SHARON MCIVOR AND JACOB GRISMER v. CANADA

PETITIONER SUBMISSION REGARDING IMPLEMENTATION BY CANADA OF THE 11 JANUARY 2019 DECISION OF THE COMMITTEE CONCERNING THE PETITION OF SHARON MCIVOR AND JACOB GRISMER (CCPR/C/124/D/2020/2010)

Before:

The United Nations Human Rights Committee
Office of the High Commissioner for Human Rights
United Nations Office at Geneva

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June 15, 2021

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Introduction

The subject matter of the Petition, which was initiated on November 24, 2010, is sex discrimination with regard to Indian status registration.

In *McIvor* (CCPR/C/124/D/2020/2010) (hereinafter referred to as "the *McIvor* Decision"), the Committee determined, in its Views adopted November 1, 2018, that the denial of full s. 6(1)(a) Indian status to Indigenous women and their descendants solely as a result of 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, discriminates based on sex.

In particular, the Committee determined that s. 6 of the *Indian Act*, introduced by the 1985 *Act*, and continued by amendments of 2011 and 2017, violates the right to equal protection of the law without discrimination based on sex, and violates the equal right of Indigenous women to the enjoyment of their Indigenous culture, guaranteed by the CCPR (articles 3 and 26, read in conjunction with article 27 of the Covenant).

Article 26 establishes the right of all persons to equality before the law and to the equal protection of the law without discrimination based on sex. Article 3 guarantees the equal right of men and women to the enjoyment of Covenant rights, including the Article 27 right to enjoyment of Indigenous culture. In the *McIvor* Decision, the Committee recalled its General Comment No. 23 (1994), and noted that article 27 of the Covenant establishes a right which is conferred on individuals belonging to Indigenous groups, which is distinct from, and additional to, the other rights which all persons are entitled to enjoy under the Covenant.

The Committee also recalled that the prohibition against discrimination in the Covenant applies not only to discrimination in law, but also to discrimination in fact.

The Committee delineated Canada's obligations to provide an effective remedy. The Committee stated: "This requires the State party to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State Party is obligated, *inter alia*, (a) to ensure that section 6(1)(a) of the 1985 *Indian Act*, or of that *Act* as amended, is interpreted to allow registration by all persons including the authors who previously were not entitled to be registered under section 6(1)(a) solely as a result of preferential treatment accorded to Indian men over Indian women born prior to 17 April 1985 and to patrilineal descendants over matrilineal descendants, born prior to 17 April 1985; and (b) to take steps to address residual discrimination within First Nations

communities arising from the legal discrimination based on sex in the *Indian Act*. Additionally, the State party is under the obligation to take steps to avoid similar violations in the future." (para.. 9)

The Committee also requested that Canada publish the *McIvor* Decision and disseminate it broadly in Canada's official languages. (para. 10)

The Petitioners' June 15, 2021 submission in the Follow-up Process consists of the Petitioners' comments, and letters to the Committee from four organizations (Union of BC Indian Chiefs; Ontario Native Women's Association; Quebec Native Women's Association; the Canadian Feminist Alliance for International Action) and two individual experts, Dr. Pamela Palmater and Mary Eberts, with whom the Petitioner, Sharon McIvor, and the Petitioners' representative, Gwen Brodsky, have been engaged in collaborative advocacy efforts intended to make the promise of the Petitioners' successful Petition a reality, not a pyrrhic victory.

The information provided in the included letters substantiates the concerns that the Petitioners seek to draw to the attention of the Committee, and add context for the concerns. Additionally, the letters, in particular the letter from FAFIA, document the extensiveness of the efforts that the Petitioner Sharon McIvor, with others, has made to persuade Canada to implement the *McIvor* Decision.

This submission follows on the Petitioners' previous submissions of June 27, 2019; March 30, 2020, and September 18, 2020.

Summary of the Petitioners' Position Regarding Canada's Implementation of the McIvor Decision

The Petitioners submit that Canada has both failed to implement the Committee's Decision, and that it has rejected the Decision. This is evidenced by the extent and persistence of its non-implementation of the *McIvor* Decision, and by its express, ongoing disagreement with the Committee, which it has made a matter of public record.

For decades Indigenous women in Canada have sought justice in the courts and remedial action by legislators to bring an end to longstanding sex discrimination in the *Indian Act*. This Petition launched in 2010, and the *McIvor* Decision rendered in 2018, follow the similar case of Sandra Lovelace concerning s. 12(1)(b) of the *Indian Act.* In 1981 the Committee ruled in favour of Sandra Lovelace's favour (CCPR/C/13/D/24/1977).

Nevertheless, sex discrimination in status registration under the *Indian Act* continues to affect Indigenous women and their descendants.

Following *Lovelace* and a stream of litigation in Canada's domestic courts, Canada has made legislative amendments, removing bits of the discrimination a sliver at a time, but has never fully eliminated it. It is an unfortunate fact that Canada has been resistant to living up to its human rights obligations to Indigenous women, and continues to be so.

The Committee and the Petitioners were led to believe by Canada that through the Bill S-3 amendment to the *Indian Act* that was brought into force on August 15, 2019 the sex discrimination would be brought to an end. (See *McIvor* Decision, paras. 7.6 and 7.11; State party's Submission, January 16, 2020 para. 5) It is now apparent that this is not the case. Notwithstanding the coming into force of the Bill S-3 amendment, known as '6(1)(a) all the way', sex discrimination persists because of barriers to registration that are in the sole control of the State party; the failure of the State party to provide, discuss, or even assume responsibility for making full reparation; and the continuation and repetition of sex discrimination with regard to involuntarily enfranchised women, as well as the two parent rule and the second-generation cut-off.

Other outstanding issues of sex discrimination concern residual sex discrimination with regard to band membership, benefits and services related to status and band membership, restoration of treaty rights and the legislative bar to obtaining compensation in the courts. These outstanding issues are of a profoundly serious nature, reflecting both non-implementation and rejection of the *McIvor* Decision. In addition, the State party's continuing express rejection of the *McIvor* Decision is inconsistent with Canada's obligations as a signatory to the Covenant and the Optional Protocol.

Canada has long been aware of the Petitioners' concerns which have been raised repeatedly by the Petitioner and her representative, and by the Indian Act Sex Discrimination Working Group. (See: FAFIA June 15, 2021 letter.)

Barriers to Registration

As a result of the Bill S-3 2019 amendment, the Petitioners had their status upgraded. However, as we advised the Committee in the Petitioners' submissions of March 30, 2020 and September 18, 2020, there are thousands of newly entitled women and their descendants who have not been registered because Canada has failed to take necessary steps to ensure that people are aware of their rights, and because there are no adequate supports for applicants and there are unconscionable delays in the registration process. It is the plain wording and intention of the *McIvor* Decision that "all persons" previously excluded from full s. 6(1)(a) registration status based on sex be allowed to register under s. 6(1)(a), not just the Petitioners individually.

In 2017, the Parliamentary Budget Officer, based on estimates from independent demographers, calculated that there are 670,450 First Nations women and their descendants who are newly entitled to status as a result of the Bill S-3 '6(1)(a) all the way' amendment that came into force on August 15, 2019.[1] The Parliamentary Budget Officer predicted that about 268,00 of these would actually apply for status. In documents produced since that time, Indigenous Services Canada cites the number of newly eligible

[1] Office of the Parliamentary Budget Officer, *Bill S-3: Report on Sex-Based Inequities in Indian Registration*, 5 December 2017, online at: https://www.pbo-dpb.gc.ca/web/default/files/Documents/Reports/2017/Bill%20S-3/Bill%20S-3_EN.pdf.

at 270,000 to 450,000.[2] Yet, as of March 25, 2021 Canada had completed only 17,500 new registrations since 2017, and the Petitioners are informed that the Government of Canada cannot tell us how many of these are from applicants who are newly entitled by the 2019 amendment. This information was provided by the Honourable Carolyn Bennett Minister of Crown-Indigenous Relations in a March 29, 2021 videoconference meeting attended by the Petitioner Sharon McIvor. (Confirmed by FAFIA June 15, 2021 letter to the Committee)

The Petitioners reiterate and emphasize that the Covenant violations addressed by Bill S-3 did not cease with the coming into force of the amendment on August 15, 2019. They will only cease with the registration and consequent granting of status and benefits to all those who are now eligible. For those newly eligible for status, ensuring their Covenant rights to equal registration status depends on there being: 1) a pro-active and effective information campaign that reaches First Nations communities, on and off reserve, to advise First Nations women and their descendants of their new eligibility and the process for applying for status; 2) a timely and effective registration process in place so that they can secure the status they have been discriminatorily denied; and 3) information and other assistance for the newly eligible, to assist them in making their applications for status registration in a system that is notoriously opaque and complex.

There is still no proactive collaborative communications campaign to inform those who are newly eligible that they are entitled to status, despite our repeated requests to Canada, and our submissions to the Committee in this Follow-up Process.

For those who do apply, delays in the registration process are unconscionably long, with applicants being told that wait times are six months to two years, and information from Canada showing that even this standard is not being met in the majority of cases. (The Committee is referred to the Petitioners' March 30, 2020 Submission p. 5; see: also ONWA May 28, 2021 letter to the Committee referencing evidence of three year wait times; FAFIA June 15, 2021 letter to the Committee referencing most current information provided by Minister of Crown-Indigenous Relations)

Canada has posted some information on its website regarding eligibility for status in light of the August 15, 2019 Bill S-3 amendment. However, the Petitioners reiterate, this is a passive means of providing essential information, only accessible to those who are internet-connected. There is no organized, pro-active and effective campaign, being conducted by Canada, in collaboration with regional and local First Nations organizations, and, specifically, with First Nations women's organizations, to ensure that First Nations women and their descendants who are newly eligible are fully informed of their rights to registration and benefits, and that they have access to timely and adequate

[2] Indigenous Services Canada in *The Final Report to Parliament on the Review of S-3*, December 2020, cites the figure 270,000 to 450,000 at 3, online at: https://www.sac-isc.gc.ca/eng/1608831631597/1608832913476. See also Crown-Indigenous Relations and Northern Affairs Canada, "Removal of all sex-based inequities in the Indian Act",15 August 2019, online at: https://www.newswire.ca/news-releases/removal-of-all-sex-based-inequities-in-the-indian-act-890690227.html

assistance to complete the registration process. (See: UBCIC June 1, 2021 letter to the Committee, and QNW May 31, 2021 letter to the Committee)

Transparency with regard to the number of people affected is also deficient. The Petitioners reiterate there must be transparency and accessibility of information, regularly updated, regarding the number of applications from First Nations women and their descendants who are newly eligible: received, denied, accepted and pending. This is necessary for public accountability and so that there can be ongoing monitoring of Canada's performance. As the Quebec Native Women's Association, a front line Indigenous women's organization, has confirmed, "...the accessibility of information concerning the new registration process of Bill S-3 is significantly lacking." (QNW May 31, 2021 letter to the Committee p. 2)

In the absence of an effective information campaign, people who are not aware of their rights cannot be expected to exercise them. Canada should be actively reaching out to the newly entitled. As one example, the State party says that between 2018 and 2020 it automatically upgraded the entitlement categories for 125,000 previously registered individuals, and over 57,000 individuals are now able to pass status to their descendants because of the 2019 Bill S-3 amendment. (State party's Submission, February 4, 2021 para. 12) However, an official in Indigenous Services Canada also informed the Petitioners that it has not notified these individuals who are newly entitled to transmit status because it does not have contact information for them. (FAFIA June 15, 2021 letter to the Committee). That the State party has no means of contacting these people is not credible. This change in status is of no value unless it is known, and people are informed that it can be transmitted to descendants. Canada should be required to provide information to the Committee about its plan and timelines for implementing effective measures to reach out to people who are victims of longstanding *Indian Act* sex discrimination.

The Petitioners stand by the analysis and the concrete requests set out in our submissions of March 30, 2020 and September 18, 2020. Having regard to COVID, the Petitioners emphasize our previous request that the Committee ask Canada to recognize that the processing of applications is an <u>essential service</u> that must be carried out in a timely manner. The State party acknowledges that it allowed registration to be slowed because of COVID. (State party's Submission, February 4, 2021 para. 14) That slowing of registration services was preventable and should never have been allowed to happen. Indigenous people's access to crucial COVID-related benefits including health care is often tied to status. Registration should be, and should have been from the beginning of the pandemic, designated as an essential service, and the files of newly eligible S-3 applicants expedited. The Petitioners reiterate that many of the newly eligible S-3 applicants are ill and elderly; and they need their applications processed expeditiously.

Furthermore, a return to pre-COVID delays is not an adequate response. (State party's Submission, February 4, 2021 para. 14) Even prior to the pandemic wait times were unconscionably long, at two years or more. (The Committee is referred to the Petitioners' submission of March 30, 2020 at p. 5)

The State party states that Indigenous Services Canada is working to address delays and raise consciousness among the newly entitled, and to simplify the application process. However, details are lacking. The State party has not provided the Committee with any details of what changes are being made, or when these changes will be implemented. Nor has Canada provided the Committee with a plan for how and when it will reduce wait times, and become effective in providing information, and assistance to the newly entitled with regard to the application process. Letters filed in this Follow-up Process from leading organizations that the Petitioner Sharon McIvor works with confirm the continuing existence of the unacceptable and unnecessary barriers in the registration process. (QNW May 31, 2021 letter to the Committee; UBCIC June 1, 2021 letter to the Committee; ONWA May 28, 2021 letter to the Committee; FAFIA June 15, 2021 letter to the Committee)

Residual Discrimination

There is extensive residual discrimination arising from *Indian Act* sex discrimination that the State party must address. (The Petitioners refer the Committee to Dr. Palmater June 14, 2021 letter to the Committee.)

Without status registration, women and their descendants cannot be registered as band members on the lists that are controlled by the State party. This accounts for a majority of 634 First Nations.

Without status registration, First Nations women are excluded from accessing First Nations-specific social programmes and services such as uninsured health benefits. As Dr. Pamela Palmater explains, "Every day that Canada fails to register these women and children, contributes to their high rates of poverty, ill health and pre-mature death rates." (Dr. Palmater June 14, 2021 letter to the Committee)

A lack of status also effectively means that band membership is not available. Pursuant to s. 10 of the *Indian Act* a band is permitted to assume control of its membership by adopting a membership code. However, bands do not have the resources to provide programmes and services such as on reserve housing to non-status members.

Further, the State party has failed to protect band membership for women and their descendants who become registered under the '6(1)(a) all the way amendment'. In situations where a band has adopted a membership code, the new '6(1)(a) all the way' registrants can be excluded from band membership. The State party must ensure band membership for those entitled to status under the '6(1)(a) all the way amendment'. As Dr. Palmater explains, if Canada does not protect band membership for those newly entitled due to sex discrimination, then it has only remedied half the discrimination. (Dr. Palmater June 14, 2021 letter to the Committee)

Lack of band membership has serious consequences. It means lack of access to on reserve housing and other benefits associated with band membership. Lack of band

membership also means exclusion from participation in community decision-making about matters of fundamental importance such as those pertaining to First Nation land rights. (Dr. Palmater June 14, 2021 letter to the Committee)

Furthermore, federal and provincial governments often rely on registration and band membership to determine who may access Aboriginal and treaty rights. Those without status are also excluded from benefits and other payments associated with treaty rights. Canada must restore treaty rights to those who lost them because of *Indian Act* sex discrimination. For decades, Canadian policy was that only a "status" Indian could benefit from a Treaty which included her family and community. When women lost status because they married a non-status male, they and their descendants also lost Treaty rights and benefits. Although a woman deprived of her status could be given a lump sum equal to ten years' worth of annuity payments, this sum was inadequate to compensate for the loss of being permanently excluded, with her descendants, from Treaty and all the tangible and intangible benefits of Treaty. This harm of *Indian Act* sex discrimination has not been acknowledged or repaired.

To ensure that the newly entitled individuals actually derive the benefits that attend band membership the State party must provide support to the bands. Where there are band resource issues raised by the addition of new members the State party is responsible for addressing them. In anticipation of the coming into force of the Bill S-3 '6(1)(a) all the way' amendment, the Minister's Special Representative Claudette Dumont-Smith made various recommendations to the federal government designed to assist the bands in reintegrating the newly entitled members, including 1.3 - 1.6:

- provide funding to communities to carry out information sessions with community members on this and future legislative reform;

- provide the necessary funds to increase the administrative financial and human resources capacity to correspond to anticipated increases in the numbers of band members;

- change current funding formulas for federally-funding programs, to First Nations to meet the increased need for services to Indian women and their descendants in a timely manner;

- make immediate adjustments to the Additions to Reserve requests and respond in a more efficient and timely manner upon the coming into force of the of the Bill S-3 amendment.

Canada has provided no information to the Committee or the Petitioners regarding implementation of the Dumont-Smith recommendations, which are integrally related to implementation of the *McIvor* Decision. The Petitioners reiterate that Canada should

implement immediately the recommendations in the Dumont-Smith 2019 report.[3]

The State party acknowledges that Indigenous women and leaders have raised concerns about residual discrimination, including with regard to "timely access to rights; services, and benefits, access to retroactive treaty benefits, reparations; and band membership; and the ways that other provisions of the *Indian Act* intersected with historic laws and policies". (State party's Submission, February 4, 2021 para. 11) However, the *McIvor* Decision requires that steps actually be taken to address residual discrimination. Canada has not provided the Committee with any information about concrete measures that it has taken to implement the requirement that residual discrimination be addressed, or any measures that it will take.

Full Reparation, including Compensation, Apology, and Education

Despite our request of January 18, 2019 to Canada, and our submission of March 30, 2020 to the Committee, there has been no discussion between Canada and the Petitioners about full reparation, nor has reparation been mentioned in any public statement. Nor, according to information provided to the Petitioners, does any Minster have authority to discuss or consider reparations (See: FAFIA June 15, 2021 letter to the Committee) Further, Canada's most recent submissions to the Committee omit any discussion of Canada's obligations to ensure full reparation. The Petitioners reiterate, full reparation, in this circumstance, would encompass *inter alia*: compensation to victims for the harms done, including the loss of band membership, treaty rights, and all related benefits and services; a public apology, including acknowledgement of the facts and acceptance of responsibility; and inclusion of an accurate account of the violations that occurred, in Canada's law school training, in judicial training, and in educational material at all levels.

Canada has not made a public apology to the thousands of First Nations women and their descendants who have been discriminated against at law by Canada since the *Indian Act* was first introduced more than 140 years ago.

The State party notes that in 2017 Minister Bennett paid tribute to some Indigenous women who have challenged *Indian Act* sex discrimination, including the Petitioner, Sharon McIvor. (State party's Submission, January 16, 2020 para. 11) This was not an apology to anyone, and certainly not to all the thousands of women and their descendants whose Covenant rights have been, and continue to be, violated by *Indian Act* sex discrimination.

Rather, Canada continues to publicly deny that the Petitioners' Covenant rights were violated and to criticize the Committee for finding otherwise, and continues to resist providing the remedy directed by the Committee. In contrast, public apologies have been made in Canada to Indigenous peoples who have suffered other forms of discrimination

[3] *Report to Parliament on the Collaborative Process on Indian Registration, Band Membership and First Nation Citizenship*: *Minister's Special Representative final report on the collaborative process on Indian registration, band membership and First Nation citizenship* (https://www.rcaancirnac.gc.ca/eng/1561561140999/1568902073183)

and harms at the hands of Canadian governments, for example, residential school survivors, and Inuit and Ahiarmiut who were subjected to forced relocations in the High Arctic and in southwestern Nunavut.

Residential school survivors, and others, have also been granted compensation for the harms done to them. Compensation schemes can be put in place in a variety of ways. However, it is a matter of grave concern that the *Indian Act* now specifically bars those previously excluded from 6(1)(a) status because of sex discrimination from claiming or receiving compensation.

Section 10.1 of the *Indian Act*, as amended by S.C. 2017 c. 25, states:

> **No liability**
>
> 10.1 For greater certainty, no person or body has a right to claim or receive any compensation, damages or indemnity from Her Majesty in right of Canada, any employee or agent of Her Majesty in right of Canada, or a council of a band, for anything done or omitted to be done in good faith in the exercise of their powers or the performance of their duties, only because
>
> (a) a person was not registered, or did not have their name entered in a Band List, immediately before the day on which this section comes into force; and
>
> (b) that person or one of the person's parents, grandparents or other ancestors is entitled to be registered under paragraph 6(1)(a.1), (a.2) or (a.3) of the *Indian Act*.

The Petitioners reiterate that Canada's refusal to accept liability for harms caused by *Indian Act* sex discrimination and attempt to bar affected individuals from seeking compensation is inconsistent with its Covenant obligation to provide an effective and enforceable remedy, and itself constitutes sex discrimination.

To our knowledge, Canada has no plans to ensure that education materials and training regarding the history and legacy of the sex discrimination practiced against First Nations women and their descendants are included in law school, judicial training or school curricula. Canada has not provided any evidence concerning its concrete measures to address these outstanding matters of reparation, either undertaken or planned.

Continuation and Repetition of Discrimination

Canada has failed to remedy the continuing *Indian Act* sex discrimination against those who involuntarily lost their status upon the enfranchisement of a husband. Indian men were enfranchised involuntarily if they served in the military or gained a university degree. Indian men could also apply to enfranchise, and thereby lose their Indian status. Women married to men who were enfranchised, automatically lost their Indian status. These women, like the women who 'married out', were also treated by the *Indian Act* as

though they, along with their children, were the property of their husbands. Under the 1985 *Indian Act* the women who had lost status because of the enfranchisement of their spouse were reinstated to lesser categories of status, with limited rights to transmit status, in the same way that Sharon McIvor was reinstated to a lesser category of status, with limited rights to transmit status.

However, whereas the '6(1)(a) all the way' amendment accords full status to the women like Sharon McIvor who married a non-status man, the situation of women who lost their status due to involuntarily enfranchisement was not specifically addressed. Further, the Registrar does not interpret s. 6(1)(a) of the *Indian Act* as including these women and their descendants. The women continue to be relegated to lesser categories of status. Also, their descendants continue to be relegated to inferior categories of status, or denied status. This is contrary to the State party's obligation of non-repetition.

The State party inaccurately refers to the issue of enfranchisement as among the "non-sex based inequities that continue to persist in the *Indian Act*." (State party's Submission, February 4, 2021 para. 11) Although Canada says otherwise, clearly this is an issue of sex discrimination. It functions in the same way as the sex discrimination identified in the *McIvor* Decision. Furthermore, this ongoing sex discrimination against the involuntarily enfranchised women is so similar to the sex discrimination against the women who lost status upon marriage to a non-Indian man, at issue in the *McIvor* Decision, that the State Party's obligation of non-repetition requires that it be addressed. (For additional analysis of enfranchisement as sex discrimination the Committee is referred to Mary Eberts June 14, 2021 letter to the Committee.

The State party says that the enfranchisement is among the issues that "will likely require legislative changes." However, the Petitioners do not agree that legislative change is necessary. The Petitioners submit that the situation of the involuntarily enfranchised women is encompassed by the language of the remedy issued by the Committee in the *McIvor* Decision. The remedy in the *McIvor* Decision requires that s. 6(1)(a) be interpreted to allow registration by "all persons who previously were not eligible to be registered" solely as a result of the sex discrimination embedded in the registration scheme. (*McIvor* Decision, para. 9) The enfranchised women and their descendants are among the persons who previously were not eligible to be registered" solely as a result of the sex discrimination embedded in the registration scheme.

A simple and effective way for the State party to remedy this blatant sex discrimination and fulfill its "obligation to avoid similar violations in the future" is for the State party to interpret s. 6(1)(a) as allowing registration by enfranchised women and their descendants, born prior to April 17, 1985.

The Petitioners submit that, based on the *McIvor* Decision and having specific regard to the remedy set out in paragraph 9 of the *McIvor* Decision, the Registrar should be directed to interpret s. 6(1)(a) of the *Indian Act* to include Indian women who were involuntarily enfranchised and their descendants, born prior to April 17, 1985. If Canada maintains that legislative change is required to end the sex discrimination against

enfranchised women and their descendants, it should proceed with that legislative change immediately. It is not adequate or acceptable for Canada to make a vague reference to the need for legislative change to remove discrimination, with no specified time frame, and without committing to make that change.

Another outstanding issue of residual sex discrimination concerns the *Indian Act* provisions known as the two parent rule and the second generation cut-off, which, as explained by Mary Eberts, discriminate based on sex despite being neutral on their face. (See: Mary Eberts June 14, 2021 letter to the Committee) The continuation of this sex discrimination is not consistent with State Party's obligation to avoid future violations.

Canada' Rejection of the Committee's Decision

The Petitioners submit that Canada's failures to satisfy the remedial requirements of the Committee's Decision are so egregious as to be tantamount to a rejection of the Committee's Decision. Moreover, Canada has also expressly criticized and rejected the Committee's Decision. Canada states that it does not agree with the Committee that the Petitioners' Covenant rights were violated, and the Committee should have viewed the Petition as inadmissible or without merit. Canada continues to press its position that the sex discrimination that affected the Petitioners was fully remedied by 2011 amendments to the *Indian Act*.

This is the same argument that Canada advanced in the Petition process, and which was rejected by the Committee (State party's Submission, January 16, 2020 para. 9) Canada also stated in its January 16, 2020 submission that it was making efforts to address the Committee's recommendations, but only because it recognized and regretted the historical discrimination and other inequities to which Indigenous women and their descendants had been subject. Canada accepts no responsibility for the profoundly serious sex discrimination suffered by the Petitioners and other similarly situated Indigenous women and their descendants, who are the intended beneficiaries of the '6(1)(a) all the way' amendment in Bill S-3.

Canada's relentless challenges to the Committee's jurisdiction to decide the McIvor case, and denial of responsibility for any sex discrimination, is the context in which Canada's failure to implement the Committee's remedial recommendations must be understood. Canada’s only commitment is to "make efforts to address" the Committee's recommendations. In contrast, Canada's remedial obligation is to actually provide an effective remedy.

Canada's continuing non-implementation of the *McIvor* Decision and continuing criticism of the Decision is disrespectful of the Committee's role and inconsistent with the State party's undertaking under international human rights law. By becoming a party to the Optional Protocol, Canada recognized the competence of the Committee to determine whether there has been a violation of the Covenant. And, pursuant to article 2 of the Covenant, Canada has undertaken to ensure to all individuals within its territory the rights

recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined by the Committee that a violation has occurred.

Canada's Nation-to-Nation Relationship with Indigenous Peoples

The State party says it is committed to a renewed nation-to-nation relationship with Indigenous peoples, based on recognition of rights, respect and co-operation guided by the principles in UNDRIP, and that it continues to engage with First Nations and Indigenous partners in order to determine how best to address outstanding concerns regarding registration, including among other things access to rights, services, and benefits; entitlement to treaty benefits, reparations, and band membership. (State party's Submission, February 4, 2021 para. 11-18) The State party characterizes these endeavours as part of ensuring that that it is "on the path of 'getting out of the business or Indian registration'." (State party's Submission, February 4, 2021 para.15)

This echoes submissions that the State party made to the Committee in 2017 in which the State party contended that its approach in failing to immediately eliminate sex discrimination was in keeping with the government's renewed nation-to-nation relationship with Indigenous peoples and its endorsement of the UNDRIP. (The Committee is referred to: 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, at paras. 85 - 87)

The Petitioners reiterate that 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*,[4] the *Universal Declaration of Human Rights*,[5] and international human rights law.

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."

Further, pursuant to UNDRIP, Indigenous individuals have a right to belong to an Indigenous community or nation, and the right not to be subjected to any form of forced population transfer which has the aim or effect of violating or undermining their rights. States are obliged to provide effective mechanisms of redress for any form of forced assimilation. (UNDRIP articles 8, 9). *Indian* Act sex discrimination is a tool of forced assimilation that runs afoul of UNDRIP as well the Covenant. It has been an effective tool of assimilation, defining thousands of women and their descendants out of the pool of 'Indians' who have inherent and treaty rights recognized by Canada. (For further details on this point, the Committee is directed to: UBCIC June 1, 2021 letter to the

[4] *Charter of the United Nations*, 26 June 1945, Can TS 1945 No. 7.
[5] GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71.

Committee)

The Petitioners submit that at this time the urgency accorded by the State party to "getting out of the business of Indian registration," through alleged nation-to-nation engagement, far from being a positive step towards dismantling Canada's colonial history, may, in effect, simply shift the damage of sex discrimination, and the burden of repair, to First Nations. The fact is that because of *Indian Act* sex discrimination thousands of Indigenous women and their descendants have been, and continue to be, excluded from their nations. The State party's first priority, and an obligatory step prior to "getting out of the business of Indian registration", must be to undo the egregious damage it has done, and restore status to the women and the matrilineal descendants so that Indigenous nations can be made whole again. (See: Dr. Palmater June 14, 2021 letter to the Committee; ONWA May 28, 2021 letter to the Committee; and FAFIA June 15, 2021 letter to the Committee)

The State party's continuation of *Indian Act* sex discrimination through its continuing failure to address the outstanding issues of sex discrimination, of which the State party is well aware, does not reflect a commitment to the Covenant rights of Indigenous women. Nor does it reflect a commitment to the principles of UNDRIP.

The Petitioners also recall the Committee to the fact that the long-standing discrimination in the *Indian Act* has been found by the United Nations Committee on the Elimination of Discrimination against Women, the Inter-American Human Rights Commission, and Canada's National Inquiry on Missing and Murdered Indigenous Women and Girls to be a root cause of the high numbers of murders and disappearances, which are recognized as a human rights crisis in Canada. Ensuring the rights of First Nations women and their descendants to equal protection of the law and to equal enjoyment of their culture is key to ending the violence.

The Petitioners' Efforts to Secure the State Party's Compliance with the Decision

Since the issuance of the Committee's decision in this Communication, the Petitioner, Sharon McIvor, with the support of her legal counsel and in collaboration with leading Indigenous and human rights organizations, including, among others, the Union of B.C. Indian Chiefs, the Quebec Native Women's Association, the Ontario Native Women's Association, the Canadian Feminist Alliance for International Action, and leading experts including Dr. Pamela Palmater and Mary Eberts, letters from whom are included as part of this submission by the Petitioners, has tried repeatedly to persuade Canada's top officials of the urgency of implementing the Committee's Decision. The history of these collaborative efforts and their disappointing results are documented in the FAFIA June 15, 2021 letter and three appendices, to which the Committee is referred. The Petitioners' efforts to communicate with Canada about implementation of the systemic aspects of the Decision began on January 18, 2019 with a letter sent by their representative to the Minister of Indigenous Affairs. (See: Petitioners' Submissions, June 27, 2019 and March 30, 2020)

We made detailed requests for concrete steps to be taken by Canada in the Petitioners' March 30, 2020 Submission. We raised the matter of Canada's continuing non-compliance again in the Petitioners' submission of September 18, 2020. Now, despite our efforts, supported by the efforts of others, and despite the passage of a long period of time since the Decision was rendered, Canada still does not consider *Indian Act* registration, or any other aspect of implementation of the Committee's decision, a priority. We are making no progress in trying to persuade Canada that it needs a plan with clear timelines for addressing all the remedial components of the Committee's decision.

Conclusion

The Petitioners have demonstrated that Canada has failed to implement the Committee's Decision; and that it has rejected the Decision, both implicitly and expressly.

The State party has made a facial change to s. 6 of the *Indian Act* and granted 6(1)(a) status to Sharon McIvor and Jacob Grismer; it has done little more. Canada's efforts to provide an effective remedy and full reparation are deficient, as described in this submission.

Notwithstanding the coming into force of the Bill S-3 amendment, known as '6(1)(a) all the way', sex discrimination persists because of barriers to registration, that are in the sole control of the State Party, and the failure of the State party to provide, discuss, or even assume responsibility for making full reparation. Other outstanding issues concern residual sex discrimination with regard to benefits and services related to band membership and restoration of treaty rights; and the continuation and repetition of sex discrimination with regard to the denial of s. 6(1)(a) status to involuntarily enfranchised women; the legislative bar to obtaining compensation in the courts; and the discrimination inherent in the two-parent rule and the second generation cut-off.

A record of concerted, but unsuccessful, efforts by the Sharon McIvor, in collaboration with others, to secure Canada's compliance underscores the importance and urgency of further actions by the Committee in relation to Canada. In light of Canada's continuing non-compliance with the Covenant and failure to implement the Decision clear direction from the Committee to Canada is necessary and appropriate.

Petitioners' Requests

Based on the *McIvor* Decision, and because this is a matter of such fundamental importance, the Petitioners urgently request that the Committee ask Canada to:

Transparency

- Provide up to date information regarding:

- The number of applications for status or improved status pursuant to the 6(1)(a) amendment and the *McIvor* Decision that have been a) received b) granted and c) denied;
- The wait times for the processing of applications;
- The details of steps taken to provide information regarding new entitlements under the '6(1)(a) all the way' amendment and the *McIvor* Decision, including the content of the information that was provided, to whom, when, and the format or method of communicating the information.

Registration

- Develop an effective information campaign to ensure that information regarding new eligibility for status, and the potential eligibility for upgraded status, is widely available and accessible, in urban, rural and on reserve communities, with a timeline for carrying out these measures;
- Provide access to the government's genealogical information on First Nations people for the use of applicants;
- Provide legal and paralegal assistance and supports in the application process to First Nations applicants who may be affected by the '6(1)(a) all the way' amendment and the *McIvor* Decision;
- Notify those whose status has been automatically upgraded that their descendants may be newly eligible for status, or upgraded status.

Reduce Wait Times

- Provide adequate resources, including adequate numbers of registration clerks for processing of applications from First Nations women and their descendants who may be affected by the '6(1)(a) all the way' amendment and the *McIvor* Decision;
- Provide information regarding these resources, including where, when, and how they are deployed, and how the State Party will assess the adequacy of these resources to ensure that First Nations women and their descendants will receive an effective remedy as set out in the *McIvor* Decision;
- Expedite applications for registration filed by those who may be newly eligible under the '6(1)(a) all the way' amendment and the *McIvor* Decision, particularly for those who have disabilities or are ill or elderly;
- Reduce wait times very significantly and institute improved standards for processing;
- Recognize and designate processing of applications for status registration as an essential service that must be carried out in a timely manner at all times, including during a pandemic.

Residual Discrimination

Address residual discrimination within First Nations communities, by taking steps that will:

- Ensure band membership to all women and their descendants, who receive status registration pursuant to the '6(1)(a) all the way' amendment and the *McIvor* Decision;
- Ensure that the women who were involuntarily transferred to their husband's bands because of discriminatory application of the *Indian Act* have the opportunity to be restored to their birth bands;
- Ensure that First Nations women and their descendants are accorded equal access to band membership, reserve housing and services, treaty entitlements, participation in the political decision–making of their communities, and any other incidents of band membership;
- Provide adequate resources to extend statutory benefits and services to registrants who are newly eligible;

- Implement recommendations 1.3 – 1.6 of the Minister's Special Representative, Claudette Dumont-Smith in her final report on Indian registration, band membership, and First Nations citizenship;[6]
- Restore treaty rights and related benefits and payments.

Full Reparation

Design a process and identify appropriate measures that will "make full reparation" including:

- Compensation, apology and inclusion of a full and accurate account of the history of discrimination against First Nations women and their descendants in education material at all levels of schooling in Canada, and in particular in Canada's law school training, and in judicial training;
- Provide a mandate to the appropriate Ministers to implement the *McIvor* Decision, that includes providing an effective and enforceable remedy to the First Nations women and their descendants whose rights have been violated;
- Eliminate barriers to obtaining an effective and enforceable remedy from Canada for harms caused to individuals by the violation of their Covenant rights, including s. 10. 1 of the *Indian Act*, as amended by S.C. 2017 c. 25, which bars them from claiming or receiving compensation;
- Implement measures to promote broad public understanding that the *Indian Act* has discriminated against First Nations women and their descendants for decades, that this discrimination violates international human rights law, and that an effective remedy is now required of Canada.

[6] Minister's Special Representative final report on the collaborative process on Indian registration, band membership and First Nation citizenship, June 2019, online at: https://www.rcaanc-cirnac.gc.ca/eng/1561561140999/1568902073183

Obligation of Non-Repetition

- Ensure that 6(1)(a) of the *Indian Act* is interpreted to include Indian women who were involuntarily enfranchised, and their descendants, born prior to April 17, 1985, or make immediate legislative changes if deemed necessary to achieve this result;
- Address the sex discrimination inherent in other provisions of the *Indian Act*, and eschew interpretations that perpetuate preferential treatment of male Indians over female Indians and matrilineal over patrilineal descendants.

Report to Committee

- Report back to the Committee regarding the above measures, in a fulsome manner, within a period of time specified by the Committee.

All of which is respectfully submitted,

Gwen Brodsky
Counsel to Sharon McIvor and Jacob Grismer