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11 January 2019

Dear Ms. Brodsky,

I have the honour to transmit to you herewith, the (advance unedited) text of the Views, adopted by the Human Rights Committee on 1 November 2018, concerning communication No. 2020/2010, which you submitted to the Committee for consideration under the Optional Protocol to the International Covenant on Civil and Political Rights, on behalf of Ms. Sharon McIvor and Mr. Jacob Grismer.

In accordance with the established practice, the text of the Views will be made public.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Ibrahim Salama'.

Ibrahim Salama  
Chief  
Human Rights Treaties Branch

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## International Covenant on Civil and Political Rights

Advance unedited version

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### Human Rights Committee

#### Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2020/2010\*

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<i>Submitted by:</i>	Sharon McIvor and Jacob Grismer (represented by Gwen Brodsky)
<i>Alleged victim:</i>	The authors
<i>State party:</i>	Canada
<i>Date of communication:</i>	24 November 2010 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 23 December 2010 (not issued in a document form)
<i>Date of adoption of Views:</i>	1 November 2018
<i>Subject matter:</i>	Entitlement to Indian status as First Nations descendants on the maternal line (discrimination)
<i>Procedural issues:</i>	Non-substantiation of claims; victim status; non-exhaustion of domestic remedies; admissibility <i>ratione temporis</i>
<i>Substantive issues:</i>	Protection of the law, minorities, right to enjoy own culture, indigenous peoples, gender discrimination
<i>Articles of the Covenant:</i>	2(1), 2(3)(a), 3, 26, 27
<i>Article of the Optional Protocol:</i>	1, 2, 3, 5(2)(b)

\* Adopted by the Committee at its 124th session (8 October – 2 November 2018).

\*\* The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Bamariam Koita, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Yuval Shany, Margo Waterval and Andreas B. Zimmermann.



1. The authors of the communication are Sharon McIvor, born in 1948, and her son, Jacob Grismer, born in 1971. They are Canadian nationals and members of the First Nations residing in Merritt, British Columbia. The authors claim to be victims of violations by Canada of their rights under articles 2(1) and (3)(a), 3, 26 and 27. They are represented by Gwen Brodsky. The Optional Protocol entered into force for Canada on 19 August 1976.

### **Factual background**

2.1 Since at least 1906, Indian status, a legal construct created and applied to regulate wide-ranging facets of the lives of First Nations, was defined by Canadian law on the basis of patrilineal descent, excluding maternal lines.

2.2 Indian status under Canadian law confers significant tangible and intangible benefits. Tangible benefits include entitlement to apply for extended health benefits and postsecondary education funding, and certain tax exemptions. Intangible benefits relate to cultural identity. They include the ability to transmit status, and a sense of identity and belonging. The authors define Indian status as a dignity-conferring benefit.

2.3 The authors are descendants of Mary Tom, born in 1888 as a First Nations woman and member of the Lower Nicola Band. Mary Tom's daughter, Susan, is Sharon McIvor's mother. Susan's father was a man of Dutch descent with no First Nations ancestors. Susan was born in 1925 and, under the Indian Act of the day, was not eligible for registration as an Indian because Indian status was transmitted through the male line, and not through matrilineal descent.

2.4 At birth, neither Sharon McIvor nor her siblings were eligible for status, as their claim would have been based on matrilineal descent. On 14 February 1970, Sharon married Charles Terry Grismer, a man with no First Nations heritage, and had three children, one of whom is Jacob Grismer, born on 3 June 1971.

2.5 Until 1985, the statutory rules which governed eligibility for registration as an Indian took status away from Indian women who married non-Indian men and denied status to children who traced their First Nations' descent through those women.

2.6 The revised Indian Act<sup>1</sup> came into effect on 17 April 1985. It governs current entitlement to registration status and determines the class of registration status assigned to Indian women and their descendants. Although the Act was intended to eliminate sex discrimination, the authors submit that it did not achieve this goal, and is incomplete remedial legislation, as it transferred and incorporated into the new regime the existing preference for male Indians and patrilineal descent.

2.7 Pursuant to section 6 of the 1985 Indian Act, Sharon McIvor is ineligible for full Indian status under section 6(1)(a).<sup>2</sup> Under the section 6(1)(c)<sup>3</sup> registration to which she is now entitled, she is only able to transmit partial status to her son Jacob, and is unable to transmit Indian status to her grandchildren.<sup>4</sup> In contrast, Sharon McIvor's brother is eligible

<sup>1</sup> Indian Act, RSC 1985, c I-5, available at: <http://laws-lois.justice.gc.ca/eng/acts/i-5/FullText.html>.

<sup>2</sup> "6(1) Subject to section 7, a person is entitled to be registered if (a) that person was registered or entitled to be registered immediately before April 17, 1985".

<sup>3</sup> "6(1) Subject to section 7, a person is entitled to be registered if (...) (c) the name of that person was omitted or deleted from the Indian Register, or from a band list before September 4, 1951, under subparagraph 12(1)(a)(iv), paragraph 12(1)(b) or subsection 12(2) or under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately before April 17, 1985, or under any former provision of this Act relating to the same subject matter as any of those provisions".

<sup>4</sup> See statement of the authors in their initial submission dated 24 November 2010. Following the amendments introduced by Bill C-3 – see below – the authors conceded that the 1985 Act as amended by Bill C-3 improved the registration entitlement of Jacob Grismer, making him eligible for section 6(1)(c) status, and thereby able to transmit status to his children (Sharon's grandchildren) born after 17 April 1985.

for full section 6(1)(a) registration status for himself, he can transmit full status to his children, and he can transmit status to his grandchildren. This difference is based solely on sex, as Sharon McIvor's brother has the same lineage as herself, and the same pattern of marriage and parenting.

2.8 On 23 September 1985, Sharon McIvor applied for registration status for herself and her children. The Registrar of Indian and Northern Affairs Canada determined that she was entitled to registration under section 6(2) of the Indian Act, and not under section 6(1), because of her non-Indian paternity. Sharon McIvor challenged that decision, which was nonetheless confirmed by the Registrar on 28 February 1989.

2.9 On 18 July 1989, the authors filed a statutory appeal against the Registrar's decision. On 13 May 1994, they also challenged the constitutionality of section 6 of the 1985 Indian Act under the Canadian Charter of Rights and Freedoms ("the Charter"). They also invoked a violation of articles 2(1) and (2), 3, 23, 24(1) and (3), 26 and 27 of the Covenant.

2.10 On 2 April 1999, Jacob Grismer married a woman with no First Nations ancestry. Jacob has not standing to pass status to his children, and is ineligible for full section 6(1)(a) status because his entitlement to status is based on maternal descent. If Jacob's father – rather than his mother – were a status Indian, his children would have status. Jacob would also have full section 6(1)(a) status for himself.

2.11 On 8 June 2007, the British Columbia Supreme Court found that section 6 of the 1985 Act violated the Charter in that it discriminated, on grounds of sex and marital status, between matrilineal and patrilineal descendants born prior to 17 April 1985, and against Indian women who had married non-Indian men.

2.12 Canada appealed the Trial Court decision in the British Columbia Court of Appeal. In its 6 April 2009 decision, the Court of Appeal confirmed that section 6 of the 1985 Indian Act was discriminatory, but on a narrower basis: applying an approach that focused on the Government's stated objective of "preserving acquired rights", the Court found that sections 6(1)(a) and 6(1)(c) violate the Charter only to the extent that they grant individuals to whom the "double-mother rule"<sup>5</sup> applied greater rights than they would have had under the pre-1985 legislation. The only discrimination recognized by the Court as unjustified was thus with regard to the preferential treatment accorded by the 1985 Act to a small subset of descendants of male Indians. The Court declared sections 6(1)(a) and 6(1)(c) of the 1985 Indian Act of no force and effect, but suspended the effect of the declaration to allow time for legislative amendments.

2.13 The authors contend that the Court's declaration does not provide them with a remedy. It did not result in Sharon's grandchildren becoming eligible for status, nor did it result in the authors becoming eligible for section 6(1)(a) status for themselves. The leave to appeal was refused on 5 November 2009, without reasons.

2.14 In March 2010, the Government introduced Bill C-3 amending the 1985 Indian Act.<sup>6</sup> For the authors, that bill was tailored to the decision of the Court of Appeal and, given that the Supreme Court denied leave to appeal that decision, it would have been futile to seek further judicial redress. In addition, any attempt to challenge the failure of the legislature to

<sup>5</sup> Under the 1951 Act, where an Indian man married a non-Indian woman, any of their children was an Indian. If however, the Indian man's mother was also non-Indian prior to marriage, the child would cease to have Indian status upon the age of 21 under the double-mother rule.

<sup>6</sup> The Gender Equity in Indian Registration Act, previous Bill C-3, came into force on 31 January 2011. Under this amendment, individuals are eligible for status under section 6(1)(c.1) where: their mother lost Indian status upon marrying a non-Indian man; their father is a non-Indian; they were born after the mother lost Indian status and, if the individual's parents did not marry each other before 17 April 1985, were born before that date; and they had or adopted a child on or after 4 September 1951 with a person not eligible for status.

fully correct the sex discrimination embedded in Bill C-3 would have entailed an unreasonably prolonged process in court.

2.15 On 3 August 2015, the Superior Court of Quebec rendered a decision in a third party's case, in which it found that section 6(1)(a), (c) and (f) and section 6(2) of the Indian Act were an unjustifiable infringement of the Charter protection against discrimination on the basis of sex.<sup>7</sup> However, the Court suspended its order for an initial period of 18 months to allow Parliament to make the necessary legislative amendments. The Government filed an appeal against that decision but abandoned it and began a new process of policy development. On 25 October 2016, Bill S-3 was introduced in the Senate.<sup>8</sup> Sharon McIvor testified before the House of Commons Committee on behalf of the Union of B.C. Indian Chiefs, and before the Senate Committee as an individual.

2.16 On 7 November 2017, the Government introduced further amendments to Bill S-3. The majority of its provisions came into force on 22 December 2017.

### **The complaint<sup>9</sup>**

3.1 The authors allege that the sex-based hierarchy for the determination of entitlement to Indian registration status contained in section 6 of the 1985 Indian Act violates article 26, and article 27 in conjunction with articles 2(1) and 3 of the Covenant, in that it discriminates on grounds of sex against matrilineal descendants born prior to 17 April 1985, and against Indian women born prior to that date who married non-Indian men. They consider that under article 2(3)(a), they are entitled to an effective remedy for the violation of their rights under articles 26 and 27 in conjunction with articles 2(1) and 3.

#### *Article 26*

3.2 As a result of the sex-based hierarchy of the status registration regime, Sharon McIvor suffered a form of social and cultural exclusion. Her experience has been that within Aboriginal communities there is a significant difference in the degree of esteem that is associated with section 6(1)(a) status. She has experienced stigma that is associated with being a "Bill C-31 woman," the label that is given to women who have been assigned to the section 6(1)(c) sub-class. The implication is that they are inferior to and "less Indian" than their male counterparts. This extended to her children, to whom she was unable to transmit status, which made her feel inferior. She was unable to access the tangible benefits of status – such as extended health benefits and post-secondary education funding – available under the 1985 Act for her children when they were growing up.

3.3 Jacob Grismer's injury from not being eligible for full section 6(1)(a) status from 1985 onwards is profound. He has lived his whole life in the ancestral territory of his Indian forebears, in Merritt, British Columbia. Throughout high school, he experienced isolation and stigmatization because he did not have Indian status. For example, while he was growing up, he wanted to participate in traditional hunting and fishing activities. He sometimes accompanied friends or relatives who had Indian status on fishing trips to the Fraser River. But because he did not have status, he could not pack the fish that others had caught. He was never taught traditional fishing and hunting skills, and accordingly feels a great sense of loss. Based on his own experience of the harmful consequences of the denial of his cultural identity, it is of serious concern to him that his children are ineligible for status. He wants

<sup>7</sup> *Descheneaux v. Canada (General Prosecutor)*, 2015 QCCS 3555. In particular, the Superior Court found that "[t]he 2010 Act (...) did not entirely correct the situation of increased discrimination resulting from the 1985 Act. (para. 216). For the Court, "[p]aragraphs 6(1)(a), (c) and (f) and subsection 6(2) of the Act violate subsection 15(1) of the Canadian Charter" and the State party had not demonstrated that this discrimination was justified (para. 219).

<sup>8</sup> An act to amend the Indian Act (elimination of sex-based inequities in registration), available at: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=8532512>.

<sup>9</sup> As formulated in their initial submission of 24 November 2010.

them to benefit from the State's recognition of their Aboriginal ancestry, including having access to the traditional cultural practices of the community. This is the class of status he would have, but for the fact that his Indian parent is female.

3.4 The amendments brought by the 2011 *Gender Equity in Indian Registration Act* did not accord the authors full section 6(1)(a) status, even though their counterparts in the double-mother group have section 6(1)(a) status. The Act could have made Sharon's grandchildren eligible for status, but it still left the authors without official recognition of their inherent equality.

3.5 As a result of being registered under section 6(1)(c) of the 1985 Indian Act, Sharon is entitled to receive the same tangible benefits as those registered under section 6(1)(a). However, she does not benefit from the full recognition of status associated with section 6(1)(a). The 2009 Court of Appeal decision suggested, erroneously, that discrimination based on matrilineal descent may not constitute sex discrimination if there are multiple generations involved. The Indian Act's prejudicial treatment of matrilineal descent amounts to sex discrimination even if it is against a grandchild or great-grandchild, rather than the child, of the woman who was unable to transmit status solely because of her sex.

3.6 The discrimination embodied in section 6 of the Indian Act is not pursuant to an aim which is legitimate under the Covenant, objective and reasonable. The authors disagree with the Court of Appeal's finding that preserving acquired rights was a legitimate goal justifying creation of different tiers of status. Preservation of the full status of those registered under section 6(1)(a) would in no way be diminished by extending that same registration entitlement to others.

3.7 The continued discrimination embodied in the 1985 Act results in the authors' being denied full status under section 6(1)(a). Sharon's brother and his children, in contrast, are entitled to that status. As a result, his grandchildren are entitled to status, and can transmit status to their children. The effect of the sex-based status hierarchy will thus continue for generations.

#### *Article 27 in conjunction with articles 2(1) and 3*

3.8 Capacity to transmit cultural identity is a key component of cultural identity itself. It is closely linked to personal cultural identity, and inter-generational transmission is key in light of pressing concerns about the continuity and survival of cultural traditions. Section 6 of the Indian Act denies female progenitors and their descendants the equal right to full enjoyment of their cultural identity on an equal basis between men and women, in violation of article 27, read in conjunction with articles 2(1) and 3 of the Covenant. It denies their capacity to transmit their cultural identity to the following generations on an equal basis between men and women, and deprives them of the legitimacy conferred by full status.

3.9 The right of indigenous persons to enjoy their culture has been repeatedly acknowledged in the Committee's jurisprudence as an essential aspect of their rights under article 27. A foundational aspect of the individual's right to enjoy his or her culture is the formation of a sense of identity and belonging to a group, and recognition of that belonging by others in the group. Cultural identity is shaped by complex processes and encompasses both objective and subjective elements. However, where through the legislative schemes that it introduces in that regard, the State assumes a direct role in the formation of the cultural identities of individuals and their communities.

#### *Article 2(3)(a)*

3.10 The State party has failed to provide the authors with an effective remedy for the violation of their rights under articles 26 and 27 in conjunction with articles 2(1) and 3. The 2011 Act did not eliminate the discrimination entrenched in section 6 of the Indian Act. The proposed amendment only granted section 6(2) status to the grandchildren of Aboriginal

women who married out, while grandchildren born prior to 17 April 1985 to status men who married out are eligible for section 6(1)(a) status.

3.11 The 2009 decision of the British Columbia Court of Appeal and the subsequent denial of the Supreme Court of Canada of leave to appeal that decision have deprived the authors of the remedy they obtained in the Trial Court. The only effective remedy will be one which eliminates the preference for male Indians and patrilineal descent and confirms the entitlement of matrilineal descendants, including of women who married out, to full section 6(1)(a) status.

#### **Parties' observations on admissibility**

4.1 The State party submitted observations on admissibility and merits on 29 August 2011, 28 February 2012, 28 June 2016, 28 February 2017, 29 November 2017, 31 January 2018 and 10 August 2018. In addition to their initial submission of 24 November 2010, the authors submitted further comments on admissibility and merits on 6 and 16 December 2011, 20 June 2016, 16 March 2017 and 12 May 2018.

#### *Ratione temporis*

State party

4.2 The authors' allegations rely in large part on historical discrimination of First Nations women under successive versions of the Indian Act prior to 1985. The general allegations and those relating to the application of the pre-1985 criteria to the authors are outside the competence of the Committee under the Optional Protocol. Any residual discrimination, which resulted from the 1985 amendments to the eligibility criteria, was corrected by the 2011 amendments now in force.

Authors

4.3 The 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.

#### *Ratione personae*

State party

4.4 Certain aspects of the communication are inadmissible because the authors cannot demonstrate that the alleged harms are attributable to the Government. The impacts on the authors' social and cultural relationships that they perceive or in fact suffer because of the provisions under which they are eligible for status should be attributed to the authors' family and larger social and cultural communities, and not to the State.

Authors

4.5 The claim is not about violations by non-state actors, but about the conduct of the State party in enacting and maintaining a legislative scheme that discriminates on the basis of sex. After more than a century of living under a State-imposed regime that defines who is an Indian, Indigenous people view legal entitlement to registration status as confirmation or validation of their "Indianness", a matter separate from the capacity to transmit status and to access certain tangible benefits which are conferred by status.

#### *Victim status*

State party



4.6 In the Committee's jurisprudence, where an alleged inconsistency with the Covenant has been remedied by the State party, individuals cannot claim to be victims of a violation of the Covenant within the meaning of article 1 of the Optional Protocol.<sup>10</sup> The authors have successfully pursued their allegations of discrimination before Canadian tribunals, and have received a remedy that effectively answers their allegations. In light of the 2011 amendments, the authors have not substantiated their claim that they are victims of discrimination due to distinctions in the criteria for eligibility for Indian status. Therefore, the communication is inadmissible under article 1 of the Optional Protocol in respect of the allegations of discrimination based on articles 2(1), 3, 26 and 27 of the Covenant.

#### Authors

4.7 The 1985 Act as amended in 2011 and then in 2017 leaves intact the core of the sex discrimination embedded in the registration provisions, of which the authors successfully complained in the British Columbia Supreme Court, and categorically excludes the authors from eligibility for full section 6(1)(a) status.

#### *Actio popularis*

#### State party

4.8 Certain aspects of the communication related to perceived problems with the eligibility criteria in the 1985 amendments are inadmissible because the authors cannot demonstrate that they are the victims of the harm alleged.<sup>11</sup>

#### Authors

4.9 The authors' claim is that full section 6(1)(a) status is reserved for those who can establish their entitlement to registration under the prior discriminatory regime. This is not an *actio popularis* challenge to the legislation. The sex-based hierarchy embedded in the 1985 Act affects them personally and directly, and the discrimination they suffer has not been remedied by the 2011 and 2017 amendments.

#### *Non-exhaustion of domestic remedies*

#### State party

4.10 A number of the alleged problems with the eligibility criteria, which do not apply to the authors, are currently being examined through domestic litigation. These allegations were not properly brought before the British Columbia Supreme Court (at trial), the Court of Appeal or the Supreme Court of Canada (in the application for leave to appeal) for the simple reason that they did not arise on the authors' facts. These aspects of the communication are therefore inadmissible for non-exhaustion of domestic remedies pursuant to articles 2 and 5(2)(b) of the Optional Protocol.

#### Authors

4.11 The authors reiterate that they have exhausted all available domestic remedies.

<sup>10</sup> Inter alia, *Dranichnikov v. Australia* (CCPR/C/88/D/1291/2004).

<sup>11</sup> The State party refers to the exclusion from eligibility of grandchildren born prior to 4 September 1951; to descendants of Indian women who parented in common-law unions with non-Indian men; and to the illegitimate female children of male Indians.

## Parties' observations on merits

*Article 26 in conjunction with articles 2(1) and 3*

### State party

5.1 Section 6 of the 1985 Act entitles several categories of individuals to status as an Indian including section 6(1)(a), which applies to persons eligible for status immediately prior to 17 April 1985 and preserves previously acquired or vested rights; and section 6(1)(c), which applies to persons whose status was restored by the 1985 amendments – those previously removed or omitted from the status list (Indian Register) because they were, inter alia, women who had married non-Indians or their descendants.<sup>12</sup> Section 6(2) applies to men or women with one parent eligible for status under any paragraph of section 6(1).

5.2 In April 1985, the Indian Act was amended to include these new registration and new band membership provisions. The Court of Appeal in *McIvor* found that the 1985 legislation was a *bona fide* attempt to eliminate discrimination on the basis of sex and that the Government had acted in good faith in enacting the legislation.

5.3 The Indian Act provides only for one Indian status; persons are either eligible for it or not. The 1985 amendments did not create degrees of status or degrees of “Indianness.” The rules governing eligibility for status as an Indian are found in section 6 of the Indian Act as amended. The paragraphs of section 6(1) (particularly (a), (c), (d) and (e)) are essentially transitional provisions which indicate, for persons born before 1985, how the eligibility criteria move from the 1951 Indian Act registration regime to the 1985, and now the 2011, criteria. For everyone born after 1985, the most relevant provisions are section 6(1)(f) and section 6(2).

5.4 Following the 2011 amendments, Sharon McIvor was still eligible for status under the criteria set out in section 6(1)(c). Her son was eligible for status according to the new criteria set out in section 6(1)(c.1), and his children were eligible under section 6(2). This was the same basis for eligibility that their cousins would have if those cousins were eligible for status based on having one male Indian grandparent instead of one female Indian grandparent.

5.5 The children of a person eligible for status under section 6(1) are eligible for status regardless of the eligibility of their other parent. If a person eligible for status under section 6(1) has a child with a non-Indian, the child is eligible under section 6(2) – which sets up the possibility for the operation of the so-called second generation cut-off,<sup>13</sup> since the child of a person eligible under section 6(2) and a non-Indian is not eligible for status, regardless of the sex of the eligible grandparent or the sex of the parent. Status as an Indian is lost upon two successive generations of parenting out.

5.6 The negative impact of the 1985 eligibility criteria on persons in a similar position as the authors was removed by placing eligibility of the children of re-instatees under the criteria in section 6(1), thereby postponing the second generation cut-off one generation in those families. This has placed the grandchildren of Sharon McIvor on par with their counterparts who also have only one eligible grandparent – and that grandparent is a man.

5.7 The 2011 amendments removed the distinction in the 1985 amendments and remedied any impact it had on the authors. Contrary to the authors' claim, there is no discrimination in

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<sup>12</sup> Section 6(1)(c) restores status for: women who had married non-Indians; men and women whose mothers and paternal grandmothers were non-Indians prior to marriage (the “double-mother rule”); illegitimate children of Indian women who had lost status because of non-Indian paternity; and women who married Indians who lost status through enfranchisement and any children of those women.

<sup>13</sup> The “second generation cut-off” in the Indian Act provides that persons descending from two consecutive generations of parenting between an Indian and a non-Indian are not entitled to registration.

fact or law between section 6(1)(a) and section 6(1)(c). Individuals are either eligible to be registered as an Indian under the Indian Act or they are not. There is no “sub-class” of persons with some lesser form of Indian status. The various paragraphs of section 6 identify the various bases on which individuals are eligible for status.

5.8 All persons eligible for status under section 6 have the same legal rights, and the Government makes no distinctions – either in the treatment of any person or in the provision of any benefits – based on the provision of section 6 on which their eligibility for status is founded. When the Federal Government provides funding to Indian bands, which is linked to the number of members of the band who are status Indians, all individuals with status are included. Accordingly, there is no violation of article 26 of the Covenant.

5.9 The difference that remains in the eligibility criteria following the 2011 amendments is the difference between section 6(1) and section 6(2). This is the second generation cut-off. However, this issue has not been challenged by the authors, and the second generation cut-off does not distinguish between persons on the basis of sex.

5.10 If the Committee considers that there is a distinction between section 6(1)(a) and sections 6(1)(c) and (c.1), this distinction is not discriminatory,<sup>14</sup> as it is only one of legislative drafting. Each provision describes a different historical route to obtaining status. Such distinctions are required in order to bring clarity, but do not otherwise negatively impact individuals based on any listed or analogous personal characteristic.

5.11 Section 6(1)(a) includes everyone who had status prior to 1985, when the Indian Act was amended. At the time, the Government’s policy choice included not only the principle that discrimination against women should be removed from the eligibility criteria going forward but also, *inter alia*, that no one should lose status acquired under previous eligibility criteria. Section 6(1)(c) describes those who had previously been deprived of Indian status for a variety of reasons, including women who lost status through marriage to a non-Indian, who were re-instated under the 1985 criteria.

5.12 The preservation of acquired rights – *inter alia*, that no one should lose status previously acquired – is a legitimate aim and the use of separate paragraphs within section 6(1) in order to clearly elaborate the various bases for eligibility for persons born prior to 1985 was a reasonable drafting approach. The authors seek criteria that would base eligibility on “matrilineal descent” without regard for how many generations the individual was from the female ancestor in question. The authors’ eligibility for status is based on the reinstatement of Sharon McIvor herself and not on the reinstatement of any of her distant ancestors – male or female.

5.13 What the authors seek would potentially involve descendants of many generations removed from the female ancestor who initially suffered discrimination based on sex. The State party is not obligated, under the Covenant, to rectify discriminatory acts that pre-dated the coming into force of the Covenant. Apart from the uneven application of the second generation cut-off, the impact of which on the authors was corrected by the 2011 amendments, the 1985 amendments did – to a very large degree – go back in time so as to deem ancestors of living persons eligible for re-instatement in order to rectify the problem in their line of descent.

5.14 On 29 November 2017, a new Bill S-3 extended eligibility for status to all descendants of women who lost status because of their marriage to a non-Indian man, who were born prior to 17 April 1985, going back to the 1869 Gradual Enfranchisement Act. This change is subject to a delayed coming-into-force clause that allows for consultation with First Nations

<sup>14</sup> Citing General comment No. 18 (1989) on non-discrimination, and *Communications Derksen v. Netherlands* (CCPR/C/80/D/976/2001); *Love et al. v. Australia* (CCPR/C/77/D/983/2001); and *Haraldsson and Sveinsson v. Iceland* (CCPR/C/91/D/1306/2004).

and other Indigenous groups on how and when it will be implemented.<sup>15</sup> Thus, the majority of the provisions in Bill S-3 came into force on 22 December 2017, but additional provisions will come into force at a date to be determined by Order-in-Council.

5.15 These amendments that are not yet in force mean that 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 woman who lost status upon marriage, and that both will have the same ability to transmit status to their children. The Bill also eliminates the differential treatment between family members as a result of being eligible for registration based on their maternal lines versus paternal lines, entitling all descendants of Indigenous women who lost Indian status upon marrying a non-Indian man between 1869 and 1985 to registration on an equal basis with the descendants of Indigenous men. The amendments will also restructure the registration provisions of the Indian Act so that persons that would previously have obtained Indian status under section 6(1)(c) of the Act, will be eligible for registration under a new section 6(1)(a.1). These amendments comply with the authors' requests. While the date of entry into force is not stipulated, the Bill contains numerous safeguards holding the Government accountable to Parliament to implement the legislation.<sup>16</sup>

5.16 Finally, the State party admits that persons registered under the Indian Act have an important interest in transmitting their status to their children. It also recognizes the significant links, for some Indigenous Canadians, between Indian status and their personal identity as Indigenous persons. The State party does not agree that the differential treatment of the descendants of Indian women born prior to 1951 violates the Covenant, but it recognizes that there were significant historical inequities related to the Indian Act's treatment of Indigenous women prior to 1951. And eligibility for registration under section 6(1)(a) has special significance for certain individuals, such as the authors, who have experienced historical sex-based discrimination. It is in recognition of this fact that Parliament adopted in Bill S-3 amendments that will ensure that persons in the authors' situation become eligible under section 6(1)(a). Bill S-3 removes remaining sex-based inequities in the Indian Act by extending eligibility for persons previously affected by the "1951 cut-off." The State party regrets the historical discrimination and other inequities to which Indigenous women and their descendants have been subject. It views addressing these inequities as an important step towards reconciliation with Indigenous peoples.

#### Authors

5.17 The 1985 Act as amended in 2011 still excludes from eligibility for registration status Aboriginal women and their descendants who would be entitled to register if sex discrimination were completely eradicated from the scheme.

5.18 The 2011 amendments improved the registration entitlement of Jacob Grismer, making him eligible for section 6(1)(c.1) status, and thereby able to transmit status to his children. In contrast, Sharon McIvor's brother and all his children have full section 6(1)(a) status, and this difference is solely based on sex. The 2011 amendments also do not treat Jacob Grismer and his cousins equally: he is ineligible for section 6(1)(a) status, but the cousins are. Although the authors enjoy the tangible benefits of status for themselves, they

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<sup>15</sup> The consultation plan includes an information-gathering phase lasting from September 2018 to March 2019, and an analysis and formulation of recommendations phase taking place from April 2019 to June 2019. As part of this latter phase, the Government, in cooperation with the Minister's Special Representative, will develop an implementation plan for the remaining aspects of Bill S-3 that are not yet in force, as well as for next steps for broader legislative reform including devolution of the responsibility for determining membership/citizenship to First Nations. The Government will also table a report to Parliament to summarize the process and to provide recommendations.

<sup>16</sup> Section 12(1) of Bill S-3 requires the Minister to review section 6 of the Indian Act to ensure that all sex-based inequities have been eliminated.

still do not enjoy all the intangible benefits on an equal basis with their peers, in particular the legitimacy and social standing.

5.19 The State party's assumption that there is only one Indian status is incorrect. Section 6(1)(a) status is superior and the intangible benefits (the ability to transmit status and the legitimacy and social standing conferred by status) associated with it are unquestionably superior to those associated with section 6(1)(c) and section 6(2) status, although the tangible benefits (access to social programs and tax exemptions) are the same. Furthermore, section 6(1)(c) status is stigmatized within Indigenous communities. There is a perception among First Nations communities that "real" Indians are those who have section 6(1)(a) status. Such differences are not simply a matter of individual perception.

5.20 The State party claims that section 6(1)(c) status is transitional. However, the authors continue to be directly affected by the discrimination that remains in the 1985 Act after the amendments of 2011 and 2017, and that will continue for generations to come. The 2017 amendments which have already come into force do not afford them a remedy. They extend a form of inferior section 6(1)(c) status to some additional subgroups, but leave the discriminatory sex-based hierarchy between section 6(1)(a) and section 6(1)(c) undisturbed.

5.21 On 12 May 2018, the authors reiterated that the State party's registration regime continues to privilege male Indian progenitors and patrilineal descendants. Even if the State party contends that the distinction between section 6(1)(a) status and section 6(1)(c) status is based on reasonable and objective criteria and that the sex-based differential treatment is justified because it preserves "acquired rights," this 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. Furthermore, as a matter of fact, previously acquired rights would not be diminished by extending full section 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.

5.22 The 2017 Bill S-3 did not remove the core of the discrimination that resides in the hierarchy between section 6(1)(a) and section 6(1)(c). Although it contains a provision (section 2.1) that has the potential to create entitlement to full section 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 and has been deferred indefinitely.

5.23 The inclusion of section 2.1 in Bill S-3 represents a kind of moral vindication for the authors. 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 section 6 of the Indian Act is one which accords full section 6(1)(a) status to all Indian women and their descendants born before 1985, on the same basis as Indian men and their descendants born prior to that year. Through these additional provisions, the State party has demonstrated that it knows how to fix the problem. The State party declares that the Government's version of "6(1)(a) all the way" means that 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. It appears that the intention of that amendment is to eliminate the sex-based hierarchy. If the Government's "section 6(1)(a) all the way" amendment were brought into force, the authors would become entitled to section 6(1)(a) status at long last.

5.24 However, the lack of a fixed date for section 2.1 to come into force means that the amendment is entirely without legal force and makes the authors' remedy completely hypothetical. Furthermore, Bill S-3 is devoid of any mechanism to ensure that the amendment will ever come into force, which means that, as a legal legislative provision, it is meaningless.

5.25 In conclusion, the authors' situation of inequality is unchanged by Bill S-3 which is already in force. Sharon McIvor continues to be confined to inferior and stigmatized section 6(1)(c) status. She is neither able to hold section 6(1)(a) status, nor to transmit that status to her child.

5.26 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. It is not appropriate for the State party to consult about whether it will continue legislated discrimination. Nor is it necessary to consult about discrimination in the status registration scheme. The State party 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.

5.27 Therefore, the authors request the Committee to find that they are entitled to be registered under section 6(1)(a) of the Indian Act.

#### *Article 27*

##### State party

5.28 The authors have not adequately claimed or substantiated a violation of their right to enjoy their culture. Both are members of the Lower Nicola Indian Band (part of the Nlaka'pamux Nation), and at issue is their ability to enjoy the Nlaka'pamux culture as practiced by the Lower Nicola Indian Band. They have failed to substantiate any violation of their right to enjoy the particular culture of their indigenous group. Moreover, the Committee's view is that not every interference is a denial of rights within the meaning of article 27.<sup>17</sup>

5.29 The current Indian Act imposes no limit on the authors' ability to enjoy their own culture, to practice their religion or to speak their language. The question is whether the impact of a measure adopted by the State is "so substantial" that it effectively denies the authors the right to enjoy their culture. The Views of the Committee under article 27 all refer to tangible detrimental impacts established by solid proof.

5.30 The authors do not allege that they have no right to live on the reserve lands of their band. It is the Band, and not the Government, that decides who lives on the reserves of the Lower Nicola Indian Band on the basis of its membership list.

5.31 Indian status is only one facet of the identity of those who are eligible.<sup>18</sup> The legislated scheme for determining eligibility for status does not and cannot confer personal dignity. Furthermore, eligibility for status under any of the paragraphs of section 6 is not a marker for legitimacy, whether personal or cultural, except in the *perception* of the authors, perhaps bolstered by the actions of family and community. It cannot be attributed to the State party.

5.32 The authors conflate cultural identity and Indian status to too great a degree. Indian status is not a legislated approximation of any First Nation culture; it is a determinant of eligibility for a range of specific benefits provided by the State party to individuals. Since the 1985 amendments, status as an Indian and membership in an Indian band have been separated. Band membership and not Indian status is more closely aligned with cultural identity as bands are communities of persons sharing the same culture.

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<sup>17</sup> *Poma Poma v. Peru* (CCPR/C/95/D/1457/2006); *Prince v. South Africa* (CCPR/C/91/D/1474/2006), para. 7.4; *Lansman (Ilmari) et al. v. Finland* (CCPR/C/52/D/511/1992); and *Lovelace v. Canada* (CCPR/C/13/D/24/1977), para. 15.

<sup>18</sup> The State party refers the Committee to the website of the Lower Nicola Indian Band to which the authors belong, as an illustration of the importance that membership in their particular community and culture gives to the sense of personal identity of First Nations individuals: [www.lnib.net](http://www.lnib.net).

## Authors

5.33 The authors 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.

5.34 The State party attempts to avoid responsibility for the impact of its legislated sex discrimination within Indigenous communities. 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, the alleged sex discrimination is ongoing.

5.35 The Covenant requires the State party to ensure and 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. When the State party submits that status is not official recognition of an individual's cultural identity, it seeks to ignore the harmful effects of its discriminatory status regime. But 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.

## Article 2(3)

### State party

5.36 Article 2(3) of the Covenant cannot alone give rise to a claim under the Optional Protocol.<sup>19</sup> Since the allegations of violations of articles 26 and 27 have not been substantiated, there is no foundation on which to find a breach of article 2(3). In addition, the authors not only have had access to effective remedies, but have also been successful in their cases.

## Authors

5.37 The authors insist that they have not received an adequate remedy. The authors request that the Committee (a) direct Canada to take immediate measures to ensure that section 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 section 6(1)(a) those persons who were previously not entitled to be registered under section 6(1)(a) solely as a result of the 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) find that the authors are entitled to be registered under either section 6(1)(a) of the 1985 Indian Act or section 6(1)(a) of the 1985 Indian Act as amended.

## Issues and proceedings before the Committee

### Consideration of admissibility

6.1 Before considering any claims contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether it is admissible under the Optional Protocol.

6.2 The Committee notes the State party's contention that the communication should be declared partly inadmissible for failure to exhaust domestic remedies, on the ground that the

<sup>19</sup> Rogerson v. Australia (CCPR/C/74/D/802/1998), para. 7.9, and Peirano Basso v. Uruguay (CCPR/C/100/D/1887/2009), para. 9.4.

authors' allegations were not argued before the Canadian jurisdictions, as the authors lacked standing to raise such allegations. The Committee notes, however, that the authors challenged the constitutionality of section 6 of the 1985 Indian Act under the Canadian Charter of Rights and Freedoms, also relying on articles 2 and 26 of the Covenant; that on 8 June 2007, the British Columbia Supreme Court ruled in their favour, and determined that section 6 of the 1985 Indian Act violated the Canadian Charter in that it discriminated on grounds of sex and marital status, and that the British Columbia Court of Appeal confirmed on 6 April 2009 that section 6 of the Indian Act was discriminatory, albeit on a narrower basis. Following that ruling, the authors sought leave to appeal before the Supreme Court of Canada, which was refused. The Committee considers that the authors have adequately pursued domestic remedies at their disposal, and that it is not precluded from considering the communication under article 5(2)(b) of the Optional Protocol.

6.3 The Committee notes the State party's objection to the admissibility of the communication on the grounds that the authors' allegations, to the extent that they relate to the 1951 amendments to the Indian Act, should be excluded *ratione temporis* from the competence of the Committee, as they pertain to Sharon McIvor's loss of status, which occurred before the entry into force of the Covenant and Optional Protocol for Canada. The Committee, however, notes the authors' claim that the essence of their complaint lies in the alleged discrimination inherent to the eligibility criteria in s. 6 of the Indian Act, as amended in 1985, and later in 2011 and 2017, which occurred after the entry into force of the relevant instruments for the State party. The Committee therefore considers that it is not precluded, *ratione temporis*, from examining the authors' allegations related to the 1985, 2011 and 2017 amendments.

6.4 The Committee also notes that State party's objection to admissibility based on the fact that the alleged harm and the impact on the authors' social and cultural relationships are not attributable to the State. However, the Committee notes the authors' contention that their claim is based on the discriminatory effects of the State's regulation of Indian registration, including the effects the State's actions had on non-state actors. The Committee therefore considers that it is not precluded, *ratione personae*, from examining the authors' claims.

6.5 The Committee notes the State party's allegation that certain aspects of the communication are inadmissible because the authors point to a series of perceived problems with the eligibility criteria in the 1985 amendments to the Indian Act which have no application to them and thus cannot demonstrate that they are the victims of the harm alleged. In this regard, the Committee recalls its jurisprudence according to which "a person may claim to be a victim under article 1 of the Optional Protocol only if his or her rights are effectively violated. The concrete application of this condition is a question of degree. However, no person can in the abstract, by way of *actio popularis*, challenge a law or practice claimed to be contrary to the Covenant".<sup>20</sup> The Committee, however, notes the authors' submission that their communication refers to the application to their specific situation of the legal framework created under section 6(1) of the Indian Act. The Committee therefore considers that the authors may claim to be victims of the alleged violation of their rights under the Covenant in the meaning of article 1 of the Optional Protocol.

6.6 The Committee notes the State party's allegation that article 2(3) of the Covenant cannot alone give rise to a claim under the Optional Protocol, but observes that the authors invoked that provision with reference to an alleged violation of their rights under articles 26 and 27 in conjunction with articles 2(1) and 3 of the Covenant. Accordingly, the Committee declares this claim admissible.

6.7 The Committee further considers that the authors' claims under articles 2(1), 2(3), 3, 26 and 27 of the Covenant have been sufficiently substantiated for purposes of admissibility and proceeds to their examination on the merits.

<sup>20</sup> Aumeeruddy-Cziffra *et al.* v. Mauritius (CCPR/C/12/D/35/1978), para. 9.2.



*Consideration of the merits*

7.1 The Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5(1) of the Optional Protocol.

7.2 The Committee notes the authors' argument that until 1985, the Indian Act favoured Indian men and their male descendants, and took away status from Indian women who married non-Indian men, while also denying status to children whose First Nations descent was derived through Indian women. In spite of legislative amendments in 2011 and 2017, the authors contend that they continue to be directly affected by the alleged discrimination that remains in the 1985 Indian Act. Although the authors admit enjoying the tangible benefits of status for themselves, they contend that they do not enjoy all the intangible benefits of status on a basis of equality with their peers, especially the ability to transmit full section 6(1)(a) status and the social legitimacy conferred by that status, in violation of articles 2(1), 3 and 26 of the Covenant. The authors further contend that the continuing discrimination in section 6 of the amended Indian Act has denied them and other female progenitors and their descendants the equal right to full enjoyment of their cultural identity as members of First Nations, in violation of article 27 of the Covenant.

7.3 The Committee notes the authors' claim that the 1985 Act, as amended in 2011, did not recognize their eligibility for full section 6(1)(a) registration status, while Sharon McIvor's brother and all his children have full section 6(1)(a) status. This difference is based solely on sex, as Sharon McIvor's brother has the same lineage as herself and the same pattern of marriage and parenting. While Sharon McIvor's brother can hold and transmit section 6(1)(a) status to his children born prior to 17 April 1985, following the passage of the 2011 amendments, Sharon McIvor continued to be confined to the allegedly inferior and stigmatized section 6(1)(c) status, neither able to hold nor transmit section 6(1)(a) status to her child. Moreover, the authors claim that this discriminatory state of affairs is fundamentally unchanged following the 2017 amendments to the Indian Act, since the enacted provisions to date have extended a form of inferior section 6(1)(c) status to some additional subgroups, but have not altered the discriminatory sex-based hierarchy between section 6(1)(a) and section 6(1)(c).

7.4 The Committee notes the significant efforts by the State party in recent years to address continuing distinctions on the basis of sex in the Indian Act, including the recent 2017 amendments to the Indian Act and the fact that most of them have come into force. However, section 2.1, that the authors consider crucial for their situation by bestowing 6(1)(a) status based on maternal as well as paternal lineage, has not entered into force. The authors state that if those provisions were brought into force, the discrimination based on sex would be eliminated and they would become entitled to section 6(1)(a) status, but that this remains hypothetical.

7.5 The Committee also notes the State party's argument that there is only one Indian status associated with corollary tangible benefits, such as health benefits, financial assistance, tax exemptions, and that the provision of these tangible benefits is equal for all persons with status under section 6. It further notes the State party's argument that section 6(1)(a) includes everyone who had status prior to 1985, whereas section 6(1)(c) applies to those who were previously deprived of Indian status for a variety of reasons, including women who lost status through marriage to a non-Indian. The State party therefore contends that there is no discrimination in fact or law between section 6(1)(a) and section 6(1)(c); that the preservation of acquired rights is a legitimate legislative objective that justifies the distinction, and that any differences under the subsections of section 6 of the Indian Act are ones of legislative drafting, which describe different background eligibility criteria leading to status entitlement, and that the paragraphs of section 6(1), in particular (a), (c), (d) and (e) are transitional provisions for persons born before 1985. Accordingly, there is no "sub-class" of persons with some lesser form of Indian status. Any differential treatment in access to intangible benefits to persons with status under section 6(1)(c) is not attributable to the State party.

7.6 The Committee recalls that the principle of equal treatment of the sexes applies by virtue of articles 2(1), 3 and 26.<sup>21</sup> It further recalls its General comment No. 18 on non-discrimination, according to which the Covenant prohibits any distinction, exclusion, restriction or preference which is based on any ground including sex, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.<sup>22</sup> In the present case, the Committee notes that the Indian Act as amended in 1985, 2011 and 2017 still incorporates a distinction based on sex.<sup>23</sup> It further notes that according to the State party, this distinction will be eliminated, and all persons in the maternal line will be entitled to the same status as persons in the paternal line, when the additional provision in Bill S-3 comes into force (para. 5.14). The Committee considers, however, that at the present time, those amendments are not yet in force, and the distinction based on sex still persists in the Indian Act. The Committee further notes that the domestic courts also found that section 6 of the 1985 Indian Act was discriminatory after the 2011 amendments.<sup>24</sup>

7.7 The Committee recalls its General comment No. 18 and its jurisprudence that not every differentiation amounts to discrimination, as long as it is based on reasonable and objective criteria, in pursuit of an aim that is legitimate under the Covenant. The test for the Committee therefore is whether, in the circumstances of the present communication, the distinction based on sex in the Indian Act, as amended, meets the criteria of reasonableness, objectivity and legitimacy of aim.

7.8 In this connection, the Committee notes that Sharon McIvor is treated differently from her own brother under the Indian Act and, as the State party admits, does not have the same section 6(1)(a) status as persons in the paternal line and also cannot transmit the same status in the same conditions as her brother. The Committee also notes the authors' argument that, as a consequence of the discrimination based on sex in the Indian Act, they have been stigmatized within their community and denied full opportunity to enjoy their culture in community with the other members of their Indigenous group. The authors submit that they are perceived as not being "real" Indians; Sharon McIvor is treated as a "Bill C-31 woman"; and following adoption of the 1985 Act, Jacob Grismer was denied full participation in traditional hunting and fishing activities.<sup>25</sup> The authors contend that the State party's century-old practice of defining who is an Indian has led Indigenous people to view legal entitlement to registration status as confirmation or validation of their "Indianness". The authors contend that the longstanding distinction in the Indian Act between recognizing status for descendants of the paternal line, but not the maternal line, has contributed to the stigmatization of descendants of the maternal line, and that this stigmatization is perpetuated in the different legal status for descendants of the maternal line in the amended Indian Act.

7.9 The State party argues that any impact of the status bestowed by the Indian Act, as amended, on the authors' social and cultural relationships that they perceive or in fact suffer because of the provisions under which they are eligible for status should be attributed to the

<sup>21</sup> Ibid., para. 9.2 (b) 2 (i) 5.

<sup>22</sup> General comment No. 18, para. 7.

<sup>23</sup> The Committee notes that in 2016, the Committee on the Elimination of Discrimination against Women recommended that the State party "remove all remaining discriminatory provisions of the Indian Act that affect indigenous women and their descendants". CEDAW, Concluding observations on the combined eighth and ninth periodic reports of Canada (CEDAW/C/CAN/CO/8-9) (2016), paras. 12-13.

<sup>24</sup> *Descheneaux v. Canada*, note 7 above.

<sup>25</sup> Cf. IACHR, *Missing and murdered indigenous women in British Columbia, Canada* (OEA/Ser.L/V/II. Doc.30/14) (2014), paras. 68-69 ("[T]he Indian Act as amended fails to fully address remaining concerns about gender equality....[I]n 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.").

authors' family and larger social and cultural communities, and not to the State (para. 4.3). However, the State party acknowledges that the amended Indian Act still maintains a distinction in status based on sex – a distinction that would be eliminated in the pending revision to the Indian Act (para. 5.15). The State party recognizes the significant links, for some Indigenous Canadians, between Indian status and their personal identity as Indigenous persons. The State party also acknowledges the historical discrimination and other inequities to which Indigenous women and their descendants have been subject, and that eligibility for registration under section 6(1)(a) has special significance for certain individuals, such as the authors, who have experienced historical sex-based discrimination. The pending revision establishing such eligibility was adopted in recognition of this fact (para. 5.16). The Committee considers that such a discriminatory distinction between members of the same community can affect and compromise their way of life.

7.10 The Committee recalls its General comment No. 23 (1994) that article 27 establishes and recognizes a right which is conferred on individuals belonging to indigenous groups and which is distinct from, and additional to, the other rights which all persons are entitled to enjoy under the Covenant.<sup>26</sup> Culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples, which may include such traditional activities as fishing and hunting. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.<sup>27</sup>

7.11 The Committee further recalls that the prohibition on discrimination in the Covenant applies not only to discrimination in law, but also to discrimination in fact, whether practised by public authorities, by the community, or by private persons or bodies.<sup>28</sup> It further recalls that the principle of equality sometimes requires States parties to adopt temporary special measures in order to diminish or eliminate conditions that cause or help to perpetuate discrimination prohibited by the Covenant.<sup>29</sup> In the present case, the State party acknowledges both that differential treatment based on status exists, and that the additional provisions of Bill S-3 that are not yet in force will entitle persons in the maternal line to the same status as those in the paternal line. The Committee also notes the State party's argument that the distinction based on sex existing in the different sub-paragraphs of section 6(1) of the 1985 Indian Act, as amended, is justified by the legitimate aim of preservation of acquired rights. However, the State party has not demonstrated how recognizing equal status for the authors under section 6(1)(a) would adversely affect the acquired rights of others. The State party therefore has failed to demonstrate that the stated aim is based on objective and reasonable grounds. The Committee accordingly concludes that the continuing distinction based on sex in section 6(1) of the Indian Act constitutes discrimination, which has impacted the right of the authors to enjoy their own culture together with the other members of their group. The Committee therefore concludes that the authors have demonstrated a violation of articles 3 and 26, read in conjunction with article 27 of the Covenant.

7.12 In the light of the previous findings, the Committee considers that it is not necessary to examine the authors' remaining claims under the Covenant.

8. The Committee, acting under article 5(4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of the authors' rights under articles 3 and 26, read in conjunction with article 27 of the Covenant.

9. In accordance with article 2(3)(a) of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State

<sup>26</sup> General comment No. 23, para. 1.

<sup>27</sup> *Ibid.*, para. 6.1.

<sup>28</sup> General comment No. 18, para. 9.

<sup>29</sup> *Ibid.*, para. 10.

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.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and disseminate them broadly in the official languages of the State party.

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