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UN Human Rights Committee Rules *Indian Act* is Discriminatory in McIvor Case

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Decision Commented On: Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2020/2010

*Note on terminology: "Indian" is used to describe a person defined as such under the *Indian Act* and is not intended to carry any derogatory connotations in this post.

Introduction

In a decision released on January 14, 2019, the United Nations Human Rights Committee (UNHRC) determined that the Government of Canada violated the International Covenant on Civil and Political Rights (ICCPR) by discriminating against First Nations women and their descendants through Status requirements under the *Indian Act*, RSC 1985, c I-5. The decision was one that the claimants, Sharon McIvor and her son Jacob Grismer, had been waiting for more than a decade since their case was first heard by the British Columbia Superior Court in 2007.

To understand McIvor and Grismer's complaint to the UNHRC and the litigation that preceded it, a review of their family lineage and the many amendments made to the *Indian Act* will be reviewed in this post. We will also briefly review the Status provisions of the *Indian Act* and the litigation and legislative amendments that have resulted from claims of sex discrimination under the *Act*, review McIvor and Grismer's litigation, and summarize the arguments made to the UNHRC and the Committee's final decision.

Sex Discrimination under the Indian Act

An excerpt from a prior ABlawg post outlining the historical importance of obtaining Status under the *Indian Act* and the relevant discriminatory provisions will be repeated here:

> Section 6 of the *Indian Act* sets out rules for entitlement to Indian registration (Status) based on an individual's descent from a person registered or eligible to be registered as a 'Status Indian'. Whether or not a Canadian is granted Status, a concept based on 19th century ideas of racial essentialism (and many would argue, including the authors, white supremacy), dictates who can be recognized as an Indian person by the Canadian government. This finding has enormous implications for the individual involved, from their ability to live on reserve, to their access to government programs. Being denied Status can block Indigenous peoples from participating in important aspects of

> Indigenous life and exclude them from various rights and forms of government support offered to Status Indians… Despite its problematic implications, Status is often seen as a necessity if one wishes to access any of the government funded programs for First Nations people and participate fully in reserve or Nation life.
>
> Section 6(1) v Section 6(2)
>
> Within the broader category of Status Indians, there is a further distinction between persons who have Status under section 6(1) of the *Indian Act*, and those who have Status under 6(2). While this is a gross over-simplification, the main distinctions between the two are:
> 1. That both parents of a 6(1) Indian had Status, while 6(2) Indians only had one parent with Status; and
> 2. 6(1) Indians can marry a non-Status person and still pass on Status to their children. If 6(2) Indians marry a non-Status person, Status is not passed onto their children.
>
> A person's 6(1) or 6(2) Status is in many cases affected by whether their mother or grandmother was denied Status based on their gender, a historically common occurrence.
>
> Gender and Status
>
> Historically several provisions of the *Indian Act* worked to exclude women from various rights by terminating their Status, or 'enfranchising' them. Originally, the *Indian Act* held that a Status Indian woman who married a non-Indian man would cease to be an Indian. She would lose her Status and all associated rights. Conversely, if an Indian man married a non-Status woman, he would maintain his Status, and it would be conferred on his wife. After extensive litigation, the most overtly discriminatory provisions of the *Indian Act* were amended in 1985 and 2010. These amendments allowed women who had lost their Status by marrying non-Status men to regain it.

As outlined in a prior post by Jennifer Koshan, the legislative changes enacted left many residual problems that have been the source of much litigation in Canada (See *Attorney General of Canada v Lavell*, [1974] SCR 1349, 1973 CanLII 175 (SCC); *Lovelace v Canada*, Communication No R.6/24, UN Doc Supp No 40 (A/36/40) (1981); *Matson et al v Indian and Northern Affairs Canada*, 2013 CHRT 13 (CanLII); *Andrews et al v Indian and Northern Affairs Canada*, 2013 CHRT 21 (CanLII); *Descheneaux c. Canada (Procureur General)*, 2015 QCCS 3555 (CanLII); and *Gehl v Canada (Attorney General)*, 2017 ONCA 319 (CanLII).

Family and Judicial History

Sharon McIvor's mother is Susan, daughter of Mary Tom, a member of the Lower Nicola Band born in 1888, and a Dutch man of no First Nations ancestry. Susan was born in 1925 and was not eligible for registration as an Indian because the *Indian Act* required that First Nations ancestry be transmitted through patrilineal descent only (UNHRC Decision at para 2.3). At birth, neither Sharon 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; Jacob Grismer was born to the couple in 1971 (at para 2.4).

The revised *Indian Act* came into effect on 17 April 1985. Until then, the *Act* took Status away from Indian women who married non-Indian men and deprived children of Status if their First Nations ancestry was traced to these women (at para 2.5). However, the amended *Act* failed to fully eliminate sex discrimination (at para 2.6). Under section 6 of the 1985 *Indian Act*, McIvor is still ineligible for full Indian Status under section 6(1)(a). Instead, she is entitled to registration under section 6(1)(c), but this restricts her from passing on full Status to her son and deprives her grandchildren of any entitlement (at para 2.6). This has become known as the 'second generation cut-off rule', which denies Status entitlement to the second consecutive descendants of an Indian and non-Indian. The discriminatory effect of this rule is seen when comparing this scenario to that of Sharon McIvor's brother, who is eligible for full section 6(1)(a) registration Status for himself, his children, and his grandchildren because their ancestry is traced through patrilineal descent (at para 2.7).
McIvor attempted to register for Status for herself and her children in 1985 and the Registrar of Indian and Northern Affairs Canada determined that she was entitled only to registration under section 6(2), not section 6(1), because of her non-Indian paternity. She appealed the decision and lost (at para 2.8).

In 1999, Jacob Grismer married a woman with no First Nations ancestry. Jacob's children receive no entitlement, and he is ineligible for full section 6(1)(a) Status because his entitlement is based on his mother's ancestry (at para 2.10). Conversely, his cousins – the children of his mother's brother – can pass Status to their children.

In 2007, McIvor and Grismer challenged the constitutional validity of sections 6(1) and 6(2) of the *Indian Act* (*McIvor v The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 827 (*McIvor*, BSSC)). The Court concluded that section 6 of the 1985 *Indian Act* violated section 15(1) of the *Charter* "in that it discriminates between matrilineal and patrilineal descendants born prior to April 17, 1985, of Indian women who married non-Indian men, and the descendants of Indian men who married non-Indian women" (at para 343). The government appealed the decision, and the British Columbia Court of Appeal narrowed the scope of the *Charter* breach found by the trial court, determining that sections 6(1)(a) and 6(1)(c) violated the *Charter* "only to the extent that that they grant individuals to whom the 'double-mother rule' applied greater rights than they would have had under the pre-1985 legislation" (*McIvor v Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153 (CanLII) at para 154 (*McIvor*, BCCA). As summarized in that case, the 'double-mother rule' dictated that a person who traced their Status exclusively through their mother and grandmother, where both the mother and grandmother married out or propagated with a non-Status individual, would lose their Status (*McIvor*, BCCA at para 5). Section 6(1)(c) of the 1985 *Indian Act* granted 6(1) Status to the individuals who had lost their Status under the 'double-mother rule' and in doing so augmented the rights of these individuals so that they were treated more favourably than those in Grismer's circumstances. The relief granted by the Court of Appeal was limited to ensuring that Mr. Grismer could obtain and maintain his 6(1) Status, but no additional relief was granted to other subcategories identified by Sharon McIvor in her pleadings.

As a result, the Court of Appeal 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 (*McIvor*, BCCA at para 161). The Court of Appeal decision left McIvor and Grismer without a remedy because it did not provide McIvor's grandchildren with Status, nor

make them eligible for section 6(1)(a) Status (UNHRC Decision at para 2.13). They appealed to the Supreme Court of Canada, and leave to appeal was refused on 5 November 2009, without reasons.

UN Complaint and Decision

The Arguments

McIvor and Grismer initiated a complaint to the UNHRC in November 2010 (UNHRC Complaint). It stated:

> …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 (Decision at para 3.1).

Canada is a party to the Optional Protocol, and as such, recognizes the competence of the UNHRC to determine if there has been a violation of the ICCPR. The following articles of the ICCPR apply:

> Article 26: which establishes the right of all persons to equality before the law and to the equal protection of the law without any discrimination on the basis of sex.
> Articles 2(1), 3, and 27: which together guarantee the equal right of men and women to the enjoyment of their culture, without discrimination based on sex.
> Article 2(3)(a): which guarantees the right to an effective remedy for violations of rights recognized in the ICCPR (UNHRC Complaint at 10).

In their argument on Article 26, the complainants described the stigma that surrounds First Nations people without Status in Canada; the implication is that they are "inferior and 'less Indian' than their male counterparts" (UNHRC Decision at para 3.2). Grismer specifically noted the isolation he experienced as a young man being unable to participate in traditional hunting and fishing activities because he lacked Indian Status (at para 3.3). He stated that "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." (at para 3.3)

In response, the Canadian government largely denied the existence of "sub-classes" of Indian Status due to the discrepancies under section 6(1)(a) and 6(1)(c) of the *Indian Act* (at para 5.7). Instead, the government acknowledged that the discrimination lies in the difference between section 6(1) and 6(2) and the resulting 'second generation cut-off rule' (at para 5.7). Since the second-generation cut-off rule was not raised by McIvor and Grismer in their complaint, it was not at issue.

Further, the government argued that the remedy sought by McIvor and Grismer would result in "descendants of many generations removed from the female ancestor who initially suffered discrimination based on sex" receiving Status (at para 5.13). Because they are not required to

remedy discriminatory acts that occurred prior to the date the ICCPR came into force, this is outside their obligations as a State Party to the ICCPR (at para 5.13).

Lastly, Canada argued that in any event, the recently passed Bill S-3 removes remaining sex-based inequities in the *Indian Act* by extending eligibility for persons previously affected by the discriminatory provisions of the *Act* (at para 5.16).

Under Article 27, McIvor and Grismer argued that section 6 of the *Indian Act* "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." (at para 3.8)

Canada's defence of the Article 27 violation equates to an outright denial of the effect that Indian Status has on First Nations people in Canada. First, Canada argued that McIvor and Grismer failed to "substantiate any violation of their right to enjoy the particular culture of their Indigenous group", noting that, for example, they are still able to live on their Nation's land (at para 5.28). Second, Canada argued that the *Indian Act* does not limit one's ability to partake in their culture, and that McIvor and Grismer "conflate cultural identity and Indian Status to too great a degree" (at para 5.32).

McIvor and Grismer petitioned the Committee for a remedy under Article 2(3)(a), because the prior litigation and legislative amendments failed to provide them with a remedy. Bill S-3, the latest amendment to the Status provisions of the *Indian Act*, was given Royal Assent on 12 December 2017 and contains a provision that has the potential to create entitlement to full section 6(1)(a) Status for McIvor and Grismer (see section 2.1). However, that provision is not yet in force, and the government of Canada has made no concrete plans for when it will be available to the complainants and others in their position (at para 5.22).

Canada argued that there was "no foundation on which to find a breach of Article 2(3)" because the claims under Article 26 and 27 were not substantiated, and McIvor and Grismer were successful in their previous litigation (at para 5.36).

The Decision

The Committee, in its decision, recalled General comments No 18 and 23 on the ICCPR. General comments are "authoritative interpretations of individual human rights or of the legal nature of human rights obligations" (see here). General comment No 18 prohibits any "distinction, exclusion, restriction or preference which is based on any ground…and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons…of all rights and freedoms" (at para 7). It also states that not every differentiation amounts to discrimination, "if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant" (at para 13). The Committee reviewed the evidence of both McIvor and Grismer and the Government of Canada. It noted "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" (UNHRC Decision at para 7.10, citing General comment No. 23 at para 1).

Acknowledging this context, the Committee recalled Canada's acknowledgement that the sex discrimination within section 6(1) of the 1985 *Indian Act* "is justified by the legitimate aim of preservation of acquired rights" (at para 7.11). However, Canada had not demonstrated how recognizing equal Status for McIvor and Grismer under section 6(1)(a) would adversely affect the acquired rights of others (at para 7.11). The Committee concluded that Canada failed to demonstrate that the stated aim was based on objective and reasonable grounds. Therefore, "McIvor and Grismer demonstrated a violation of articles 3 and 26, read in conjunction with article 27" (at para 7.11).

In accordance with article 2(3)(a), Canada is obligated to

(a) Ensure that section 6(1)(a) of the 1985 *Indian 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)…; 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*. (at para 9).

Canada has 180 days before it is required to report back to the UNHRC on its progress (at para 10).

Reaction to Decision

In response to the decision, McIvor said "I'm very happy with the decision. If Canada follows through as they're supposed to do, it's a game changer for a lot of women."

Matthew Dillon, spokesperson on behalf of the Office of Crown-Indigenous Relations, said in a statement that "Gender equality is a fundamental human right, and that was why it was a priority of our government to finally eliminate all sex-based discrimination from the Indian Act through Bill S-3…Our government will be reporting to Parliament in June on the implementation plan and next steps."

The government has appointed Claudette Dumont-Smith as a Ministerial Special Representative to oversee collaborative engagement sessions throughout Canada to solicit feedback from Canada's First Nation communities, organizations and other interested parties regarding the draft changes to the *Indian Act* introduced under Bill S-3. One of the mandates of the collaborative process is to consult on issues pertaining to sex discrimination, as well as other issues affected by the *Indian Act* such as: (a) issues relating to adoption; (b) the 1951 cut-off date for entitlement to registration; (c) the second-generation cut-off rule; (d) unknown or unstated paternity; (e) enfranchisement; (f) the continued federal government role in determining Indian status and band membership; and (g) First Nations authorities to determine band membership.

While these steps are important, they do reinforce the fact that Bill S-3 does not currently provide relief to persons in the position of McIvor and Grismer.

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