maternal side</th></tr>
<tr><td>Alex McIvor
(non-Indian)</td><td>Cecelia McIvor (entitled to be a band member)</td><td>Jacob Blankenship
(non-Indian)</td><td>Mary Tom
(band member)</td></tr>
<tr><td colspan="2">Ernest McIvor (born out of wedlock, never registered)</td><td colspan="2">Susan Blankenship (born out of wedlock, never registered)</td></tr>
<tr><td colspan="4">Sharon McIvor (born out of wedlock, married Charles Terry Grismer, a non-Indian)</td></tr>
<tr><td colspan="4">Charles Jacob Grismer (born in wedlock, married Deneen Simon, a non-Indian)</td></tr>
<tr><td colspan="4">Jason Grund, Christopher Grund</td></tr>
</table>

[12] Sharon McIvor also has two daughters, Jaime Grismer born September 27, 1976 and Jordana Grismer born February 6, 1983. They were not registered at birth. The Registrar held in 1987 and 1989 that Sharon McIvor was unable to transmit status to them on her own, for the same reason she was unable to transmit status to Jacob Grismer. They became registered on November 27, 2001 as a result of an adoption order. The applicant Jacob Grismer was not eligible to be adopted.

ii. Proceedings Regarding Registration

67. Sharon McIvor's efforts to obtain registration status for herself and her children began over twenty five years ago, within months of the 1985 *Indian Act* coming into force. On September 23, 1985 Sharon McIvor applied to the Registrar of Indian and Northern Affairs Canada, for registration status for herself and her children.

68. Sharon McIvor lacked status from birth, because she traced her Indian ancestry through the maternal line, and her father did not have status. Sharon's parents lived in a common-law relationship, and were never married.

69. The Registrar determined that Sharon McIvor was entitled to registration under s. 6(2) of the *Indian Act*, but not s. 6(1), because of her non-Indian paternity. Sharon McIvor's female ancestors were members of the Lower Nicola Band, including her maternal grandmother, but Sharon McIvor was unable to establish the Indian paternity of herself or her mother. The Registrar deemed Sharon McIvor's deceased mother to have been omitted from the Band list because of non-Indian paternity, and for that reason, to be entitled to registration only under s. 6(1)(c) of the *Indian Act*. This meant that Sharon McIvor was consigned to s. 6(2) of the 1985 *Indian Act*, and, as a consequence, she was unable to transmit status to her children, including Jacob. Sharon McIvor protested the Registrar's decision. On February 28, 1989, the Registrar confirmed his decision.[13]

70. On July 18, 1989, the applicants filed a statutory appeal of the Registrar's decision. On May 13, 1994 the applicants initiated a constitutional challenge under the equality guarantees of the *Canadian Charter of Rights and Freedoms* (ss. 15 and 28) claiming entitlement to full s. 6(1)(a) registration status under the *1985 Act*. Shortly before the constitutional trial, and more than twenty years after Sharon McIvor's application for registration, Canada conceded that Sharon McIvor's mother's status and Sharon McIvor's

[13] The history of these proceedings is set out in TC Decision, paras. 98 – 102.

status under the *1985 Act* had been wrongly assessed,[14] and that consequently Sharon McIvor was entitled to 6(1)(c) status that would allow her to transmit s. 6(2) status to Jacob Grismer. However, this concession turned on an unintended technicality, that is, the fact that there had never been any formal declaration by the Registrar regarding paternity. As Ross J. explained at para. 122 of the TC Decision,

> "There is a certain irony to the defendants' present position. The defendants' concessions were based upon the fact that the exclusions from registration had never been triggered because there had never been a declaration by the Registrar regarding paternity in the case of either Susan Blankinship or Sharon McIvor. Their concession is consistent with the provisions of the relevant versions of the *Indian Act*. However, I think it is fair to say that the Registrar's initial response to the plaintiffs' applications for registration reflected what the response would have been had an application been made under the previous legislation. This is consistent with the plaintiffs' understanding that they were not entitled to registration [prior to 1985]. There were no applications made for registration of Susan Blankinship or Sharon McIvor prior to the amendments reflected in the *1985 Act*. If they had applied prior to 1985, they almost certainly would have been refused." (*Annex 2*, British Columbia Supreme Court Decision on the Merits, dated June 8, 2007).

71. This much-delayed resolution of the statutory appeal did not eliminate the discrimination against Sharon McIvor and Jacob Grismer. In particular, unlike those registered with full s. 6(1)(a) status they are constrained in their ability to transmit status to their descendants. Sharon McIvor is only able to transmit partial - s. 6(2) - status to Jacob Grismer, which he cannot transmit to his children (Sharon McIvor's grandchildren). In addition, Sharon McIvor and Jacob Grismer are ineligible for full s. 6(1)(a) registration status for themselves. Moreover, the legislative scheme continues to discriminate with regard to non-Indian paternity in the context of common-law relationship, as explained in paragraph 57 above.

[14] Canada also conceded that Sharon's father should be considered eligible for status.

iii. The Applicants' Constitutional Challenge

Trial Court Proceedings

72. In the constitutional challenge initiated on May 13, 1994, the applicants impugned the legality of the sex-based hierarchy for the determination of entitlement to Indian registration status contained in s. 6 of the 1985 *Indian Act*.

73. The applicants (plaintiffs in the court case) alleged that the registration provisions contained in s. 6 of the 1985 *Indian Act* violate the equality guarantees of the *Charter*, in two ways. As noted by the trial judge, the applicants also relied on international human rights law, including, *inter alia*, ICCPR Articles 2(1), 2(2), 3, 23, 24(1), 24(3), 26, and 27.[15] They alleged that the *1985 Act* discriminated against matrilineal descendants born prior to April 17, 1985, and against Indian women who had married non-Indian men. They sought declaratory relief that would recognize the entitlement of female status Indians to have and transmit equal registration status to their descendants without discrimination based on sex, and that would recognize the entitlement of matrilineal descendants to equal registration status without discrimination based on the sex of their Indian parent. They also asked to be accorded full s. 6(1)(a) registration status.

74. The trial in the British Columbia Supreme Court ("Trial Court") took place October 16 to November 10, 2006. The applicants were entirely successful. On June 8, 2007, the Trial Court rendered a decision finding that s. 6 of the *1985 Act*, which determines entitlement to Indian registration status violates ss. 15(1) and 28 of the *Charter* in that it discriminates, on the grounds of sex and marital status, between matrilineal and patrilineal descendants born prior to April 17, 1985, and against Indian women who had married non-Indian men, and is not saved by s. 1, the reasonable limits provision of the *Charter*.[16]

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[15] TC Decision, para. 277.

[16] TC Decision, paras. 288, 342-343.

75. The Trial Court 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) [full status] who were previously not entitled to full status 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. This is the full text of the Court's remedial order:

> (a) Section 6 of the *Indian Act*, R.S.C. 1985, C. 1-5 (the "*1985 Act*") violates ss. 15 and 28 of the *Canadian Charter of Rights and Freedoms* in that it discriminates, on the grounds of sex and marital status, against matrilineal descendants, born prior to April 17, 1985, and Indian women born prior to April 17, 1985, who married non-Indian men, in the entitlement to be registered as Indians, and is not saved by s. 1 of the *Charter*;
>
> (b) Section 6 of the *1985 Act* is of no force and effect in so far, and only in so far, as it provides for the preferential treatment of Indian men over Indian women born prior to April 17, 1985, and the preferential treatment of patrilineal descendants over matrilineal descendants born prior to April 17, 1985, in the right to be registered as an Indian;
>
> (c) Every person who was registered or was entitled to be registered as an Indian under s. 6(1)(a) of the *1985 Act* shall continue to be registered or entitled to be registered under s. 6(1)(a) as the case may be. Section 6(1)(a) of the *1985 Act* shall, however, be interpreted so as to entitle persons to be registered under s. 6(1)(a), 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;
>
> (d) Nothing in this order shall entitle any person to membership in an Indian band, under s. 11 of the *1985 Act*, or under the membership rules enacted by an Indian band which has assumed control of its own membership under s. 10 of the *1985 Act*. For greater certainty:
>
> > a. the terms of this order respecting s. 6 of the *1985 Act* and the interpretation of paragraph 6(1)(a) in paragraph (c) of this Order apply only to a person's entitlement to be registered as an Indian and not to an entitlement to band membership;
> >
> > b. a person who, solely as a result of this Order, becomes entitled to be registered as an Indian under section 6 of the *1985 Act*, and who would not otherwise be entitled to band membership, shall not be

> entitled to membership in an Indian band under s. 11 of the *1985 Act*, or under the membership rules enacted by an Indian band which has assumed control of its own membership under s. 10 of the *1985 Act*;
>
> c. nothing in this order prevents an Indian band which has assumed control of its own membership under s. 10 of the *1985 Act* from amending its membership rules after the entry of this order so as to add to its Band List the name of any person who solely as a result of this order, becomes entitled to be registered as an Indian under s. 6 of the *1985 Act*;
>
> (e) Nothing in this order shall deprive any person who is a member of an Indian band or entitled to be a member of an Indian band, under s. 11 of the *1985 Act*, or under the membership rules enacted by an Indian band which has assumed control of its own membership under s. 10 of the *1985 Act*, from that membership or entitlement. (*Annex 4*, British Columbia Supreme Court Decision on Remedy, dated December 3, 2007, hereinafter referred to as "TC Decision on Remedy".)[17]

76. The Trial Court did not order the Registrar to alter the applicants' registration status. However, the declaration in paragraph (c) above would have entitled them to registration under s. 6(1)(a) of the 1985 *Indian Act*.

British Columbia Court of Appeal Proceedings

77. Canada appealed the Trial Court decision in the British Columbia Court of Appeal. On September 14, 2007 Canada obtained a stay of the order of the Trial Court. The hearing of the appeal took place between October 14 and October 17, 2008. The Court requested additional written submissions that were received by the Court on October 31, November 14 and 20, 2008.

78. In the appeal, numerous Aboriginal organizations intervened: Native Women's Association of Canada, Congress of Aboriginal Peoples, First Nations Leadership Council, West Moberly First Nations, T'Sou-ke Nation, Grand Council of the Waban-Aki Nation, Band Council of the Abenakis of Odanak and the Band Council of the Abenakis of Wôlinak, Aboriginal Legal Services of Toronto. All of the intervenors supported the

[17] TC Decision on Remedy, para. 9.

decision of the Trial Court, in which Sharon McIvor and Jacob Grismer prevailed (*Annex 5,* Selected Factums of Aboriginal organizations filed in the Birtish Columbia Court of Appeal).

79. In its April 6, 2009 decision the Court of Appeal confirmed that s. 6 of the 1985 *Indian Act* discriminated, but on a much narrower basis (*Annex 6,* British Columbia Court of Appeal Decision, dated April 6, 2009, hereinafter referred to as "CA Decision"). Based on this narrower analysis, and, in particular, based on the Court's view that much of the discrimination was justified, the Court of Appeal allowed the appeal in part and set aside the trial judge's remedial order.

80. Applying an approach that focused on the Government's stated objective of "preserving acquired rights", the Court of Appeal found that ss. 6(1)(a) and 6(1)(c) of the 1985 *Indian Act* violate the *Charter* only to the extent that they grant individuals to whom the double mother rule applied greater rights than they would have had under the pre-1985 legislation.

81. The only discrimination recognized by the Court of Appeal as unjustified was with regard to the preferential treatment accorded by the *1985 Act* to 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, but improved.[18]

82. 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.[19]

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[18] CA Decision, para. 165.

[19] TC Decision, para 246.

83. Under the *1985 Act* individuals affected by the double mother rule born prior to April 17, 1985 were made eligible for s. 6(1) status (either 6(1)(a) or 6(1)(c)). None was consigned to the 6(2) subclass.

84. The Court of Appeal declared that ss. 6(1)(a) and 6(1)(c) of the *1985 Act* are of no force and effect, but suspended the effect of the declaration. Initially, the suspension was for 12 months. The suspension was extended to July 5, 2010, on application by the Government (*Annex 7*, British Columbia Court of Appeal Extension Decision, dated April 1, 2010). The suspension was then extended to January 31, 2011, on further application by the Government (*Annex 8*, British Columbia Court of Appeal Extension Decision No. 2, dated July 2, 2010).

85. The Court's declaration of invalidity, suspended or otherwise, does not provide a remedy for the discrimination from which the applicants sought relief. It does not require that discrimination against women who married out and matrilineal descendants be fully eliminated from the registration scheme. It does not result in Sharon's grandchildren becoming eligible for status. Nor does it result in Sharon McIvor and Jacob Grismer becoming eligible for s. 6(1)(a) status for themselves.

86. The Court referred back to Parliament the question of how to remedy the discrimination. However, the reasoning of the Court of Appeal decision does not require Parliament to address the full extent of the discrimination that the applicants' claims present, namely the preservation and carrying forward of preferential treatment of the male line, of which the double mother group is a very limited aspect.

87. Following the ruling of the Court of Appeal the applicants sought leave to the Supreme Court of Canada. On November 5, 2009, leave was refused, without reasons. The Supreme Court of Canada is the highest domestic court of appeal for Canada.

E. The State Party Has Failed to Ensure an Adequate and Effective Remedy

i. There is No Effective Legislative Reform Pending

88. There is no prospect of effective legislative reform in sight. Draft legislation was introduced by the Government after the decision by the Court of Appeal, but it does not eliminate the discrimination entrenched in section 6. Nor does it purport to do so. Bill C-3, introduced by the Government of Canada in March 2010, attempts to deal specifically with the narrow instance of sex discrimination which the Court of Appeal found to be unjustified (*Annex 9, 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)* ("Bill C-3")).

89. This draft legislation leaves untouched most of the sex discrimination embedded in s. 6, of which the applicants complain. Bill C-3 contains various qualifications. In the result, Bill C-3 excludes Aboriginal women and their descendants who would be entitled to register if sex discrimination were completely eradicated from the registration scheme. Examples include: the grandchildren of status women and non-status men who were unmarried; the female child of a status man and a non-status woman who were unmarried; and the grandchildren born prior to September 4, 1951 (the date of the double mother rule) who are the descendants of women who married out.

90. Further, the proposed amendment will only grant s. 6(2) status, and never s. 6(1)(a) status to the grandchildren of Aboriginal women who married out, notwithstanding that grandchildren born prior to April 17, 1985 to status men who married out are eligible for s. 6(1)(a) status.

91. If passed into law, Bill C-3 would not accord Sharon McIvor and Jacob Grismer full s. 6(1)(a) registration status, notwithstanding that even their counterparts in the double mother group have s. 6(1)(a) status. 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, it is apparent that they should have s. 6(1)(a) status. Thus, even though Bill C-3 could make Sharon McIvor's grandchildren eligible for status, it would still leave Sharon McIvor and Jacob Grismer without official recognition of their inherent equality. In particular, under Bill C-3 Sharon McIvor and Jacob Grismer would both be 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.

92. The experience of the applicants is that recognition of an individual's entitlement to full s. 6(1)(a) status carries with it a legitimacy and social standing that neither s. 6(1)(c) status nor s. 6(2) status signify. Bill C-3, if passed, therefore would not address the applicants' claim that respect for their inherent dignity and equality requires that they be accorded the same status as Sharon's brother and his descendants born prior to April 17, 1985.

ii. The Journey of the Applicants Has Been Long

93. The applicants have done all they could to obtain an adequate and effective remedy in the Canadian judicial system, in a long and protracted process. The January 9, 2007 decision of the trial judge decision reviews a number of the delays to which the applicants' claim was subjected. Repeated delay in the proceedings was a factor supporting the Court's decision to deny the Government's request that any remedy be suspended for 24 months to allow Parliament time to amend the legislation. After reciting aspects of the procedural history of the case, Justice Ross concluded that "[a]gainst this backdrop, I conclude that the plaintiffs should not be told to wait two more years for their remedy."[20]:

- the Registrar took sixteen months to decide Ms. McIvor's original application for registration;[21]
- the Registrar took a further twenty-one months to confirm his decision;[22]

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[20] TC Decision, para. 350.

[21] TC Decision, para. 347.

[22] *Ibid.*

- in 2005, sixteen years after Ms. McIvor initiated her statutory appeal and eleven years after she initiated her constitutional challenge, the government sought a substantial adjournment to prepare for the trial, notwithstanding the extraordinary passage of time since the action had been initiated;[23]
- at the same time, the government claimed that up to six months would be required for a trial that was eventually concluded in under a month, primarily on affidavits, with the oral testimony of only two witnesses;[24]
- the concession that Ms. McIvor was entitled to s. 6(1)(c) status and Mr. Grismer was entitled to s. 6(2) status was based on an interpretation that, in Madam Justice Ross's view "could have been advanced at any time following the 1989 Decision of the Registrar."[25]

iii. Access to Equal Registration Status is Important

94. Prior to the 1985 amendments to the *Indian Act*, registration as an Indian was linked to band membership and to such matters as entitlement to live on a reserve.

95. Although the *1985 Act* severed band membership from status, status continues to confer significant tangible and intangible benefits. The tangible aspects of status include entitlement to apply for extended health benefits and post-secondary education funding, and certain tax exemptions. The trial judge held that such benefits are in effect benefits for both parent and child, in recognition of the fact that parents are responsible for the care of their children. All status Indians receive the tangible benefits of status.[26]

96. The intangible aspects of status relate to cultural identity. The intangible aspects include: the ability to transmit status; and the legitimacy that status connotes and confers, which, in turn shape an individual's sense of cultural identity and belonging within their community.

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[23] TC Decision, para. 348.

[24] *Ibid.*

[25] TC Decision, para. 349.

[26] TC Decision, para 179.

97. The trial judge found that, "[t]he concept of Indian has become and continues to be imbued with significance in relation to identity that extends far beyond entitlement to particular programs." [27]

98. Although the concept of Indian status was originally imposed on Aboriginal people by the Government of Canada, it has developed into a powerful source of cultural identity for individuals of Aboriginal descent and Aboriginal communities.

99. With regard to the transmission of status, the trial judge found that it is one of our most basic expectations that we will acquire the cultural identity of our parents; and that as parents we are able transmit our cultural identity to our children.[28]

100. Although all status Indians are able to access the tangible benefits of status, the intangible incidents of status are not identical for the various categories of status. As explained above, ss. 6(1)(c) and 6(2) status do not confer the same ability to transmit status as full s. 6(1)(a) status.

101. The applicants also raise the issue of equal entitlement to full s. 6(1)(a) status as an issue of recognition and legitimacy. Registration status is the official indication of State recognition of an individual's Aboriginal cultural identity. The applicants state that they have observed that in Aboriginal communities there is prestige and an enhanced sense of worthiness as an Indian associated with having s. 6(1)(a) status. In their experience, having s. 6(1)(a) status confers and connotes legitimacy, and belonging in a way that having ss. 6(1)(c) or 6(2) status does not.

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[27] TC Decision, para. 133.

[28] TC Decision, paras. 7(b), 128-143, 186-87, 193, 267, 280, 282, 285-86.

iv. Withholding Equal Registration Status Has Detrimental Effects: The Applicants Have Been Personally and Directly Affected

102. The applicants have been personally and directly affected by the continuing refusal of the State party to provide an adequate and effective remedy for sex discrimination. Both Sharon McIvor and Jacob Grismer have been affected as matrilineal descendants. Sharon McIvor has been additionally affected as an Indian woman who married out.

103. Sharon McIvor states that her encounters with the sex-based hierarchy of the status registration regime have caused her to suffer in various ways. Under the pre-1985 regime, as a matrilineal descendant who was ineligible for status, like her mother before her, she suffered a form of banishment from the Aboriginal community that was hurtful and isolating, and excluded her from participating in important cultural activities. The social and cultural exclusion extended to her children, to whom she was unable to transmit status.

104. Like thousands of others, Sharon McIvor was encouraged by the passing of the 1985 amendments to the *Indian Act* (Bill C-31) because she thought at last the exclusion, loss of cultural connection, and erosion of her indigenous cultural identity and sense of self-worth, which, as a person previously unable to be registered, she had suffered from birth, would come to an end. The fact that her children were not automatically granted status in 1985 is a constant grief and indignity. She was unable to access the tangible benefits of status available under the *1985 Act* for her children when they were growing up. It also made her feel inferior not to be able to transmit status to her children alone. For her, the implication was that her lineage was inferior. She is painfully aware that the lives of her children could have been different had they been granted status at the same time as her in 1987, particularly as regards Jacob's access to Aboriginal cultural and other community activities.

105. Even though Jacob gained s. 6(2) status in 2006, her sense of hurt and humiliation and the denial of respect for her inherent dignity and equality continues because the status that she is able to transmit is not equal to that which her brother can transmit. She is only able to transmit inferior s. 6(2) status to Jacob Grismer and no status to her grandchildren. And she is not eligible for s. 6(1)(a) status for herself.

106. Sharon McIvor anticipates that Canada might pass legislation that would grant s. 6(1)(c) status to Jacob, and thereby allow her grandchildren to apply for 6(2) status. However, for her, the inability to transmit a form of status to her grandchildren is not the only detrimental effect of the discrimination that requires redress.

107. Sharon McIvor feels hurt and demeaned by the unfairness and injustice of not being eligible for full s. 6(1)(a) status. She believes that she will not be truly equal, and recognized as such in all Aboriginal communities, until Canada recognizes her entitlement to the same s. 6(1)(a) status she would have if she were male.

108. 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. Although she has experienced increased acceptance since gaining status in 1987, she has found that within Aboriginal communities, after so many decades of State-imposed sex discrimination, there is an attitude that real Indians have s. 6(1)(a) status. She has experienced stigma that is associated with being a "Bill C-31 woman," the label that is given to women who have been assigned to the s. 6(1)(c) sub-class. The implication is that they are inferior to and less Indian than their male counterparts.

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

110. Jacob Grismer states that the hurt of not being eligible for full s. 6(1)(a) status from 1985 onwards is profound. Like Sharon McIvor, Jacob Grismer has lived his whole life in the ancestral territory of his Indian forebears, in Merritt, British Columbia. In 1985 he was 15 years old. Throughout high school he experienced isolation and stigmatization because he did not have Indian status. For example, as he was growing up, he wanted to participate in traditional hunting and fishing activities. When he was in high school, he sometimes accompanied friends or relatives who had Indian status on fishing trips to the Fraser River. However, because he did not have status, he could only pack the fish that others caught. He was never taught the traditional fishing and hunting skills, such as how to use a dip net, and so feels a great sense of loss. Based on his own experience of the harmful consequences of the denial of his cultural identity, it is of serious concern to him that his children are ineligible for status. He wants them to have the benefits of the State party's recognition of their Aboriginal ancestry, including access to the traditional cultural practices of the community.

111. Jacob Grismer also feels strongly that it is a violation of his human rights for Canada not to recognize his entitlement to full s. 6(1)(a) status. He understands that this is the class of status he would have but for the fact that his Indian parent is female. The implication is that his Indian lineage is deficient and inferior. If his Indian parent were male, under the *1985 Act*, Jacob would be entitled to full s. 6(1)(a) status. It is demeaning to Jacob and he believes wrong that solely because he is a matrilineal descendant he can never be eligible for s. 6(1)(a) status, whereas his cousins who are the children of Sharon McIvor's brother, are eligible for full status.

IV. ADMISSIBILITY

A. Standing

112. The facts as summarized above establish that the applicants have been and continue to be personally and directly affected by the refusal of the State party to

eliminate the sex discrimination embedded in s. 6 and provide an adequate and effective remedy for the effects of that discrimination.[29]

113. To the present day, Canada does not recognize the entitlement of Sharon McIvor and Jacob Grismer to full s. 6(1)(a) status.

114. The applicants have suffered detrimental effects because of the refusal of the State party to provide an adequate and effective remedy for the sex discrimination embedded in s. 6. Although they each have a form of registration status that enables them to access the tangible benefits of status for themselves, the discriminatory denial of s. 6(1)(a) status means that their ability to transmit status to the next generation is still compromised. Moreover, they are denied the enjoyment of the legitimacy conferred by s. 6(1)(a) status, which directly affects their sense of cultural identity and belonging within their community, and denies their equal right to the full enjoyment of the cultural life of their community.

115. As a consequence of the decision of the Court of Appeal and the subsequent denial of leave to appeal to the Supreme Court, the discrimination that forms the basis of the applicants' claims and its detrimental effects on the applicants remain uncorrected. The aim of their claims was to eliminate the preferences for patrilineal descent and for male Indians as spouses and fathers that are embodied in the State party's legislative scheme and to confirm the entitlement of matrilineal descendants and women who married out to full s. 6(1)(a) registration status, without any discrimination based on sex.

116. The applicants request that, if amendments to the *1985 Act* contained in the draft legislation Bill C-3 are passed into law prior to the Committee's consideration of this petition, the Committee consider those amendments to be encompassed by the present petition, for the reasons outlined in paragraph 141 concerning the insufficiency of the remedial measures provided under draft Bill C-3. Should Bill C-3 be passed into law

[29] See paras. 88 - 111 above.

prior to the Committee's consideration of this petition, applicants submit that their claims under the ICCPR will remain unsettled due to the failure of Bill C-3 to provide for the relief they sought, namely: elimination of the preference for male Indians and patrilineal descent that is embodied in the legislative scheme; and confirmation of the entitlement of matrilineal descendants and women who married out to full s. 6(1)(a) registration status, without any discrimination based on sex.

B. Admissibility *Ratione Temporis*

117. This communication concerns the application of the ICCPR to s. 6 of the 1985 *Indian Act*. The discrimination entrenched in s. 6 has continuing effects which in themselves constitute violations of the ICCPR.[30]

118. The operative period of the claims presented by applicants is from April 17, 1985, the date when the 1985 *Indian Act* took effect, onwards. The discrimination of which the applicants complain does not precede the *1985 Act.*

119. In the domestic proceedings concerning the applicants' constitutional claims Canada argued unsuccessfully that the applicants' constitutional claim constituted an impermissible attempt to apply the *Charter* in a retroactive or retrospective manner to a pre-April 17, 1985 point in time. For the same reasons that the applicants' *Charter* case was neither retroactive nor retrospective, this petition does not concern events that predate Canada's agreement to be bound by the ICCPR and the First Optional Protocol to the ICCPR. The ICCPR and the First Optional Protocol entered into force for Canada on August 19, 1976.

[30] With regard to admissibility *ratione temporis*, the Committee has repeatedly stated that such violations are exceptions to the general rule. See, e.g., *Prince v. South Africa*, Communication No. 1471/2006, Views of 31 October 2007, para. 6.4; *Singarasa v. Sri Lanka*, Communication No. 1033/2002, Views of 21 July 2004, para. 6.3; *Lovelace*, *supra* note 1, para. 7.3

120. Analysis of whether a claim is inadmissible *ratione temporis* should focus on the substance or essence of the claim. The essence of the claims presented by the applicants is that the eligibility criteria in s. 6 of the *1985 Act* discriminate contrary to various provisions of the ICCPR. The eligibility provisions of previous versions of the *Indian Act* are engaged only because and to the extent that these provisions have been incorporated into, and continued by, the *1985 Act*. The fact that such criteria have been incorporated in the *1985 Act* does not make the application of those criteria to current issues of eligibility a retrospective or retroactive exercise.

121. Sharon McIvor first applied for registration status for herself and her children on September 23, 1985, many years after the ICCPR and the Optional Protocol came into force for Canada.

122. Further, the discrimination against the applicants did not crystallize until February 12, 1987 when the Registrar responded to Sharon McIvor's application for registration status, granting her only partial s. 6(2) status. The discrimination was affirmed on October 16, 2006 when the Trial Court granted the applicants' statutory appeal of the Registrar's decision. The effect of granting the statutory appeal was to grant Sharon McIvor and Jacob Grismer ss. 6(1)(c) and 6(2) status respectively, and, simultaneously to confirm that under the *Act* they are *not* eligible for s. 6(1)(a) registration status.

123. Further, with regard to each applicant, it is an ongoing status that is in issue, not a discrete event. Sharon McIvor did not become disentitled to registration because of the discrete act of marriage, but because she is a woman. Marriage was not, and is not, an event that results in the loss of Indian status. A man could marry a woman without effect on his Indian status, whether the woman had Indian status or not. The relevant factor, therefore, is not marriage, which typically does not result in a loss of entitlement to registration, but being a woman who married a non-Indian man. It was therefore Sharon

McIvor's sex, not the fact of her being married, that was the primary cause of the loss of her entitlement to registration, as the trial judge and the Court of Appeal found.[31]

124. These facts establish that the applicants' claims are admissible *ratione temporis*.

C. Exhaustion of Domestic Remedies

125. The applicants have exhausted all available domestic remedies. The applicant's constitutional challenge to the sex discrimination embedded in the status registration provisions of s. 6 of the *1985 Act* was commenced in 1994 in the Trial Court. All available effective domestic remedies for the relief sought by the applicants have been exhausted. The Trial Court issued an order that was adequately and appropriately tailored to the discrimination from which the applicants sought relief. This petition challenges the decision of the British Columbia Court of Appeal which reversed in part the decision of the Trial Court, set aside the remedial order of the Trial Court, and narrowed the finding. On June 4, 2009, the applicants sought leave to appeal the decision of the British Columbia Court of Appeal to the Supreme Court of Canada. On November 5, 2009, the Supreme Court of Canada refused leave.

126. The applicants are claiming a denial of their right to an effective remedy for the discrimination they have suffered in violation of Article 26, and Article 27, together with Articles 2(1) and 3. A more detailed review of the domestic remedies sought and the inadequacy and ineffectiveness of the remedy obtained in domestic proceedings is presented in the discussion of the merits of the applicants' claims, below.

127. The applicants reiterate their submission regarding Bill C-3, a point that was also made with respect to standing. Should the amendments to the *1985 Act* now contained in Bill C-3 be passed into law prior to the Committee's consideration of this petition, the

[31] TC Decision, para. 157; CA Decision, para. 57.

applicants submit that their claims under the ICCPR will remain unsettled due to the failure of the draft legislation to provide for the relief they sought, namely: elimination of the preference for male Indians and patrilineal descent that is embodied in the legislative scheme; and confirmation of the entitlement of matrilineal descendants and women who married out to full s. 6(1)(a) registration status, without any discrimination based on sex.

128. Applicants further submit that the exhaustion of domestic remedies would not be required in relation to a challenge by them to the draft Bill C-3 amendments to the 1985 *Indian Act*. Because draft Bill C-3 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.

129. 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."[32]

130. A separate consideration with regard to draft Bill C-3 is that, should it be passed, any attempt to challenge the failure of the legislature to fully correct the sex discrimination embedded in the registration scheme would entail an unreasonably prolonged process in the courts. The length of time and cost involved in pursuing constitutional litigation would make it unreasonable and contrary to the interests of justice to require additional attempts by other victims of discrimination to exhaust domestic remedies, especially given the fact that such efforts would be futile in light of the refusal of the Supreme Court to review the decision of the Court of Appeal.

[32] *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*, Communication 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.

Aboriginal women in Canada have been contesting the discrimination in the status registration provisions of the *Indian Act* for at least forty years. More decades of litigation should not be required to secure justice for Aboriginal women and their descendants.

D. Other Admissibility Criteria

131. The applicants' claims are not being, and have not been, examined under another procedure of international investigation or settlement**.** This petition is admissible under all other grounds applicable under the First Optional Protocol.

V. MERITS

A. This Petition is Necessitated by the Longstanding Failure of the State Party to Eliminate Discrimination based on Sex

132. It must be underscored that this claim arises in the context of a long history of sex discrimination in the criteria used by Canada for determining Indian status, extensive public criticism of that discrimination, international human rights jurisprudence on its impermissibility, and failed Government efforts to remedy the problem.

133. The long history of legislated discrimination against Aboriginal women and matrilineal descendants has been the subject of extensive public criticism within Canada and of critical comment by international human rights treaty bodies. The discrimination has its roots in colonial legal and social constructs of gender roles that have shaped Canada's law and policy related to Aboriginal communities since the Victorian era. The full and final elimination of sex discrimination from the status registration scheme is long overdue.

134. The extensive public criticism in the form of reports adopted by the State party itself and comments by human rights bodies is outlined in the facts of this petition, and more fully detailed in the decision of the trial judge.[33]

135. The Committee has previously considered aspects of sex discrimination in the State party's legislative scheme. Almost thirty years ago. in *Lovelace* v. *Canada*, the Committee found that the revocation of Indian women's status pursuant to s. 12(1)(b), the marrying out provision of the *1951 Indian Act,* violated Article 27.[34]

136. This Committee and other human rights treaty bodies have expressed concern regarding the inadequacy of the State party's responses to the sex discrimination in the 1985 *Indian Act*:

> *Concluding observations of the Human Rights Committee: Canada*, 07/04/99, CCPR/C/79/Add. 105, para. 19:
>
> The Committee is concerned about ongoing discrimination against aboriginal women. Following the adoption of the Committee's Views in the Lovelace case in July 1981, amendments were introduced to the Indian Act in 1985. Although the Indian status of women who had lost status because of marriage was reinstituted, this amendment affects only the woman and her children, not subsequent generations....
>
> *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Canada*, 01/31/03, A/58/38, para. 361:
>
> The Committee is further concerned that the First Nations Governance Act currently under discussion does not address remaining discriminatory legal provisions under other Acts, including …status…questions which are incompatible with the Convention.
>
> *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UN Doc. E/C. 12/CAN/CO/5, 22 May 2006, para. 17:

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[33] TC Decision, paras. 23, 32, 35, 37-39, 41-42, 49, 53-59, 62, 63, 65, 72-74, 77, 135, 186-189, 190, 217, 261-262, 278-279, 282, 288, 317.

[34] *Sandra Lovelace v. Canada*, *supra* note 1.

> The Committee notes with concern that the long-standing issues of discrimination against First Nations women and their children, in matters relating to Indian status, …have still not been resolved. The Committee notes that such discrimination has had a negative impact on the enjoyment of economic, social and cultural rights of some First Nations women and their children under the Covenant.
>
> *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Canada,* 11/07/08, CEDAW/C/CAN/CO/7, paras. 17-18:
>
> The Committee is concerned that …discriminatory legislation still exists. In particular, the Committee is concerned at the fact that the Indian Act continues to discriminate….
>
> The Committee recommends that the State party take immediate action to amend the Indian Act to eliminate the continuing discrimination against women with respect to the transmission of Indian status, and in particular to ensure that aboriginal women enjoy the same rights as men to transmit status to children and grandchildren, regardless of whether they have married out or of the sex of their aboriginal ancestors…

137. The State party has thus been aware for many years of the concerns of human rights treaty bodies regarding continuing sex discrimination in its registration scheme. The State party can have no doubt that the current legislative scheme is incompatible with its international human rights obligations.

138. The claims presented in this petition differ from the claims considered by the Committee in *Lovelace*, in at least three respects:

1) This petition is not concerned with band membership. The *1985 Act* severed membership from status. Further, the applicants do not challenge the *1985 Act*'s provisions with regard to band membership. Nor do they seek a remedy that would have any impact on existing or future entitlement to band membership.

2) This petition concerns discrimination that is broader in scope than the specific form of discrimination at issue in *Lovelace.* Whereas *Lovelace* challenged the pre-1985 marrying out rule, this petition claims that the status registration provisions of the *1985 Act* discriminate because of their differential treatment of women who married out, based on their sex, and because of the differential treatment of matrilineal descendants, based on the female sex of their Indian parent. This is the same discrimination from which the applicants sought relief in their constitutional challenge brought in the Trial Court.

3) The applicants do not seek the right simply to be registered as Indians. They seek confirmation of their right to be registered with full s. 6(1)(a) status, and they seek confirmation that other matrilineal descendants and women who married out also have the right to registration with full s. 6(1)(a) status, without discrimination based on sex. This is the same remedy that the applicants sought and obtained in their constitutional challenge in the Trial Court.

139. In other respects, this complaint resembles *Lovelace.* Partly in response to *Lovelace* amendments, in the form of Bill C-31, were introduced in 1985. The *1985 Act* was supposed to eliminate sex discrimination from the scheme for status registration, but instead perpetuated discrimination, by carrying it forward and incorporating it into the criteria for status registration in s. 6 of the *1985 Act*.

140. Like *Lovelace* this case represents the continuing efforts of Aboriginal women to end sex discrimination by the State party against them and their descendants.

141. The Government's pending legislation, Bill C-3, is further evidence of the State party's piecemeal and inadequate approach to eliminating the ongoing discrimination in s. 6 of the *Indian Act*. Bill C-3 does not eliminate the sex-based hierarchy for registration, as noted in paragraphs 89 – 91 above. First, it excludes from eligibility for registration: a) grandchildren born prior to September 4, 1951 (the date of the double mother rule) who are descendants of a status woman who married out; b) descendants of

Indian women who parented in common-law unions with non-status men; and c) the illegitimate female children of male Indians. All of these individuals would be entitled to registration status if sex discrimination were eradicated from the scheme. Secondly, Bill C-3 would continue to confer unequal registration status on Aboriginal women and their descendants. While Bill C-3 would preserve s. 6(1)(a) registration status for Indian men who married out and all male lineage descendants born prior to April 17, 1985, it would assign women who married out and their children born prior to April 17, 1985 to s. 6(1)(c). The female lineage grandchildren born prior to April 17, 1985 would be assigned to the s. 6(2) sub-class. Although Bill C-3 would allow Sharon McIvor to transmit status to her grandchildren, Bill C-3 would maintain the ineligibility of Sharon McIvor and Jacob Grismer for full s. 6(1)(a) registration status, withholding from them the legitimacy that full 6(1)(a) status confers. At the same time Bill C-3 would preserve the eligibility of Sharon McIvor's brother and all his descendants born prior to April 17, 1985 to full s. 6(1)(a) status.

142. Bill C-3, if passed into law, in its present form, will represent more failed remedial legislation.

143. This petition is necessitated by the longstanding failure of Canada to fully and finally eliminate the sex discrimination from the legislative regime for registration as a status Indian.

B. The Benefits of Registration Status Under the 1985 *Indian Act*

144. Although under the *1985 Act* status has been separated from band membership and does not confer benefits such as the right to live on reserve, Indian status continues to confer significant tangible and intangible benefits.

145. The tangible aspects of status include entitlement to apply for extended health benefits and post-secondary education funding, and certain tax exemptions.

146. The intangible aspects of status relate to cultural identity. They include: the ability to transmit status and a validation of cultural identity. Full s. 6(1)(a) Indian status is superior in the ability to transmit status and in the legitimacy that it confers and connotes.[35]

C. Article 26: Canada's Scheme for Status Registration Violates The Right of Aboriginal Women and their Descendants to Equality

147. Article 26 of the ICCPR states:

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

i. Article 26 is a Free-Standing Guarantee of Equality

148. The longstanding jurisprudence of the Committee makes clear that Article 26 establishes a free-standing guarantee of equality before the law and equal protection of the law.[36]

149. As the Committee stated in its General Comment No. 18: "when legislation is adopted by a State party, it must comply with the requirement of Article 26 that its content should not be discriminatory. In other words, the application of the principle of

[35] See paras. 94-101 above.

[36] See, *inter alia*, *Broeks v. Netherlands*, Communication No. 172/1984, Views of 9 April 1987; *Zwaan de Vries v. Netherlands*, Communication No. 182/1984, Views of 9 April 1987; *Adam v. Czech Republic*, Communication No. 586/1994, Views of 23 July 1996; *Brinkhof v. Netherlands*, Communication No. 402/1990, Views of 27 July 1994.

non-discrimination contained in Article 26 is not limited to those rights which are provided for in the Covenant."[37]

150. It is similarly well established in the Committee's jurisprudence that the prohibition of discrimination encompasses indirect as well as direct discrimination.[38]

151. The Committee has explained that "not every distinction constitutes discrimination, in violation of article 26, but that distinctions must be justified on reasonable and objective grounds, in pursuit of an aim that is legitimate under the Covenant." [39]

152. The test applied by the Committee to assess whether a distinction constitutes discrimination thus comprises three elements: whether the difference in treatment is pursuant to an aim that is legitimate under the Covenant; whether the distinction is objective; and whether the distinction is reasonable, an assessment that requires consideration of whether the difference in treatment is in a reasonable relationship of proportionality to the legitimate aim pursued.

ii. Adverse Treatment on the Basis of Sex is Difficult to Justify

153. In applying the standard articulated by the Committee for assessing whether a difference of treatment amounts to discrimination to claims that involve discrimination on the basis of sex, the Committee has indicated that the State party bears a heavy burden

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[37] General Comment No. 18, Non-discrimination (1989), para. 12.

[38] See, e.g., *Derksen v. Netherlands*, Communication No. 976/2001, Views of 1 April 2004; *Bhinder v. Canada*, Communication No. 208/1986, Views of 9 November 1989; *Simunek et al. v. Czech Republic*, Communication No. 516/1992, Views of 19 July 1995; *Althammer v. Austria*, Communication No. 998/2001, Views of 8 August 2003. See also General Comment No. 18, para. 7.

[39] *Haraldsson and Sveinsson v. Iceland*, Communication No. 1306/2004, views of 24 October 2007, para. 10.2. See, e.g., *Gonçalves et al. v. Portugal*, 1565/2007, Views of 18 March 2010, para. 7.4; *Love et al. v. Australia,* Communication No. 983/2001,Views of 25 March 2003, para.

of justification with respect to its objectives and the reasonableness or proportionality of the measure. In *Müller and Engelhard v. Namibia*, concerning sex discrimination in legislation governing procedures for changing surnames, the Committee stated that:

> "[a] different treatment based on one of the specific grounds enumerated in article 26, clause 2 of the Covenant, however, *places a heavy burden on the State party to explain the reason for the differentiation*." [40]

154. The Committee applied this "heavy burden" of justification in finding that the legislation at issue in *Müller* violated Article 26:

> *In view of the importance of the principle of equality between men and women*, the argument of a long-standing tradition cannot be maintained as a general justification for different treatment of men and women, which is contrary to the Covenant. To subject the possibility of choosing the wife's surname as family name to stricter and much more cumbersome conditions than the alternative (choice of husband's surname) cannot be judged to be reasonable; at any rate the reason for the distinction has no sufficient importance in order to outweigh the *generally excluded gender-based approach*. (Emphasis added).[41]

155. Under the approach adopted by the Committee in *Müller*, as the importance of the right to be protected increases, the nature of the interests advanced by the State must be of a more compelling nature and the reasonableness or proportionality of the relationship between the means employed and the objective sought to be realized must also increase.

156. Other human rights bodies have similarly indicated that the State bears a heavy burden of justification in claims involving sex discrimination, a view that reflects the fundamental nature of the principle of the equality of women and men. The European Court of Human Rights has repeatedly explained that a differentiation based on sex must be justified by "particularly weighty reasons" or "very weighty reasons." In *Abdullaziz et al. v. UK*, the European Court of Human Rights said:

8.2; *Danning v. the Netherlands*, Communication No. 180/1984, Views of 9 April 1987, paras. 13, 14. See also General Comment No. 18, para. 13.

[40] *Müller and Engelhard v. Namibia*, Communication No. 919/2000, Views of 26 March 2002, para. 6.7.

[41] *Ibid* at para. 6.8.

> "very weighty reasons would have to be advanced before the difference of treatment on the ground of sex could be regarded as compatible with the Convention."[42]

157. The Inter-American Commission on Human Rights has also determined that the State bears a heavy burden of justification in claims related to discrimination on the basis of sex.[43] In so doing the Commission emphasized the importance of the principles of non-discrimination and equality, as did this Committee did in *Müller*:

> The Commission observes that the guarantees of equality and non-discrimination underpinning the American Convention and American Declaration of the Rights and Duties of Man *reflect essential bases for the very concept of human right*s. As the Inter-American Court has stated, these principles "are inherent in the idea of the oneness in dignity and worth of all human beings." Statutory distinctions based on status criteria, such as, for example, race or sex, therefore *necessarily give rise to heightened scrutiny.* What the European Court and Commission have stated is also true for the Americas, that as "the advancement of the equality of the sexes is today a major goal," … "very weighty reasons would have to be put forward" to justify a distinction based solely on the ground of sex. (Emphasis added, citations omitted).[44]

iii. Article 26 Applies to Registration Status, including the Ability to Transmit Status

158. There can be no doubt that registration status and the ability to transmit status, conferred by the *Indian Act*, are rights to which Article 26 of the ICCPR apply, since Article 26 establishes an autonomous guarantee to the equal protection of the law.

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[42] *Abdullaziz et al. v. UK* , Judgment of 28 May 1985, Ser. A No. 94, para. 78. See also *Burghartz v. Switzerland*, Judgment of 22 February 1994, Ser. A No. 280-B, para. 27; *Karlheinz Schmidt v. Germany*, Judgment of 18 July 1994, Ser. A No.291-B, para. 24; *Schuler-Zgraggen v. Switzerland*, Judgment of 24 June 1993, Ser. A No. 263, para. 67; *Zarb Adami v. Malta*, Judgment of 20 June 2006, Reports 2006-VIII, para. 80.

[43] See *María Eugenia Morales de Sierra v. Guatemala*, Inter-American Commission on Human Rights, Report No. 4/01, Case 11.625, 19 Jan. 2001.

[44] *Ibid* at para. 36 (citing Schmidt v. Germany and Burghartz v. Switzerland, *supra* note 33).

159. The issue of discrimination against women with regard to transmission of citizenship status, which is akin to Indian registration status, has been the frequent subject of comment by international human rights bodies, as the trial judge noted. The treaty bodies have also commented on the right of children to receive status equally from their mother or their father.

160. Examples of treaty body observations on the equal right of women to transmit nationality include:

> *Concluding observations of the Human Rights Committee: Morocco*, CCPR/CO/82/MAR, (1 December 2004), para. 32;
>
> *Concluding observations of the Human Rights Committee: Egypt*, CCPR/CO/76/EGY (28 November 2002), para. 10;
>
> *Concluding observations of the Human Rights Committee: Yemen*, CCPR/CO//75/YEM (12 August 2002), at para. 11.
>
> *Concluding observations of the Human Rights Committee: Initial report of the Principality of Monaco*, CCPR/CO/72/MCO, (28 August 2001), at para 10;
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> Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Jordan, A/55/38, paras. 139-193, (January 27, 2000) at para. 172;
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> Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Iraq, A/55/38, paras. 166-210, (June 14, 2000) at para. 172;
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> *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Algeria*, A/54/38 paras. 41-94 (January 27, 1999) at para. 83;
>
> *Concluding observations of the Committee on the Rights of the Child: Kuwait*, CRC/C/15/Add.96, (October 26, 1998) at para. 20; and
>
> *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Morocco*, A/52/38/Rev.1, paras. 45-80, (August 12, 1997) at para. 64.

161. Typical of these treaty body observations is that of the Human Rights Committee on Morocco. The Human Rights Committee stated:

> The Committee notes that a child born of a Moroccan mother and a foreign father (or a father of unknown nationality) is treated differently from the children of a Moroccan father with regard to obtaining Moroccan nationality.
>
> The State party should comply with the provisions of article 24 of the Covenant and should ensure equal treatment for the children of a Moroccan mother and a Moroccan or foreign father (Covenant, arts. 24 and 26).

162. In its observations on Egypt the Committee said:

> The Committee draws attention to the discrimination affecting women as regards transmission of nationality to their children when their spouses are not Egyptian and as regards the rules governing inheritance (articles 3 and 26 of the Covenant).
>
> The State party is encouraged to bring its current inquiries to a conclusion and do away with all discrimination between men and women in its domestic legislation.

iv. Section 6 of the Indian Act Makes Preferential Sex-Based Distinctions

163. The *1985 Act* is a comprehensive code for the determination of Indian status, based on Indian ancestry. Section 6 of the *1985 Act* provides preferential treatment to male Indians over female Indians and to descendants of male Indians over descendants of female Indians. This is accomplished by means of s. 6(1)(a) which preserves full status for male Indians born prior to April 17, 1985, whether or not they married out, and to those who claim entitlement to registration through the male line of descent.

164. Section 6 withholds full s. 6(1)(a) registration status from Sharon McIvor and other women who married non-Indian men. The *1985 Act* also withholds full s. 6(1)(a) registration status from Jacob and other direct descendants who claim entitlement through the female line of descent, including through descent from an Aboriginal woman who married a non-Indian man. In doing so, s. 6 draws distinctions that are based on sex.

165. Before s. 6 of the *1985 Act* came into force, if an Indian man married a woman not entitled to registration, his wife would become entitled to registration as an Indian. If

the couple had children, the children would be entitled to registration. Once the *1985 Act* came into force, pursuant to s. 6 of the *1985 Act*, the husband, wife and children would be entitled to registration pursuant to s. 6(1)(a). If the couple did not have children prior to the *1985 Act* coming into force, but had children after it came into force, those children would be entitled to be registered under s. 6(1)(f) because both parents were entitled to be registered as Indians. If, after the *1985 Act* came into force, any of the children married persons not entitled to registration, their children would be entitled to registration under s. 6(2) of the *1985 Act.*

166. By contrast, if before s. 6 of the *1985 Act* came into force, an Indian woman married a man not entitled to registration, she lost her entitlement to registration. The children of the marriage were not entitled to registration. After the *1985 Act* came into force, she became entitled to registration pursuant to s. 6(1)(c). Her children were entitled to registration pursuant to s. 6(2). If, after the *1985 Act* came into force, any of the children married persons not entitled to registration, their children would not be entitled to registration. This is, in fact, the situation of the applicants.

v. The Denial of Equal Registration Status is Not Neutral

167. In the McIvor constitutional litigation Canada argued that the distinction drawn by s. 6 is merely temporal or generational, and therefore sex-neutral. Both the trial and appellate courts rejected that argument and it is completely without merit. The way in which the *Act* differentiates based on the ground of sex is illustrated by the applicants' situation.

168. When Sharon McIvor is compared with males who as at April 17, 1985, were registered or entitled to be registered as Indians, who were married to persons who were not Indian and who had children, it is apparent that she does not receive the same treatment as her male counterparts, solely because of her sex. When Jacob Grismer is compared with children of males who as at April 17, 1985, were registered or entitled to be registered as Indians, and who were married to persons who were not Indian, it is

apparent that he is not treated the same as his counterparts, solely because of the sex of his Indian parent.

169. As the trial judge explained, Sharon McIvor's male counterparts would be registered under s. 6(1)(a) of the *1985 Act*, as would their wives and their children.[45]

170. In contrast, Sharon McIvor is restricted to registration under s. 6(1)(c) of the *1985 Act*. While she personally is entitled to receive the same tangible benefits as those registered under s. 6(1)(a), she personally was not able to benefit from the full recognition associated with s. 6(1)(a) status, and her children are not entitled to registration under s. 6(1)(a), but only under s. 6(2). If her children parented with persons who were not registered Indians, their children (Sharon McIvor's grandchildren), whether born before or after April 17, 1985, are not entitled to registration.

171. Without doubt, the preference for male Indians and male lineage embodied in s. 6 of the *1985 Act* is based on sex. In drawing a distinction between those who were entitled to status prior to April 17, 1985, and those who were not so entitled to status, the *1985 Act*, in effect, makes a sex-based distinction.

172. The Court of Appeal chose to focus only on the discriminatory effect of the scheme on the *children* of women who married out. The Court of Appeal suggested, erroneously, that discrimination based on matrilineal descent may not constitute sex discrimination if there are multiple generations involved.[46] The applicants submit that the *Indian Act*'s prejudicial treatment of matrilineal descent is sex discrimination even if it is against a grandchild or great grandchild, rather than the child, of the woman who was unable to transmit status solely because of her sex. The Court of Appeal overlooked the crucial fact that the *1985 Act* allows male lineage descendants to establish their eligibility for s. 6(1)(a) registration status based on the eligibility of their male Aboriginal ancestors

[45] TC Decision, paras. 218 – 220.

[46] CA Decision, paras. 97-98.

for status, even if that entails tracing back through multiple generations of living or deceased ancestors, as found by the trial judge. By adopting legislation that precludes female lineage descendants from tracing back their ancestry in the same way, the State party, in effect, makes a sex-based distinction, for which the Committee should not provide immunity.

173. The Court of Appeal also described as dubious the proposition that the right to equality precludes discrimination based on matrilineal or patrilineal descent, on the ground that we all have both male and female ancestors.[47] Missing from the Court of Appeal's analysis is the recognition that the *Indian Act* is based on Aboriginal ancestry. While we may all have both male and female ancestors, the *Indian Act* discriminates between Aboriginal ancestors solely on the basis of their sex. It prefers male Aboriginal ancestors to female Aboriginal ancestors in the determination of Indian status.

vi. The Sex-Based Hierarchy Imposes Substantive Discrimination

174. This is not a case of a mere distinction, without meaningful consequences for the affected individuals, as is illustrated by the experience of the applicants described in the facts of the petition. The sex-based distinction perpetuated by s. 6 has a range of detrimental effects on individuals, as explained above.[48]

175. The question of equal registration status for oneself and equal capacity to transmit status must be considered in light of the substance of the concept of Indian status. The Government created the concept of Indian, and in so doing, superimposed its concept upon the First Nations' own definitions of themselves and their cultural identity. As previously noted, it is clear that this State imposed concept of Indian identity has come to form an important aspect of cultural identity for Aboriginal peoples in Canada.

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[47] CA Decision, para 149.

[48] See paras. 102-111 above.

176. It is not surprising that after more than a century of living under a State imposed regime that defines who is an Indian, Aboriginal people themselves have come to view entitlement to registration status as confirmation or validation of their Indianness, even as a separate matter from the capacity to transmit status and access certain tangible benefits which are conferred by status. In particular, it is reasonable that individuals like Sharon McIvor and Jacob Grismer would feel that they are demeaned and that recognition of their inherent dignity is denied by Canada's refusal to recognize their entitlement to full s. 6(1)(a) status.

vii. Historic Denials of Women's Equality are Perpetuated by the Legislative Scheme

177. The conclusion that s. 6 of the *Indian Act* discriminates in a substantive sense is further demonstrated by the fact that it perpetuates historic denials of women's equality. The discriminatory denial of s. 6(1)(a) status to matrilineal descendants and women who married out reflects and reinforces the disadvantages and vulnerability of generations of matrilineal descendants and women who are already disadvantaged and vulnerable because of the sex discrimination imposed by previous *Indian Acts*.

178. As the Trial Court found, the perpetuation of sexist stereotypes of Aboriginal women as incapable of transmitting Indian culture and heritage to their children, and ineligible for full s. 6(1)(a) registration status for themselves, has discriminatory effects on Aboriginal women, and their descendants. The discriminatory effects of this stereotype are particularly damaging to Aboriginal women who are ineligible for s. 6(1)(a) status under the *1985 Act*, because it embodies the sexist stereotype of female inferiority, and perpetuates the notion of women as property, not full human persons equal with men as progenitors and transmitters of status, heritage and culture. This has direct effects on their standing within Aboriginal communities. The "Bill C-31 women" who have 6(1)(c) status, not full 6(1)(a) status under the *1985 Act*, are seen to be "less Indian" than their male counterparts, as described by Sharon McIvor in the facts of this petition.

179. The *1985 Act* perpetuates the historic, legislated discrimination experienced by Aboriginal women who, for the most part, have not been able to transmit status, and that of Aboriginal persons who were denied Indian status under previous *Indian Acts*, either because they were women who married non-status men, or because they trace their Indian descent through the maternal line. Because of the history of discrimination, this group of Aboriginal people has suffered exclusion, loss of identity, and loss of culture over a long period of time. The continuing preference embodied in the *1985 Act* for male Indian progenitors and their descendants reinforces the disadvantage and vulnerability of the previously excluded marginalized group, because the *1985 Act* denies them full s. 6(1)(a) Indian status.

viii. The Intangible and Tangible Benefits Affected are of Fundamental Importance

180. The conclusion that s. 6 of the *Indian Act* discriminates in a substantive sense is also confirmed by the nature of the interests affected. The tangible and intangible benefits affected by the impugned legislation are of fundamental importance and go to the heart of human dignity and equality.

181. For the applicants and other Aboriginal persons, Indian status is a dignity-conferring benefit. Any reasonable person in the position of the claimants would legitimately feel that s. 6 is demeaning to the human dignity of Aboriginal women and their descendants.

183. The intangible aspects of status which relate to cultural identity are vital aspects of the right of Aboriginal persons to the full and equal enjoyment of their right to cultural life in association with others of Aboriginal ancestry and in their communities. Those aspects include the individual's capacity to transmit status as a State sanctioned validation of cultural identity, and the legitimacy that status—particularly s. 6(1)(a) status— connotes and confers. Refusal by the State party to recognize an individual's

entitlement to equal registration status impairs his or her sense of cultural identity, as does categorical ineligibility for registration status.

184. As indicated by the concerns expressed by the CEDAW Committee and the CESCR Committee, lack of equal access to the tangible benefits of status, including financial assistance for post-secondary education and health benefits, also affects important interests.[49]

D. The Denial of Equal Registration Status Lacks A Legitimate Objective under the ICCPR and is Not Objectively and Reasonably Justified

i. The Trial Court Concluded Correctly that the Sex Discrimination is Not Justified

185. The applicants submit that Canada cannot establish that the discrimination embodied in s. 6 of the 1985 *Indian Act* is pursuant to an aim that is legitimate under the ICCPR and is objective and reasonable.

186. In the Trial Court, the State party sought to justify the discrimination in s. 6 on several different grounds. Every justificatory argument advanced by the State party was considered and rejected by the Trial Court.[50]

187. The State party argued that infringement of the applicants' rights was justified in light of the broad objectives of the 1985 amendments to the *Indian Act*. The Government contended that the amendments represented a policy decision that was entitled to deference because it was made after extensive consultation, and represented the outcome of an exercise in balancing all affected interests.

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[49] See para. 136 above.

[50] TC Decision, paras. 6-7, 195-198, 234-236, 254-258, 260-262, 270, 273, 283-287, 289-342.

188. The Trial Court concluded that the discrimination had not been justified by the Government of Canada. With regard to the 1985 amendments, the Trial Court found as follows: the Government elected to sever the relationship between status and band membership; status is now purely a matter between the individual and the state; there are no competing interests to be balanced; and no pressing and substantial objective was identified with respect to the discriminatory provisions in the registration scheme.[51]

189. With regard to the objectives sought to be achieved by the Government, the Trial Court found that: the protection of acquired rights cannot be characterized as an objective of the scheme because the creation of a non-discriminatory regime need not entail the diminishment of anyone's status.[52] The Government had failed to demonstrate that any group had an interest in perpetuating the discrimination. Accordingly, a heightened standard of deference was not appropriate.[53]

190. With respect to financial considerations as an objective sought to be advanced by the Government, the Trial Court found that "[t]he extent to which the Government's choice is entitled to deference with respect to this element must be tempered. First, there is no evidence either at the time of passing the legislation or at present, of financial emergency or severe financial crisis. There is no evidence that the costs associated with the relief sought could not be absorbed by the Government. Further, the plaintiffs do not assert a constitutional right to particular financial benefits. They claim a constitutional right to status and incidentally to whatever benefits the Government chooses to associate with status. The nature of such programs, entitlements and benefits are within the control of the Government." [54]

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[51] TC Decision, paras. 323, 327, 340

[52] TC Decision, para. 307.

[53] TC Decision, para 330.

[54] TC Decision, para. 333.

191. With regard to the degree to which the legislation impaired the applicants' equality rights, the Trial Court found further that the discrimination was not minimally impairing of the right to equality because it was clear that a system could have been established that would have treated matrilineal descent on an equal basis with patrilineal descent.[55]

192. Finally, the Trial Court found that the deleterious effects of s. 6 of the Act were disproportionate. The Trial Court emphasized that "fair balance" is not an appropriate measure of proportionality in this case since neither the collective identity of Aboriginal communities nor the collective interests of band communities are affected by the registration provisions at issue, which relate solely to the relationship between the individual and the state.[56]

193. The Trial Court concluded that the damaging effects of the continuing discrimination against Aboriginal women and their descendants are significant, and that "such harms cannot be justified where, as here, the impugned measures actually undermine the objectives of the legislation." [57]

194. The applicants submit that the Trial Court's findings of fact and analysis demonstrate that the State party lacks a legitimate goal for maintaining the sex-based distinction embedded in s. 6 and the differentiation created is not objectively and reasonably justified.

195. None of the goals identified by the State party in domestic proceedings as the basis for the differentiation based that is created by s. 6 of the *1985 Act* is objectively and reasonably justified.

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[55] TC Decision, paras 329-333, 337.

[56] TC Decision, para. 340.

[57] TC Decision, paras. 340-341.

196. In particular, the State party cannot demonstrate that the maintenance of a sex-based hierarchy for registration status is justified by the goal of preserving acquired rights.

197. The applicants strongly disagree with the conclusion of the Court of Appeal that the Government's stated goal of preserving acquired rights provides sufficient justification for the perpetuation of the discrimination.[58]

198. The Court of Appeal's assessment of the legitimacy of the State party's goals, the fit between the State party's goals and the means adopted, and the permissibility of discrimination based on its alleged temporariness as part of a transitional scheme are all manifestly flawed. Moreover, the Court of Appeal's conclusion that, except with regard to a narrowly defined sub-class of persons, the discrimination embedded in s. 6 is constitutionally permissible does not mean that s. 6 meets the Committee's test for assessing its permissibility under Article 26 of the ICCPR.[59]

ii. Preservation of Acquired Rights is Not a Legitimate Goal

199. There are several reasons why the goal of preserving acquired rights is inadequate to discharge the State party's heavy burden of justification, which the Committee has indicated applies in claims involving discrimination on the basis of sex.

200. Firstly, on the facts of this complaint, preservation of acquired rights is a suspect goal. It must be emphasized that the *1985 Act* did not just preserve existing legal entitlements. It preserved the *privileged position* of those who acquired registration status under the discriminatory provisions of previous *Indian Acts*, carrying forward more than a century of sex discrimination. Under the ICCPR, preserving a hierarchy of sex-based

[58] See paras. 79 – 81 above; CA Decision, para. 133.

[59] Cf. *Waldman v. Canada*, Communication No. 694/1996, Views of 31 November 1999, para. 10.4.

privilege cannot be a juridically valid goal for any State conduct. It is a blatantly discriminatory goal. A discriminatory goal must always be regarded as inconsistent with the ICCPR.

201. Accepting 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 purposes underlying the non-discrimination and equality guarantees enshrined in the ICCPR or the obligations of States parties to ensure the full and equal enjoyment of rights in the ICCPR and the equal protection of the law.[60]

202. The preservation of acquired rights for a group whose enjoyment of historical privilege stemmed from systemic discrimination against another group cannot be accepted as a legitimate goal under the ICCPR. If the Committee were to accept this rationale, it could be advanced to justify a great many infringements of rights under the ICCPR.

iii. Extending Equal Registration Status to the Female Line Does Not Diminish the Rights of Others

203. If, however, preservation of acquired rights is taken to mean simply preserving existing legal entitlements because individuals have a legitimate interest in maintaining such entitlements and may have relied on being able to do so, that could be a valid goal. However, such a goal is not rationally connected to the discriminatory denial of full status to Aboriginal women and their descendants in this case. 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, as the trial judge found.[61] The Court of

[60] See General Comment No 18, Non-discrimination (1989), para.1" "[n]on-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights"; para. 2: "the principle of non-discrimination is so basic that Article 3 obligates each State party to ensure the equal rights of men and women to the enjoyment of the rights set forth in the Covenant."

[61] TC Decision, paras. 299, 321, 328, 337.

Appeal's conclusion that there was a rational connection between the Government's goal and its means is wholly unpersuasive because it is entirely circular.[62] There is no rational connection between preserving full status for male Indians and their descendants and denying status Indian women and their descendants the same rights.

204. A discriminatory measure that is not rationally connected to a valid legislative goal is, by definition, not reasonable and objective.

iv. There is an Absence of other Legitimate Objectives that are Reasonably and Objectively Justified

205. The Court of Appeal found that the detriments created by s. 6 did not outweigh its salutary effects because it considered the legislation's discriminatory effects to be merely "temporary", because the legislation regulates a transition from a one-parent rule to a two-parent rule.[63] The applicants strongly disagree with the characterization of the effects of the discrimination as temporary. The discrimination continued in the *1985 Act* is not temporary. Sharon McIvor and Jacob Grismer are denied full s. 6(1)(a) status for the rest of their lives. Sharon McIvor can only transmit s. 6(2) status to her child, Jacob, and, as a result, her existing grandchildren are permanently disentitled to any status. Her brother Ernie McIvor and his children are entitled to full status. As a result, his existing grandchildren are entitled to status and have qualified entitlement to transmit status to their children (Ernie's great-grandchildren). The effects of the sex-based status hierarchy will continue for generations.

206. In any event, temporariness does not excuse a failure by the State party to comply with its obligations under the ICCPR. In *Derksen v. Netherlands*,[64] the Committee considered a similar argument by the State party regarding the compatibility of Article 26 of legislation that provided survivorship benefits to children of unmarried parents, but

[62] CA Decision, para. 134.
[63] CA Decision, paras. 131, 149.
[64] *Derksen v. Netherlands*, Communication No. 976/2001, Views of 1 April 2004.

only if they were born after a specific date. In that case, the State party characterized the legislation as a "transitional" regime meant to correct the differential treatment accorded unmarried and *de facto* partners under previous legislation, but only from a given date. It stated that this transitional scheme was "based on respect for prior rights."[65]

207. The Committee considered the transitional scheme to lack reasonable and objective justification, apparently viewing the justifications presented by the State party as insufficient:

> "[t]he Committee considers that the distinction between children born, on the one hand, either in wedlock or after 1 July 1996 out of wedlock, and, on the other hand, out of wedlock prior to 1 July 1996, is not based on reasonable grounds. In making this conclusion the Committee emphasizes that the authorities were well aware of the discriminatory effect of the AWW when they decided to enact the new law aimed at remedying the situation, and that they could have easily terminated the discrimination in respect of children born out of wedlock prior to 1 July 1996 by extending the application of the new law to them."[66]

208. It must be concluded that the registration provisions embodied in s. 6 of the *1985 Act* continue the very discrimination that the amendments were intended to eliminate, and are not in accord with Article 26. The registration provisions of the *1985 Act* continue to prefer descendants who trace their Indian ancestry along the paternal line over those who trace their ancestry through the maternal line. The provisions prefer male Indians and their descendants to female Indians and their descendants. These provisions deny applicants the equal protection of the law, in contravention of Article 26 of the ICCPR.

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[65] *Ibid* at para. 4.2.

[66] *Ibid* at para. 9.3

E. Article 27 in Conjunction with Articles 2(1) and 3: Canada's Scheme for Status Registration Violates the Right of Aboriginal Women and their Descendants to the Equal Enjoyment of their Culture

209. Article 27 of the ICCPR states:

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

210. Article 2(1) of the ICCPR states:

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

211. Article 3 of the ICCPR states:

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

212. The applicants' challenge to s. 6 of the *1985 Indian Act* as a violation of Article 27, in conjunction with Articles 2 and 3, is based on its effects on the equal enjoyment of cultural identity. By withholding full s. 6(1)(a) status from women who married out and matrilineal 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.

213. This Committee has recognized that the scope of Article 27 encompasses the rights of individuals who are members of indigenous communities.[67]

[67] In its General Comment No. 23 the Committee emphasized the applicability of Article 27 in respect of indigenous peoples. General Comment No. 23, The Rights of Minorities (Article 27),

214. The right of indigenous persons to enjoy their culture has been repeatedly acknowledged in the Committee's jurisprudence as an essential aspect of their rights under Article 27.[68]

215. A foundational aspect of the 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. An individual's cultural identity, like collective cultural identities, is shaped by complex processes and encompasses both objective and subjective elements. However, where the State intervenes in the formation of cultural identity by establishing a legislative scheme for Indian status registration status, the criteria devised by the State for determining status eligibility and different classes of status, have pervasive effects on individual and collectively held concepts of cultural identity.

216. Where the State constructs legislative concepts of cultural identity, those concepts carry social meaning and often function for the individual and the group as social legitimation of the individual's claim to shared cultural identity with the group. Through such legislative schemes, the State assumes a direct role in the formation of the cultural identities of individuals and their communities.

(1994), paras. 3.2, 7. Many of the Committee's decisions under Article 27 have concerned the rights of indigenous persons. See, e.g., Poma Poma v. Peru, Communication No. 1457/2006, Views of 27 March 2009; *Länsman v. Finland II*, Communication No. 1023/2001, Views of 17 March 2005, and *Länsman v. Finland I, C*ommunication No. 511/1992, Views of 26 October 1994; *Mahuika et al. v. New Zealand*, Communication No. 547/1993, Views of 27 October 2000, *Lubicon Lake Band v. Canada*, Communication No. 547/1993, Views of 26 March 1990; *Kitok v. Sweden*, Communication No. 197/1985, Views of 27 July, 1988; *Lovelace, supra note 1.*

[68] See, e.g., *Lansman I and Lansman II*, *supra* note 32 and 67; *Mahuika*, *Lubicon Band*, and *Kitok*, *supra* note 67; and *Lovelace*, *supra* note 1. The Committee has also recognized that the right to enjoy one's culture, like other rights protected by Article 27, has both individual and collective dimensions. See General Comment No. 23, paras. 5.3, 6.2, and 7.

217. The capacity to transmit one's cultural identity is a key component of cultural identity itself. In particular, the transmission of cultural identity to one's descendants is closely linked to personal cultural identity. Moreover, intergenerational aspects of cultural identity have been of central importance for many indigenous persons and their communities in light of pressing concerns about the continuity and survival of their cultural traditions. Legislative schemes imposed by the State that limit the capacity to transmit cultural identity to one's descendants have the effect of restricting the full and equal enjoyment of the right to cultural life not only within the community but within families.

218. Under the status registration provisions of the 1985 *Indian Act* and predecessor versions of the *1985 Act*, Canada has regulated the cultural identity of Aboriginal people, and statutory definitions of "Indian-ness" have had far-reaching effects on the cultural identities of Aboriginal individuals and their communities. Indian status is a legal construct formulated by the State. As the trial judge explained in her decision regarding the applicants' constitutional challenge:

> [t]he government created the concept of Indian, and in so doing, superimposed this concept upon the First Nations' own definitions of cultural identity.[69]

219. The statutory definition of Indian status prescribes objective elements of cultural identity recognized by the State.

220. As previously explained, although the *1985 Act* severed band membership from status, registration status, including the legislative criteria determining eligibility for a particular class of status, it continues to have far-reaching effects on the sense of personal identity and on perceptions of individuals' cultural identity within Aboriginal communities.

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[69] TC Decision, para. 185.

221. Based on the evidence presented in the trial proceedings on the applicants' constitutional action, the Trial Court concluded that "[i]n Aboriginal communities registration status continues to carry significance that is independent of membership in a particular band."[70]

222. Registration as a status Indian operates as a validation of Aboriginal identity both for the individual, and for other members of the Aboriginal community, affecting individuals' sense of belonging. Where the State has extensively regulated a group with shared cultural heritage, as is the case for the Aboriginal peoples of Canada, legislation regulating cultural identity inevitably has a substantial impact on the individual's sense of cultural identity and perceptions of his or her cultural identity by other members of the group. As the trial judge concluded, Indian status, a legal construct of the State, has "come to form an important aspect of cultural identity." [71]

223. This is so because the authority of the State has been employed in its creation and imposition on Aboriginal people, over a very long period of time. The discriminatory denial of registration as a status Indian, or withholding of equal registration status from Aboriginal women and their descendants, can have profoundly detrimental effects on the individual's sense of cultural identity and entitlement to inclusion in the cultural life of the community, as illustrated by the applicants' evidence at trial.[72]

224. Where the State constructs legal concepts of cultural identity that entrench discrimination on the basis of sex, it assumes a direct role in defining the cultural identity of Aboriginal women and perpetuating discriminatory concepts of cultural identity within Aboriginal communities.

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[70] TC Decision, para. 142.

[71] TC Decision, para. 185

[72] TC Decision, para. 126-131. See also: paras 102-111, above.

225. In *Lovelace* v. *Canada*, the Committee considered the relationship between a legislative definition of cultural identity that discriminated on the basis of sex and the individual's capacity to exercise her cultural rights under Article 27. In finding that Canada had breached Article 27, the Committee noted that the essence of Sandra Lovelace's challenge to the denial of Indian status related to her loss of cultural identity:

> "[i]n this respect the significant matter is her last claim, that "the major loss to a person ceasing to be an Indian is the loss of the cultural benefits of living in an Indian community, the emotional ties to home, family, friends and neighbours, and the *loss of identity*".[73] (emphasis added)

226. Articles 2 and 3 of the Covenant oblige the Government to respect and ensure women's equal enjoyment of rights under Article 27 without any discrimination. From the early stages of its practice under the First Optional Protocol, the Committee has insisted that "[w]henever restrictions are placed on a right guaranteed by the Covenant, this has to be done without discrimination on the ground of sex. Whether the restriction in itself would be in breach of that right regarded in isolation, is not decisive in this respect. It is the enjoyment of the rights which must be secured without discrimination."[74] When a State party establishes criteria for determining eligibility for official state recognition of an individual's Aboriginal identity or membership in any group entitled to the protections established by Article 27, it must do so in a manner consistent with the prohibition of sex and the guarantee of the equal rights of women.

227. The Committee has recognized the maintenance of sex discrimination in legislation regulating cultural identity as an issue of particular concern. For example, in

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[73] *Lovelace*, *supra* note 1, para. 13.1.

[74] *Aumeeruddy - Cziffra v. Mauritius*, Communication No. 035/1978, views of 9 April 1981, para. 9.2(b)2(i)8. See also: *Lovelace*, *supra* note 1, para. 16, emphasizing that Article 27 must be construed and applied in the light of the Covenant provisions against discrimination, including Articles 2, 3 and 26.

its General Comment No. 28,[75] the Committee made clear that legislation regulating membership in a minority community conditions women's enjoyment of rights under Article 27 and must be consistent with Articles 2 and 3.[76] It emphasized the importance of this issue by directing States parties to "report on any legislation or administrative practices related to membership in a minority community that might constitute an infringement of the equal rights of women under the Covenant...." [77]

228. As noted in paragraph 136 above, in its review of Canada's fourth periodic report, the Committee expressed concern regarding the adequacy of measures taken by the Government to ensure the compatibility of the 1985 *Indian Act* with the ICCPR guarantees of non-discrimination and sex equality. As detailed throughout this communication, s. 6 of the *1985 Act* perpetuates the effects of sex discrimination incorporated in prior statutory definitions of Indian status by entrenching the privilege accorded to male Indians and to patrilineal descent. The State thereby imposes a sex-based hierarchy on concepts of cultural identity.

229. The evidence of applicants presented in the Trial Court and in this communication indicate that the harmful effects of that hierarchy go to the heart of the applicants' rights under Article 27. Based on that evidence presented at the trial, the British Columbia Supreme Court concluded that:

> The record in this case clearly supports the conclusion that registration as an Indian reinforces a sense of identity, cultural heritage, and belonging. A key element of this sense of identity, heritage, and belonging is the ability to pass this heritage to one's children. The evidence of the plaintiffs is that the inability to be registered with full s. 6(1)(a) status because of the sex of one's parents or grandparents is insulting and hurtful and implies that one's female ancestors are deficient or less Indian than their male contemporaries. The implication is that one's lineage is inferior. The implication for an Indian woman is that she is

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[75] General Comment No, 28, The Equality of Rights between Men and Women (Article 3) (2000).

[76] General Comment No. 28, para. 32.

[77] General Comment No. 28, para. 32 (citing Lovelace).

inferior, less worthy of recognition.[78]

230. Section 6 perpetuates sexist stereotypes of Aboriginal women as less Indian than their Indian male counterparts, and as lacking capacity to transmit Indian culture and heritage to their children. Those stereotypes have discriminatory effects on the rights of Aboriginal women and their descendants to the enjoyment of the cultural rights protected by Article 27.

231. As noted, above, it is well established in the Committee's case law and practice that differential treatment based on sex constitutes discrimination if its purpose is not legitimate under the Covenant and the differentiation is not reasonable and objective. For the reasons outlined in relation to the applicants' claim under Article 26, above, s. 6 of the 1985 *Indian Act* lacks a legitimate objective and is not objectively and reasonably justified.

232. The circumstances of the applicants' case do not involve a conflict between the right of an individual to enjoy her culture and the exercise of parallel rights by other members of the minority group or by the minority as a whole. Their claim under Article 27 must therefore be distinguished from the claims considered by the Committee in *Apirana Mahuika et al.* v. *New Zealand*,[79] and *Kitok v. Sweden*.[80] Unlike the claims presented in *Mahuika* and *Kitok*, this claim does not concern individual rights to the use of natural resources or participation in economic activities that could affect parallel rights of the group. The preference for patrilineal descent entrenched in s. 6 is no way "necessary for the continued viability and welfare of the minority as a whole."[81] Ms. McIvor's claim must also be distinguished from the claim at issue in Lovelace, which

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[78] TC Decision, para. 286. See also: paras 102-111 above.

[79] *Mahuika et al.* v. *New Zealand*, *supra* note 67.

[80] *Kitok* v. *Sweden, supra* note 67.

[81] *Ibid* at para. 9.8

concerned the right to live on reserve, since that right is no longer an incident of registration status.

233. As discussed above, the trial judge found that the Government had not "identified any group or individual that has an interest that conflicts with, or that must be balanced with, the goal of adopting non-discriminatory criteria for eligibility for registration"[82] and consequently "[t]here are no competing interests to be considered and balanced"[83] in assessing the permissibility of the sex-based criteria established in s. 6 of the *1985 Act*.

234. Similarly, there are no competing rights or interests to be considered in determining the compatibility of s. 6 of the *Act* with Articles 2, 3 and 27 of the Covenant, since the creation of a non-discriminatory statutory regime would not require the removal of registration status from any person.

235. In conclusion, recognition by the Government of an individual's Indian status constitutes official recognition of Aboriginal cultural identity for purposes of the individual's special relationship to the State. In addition, status recognition conditions the legitimacy attached to the cultural identity of Aboriginal individuals within the community of Aboriginal persons in Canada. The incorporation of discriminatory criteria into s. 6, and in particular the denial of full s. 6(1)(a) status to matrilineal descendants and women who married out denies the applicants the right to enjoy their culture on a basis of equality, in violation of Articles 2, 3 and 27.

F. Article 2(3)(a): The Applicants Have Been Denied the Right to an Effective Remedy

236. Under Article 2(3)(a) applicants are entitled to an effective remedy for the violations of their rights under Article 26 and Article 27, in conjunction with Articles 2(1) and 3. The decision of the British Columbia Court of Appeal and the subsequent denial by the Supreme Court of Canada of leave to appeal that decision have deprived the

[82] TC Decision, para. 299.

applicants of the remedy they obtained in the Trial Court. As noted above, applicants consider that the order of the Trial Court provided adequate and effective relief for the discrimination they suffered.[84] In contrast, the excessively narrow scope of the relief afforded by the Court of Appeal's decision is both inadequate and ineffective to redress the discrimination of which applicants complain. The unreasonably prolonged nature of the domestic proceedings further renders that remedy ineffective.

237. As explained above, the only aspect of the sex-based differentiation in the *1985 Act* that the Court of Appeal found to be impermissible is the improvement of the status of a small number of male lineage descendants who would have lost status at age 21 due to the operation of the double mother rule. They were admitted to status by the *1985 Act*, without the age-based cut-off. This was the sole example of unjustified preference for male progenitors and male lineage descendants recognized by the Court of Appeal decision.[85]

238. The Committee is urged to consider that the Court of Appeal's reasoning means that Canada can continue discriminating in favour of male lineage descendants so long as their superior status was merely *preserved* by the *1985 Act* and not *improved*. This countenances the bulk of the sex discrimination carried forward by the *1985 Act*. The decision of the Court of Appeal authorizes Canada to continue discriminating against individuals on the female line, with the exception of those who can show themselves to have been identically situated to the double mother individuals on the male line whose status was improved by the *1985 Act*.

239. Showing that one is identically situated to the double mother individuals on the male line places an impossible burden of proof on any future litigants wishing to challenge ongoing discrimination in Canada's status registration regime as a potential

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[83] TC Decision, para. 300.
[84] See para. 125 above.
[85] See paras. 80 – 82 above; CA Decision, para. 151.

Charter violation. Most of the sex discrimination carried forward by the *1985 Act* does not entail improving the status of individuals on the male line. It involves merely maintaining and perpetuating the existing discriminatory preference for male progenitors and male lineage descendants.

240. The defeating formalism of the Court of Appeal's approach is illustrated by Sharon McIvor's own situation. The superior s. 6(1)(a) entitlement of her immediate male counterpart, her brother, was not *improved* by the *1985 Act*, it was merely *maintained.* Therefore, on the Court of Appeal's reasoning the State party is "justified" in continuing to deny her s. 6(1)(a) status, notwithstanding that this discriminates against her on the basis of her sex.

241. It may be noted that the double mother group is not, in fact, the only group whose previously acquired rights were *improved* by the *1985 Act*. The rights of non-status women married to status Indian men were also improved.

242. 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 under the *1985 Act*, 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. The fact that the *1985 Act improved* the status of non-status women married to status men is ignored in the Court of Appeal's analysis. This is an additional illustration of how the Court of Appeal's decision is flawed.

243. Thousands of Aboriginal persons are affected by the continuing sex discrimination contained in the registration provisions of the *1985 Act*. The applicants seek a remedy that will address the full extent of the sex discrimination that is embedded in s. 6 of the *1985 Act*. It would be contrary to the principles of non-discrimination and equality enshrined in the ICCPR, and patently unjust, to leave any of the outstanding sex

discrimination to be litigated domestically by other individuals in new cases, because they would have no realistic prospect of success. In this regard, the Committee is urged to consider the fact that the British Columbia Court of Appeal has endorsed the continuation of sex discrimination by the State party.

244. Finally, this denial of an adequate and effective remedy in the courts should be viewed within the context of the continuing refusal of the State party to fully and finally remedy sex discrimination in the legislative regime governing Indian status. As previously noted, the *1985 Act* is failed remedial legislation. Some thirty years ago, Sandra Lovelace sought and obtained from this Committee confirmation of her right as an Aboriginal woman to the full and equal enjoyment of cultural life. Applicants now return to this Committee seeking redress for sex discrimination still entrenched in the State party's Indian status registration regime.

VI. REMEDY SOUGHT

245. As previously stated, the applicants are claiming the denial of the right to an adequate and effective remedy for the discrimination from which relief was sought in the Trial Court. The order granted by the trial judge, set out in full in the facts of this petition,[86] reflects the remedy that was sought by the applicants, and is appropriately tailored to cure the discrimination of which the applicants complained; namely, discrimination against matrilineal descendants and women who married out, by means of the sex-based hierarchy that precludes them from having s. 6(1)(a) status; and the enjoyment of the tangible and intangible benefits that attend s. 6(1)(a) status.

246. The remedial order of the Court of Appeal is inadequate, ineffective, and not appropriately tailored to the discrimination from which relief was sought. It does not result in Sharon's grandchildren becoming eligible for status. Nor does it result in Sharon McIvor and Jacob Grismer becoming eligible for s. 6(1)(a) status. It does not

require that discrimination against women who married out and matrilineal descendants be fully eliminated from the registration scheme. Moreover, the Court of Appeal's reasoning does not require the State party to end the preferential treatment of the male line, of which the applicants complained. On the contrary, the reasoning of the Court of Appeal decision means that Canada can continue discriminating in favour of male lineage descendants so long as their superior status was merely *preserved* by the *1985 Act* and not *improved*. That permits the bulk of the sex discrimination in Canada's status registration regime to continue.

247. The applicants submit that the only adequate effective remedy will be one which places all descendants of status Indian women, that is matrilineal descendants, on the same footing as descendants of status Indian men, that is, patrilineal descendants entitled to register under s. 6(1)(a) of the *1985 Act*.

248. The applicants reiterate that they are not seeking any remedy with regard to band membership. Nor do they seek to disturb previously acquired rights to registration status or band membership. In this regard, the applicants commend for the Committee's consideration and adoption the language in paragraphs (c) through (e) of the trial judge's order, in addition to the language of paragraphs (a) and (b), as adapted in this petition, immediately below.

249. The applicants request the Committee to find that s. 6 of the *1985 Indian Act* violates Articles 26, 3, 27, and 2(1) of the ICCPR in that it discriminates, on the ground of sex against matrilineal descendants, born prior to April 17, 1985, and Indian women born prior to April 17, 1985, who married non-Indian men.

250. In light of the State party's continuing failure to implement a non-discriminatory scheme, the applicants also request the Committee to ask Canada to take timely measures to ensure that s. 6(1)(a) of the status registration regime, introduced by the *1985 Indian*

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[86] See para 75 above, and *Annex 4*, TC Decision on Remedy.

VII. Supporting Documents*

Annex 1	Authorization Form
Annex 2	British Columbia Supreme Court Decision on the Merits, dated June 8, 2007, referred to as ("TC Decision")
Annex 3	British Columbia Supreme Court Decision on the Statutory Appeal, dated January 9, 2007
Annex 4	British Columbia Supreme Court Decision on Remedy, dated December 3, 2007 ("TC Decision on Remedy")
Annex 5	*Annex 5*, Selected Factums of Aboriginal organizations filed in the British Columbia Court of Appeal
Annex 6	British Columbia Court of Appeal Decision, dated April 6, 2009 ("CA Decision")
Annex 7	British Columbia Court of Appeal Extension Decision, dated April 1, 2010
Annex 8	British Columbia Court of Appeal Extension Decision No. 2, dated July 2, 2010
Annex 9	*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)* ("Bill C-3")

* The applicants' Authorization Form is attached, with additional documents and authorities to be submitted to the Committee by applicants' counsel.

VIII. TABLE OF AUTHORITIES

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An Act to Amend the Indian Act, S.C. 1985, c. 27 (Bill C-31)

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 (Bill C-3)

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Concluding observations of the Human Rights Committee: Egypt, CCPR/CO/76/EGY (28 November 2002)

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General Comment No. 23: The rights of minorities (Art. 27) : 04/08/1994. CCPR/C/21/Rev.1/Add.5, General Comment No. 23.

General Comment No. 28: Equality of rights between men and women (article 3): 03/29/2000. CCPR/C/21/Rev.1/Add.10, General Comment No. 28.

Act, is interpreted or amended so as to entitle persons to be registered under s. 6(1)(a), 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.

251. The applicants also request the Committee to find that the applicant Sharon McIvor is entitled to be registered under s. 6(1)(a) of the *Indian Act* and that the applicant Jacob Grismer is entitled to be registered as an Indian under s. 6(1)(a) of the *Indian Act*.

All of which is respectfully submitted by:

Gwen Brodsky, on behalf of Sharon McIvor and Jacob Grismer

Date: November 24, 2010

AUTHORIZATION OF THE ALLEGED VICTIMS

The United Nations Human Rights Committee
Petitions Team
Office of the High Commissioner for Human Rights
United Nations Office at Geneva
1211 Geneva 10, Switzerland
Fax + 41 22 9179022

Dear Sirs/Madams,

We, the alleged victims in the petition of **Sharon McIvor and Jacob Grismer v. Canada**, authorize our legal counsel, Gwen Brodsky, to represent us for the purposes of the "Communication Submitted For Consideration Under The First Optional Protocol To The International Covenant On Civil And Political Rights", dated November 24, 2010, and pertaining to certain violations of ICCPR provisions by Canada.

Sharon McIvor
Merritt, British Columbia
Canada

Jacob Grismer
Merritt, British Columbia
Canada

November 26, 2010