SHARON MCIVOR AND JACOB GRISMER v. CANADA

PETITIONER COMMENTS IN RESPONSE TO STATE PARTY'S 2017 AND 2018 SUPPLEMENTAL SUBMISSIONS ON THE ADMISSIBILITY AND MERITS OF THE APPLICANTS' PETITION TO THE HUMAN RIGHTS COMMITTEE

COMMUNICATION NO. 2020/2010

Before:

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

By:

Sharon McIvor and Jacob Grismer
Merritt, British Columbia
Canada

Represented by:

Gwen Brodsky
Barrister and Solicitor
307 West 18th Avenue
Vancouver, British Columbia
Canada V5Y 2A8
brodsky@brodskylaw.ca

Tel 604 874 9211

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Petitioner Comments in Response to State Party's 2017 and 2018 Submissions on the Admissibility and Merits of the Applicants' Petition to the Human Rights Committee

COMMUNICATION NO. 2020/2010

Summary of Applicants' Comments

The Director of the Human Rights Treaty Division has provided the Applicants with a copy of Canada's 2017 and 2018 supplemental submissions on the admissibility and merits of the Applicants' claim and invited the Applicants to comment.

The Applicants Sharon McIvor and Jacob Grismer seek confirmation of: 1) the entitlement of female status Indians to hold and to transmit equal registration status to their descendants, without discrimination based on sex; and 2) the entitlement of matrilineal descendants to equal registration status without discrimination based on the sex of their status Indian ancestor. The Applicants submit that the only adequate and effective remedy for the sex discrimination embedded in the State Party's status registration regime will be one which places Indian women and their descendants, born prior to April 17, 1985 ("matrilineal descendants"), on the same footing as Indian men and their descendants, born prior to April 17, 1985 ("patrilineal descendants") who are entitled to registration under s. 6(1)(a) of the *Indian Act.* The Applicants submit further that, although the amendments of 2011 and 2017 removed some of the sex discrimination, they re-enacted the core of it. In the result, the Applicants have not been afforded an effective remedy.

This submission responds to the State Party's supplemental submissions relating to 2017 amendments to the *Indian Act*. For ease of the Committee's reference, this submission incorporates some points that were dealt with by the Applicants in their previous submissions. The record of this proceeding reveals the intransigence of the State Party in eliminating sex discrimination from the *Indian Act*.

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

Admissibility

The Applicants have demonstrated the admissibility of their claims with regard to all requirements of the First Optional Protocol to the Covenant.[1] The Applicants are personally and directly affected by the sex discrimination in the State Party's registration regime; the operative period of their claim is post April 17, 1985; and the Applicants have exhausted all available domestic remedies.

However, the State Party contends that the Applicants' claim is inadmissible in whole or in part because the 2011 amendments to the 1985 *Indian Act* ("Bill C-3") afforded them an effective remedy.[2]

- ***The Applicants Have Not Been Afforded a Remedy that Answers Their Allegations***

The Applicants remind the Committee that in the *McIvor* constitutional litigation, while the British Columbia Supreme Court (the "Trial Court") dealt with the full scope of the Applicants' allegations, the British Columbia Court of Appeal (the "Court of Appeal") radically narrowed the analysis of the sex discrimination in the 1985 *Act* and, consequently, narrowed the scope of the declaratory relief.

In particular, the Court of Appeal found that much of the sex discrimination was justified based on the government's stated objective of "preserving acquired rights." The only discrimination recognized by the Court of Appeal as unjustified was the preferential treatment of a small subset of descendants of male Indians affected by the "double mother rule" whose rights acquired prior to 1985 were not only preserved by the 1985 *Act*, but improved. The Bill C-3 2011 amendments were tailored to the Court of Appeal decision.

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

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

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1 International Covenant on Civil and Political Rights, GA Res 2200A (XXI), 21 UN GAOR Supp (No 16), UN Doc. A/6316 (1966), 999 UNTS 171, entered into force March 23, 1976.

2 State Party's Submission, January 31, 2018, para. 15.

Bill C-3 made no change to the criteria for eligibility for full s. 6(1)(a) status. The 1985 *Act* as amended by Bill C-3 preserved entitlement to s. 6(1)(a) status for those who were entitled to be registered under the pre-1985 regime. Bill C-3 merely extended inferior s. 6(1)(c) status to some individuals, on the condition of their satisfying various restrictive qualifications that continued to favour male Indians and patrilineal descendants.

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

However, this did not accord the Applicants equality. In particular, the 1985 *Act* as amended in 2011 did not recognize the eligibility of Sharon McIvor and Jacob Grismer for full s. 6(1)(a) registration status. In contrast, Sharon McIvor's brother and all his children have full s. 6(1)(a) status. This difference is based solely on sex, as Sharon McIvor's brother has the same lineage as Sharon McIvor and the same pattern of marriage and parenting. Sharon McIvor's brother can hold and transmit s. 6(1)(a) status to his children born prior to April 17, 1985. Following the passage of Bill C-3, Sharon McIvor continued to be confined to inferior and stigmatized s. 6(1)(c) status, neither able to hold nor transmit s. 6(1)(a) status to her child.

As explained below at paragraphs 39-59, this discriminatory state of affairs is fundamentally unchanged following the 2017 amendments to the *Indian Act.* Once more, the 2017 amendments do not afford the Applicants a remedy that answers their allegations. As with the 2011 amendments, the 2017 amendments extended a form of inferior s. 6(1)(c) status to some additional subgroups, but left the discriminatory sex-based hierarchy between s. 6(1)(a) and s. 6(1)(c) undisturbed.

The Applicants continue to be directly affected by the discrimination that remains in the 1985 *Act* after the amendments of 2011 and 2017. Although the Applicants have the tangible benefits of status for themselves, the Applicants still do not enjoy all the intangible benefits of status on a basis of equality with their peers. In particular, they are denied the legitimacy and social standing that full s. 6(1)(a) status confers.

- ***Other Admissibility Issues***

The State Party continues to rely on its submission of August 23, 2011 and contends that certain aspects of the Applicants' claims are inadmissible because: the facts predate the coming into force of the Covenant and the Optional Protocol

for Canada; the sex discrimination challenged by the Applicants does not apply to the Applicants; and the sex discrimination in the impugned legislation is the subject of other ongoing domestic cases.

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

The Applicants' claims do not constitute an *actio popularis* challenge to the legislation. The Applicants have shown that the sex-based hierarchy embedded in the 1985 *Act* affects them personally and directly and that the discrimination they suffer—their continuing ineligibility for s. 6(1)(a) status—has not been remedied by the 2011 amendments, or by the 2017 amendments.

The record shows that Sharon McIvor has been personally and directly affected by the scheme's sex discrimination *both* as a woman who married out and as a matrilineal descendant of Indigenous women who did not marry their children's non-status fathers. The fact that there is additional domestic litigation pending, initiated by other victims of discrimination is not a bar to the Applicants' claim. The facts on which the claims presented in this Petition rest are part of the record of the domestic proceeding. The State Party has had an ample opportunity through domestic processes to address the defects in the scheme.

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

Merits

The State Party continues to rely on its submission of August 23, 2011, contending that the Applicants' Petition is without merit. The State Party also maintains that

the 2017 amendments to the *Indian Act* remedy in full the discriminatory treatment of Indigenous women and their descendants.[3]

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

The State Party maintains that the Applicants' Article 26 Covenant claim is without merit because: there is no discriminatory distinction; the difference between s. 6(1)(a) and s. 6(1)(c) is merely one of formal drafting; the *Act* only provides for one status, not degrees of status; and the capacity to transmit status is not a benefit of the legislation. Previously, the State Party maintained that the ability to transmit Indian status is not a benefit of the law and that Indian status is not a marker of cultural identity or legitimacy. Canada appears to have altered its position somewhat, and now admits that persons registered under the *Indian Act* have an important interest in transmitting their status to their children. Canada also now recognizes that there are significant links, for some Indigenous Canadians, between the State Party's legislated recognition of their Indian status and their personal identity as Indigenous persons.[4]

The Applicants refer the Committee to their Submission of December 5, 2011. The Applicants reiterate that the State Party's registration regime continues to privilege male Indian progenitors and patrilineal descendants through the vehicle of s. 6(1)(a). The argument that there is only one status, and that there is no significant legal distinction between s. 6(1)(a) status and s. 6(1)(c) status, is inaccurate and misleading. Section 6(1)(a) status is still superior in terms of the ability to transmit status to descendants born prior to April 17, 1985. Characterizing the capacity to transmit status as a benefit of the status regime is consistent with settled law and ordinary reasoning.

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

[3] State Party's Submission, January 31, 2018, para. 17.
[4] State Party's Supplemental Submission, November 29, 2017, para. 35.

of Bill C-31—which is the Bill that introduced s. 6(1)(c)—are often referred to as "Bill C-31 women," implying that they are not "real Indians" like the Indian men and their descendants who have s. 6(1)(a) status.

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

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

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

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

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

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

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

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

- ***Right to Equal Exercise and Enjoyment of Culture***

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

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

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

and in the broader community of First Nations and individuals of First Nations descent across Canada.

- ***The 2017 Amendments to the 1985 Indian Act Perpetuate Sex Discrimination, in Violation of the Covenant***

Further amendments to the *Indian Act* were passed in 2017 ("Bill S-3").[5] Bill S-3 removed another sliver of sex discrimination, by extending inferior 6(1)(c) status to some previously excluded subgroups in response to specific scenarios raised by the case of *Descheneaux v. Canada*.[6]

However, Bill S-3 did not remove the core of the discrimination that resides in the hierarchy between s. 6(1)(a) and s. 6(1)(c). As such, it is more piecemeal, failed remedial legislation.

Although Bill S-3 contains a provision (s. 2.1) that has the potential to create entitlement to full s. 6(1)(a) status for Indigenous women like Sharon McIvor and her descendants, this provision is not in force. Rather, it is subject to a delayed-coming-into-force clause which has no fixed date. Bill S-3 was given Royal Assent on December 12, 2017. It came into force on December 22, 2017, but not s. 2.1. Section 15(2) provides that s. 2.1 comes into force on an unspecified date to be fixed by the Governor in Council.

Thus, most of the *Act* came into force on December 22, 2017. However, the coming into force of the provision that is crucial to the Applicants' claim is deferred indefinitely.

On the one hand, the inclusion of s. 2.1 in Bill S-3 can be seen as representing a kind of moral vindication for the Applicants. This provision, known as the government's version of "6(1)(a) all the way," is an acknowledgement by the State Party that the only effective remedy for the ongoing sex discrimination in s. 6 of the *Indian Act* will be one which accords full s. 6(1)(a) status to all Indian women and their descendants born prior to April 17, 1985 on the same basis as Indian men and their descendants born prior to April 17, 1985. Furthermore, through these additional provisions, the State Party has demonstrated that it knows how to fix the problem. The State Party says that the government's version of 6(1)(a) all the way means that:

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5 http://www.aadnc-aandc.gc.ca/eng/1478177979520/1478178031024.

6 *Descheneaux c. Canada (Procureur général),* 2015 QCCS 3555 [*Descheneaux*].

> all persons will be entitled to the same status as persons on the paternal line, no matter how many generations removed from the women who lost status upon marriage, and that both will have the same ability to transmit status.[7]

At a superficial level, it appears that the intention of the government's s. 6(1)(a) all the way amendment is to eliminate the sex-based hierarchy between s. 6(1)(a) and s. 6(1)(c) registration status. The Applicants believe that if the government's s. 6(1)(a) all the way amendment were brought into force, they would become entitled to s. 6(1)(a) status at long last.

However, on the other hand, the fact that the coming into force of these provisions is delayed indefinitely makes the Applicants' remedy completely hypothetical. For the government's s. 6(1)(a) all the way amendment to have any real practical effects, it must be brought into force.

The State Party's contention that Bill S-3 remedies in full the sex discrimination against Indigenous women and their descendants in the status registration regime is invalid.

The lack of a fixed date for s. 2.1 to come into force means that the government's s. 6(1)(a) all the way amendment is entirely without legal force. Furthermore, Bill S-3 is devoid of any mechanism to ensure that the amendment will ever be brought into force. In short, the government's s. 6(1)(a) amendment, as a legal legislative provision, is meaningless.

In its most recent submission in this proceeding, the State Party seeks to minimize the implications of the content of what it has deferred. In particular, the State Party attempts, erroneously, to cast the government's 6(1)(a) all the way amendment in Bill S-3 as "the 1951 cut-off elimination provision," and contends that Bill S-3 addresses all sex discrimination except for the exclusion of descendants of women who married out prior to September 4, 1951. That is misleading and inaccurate. Significantly, no one gained entitlement to s. 6(1)(a) status under Bill S-3. Bill S-3 re-enacted the hierarchy between s. 6(1)(a) and s. 6(1)(c). That, fundamentally, is the issue of sex discrimination that remains outstanding, and which is the basis of the Applicants' Petition. The 1951 cut-off is a red herring. The fact that those victimized by the ongoing discrimination embedded in the s. 6(1)(a) and s. 6(1)(c) hierarchy includes some descendants whose grandmothers married out prior to the government's artificial 1951 cut-off is simply one facet of the scheme's failure to

[7] State Party's Supplemental Submission, January 31, 2018, para. 12.

grant s. 6(1)(a) status to any Indigenous women who lost status prior to April 17, 1985.

If the sex-based hierarchical distinction between s. 6(1)(a) and s. 6(1)(c) were removed, as required by the Covenant and requested by the Applicants, the 1951 cut-off is just one of the various manifestations of the sex discrimination that would, by necessary implication, be eliminated.

As a result of the State Party's failure, once again, in the 2017 amendments to eliminate the distinction between s. 6(1)(a) and s. 6(1)(c) registration status, Indian women and female-line descendants who were victims of sex discrimination under the State Party's registration scheme prior to April 17, 1985 continue to be relegated to inferior categories of status. Some are completely excluded from status. The exclusion of grandchildren of status females who married out prior to September 4, 1951 is an obvious example. Pursuant to the 1985 *Act*, their grandmothers are consigned to s. 6(1)(c), resulting in the children being consigned to s. 6(2), and the grandchildren born prior to September 4, 1951 being ineligible for status.

Bill S-3 also perpetuates the denigration and stigmatization of Indigenous women and their descendants by withholding from them the legitimacy and social standing associated with full s. 6(1)(a) status and restricting their ability to transmit status to their descendants. The harms of withholding full s. 6(1)(a) status from the so-called "Bill C-31 women" and their descendants are well documented in this proceeding. As long as the hierarchy between s. 6(1)(a) and s. 6(1)(c) continues, it will have exclusionary effects for generations to come.

The Applicants reiterate that their situation of inequality is unchanged by Bill S-3. Sharon McIvor continues to be confined to inferior and stigmatized s. 6(1)(c) status, neither able to hold nor transmit s. 6(1)(a) status to her child. Although the Applicants have the tangible benefits of status for themselves, the Applicants still do not enjoy all the intangible benefits of status on a basis of equality with their peers. In particular, they are denied the legitimacy and social standing that full s. 6(1)(a) status confers.

The State Party attempts to excuse its failure to bring the government's 6(1)(a) all the way clause into effect for an indefinite period of time on the grounds that it wishes to consult First Nations about a wide range of issues. This is not a valid justification for further delay. It is not appropriate for the State Party to consult about whether the State Party will continue legislated discrimination. Nor is

it necessary for the State Party to consult about discrimination in the status registration scheme, which is concerned with the special relationship between Canada and individuals of Indigenous descent. Canada has been consulting about this discrimination for decades, and consultation has been a tactic for delaying the elimination of sex discrimination. More delay cannot be countenanced under the Covenant.

The Applicants wish to bring to this Committee's attention yet again, the failures of the State Party to take effective remedial action and the government's intransigence in eliminating the sex discrimination of which it has been aware for a prolonged period of time, at least since this Committee's decision in *Lovelace v. Canada*.[8] Within this context, the Applicants stress the desirability of specific guidance from this Committee regarding the nature of the remedy to be provided by the State Party.

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

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I. Introductory Information

A. Review of the Applicants' Initial Submission

1. The Committee is referred to the Applicants' Submission of December 5, 2011 and to the Applicants' Initial Submission, which explains that:

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

- The Applicants' claim is that the sex-based criteria for the determination of Indian registration status violate Articles 26; 2(1), 3, and 27; and 2(3)(a) of the Covenant;[9]

- The State Party has long been aware of the sex discrimination in its regime for status registration, which has been the subject of extensive public criticism, including, but not limited to, the 1981 decision of this Committee in *Lovelace v. Canada*;[10]

- The 1985 *Indian Act* is failed remedial legislation. Instead of eliminating sex discrimination as was intended, the 1985 *Indian Act* transferred and incorporated the pre-existing and longstanding legislative preference for male Indians and patrilineal descent by means of s. 6(1)(a). Section 6(1)(a) preserved full status for male Indians born prior to April 17, 1985, whether or not they married out, and for descendants who claim entitlement to registration through the male line of descent;[11]

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

[9] Applicants' Initial Submission, paras. 6, 23, 24-29, 34, 73, 126, 147-184, 198, 208, 209-235, 236-244, 249.

[10] Applicants' Initial Submission, paras. 9, 38-46. See also *Sandra Lovelace v. Canada*, *supra* note 8.

[11] Applicants' Initial Submission, paras. 35, 45, 47-58, 139, 179, 200, 208, 239, 244.

certain tax exemptions. The intangible benefits of status relate to cultural identity. They include the ability to transmit status and a sense of cultural identity and belonging;[12]

- Section 6(1)(a) status is superior to s. 6(1)(c) and s. 6(2) status in terms of the ability to transmit status to descendants born prior to April 17, 1985, and in the social standing and legitimacy that s. 6(1)(a) confers;[13]

- The operative period of the claims is from April 17, 1985, the date when the 1985 *Indian Act* took effect. Therefore the claims are admissible *ratione temporis*;[14]

- The Applicants, who are personally and directly affected, have exhausted domestic remedies, through constitutional litigation in the British Columbia Supreme Court, the British Columbia Court of Appeal, and an application for leave to appeal to the Supreme Court of Canada, which was refused;[15]

- The Trial Court granted declaratory relief to the Applicants, the effect of which would have been to entitle them to registration under s. 6(1)(a) of the 1985 *Act*. However, their success in the Trial Court was rolled back by the Court of Appeal;[16]

- The Court of Appeal focused on a narrow and discrete aspect of the sex discrimination which the Applicants had successfully challenged in the Trial Court, and referred the question of how to remedy the discrimination back to Parliament.[17]

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12 Applicants' Initial Submission, paras. 21-22, 32, 95-101, 104, 114, 144-146, 170, 176, 180-184, 245.

13 Applicants' Initial Submission, paras. 15, 19, 22, 60, 92, 96, 101, 114, 141, 146, 183, 212, 234.

14 Applicants' Initial Submission, paras. 118-124.

15 Applicants' Initial Submission, paras. 28, 87, 115, 125-130.

16 Applicants' Initial Submission, paras. 28, 74-87, 125, 185-194, 198, 236, 245-246.

17 Applicants' Initial Submission, paras. 77-86, 237-243, 246.

B. The 2011 and 2017 Amendments

Bill C-3

2. As anticipated by the Applicants' Initial Submission, at the time of filing amendments to s. 6 of the 1985 *Indian Act* were pending ("Bill C-3"). As the Applicants advised the Committee, it was apparent that Bill C-3 would not eliminate the discrimination entrenched in s. 6 of the 1985 *Indian Act*.[18] Soon thereafter, Bill C-3 was passed into law and came into force in 2011.[19]

3. With regard to the 2011 amendments, the Committee is referred to the Applicants' December 5, 2011 Submission. The Applicants reiterate that Bill C-3 did not eliminate the discrimination entrenched in s. 6 of the 1985 *Indian Act*. Nor did it purport to do so. The government's name for the *Act* is telling: *An Act to promote gender equity in Indian registration by responding to the Court of Appeal for British Columbia decision in McIvor v. Canada (Registrar of Indian and Northern Affairs)*. The government's legislative response attempted to deal specifically with the discrete facet of the sex discrimination which the Court of Appeal found to be unjustified, leaving untouched the bulk of the sex discrimination, of which the Applicants successfully complained in the British Columbia Supreme Court, and for which they now seek an effective remedy from this Committee.

4. Bill C-3 *re-enacted* the s. 6(1)(a) and s. 6(1)(c) sex-based hierarchy.[20] Bill C-3 made no change to the criteria for eligibility for full s. 6(1)(a) status. The 1985 *Act* as amended by Bill C-3 (the "1985 *Act* as amended") preserved entitlement to s. 6(1)(a) status for those who were entitled to be registered under the pre-1985 regime. Bill C-3 expressly recognizes entitlements to be registered that existed under s. 6(1)(a) or s. 6(1)(c) prior to Bill C-3[21]. Bill C-3 merely extended inferior s. 6(1)(c) status to some individuals, if and only if, they could satisfy

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18 Applicants' Initial Submission, paras. 89, 141-143.

19 *Gender Equity in Indian Registration Act*, RSC, 2010, c I-5, Assented to 15th December, 2010, in force January 31st, 2011.

20 Bill C-3, *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)*, 3rd Sess, 40th Parl, 2010, cl. 2(2), (3) [Bill C-3].

21 Bill C-3, cl. 5, 6.

various restrictive qualifications set out in s. 6(1)(c)*(c.1)*. (The Committee referred to the Applicants' December 5, 2011 Submission at para. 4 of Bill C-3.)

5. Further, the 1985 *Act* as amended only granted s. 6(2) status, and never s. 6(1)(a) status, to grandchildren born prior to April 17, 1985 of Indigenous women who married out and whose children married out, notwithstanding the fact that grandchildren born prior to April 17, 1985 of status men who married out and whose children married out *are* eligible for s. 6(1)(a) status. The second-generation cut-off was thereby postponed for the male lineage grandchildren until at least the following generation. This is yet another way in which the 1985 *Act* as amended by Bill C-3 did not place Indian women who married out and their descendants on the same footing as Indian men who married out and their descendants, and it had the effect of excluding subsequent generations because of the sex of their Indigenous ancestor.

6. As anticipated in the Applicants' Initial Submission, the 1985 *Act* as amended by Bill C-3 improved the registration entitlement of Jacob Grismer, making him eligible for s. 6(1)(c) status, and thereby able to transmit status to his children (Sharon's grandchildren) born after April 17, 1985. However, this did not accord the Applicants equality. In particular, the 1985 *Indian Act* as amended did not recognize the eligibility of Sharon McIvor and Jacob Grismer for full s. 6(1)(a) registration status. In contrast, Sharon McIvor's brother and all his children born prior to April 17, 1985 have full s. 6(1)(a) status.

7. Even when Jacob Grismer is compared to the second generation of men who married out under the double mother rule, and Sharon McIvor is compared to the first generation of men who married out under the double mother rule, equality requires they have s. 6(1)(a) status.

Bill S-3

8. With regard to Bill S-3, the Committee is referred to the Applicants' Submissions of June 20, 2016 and March 16, 2017. As anticipated in the Applicants' submissions, Bill S-3, the 2017 amendment, did not eliminate the sex discrimination in the State Party's registration scheme. Bill S-3 merely extended inferior s. 6(1)(c) status to additional

previously excluded subgroups, in response to specific scenarios raised by the case of *Descheneaux v. Canada*.[22]

9. Bill S-3 did not remove the core of the discrimination embedded in the hierarchy between s. 6(1)(a) and s. 6(1)(c), but rather reaffirmed it. Like Bill C-3 before it, Bill S-3 re-enacted and re-entrenched the sex-based hierarchy between s. 6(1)(a) and s. 6(1)(c). The government's name for the 2017 *Act* is also telling: *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général)*. When Bill S-3 was first introduced, the government's name for it was *An Act to amend the Indian Act (elimination of sex-based inequities in registration)*. When the government was confronted with the contradiction between the name of the Bill and its discriminatory contents, it changed the Bill's name.

10. Bill S-3 made no change to the criteria for eligibility for full s. 6(1)(a) status. The 1985 *Act* as amended by Bill S-3 preserved entitlement to s. 6(1)(a) status for those who were entitled to be registered under the pre-1985 regime. Bill S-3 merely extended inferior s. 6(1)(c) status to some individuals.

11. Although Bill S-3 contains a provision (section 2.1) that has the potential to create entitlement to full s. 6(1)(a) status for Indigenous women like Sharon McIvor and her descendants born prior to April 17, 1985, this provision is not in force. Rather, it is subject to a delayed-coming-into-force clause which has no fixed date. This provision is therefore meaningless. Without doubt, this is a situation in which equality deferred is equality denied.

12. The discriminatory deficiencies of Bill S-3 include the following:

- Bill S-3 perpetuates the denigration and stigmatization of Indian women and their descendants by withholding from them the legitimacy and social standing associated with full s. 6(1)(a) status, and restricts their ability to transmit status to future generations;

- Bill S-3 perpetuates the sex-based exclusion of descendants on the female line who continue to be affected by the premature application

[22] *Descheneaux*, *supra* note 6.

of the second-generation cut-off, one illustration of which is the continuing exclusion of descendants of status females who married out prior to September 4, 1951.

13. In contrast, the 1985 *Act* as amended by Bill S-3 reaffirms the s. 6(1)(a) registration entitlement of males and their descendants on the male line born prior to April 17, 1985, including: descendants of status men who married out prior to September 4, 1951; descendants of Indian men who parented in common-law unions with non-status women; and illegitimate male children of male Indians.

14. In short, the 1985 *Act* as amended in 2017 by Bill S-3 is yet another piece of failed remedial legislation.

15. The Applicants' situation of inequality remains unchanged after the 2017 amendments in Bill S-3. Despite their increasingly protracted journey, Sharon McIvor and Jacob Grismer are left without official recognition of their inherent equality. Notwithstanding the 2017 amendments, Sharon McIvor and Jacob Grismer remain consigned to the s. 6(1)(c) subclass, whereas Sharon McIvor's brother and all his children born prior to April 17, 1985 are entitled to s. 6(1)(a) status.

16. Although the Applicants have the tangible benefits of status for themselves, and Jacob is able to transmit s. 6(2) status to his children born after April 17, 1985 (Sharon's grandchildren), the Applicants do not enjoy all the intangible benefits of status on a basis of equality with their peers. In particular, they are denied the legitimacy and social standing that full s. 6(1)(a) status confers.

17. The Applicants' claims, therefore, remains as stated in their Initial Submission: Canada has failed to eliminate discrimination and ensure an adequate and effective remedy. The sex discrimination embedded in s. 6 of the 1985 *Act* is ongoing. This discrimination has not been eliminated in the new s. 6 of the 1985 *Act* as amended by Bill S-3.

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

18. The only adequate and effective remedy will be one which places all Indian women and their descendants (matrilineal descendants) on the same footing as Indian men and their descendants (patrilineal descendants), who are entitled to register under s. 6(1)(a). The only

difference between the pre- and post-Bill C-3 situation, with regard to the complaint to this Committee, was that a narrow and discrete facet of the sex discrimination was removed from the scheme.[23] Bill S-3 has removed another sliver of sex discrimination from the scheme.

19. However, the Applicants reiterate that their Petition is necessitated by the longstanding failure of the State Party to fully and finally eliminate the sex discrimination from the legislative regime for registration as a status Indian. This reality is underscored by the fact that, through the 1985 *Act*, Bill C-3, and now Bill S-3, the State Party has persisted in its piecemeal and inadequate approach to eliminating sex discrimination.[24]

20. In light of the State Party's continuing failure to correct fully the sex discrimination entrenched in its legislative scheme for determining Indian status, the Applicants respectfully urge the Committee to request Canada to take immediate measures to ensure that s. 6(1)(a) of the status registration regime, introduced by the 1985 *Indian Act*, re-enacted by Bill C-3, and again re-enacted by Bill S-3, is interpreted or amended so as to entitle to registration under s. 6(1)(a) those persons who were previously not entitled to be registered under s. 6(1)(a) solely as a result of the preferential treatment accorded to Indian men over Indian women born prior to April 17, 1985 and patrilineal descendants over matrilineal descendants born prior to April 17, 1985.[25]

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

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23 Applicants' Initial Submission, para. 247.

24 Applicants' Initial Submission, paras. 88-92, 116, 127, 141-143.

25 Applicants' Initial Submission, para. 35. See also Applicants' Submission, December 5, 2011, para. 14.

22. In their Initial Submissions, the Applicants requested that the Committee direct Canada to take "timely" measures to eliminate the core of the sex discrimination challenged in the Petition. In light of the extreme delay by the State Party, the Applicants hereby request the Committee to direct Canada to take *immediate* measures to address the sex discrimination inherent in the hierarchy between s. 6(1)(a) and s. 6(1)(c).

II. Applicants' Comments on the State Party's Submissions Regarding the Facts (State Party's Submission August 23, 2011 paragraphs 9-48; State Party's Supplemental Submissions November 29, 2017 and January 31, 2018)

A. Male Children of Unmarried Non-Status Male Indians

23. The State Party's submission that, under the pre-1985 legislation, "if only the father was an Indian, the illegitimate child was also an Indian"[26] is incorrect. The correct characterization of this provision of the legislation is "if only the father was an Indian, the illegitimate child, *if male*, was also an Indian." Illegitimate female children of male Indians did not have status. This was finally and unequivocally determined by Canada's highest Court, purely as a matter of statutory interpretation, in *Martin v. Chapman*,[27] cited at footnote 10 of the Applicants' Initial Submission.

B. Pre-1985 Legislative Process

24. The State Party submits that, in the process leading up to the 1985 *Indian Act*, there was no consensus among First Nations as to what the future rules governing status should be.[28] The Applicants reiterate that this statement is misleading when presented in isolation from the historic context. As the Trial Judge found, the historic context was "the existing legislation in which entitlement to registration or status was linked to band membership and entitlement to live on a reserve." First Nations groups did not oppose the elimination of sex discrimination in registration status, which under the 1985 *Act* was severed from band

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26 State Party's Submission, August 23, 2011, para. 15.
27 [1983] 1 SCR 365, p. 370.
28 State Party's Submission, August 23, 2011, para. 19. See also Applicants' Submission, December 11, 2011, para. 17.

membership.[29] Any concerns raised were with regard to incidents of band membership that are distinct from, and unaffected by, the claims presented in the Applicants' Petition.

C. Section 6(1)(a) Status

25. The State Party submits that s. 6(1)(a) merely preserves pre-1985 entitlements to eligibility.[30] The Applicants emphasize two points. As stated in the Initial Submission, included among those eligible for s. 6(1)(a) status are descendants of men who married out, including the descendants of two generations of men who married out who did not lose status under the double mother rule, either because they had not yet turned 21 in 1985 or because their bands had obtained exemptions from the double mother rule.[31]

26. Furthermore, s. 6(1)(a) did not merely preserve pre-1985 entitlements, it enhanced the ability of non-status wives of status men to transmit status. Under the *1985 Act*, the non-Indian wife of a male Indian married prior to 1985 acquired the ability to transmit status for the first time. Even if she and her status Indian husband divorced prior to April 17, 1985, under the *1985 Act*, she may be eligible for s. 6(1)(a) registration status and be able to transmit status. In contrast, the status Indian women in Sharon McIvor's generation who married out can neither obtain nor transmit s. 6(1)(a) status. As stated in the Applicants' Initial Submission, this feature of the scheme is an additional illustration of the flaws in the Court of Appeal's opinion that the preservation of existing rights constitutes a legitimate objective justifying the discrimination in the legislation.[32]

27. It may also be noted that the authority of the BC Court of Appeal's decision in *McIvor* as precedent inside Canada's legal system has been eroded by the subsequent decision of the Quebec Superior Court in *Descheneaux*. In *Descheneaux*, the Quebec Court refrained from explicitly overruling *McIvor*, having regard to the doctrine of *stare*

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29 *McIvor v. The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 827, paras. 44-45. The "TC Decision" is Annex 2 to the Applicants' Initial Submission.

30 State Party's Submission, August 23, 2011, para. 24. See Applicants' Submission, December 11, 2011, paras. 18-19.

31 Applicants' Submission, December 5, 2011, footnote 12.

32 Applicants' Initial Submission, para. 242.

decisis. However, additional facets of the scheme's discriminatory exclusionary effects were identified by the Quebec Court, and found to be inconsistent with the sex equality guarantees of the *Canadian Charter of Rights and Freedoms*.[33] Moreover, the Quebec Court expressed reservations about the BC Court of Appeal's reasoning regarding the preservation of existing rights as a justification for discrimination.[34]

D. Hierarchy of Status Categories

28. The State Party submits that the 1985 *Act* provides for only one Indian status.[35] The Committee is referred to the Applicants' Submission of December 5, 2011, paragraphs 18-20. The Applicants reiterate that this is incorrect as a matter of fact. As explained above, s. 6(1)(a) status is superior. The intangible benefits associated with s. 6(1)(a) status are unquestionably superior to those associated with s. 6(1)(c) and s. 6(2) status. Although the tangible benefits (access to social programs and tax exemptions) are the same, the intangible benefits (the ability to transmit status and the legitimacy conferred by status) is greatest for full s. 6(1)(a) status. Furthermore, s. 6(1)(c) status (the category of status accorded to "Bill C-31 women") is stigmatized within Indigenous communities.

E. Transitional Category of Status

29. The State Party submits that s. 6(1)(c) status is merely "transitional" in nature.[36] The Committee is referred to the Applicants' Submission of December 5, 2011, para. 21. The Applicants reiterate that characterizing s. 6(1)(c) status as transitional, and therefore acceptable,

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33 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

34 *Descheneaux*, *supra* note 6, paras. 180-184.

35 State Party's Submission, August 23, 2011, para. 26. It should also be noted that the State Party's chart following para. 53 of the State Party Submission shows, correctly, that there is differential treatment between Sharon McIvor and her male counterpart, and Jacob Grismer and his counterpart: Sharon McIvor and Jacob Grismer are not entitled to s. 6(1)(a) status, and that in contrast to the "comparable man," and the child of the "comparable man", who are entitled to s. 6(1)(a) registration status, under either the 1985 *Act* or the *Act* as amended in 2011 and 2017.

36 State Party's Submission, August 23, 2011, para. 26. See Applicants' Submission, December 5, 2011, para. 21.

obscures the fact that, for those affected by the scheme, the effect of the discrimination is not transitional. It will continue to affect them for all their lives and their families for generations to come. The fact is that the *McIvor* Petition pertains exclusively to sex discrimination against Indian women and their descendants *born prior to April 17, 1985*. The longer Canada delays, the more likely it is that people born prior to April 17, 1985 who are affected by the discrimination challenged in the Applicants' Petition will be dead. That fact does not constitute a justification for discrimination.

F. The Applicants' Statutory Appeal

30. The State Party submits that Sharon McIvor contributed to the length of time required to resolve her statutory appeal.[37] The Committee is referred to the Applicants' Submission of December 5, 2011. The Applicants reiterate that this argument is misleading and unfair to the Applicants. The Applicants reject both the premise and the government's conclusions.[38] The Applicants also contend that the government's attempt to draw support for this point from the Court of Appeal's decision depends on an unreasonable interpretation of the Court's comments on the matter. The government was in control of the timetable for the statutory appeal. The government earlier objected to the combining of the statutory appeal with an action seeking constitutional remedies. Prior to 2006, when the government conceded that the Registrar's application of the *Act* to the Applicants could not stand, Sharon McIvor reasonably believed that it was only by seeking a constitutional remedy that she could obtain status for her son. It must be emphasized that the government's concession that Sharon could advance beyond s. 6(2) status *was based on a technicality*, that is, that there had been no formal declaration of non-Indian paternity with regard to Sharon, or her mother, *who was unmarried and the child of an unmarried status woman*. The systemic discrimination against matrilineal descendants of unmarried Indian women has not been eliminated from the scheme. For a description of the litigation process and delay by the government, the Committee is referred to: paragraphs 71 and 93 of the Applicants' Initial Submission, paragraphs 16-19 of

[37] State Party's Submission, August 23, 2011, para. 28.
[38] State Party's Submission, August 23, 2011, paras. 73, 122.

the Trial Judge's 2007 decision on the statutory appeal,[39] and paragraphs 103-115 and 346-350 of the Trial Judge's decision on the merits.[40]

31. The State Party submits that the Applicants challenged the unequal treatment of descendants of Indian women who married non-Indian men as compared with descendants of Indian men who married non-Indian women.[41] The Applicants' reiterate that that their constitutional challenge was broader than is acknowledged by the State Party. The Applicants' challenge was not confined to the unequal treatment of descendants of women who *married out*. It included the descendants of Indian women who parented with non-Indian men in common-law relationships. Nor was it confined to descendants; it also included progenitors. The Applicants challenged the registration provisions to the extent that they prefer descendants who trace their ancestry along the patrilineal line over those who trace their ancestry along the matrilineal line, and male Indians who married non-Indians and their descendants over female Indians who married non-Indians and their descendants.

32. For confirmation of the breadth of their constitutional challenge, the Applicants refer the Committee to paragraphs 4 and 5 of the Trial Court decision, in which the Court notes that "the plaintiffs submit that the registration provisions continue to prefer descendants who trace their ancestry along the paternal line over those who trace their ancestry along the maternal line. The plaintiffs submit further that the provisions prefer male Indians who married non-Indians and their descendants, over female Indians who married non-Indians and their descendants."[42]

33. The Applicants have also referred the Committee to paragraph 5 of the Trial Court Decision which, in points 1 and 2, sets out the relief sought by the Applicants at trial in a way that makes it clear that the Trial Court understood that the challenge to discrimination against

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

40 TC Decision.

41 State Party's Submission, August 23, 2011, para. 32.

42 TC Decision, para. 4.

matrilineal descendants included the descendants of women who married out but was *not limited to descendants of Indian women who were married.*

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

35. Finally, the Applicants have referred the Committee to paragraph 343 of the Trial Court decision, in which, the Court states: "I have concluded that s. 6 of the 1985 *Act* violates s. 15(1) of the *Charter* in that it discriminates between matrilineal and patrilineal descendants born prior to April 17, 1985, in the conferring of Indian status, *and* discriminates between descendants born prior to April 17, 1985, of Indian women who married non-Indian men, and the descendants of Indian men who married non-Indian women."[43]

G. Leave Denied by the Supreme Court of Canada

36. The State Party attempts to interpret the Supreme Court of Canada's refusal of leave in the *McIvor* constitutional case as due to the Applicants' success in the court below.[44] The Applicants reiterate that this is wholly unpersuasive. It is impossible to know why leave to appeal was refused in the Applicants' case or why leave is ever refused. Statistics demonstrate that most applications for leave to the Supreme Court of Canada are denied. In 2009, the year that leave to appeal was sought in *McIvor*, only 11% of the 518 applications were accepted by the Court. This is consistent with statistics for the last ten years.[45]

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43 TC Decision, para. 343 [emphasis added].

44 State Party's Submission, August 23, 2011, paras. 43-45. See Applicants' Submission, December 5, 2011, para. 28.

45 *Bulletin of Proceedings: Special Edition, Statistics 2000 to 2010*, (Ottawa: Supreme Court of Canada, 2011).

H. Process Leading up to the Bill C-3 Amendments

37. The State Party submits that the government sought input on Bill C-3 from Indigenous organizations including Indigenous women's groups and regional organizations.[46] However, the State Party ignored input calling for the elimination of sex discrimination from its status registration regime. Throughout the parliamentary reform process that culminated in the 2011 amendments, there were repeated calls by individuals, groups, and members of Canada's Parliament and Senate to amend Bill C-3 to eliminate the sex discrimination from the *Indian Act* registration scheme. The Committee is referred to the Applicants' Submission of December 5, 201l, paragraphs 29-30, for detailed consideration of the failed legislative process surrounding Bill C-3.

I. The 1985 Amendments

38. The State Party submits that Sharon McIvor *lost* eligibility for status registration when she married a non-Indian in 1970 and that she was previously entitled to Indian status.[47] The Applicants reiterate that this submission is misleading, and is addressed by the Applicants in their Submission of December 5, 2011, paragraphs 47-52.

J. The 2011 and 2017 Amendments

39. The State Party has described the operation of the 2011 and 2017 amendments and argued that any subsisting discrimination in the *Indian Act* registration scheme, and against the Applicants in particular, has been remedied.[48] The Applicants emphasize that the State Party's argument is not supported by the facts. The discrimination of which the Applicants complain is continuing. The State Party's submission ignores the evidence submitted by the Applicants regarding the superior legitimacy and social standing conferred by s. 6(1)(a) status. The State Party's characterization of the law and the facts also obscures at least four critical features of the regime as amended:

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46 State Party's Submission, August 23, 2011, para. 46.

47 State Party's Submission, August 23, 2011, para. 49.

48 State Party's Submission, August 23, 2011, paras. 52-54. State Party's Supplemental Submission, January 31, 2018, paras. 11-17. See Applicants' Submission, December 5, 2011, para. 32.

(i) The 2011 amendments and the 2017 amendments do not treat Sharon McIvor and her brother equally. She is ineligible for s. 6(1)(a) status. He is eligible for s. 6(1)(a) status.

(ii) The 2011 amendments and the 2017 amendments do not treat Jacob Grismer and his cousins equally. He is ineligible for s. 6(1)(a) status. The cousins are eligible for s. 6(1)(a) status under the 2011 amendments and under the 2017 amendments.

(iii) Because Bill S-3 re-enacts the sex-based hierarchy between s. 6(1)(a) and s. 6(1)(c), there are also continued differential effects on the ability to transmit status. There are still female line descendants born prior to April 17, 1985 who are subject to the premature application of s. 6(2), known as the second-generation cut-off. This includes the grandchild born prior to September 4, 1951 to a status female who married out. The grandchild is categorically ineligible for status. If the State Party recognized the entitlement of the grandmothers to s. 6(1)(a) status, the grandchildren would also be entitled to s. 6(1)(a) status. This is but one facet of the discriminatory effects that the hierarchy between s. 6(1)(a) and s. 6(1)(c) has. Inevitably, other scenarios of exclusion will arise as long as this sex-based hierarchy is in place. The Applicants reiterate that their Petition is a comprehensive challenge to the hierarchy between s. 6(1)(a) and s. 6(1)(c). It cannot be reduced to the matter of the 1951 cut-off, which is part and parcel of the hierarchy between s. 6(1)(a) and s. 6(1)(c).

(iv) The government's 6(1)(a) all the way clause contained in Bill S-3, which the State Party erroneously refers to as the "1951 cut-off elimination provision," is not in force, and its coming into force is postponed indefinitely.

40. The Applicants make the following additional observations about Bill S-3 and the State Party's Supplemental Submissions. Bill S-3 removed another sliver of the sex discrimination by extending inferior s. 6(1)(c) status to some previously excluded subgroups in response to specific scenarios raised by the case of *Descheneaux v. Canada*.

41. Bill S-3 did not remove the core of the discrimination that resides in the hierarchy between s. 6(1)(a) and s. 6(1)(c). As such, it is more piecemeal failed remedial legislation

K. Bill S-3 Amendments Not in Force

42. Although Bill S-3 contains an additional provision (section 2.1) that has the potential to create entitlement to full s. 6(1)(a) status for reinstatees like Sharon McIvor and her descendants, this provision is not in force but rather is subject to a delayed-coming-into-force clause which has no fixed date.[49] Bill S-3 amends s. 6(1) of the *Indian Act* by adding the following paragraph:

> (a.3) that person is a direct descendant of a person who is, was or would have been entitled to be registered under paragraph (a.1) or (a.2) and
>
> > (i) they were born before April 17, 1985, whether or not their parents were married to each other at the time of the birth, or
> >
> > (ii) they were born after April 16, 1985 and their parents were married to each other at any time before April 17, 1985;[50]

43. The inclusion of the government's version of 6(1)(a) all the way in Bill S-3 is an acknowledgement by the State Party that the only effective remedy for the ongoing sex discrimination in s. 6 of the *Indian Act* will be one which accords full s. 6(1)(a) status to all Indian women and their descendants, born prior to April 17, 1985 on the same basis as Indian men and their descendants born prior to April 17, 1985. Furthermore, through this provision, the State Party has demonstrated that it knows how to fix the problem. The State Party has explained that the government's 6(1)(a) all the way amendment means that:

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[49] See Bill S-3, *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général)*, 42nd Parl, 1st Sess (12 December 2017), cl 15(2).

[50] *Indian Act*, RSC 1985, c I-5, as amended by *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général)*, SC 2017, c 25, Assented to 12th December, 2017.

> all persons in the maternal line will be entitled to the same status as persons in the paternal line, no matter how many generations removed from the women who lost status upon marriage, and that both will have the same ability to transmit status to their children.[51]

44. In Bill S-3, the government's stance regarding the removal of all sex discrimination from the State's registration provisions is contradictory, at best. On the one hand, from the content of the government's s. 6(1)(a) all the way amendment, it appears that the government consents to the elimination of the sex-based hierarchy between s. 6(1)(a) and s. 6(1)(c). The Applicants would be justified in believing that, if the government's s. 6(1)(a) amendment were brought into force, they would become entitled to s. 6(1)(a) status, at long last. On the other hand, the fact that the coming into force of these provisions is delayed to an undetermined date, makes the Applicants' remedy completely hypothetical and illusory. For the government's s. 6(1)(a) amendment to have any real practical effect, it must be brought into force immediately.

45. The State Party's contention that Bill S-3 remedies in *full* the sex discrimination against Indigenous women and their descendants in the status registration regime is not valid.[52]

46. The presence in Bill S-3 of the delayed-coming-into-force clause with no fixed date means that the government's s. 6(1)(a) all the way amendment is entirely without legal force. Furthermore, Bill S-3 is devoid of any mechanism to ensure that the amendment will ever be brought into force. In short, the government's s. 6(1)(a) amendment, as a legal legislative provision, is meaningless.

L. Mischaracterization of the Not in Force Amendment (s. 2.1)

47. In its most recent submission in this proceeding, the State Party erroneously casts the government's s. 6(1)(a) amendment in Bill S-3 as "the 1951 cut-off elimination provision," and contends that Bill S-3 addresses all sex discrimination except for the exclusion of descendants

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51 State Party's Supplemental Submission, January 31, 2018, para. 12.
52 State Party's Supplemental Submission, January 31, 2018.

of women who married out prior to September 4, 1951.[53] That is misleading and inaccurate because it mischaracterizes and overlooks the core of the sex discrimination and fails to acknowledge the Applicants' actual claim, which is that the hierarchy between s. 6(1)(a) and s. 6(1)(c) discriminates based on the ground of sex, in violation of the Covenant.

48. The fact is that no one gained entitlement to s. 6(1)(a) status under Bill S-3. The issue of sex discrimination remains outstanding, notwithstanding Bill S-3. Although it is correct to observe that those victimized by the ongoing discrimination include some descendants whose grandmothers married out prior to the government's artificial 1951 cut-off, this is simply an obvious manifestation of the scheme's failure to grant s. 6(1)(a) status to any Indigenous women who lost status prior to April 17, 1985.

49. If the sex-based hierarchical distinction between the different categories of status (6(1)(a) and 6(1)(c)) were removed—as required by the Covenant, requested by the Applicants in their Petition, and accepted, in principle, by the government's 6(1)(a) amendment in Bill S-3—removal of the 1951 cut-off would logically follow. The grandmothers affected by the 1951 cut-off would become eligible for s. 6(1)(a) status along with their descendants born prior to April 17, 1985.

50. As a result of the State Party's failure once again to eliminate the distinction between s. 6(1)(a) and s. 6(1)(c), Indigenous women and female-line descendants, who were victims of sex discrimination under the State Party's registration scheme prior to April 17, 1985, continue to be relegated to inferior categories of status. This includes, but is not limited to, grandchildren born prior to September 4, 1951 who are descendants of status women who married out.

51. Bill S-3 perpetuates the denigration and stigmatization of Indigenous women and their descendants by withholding from them the legitimacy and social standing associated with full s. 6(1)(a) status, and restricting their ability to transmit status to their descendants. The harms of

[53] State Party's Supplemental Submission, January 31, 2018, para. 25.

withholding full s. 6(1)(a) status from the so-called "Bill C-31 women" and their descendants are well documented in this proceeding. As long as the hierarchy between s. 6(1)(a) and s. 6(1)(c) continues, it will have exclusionary effects. The exclusion of descendants of status females born prior to September 4, 1951 is an obvious example. The s. 6(1)(a) distinction will have discriminatory effects for generations to come, including on some descendants born after April 17, 1985. The history of repeated *Indian Act* sex-discrimination litigation, including *Lavell*,[54] the *Lovelace* Petition to this Committee, *McIvor* and *Descheneaux*, and the existence of ongoing cases including *Matson v. Canada (Indian Affairs and Northern Development)*,[55] demonstrate that various scenarios of inequality keep arising.

52. The Applicants reiterate that their situation of inequality is unchanged by Bill S-3. Sharon McIvor continues to be confined to inferior and stigmatized s. 6(1)(c) status, neither able hold nor transmit s. 6(1)(a) status to her child. Although the Applicants have the tangible benefits of status for themselves, the Applicants still do not enjoy all the intangible benefits of status on a basis of equality with their peers. In particular, they are denied the legitimacy and social standing that full s. 6(1)(a) status confers, as well as the ability to transmit full status.

M. Process Leading up to the Bill S-3 Amendments

53. As anticipated by the Applicants' submissions of June 20, 2016 and March 16, 2017, to which the Committee is referred, Bill S-3 responds narrowly and minimally to the constitutional litigation in *Descheneaux* v. *Canada*. There is a longstanding pattern of the State Party doing the bare minimum following constitutional court rulings against them. The stripe of the government and its rhetoric may change, but the pattern remains the same.

54. Doing the least possible was the State Party's approach following the *McIvor* BC Court of Appeal decision, when Stephen Harper was the Prime Minister. *Descheneaux* was decided on August 3, 2015. In her

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54 *Canada (AG) v. Lavell*, [1974] SCR 1349 [*Lavell*].

55 2013 CHRT 13. See *Canada (Human* Rights *Commission) v. Canada (Attorney General)*, 2015 FC 398; *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2016 CAF 200, leave to appeal to the Supreme Court of Canada granted, 37208 (March 30, 2017).

ruling against Canada, Judge Chantal Masse of the Quebec Superior Court reflected on the government's limited approach following the BC Court of Appeal decision in *McIvor*, and urged the government not to do the "bare minimum," and "wait for the courts to rule on a case by case basis." The Judge characterized this governmental tendency as a "certain legislative abdication." The remedy was temporarily suspended to give Canada time to remove the sex discrimination from the *Indian Act*. In October of 2015, the Harper Conservative government was defeated by the Trudeau Liberals. The Trudeau government announced that it would not appeal Judge Masse's decision. In 2017, in a follow-up hearing in *Descheneaux* during the Bill S-3 law reform process, Judge Masse reiterated the Court's concerns about the narrow approach to removing sex discrimination taken by the government following BC Court of Appeal decision in *McIvor*. At this time, Canada sought an extension of time before the ruling of constitutional invalidity in *Deschenaux* came into force.

55. The concerns of Judge Masse proved to be well founded. Bill S-3 is the product of yet another failed law reform process in which the new Trudeau government had the opportunity, and more than two years, to eliminate all of the sex discrimination, and yet chose deliberately to re-enact the core of the discrimination.

56. The Government of Canada introduced the first version of Bill S-3 in the Senate in October 2016. In May 2017, after considering Bill S-3 and hearing from witnesses, the Senate Committee on Aboriginal Peoples decided to amend Bill S-3 to remove the hierarchy between s. 6(1)(a) and s. 6(1)(c). The Senate Committee (of which Sandra Lovelace Nicholas, an Indigenous woman and the Petitioner in *Lovelace v. Canada* is a member, and which is chaired by Lilian Dyck, an Indigenous Senator) introduced an amendment intended to create immediate s. 6(1)(a) entitlement for Indigenous women and their descendants born prior to April 17, 1985, on the same basis as the men and their descendants. This was the very amendment language that the Liberals supported during the law reform process in 2010, when they were in opposition. The amendment is known as "6(1)(a) all the way." Later, in June of 2017, a version of the "6(1)(a) all the way" amendment was passed by the full Senate.

57. However, the Senate's "6(1)(a) all the way" amendment was rejected by the Trudeau-led Liberal government, which holds a majority of seats in the House of Commons. The Senate's 6(1)(a) all the way amendment was stripped from Bill S-3 by the House of Commons Committee on Indigenous and Northern Affairs. On June 21, 2017, the House of Commons passed Bill S-3, minus the Senate's 6(1)(a) all the way amendment. In order to break a stalemate between the House of Commons and the Senate, the government's representative in the Senate introduced a new motion in the Senate to amend Bill S-3 which was ultimately passed. The government's newly amended Bill S-3 contained the essence of 6(1)(a) all the way but, as explained above, the government's 6(1)(a) amendment would not actually remedy the sex discrimination. Rather, it was fatally flawed by being subject to a delayed-coming-into-force clause with no fixed dated.

58. The Senate Committee on Aboriginal Peoples and the Senate, in a take it or leave it situation, had no choice but to back down and accept the government's version of Bill S-3. It was clear that the government had no intention of moving from its position. And, as in 2010, there was government fearmongering about the dangers of failing to meet the Court's deadline and the Registrar's potential lack of jurisdiction to register newborns in Quebec if certain provisions of s. 6 were deemed to be of no force and effect because of the *Charter* violations successfully challenged in *Descheneaux*. On December 4, 2017 the House of Commons passed the current discriminatory Bill S-3.

59. Essentially a repeat of the failed 2010 legislative reform process, the 2017 process reveals the continuing resistance on the part of successive federal governments, led by different political parties, to eliminating the sex discrimination from the *Indian Act*. The Bill S-3 process also demonstrates a shocking disregard for the content and immediate nature of the State Party's Covenant obligations.

N. Consultation and Extreme Delay

60. The State Party contends that it needs more time to consult First Nations before eliminating the sex discrimination.[56] The Applicants submit that Canada's attempt to insert a wedge between the individual

[56] State Party's Supplemental Submission, January 31, 2018.

equality rights of Indigenous women and the collective rights of First Nations is a nothing more than a delay tactic. Consultation about whether to eliminate sex discrimination is not appropriate. There is no collective right of Band Councils in First Nations communities to discriminate on the basis of sex. The enjoyment by Indigenous women of their rights to equality are neither subject to consultation nor negotiation. The equality rights of Indigenous women are not commodities to be traded in a process of reconfiguring nation-to-nation relations.

61. The reasoning of the Canadian Human Rights Tribunal on the issue of consultation in the case of *First Nations Family and Child Caring Society v. Attorney General*[57] is applicable here. In that case, as here, Canada attempted to use the notion of "duty to consult" as an excuse for inaction to end federal government discrimination against children living on First Nations reserves who are in need of child welfare services. The Tribunal rejected Canada's contention that consultation with First Nations communities must be undertaken before implementing the Tribunal's remedies designed to address longstanding discrimination by Canada. In its fourth decision on remedy in the child welfare litigation under the *Canadian Human Rights Act*, the Tribunal found that consultation is important for long-term reform, but that the need to consult about long-term reforms does not excuse Canada from the legal obligation to provide immediate relief from the federal government's discrimination.[58] Similarly, here, delay in eliminating the federal government's own sex discrimination cannot be justified, even if there is a need to consult about other long-term reforms to the *Indian Act*.

62. Furthermore, consultation is not necessary because the issue of discrimination raised by the Applicants' Petition is narrow and particular: preferential treatment of the male line in the s. 6 criteria for determining entitlement to status. As previously explained by the Applicants, status is exclusively concerned with the special relationship between individuals of Indigenous descent and the Government of

[57] 2018 CHRT 4.
[58] *First Nations Family and Child Caring Society v. Attorney General*, 2018 CHRT 4, para. 55.

Canada.[59] The 1985 *Act* severed status from band membership by giving bands the ability to create membership codes.[60]

63. The State Party contends that the question for the government is not whether to implement the government's 6(1)(a) amendment but how to ensure that the proper supports and resources are in place for First Nations communities and individuals who would potentially gain status recognition.[61] This wrongly conflates the distinction between status registration and band membership created by the 1985 *Indian Act*. The State Party can, and must, eliminate sex discrimination from its status registration regime immediately.

64. The Applicants do not suggest that sex discrimination with regard to band membership would be consistent with the equality provisions of the Covenant, but rather that band membership is a distinct issue that is not raised by the Applicants' Petition. For greater certainty, the Trial Court remedy stated:

> (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 descendents, 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 descendents over matrilineal descendents 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

[59] Applicants' Initial Submission, paras. 30, 59, 60, 75, 94, 138, 144, 188, 248.
[60] Applicants' Submission, June 20, 2016, paras. 25-30.
[61] State Party Supplemental Submission, November 29, 2017, para. 24.

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 descendents, 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;[62]

65. The Applicants acknowledge that there is a long colonial history of the State Party depriving First Nations of resources that are rightfully theirs and needed to support their members, which much be addressed as part of building a new nation-to-nation relationship. However, those broad issues are beyond the scope of the Applicants' Petition. There is no valid reason for the State Party not to remove sex discrimination from the status registration provisions of the *Indian Act*, immediately. This in no way precludes the State Party from holding long-term consultations on reforms with First Nations communities about broader issues relating to band membership, First Nations citizenship, reconciliation, and requirements of First Nations for resources to support their members.

66. Canada has had ample opportunity to consult First Nations about sex discrimination in the criteria for determining entitlement to status under the *Indian Act*. There were consultations related to the 1985 amendment to the *Indian Act*. The government conducted an engagement process with First Nations following the 2011 amendments. The government conducted another engagement process in 2017.[63] The Applicant, Sharon McIvor, participated in these consultation processes, in 1985, in 2011, and in 2017. The Applicants' position that further consultation is neither appropriate nor necessary is supported by Indigenous organizations in Canada. In this proceeding before the Committee, Grand Chief Stewart Philip deposed on June 17, 2016 that:

> UBCIC [Union of BC Indian Chiefs] also participated in the parliamentary review process for Bill C-3 in 2010, to urge Canada to completely eliminate the sex discrimination in the status provisions. UBCIC was deeply disappointed by Canada's decision to once again engage in piecemeal reform, rather than removing the sex discrimination completely and finally. UBCIC's submissions were ignored. Bill C-3 addressed some of

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62 *McIvor v. The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 1732, para. 9, Annex 4 to the Applicants' Initial Submission.

63 State Party's Submission, November 23, 2017, paras. 11-12.

> the discrimination but left most of it in place. As a consequence, Aboriginal individuals and communities have continued to suffer under the discriminatory dictates of the sex-based criteria for determining Indian status, contrary to the non-discrimination requirements of the ICCPR [*International Covenant on Civil and Political Rights*], UNDRIP [*United Nations Declaration on the Right of Indigenous Peoples*].[64]

67. Grand Chief Stewart Philip deposed further that:

> It is the position of the UBCIC that there is no impediment to Canada eliminating the sex discrimination in the status provisions immediately. . . . the time for talk and consultation about whether to continue *Indian Act* sex discrimination is long past. Further consultation on this issue is neither necessary nor appropriate.[65]

68. With regard to remedying the sex discrimination in the *Indian Act*, the repeatedly stated position of UBCIC is that the only effective remedy is to place Indian women and their descendants on the same footing as Indian men and their descendants.[66]

69. Similarly, the evidentiary record before this Committee shows that the Native Women's Association of Canada (NWAC) has requested that the Human Rights Committee "direct Canada to immediately and finally eliminate all sex discrimination from Canada's *Indian Act.*"[67]

70. The NWAC affidavit emphasizes the urgency of the federal government not using consultations as a purported justification for further delay, in light of Canada's failed legislative processes, the repeated recommendations of United Nations Treaty bodies, including the Human Rights Committee itself, and the views of UN experts and

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64 Affidavit of Grand Chief Stewart Philip sworn June 17, 2016, para. 4.

65 Affidavit of Grand Chief Stewart Philip sworn June 17, 2016, para. 9.

66 The Committee is referred to the December 4, 2011 and June 17, 2016 affidavits of Grand Chief Stewart Philip, and the factum of the First Nations Leadership Council filed in the BC Court of Appeal in *McIvor v. Canada*, Annex 5 to the Applicants' Initial Submission.

67 Affidavit of Dawn Harvard sworn June 17, 2016.

the Inter-American Commission on Human Rights (IACHR) that this discrimination should be addressed immediately.[68]

71. The State Party contends that there are numerous safeguards to hold the government accountable for bringing the government's 6(1)(a) amendment into force. This position is not valid. There has already been extreme delay by the State Party in removing *Indian Act* sex discrimination, most recently in the course of this proceeding before the Committee, which the Applicants remind the Committee was commenced in 2010, and which has been suspended and delayed at various points to accommodate the State Party.

72. The Applicants emphasize that the Covenant prohibition against sex discrimination is an obligation of immediacy. The fact is that the so-called safeguards in Bill S-3 are merely reporting requirements. Legally and practically, reporting requirements do not amount to an effective remedy for the Applicants. Nor are they adequate to ensure that a remedy will ever be forthcoming. There is absolutely no guarantee that the government's version of 6(1)(a) all the way will ever be brought into force.

73. As explained in the Applicants' initial two submissions, and in their submission of June 20, 2016 opposing the State Party's request to suspend the Petition, the delay in this case is not only extreme; it is extremely harmful. The Committee is referred to paragraphs 8-17 of the Applicants' June 20, 2016 submission. Canada has failed over an extremely long period of time to take effective remedial action to eliminate the sex discrimination from the *Indian Act*. Highlights of this history are:

- In 1971, Jeannette Corbiere Lavell and Yvonne Bédard brought suit under the sex equality provision of the *Canadian Bill of Rights*.[69] In a notorious ruling, five out of nine judges of the Supreme Court of Canada ruled against Lavell and Bédard.[70]

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[68] Affidavit of Dawn Harvard sworn June 17, 2016, para. 17. The Committee is also referred to the factum of the Native Women's Association of Canada in the BC Court of Appeal in *McIvor v. Canada*, Annex 5 to the Applicants' Initial Submission.

[69] *Canadian Bill of Rights*, SC 1960, c 44.

[70] *Canada (AG) v. Lavell*, [1974] SCR 1349.

- In 1978, the Government of Canada issued a report prepared for the Department of Indian Affairs and Northern Development, entitled *Indian Act Discrimination Against Sex*, acknowledging the sex discrimination in the "marrying out" rule and other provisions of the *Indian Act*.

- In the late 1970s, Sandra Lovelace and the women of Tobique took a petition to the UN Human Rights Committee. In its 1981 decision, *Lovelace v Canada*,[71] the Committee found that the loss of Indian women's status pursuant to s. 12(1)(b) of the 1951 *Indian Act* violated the right to the enjoyment of cultural life under the *International Covenant on Civil and Political Rights*.[72]

- In 1985, the federal government enacted Bill C-31,[73] both in response to *Lovelace* and because of the introduction of Canada's new constitutional equality rights guarantee, s. 15 of the *Canadian Charter of Rights and Freedoms*. The promise was to eliminate all of the sex discrimination.[74] Instead, Bill C-31 removed some of the sex discrimination and carried forward the rest.

- In 1994, Sharon McIvor launched her constitutional sex equality challenge, which was preceded by nearly a decade of unsuccessful litigation and administrative efforts involving the Registrar of Indian and Northern Affairs.

- In 1996, the Royal Commission on Indigenous Peoples criticized the 1985 *Indian Act*'s continuation of sex discrimination.[75] Over the next decade, various UN human rights treaty bodies, including the Human

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71 *Lovelace v. Canada*, Communication No. R6/24, Supp No. 40, UN Doc A/36/40 (1981) at 166.

72 *International Covenant on Civil and Political Rights* (ICCPR) 1966, 999 UNTS 171.

73 Bill C-31, *An Act to Amend the Indian Act*, SC 1985, c 27. Bill C-31 was enacted as *Indian Act*, RSC 1985, c I-5.

74 *Minutes of Proceedings and Evidence of the Standing Committee on Legal and Constitutional Affairs*, 33rd Parl, 1st Sess (7 March 1985), 12:7-12:9 (David Crombie, Minister of Indian Affairs and Northern Development).

75 *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Supply and Services Canada, 1996).

Rights Committee,[76] the Committee on Economic, Social and Cultural Rights,[77] and the Committee on the Elimination of Discrimination against Women (CEDAW),[78] criticized Canada for its continuing discrimination against Indigenous women.

74. It is because of Canada's piecemeal approach to reform that Sharon McIvor has a Petition before this Committee.

75. Since the filing of Sharon McIvor's Petition and the passage of Bill C-3, Canada has been repeatedly urged to eliminate the sex discrimination from the *Indian Act* by this Committee,[79] by the CEDAW,[80] and by the IACHR.[81]

76. In their investigations of the murders and disappearances of Indigenous women and girls in Canada, the CEDAW Committee and the IACHR found as a fact that the sex discrimination in the *Indian Act* is a root cause of the violence.

77. The IACHR, in its report entitled *Missing and Murdered Indigenous Women and Girls in British Columbia, Canada*, found that:

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[76] Human Rights Committee, *Concluding Observations of the Human Rights Committee*, CCPROR, 85th Sess, UN Doc C/CAN/CO/5 (2006) [Human Rights Committee, *Concluding Observations* (2006)].

[77] Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights*, UNGAOR, 36th Sess, UN Doc E/C.12/CAN/CO/5 (2006).

[78] Committee on the Elimination of Discrimination against Women (CEDAW), *Concluding Observations of the Committee on the Elimination of Discrimination against Women*, CEDAWOR, 42nd Sess, UN Doc C/CAN/CO/7 (2008); CEDAW, *Report of the Committee on the Elimination of Discrimination against Women*, UNGAOR, 58th Sess, Supp No. 38, UN Doc A/58/38 (2003).

[79] Human Rights Committee, *Concluding Observations* (2006).

[80] CEDAW, *Report of the Inquiry Concerning Canada of the Committee on the Elimination of Discrimination against Women under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women Committee on the Elimination of Discrimination against Women*, Doc CAN/CEDAW/C/OP.8/CAN/1 (2015) [CEDAW, *Report of the Inquiry Concerning Canada*]

[81] Inter-American Commission on Human Rights, *Missing and Murdered Indigenous Women in British Columbia, Canada*, OEA/Ser.L/V/II, Doc 30/14 21 (2014), Organization of American States <www.oas.org/en/iachr/reports/pdfs/Indigenous-Women-BC-Canada-en.pdf> [IACHR, *Missing and Murdered Indigenous Women*].

- by addressing only particular subsets of Indigenous women who face discrimination, the *Indian Act* as amended by Bill C-3 "fails to fully address remaining concerns about gender equality";[82] and

- Indigenous women face multiple challenges with respect to securing status for themselves and their children, and in some cases the presence of a second, intermediate status classification can rise to the level of cultural and spiritual violence against indigenous women, since it creates a perception that certain subsets of indigenous women are less purely indigenous than those with "full" status. This can have severe negative social and psychological effects on the women in question, even aside from the consequences for a woman's descendants.[83]

78. The decision of the IACHR links *Indian Act* sex discrimination to the murders and disappearances of Indigenous women, finding that:

- with regard to the causes of high levels of violence against Indigenous women, historical *Indian Act* sex discrimination is a root cause of high levels of violence against Indigenous women and the "existing vulnerabilities that make Indigenous women more susceptible to violence";[84] and

- with regard to the State's international obligations, "[a]ddressing violence against women is not sufficient unless the underlying factors of discrimination that originate and exacerbate the violence are also comprehensively addressed."[85]

79. The March 6, 2015 decision of the CEDAW, in its Article 8 inquiry into missing and murdered women in Canada, made the same finding as the IACHR and recommended that:

    - [Canada] amend the *Indian Act* to eliminate discrimination against women with respect to the transmission of Indian status, and in particular to ensure that [Indigenous] women enjoy the same rights as men to transmit status

[82] IACHR, *Missing and Murdered Indigenous Women*, para. 68.
[83] IACHR, *Missing and Murdered Indigenous Women*, para. 69.
[84] IACHR, *Missing and Murdered Indigenous Women*, paras. 93, 129.
[85] IACHR, *Missing and Murdered Indigenous Women*, para. 306.

> to children and grandchildren, regardless of whether their [Indigenous] ancestor is a woman, and remove administrative impediments to ensure effective registration as a status Indian for [Indigenous] women and their children, regardless of whether or not the father has recognized the child.[86]

80. Similarly, the UN Human Rights Committee, following its 2015 periodic review of Canada, urged Canada to "remove all remaining discriminatory effects of the *Indian Act* that affect indigenous women and their descendants, so that they enjoy all rights on an equal footing with men."[87]

81. Following an official visit to Canada in 2018, Dubravka Šimonovic, the UN Special Rapporteur on Violence Against Women, provided initial observations, calling for the urgent elimination of the legal provisions that discriminate against Indigenous women in the *Indian Act*. She stated on April 23, 2018:

> Indigenous women have been discriminated historically even by the law; the *Indian Act* provided that First Nation women should not be given the same choice of status if they married men outside their communities and although this law prevailed for more than a century, reforms still fall short in providing equality to indigenous women and their descendants, which further results in the unequal access of benefits and services.
>
> On several occasions, the CEDAW, the Human Rights Committee and the IACHR have recognized that sex discrimination in the *Indian Act* was a root cause for violence.
>
> I would like to echo their recommendations and call for the urgent elimination of the legal provisions that discriminate against indigenous women in the *Indian Act*.[88]

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86 CEDAW, *Report of the Inquiry Concerning Canada*, *supra* note 80, para. 219.

87 Human Rights Committee, *Concluding Observations of the Human Rights Committee*, CCPR, 114th Sess, UNDOC C/CAN/CO/7 (2015), paras. 17-18.

88 http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22981&LangID=E. See also the UN press release of April 23, 2018.

82. The Applicants remind the Committee that delay in remedying the *Indian Act* sex discrimination is harmful to Sharon McIvor and to many other Indigenous women and their descendants because it perpetuates the perception that Indigenous women are less worthy and less deserving of respect and equal treatment than their male counterparts.

83. In addition, delay means that individuals are denied access to valuable tangible benefits that can never be recovered. It bears emphasizing that the challenged discrimination only applies to individuals of Indigenous descent born prior to April 17, 1985. Some members of the affected group are elderly. Each year that the discriminatory regime survives, individuals of Indigenous descent die without having gained status and without having been able to pass it to their descendants.

84. The Applicants reiterate that Canada has failed over an extremely long period of time to take effective remedial action to eliminate the sex discrimination from the *Indian Act*.

85. The State Party contends that its approach in failing to immediately eliminate sex discrimination is in keeping with the government's renewed nation-to-nation relationship with Indigenous peoples and its endorsement of the *United Nations Declaration on the Rights of Indigenous Peoples*.[89] The Applicants submit that, on the contrary, the continuation of sex discrimination in Canada's status registration regime is a blow for reconciliation and inconsistent with the UNDRIP. In particular, the continuing failure to treat some Indigenous women and their descendants as equals because of longstanding legislated sex discrimination against them, threatens to poison those processes.

86. The UNDRIP reinforces the claims of Indigenous women to the protection of their domestically and internationally guaranteed equality rights, including their Covenant rights. Article 1 of the UNDRIP provides that Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the *Charter of the United Nations*,[90] the

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89 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2008).

90 *Charter of the United Nations*, 26 June 1945, Can TS 1945 No. 7.

[91] and international human rights law.

87. Article 44 of UNDRIP specifically guarantees all the rights and freedoms contained in it equally to male and female Indigenous persons, and Article 22(2) provides that States, in conjunction with Indigenous peoples, will ensure that "indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination."

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

A. Overview of Issues Related to Admissibility

88. The State Party contends that the Applicants' Petition is inadmissible *ratione personae*, *ratione materiae*, and *ratione temporis*.[92] In their Initial Submission, the Applicants demonstrated the admissibility of their claims with regard to all the requirements of the First Optional Protocol to the Covenant: the Applicants are personally and directly affected by the sex discrimination in the legislative scheme; the operative period of the claims is post-April 17, 1985; and the Applicants have exhausted all available domestic remedies.[93]

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

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91 GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71.

92 State Party's Submission, August 23, 2011, paras. 58-83. See Applicants' Submission, December 5, 2011, paras. 33-63.

93 Applicants' Initial Submission, paras. 112-131.

B. Admissibility Ratione Personae

90. The State Party submits that through a combination of litigation and legislation, the Applicants have obtained an effective remedy.[94] This argument is without merit. As explained at paragraphs 72-87 of the Initial Submission, the Applicants were entirely successful in the British Columbia Supreme Court, which held that the registration provisions of the 1985 *Indian Act* should be interpreted so as to entitle persons to registration under s. 6(1)(a) who were previously not entitled to full s. 6(1)(a) status solely as a result of the preferential treatment accorded to Indian men over Indian women born prior to April 17, 1985 and to patrilineal descendants over matrilineal descendants born prior to April 17, 1985. The Trial Court decision required that the sex discrimination be totally eliminated from the registration scheme and, by necessary implication, that the Applicants be granted full s. 6(1)(a) status to place them on the same footing as others to whom status had been accorded under the previous discriminatory regime, on a going-forward basis.[95]

91. However, the scope of the declaratory relief ordered by the Trial Court was radically reduced by the Court of Appeal, which reversed the Trial Decision in part, and granted only partial relief for the discrimination the Applicants had challenged. To contend, as the State Party does, that the Court of Appeal "took a different approach to the facts" glosses over the legal significance of the approach taken by the Court of Appeal. The Court of Appeal accepted the preservation of acquired rights as a rationale for the continuation of longstanding sex discrimination in the legislation and failed to address the systemic dimensions of this discrimination. By doing so, the Court undermined the future realization of the rights guaranteed by the Covenant, as well as denying effective relief to the Applicants. Both the preservation of acquired rights rationale and the extreme degree to which the Applicants' systemic challenge was rejected are devastating defeats for the Applicants and future respect of Covenant rights in Canada.[96]

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94 State Party's Submission, August 23, 2011, paras. 3, 58, 61, 134.
95 Applicants' Initial Submission, para. 75.
96 Applicants' Initial Submission, paras. 79-81, 85.

92. The Court of Appeal sanctioned the continuation of a discriminatory hierarchy of rights, a reality that the State Party's reference to preservation of rights seeks to obscure.[97]

93. Neither have the Applicants received an effective remedy from the State Party's 2011 legislative response, which merely implements the Court of Appeal's decision, rather than totally eliminating the sex discrimination embedded in the scheme. The 1985 *Indian Act* as amended by Bill C-3, and then by Bill S-3 in 2017, leaves intact the core of the sex discrimination embedded in the registration provisions, of which the Applicants successfully complained in the British Columbia Supreme Court, and categorically excludes Sharon McIvor and Jacob Grismer from eligibility for full s. 6(1)(a) status.

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

C. Applicants' Comments on the State Party's Submission Regarding Actio Popularis

95. The State Party submits that the Applicants are attempting to raise allegations that do not arise on their facts.[98] In its most recent submission, Canada focuses on the fact that the 2017 amendments continue to exclude from eligibility grandchildren born prior to September 4, 1951 who are descendants of women who married out.

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97 State Party's Submission, August 23, 2011, paras. 23-24, 41, 112.

98 State Party's Submission, August 23, 2011, paras. 75-79; State Party's Supplemental Submission, January 31, 2018, para. 16.

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

97. This is not an *actio popularis*. Sharon McIvor and Jacob Grismer have shown that the sex-based hierarchy embedded in the 1985 *Act* affects them personally and directly, and that the discrimination they suffer—their continuing ineligibility for s. 6(1)(a) status—has not been remedied by the 2011 amendments. They have also shown that it has not been remedied by the 2017 amendments.

98. The Applicants have illustrated the consequences for Indigenous women and their descendants of the State Party's repeated failures to totally eliminate the sex discrimination from the scheme in 1985, 2011, and 2017. Under the government's approach, no one could ever invoke the Covenant to require a State Party to totally eliminate sex discrimination in a law. It would always be possible to sever some of the diverse impacts that differ in some respects from those experienced by a particular victim. In this respect, a challenge to sex discrimination in a *law* of broad application is different from a challenge to an *isolated discriminatory act*.

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

100. It must be borne in mind that the Applicants' challenge *only* pertains to the unequal treatment of Indigenous women and their descendants born prior to April 17, 1985. The Applicants reiterate that, as this group ages, each additional year of delay in fully and finally correcting the discrimination means that fewer and fewer victims of the discrimination will be alive to benefit from a remedy. Canada's approach to the issue of standing threatens to permanently immunize the State Party from answering for the consequences of its legislated sex discrimination against Indigenous women and their descendants

born prior to April 17, 1985. To perceive and remedy the sex discrimination in the State Party's registration scheme does not depend on evidence that must be adduced on a case-by-case basis. It is simply a fact that the 2011 amendments, followed by the 2017 amendments, only partially ameliorate the sex discrimination of which the Applicants complain, and which they have experienced directly.

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

102. In any case, the State Party's submission that the Applicants' allegations with respect to the continuing discrimination against descendants of unmarried Indian women do not arise on the authors' facts, is misleading. The State Party submits that Sharon McIvor was eligible for registration under the 1951 *Indian Act* but lost that entitlement in 1970 when she married a non-Indian.[99] This is inaccurate. The proposition that Sharon McIvor was actually eligible for status prior to 1985 is a fiction.

103. When she applied for registration under the 1985 *Act*, the Registrar determined that she was only entitled to inferior s. 6(2) status and her son, Jacob Grismer, was ineligible for status because neither Jacob Blankinship, Susan Blankinship's father (Sharon McIvor's maternal grandfather) or Ernest McIvor (Sharon's father) were recognized as Indians. As the Trial Judge explained: "If they [Sharon McIvor or her mother] had applied [for status] prior to 1985, they almost certainly would have been refused."[100]

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

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[99] State Party's Submission, August 23, 2011, paras. 49, 77.

[100] TC Decision para. 122. See para. 70 of the Applicants' Initial Submission, quoting the Trial Court in full.

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

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

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

108. The State Party argues further that the allegation with regard to the scheme's continuing discrimination against illegitimate children of Indian women is not substantiated because a child born prior to 1985 to a common-law union between an Indian woman and a non-Indian man has been entitled to status since 1985.[101] This argument misses the point. Prior to April 17, 1985, children of unmarried Indian women were subject to disqualification from status because of non-Indian paternity. Under the 1985 *Act*, such children were consigned to the s. 6(1)(c) or s. 6(2) subclasses and never afforded full s. 6(1)(a) status. In contrast, under the 1985 *Act*, the male child of an unmarried male Indian and a non-status woman is entitled to s. 6(1)(a) status. Moreover, that unequal treatment of matrilineal descendants is not corrected by the 2011 amendments. Nor is it corrected by the 2017 amendments.

109. This is exactly how the Registrar disposed of Sharon McIvor's application for status when she applied initially. Her unmarried mother was consigned to s. 6(1)(c) status because of her non-Indian paternity.

[101] State Party's Submission, August 23, 2011, para. 77.

In turn, Sharon McIvor was consigned to s. 6(2) status and her children were, therefore, excluded from status.

D. Exhaustion of Remedies

110. The State Party notes that there is ongoing litigation by other plaintiffs, and argues in the alternative that aspects of the Applicants' claim are therefore inadmissible for non-exhaustion of domestic remedies.[102] As established in the Applicants' Initial Submission, the facts on which the claims presented to the Committee rest are part of the record in the domestic litigation.

111. The Committee is referred to paragraphs 125-129 of the Applicants' Initial Submission. The Applicants reiterate that further exhaustion of domestic remedies should not be required in relation to a challenge by them to s. 6 of the 1985 *Act* as amended. Because the Bill C-3 amendment is tailored to the decision of the Court of Appeal and the Supreme Court of Canada denied leave to appeal that decision, the matter is settled in domestic law. It would be futile to seek further judicial redress.

112. The Applicants also reiterate that it is well established in the Committee's jurisprudence that the exhaustion of domestic remedies is not required "if the jurisprudence of the highest domestic tribunal has decided the matter at issue, thereby eliminating any prospect of success of an appeal to the domestic courts."[103] No doubt Canada is relying on the Court of Appeal decision in *McIvor* to resist any pending challenges to s. 6 of the registration scheme as amended.

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

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[102] State Party's Submission, August 23, 2011, para. 79. See Applicants' Submission, December 5, 2011 paras. 55-58.

[103] *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.

E. Admissibility Ratione Temporis

114. The State Party submits that allegations relating to the eligibility for status of Sharon McIvor and Jacob Grismer under the 1951 amendments are inadmissible *ratione temporis*.[104] This argument does not assist Canada since the Applicants are not raising allegations under the 1951 amendments. Their *Charter* challenge and their Petition to this Committee are solely concerned with the discriminatory effects of the post-1985 regime. The only reason that it may appear otherwise is that the post-1985 scheme incorporated the discrimination of prior regimes. That is a structural feature of the legislation. It does not render the Petition inadmissible *ratione temporis*. The Committee is referred to the Applicants' arguments on admissibility *ratione temporis*, contained at paragraphs 117-124 of their Initial Submission.

115. The State Party argues in the alternative that any discriminatory impact on the Applicants did not become an issue for the Applicants until 2006 or 2007.[105] This is inaccurate and misleading**.** *If Sharon McIvor had been male, she and her son Jacob would both have become eligible for s. 6(1)(a) registration status as of 1985. It is only because of the sex discrimination embedded in the 1985 Act, which continues to this day, that Sharon McIvor does not have s. 6(1)(a) status and is unable to transmit s. 6(1)(a) status to her son, Jacob Grismer.*

F. Ratione Materiae

116. The State Party submits that certain aspects of the communication are inadmissible because the alleged harms are not attributable to the government.[106] This Committee has repeatedly stated that an applicant does not need to prove the alleged violation at the admissibility stage. The Applicants have clearly submitted sufficient material substantiating their claims for the purposes of admissibility.

117. The substance of the State Party's argument regarding the responsibility of the government for the effects of its discriminatory

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[104] State Party's Submission, August 23, 2011, paras. 67-70. See Applicants' Submission December 5, 2011, paras 59-61.

[105] State Party's Submission, August 23, 2011, paras. 71-74.

[106] State Party's Submission, August 23, 2011, paras. 80-83. See Applicants' Submission December 5, 2011, paras. 62-63.

legislation on the Applicants' enjoyment of their Covenant rights within First Nation communities goes to the merits of the Applicants' claim. The substance of State Party's argument is, therefore, addressed below.

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

G. Existence of Differential Treatment

118. The State Party argues that there is no is differential treatment under the *Act*.[107] The Applicants maintain, and have demonstrated in their presentation of the facts, that the 1985 *Act* as amended treats female Indians and their descendants differently than male Indians and their descendants. The continuing preference embodied by the registration regime for male Indians and their descendants affects the equal enjoyment of both the tangible and intangible benefits of status. The effects of the registration scheme on the enjoyment of the intangible benefits of status—including the sense of cultural identity and belonging associated with status recognition—are no less a matter of government responsibility than the effects on the enjoyment of tangible benefits.

119. The government created the link between status and cultural identity through its promulgation of a legislative regime defining "Indianness". Historically, the government regulated virtually all aspects of Indigenous life. The State Party itself acknowledged in its 2011 submission that eligibility for, and status as, an Indian has become "a significant source of personal identity for many First Nations persons," and that status is important to the Applicants.[108] In 2017 the State Party informed the Committee that it recognizes that there are "significant links, for some Indigenous Canadians, between Indian status and their personal identity *as Indigenous persons*."[109] The government cannot now claim that it should not be held responsible for the effects of the status registration regime as experienced by individuals and perceived by their communities. In any case, the Covenant requires the

[107] State Party's Submission, August 23, 2011, paras. 52-54, 88-92. See Applicants' Submission, December 5, 2011, paras. 64-98.
[108] State Party's Submission, August 23, 2011, paras. 101, 103.
[109] State Party Supplemental Submission, November 29, 2017, para. 35 [emphasis added].

government to ensure as well as respect the rights guaranteed. Therefore, the State Party cannot disclaim all responsibility for discrimination by non-state actors.

120. The State Party does not acknowledge the enhanced sense of cultural identity that full s. 6(1)(a) status connotes and confers. This is unpersuasive and inconsistent with the State Party's recent acknowledgement regarding the linkage between State registration of status and Indigenous identity. The discriminatory denial of full s. 6(1)(a) status, and the enhanced sense of cultural identity that full status connotes and confers, directly and significantly impacts the Applicants' Covenant rights to the equal exercise and enjoyment of cultural rights as First Nations individuals.

Different Categories of Status

121. The Applicants' Initial Submission explains that the 1985 *Indian Act* created three categories of status:[110]

(i) It accords full s. 6(1)(a) status to those who were entitled to status under the previous patriarchal regime, including men who married non-status women, their wives, and their children;[111]

(ii) It grants lesser s. 6(1)(c) 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).

122. The 2011 amendments did not eliminate the distinctions between the three categories of status. Nor do the 2017 amendments eliminate the distinctions between the three categories of status. The Applicants reiterate that s. 6(1)(a) is superior to s. 6(1)(c) and s. 6(2) status in

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

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

terms of ability to transmit status and in the importance and legitimacy that s. 6(1)(a) status connotes and confers.

123. Bill C-3 merely extended s. 6(1)(c) status to individuals who can satisfy various exclusionary criteria.

124. In 2017, Bill S-3 removed another sliver of discrimination by extending s. 6(1)(c) status to some other subgroups. Sex discrimination is thereby perpetuated by withholding s. 6(1)(a) status from Indian women who married out and from matrilineal descendants.

Substantive Discrimination

125. The State Party's submission that there is only one status, and that there is no significant legal distinction between s. 6(1)(a) status and s. 6(1)(c) status is inaccurate and misleading.[112] The Committee is referred to paragraphs 69-87 and paragraphs 174-184 of the Applicants' Initial Submission, in which it is explained that the sex-based denial of s. 6(1)(a) status to women who married out and matrilineal descendants imposes substantive discrimination based on the following indicia:

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

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

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

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

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

127. The indisputable fact concerning the operation of the legislative scheme is that, under the 1985 *Act* as amended by Bill C-3 and Bill

[112] State Party's Submission, August 23, 2011, paras. 26, 82, 92, 100, 130.

S-3, s. 6(1)(a) status is superior to s. 6(1)(c) status in terms of ability to transmit status. The Applicants have provided the example of the woman who is relegated to s. 6(1)(c) status because she married out prior to September 4, 1951. Her grandchild born prior to September 4, 1951 continues to be excluded from status, notwithstanding the 2017 amendments. As a general rule, for the grandchildren on the male line born prior to April 17, 1985, the operation of the second-generation cut-off is postponed for at least a generation.

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

129. Canada submits that the *Indian Act* does not confer the ability to "transmit" status, since the *Indian Act* merely conveys status based on the degree of ancestry required.[113] The Applicants contest this characterization of the operation of the *Indian Act* on several grounds. First, as explained in the Applicants' Initial Submission at paragraphs 158-162, it is well established under international human rights jurisprudence that the ability to "transmit" nationality to a child is properly characterized as transmission.[114] As the Trial Court observed, status under the *Indian Act* is a concept that is closely akin to the concepts of nationality and citizenship.[115] The State Party's argument that the transmission of status is not a benefit of the registration scheme was exhaustively considered and properly rejected in the domestic court proceedings.[116]

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[113] State Party's Submission, August 23, 2011, paras. 94-100.

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

[115] TC Decision, para. 192.

[116] TC Decision, paras. 176-198.

130. The Trial Court found that "numerous publications that emanate from government ministries make use of the language of transmission of status in discussions of registration provisions under the 1985 *Act* and its previous versions."[117]

131. The Trial Court found that Canada's submission with regard to "transmission" of status was "a strained and unnatural construct that ignores the significance of the concept of Indian as an aspect of cultural identity."[118]

132. The Trial Court found further that the State Party's "approach would treat status as an Indian as if it were simply a statutory definition pertaining to eligibility for some program or benefit. However, having created and then imposed this identity upon First Nations peoples, with the result that it has become a central aspect of identity, the government cannot now treat it in that way, ignoring the true essence or significance of the concept."[119]

133. The Applicants urge this Committee to rely on the well-supported conclusions of the Trial Court on this point. The Applicants also point out that the Court of Appeal agreed that "the right to transmit status to one's offspring can be of significant spiritual and cultural value."[120]

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

134. The State Party disputes that the status hierarchy embedded in s. 6 that prevents women who married out and matrilineal descendants from holding full s. 6(1)(a) status embodies a sexist stereotype of female inferiority or perpetuates the notion of women as property.[121] Canada's submission fails to take into account the history of Canada's treatment of Indigenous people, and Indigenous *women* in particular, under

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[117] TC Decision, para. 187.
[118] TC Decision, para. 193.
[119] TC Decision, para. 193.
[120] *McIvor v. Canada (Registrar, Indian and Northern Affairs)*, 2009 BCCA 153. The "CA Decision" is Annex 6 to the Applicants' Initial Submission, para. 71.
[121] State Party's Submission, August 23, 2011, para. 90; Applicants' Submission, December 5, 2011, para. 79.

successive versions of the *Indian Act* regime for determining entitlement to Indian status.

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

136. The Applicants emphasize that the Trial Court expressly agreed with their submission in the domestic proceeding to the effect that

> the perpetuation of sexist stereotypes of Aboriginal women as incapable of transmitting Indian culture and heritage to their children has discriminatory effects on Aboriginal women, and their descendants. The invidious message of this stereotype is that neither Aboriginal women nor their descendants are deserving of equal concern and respect. This message . . . . is particularly damaging to Aboriginal women who are ineligible for s. 6(1)(a) status under the 1985 *Act* because they embody the sexist stereotype of female inferiority.[122]

137. The Applicants also highlight their own evidence that the continuing denial of full s. 6(1)(a) status to Indigenous women who married out and their descendants connotes the inferiority and deficiency of Indigenous women and perpetuates the belief that "Bill C-31 women", who have s. 6(1)(c) status rather than full s. 6(1)(a) status under the 1985 *Act*, are "less Indian" than their male counterparts.[123]

138. The Applicants reiterate the finding of both the CEDAW Committees and the IACHR that the inferior status conferred on Indigenous women by the *Indian Act* has caused longstanding and harmful discrimination, and is a root cause of the violence they experience. The State Party submits that the importance of status as an element of identity may vary among First Nations individuals.[124] To establish their claim, it is not necessary for the Applicants to demonstrate that there is no

[122] TC Decision, paras. 257, 262.
[123] Applicants' Initial Submission, paras. 107-111, 178-179.
[124] State Party's Submission, August 23, 2011, para. 103.

variation in the importance that Indian status, or different categories of status, may hold for various First Nations individuals.[125] The Applicants' evidence concerning the legitimacy associated with s. 6(1)(a) status in their communities is convincing[126] in light of the historical context of sex discrimination in the registration regime, and the fact that s. 6(1)(a) status is still superior in terms of ability to transmit status.

139. The State Party contends that status is not a marker for legitimacy or cultural identity, except in the personal perception of the Applicants. The State Party argues that the Applicants have conflated cultural identity and status to a great degree.[127]

140. The Applicants reiterate that characterizing the distinctions in status categories as merely a matter of the Applicants' idiosyncratic perceptions trivializes the nature of the rights affected and ignores the evidence that has been presented. This evidence indicates that there is a perception within First Nations communities that "real" Indians are those individuals who have s. 6(1)(a) status, that s. 6(1)(a) status is regarded as superior, and that 6(1)(c) status is regarded as inferior and is stigmatized.[128]

141. The Applicants reiterate that within their communities there are differences in the degree of esteem and legitimacy associated with status categories. These differences are not merely a matter of the Applicants' personal perceptions. The Applicants advise the Committee that it is a widely held view in First Nation communities that "real Indians" have s. 6(1)(a) status and s. 6(1)(c) status is inferior.

142. The Trial Court concluded that:

> Ms. McIvor's observations about the importance of registration with respect to a sense of identity were echoed in the *Royal Commission Report* [*on the Rights of Aboriginal Peoples*] at pp.

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[125] State Party's Submission, August 23, 2011, para. 103.
[126] Applicants' Initial Submission, paras. 15, 19, 22, 60, 92, 96, 101, 114, 141, 146, 183, 212, 235.
[127] State Party's Submission, August 23, 2011, paras. 101-105.
[128] Applicants' Initial Submission, para. 108. See also TC Decision, paras. 136-137.

> 22-24, which reported that the Department of Indian and Northern Affairs conducted a survey of 2,000 *Bill C-31* registrants, and almost two-thirds of those canvassed reported that they had applied for Indian status for reasons of identity or because of the culture and sense of belonging that it implied.[129]

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

> Discrimination based on sex is, of course, contrary to the *Canadian Bill of Rights* and now contrary to the *Charter* contained in the *Canadian Constitution Act, 1981*. Discrimination based on sex goes against international covenants which Canada has signed. It is therefore within the realm of human rights protection. This is the Federal Government's primary interest, and one which has caused this nation so much embarrassment. If a denial of Indian rights to a certain segment of Indian women were not contrary to the human rights principle of equality of the sexes, there would be no keen interest in this issue. . . .
>
> The first concern of Indian women is that they have been denied their birthright. They have been denied the right to call themselves Indian. They have been denied their nationality. By birth and by blood, Indian women are a part of the First Nations of Canada. It is not so important how or in what manner they have been denied their nationality; what is important is that they have been denied this right. It so happens that Indian women

[129] TC Decision, para. 138.

> have been systematically discriminated against on the basis of their sex in federal *Indian Act*s since 1869.
>
> However, Indian women are not merely saying that they do not want to be discriminated against on the basis of sex; what they have been saying is that they do not want to be denied their birthright for any reason. Indian women are as aware as Indian men that Indians are specifically mentioned in the *British North America Act*, now called the *Canada Act*. Indian women are as aware as Indian men that certain rights flow to Indians in Canada because of the Constitution of this country. They will not accept any recommendation which continues to deny Indian women the same rights enjoyed by Indian men. Equality of the sexes is an issue here because the Federal Government, through the *Indian Act*, chose to discriminate against Indian women and deny them their heritage because they married non-Indians. The bottom line for Indian women in the country is that by birth and by blood they are Indians and will not accept any proposal which continues to deny Indian women this recognition.[130]

Dignity

144. The State Party submits that the status regime does not and cannot confer human dignity because human dignity is inherent.[131] This misses the point. The State Party has an obligation to respect human dignity. By maintaining a discriminatory statutory regime the State Party has undermined respect for the Applicants' dignity. The State Party's comments regarding human dignity also fail to acknowledge the significance of Indian status as an aspect of identity, and the esteem and legitimacy associated with s. 6(1)(a) status in particular.

145. The State Party contends that the effects of the registration scheme on the perceptions of cultural identity held by the Applicants or others in their community are not a matter of its responsibility under the Covenant.[132] In their Initial Submission, the Applicants described the detrimental effects of the sex discrimination in the post-1985

[130] TC Decision, para. 135, quoting Standing Committee of Indian Affairs and Northern Development, September 9, 1982, 2:37-2:38.
[131] State Party's Submission, August 23, 2011, para. 103.
[132] State Party's Submission, August 23, 2011, paras. 80-81, 104-108.

registration scheme.[133] The Applicants once again draw to the Committee's attention Sharon McIvor's evidence that her experience has been that, within Indigenous communities, there is a significant difference in the degree of esteem that is associated with s. 6(1)(a) status and that there is stigma that is associated with being an Indigenous woman assigned to the s. 6(1)(c) subclass. Indigenous women consigned to the s. 6(1)(c) status are thus inferior to, and less Indian than, their male counterparts.[134] The Applicants also highlight Jacob Grismer's evidence that the implication of being denied s. 6(1)(a) status is that his Indian lineage is deficient and inferior, and the hurt of not being eligible for full s. 6(1)(a) status from 1985 onwards is profound.[135]

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

147. The Applicants reiterate that it would be surprising if, after more than a century of living under a State-imposed regime that defines who is an Indian, Indigenous people themselves had not come to view entitlement to registration status as confirmation or validation of their "Indianness" as a matter separate from the capacity to transmit status and access certain tangible benefits which are conferred by status.[136]

148. The State Party attempts to establish a dichotomy between the cultural identity of "First Nations" and status as a source of personal identity.[137] This is a false dichotomy. As the Trial Court found "the concept of Indian, has come to exist as a cultural identity alongside traditional concepts."[138]

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133 Applicants' Initial Submission, paras. 102-111.
134 Applicants' Initial Submission, para. 108.
135 Applicants' Initial Submission, paras. 110-111.
136 Applicants' Initial Submission, para. 176.
137 State Party's Submission, August 23, 2011, paras. 105-107.
138 TC Decision, para. 133.

149. The State Party submits that band membership rather than Indian status is more closely associated with cultural identity.[139] This argument fails to acknowledge the extent to which, over a very long period of time, Canada superimposed, by law, the definition of *both* band membership and status, and treated them as one and the same. The Trial Court found as a matter of fact that "in Aboriginal communities registration status continues to carry significance that is independent of membership in a particular band."[140]

150. The State Party points out that the sense of cultural identity of First Nations is strong.[141] This fact is in no way inconsistent with the Applicants' claim that status and different categories of status affect Indigenous individuals' cultural identity and belonging in their communities.

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

152. The State Party submits that status is not official recognition of State recognition of an individual's cultural identity.[142] It is immaterial whether or not Canada *intends* for registration status to function as an official indication of state recognition of an individual's Indigenous cultural identity. That is its *effect*. Under Canada's approach, the harmful effects of its discriminatory status regime could be ignored. Under the Covenant, the guarantee of equality and non-discrimination extends to both direct and indirect effects of the State Party's conduct in promulgating and maintaining the registration regime.

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139 State Party's Submission, August 23, 2011, para. 106.
140 TC Decision, para. 142.
141 State Party's Submission, August 23, 2011, para. 102.
142 State Party's Submission, August 23, 2011, para. 105.

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

153. The State Party emphasizes that the 1985 *Act* severed status from band membership.[143] It is true that, by formally severing band membership from status, the 1985 *Act* created the possibility that a band could grant membership to a person who lacks status. The Applicants advise the Committee that an overwhelming majority of bands do not grant membership to anyone who is not eligible for registration status. In addition, when a band admits to membership a person ineligible for registration, the band suffers financially: Canada's funding for bands depends on the number of registered Indians they include.

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

H. Absence of Reasonable and Objective Criteria

155. The State Party submits as an alternative argument that, if any differential treatment does exist between the s. 6(1)(a) and s. 6(1)(c) categories for status registration, it is based on reasonable and objective criteria. The State Party depends on the "preservation of acquired rights" as its rationale for the distinction.[144] The Applicants submit that preservation of acquired rights is not a legitimate goal for the differential treatment in the registration regime, since previously acquired rights were conferred under a sex-based status hierarchy created by the State Party. The Applicants refer the Committee to their Initial Submission at paragraphs 185-208 arguing that:

- On the facts of the complaint, preservation of acquired rights is not a legitimate goal because it does not preserve acquired rights—it preserves the *privileged position* of those who acquired registration under discriminatory provisions of previous *Indian Acts*, *carrying forward* past legislated discrimination. Preserving a hierarchy of

[143] State Party's Submission, August 23, 2011, paras. 25, 81, 106.
[144] State Party's Submission, August 23, 2011, para. 109, 112. See Applicants' Submission, December 5, 2011, paras. 99-107.

sex-based rights is a blatantly discriminatory goal and, as such, must always be regarded as inconsistent with the Covenant;

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

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

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

156. The State Party submits that the only distinction between entitlement to s. 6(1)(a) status and s. 6(1)(c) status is one of legislative drafting.[145] This position of the State Party ignores that the intangible benefits conferred by s. 6(1)(a) status are superior and that the criteria for s. 6(1)(a) status registration eligibility prefer patrilineal descent. As the Trial Court found, to view s. 6 as sex-neutral based on the theory that it treats all reinstatees the same, and/or that Sharon Mclvor is treated the same as other reinstatees, would reduce the equality analysis to a "shell game."[146]

157. The State Party submits that the Applicants propose criteria that would base eligibility on matrilineal descent without regard to how many generations an Indigenous individual is removed from the female Indian ancestor in question, and that this approach would raise an issue

[145] State Party's Submission, August 23, 2011, paras. 111-112. See Applicants' Submission, December 5, 2011, paras. 100-107.
[146] TC Decision, para. 213.

of "remoteness."[147] The implication of this argument is that the legislative scheme should impose a barrier to eligibility for female-line descendants that it does not impose on male-line descendants. The Trial Court correctly recognized that, under s. 6(1)(a), a current applicant can obtain registration by establishing direct descent along the male line from an Indian ancestor without regard to how many generations stand between them and that ancestor.[148]

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

159. The State Party submits that it is not required to rectify discriminatory acts that pre-date the Covenant.[149] The Applicants reiterate that their claims do not pre-date the Covenant, but rather concern the carrying forward of discrimination into the post-1985 registration regime.

160. The State Party submits further that the uneven application of the second-generation cut-off was rectified by the 2011 amendments.[150] The Applicants reiterate that after the 2011 amendments and, more recently, the 2017 amendments, the second-generation cut-off is applied unevenly to grandchildren born prior to April 17, 1985 of grandmothers who married out.

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147 State Party's Submission, August 23, 2011, para. 113. See Applicants' Submission, December 5, 2011, paras. 101-107.

148 TC Decision, para. 240.

149 State Party's Submission, August 23, 2011, para. 114. See Applicants' Submission, December 5, 2011, paras. 103-107.

150 State Party's Submission, August 23, 2011, para. 114. See Applicants' Submission, December 5, 2011, para. 104.

161. The State Party also contends that the allegation that the registration scheme discriminates against matrilineal descendants is unrelated to the Applicants' factual situation.[151] This argument seeks to prevent the Committee from addressing ongoing discrimination against matrilineal descendants of status mothers and grandmothers who partnered with non-status men in common-law relationships. The discrimination against these women and their descendants is ongoing in that they continue to be categorically ineligible for s. 6(1)(a) status, notwithstanding the 2017 amendments. An extensive record was established in the domestic proceedings documenting the discrimination against the matrilineal descendants of Indigenous women who did not marry—of whom Sharon McIvor is one. This record, and the lengthy and burdensome nature of the Applicants' efforts, spanning more than two decades, to rectify the discrimination entrenched in the legislation, argue in favour of specific guidance from this Committee to the State Party regarding the total elimination of sex discrimination from the legislation.

162. The State Party submits that, with the adoption of Bill C-3 and, then again, with the adoption of Bill S-3, discrimination has been removed from the status eligibility criteria, and the effects of historic discrimination on the Applicants' eligibility have been removed.[152] This is a merely a reiteration of the State Party's arguments in the context of its challenge to admissibility. The Applicants, in turn, reiterate that the continuing denial of s. 6(1)(a) status to Indigenous women and their descendants discriminates based on sex. The Applicants also reiterate that they are personally and directly affected by the denial of s. 6(1)(a) status to them.

163. It must be concluded that the registration provisions embodied in s. 6 of the 1985 *Act, which are only narrowly modified in the 1985 Act as amended* by Bill C-3 and Bill S-3, continue the very sex discrimination that the 1985 *Indian Act* was intended to eliminate and, as such, violate Article 26. The State Party has been aware for a long time that the Covenant requires the elimination of sex discrimination from its registration regime. In these circumstances, the goal of ensuring respect

[151] State Party's Submission, August 23, 2011, paras. 77-79, 114.
[152] State Party's Submission, August 23, 2011, para. 115; and, with regard to Bill S-3, State Party's Supplemental Submission, January 31, 2018.

for the Covenant would be well served by specific guidance from the Committee to the State Party concerning the total elimination of sex discrimination from the legislation.

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

164. The Applicants have challenged s. 6 of the 1985 *Indian Act* as a violation of Article 27, in conjunction with Articles 2 and 3, based on its effects on the equal enjoyment of cultural identity.[153]

165. In particular, the Applicants have submitted that, 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 following generations on a basis of equality of men and women, and deprives them of the legitimacy conferred by full status.[154] The Applicants' position is that this analysis also applies to the 1985 *Act* as amended, which continues to withhold full s. 6(1)(a) status from women who married out and matrilineal descendants. The Applicants submit that these are essential aspects of their rights as Indigenous individuals to enjoy the right to culture guaranteed by Article 27.

Significant Interference

166. The State Party submits the Applicants have failed to demonstrate any significant interference with their right to enjoy their culture.[155] The Applicants reiterate that a foundational, or essential, aspect of an individual's right to enjoy his or her culture is the formation of a sense of identity and belonging to a group and recognition of that belonging by others in the group.[156] The Applicants also reiterate that capacity to

[153] Applicants' Initial Submission, paras. 27-29, 212-235. See Applicants' Submission, December 5, 2011, paras. 108-117.
[154] Applicants' Initial Submission, para. 212.
[155] State Party's Submission, August 23, 2011, paras. 121-128.
[156] Applicants' Initial Submission, para. 215.

transmit cultural identity is a key component of cultural identity itself.[157]

Bands, Geographic Areas

167. The State Party argues that the Applicants' rights to culture are confined to the practices of the bands in the Merritt area. This reductionist approach is misleading, since the right to the equal exercise and enjoyment of Indigenous culture cannot be defined exclusively with reference to the practices of Indian bands and reserve life in a small geographic area of the Province. The *Indian Act* registration system and its impacts are not geographically confined in this way. The *Indian Act* is federal legislation. It applies to persons of First Nations descent throughout Canada. The scope of the application of Article 27 is not restricted to territories defined by the State Party as Indigenous reserves and the right of Indigenous individuals to the equal enjoyment of their Indigenous cultural identity is not restricted to a particular geographic region within the State Party. The equal ability to transmit status and the equal enjoyment of First Nations identity is not a right that can be circumscribed by the territory of any single First Nation. Sharon McIvor testified that she has had the experience of her identity as an Indian being accepted in the territory of a First Nation that is not her own because she had a status card.[158] This experience demonstrates that the State Party's approach is inconsistent with the reality of how Indigenous culture and identity function.[159]

Lovelace v. Canada

168. The State Party attempts to circumscribe the meaning of the right to Indigenous culture to the specific facts at issue in *Lovelace v. Canada*.[160] The *Lovelace* case revolved around the loss of cultural

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[157] Applicants' Initial Submission, para. 27.

[158] TC Decision, para. 143.

[159] The State Party submission could be interpreted as suggesting that Jacob was eligible for status and band membership as of 1985. (State Party's Submission, August 23, 2011, para. 122.) That is not the case. Jacob was not able to establish his eligibility for status or band membership until 2006 when the government conceded that the Registrar's earlier decisions regarding status could not stand. The State Party submits that the Applicants did not pursue their statutory appeal for many years. (State Party's Submission, August 23, 2011, para. 122.) This is unfair and misleading, for the reasons set out at para. 30, above.

[160] State Party's Submission, August 23, 2011, paras. 125-128.

benefits associated with residence on an Indian reserve. However, the Committee's views in *Lovelace* in no way suggest that the Covenant permits sex discrimination with regard to an Indigenous woman's rights to enjoy cultural life beyond the boundaries of a reserve. The Covenant requires the State Party to respect and ensure the rights of Indigenous women to the equal exercise and enjoyment of First Nations culture *both* on and off reserve, within their local communities, and within the broader community of First Nations and individuals of First Nations descent across Canada.

Substantial Negative Impact

169. The State Party submits that the Applicants have not demonstrated "substantial negative impact" on their rights to culture under Article 27.[161] The record shows that, under the 1985 *Indian Act* regime, the Applicants have suffered substantial interferences with their equal enjoyment of Indigenous cultural identity and their ability to transmit Indigenous cultural identity to their descendants.[162] The Applicants also refer the Committee to paragraphs 126-131 of the Trial Court decision. The Trial Court decision details the exclusion from the Indigenous community that Jacob McIvor felt when the 1985 *Act* precluded Sharon McIvor from passing status to him. He describes the pain of being treated by members of the Indigenous community as though he was not a "real Indian" because he did not have status.[163]

170. The Trial Court decision also details Sharon McIvor's testimony regarding the stigma she felt as a mother of non-status children when there were no presents under the communal Christmas tree in her community and no recognition ceremonies upon her children's graduation because they were non-status. These experiences of exclusion directly impact the sense of cultural belonging and are examples of how the denial of equal registration status has had a substantial negative impact on the Applicants' ability to participate fully in the cultural life of their community.[164]

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[161] State Party's Submission, August 23, 2011, para. 123.
[162] Applicants' Initial Submission, paras. 102-111.
[163] TC Decision, para. 137.
[164] TC Decision, paras. 128-129.

2011 Amendments

171. The 1985 *Indian Act* as amended by Bill C-3 in 2011 did not remedy the unequal enjoyment of the right to culture because it maintains a sex-based hierarchy between s. 6(1)(a) status and s. 6(1)(c) status.

2017 Amendments

172. Yet again, the 1985 *Indian Act* as amended by Bill S-3 in 2017 did not remedy the unequal enjoyment of the right to culture because it maintains a sex-based hierarchy between s. 6(1)(a) and s. 6(1)(c) status.

173. The Applicants reiterate that, after so many decades of State-imposed sex discrimination, s. 6(1)(a) is understood to be the class of status that "real Indians" hold, whereas the women who are assigned to the s. 6(1)(c) subclass are stigmatized. Section 6(1)(c) denotes inferiority and being "less Indian." Sharon McIvor's evidence is that she has experienced stigma that is associated with being a "Bill C-31 woman." To experience such stigma amounts to a substantial negative impact.[165]

174. The Applicants reiterate that it is for these reasons 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.

J. Applicants Challenge Conduct by the State Party

175. The State Party submits that the impact of status categories on the Applicants' ability to enjoy their culture in community with others is not a matter of State conduct for which the government can be held responsible under international law.[166] This argument is largely addressed above at paragraphs 145-152.

Not a Claim Regarding Violations by Non-State Actors

176. This Petition does not allege violations by non-state actors. Although the Applicants have referred to the influence of legislation on the

[165] Applicants' Initial Submission, para. 108.
[166] State Party's Submission, August 23, 2011, paras. 129-130.

conduct of non-state actors, it is the conduct of the State Party in enacting and maintaining the legislative scheme that discriminates on the basis of sex that the Applicants contend is incompatible with the Covenant.

177. Furthermore, it is important not to overstate the extent to which the Applicants have described the effects of the State Party's registration regime on non-state actors. For example, when Jacob Grismer speaks of not being allowed to participate in traditional fishing activities because he lacked a status card, it must be borne in mind that it is the lack of a status card, not the actions by the Indigenous community, that caused these restrictions on his enjoyment of these aspects of cultural life.[167]

The Invidious Message

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

The State Party's Role

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

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

180. Finally, Canada's approach is unconvincing because it ignores the positive dimensions of its obligations under the Covenant. Article 2 requires the State Party not only to respect, but also to ensure, the rights guaranteed by the Covenant. The State Party therefore has positive obligations regarding the conditions necessary for the de facto enjoyment and exercise of Covenant rights, in addition to its negative

[167] TC Decision, para. 131; Applicants' Initial Submission, para. 110.

obligations to refrain from infringing those rights. The discriminatory status registration scheme maintained by the State Party is incompatible with the State Party's obligations to respect and ensure the right to the equal exercise and enjoyment of Indigenous culture.

K. No Effective Remedy

181. The State Party submits that the Applicants have received an adequate remedy.[168] The Applicants reiterate that they have not received an adequate remedy and refer the Committee to paragraphs 236-251 of their Initial Submission, as supplemented by the comments in their December 11, 2011 Submission and in the present submission, which explain that the 2011 amendments and the 2017 amendments have not eliminated the sex discrimination for which the Applicants seek a remedy.

L. Applicants' Remedial Request

182. The Applicants' argument with regard to the remedy they seek from this Committee is contained at paragraphs 245-251 of their Initial Submission. As stated in paragraphs 20-21 above, the Applicants respectfully urge the Committee to:

(a) *direct Canada to take immediate measures to ensure that s. 6(1)(a) of the status registration regime, introduced by the 1985 Indian Act, and re-enacted by Bill C-3 and Bill S-3, is interpreted or amended so as to entitle to registration under s. 6(1)(a) those persons who were previously not entitled to be registered under s. 6(1)(a) solely as a result of the preferential treatment accorded to Indian men over Indian women born prior to April 17, 1985 and to patrilineal descendants over matrilineal descendants, born prior to April 17, 1985; and*

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

[168] State Party's Submission, August 23, 2011, paras. 134-138.

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

All of which is respectfully submitted by:

Gwen Brodsky on behalf of Sharon McIvor and Jacob Grismer

May 12, 2018