8 Indigenous women and self-determination

In Sandra Lovelace v. Canada, an indigenous woman successfully challenged the provision of the Canadian Indian Act that deprived her of her status as an Indian because she had married a non-Indian man, but would not have done so had it been an Indian man who married a non-Indian woman. This 1981 decision by the United Nations Human Rights Committee is often cited as pitting the equal rights of women against the right of self-determination of peoples, whether defined in terms of culture (the group's right to apply its traditional membership


While this chapter draws on the history of Lovelace, a full account of the First Nations politics associated with the case is beyond its scope. For an overview, see J. Borrows, 'Contemporary Traditional Equality: The Effect of the Charter on First Nations Politics' (1994) 43 University of New Brunswick Law Journal 19.

2 In Canada, the federal Indian Act defines and employs the controversial legal category of 'Indian'. The Constitution Act 1982 uses the term 'aboriginal' to refer to indigenous peoples including the Métis and the Inuit. Accordingly, this chapter refers to 'Indian' and 'aboriginal' in connection with these legal texts. In general contexts, the international legal term 'indigenous' is used.

At the same time, it is important to keep in mind that indigenous women are not homogeneous, whatever the common experience wrought by colonialism and the legal designation 'Indian' or 'non-Indian'. Their linguistic and cultural affiliations may be, for example, Cree, Iroquois or Ojibway.

3 While the Human Rights Committee technically considers 'communications' and issues 'views', this chapter also uses more generic terminology.

4 As discussed above in the Introduction at note 52 and accompanying text, Lovelace does not raise an issue of self-determination under the International Covenant on Civil and Political Rights (New York, 16 December 1966, in force 23 March 1976, 999
rules) or autonomy (the group’s right to set the rules).\textsuperscript{5} For those who side with the equal rights of women, the Indian Act raises the same issue as the collective option in the 1919 peace treaties and the underlying principle of dependent nationality of married women: a woman’s right to choose her membership in the self – state, nation, people, minority – on the same basis as a man. And, indeed, the Indian Act followed the principle of dependent nationality consistently. Not only did it deprive an Indian woman who married a non-Indian man of her Indian status, it granted Indian status to a non-Indian woman who married an Indian man. From this perspective, Sandra Lovelace simply brought the campaign for women’s equal rights, begun by white women in the civilized world\textsuperscript{6} and promoted by them elsewhere,\textsuperscript{7} to her own primitive community. The resistance she encountered therefore falls into line with the Fon of Bikom and others who asserted their own culture and power of decision against the UN decolonization process.\textsuperscript{8}

By starting from Lovelace’s own arguments to the Human Rights Committee, much as the last chapter emphasized the petitions from women in the trust territory themselves, this chapter offers an alternative reading of both the arguments and the decision in \textit{Lovelace}. On this reading, Lovelace’s claim to equality is not strongly in tension with indigenous self-determination, but rather is in opposition to the changes that colonialism had wrought in indigenous societies. Correspondingly, her arguments may be seen not as prioritizing her identity as a woman, but as reflecting her indigenousness as well. ‘Our struggle as Aboriginal women cannot be separated, even for a moment, from our struggle as a people,’ Andrea Bear Nicholas has written of Maliseet women like herself and Sandra Lovelace.\textsuperscript{9} Moreover, the reading of the \textit{Lovelace} decision developed in the chapter is consonant with this predicament in ways that the usual framing of the decision as an either-or problem is not. We thus find in the decision one of the threads that – this book has argued – run


\textsuperscript{6} See Chapter 6 above.

\textsuperscript{7} See Chapter 7 above.

\textsuperscript{8} Ibid.

\textsuperscript{9} A. Bear Nicholas, ‘Colonialism and the Struggle for Liberation: The Experience of Maliseet Women’ (1994) 43 \textit{University of New Brunswick Law Journal} 223 at 238.
through the major third-party interpretations of self-determination: the use of an intermediate concept in an attempt to do justice to identity.

Equality

Sandra Lovelace was born and registered as a ‘Maliseet Indian’. Under section 12(1)(b) of the Canadian Indian Act, Lovelace lost her Indian status when she married a non-Indian man in 1970. Her loss of status meant that she could not convey Indian status to her children. Her marriage also deprived her of membership in the Tobique band. This, in turn, meant that she was no longer legally entitled to live on the Tobique Reserve in New Brunswick, where she had been living with her parents at the time of her marriage. The loss of her right to possess or reside on reserve lands included the loss of the right to inherit a possessory interest in the land from her parents and the right to be buried on the reserve. At the time of the case, Sandra Lovelace was living on the reserve, but had no right to remain there. Moreover, she did not have her own place to live and, as a non-status Indian, would not have been able to borrow money for housing from the Band Council. In his dissent in Canada AG v. Lavell, the 1973 Supreme Court of Canada judgment which found that section 12(1)(b) did not violate the right of equality guaranteed by the Canadian Bill of Rights, Justice Laskin summarized the effect of section 12(1)(b) on Indian women who married non-Indian men as ‘statutory banishment’.

In Lovelace, the Human Rights Committee considered possible violations of four groups of rights under the International Covenant on Civil and Political Rights: general provisions against discrimination (Articles 2, 3, 26), the right to choose one’s residence (Article 12), rights aimed at protecting family life and children (Articles 17, 23 and 24) and the rights of persons belonging to ethnic, religious or linguistic minorities (Article 27). It found that Canada had violated the minority rights guaranteed by Article 27 because Sandra Lovelace had been denied the legal right to live on the Tobique Reserve.

It is striking that although the Committee did not base its views, or based them only weakly, on any of the Covenant articles on sex discrimination, Lovelace is often portrayed as a victory for women’s equality.

18 Lovelace v. Canada (merits), p. 172. Lovelace herself appears to have argued only Articles 2, 3, 23, 26 and 27. Ibid., p. 166.
19 Ibid., p. 174.
One reason for this impression may be the outcome; the Committee's decision did remedy the effects of the statutory discrimination for Lovelace and helped to speed the amendments that removed much of the discrimination in the statute itself. Another explanation lies in the projection of the expectations of the time onto the decision. Professor Donald Fleming, who assisted Lovelace, recollects that no one he spoke with during the years the case was under consideration anticipated that the Committee would rely on Article 27. The downplaying of this reliance is furthered and, indeed, rationalized by Anne Bayefsky's much-cited commentary on Lovelace. Bayefsky argues essentially that we should take Lovelace as a decision about women's equality because the Committee wanted to say and should have said that there had been a violation of Covenant Article 2(1) on non-discrimination, but wrongly concluded that it had no competence to do so.

Bayefsky's argument relies on the fact that at the time of Sandra Lovelace's marriage and loss of Indian status by application of section 12(1)(b) of the Indian Act, the International Covenant on Civil and Political Rights had not yet come into force for Canada. The Human Rights Committee therefore found that it could not rule on the original cause of her loss of status, that is, the Indian Act as applied to her at the time of her marriage, but only on any continuing effects of its application. According to Bayefsky, the Committee limited its decision to Article 27, the minority rights article, because it overcautiously concluded that it also could not consider whether any continuing effects might violate the articles on sex discrimination. Bayefsky implies that had the Committee not felt itself constrained in this way, it would have said what it really wanted to say—and, to her mind, should have


21 Letter from Professor Donald J. Fleming to the author, 28 May 1999.


24 Ibid., pp. 172, 174.
said – about the continuing violation. Since the Committee needlessly tied its hands, Bayefsky hints, Lovelace can be taken for what it actually meant and ought to have said: that the case was about sex discrimination. She chides the Committee as follows:

It might, therefore, have been more accurate for the Human Rights Committee to have decided that Lovelace was denied the right to enjoy her culture and to use her language in community with other members of her band, in a discriminatory fashion or because she was a woman. In other words, there was a violation of Article 2(1) in relation to the right embodied in Article 27. The Committee, however, was of the view that only by confining the violation to Article 27 could it avoid the problem that loss of Indian status occurred prior to the Covenant coming into force for Canada. It is to be hoped that its use of the Covenant to describe the derogation of rights that results from section 12(1)(b) of the Indian Act will be more exact in the upcoming case.\(^{25}\)

Bayefsky thus uses the problem of timing to read the Committee’s decision in Lovelace as about women’s equality. Her rhetoric of accuracy and exactitude implicitly gives us licence to correct for the Committee’s excessive caution in confining itself to Article 27 and to do so by adding Article 2(1), which guarantees respect for all rights in the Covenant without distinction as to sex.

**Lovelace’s arguments**

While Sandra Lovelace did argue that the Canadian Indian Act was contrary to the equality provisions of the International Covenant on Civil and Political Rights, she also disputed the Canadian government’s contention that the Act reflected an Indian tradition of patrilineal legal relationships.\(^{26}\) One of the government’s two main justifications for section 12(1)(b) was that it employed the same definition of Indian as Indians themselves did; the Indian Act traced Indian status through the father’s line just as Indian tradition was patrilineal.\(^{27}\) It follows that

\(^{25}\) (Emphasis mine) Bayefsky, ‘The Case of Sandra Lovelace’, 263. The ‘upcoming case’ alluded to by Bayefsky is presumably the communication by Paula Sappier Sisson. See Response of Canada, p. 250. There appears to be no record of this case in the UN Human Rights Committee’s publications. See also L. S. N. v. Canada (Communication No. 94/1981), Selected Decisions of the Human Rights Committee under the Optional Protocol, vol. II (New York: United Nations, 1990), UN Doc. CCPR/C/OP/2, p. 6 (subsequently withdrawn).

\(^{26}\) Lovelace v. Canada (merits), p. 167.

status Indians and ‘real’ Indians were identical. Moreover, the Canadian government accepted that Indian tradition, or self-definition, was not static and that any change in the law could only be made in consultation with the Indians.\textsuperscript{28}

The Canadian government’s other main justification was that the special privileges granted to Indian communities, in particular the right to occupy reserve lands, created the need for a definition of Indian. On this justification, the Indian Act did not define all ‘real’ Indians. The need to protect scarce resources and preserve Indian society and culture meant not all ‘real’ Indians could live on reserves. Status Indians were the subset of ‘real’ Indians that were entitled to do so. Indian women who ‘married out’ lost their status and Indian men did not because non-Indian husbands were in nineteenth-century farming societies and continued to be a much greater threat to reserve land than non-Indian wives.\textsuperscript{29}

Lovelace challenged the Canadian government’s assertion that indigenous peoples were traditionally patrilineal. Bet-te Paul, one of the women from the Tobique Reserve who encouraged Sandra Lovelace to bring her case to the Human Rights Committee, described what she discovered about Maliseet society when she began digging:

it was matrilineal . . . there was a special relationship between the elder women and the young girls. Also, the elder women were the ones to hold places in council and to guide the men. We had chiefs, but the elder women were behind the men; they were listened to and held in high respect . . . The married women looked after the families, and had a say in anything that concerned the community . . .

. . . The blood comes from the mother, not the father, which is exactly the opposite of what the Indian Act imposed on us.\textsuperscript{30}

In her inquiry into the role of women in Maliseet society and how that role had been changed by colonialism, Andrea Bear Nicholas concluded that the

dispersal of decision-making among both men and women in traditional Maliseet society is certainly confirmed by any knowledge of our culture and history. It shows up in our language, which has no gender. It shows up in our terms of kinship which, for the most part, are precisely the same for maternal relatives as for paternal relatives, indicating a means of reckoning lineage and

\textsuperscript{28} Lovelace v. Canada (merits), p. 167.  \textsuperscript{29} Ibid.
\textsuperscript{30} Tobique Women’s Group, Enough is Enough: Aboriginal Women Speak Out, as told to J. Silman (Toronto: The Women’s Press, 1987), p. 226.
relationships that is neither patriarchal nor matriarchal, but bilateral. According to our recently deceased elder, Dr Peter Paul, our people showed a strong tendency toward matrilocality insofar as a husband often took up residence in or near the family of the wife.\(^{31}\)

For the Maliseet, then, the Indian Act legislated not indigenous custom, but European patriarchy.\(^{32}\) As the following conversation between Sandra Lovelace and another Maliseet woman illustrates, however, the Maliseet tended to internalize the patriarchy of the Indian Act over time.

\[\text{Sandra [Lovelace Sappier]: [The chiefs] said things like, ‘You’ve made your bed [by marrying a non-Indian], now sleep in it’; ‘My (white) wife is an Indian because the law says she is.’}\]

\[\text{Karen [Perley]: They believed, the government says you’re Indian, so you’re Indian. Therefore the government tell us we’re not Indian, so we’re not Indians.}\]

\[\text{Sandra: Then we’d start arguing. Heavy arguments! (laughter) ‘I was born an Indian,’ that’s what I’d tell them.}\]

\[\text{Karen: If they believed that, where is the reason in all of it? Sometimes your own flesh and blood would say, ‘You’re not an Indian any more. That’s the law; that’s the Indian Act.’ See how law-abiding Native Indian people are? (laughter) So we’d have these chiefs telling us, ‘It’s our right to discriminate.’}\]

\[\text{Sandra: A few chiefs supported us… But most of them are chauvinist. They’d say, ‘You’re only a woman, so what do you know? Go watch your babies, clean your house.’ That’s the attitude.}\(^{33}\)

Unlike Lovelace’s sex discrimination argument, which measured the definition of the self against the external standard of equality in the Covenant, her invocation of a matrilineal tradition was thus internal to the historical definition of themselves that some indigenous peoples had.\(^{34}\)

\(^{31}\) (Footnotes omitted) Nicholas, ‘Colonialism and the Struggle for Liberation’, 229.


If Sandra Lovelace’s assertion that the Indian Act could not be justified as codifying Indian tradition is seen as an identification with indigenous peoples and their process of self-determination, it complicates her position relative to those indigenous peoples who argued that self-determination should take priority over women’s equality. Seven years before the Human Rights Committee’s decision in *Lovelace*, Jeanette Corbière Lavell and Yvonne Bédard, Ojibway and Iroquois Indians respectively who had lost their status when they married non-Indians, had failed in their equality challenge to section 12(1)(b) under the Canadian Bill of Rights. In the *Lavell* case, the vast majority of indigenous organizations intervened against Lavell and Bédard, for reasons of either strategy or discrimination. *Lavell* also resulted in the formation of the Native Women’s Association of Canada, which has since played a major part in advocating equality for indigenous women on the Canadian political and legal scene.

Indigenous women also differed among themselves as to whether their struggle for equality should take priority over the larger movement for indigenous self-government and, furthermore, what form that equality and its guarantees should take. For Sandra Lovelace and the women from the Tobique Reserve who were in the forefront of the campaign

Whether Lovelace’s strategy was consistent with indigenous culture is a different question. See e.g. T. Isaac and M. S. Maloughney, ‘Dually Disadvantaged and Historically Forgotten?: Aboriginal Women and the Inherent Right of Aboriginal Self-Government’ (1992) 21 *Manitoba Law Journal* 453 at 464 (using white law means co-opted by white society); Borrows, ‘Contemporary Traditional Equality’, 43 (adversarialism inimical to First Nations professions of consensus, harmony and respect); Moss, ‘Indigenous Self-Government in Canada and Sexual Equality Under the Indian Act’, 299 (threat of imposition of externally developed norms even if they coincide with internal cultural norms).

35 Even earlier, Mary Two-Axe Early and other Indian women had brought the problem to the attention of a Royal Commission on the Status of Women. Borrows, ‘Contemporary Traditional Equality’, 26.

36 Lavell and Bédard were supported by a few women’s organizations, the Native Council of Canada, and Anishnawbekwe of Ontario Incorporated. The position of the Attorney General of Canada was supported by the Indian Association of Alberta, the Union of British Columbia Indian Chiefs, the Manitoba Indian Brotherhood Inc., the Union of New Brunswick Indians, the Indian Brotherhood of the Northwest Territories, the Union of Nova Scotia Indians, the Union of Ontario Indians, the Federation of Saskatchewan Indians, the Indian Association of Quebec, the Yukon Native Brotherhood, the National Indian Brotherhood (forrunner of the Assembly of First Nations), the Six Nations Band and the Treaty Voice of Alberta Association. *Canada AG v. Lavell*, 1378.

to change the discriminatory rules on status in the Indian Act, equality had to come before self-government. Others maintained that equality could not be disaggregated from the political environment for indigenous beliefs and existence in Canada. Mary Ellen Turpel, for example, objected to any reform to the Indian Act as tampering with an ethically unacceptable piece of colonial legislation. ‘Before imposing upon us the logic of gender equality (with White men), what about ensuring for our cultures and political systems equal legitimacy with the Anglo-Canadian cultural perspective which dominates the Canadian State?’

In this light, Sandra Lovelace’s allusion to matrilineal tradition complicates the criticism that she and the other Tobique women adopted the white feminists’ goal of equality over the indigenous goal of self-determination. Eva (Gookum) Saulis, one of the Tobique women, gave an example of white women’s misunderstanding of the equal and complementary places of men and women in indigenous society:

[In] old pictures of an Indian family moving from one place to another; you’d see a man walking ahead with his bow and arrow and the woman walking behind with small children, hauling that *travois*. It looks like she’s doing all the hard work.

I heard remarks about that by white women, ‘I don’t want to be your squaw. I don’t want to work hard like that.’ But there is a reason for why that man walked ahead. It’s because he had to protect his family against animals and enemies. It wasn’t that the woman walked behind him because she had to do everything. Like when the woman had to look after the family, it was because the men went away to provide for them by trapping or working in the woods. ‘Being a squaw’ wasn’t a worse or unequal thing. Everything had a purpose.

The Tobique women thus shared with Mary Ellen Turpel and other indigenous women an attention to what they saw as the traditional

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38 Tobique Women’s Group, *Enough is Enough*, pp. 244 (Sandra Lovelace Sappier), 247 (Shirley Bear). This is not to say that they did not also support self-government. See e.g. *ibid.*, p. 224 (Juanita Perley).


relationship of equality and complementarity between indigenous men’s and women’s roles.42

Taken together, Sandra Lovelace’s arguments to the Human Rights Committee suggest an attempt to present her identity as a woman within the context of colonialism. In contrast, Bayefsky’s commentary on *Lovelace* emphasizes and authenticates Sandra Lovelace’s complaint as part of the struggle of all women for equality, while minimizing and problematizing Lovelace’s claim about the cultural violence of colonialism. Although Bayefsky reproduces the parties’ arguments on whether indigenous peoples were traditionally patrilineal in a section of her commentary summarizing the proceedings,43 she cordons them off as a factual dispute in another section entitled ‘An Historical Survey’.44 By assigning the meaning of women’s equal rights to the Human Rights Committee’s decision, Bayefsky associates Sandra Lovelace’s identity as a woman with the normative and thereby, with the real; and Lovelace’s vision of a lost matriarchy with the factual and thereby, paradoxically, with the fictional.45 In so doing, moreover, Bayefsky lends support to the indigenous criticism of Sandra Lovelace and other women from the Tobique Reserve as ‘white-washed women’s libbers’.46

**Views in Lovelace**

If reading *Lovelace* as a decision about women’s equality implicitly identifies Sandra Lovelace with women over indigenous peoples, despite

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45 In *Sawridge Band v. Canada*, [1996] 1 Canada Federal Court Reports 3, the Trial Division of the Federal Court of Canada accepted the anthropological evidence of the defendant’s expert, Dr Alexander von Gernet, that lineality itself as a criterion for membership in an aboriginal group ‘is merely an artificial construct that confines the notion of “membership” to a particular theoretical abstraction’. According to von Gernet, the decision as to ‘which one of a profusion of practices should serve as the “traditional” culture of a twentieth-century society’ is inappropriate for an anthropologist to make. At paras. 148–9. The Federal Court of Appeal later ordered a new trial on the ground of a reasonable apprehension of judicial bias. *Sawridge Band v. Canada*, [1997] 3 Canada Federal Court Reports 580.

the predicament of identity reflected in her arguments, such a reading is made more questionable by the Human Rights Committee’s apparent avoidance of the binary choice between women’s equality and self-determination.

On the most straightforward reading, the Human Rights Committee in Lovelace identified Sandra Lovelace with an ethnic, religious or linguistic minority under Article 27 of the Covenant. A minority within the meaning of Article 27 is independent of any definition in domestic law; in this case, the category of ‘Indian’ under the Canadian Indian Act. Abstracted from the Committee’s reasoning in Lovelace, the test for membership in a minority group has both an objective and a subjective element, where the latter involves the desire of the individual as opposed to the self-understanding of the group. A minority within the meaning of Article 27 would normally encompass ‘persons who are born and brought up on a reserve, who have kept their ties with their community and wish to maintain those ties’. On the Committee’s logic, the base definition of a minority is objective (whether being born or socialized as part of an ethnic group) and individual members have only the possibility of ceasing to belong to the group.

Being an ethnically Maliseet Indian who had only been absent from her home reserve for the few years of her marriage, Sandra Lovelace was found to be a person belonging to a minority. As such, she was entitled to the right to enjoy her culture and use her language in community with the other members of that minority. Since the Tobique Reserve was the only place where the relevant community existed, she had effectively lost the right to her culture and language.

The rights in Article 27 are not, however, absolute. This means that while the notion of status Indian was not a valid definition of the Indian minority, it might nevertheless be a valid restriction on who could enjoy the right to live on a reserve. The Canadian government could not decide who was or was not indigenous, but it might be able to justify restricting the enjoyment of any or all of the rights in Article 27 to those indigenous persons whom it chose to call status Indians. Consistent with the Canadian government’s protection justification for the Indian Act,48

48 But compare Jamieson, Indian Women and the Law in Canada, p. 13; Turpel, ‘Indian Act: Full of Snares for Women’, 6 (disagreeing with protection as the purpose of the Act) with Krosenbrink-Gelissen, Sexual Equality as an Aboriginal Right, p. 83 (stating that the constituency of National Indian Brotherhood did perceive the need for protection from an influx of white men on reserves).
status Indians would simply be the subset of Indians entitled to occupy reserve lands.

To be a valid restriction on minority rights, the restriction ‘must have both a reasonable and objective justification and be consistent with the other provisions of the Covenant, read as a whole’.\textsuperscript{49} It was open to the Committee to find that the gender bias of the restrictions was inconsistent with the provisions of the Covenant on non-discrimination, but it declined to do so, concluding as follows:

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.\textsuperscript{50}

While the Committee did refer to the equality provisions of the Covenant, in its conclusion as well as its statement of the test,\textsuperscript{51} its analysis did not turn on discrimination on the basis of sex. Instead, its conclusion depended on the naturalness and strength of Sandra Lovelace’s membership. The Committee seemed to reason that the Canadian government might be able to justify denying the right to live on a reserve to indigenous persons – even where no comparable linguistic and cultural community existed elsewhere – but not to those indigenous persons with a high degree of need for and cultural attachment to the community.

The Human Rights Committee’s 1988 decision in \textit{Ivan Kitok v. Sweden}\textsuperscript{52} reinforces the impression that the Committee saw its conclusion in

\textsuperscript{49} \textit{Lovelace v. Canada} (merits), p. 174. \textsuperscript{50} \textit{Ibid}

\textsuperscript{51} As discussed above, Anne Bayefsky’s view seems to be that the Human Rights Committee did not consider the non-discrimination provisions (Articles 2, 3 and 26) in relation to the continuing effects because it concluded that the problem of timing prevented it from doing so. To the contrary, it can be argued that the Committee did not see itself as precluded from considering these provisions, but either found it unnecessary to do so or hinted at their applicability in conjunction with Article 27.

Lovelace as a function of the minority self alone. In Kitok, Sweden, like Canada, had statutorily defined a subgroup of the ethnic minority and confined to that subgroup the exercise of rights essential to the minority culture. The legislation at issue divided the Sami population of Sweden into reindeer-herding and non-reindeer-herding Sami, with reindeer herding being reserved for Sami who were members of a Sami village (sameby). According to the Swedish government, the purpose of the legislation was to restrict the number of reindeer breeders for economic and ecological reasons and to secure the preservation and well-being of the Sami minority.\(^{53}\) The parties agreed that effective measures were needed to ensure the livelihood of the Sami whose primary income came from reindeer farming and also the future of reindeer breeding, which played an important part in Sami culture.\(^{54}\) The Committee recognized that legislation designed to protect the rights of the minority as a whole might justifiably restrict an individual member’s enjoyment of his culture, and cited the Lovelace test of ‘a reasonable and objective justification’ and ‘necessary for the continued viability and welfare of the minority as a whole’.\(^{55}\) There is no indication in Kitok that the opposite results reached in Lovelace and Kitok are anything other than an application of Article 27. Sandra Lovelace and Ivan Kitok were similarly described: both were ethnically indigenous,\(^{56}\) had maintained ties with their community and wanted to become full members of it.\(^{57}\) The distinguishing feature seems to be that Lovelace had suffered the complete deprivation of her right to live on a reserve, whereas Kitok was permitted, albeit not as of right, to graze and farm his reindeer, and to hunt and fish.\(^{58}\) The Committee singled out Kitok’s opportunities to reindeer farm, hunt and fish in concluding that there had been no violation of Article 27.\(^{59}\)

\(^{53}\) Ibid., pp. 223, 229.  
\(^{54}\) Ibid., p. 229.  
\(^{55}\) Ibid., p. 230.  
\(^{56}\) Ibid., p. 221.  
\(^{57}\) Ibid., p. 230.  
\(^{58}\) Ibid. This distinction may appear shaky, given that in practice Sandra Lovelace continued to live on the reserve. However, Lovelace was in a more precarious position than Kitok. Although Canada stated that the Band Council had made no move to remove Lovelace from the reserve, she maintained that this was only because dissident members of the tribe who supported her cause had threatened to resort to physical violence in her defence. Lovelace v. Canada (merits), p. 170. Kitok, in contrast, had a declaration of the Board of the Sami village of Sörkaitum in his favour. Kitok v. Sweden, p. 225. Moreover, Sandra Lovelace would not have been given any financial assistance with housing, whereas Kitok had the economic benefit of hunting and fishing free of charge in the community’s pastures. Lovelace v. Canada (merits), pp. 170–1; Kitok v. Sweden, p. 225.  
Examined through the lens of the minority self, the Human Rights Committee’s decision in Lovelace has a consistency that it does not have when seen through the lens of equality. Similar to Anne Bayefsky, Manfred Nowak suggests that Lovelace involved a violation of Article 3 in conjunction with Article 27, but that ‘problems were raised by Canada’s discriminatory Indian legislation, which stemmed from the period prior to entry into force of the Covenant’. Even granting the Committee’s test for limitations on minority rights, Nowak comments that the relevance of the break-up of Lovelace’s marriage is unclear. But if the Human Rights Committee in Lovelace understood the minority self partly in terms of maintaining ties with the minority community and understood the limitations on the self even more strongly in terms of emotional need for and cultural attachment to that community, then the break-up of Sandra Lovelace’s marriage becomes germane. As the Committee observed, ‘after the dissolution of her marriage her main cultural attachment again was to the Maliseet band’. Whatever one may think of the Committee’s test or its assumptions about emotional vulnerability, the pertinence of her divorce seems clear.

By basing its views in Lovelace on the notion of a minority in international law, the Human Rights Committee avoided the tension between the equal rights of women and the right of self-determination of peoples and, correspondingly, between the need to identify primarily as a woman or as indigenous. The crucial steps in this avoidance were the Committee’s distinction between a minority and the state’s legal definition of a minority, and its concentration on the latter. The distinguishing of the ‘actual’ from the legal made room for a ‘true’ identity, and the focus on the legal shifted the crux of the case from this identity to the limits that the state could place on it. Identity was therefore not

60 Nowak, CCPR Commentary, p. 70, n. 23.
61 Nowak takes exception to the Committee’s statement that ‘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).’ Lovelace v. Canada (merits), p. 173. Nowak’s position is that the minority rights in Article 27 represent lex specialis relative to the general freedoms of religion, association and so on set out in the Covenant. As lex specialis, Article 27 is already outside those general freedoms and so cannot be subject to their limitation provisos. Limitations on Article 27 can only come from other Covenant rights (i.e. not the general freedoms already implicated in Article 27) and general limitation clauses. Nowak, CCPR Commentary, p. 505.
centrally implicated in the Committee’s decision. Although the Committee did find that Sandra Lovelace was a member of a minority in the ‘actual’ sense, the Committee’s analysis left open whether the objective aspect of its definition of minority always respected formal non-discrimination or whether it reflected tradition, autonomy or both. We might almost see the Committee as positing the reconciliation of equality and culture in this non-state past or present.64

In addition, by framing the problem in Lovelace as one of state-imposed limitations, the Committee in effect acknowledged the colonial context because it essentially probed what restrictions could be justified given the scarcity of resources for material and cultural survival that was the legacy of colonialism for indigenous peoples.65 On this reading of Lovelace, the decision structures an inquiry that looks quite different from the ‘hard choice’ usually posed through the case and that exhibits important continuities with the approaches we have seen in other self-determination cases.

64 In this connection, it is noteworthy that some cite Lovelace as support for indigenous self-definition. E.g. Moss, ‘Indigenous Self-Government in Canada and Sexual Equality Under the Indian Act’, 294.