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Télégrammes : UNATIONS, GENÈVE

Télex : 28 96 96

Téléphone : 34 60 11 31 02 11

RÉF. N°: G/SO 215/51 CANA (8)

(à rappeler dans la réponse) R. 6/24

Palais des Nations
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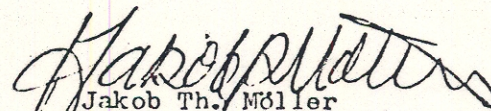
17 August 1981

Dear Dr. Kinsella,
Dear Professor Fleming,

... I have the honour to transmit to you herewith, in your capacities as legal representatives of Sandra Lovelace, the text of the views adopted by the Human Rights Committee on 30 July 1981, concerning communication No. R. 6/24, submitted by her to the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights.

An individual opinion is appended to the views, pursuant to rule 94 (3) of the Human Rights Committee's provisional rules of procedure.

Yours sincerely,


Jakob Th. Möller
Chief, Communications Unit
Division of Human Rights

Dr. Noel A. Kinsella
Chairman, Human Rights Commission
P.O. Box 6000
Fredericton, N.B.
Canada

cc : Professor Fleming

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HUMAN RIGHTS COMMITTEE
Thirteenth session

DECISIONS

Communication No. R.6/24

Submitted by: Sandra Lovelace (represented by
Professor Donald W. Fleming and Dr. Noel A. Kinsella)

Alleged victim: The author

State party concerned: Canada

Date of communication: 29 December 1977 (date of initial letter)

Documentation references: decisions - 18 July 1978 (CCPR/C/DR(IV)/R.6/24)
6 April 1979 (CCPR/C/WG(VI)/D/R.6/24)
14 August 1979 (CCPR/C/DR(VII)/R.6/24)
31 July 1980 (CCPR/C/DR(X)/R.6/24)

Date of adoption of views
under article 5 (4) of
the Optional Protocol: 30 July 1981

On 30 July 1981, the Human Rights Committee adopted its views under article 5 (4) of the Optional Protocol concerning communication No. R.6/24. The text of the views is reproduced in the annex to the present document. An individual opinion submitted by a member of the Committee is appended to the annex.

*/ All persons handling this document are requested to respect and observe its confidential nature.

ANNEX

TO THE REPORT OF THE HUMAN RIGHTS COMMITTEE

VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5 (4)
OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS a/

concerning

Communication No. R.6/24

Submitted by: Sandra Lovelace

State party concerned: Canada

Date of communication: 29 December 1977

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights

meeting on 30 July 1981;

having concluded its consideration of communication No. R.6/24 submitted to the Committee by Sandra Lovelace under the Optional Protocol to the International Covenant on Civil and Political Rights;

having taken into account all written information made available to it by the authors of the communication and by the State party concerned;

adopts the following:

VIEWS UNDER ARTICLE 5 (4) OF THE OPTIONAL PROTOCOL

1. The author of the communication dated 29 December 1977 and supplemented by letters of 17 April 1978, 28 November 1979 and 20 June 1980, is a 32-year-old woman, living in Canada. She was born and registered as "Maliseet Indian" but has lost her rights and status as an Indian in accordance with section 12 (1) (b) of the Indian Act, after having married a non-Indian on 23 May 1970. Pointing out that an Indian man who marries a non-Indian woman does not lose his Indian status, she claims that the Act is discriminatory on the grounds of sex and contrary to articles 2 (1), 3, 23 (1) and (4), 26 and 27 of the Covenant. As to the admissibility of the communication, she contends that she was not required to exhaust local remedies since the Supreme Court of Canada, in *The Attorney General of Canada v. Jeanette Lavalle, Richard Isaac et al. v. Ivonne Bédard* [1974] S.C.R. 1349, held that section 12 (1) (b) was fully operative, irrespective of its inconsistency with the Canadian Bill of Rights on account of discrimination based on sex.

a/ Mr. Walter Surma Tarnopolsky, pursuant to rule 85 of the provisional rules of procedure, did not participate in the consideration of this communication or in the adoption of the views of the Committee under article 5 (4) of the Optional Protocol in this matter.

By its decision of 18 July 1978 the Human Rights Committee transmitted the communication, under rule 91 of the provisional rules of procedure, to the State party concerned, requesting information and observations relevant to the question of admissibility of the communication. This request for information and observations was reiterated by a decision of the Committee's Working Group, dated 6 April 1979.

3. By its decision of 14 August 1979 the Human Rights Committee declared the communication admissible and requested the author of the communication to submit additional information concerning her age and her marriage, which had not been indicated in the original submission. At that time no information or observations had been received from the State party concerning the question of admissibility of the communication.

4. In its submission dated 26 September 1979 relating to the admissibility of the communication, the State party informed the Committee that it had no comments on that point to make. This fact, however, should not be considered as an admission of the merits of the allegations or the arguments of the author of the communication.

5. In its submission under article 4 (2) of the Optional Protocol concerning the merits of the case, dated 4 April 1980, the State party recognized that "many of the provisions of the ... Indian Act, including section 12 (1) (b), require serious reconsideration and reform". The Government further referred to an earlier public declaration to the effect that it intended to put a reform bill before the Canadian Parliament. It none the less stressed the necessity of the Indian Act as an instrument designed to protect the Indian minority in accordance with article 27 of the Covenant. A definition of the Indian was inevitable in view of the special privileges granted to the Indian communities, in particular their right to occupy reserve lands. Traditionally, patrilineal family relationships were taken into account for determining legal claims. Since, additionally, in the farming societies of the nineteenth century, reserve land was felt to be more threatened by non-Indian men than by non-Indian women, legal enactments as from 1869 provided that an Indian woman who married a non-Indian man would lose her status as an Indian. These reasons were still valid. A change in the law could only be sought in consultation with the Indians themselves who, however, were divided on the issue of equal rights. The Indian community should not be endangered by legislative changes. Therefore, although the Government was in principle committed to amending section 12 (1) (b) of the Indian Act, no quick and immediate legislative action could be expected.

6. The author of the communication, in her submission of 20 June 1980, disputes the contention that legal relationships within Indian families were traditionally patrilineal in nature. Her view is that the reasons put forward by the Canadian Government do not justify the discrimination against Indian women in section 12 (1) (b) of the Indian Act. She concludes that the Human Rights Committee should recommend the State party to amend the provisions in question.

7.1 In an Interim decision, adopted on 31 July 1980, the Human Rights Committee set out the issues of the case in the following considerations:

7.2 The Human Rights Committee recognizes that the relevant provision of the Indian Act, although not legally restricting the right to marry as laid down in article 23 (2) of the Covenant, entails serious disadvantages on the part of the Indian woman who wants to marry a non-Indian man and may in fact cause her to live

with her fiancé in an unmarried relationship. There is thus a question as to whether the obligation of the State party under article 23 of the Covenant with regard to the protection of the family is complied with. Moreover, since only Indian women and not Indian men are subject to these disadvantages under the Act, the question arises whether Canada complies with its commitment under articles 2 and 3 to secure the rights under the Covenant without discrimination as to sex. On the other hand, article 27 of the Covenant requires States parties to accord protection to ethnic and linguistic minorities and the Committee must give due weight to this obligation. To enable it to form an opinion on these issues, it would assist the Committee to have certain additional observations and information.

7.3 In regard to the present communication, however, the Human Rights Committee must also take into account that the Covenant has entered into force in respect of Canada on 19 August 1976, several years after the marriage of Mrs. Lovelace. She consequently lost her status as an Indian at a time when Canada was not bound by the Covenant. The Human Rights Committee has held that it is empowered to consider a communication when the measures complained of, although they occurred before the entry into force of the Covenant, continued to have effects which themselves constitute a violation of the Covenant after that date. It is therefore relevant for the Committee to know whether the marriage of Mrs. Lovelace in 1970 has had any such effects.

7.4 Since the author of the communication is ethnically an Indian, some persisting effects of her loss of legal status as an Indian may, as from the entry into force of the Covenant for Canada, amount to a violation of rights protected by the Covenant. The Human Rights Committee has been informed that persons in her situation are denied the right to live on an Indian reserve with resultant separation from the Indian community and members of their families. Such prohibition may affect rights which the Covenant guarantees in articles 12 (1), 17, 23 (1), 24 and 27. There may be other such effects of her loss of status.

8. The Human Rights Committee invited the parties to submit their observations on the above considerations and, as appropriate, to furnish replies to the following questions:

(a) How many Indian women marry non-Indian men on an average each year? Statistical data for the last 20 years should be provided.

(b) What is the legal basis of a prohibition to live on a reserve? Is it a direct result of the loss of Indian status or does it derive from a discretionary decision of the Council of the community concerned?

(c) What reasons are adduced to justify the denial of the right of abode on a reserve?

(d) What legislative proposals are under consideration for ensuring full equality between the sexes with regard to Indian status? How would they affect the position of Mrs. Lovelace? How soon can it be expected that legislation will be introduced?

(e) What was Mrs. Lovelace's place of abode prior to her marriage? Was she that time living with other members of her family? Was she denied the right to reside on a reserve in consequence of her marriage?

(f) What other persisting effects of Mrs. Lovelace's loss of status are there which may be relevant to any of the rights protected by the Covenant?

9.1 In submissions dated 22 October and 2 December 1980 the State party and the author, respectively, commented on the Committee's considerations and furnished replies to the questions asked.

9.2 It emerges from statistics provided by the State party that from 1965 to 1978, on an average, 510 Indian women married non-Indian men each year. Marriages between Indian women and Indian men of the same band during that period were 590 on the average each year; between Indian women and Indian men of a different band 422 on the average each year; and between Indian men and non-Indian women 448 on the average each year.

9.3 As to the legal basis of a prohibition to live on a reserve, the State party offers the following explanations:

"Section 14 of the Indian Act provides that '(an Indian) woman who is a member of a band ceases to be a member of that band if she marries a person who is not a member of that band'. 1/ As such, she loses the right to the use and benefits, in common with other members of the band, of the land allotted to the band. 2/ It should, however, be noted that 'when (an Indian woman) marries a member of another band, she thereupon becomes a member of the band of which her husband is a member'. As such, she is entitled to the use and benefit of lands allotted to her husband's band.

"An Indian (including a woman) who ceases to be a member of a band ceases to be entitled to reside by right on a reserve. None the less it is possible for an individual to reside on a reserve if his or her presence thereon is tolerated by a band or its members. It should be noted that under section 30 of the Indian Act, any person who trespasses on a reserve is guilty of an offence. In addition, section 31 of the Act provides that an Indian or a band (and of course its agent, the Band Council) may seek relief or remedy against any person, other than an Indian, who is or has been

"(a) unlawfully in occupation or possession of,

"(b) claiming adversely the right to occupation or possession of, or

"(c) trespassing upon

a reserve or part thereof."

9.4 As to the reasons adduced to justify the denial of the right of abode on a reserve, the State party states that the provisions of the Indian Act which govern the right to reside on a reserve have been enacted to give effect to various treaty obligations reserving to the Indians exclusive use of certain lands.

1/ Mrs. Lovelace married a non-Indian. As such, she ceased to be a member of the Tobique band. In addition, by the application of subparagraph 12 (1) (b) of the Indian Act, she lost her Indian status.

2/ It should be noted that when an Indian ceases to be a member of a band, he is entitled, if he meets the conditions set out in sections 15 and 16 of the Indian Act, to compensation from Her Majesty for this loss of membership.

9.5 With regard to the legislative proposals under consideration, the State party offers the following information:

"Legislative proposals are being considered which would ensure that no Indian person, male or female, would lose his or her status under any circumstances other than his or her own personal desire to renounce it.

"In addition, changes to the present sections under which the status of the Indian woman and minor children is dependent upon the status of her spouse are also being considered.

"Further recommendations are being considered which would give Band Councils powers to pass by-laws concerning membership in the band; such by-laws, however, would be required to be non-discriminatory in the areas of sex, religion and family affiliation.

"In the case of Mrs. Lovelace, when such new legislation is enacted, she would then be entitled to be registered as an Indian.

"Legislative recommendations are being prepared for presentation to Cabinet for approval and placement on the Parliamentary Calendar for introduction before the House by mid-1981."

9.6 As to Mrs. Lovelace's place of abode prior to her marriage both parties confirm that she was at that time living on the Tobique Reserve with her parents. Sandra Lovelace adds that as a result of her marriage, she was denied the right to live on an Indian reserve. As to her abode since then the State party observes:

"Since her marriage and following her divorce, Mrs. Lovelace has, from time to time, lived on the reserve in the home of her parents, and the Band Council has made no move to prevent her from doing so. However, Mrs. Lovelace wishes to live permanently on the reserve and to obtain a new house. To do so, she has to apply to the Band Council. Housing on reserves is provided with money set aside by Parliament for the benefit of registered Indians. The Council has not agreed to provide Mrs. Lovelace with a new house. It considers that in the provision of such housing priority is to be given to registered Indians."

9.7 In this connection the following additional information has been submitted on behalf of Mrs. Lovelace:

"At the present time, Sandra Lovelace is living on the Tobique Indian Reserve, although she has no right to remain there. She has returned to the reserve with her children because her marriage has broken up and she has no other place to reside. She is able to remain on the reserve in violation of the law of the local Band Council because dissident members of the tribe who support her cause have threatened to resort to physical violence in her defence should the authorities attempt to remove her."

9.8 As to other persisting effects of Mrs. Lovelace's loss of Indian status the State party submits the following:

"When Mrs. Lovelace lost her Indian status through marriage to a non-Indian, she also lost access to federal government programs for Indian people in areas such as education, housing, social assistance, etc. At the same time, however, she and her children became eligible to receive similar benefits from programs the provincial government provides for all residents of the province.

"Mrs. Lovelace is no longer a member of the Tobique band and no longer an Indian under the terms of the Indian Act. She however is enjoying all the rights recognized in the Covenant, in the same way as any other individual within the territory of Canada and subject to its jurisdiction."

9.9 On behalf of Sandra Lovelace the following is submitted in this connection:

"All the consequences of loss of status persist in that they are permanent and continue to deny the complainant rights she was born with.

"A person who ceases to be an Indian under the Indian Act suffers the following consequences:

"(1) Loss of the right to possess or reside on lands on a reserve (ss. 25 and 28 (1)). This includes loss of the right to return to the reserve after leaving, the right to inherit possessory interest in land from parents or others, and the right to be buried on a reserve;

"(2) An Indian without status cannot receive loans from the Consolidated Revenue Fund for the purposes set out in section 70;

"(3) An Indian without status cannot benefit from instruction in farming and cannot receive seed without charge from the Minister (see section 71);

"(4) An Indian without status cannot benefit from medical treatment and health services provided under section 73 (1) (g);

"(5) An Indian without status cannot reside on tax exempt lands (section 87);

"(6) A person ceasing to be an Indian loses the right to borrow money for housing from the Band Council (Consolidated Regulations of Canada, 1978, c. 949);

"(7) A person ceasing to be an Indian loses the right to cut timber free of dues on an Indian reserve (section 4 - Indian Timber Regulations, c. 961, 1978 Consolidated Regulations of Canada);

"(8) A person ceasing to be an Indian loses traditional hunting and fishing rights that may exist,

"(9) The major loss to a person ceasing to be an Indian is the loss of the cultural benefits of living in an Indian community, the emotional ties to home, family, friends and neighbours, and the loss of identity."

10. The Human Rights Committee, in the examination of the communication before it, has to proceed from the basic fact that Sandra Lovelace married a non-Indian on 23 May 1970 and consequently lost her status as a Maliseet Indian under Section 12 (1) (b) of the Indian Act. This provision was - and still is - based on a distinction de jure on the ground of sex. However, neither its application to her marriage as the cause of her loss of Indian status nor its effects could at that time amount to a violation of the Covenant, because this instrument did not come into force for Canada until 19 August 1976. Moreover, the Committee is not

competent, as a rule, to examine allegations relating to events having taken place before the entry into force of the Covenant and the Optional Protocol. Therefore, regarding Canada it can only consider alleged violations of human rights occurring on or after 19 August 1976. In the case of a particular individual claiming to be a victim of a violation, it cannot express its view on the law in the abstract, without regard to the date on which this law was applied to the alleged victim. In the case of Sandra Lovelace it follows that the Committee is not competent to express any view on the original cause of her loss of Indian status, i.e. the Indian Act as applied to her at the time of her marriage in 1970.

11. The Committee recognizes, however, that the situation may be different if the alleged violations, although relating to events occurring before 19 August 1976, continue, or have effects which themselves constitute violations, after that date. In examining the situation of Sandra Lovelace in this respect, the Committee must have regard to all relevant provisions of the Covenant. It has considered, in particular, the extent to which the general provisions in articles 2 and 3, as well as the rights in articles 12 (1), 17 (1), 23 (1), 24, 26 and 27, may be applicable to the facts of her present situation.

12. The Committee first observes that from 19 August 1976 Canada had undertaken under article 2 (1) and (2) of the Covenant to respect and ensure to all individuals within its territory and subject to its jurisdiction, the rights recognized in the Covenant without distinction of any kind such as sex, and to adopt the necessary measures to give effect to these rights. Further, under article 3, Canada undertook to ensure the equal right of men and women to the enjoyment of these rights. These undertakings apply also to the position of Sandra Lovelace. The Committee considers, however, that it is not necessary for the purposes of her communication to decide to what extent in all respects. The full scope of the obligation of Canada to remove the effects or inequalities caused by the application of existing laws to past events, in particular as regards such matters as civil or personal status, does not have to be examined in the present case, for the reasons set out below.

13.1 The Committee considers that the essence of the present complaint concerns the continuing effect of the Indian Act, in denying Sandra Lovelace legal status as an Indian, in particular because she cannot for this reason claim a legal right to reside where she wishes to, on the Tobique Reserve. This fact persists after the entry into force of the Covenant, and its effects have to be examined, without regard to their original cause. Among the effects referred to on behalf of the author (quoted in paragraph 9.9, above, and listed (1) to (9)), the greater number, ((1) to (8)), relate to the Indian Act and other Canadian rules in fields which do not necessarily adversely affect the enjoyment of rights protected by the Covenant. In this respect the significant matter is her last claim, that "the major loss to a person ceasing to be an Indian is the loss of the cultural benefits of living in an Indian community, the emotional ties to home, family, friends and neighbours, and the loss of identity".

13.2 Although a number of provisions of the Covenant have been invoked by Sandra Lovelace, the Committee considers that the one which is most directly applicable to this complaint is article 27, which reads as follows:

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

It has to be considered whether Sandra Lovelace, because she is denied the legal right to reside on the Tobique Reserve, has by that fact been denied the right guaranteed by article 27 to persons belonging to minorities, to enjoy their own culture and to use their own language in community with other members of their group.

14. The rights under article 27 of the Covenant have to be secured to "persons belonging" to the minority. At present Sandra Lovelace does not qualify as an Indian under Canadian legislation. However, the Indian Act deals primarily with a number of privileges which, as stated above, do not as such come within the scope of the Covenant. Protection under the Indian Act and protection under article 27 of the Covenant therefore have to be distinguished. Persons who are born and brought up on a reserve, who have kept ties with their community and wish to maintain these ties must normally be considered as belonging to that minority within the meaning of the Covenant. Since Sandra Lovelace is ethnically a Maliseet Indian and has only been absent from her home reserve for a few years during the existence of her marriage, she is, in the opinion of the Committee, entitled to be regarded as "belonging" to this minority and to claim the benefits of article 27 of the Covenant. The question whether these benefits have been denied to her, depends on how far they extend.

15. The right to live on a reserve is not as such guaranteed by article 27 of the Covenant. Moreover, the Indian Act does not interfere directly with the functions which are expressly mentioned in that article. However, in the opinion of the Committee the right of Sandra Lovelace to access to her native culture and language "in community with the other members" of her group, has in fact been, and continues to be interfered with, because there is no place outside the Tobique Reserve where such a community exists. On the other hand, not every interference can be regarded as a denial of rights within the meaning of article 27. Restrictions on the right to residence, by way of national legislation, cannot be ruled out under article 27 of the Covenant. This also follows from the restrictions to article 12 (1) of the Covenant set out in article 12 (3). The Committee recognizes the need to define the category of persons entitled to live on a reserve, for such purposes as those explained by the Government regarding protection of its resources and preservation of the identity of its people. However, the obligations which the Government has since undertaken under the Covenant must also be taken into account.

16. In this respect, the Committee is of the view that statutory restrictions affecting the right to residence on a reserve of a person belonging to the minority concerned, must have both a reasonable and objective justification and be consistent with the other provisions of the Covenant, read as a whole. Article 27 must be construed and applied in the light of the other provisions mentioned above, such as articles 12, 17 and 23 in so far as they may be relevant to the particular case, and also the provisions against discrimination, such as articles 2, 3 and 26, as the case may be. It is not necessary, however, to determine in any general manner which restrictions may be justified under the Covenant, in particular as a result of marriage, because the circumstances are special in the present case.

17. The case of Sandra Lovelace should be considered in the light of the fact that her marriage to a non-Indian has broken up. It is natural that in such a situation she wishes to return to the environment in which she was born, particularly as after the dissolution of her marriage her main cultural attachment again was to the Maliseet band. Whatever may be the merits of the Indian Act in other respects,

it does not seem to the Committee that to deny Sandra Lovelace the right to reside on the reserve is reasonable, or necessary to preserve the identity of the tribe. The Committee therefore concludes that to prevent her recognition as belonging to the band is an unjustifiable denial of her rights under article 27 of the Covenant, read in the context of the other provisions referred to.

18. In view of this finding, the Committee does not consider it necessary to examine whether the same facts also show separate breaches of the other rights invoked. The specific rights most directly applicable to her situation are those under article 27 of the Covenant. The rights to choose one's residence (article 12), and the rights aimed at protecting family life and children (articles 17, 23 and 24) are only indirectly at stake in the present case. The facts of the case do not seem to require further examination under those articles. The Committee's finding of a lack of a reasonable justification for the interference with Sandra Lovelace's rights under article 27 of the Covenant also makes it unnecessary, as suggested above (paragraph 12), to examine the general provisions against discrimination (articles 2, 3 and 26) in the context of the present case, and in particular to determine their bearing upon inequalities predating the coming into force of the Covenant for Canada.

19. Accordingly, the Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts of the present case, which establish that Sandra Lovelace has been denied the legal right to reside on the Tobique Reserve, disclose a breach by Canada of article 27 of the Covenant.

APPENDIX

Individual opinion submitted by a member of the Human Rights Committee
under rule 94 (3) of the Committee's provisional rules of procedure

Communication No. R.6/24

Individual opinion appended to the Committee's views at the request of
Mr. Néjib Bouziri:

[Original: French]

[30 July 1981]

In the Lovelace case, not only article 27 but also articles 2 (para. 1), 3, 23 (paras. 1 and 4) and 26 of the Covenant have been breached, for some of the provisions of the Indian Act are discriminatory, particularly as between men and women. The Act is still in force and, even though the Lovelace case arose before the date on which the Covenant became applicable in Canada, Mrs. Lovelace is still suffering from the adverse discriminatory effects of the Act in matters other than that covered by article 27.