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HUMAN RIGHTS COMMITTEE
Forty-third session

DECISIONS

Communication No. 358/1989

Submitted by :	R.L. et al. [represented by counsel]
Alleged victims :	The authors
State party :	Canada
Date of communication :	1 April 1989 (initial submission)
Documentation references :	Prior decisions - Special Rapporteur rule 91 decision, transmitted to the State party on 26 May 1989 (not issued in document form)
Date of present decision :	5 November 1991

Decision on admissibility

[Annex]

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

DEC358.43 MS/cm

ANNEX*/

Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights
- Forty-third session -

concerning

Communication No. 358/1989

Submitted by: R.L. et al. [names deleted]

Alleged victims: The authors

State party: Canada

Date of communication: 1 April 1989 (initial submission)

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

Meeting on 5 November 1991,

Adopts the following:

Decision on admissibility

1. The authors of the communication (initial submission dated 1 April 1989 and subsequent correspondence) are Chief R.L., M.B., M.H. and 14 other members of the Whispering Pines Indian Band, residing in the province of British Columbia, Canada. The authors allege violations by the Government of Canada of article 1, paragraph 1, article 2, paragraph 1, articles 17, 22, 23, 26 and 27 of the International Covenant on Civil and Political Rights. They are represented by counsel.

*/ Made public by decision of the Human Rights Committee.

The facts as submitted by the authors:

2.1 The Whispering Pines Indian Band belongs to the Shuswap Nation in south-central British Columbia. The Shuswap are the indigenous people of the region and constitute a single social, cultural, political and linguistic community distinct both from Euro-Canadians and from neighbouring indigenous peoples. Approximately half of the contemporary members of the Band live in a small farming community numbering about 26 persons and engage in raising cattle on 1,200 acres (750 ha) of land.

2.2 The communication challenges certain aspects of Bill C-31, i.e. the legislation which was enacted by the Government of Canada in 1985 in response to the recommendations of the Human Rights Committee in its Views in the case of Sandra Lovelace v. Canada (adopted on 30 July 1981 at the Committee's thirteenth session). [1] By virtue of Bill C-31 certain persons formerly deprived of "Indian" status on the basis of sex were reinstated, but at the same time, other persons who formerly enjoyed Indian status were deprived of it on the basis of a racial quota.

2.3 Owing to the small size of the Band, members frequently marry non-members. Because of its geographical isolation from other Shuswap communities and in view of the relative proximity to the city of Kamloops, social contact and inter-marriage with non-Indians has been common. Traditional Indian membership rules allowed for considerable flexibility and facilitated the incorporation of non-members into the various bands. Problems

[1] Communication No. 24/1977, reproduced in Human Rights Committee 1981 Report to the General Assembly, Annex XVIII; Selected Decisions, Vol. I, pp. 83 et seq. . See also the statement by the Government of Canada concerning the implementation of the Views in the case of Lovelace , in HRC 1983 Report, Annex XXXI; Selected Decisions, Vol. II, pp. 224 et seq. .

allegedly started with the enactment of the original Indian Act, 1876, which imposed the Euro-Canadian concept of patrilineal kinship and inheritance on the indigenous peoples of Canada. To be considered an "Indian" under the Indian Act, a person had to be the biological child of an Indian father, or have been adopted by an Indian father in accordance with Canadian family law. The Indian Act also provided that women would take their legal status from their husbands. A Shuswap woman who married a non-Indian Canadian continued to belong to her childhood band under Shuswap law, but became "white" under the Indian Act. Likewise, although a "white" Canadian woman who married a Shuswap became a member of her husband's band under the Indian Act, she was never regarded as Shuswap by her husband's band. As a result of the original Indian Act, Shuswap women who married non-Indians were removed from "band lists" maintained by the Government of Canada, thereby losing their rights to live on lands set aside for Shuswap bands ("Indian reserves"). In 1951 the Indian Act was amended to the extent that minor Indian children would also lose their status if their mother marries a non-Indian; bands could, however, apply for an exemption from this rule. Other Shuswaps lost their Indian status upon obtaining off-reserve employment, serving in the Canadian armed forces, or completing higher education. The authors conclude that it was Government policy to remove from Indian reserves anyone deemed capable of assimilating into non-Indian Canadian society.

2.4 By virtue of Bill C-31 women who, on account of their marriage to non-Indians prior to 17 April 1985, had lost their Indian status under the former Indian Act, together with any of their children who had lost status with them, could be reinstated and thus be re-considered band members. In addition, Bill C-31 authorized the reinstatement of men or women who were deprived of their status before 1951 for other reasons. The children of such persons, however, were added to a band list only if both parents were Indians or were entitled to be registered as Indians. Children born before 17 April 1985, merely required the child's father (or, if the parents were unmarried, mother) to have Indian status.

2.5 Bill C-31 provides that a band "may assume control of its own membership if it establishes membership rules for itself in writing". It is submitted, however, that few bands were able to obtain approval of their own rules before 28 June 1987, the deadline established by Bill C-31. The net effect has been that persons who left the reserves before 1985, together with most of their children, have been reinstated upon request, and that all

children born out of interracial marriages after 1985 have been, or will be, deleted from band lists.

The complaint :

3.1 The authors submit that two aspects of Bill C-31 affect them adversely: bringing in new band members whom the community cannot house or support, and imposing new standards for Indian status which will operate to deprive many of the authors' children and grandchildren of their Band membership and right to live on the reserve. The net result on the Band is a gain of nine persons, in terms of Indian status, and a loss of two. In addition, since the Band's proposed membership rules were not approved by the Minister before 28 June 1987, all persons acquiring the legal status of Indians are entitled to Band membership. Another problem arises with respect to children born after 17 April 1985, since they may acquire such status only if they have two Indian parents. The continued application of Bill C-31 will have an increasingly negative effect on the authors' families if their children marry non-Indians in the same proportions as their parents. To avoid the termination of family lines through the operation of Section 6(2) of Bill C-31, the authors would have to arrange all future marriages of Band members with members of other Bands. This is said to force them to choose between gradually losing their legal rights and their reserve land, and depriving their children of personal freedom and privacy, which would be incompatible with the Covenant and the Canadian Charter of Rights and Freedoms.

3.2 Another current problem is that twenty-eight persons who are not directly related to the families now residing on the reserve have applied for Indian status and Band membership. This would entail a 50 per cent increase in housing requirements, which the Band cannot meet. So as to accommodate new members, the Band would have to develop a cluster-housing project requiring new water wells, sewer systems and power lines, at an estimated cost of $223,000 Canadian dollars. Federal adjustment assistance under Bill C-31 is, however, extremely limited. Even if new members could be housed on the reserve, there is very little possibility of ensuring their employment. Cultural problems also arise, because some of the newcomers have never lived on an Indian reserve and others have lived off-reserve for more than ten years. Considering that most are single, older adults without children, their social impact on a community which has consisted of three to four self-

sufficient farm families would be overwhelming.

3.3 The authors believe that the Committee's Views in the Lovelace case confirm that States cannot unreasonably restrict freedom of association and co-habitation of individual families, nor of the related families which comprise an ethnic, religious or linguistic community. The authors consider that their "freedom of association with others" (article 22, paragraph 1) has been interfered with, in that they cannot themselves determine membership in their small farming community. They can be forced to share their limited land and resources with persons who acquire Indian status and membership, while their own direct descendants may lose the right to be part of the community.

3.4 It is submitted that the implementation of Bill C-31 constitutes "arbitrary and unlawful interference" with the authors' families (article 17, paragraph 1), on account of the fact that the Government, and not the Band, determines who may live on the reserve. Moreover, this interference is said to be arbitrary in that it distinguishes among family members on the basis of whether they were born before or after 17 April 1985, and in that it distinguishes among family members on the basis of whether one or both of their parents were Indians, a purely racial criterion contrary to articles 2, paragraph 1, and 26 of the Covenant.

3.5 The implementation of Bill C-31 allegedly conflicts with article 23 of the Covenant, in that it restricts the freedom of Band members to choose their own spouses, particularly considerating that marriage to non-Indians would result in disenfranchising the children.

3.6 Further, the authors claim a violation of article 26 of the Covenant, which prohibits "any discrimination" on the ground of race, in that it makes racial quantum, rather than cultural factors and individual allegiance, the basis for allocating indigenous rights and indigenous peoples' lands. Traditional Shuswap law regarded as Shuswap anyone who was born in the territory or raised as a Shuswap. Bill C-31 requires that, in the future, both parents be "Indian" as defined under Canadian law. Children born to a Shuswap mother or father and raised on Shuswap territory in the Shuswap culture would still be denied Indian status and Band membership.

3.7 Concerning article 27 of the Covenant, the authors point out

that they regard themselves as an indigenous people rather than an "ethnic (or) linguistic minority", but that since the indigenous and minority categories overlap, indigenous peoples should also be entitled to exercise the rights of minorities. They conclude that Bill C-31 violates article 27 by imposing restrictions on who can reside in, or share in the economic and political life of the community.

3.8 The Shuswap consider themselves a distinct people and thus entitled to determine the form and membership of their own economic, social and political institutions, in accordance with article 1, paragraph 1, of the Covenant. Control of membership being one of the inherent and fundamental rights of indigenous communities, the authors invoke article 24 of the draft Universal Declaration of Indigenous Rights.

3.9 As to the requirement of exhaustion of domestic remedies, the authors state that they endeavoured to counter the detrimental effects of Bill C-31 by attempting to assume control of Band membership. On 23 June 1987 they adopted rules which were duly transmitted to the Ministry of Indian Affairs. On 25 January 1988, the Minister replied that the proposed rules were inconsistent with Bill C-31, in that they excluded certain classes of persons eligible for reinstatement. In this connection the authors invoke Section 35 of the Constitution Act, 1982, which was intended to secure "aboriginal and treaty rights of the aboriginal peoples of Canada" against future legislative erosion. The authors admit that, in theory, the Supreme Court of Canada could determine that Bill C-31 is of no effect if it is found to conflict with the authors' "aboriginal rights". But they claim that it would take several years of litigation to settle the issue at a financial cost considerably beyond the means of three farm families. According to the authors, an attempt to solve the matter by appeals to the Canadian courts would entail "unreasonably prolonged" proceedings in the sense of article 5, paragraph 2(b), of the Optional Protocol. Moreover, once the legal issue is determined by the Supreme Court, it would be too late to reverse the effects on the community of losing some of its members and accommodating others under Bill C-31. Therefore, the authors seek immediate measures to preserve the status quo pendente lite and request the Committee, pursuant to rule 86 of the rules of procedure, to urge the State party to refrain from making any additions to or deletions from the Band List of the Whispering Pines Indian Band, except as may be necessary to ensure that every direct descendant of the authors is

included for the time being as a member of the Band.

The State party's observations and authors' comments :

4.1 The State party contends that the communication is inadmissible ratione personae , pursuant to article 1 of the Optional Protocol. It notes that the authors contend that Bill C-31 threatens to deprive their descendants of Indian status, and observes that the victims of such a claim would be children born after 1985, of one parent who is non-Indian and another parent who alone cannot pass on Indian status (i.e. a child out of a marriage between a status Indian and a non-status Indian, who marries a non-status Indian). In the State party's opinion, the authors have not shown that there are in the Band individuals meeting these criteria and who therefore could claim to be victims. The State party further contends that the Committee itself has repeatedly acknowledged that it will not entertain claims of abstract or potential breaches of the Covenant; it adds that the communication does not identify anyone currently affected by Bill C-31, and that the communication is inadmissible on that ground.

4.2 The State party submits that the authors have not complied with their obligation to exhaust domestic remedies. It emphasized that article 5, paragraph 2(b), of the Optional Protocol reflects a fundamental principle of general international law that local remedies be exhausted before resorting to an international instance. This rule ensures that domestic courts are not superseded by an international organ, and that a State has an opportunity to correct any wrong which may be shown before its internal fora, before that State's international responsibility is engaged. Domestic courts are generally better placed to determine the facts of and the law applicable to any given case, and where necessary, to enforce an appropriate remedy. In the present case, mere doubts about the success of remedies does not absolve the authors from resorting to them, a principle recognized by the Committee in its decisions in cases R.T. v. France (communication

No. 262/1987) [2] and S.S. v. Norway (communication No. 79/1980) [3].

4.3 With regard to the alleged prohibitive cost of, and length of time for exhausting domestic remedies, the State party refers to the Committee's decisions in J.R.C. v. Costa Rica (communication No. 296/1988) [4] and S.H.B. v. Canada (communication No. 192/1985) [5] where, in similar circumstances, the communications were declared inadmissible.

4.4 Moreover, the State party points out that judicial remedies remain available to the authors: thus, it remains open to them to apply to the Federal Court, Trial Division, for a declaration that "aboriginal rights" include control over the Band's own membership. The State party notes that the recent judgment of the Supreme Court of Canada in the case of R. v. Sparrow clarifies both meaning and scope of the "aboriginal rights" referred to in Section 35 of the Constitution Act, 1982; in this case, it was held that the government must meet exacting standards before implementing actions that impinge upon the enjoyment of existing aboriginal and treaty rights. The State party submits that this judgment underlines the importance of first allowing local courts to address national issues.

4.5 Further, it is open to the authors to file an action in the same court, based on breach(es) of the Canadian Charter of Rights and Freedoms. Among the rights guaranteed in the Charter are the right to freedom of association [s. 2(d)], the right not to be deprived of life, liberty or security of the person except in accordance with principles of fundamental justice (s. 7), and the

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[2] Declared inadmissible at the Committee's thirty-fifth session.

[3] Declared inadmissible at the Committee's fifteenth session.

[4] Declared inadmissible at the Committee's thirty-fifth session.

[5] Declared inadmissible at the Committee's twenty-ninth session.

right to equality "before and under the law and... the right to equal protection and equal benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability" (s. 15). These rights are guaranteed to individuals in relation to federal and provincial governments (s. 32). Anyone whose Charter rights have been infringed may apply to a competent court jurisdiction to obtain such remedy as the court considers appropriate and just within the circumstances (s. 24).

4.6 The State party notes that the two avenues of recourse described above have been tried by a number of Indian Bands. In Twinn v. R., members of six Alberta Indian Bands applied to the Federal Court, Trial Division, for a declaration: (a) that Bill C-31 is inconsistent with section 35 of the Constitution Act, 1982, to the extent that it limits, or denies, the aboriginal and implied treaty rights of Indian Bands to determine their own membership; or (b) that the imposition of additional members on the plaintiff Bands pursuant to the Bill, without the Bands' consent, constitutes a violation of the right to freedom of association, guaranteed by section 2(d) of the Charter. Evidence-gathering examinations were initiated early in 1989, but because of several interlocutory motions and the large number of parties seeking to intervene, they have not been completed. The State party expresses its hope that the matter will go on trial late in 1991. Similar issues have been raised in the cases of Martel v. Chief Omeasoo before the Federal Court, Trial Division, and of Chief Omeasoo v. The Queen before the Federal Court, Appeals Division; the State party indicates, however, that the plaintiffs in these cases are not currently actively pursuing their actions.

4.7 In respect of allegedly prohibitive costs of litigation, the State party argues that the Department of Indian Affairs and Northern Development has provided funding to various of the parties involved in the cases discussed above. In Twinn, approximately $55,000 was given to the Native Council of Canada and Indian Rights for Indian Women, to assist in the preparation of court documentation. In September 1988, the government approved a Bill C-31 Litigation Funding Program. Since funds have already been granted to certain litigants in the Twinn case pursuant to this programme, it is, however, unlikely that further funds will be made available for the litigation of identical issues between different parties, at least until the Twinn case is resolved. The State also contends that the authors may seek financial assistance through the

Court Challenges Program, which was established in 1985 to assist litigants in cases involving important and novel issues relating to the applicability of the Charter's equality clause to federal laws. The State party notes that there is no indication whether the authors have sought financial assistance under this programme from its independent administering body. Finally, the State party refers to the existence of a Test Case Funding Programme, but observes that there is no indication that the authors applied for assistance under it.

4.8 Bill C-31 also allows Indian Bands to determine their own membership rules if two conditions are met. These conditions are that the rules be approved by a majority of band electors, and that certain specified groups of persons be included in the membership list.

4.9 In 1987 the authors submitted their membership rules for approval to the Department of Indian Affairs and Northern Development. By letter dated 25 January 1988, the Chief of the Whispering Pines Band was advised that the membership rules were not acceptable because they excluded certain specified groups, such as women who lost their entitlement to band membership as a result of marriage to non-Indians, their minor children, and others. The Minister invited the Band to amend its membership rules in accordance with the preconditions, and re-submit the amended rules for approval by the Department. The two year deadline to which the Band refers does not apply to re-submission of proposed rules. Therefore, the Minister's offer to the Band remains valid and would provide a remedy to the alleged violations of the Covenant.

5.1 In response to the State party's submission, the authors assert that since the complaint arises directly from the State party's efforts to implement a previous decision of the Committee involving the same State, the same category of persons and the same basic principles, it constitutes a case of "continuing jurisdiction". They invoke the principles of natural justice, that the author of a communication may return to the Committee for a clarification and reaffirmation of its Views without first having to re-litigate the matter before domestic tribunals. The authors believe that not only the author of a communication could seek further action following the transmittal of the Committee's Views, but also other individuals, similarly placed and similarly affected, should be entitled to address the Committee for

clarifications of the application of its Views to them.

5.2 The authors argue that the Committee's Views were not properly implemented, as Bill C-31 merely replaced gender restrictions by racial ones, and that it would be unreasonably formalistic to require prior exhaustion of domestic remedies in these circumstances.

5.3 In respect of the availability of domestic remedies, the authors reiterate their view that litigation would not afford them an "effective and available" remedy and that the cost and time required for judicial resolution would not be reasonable under the circumstances. They also claim irreparable harm as pendente lite there would be no protection for children not registered as Indians or as members of the Band. Finally, the authors reiterate that a constitutional challenge could take at least 4 1/2 years, a period the Committee has deemed unreasonably prolonged within the meaning of article 5, paragraph 2(b), of the Optional Protocol on previous occasions. [6]

5.4 The authors further contend that they have been offered neither financial nor legal assistance. Funding remains entirely at the discretion of the Minister for Indian Affairs and Northern Development, and none of the government's comments suggest that legal assistance would be forthcoming if the current complaint were to be dismissed.

5.5 In respect of revising and re-submitting their Band by-laws to the competent Minister, the authors underline that by-laws cannot override the provisions of Bill C-31, including the racial standards they have challenged. The Minister cannot approve by-laws which conflict with statutory norms.

5.6 In another submission, dated 3 October 1990, the authors explain that they have not applied for financial assistance from the Department of Justice, since they were advised that there is little hope of success and that this assistance is ordinarily available only for appeals, rather than for the preparation for trial and initial complaints. In addition, the authors have ascertained that in other domestic litigation concerning rights of

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[6] Weinberger Weisz v. Uruguay (communication No. 28/1978), Selected Decisions, Vol. I, pp. 57 et seq..

indigenous peoples, no judicial decisions have been handed down. In particular, the Twinn case is not expected to go to trial before 1991.

5.7 Author's counsel indicates that there are presently six adults in the Whispering Pines Band with so-called "6(2)" status under Bill C-31 - i.e. adults who, if marrying a non-status Indian, cannot pass on Indian status to their children. None of these children can be registered under Bill C-31. The consequences for the others depend on whom they will marry; in view of the small size of the Band, counsel notes that it is unlikely that they will marry anyone with status under Bill C-31. Thus, the children of P.E. and V.E. will be ineligible to become Band members, since P.E and V.E. married non-Indians; counsel adds that it is unlikely that any of the future children of other registered Band members will be eligible. This situation, it is submitted, does not involve hypothetical and future violations of the Covenant: some of the Band's children will grow up in the knowledge that they can only protect their cultural heritage if they marry an Indian registered under Bill C-31. The Bill is thus said to constitute an infringement on the right to marry even in circumstances where no individualized child has as of yet been disenfranchised.

The issues and proceedings before the Committee:

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 With respect to the authors' claim of a violation of article 1 of the Covenant, the Committee recalls its constant jurisprudence that pursuant to article 1 of the Optional Protocol, it may receive and consider communications only if they emanate from individuals who claim that their individual rights have been violated by a State party to the Optional Protocol. While all peoples have the right to self-determination and the right freely to determine their political status, pursue their economic, social and cultural development (and may, for their own ends, freely dispose of their natural wealth and resources) the Committee has already decided

that no claim for self-determination may be brought under the Optional Protocol. [7] Thus, this aspect of the communication is inadmissible under article 1 of the Optional Protocol.

6.3 With regard to the requirement of exhaustion of domestic remedies, the Committee has noted the authors' arguments that they have unsuccessfully endeavoured to challenge Bill C-31 by attempting to assume control of Band membership. It observes, however, that the authors themselves concede that the Supreme Court of Canada could rule Bill C-31 to have no effect where it conflicts with the authors' "aboriginal rights", i.e. the desired control of Band membership.

6.4 The Committee further observes that other Indian Bands have instituted proceedings before the Federal Courts, the outcome of which is pending, notably in the case of Twinn v. R., and that the alleged high cost of litigation can, under specific circumstances, be offset by funding provided pursuant to a number of programmes instituted by the State party. As to the authors' concern about the potential length of proceedings, the Committee reiterates its constant jurisprudence that fears about the length of proceedings do not absolve authors from the requirement of at least making a reasonable effort to exhaust domestic remedies (A. and S.N. v. Norway, communication No. 224/1987, declared inadmissible on 11 July 1988, paragraph 6.2). In this light, the Committee finds that available domestic remedies that may indeed prove to be effective remain to be exhausted.

7. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible under article 1 of the Optional Protocol in so far as it concerns the right of self-determination and under article 5, paragraph 2(b), of the Optional Protocol in so far as it concerns the authors' other allegations;

(b) that this decision shall be transmitted to the State

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[7] Communication No. 167/1984 (B. Ominayak v. Canada), decision of 26 March 1990, paragraph 32.1; communication No. 413/1990 (A.B. et al. v. Italy), inadmissibility decision of 2 November 1990, paragraph 3.2.

party, to the authors and to their counsel.

[Done in English, French, Russian and Spanish, the English text being the original version].

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