Chapter Seven

Victoria's Secret

How to Make a Population of Prey

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Being Indian is a High-Risk Lifestyle

"Indigenous women and girls are far more likely than other Canadian women and girls to experience violence and to die as a result" (HRW 2013: 25). Young Indigenous women are five times more likely than other Canadian women of the same age to die of violence, and between 1997 and 2000, the rate of homicide for Indigenous women was almost seven times higher than the rate for non-Indigenous women (NWAC and PAFIA 2013: 6). Indigenous women are more likely than non-Indigenous women to be killed by a stranger, and nearly half the murders are unsolved (NWAC 2010: ii).

The staggering violence against Indigenous women is a legacy of colonization (Kuokkenen, this volume, and HRW 2013). In this chapter, I examine how Canada's Indian Act, an instrument of colonization, makes Indigenous women legal nullities, places them outside the rule of law and transforms them into prey for those who would harm and abuse them.

The Act's historic aim was the assimilation of 'Indians.' It segregated them from settler society and indoctrinated them until a satisfactory degree of 'civilization' had been reached. Such civilization involved stripping Indigenous nations of name, language, culture and social organization (Cannon and Sunseri 2011: xvi, xvii), and re-creating them as small government-dependent polities of 'Indians' meant to look like Victorian villages populated by Victorian families. The scheme discriminates on the basis of both race and gender. It rests on the view that the humanness of the Indian does not measure up to the humanity of the European. Its adoption of the Victorian patriarchal model of the family reflects the belief that the only proper place for women is under the dominion and control of men.

Women subject to the Indian Act are doubly diminished. If they fit within its Victorian confines, they have few or no rights. If they do not become (or seem to be) docile Victorian wives, as dictated by the Act, they are branded as deviants (often prostitutes) and considered fair game for mistreatment. The B.C. Human Rights Council found this branding to be discrimination on the combined grounds of race and gender. Valerie Frank of the Comox Indian Band had never experienced maltreatment when staying at a hotel with her family but was twice roughly evicted from her hotel room, and denied other services, when she visited there by herself (Frank 1993: paras. 6–12). In ruling against the hotel, the Council commented,

"What is particularly offensive ... is the assumption that she is a prostitute because she is a single Native woman in a hotel by herself" (Frank 1993: para. 31).

The Act's definition of "Indian" is conditioned by the reduction of Indigenous women's identity to primarily, if not exclusively, that of ungovernable sexual beings, appropriately treated as "sub-humans" (Oppol 2012, vol. IIA: 2). The Indian Act imports into the structure of Indian governance in Canada the widespread stereotypical portrayal of the Indigenous woman as "squaw," described by Métis scholar Emma LaRocque as a being with no human face who is lascivious, immoral, unfeeling and dirty (Aji 1991 vol. 1: 479). This stereotype is applied to all Indigenous women, whether they are subject to the Indian Act or not.

Embedding that stereotype into legislation gives it the legitimacy of government approval, and in turn gives Canada an interest in its continued survival. The flourishing of this stereotype in the wider society is difficult, if not impossible, to curtail as long as it remains a centerpiece of official policy. The legislative scheme constructed on that stereotype drives women into exile, separates them from their families and impoverishes them and their children if they do not conform to the model of demure Victorian wife imposed upon Indigenous women.

Violence Against Indigenous Women in Canada

The patterns of violence against Indigenous women in Canada are endemic, pandemic and horrifying. Between 1997 and 2000, the rate of homicide for Indigenous women was 5.4 per 100,000, compared to 0.8 per 100,000 for non-Indigenous women (HRW 2013: 25, note 11). The Sisters in Spirit research program of the Native Women's Association of Canada (NWAC) found that between the 1960s and 2010, 582 Indigenous women and girls were missing or murdered in Canada (NWAC 2010: 20–21). Two-thirds of the cases are murders, one-fifth are disappearances and the remainder are suspicious deaths or unknown (NWAC 2010: 18). The majority of the victims were under the age of thirty-one and many were mothers (NWAC 2010: ii). An updated report as of March 2013 found a total of 668 missing or murdered Indigenous women and girls (NWAC and PAFIA 2013: 7).

Further scrutiny has revealed even higher rates of murder and disappearance. Using the same type of public sources available to Sisters in Spirit, researcher Maryanne Pearce found 824 missing or murdered Indigenous women in the years 1990 to 2013 (Pearce 2013: 18, 28). In May 2014, the RCMP stunned observers by revealing, for the first time, statistics it had compiled across all federal, provincial and municipal police forces in Canada, showing that nearly 1,200 Indigenous women have been murdered or gone missing over the past thirty years (MacCharles 2014). About one thousand of these women are murder victims. This is the first time that official police statistics have been disclosed, and these numbers double those found by Sisters in Spirit. RCMP Commissioner Paulson stated that although 4 percent of the women in Canada are Indigenous, 16 percent of Canada's murdered women and 12 percent of Canada's missing women are Indigenous, "clearly an
overrepresentation." The same day these statistics were disclosed, the Government of Canada once again refused to hold a national inquiry into the murders and disappearances of Indigenous women (MacCharles 2014).

In 2004, Amnesty International Canada kicked off a period of intense international scrutiny of the violence against Indigenous women in Canada with the publication of its Stolen Sisters report (AC 2004), characterizing violence against Indigenous women as a violation of their domestic and international human rights. Before that, attention had been drawn to the murder and disappearance of Indigenous women in various ways, including Ryga's 1967 play, The Ectasy of Rita Joe (Ryga 1971), Amber O'Hara's database of missing and murdered women (Bronskill and Bailey 2005), the report of the Aboriginal Justice Inquiry of Manitoba into the murder of Helen Betty Osborne in The Pas in 1971 (AJI 1991) and individual cases like the conviction of two Regina university students for murdering Pamela George in 1995 (Razack 2002: 123–25) and the conviction of John Martin Crawford for the murder of three young Indigenous women in Saskatchewan in the 1990s (Goulding 2001).

With increased attention to incidents of violence against Indigenous women, long-buried historical cases came into public view, like the sexual assault of young women at the Cariboo Indian Residential School by Father (later Bishop) Herbert O'Connor in 1961, for which he was charged in 1991 (R. v. O'Connor 1996), and the sexual assault of two teenage girls by Reform Party MP (and Justice critic) Jack Ramsay in 1969 when he was an RCMP constable in northern Saskatchewan (CBC News 2001).

The behaviour of the justice system in contemporary cases also came under scrutiny, including the decision-making of the Vancouver Police Department with respect to the numerous murders of women in the Downtown East Side of Vancouver (for many but not all of which Robert Pickton was later prosecuted and convicted) (Oppal 20:2 vol. IIA: pt.2 and vol. IIb), and questioning of what was known locally, by whom and when about the abuse of young Indigenous women by sitting judge David Ramsay in Prince George, British Columbia (HRW 2013: 13-33). The perception grew that abuse of Indigenous women is more acceptable to the courts than abuse of non-Indigenous women. (AJI 1991 vol. 1: 482).

Despite the attention now focused on violence against Indigenous women in Canada, efforts to gather information have been frustrated by government actions. The Sisters in Spirit research program of NWAC was funded from 2005 until 2010, but the funding was not renewed (HRW 2013: 26). When a Commission of Inquiry was set up in British Columbia to study police decision-making with respect to the rash of murders in Vancouver's Downtown East Side, the government of British Columbia refused to fund Indigenous groups (including NWAC and the communities of the deceased women) to participate in the Inquiry. The Commission itself declared that it was not in the public interest to deny funding to these groups (Oppal 2012 vol. IV: 9–10). The Conservative majority on a Parliamentary Committee blocked it from recommending a national inquiry into the murders and disappearances in a report issued in 2014 after examining the phenomenon for several months (Special Committee on Violence Against Indigenous Women 2014).

Indigenous victims of violence are not seen as women with families and communities, or rounded human lives; they are all too often reduced to the stereotype of women who frequent bars or dangerous urban areas engage in prostitution or have "high-risk" lifestyles. These characterizations are made by police (Project KARE 2012; Oppal 2012 vol. IIa: 2) and also by media and public commentary (Acoose 1995: 96–97; Goulding 2001: 209–19). In one case, the court attributed an adult level of sexual agency to a twelve-year-old Indigenous girl sexually assaulted by three white men in their twenties (Beyond Borders 2007: 7). By contrast, those accused of harming Indigenous women are sometimes portrayed as "normal," and a positive factor in their sentencing is the support they get from family and community (R. v. Edinburgh 2005; R. v. Brown 1995: para. 97; Acoose 1995: 97; Razack 2002: 123–25). In some cases, the police, or the family or community of those eventually accused, may have known of the crime for some time before it came to light (AJI 1991, vol. 2: 1–2), or families may have helped to conceal it (Razack 2002: 139–40). Police may have been aware of practices endangering Indigenous women but done nothing about them (AJI 1991 vol. 2: 8; AC 2004: 50; Oppal 2012 vol. IIb: 287).

Women disappear from or are found murdered in isolated areas, along highways or on vacant land outside cities, and also in urban areas where the most poor and marginal are forced to live. They may be missing for some time before their families are able to interest police in the disappearance. The Oppal Commission found that barriers in the reporting process contributed to delays in investigation. In some cases, families experienced degrading and insensitive treatment, and in a few, "the barriers were so pronounced as to amount to a denial of the right to make a report" (Oppal 2012 vol. IIb: 284–85). Women and their families do not, and perhaps cannot, expect help from the police, because of indifference, incompetence or even the involvement of police in misconduct of their own (AJI 1991 vol. 1: 482; HRW 2013: 29, 31–34; Oppal 2012 vol. IIb: 284–85). It has been suggested by a number of observers that if the missing or murdered woman were white instead of Indigenous, public and police interest would have been more forthcoming (HRW 2013: 37; Acoose 1995: 87; Goulding 2001: 211).

There have been many calls for a national commission of inquiry into the missing and murdered Indigenous women. Domestically, these calls come from groups as diverse as NWAC, Amnesty International and the Feminist Alliance for International Action, on the one hand (ICFMN 2013), and the premiers of Canada’s provinces and territories on the other (Benzie and Brennan 2013: A6).

Internationally, pressure has come from the U.N. Human Rights Council (in 2009 and 2013), the Committee to Eliminate All Forms of Discrimination Against Women (2008) and most recently by the United Nations Special Rapporteur on
Indigenous Issues, Dr. James Anaya, in the fall of 2013 (Canadian Press 2013). The Government of Canada repeatedly refuses to undertake an inquiry (Blanchfield 2012).

Foundations of the Indian Act

Canada is an example of "settler colonialism" (RCAP 1991: vol. 1, part 1, 105). Settler colonies practise "internal colonization," where "the dominant society coexists on and exercises exclusive jurisdiction over the territories and jurisdictions that indigenous peoples refuse to surrender" (Tully 2009: 39; see also Wolfe 1999: 1). Tully asserts that the colonizer aims to resolve this contradiction in the long term "by the complete ... disappearance of the indigenous peoples as free peoples with the rights to their territories and governments" (Tully 2009: 40). One strategy for accomplishing this objective is that the Indigenous peoples would become "extinct in fact," through dying out, intermarriage, urbanization or extinguishing their will to resist assimilation (Tully 2009: 40).

The Indian Act has been preoccupied with extinction in fact. Deputy Superintendent of Indian Affairs Duncan Campbell Scott infamously proclaimed to Parliament in 1920, "Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian question, and no Indian Department, and that is the whole object of this Bill" (Titey 1986: 50, note 55).

S. 91(24) of the Constitution Act, 1867 gives the federal government jurisdiction over "Indians and lands reserved for Indians." Canada has sought to define "Indians" as narrowly as possible, so as to restrict the numbers for whom it is responsible. However, in the Eskimo Reference, the Supreme Court of Canada held that Inuit are included, and in 2014 the Federal Court of Appeal included Métis (Canada v. Daniels 2014) (the Canadian government is appealing this decision at the time of writing this chapter).

The major legislative enactment under s. 91 (24) is the Indian Act. It establishes a comprehensive regime of governance directed at "lands reserved for Indians." The Indian Act provides for the existence of bands, which are composed of "Indians," and for allocation to a band of a reserve. Only members of that band may occupy or use the reserve. If the band ceases to exist, then the land is taken by the Crown. A band exists only so long as there are members of the band who are recognized by Canada as entitled to share in its land.

A narrow definition of "Indian" furthers Canada's own land ambitions in several ways: the fewer Indians it recognizes, the less land must be allocated as reserves in the first place; and the more people who are excluded from bands, the more quickly the Indian population will shrink. The faster the bands shrink and ultimately disappear, the more quickly the land may be taken by Canada. Beneficiary programs for Indians, such as education and health care, will also cost the federal government less to the extent that the number of Indians is reduced.

Although the Indian Act has never used the term "status," those recognized by Canada for purposes of the Act are commonly referred to as "status Indians" (Aboriginal Affairs and Northern Development Canada 2012a and 2012b). Indian status is seen by Canada as inferior to the full citizenship of the "normal" person. However, Indian status is also a form of privilege: as Palmer (2011: 39) observes, "with regard to accessing programs and services, land, natural resources, and seats at self-government negotiating tables, the real question is not whether one is a citizen of the Mi'kmaq, Cre, or Mohawk, but whether one is an Indian and a band member." Sharon McVor has argued that status confers cultural identity and belonging (McVor and Grasmor 2010: para. 22).

The Victorian view of woman and the family embodied in the Indian Act features the male as the patriarch and the female his dependent and obedient wife (Holcombe 1983: 33). The relationship between husband and wife paralleled that between master and servant (Chambers 1997: 10–11). By depriving married women of property, "the law deprived them of legal existence, of the rights and responsibilities of other citizens, and thus of self-respect" (Holcombe 1983: 35).

While adopting these elements of the Victorian family, the Indian Act made one crucial exception. In Victorian settler society, the mother had responsibility in fact for rearing children, even though she had no legal authority to make decisions about them and no right to their custody. The Indian Act, by contrast, provided that Indian children would not be raised by their parents at all.

Nicholas Davin (1879: 10), architect of the residential school system, observed: "The Indian himself is a noble type of man, in a very early stage of development ... the race is in its childhood." Declaring that "one of the earliest things an attempt to civilize them does, is to take away their simple Indian mythology," he continued, "to disturb this faith, without supplying a better, would be a curious process to enlist the sanction of civilized races whose whole civilization, like all the civilizations with which we are acquainted, is based on religion" (Davin 1879: 14).

Davin (1879: 13) urged the government to utilize missionary schools and specified the role that religious women would play: "the influence of civilized women must be constantly present in the early years ... the plan is now to take young children, give them the care of a mother, and have them constantly in hand. Such care must go pari passu with religious training" (Davin 1879: 12). In this plan, Indigenous mothers would be replaced by civilized white mothers who would indoctrinate children in the practices and the faiths of the settler regime.

The residential schools run by Canada in conjunction with the major religious denominations had the twin goals of civilizing and Christianizing (RCIC 2012: 10). The government considered that to achieve these goals, children had to be separated from their families (RCIC 2012: title page). This policy tore the heart from Indigenous women's role in the family (Carter 2005: 139; Barman 2006: 286) as it tore the children from their families and communities.

Among the many reasons why the Indigenous mother was considered an
inappropriate influence on her own children was the alleged hypersexuality of Indigenous women, a characterization that was essential to the justification of colonization. Indigenous women were "constructed as lascivious, shameless, unmatri- nal, prostitutes, ugly, and incapable of high sentiment or manners — the dark, mirror-image to the idealized nineteenth-century visions of white women" (Perry 2001: 49; also see Carter 1997: 161; Carter 1993: 148, 154; White 1991: 61). Aboriginal women represented "the wild" (Barman 2006: 279); they are almost wholly sexualized by settler society (Barman 2006: 277). They were rarely permitted any other form of identity (Barman 2006: 289). Barman attributes much of the white preoccupation with controlling Indigenous women's sexuality to a fear of their exercise of autonomy, the ultimate threat to the Victorian patriarchal family (Barman 2006: 277-86; Barman 2005: 208). Protecting the Victorian patriarchal family of the settler was, in effect, protecting the white race that was reproduced through that family.

White (1991: 61) says French observers "tended to select material that made the women seem merely a disorderly and lewd set of Europeans, not people following an entirely different social logic." One striking example of this is the refusal of colonial society, and the Canadian government, to acknowledge the Indigenous acceptance of divorce and remarriage, an omission that imparted an illicit characterization to any Indigenous conjugal union but the first (Carter 2005: 140; Carter 2008: 162; Sangster 2006: 312). This colonial characterization of Indigenous women was self-serving: it was used to deflect criticism from misbehaving government agents and from police who abused Indigenous women or did not protect them (Carter 1993: 150), or to allow settler men to abuse the women with impunity (Carter 1997: 165; Barman 2005: 205). This portrayal of Indigenous women as dangerously sexual helped justify the placing Indigenous peoples on remote reserves and introducing a pass system to confine residents there (Carter 1997: 187; Carter 2008: 152; Mawani 2009: 138).

Differing from the divide between Indigenous and white races. This practice emerged when the itinerant fur trade started giving way to established trading posts and with the upswelling of settlements, both developments that brought more European women to Canada (Van Kirk 1980: 174; Brown 1980: 148-49; Mawani 2009: 87, 159). Unions between European men and Indigenous women had been a feature of the fur trade, though they were comparatively rare in the settled eastern part of Canada (Van Kirk 2002: 3, 5), and they had underwritten the success of the fur trade by opening up valuable networks and skill sets to the European traders (Van Kirk 1980; Sleeper-Smith 2001: 19; McCormack 2011: 61).

However, such unions were seen to pose grave threats to the establishment of a land based white settler society. Indelible in the white population the mixed-race children of such unions could have claims to land set aside for settlers; they could also challenge their white kin for possession of their father's property and estate, compromising whiteness as an entitlement factor (Carter 2008: 152, 188; Carter 1993: 158; Mawani 2002: 50, 53). Including too many mixed-race children amongst the acknowledged Indian population could have required additional lands to be added to reserves (Mawani 2002: 65).

Inter-racial unions threatened not just whites' preferential access to land, but also the racial hierarchy itself. Perry observes that a white man who married an Indigenous woman was seen as "dangerously flirtatious" with relinquishing his place in the civilized race and becoming deracinated (Perry 2001: 70). Rather than upholding the superiority of the white race, the man became a "squaw man," corrupting and degrading the white race (Carter 1993: 154).

The answer to all of these challenges was a two-level enforcement by the Indian Act of the Victorian family ideal. Indians on reserve were to have conventional Victorian unions, with the husband as the controlling partner and the wife under his dominance. If an Indian woman married a white man, she would follow her husband off the reserve (and the Indian register) like a good Victorian wife (Green 2001: 723-27). In the words of the federal government, this would involve the woman's transition "from dependence upon the Indian community and its special position under our law to dependence upon her husband in the ordinary circumstances of the larger community" (Attorney General of Canada 1972: para 12).

This move from the reserve to the broader world was seen as the achievement of "civilization" (Mawani 2009: 138). For the federal government, "off-reserve residence has tended to carry an assumption that the integration process was proceeding satisfactorily" (Hawthorn 1966: 250). However, in the case of women who were forced off reserve for marrying a non-status man, the government was totally indifferent to whether they, and their children, were actually faring well in the new environment.

"To Be an Indian Is to Be a Man"

This opening sentence of Canada's White Paper sums up over one hundred years of Indian policy (RCSS 1970: para. 58). Under the rules for determining Indian status that endured in almost identical form until 1985 (see Brodsky; Kuokkanen in this volume for more complete description), it only took one Indian parent to make a person eligible for Indian status: the father. A Status Indian would confer status on his children, and also on his wife if she were not already a status Indian. By contrast, an Indian woman who married a non-Indian (that is, "married out") would cease to be an Indian, and her children could not be registered as Indians. For purposes of this rule, Canada accepted the validity of marriages between Indigenous women and non-Indigenous men performed according to Indigenous custom: doing so meant that more women would be removed from Indian status (Carter 2008: 169).

Although it had been rare for a white woman to marry an Indian man (Van Kirk 2002: 2), by the 1960s the practice had become common enough to be
cause for concern to Indian women (Standing Committee on Indian Affairs and Northern Development 1985, Issue 74: 24–33; Silman 1987: 11, 97, 185). The 1951 Indian Act introduced loss of Indian status at twenty-one for anyone whose mother and grandmother had both acquired status by marrying a status male (the double-mother rule). Starting in July 1980 the Minister of Indian Affairs offered the bands the option of being exempted from the operation of this double-mother rule, and also from the rule that women who married a non-Indian would lose status (Standing Committee on Indian Affairs and Northern Development 1982, Issue 58: 10–11). By July 1984, 54 percent of bands had opted for exemption from the double-mother rule, while only 18 percent had asked to be excused from the operation of the marrying out rule (Melvyn 2007: para. 61; Melvyn 2009: para. 30). These were choices of a male leadership cadre in Indian bands that was becoming comfortable with the role of Victorian patriarchs.

A woman who lost status upon marriage could not live on or visit the reserve, inherit reserve property or participate in the political and cultural life of the reserve. Mary Two-Axe Earley lamented that her marriage to a non-status man meant that she could not be buried on her reserve, although it had on its land a cemetery where outsiders could inter their pets (Sub-committee on Indian Women and the Indian Act 1982 Issue 4: 461). The women's children were similarly excluded. Even after widowhood or divorce, the woman could not regain her Indian status except by marrying a status Indian man.

We do not know how many women and children were excluded in this way, for Canada kept no statistics. However, it has been estimated that between 1985 and 1999, changes introduced by Bill C-31 increased the number of Status Indians by about 174,500 individuals (Clatworthy 2001: vii–ix). It is also estimated that about 40,000 people will move onto the Indian register as a result of the 2010 amendments to the Act contained in Bill C-3 (Indian and Northern Affairs Canada 2010). We can infer from the relatively large numbers of those still alive and seeking to regain status after 1985 that over the previous century the marrying out rule was responsible for a massive exile of women and children. Justice Laskin of the Supreme Court called the rule a "statutory excommunication" and a "statutory banishment" of Indian women who marry non-Indians (Lavelle and Bédard 1974: 1386).

This exile heightened the vulnerability of women and children. Should an exiled woman be deserted, widowed or divorced, she could not return to her family and community. Should she lose the financial support of her husband, Canada would not resume its obligations to her. The marrying out rules, like the residential schools, fractured Indigenous families. Pearce has found that "the most striking risk factor for violence against the Indigenous woman is being separated from her family (Pearce 2013: 256).

Women who did not lose status on marriage were also discriminated against by the Indian Act's embrace of the Victorian family model. Indian women on reserve were legal nullities, having no right to vote or stand for election in band elections until past the middle of the twentieth century. Permission to occupy reserve land was granted preferentially to Indian men. A woman leaving an abusive marriage usually could not get her own reserve residence. Unless they could move in with another on-reserve family member, she and her children would have to leave the reserve, another instance of exile and family fragmentation being caused by the Indian Act.

The situation became even worse after the Supreme Court of Canada held in Derrickson (1986) and Paul (1986) that provincial family law dealing with occupation of the matrimonial home and division of matrimonial real property did not apply on reserve. These rulings left a legal gap, because there was no federal law dealing with these questions (Eberts and Jacobs 2004; Cornet and Lendor 2002, 2004). Not only were women left without substantive legal protection, they also suffered from "an equally significant ... gap in access to the court system, access to legal aid ... policing, enforcement of law ... and many other areas" (Grant-John 2007, Item 70: 5). Despite many calls for action (Canada House of Commons 2005; Canada Senate 2003), the gap persisted until the Family Homes on Reserves Act of 2013.

Although the Indian Act did not contain specific provisions allowing departmental officials to interfere with Indian women's sexual behaviour within their families, the Indian agent possessed broad discretion to do so. Sangster found that the Indian Affairs filing system had a whole category dealing with immorality on reserves (Sangster 2006: 313). In her study based on Agency records for Manitoulin Island and Parry Sound, Brownlie provides details of the Department's campaign between World Wars I and II to confine women to conventional patriarchal marriages. Indian agents used financial threats, like denying women treaty and interest payments on the ground of sexual transgression, and refusing or delaying provision of relief (Brownlie 2005: 163, 167). Agents might also send to residential school the children of a woman regarded as adulterous (Brownlie 2005: 169, 163). Ironically, in this same period, there are many stories of Indian agents and police coercing sex from Indian women in return for rations or other favours.

Indigenous women's activism in the 1960s and 1970s attacked both the Indian Act's discrimination against status women on reserve (Sillan 1987: 94, 99, 103–104, 175) and also the marrying out rules. Indian Rights for Women organizations in Alberta and Quebec secured from the Royal Commission on the Status of Women a recommendation that women should not lose status for marrying a non-status man and should be able to pass status to their children (ACSW 1970: 237–38, 410). Jeannette Lavelle from the Wikwemikong Unceded Territory on Manitoulin Island and Yvonne Bédard of Six Nations challenged their loss of status upon marriage under the Canadian Bill of Rights equality before the law guarantee.

The majority of the Supreme Court ruled against them. Mr. Justice Ritchie observed that rules about the status of Indian women who marry non-Indians
were imposed as "a necessary part of the structure created by Parliament for the internal administration of the life of Indians on reserves and their entitlement to the use and benefit of Crown lands" (Lavell and Bédard 1974: 1359, 1369). Pointing out that these rules had been in effect for more than one hundred years, Justice Ritchie stated that any change to them had to be accomplished by specific, highly targeted legislation, and not by "broad general language directed at the statutory proclamation of the fundamental rights and freedoms of all Canadians" (Lavell and Bédard 1974: 1359-60).

Much the same reasoning had been used in the late 1920s when the "Five Persons" — white settler women from the Canadian establishment — argued in the Supreme Court that because "person" includes both male and female under modern-day Interpretation Acts, the term "Person" in the Constitution Act, 1867 should be read to include women, thus permitting their appointment to the Senate. Chief Justice Anglin stated that it would be "dangerous to assume that by the use of the ambiguous term 'persons' the Imperial Parliament meant in 1867 to bring about so vast a constitutional change affecting Canadian women as would be involved in making them Privy Councillors" (Persons Case 1928: 287). This holding was almost immediately overturned by the Privy Council in London, which rejected the Supreme Court's protection of the discriminatory status quo (Persons Case 1930). However, this discredited reasoning was still used by the Supreme Court of Canada almost fifty years later to justify the legislated inequality of Indigenous women.

While Yvonne Bédard and Jeannette Corbière Lavell received support from women's organizations and from the Native Council of Canada (representing non-status Indians), major Indian groups like the National Indian Brotherhood and the Alberta chiefs opposed them. Indian leaders feared that a decision making the Indian Act subject to the Canadian Bill of Rights "would wipe out the Indian Act and remove whatever legal basis we had for our treaties" (Cardinal 1977: 110-11). To prevent this, the leadership decided to intervene in the Supreme Court against the women (Weaver 1981: 199). Despite the Act being upheld by the Supreme Court, Cardinal recounts that the case brought renewed attention to the political urgency of Indian Act revisions (Cardinal 1977: 115).

No revisions to the Indian Act resulted from the Lavell and Bédard case. What did result was exemption of the Indian Act from the Canadian Human Rights Act passed in 1977. The exemption was necessary, said the Justice Minister, because the government promised not to revise the Indian Act without consulting the National Indian Brotherhood and others (Standing Committee on Justice and Legal Affairs 1977, Issue No. 6A: 23; Cornet 2001: 125).

No amendments to the Indian Act resulted from this protected process (Cornet 2001: 125). However, the exemption stayed in the Human Rights Act for just over thirty years, in spite of widespread calls for its repeal and its inconsistency with Canada's international human rights obligations (Canadian Human Rights Act Review Panel 2000: 39-41, 127-33, and rec. 141; NWAC 2000; Canadian Human Rights Commission 2005: 8-9). It was repealed with respect to federal government action in 2008 and with respect to band actions in 2011 (Statutes of Canada 2008).

This gap in the rule of law is profoundly unconstitutional, as was the gap in family law legislation on reserve. The Universal Declaration of Human Rights (General Assembly; 1948) states in its preamble that it is essential that human rights should be protected by the rule of law. The Supreme Court has held that "constitutionalism and the rule of law" is one of Canada's four foundational constitutional principles. Another is respect for minority rights, which the Supreme Court has interpreted as including the rights of Indigenous peoples. (Sccession Reference 1998: paras. 49, 82) At its most basic, the rule of law "vouches for the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action" (Scession Reference 1998: para. 70). The rule of law requires the creation and maintenance of an actual order of positive laws (Scession Reference 1998: para. 71). These two prolonged gaps in the rule of law affecting Indigenous women are clearly contrary to Canada's constitutional imperatives and to its international human rights obligations.

Following the Supreme Court decision in Lavell and Bédard, activist Maliseet women took the marrying out rule to the U.N. Human Rights Committee under the Optional Protocol to the United Nations Convention on Civil and Political Rights, with Sandra Lovelace as the case's named complainant (Saman 1987: 74, 134-35, 176-77). Article 27 of the Convention provides that members of ethnic, religious or linguistic minorities shall not be denied the right, is common with other members of their group, to enjoy their own culture, to profess and practise their own religion or to use their own language. Ms. Lovelace, a fluent speaker of Maliseet, wanted to live on the Tobique reserve, with her son, after her marriage to a non-Indian broke up. She was prevented from doing so because of her loss of status. While holding that Article 27 does not guarantee her the right to live on reserve, the Committee found that her rights under Article 27 were interfered with because there is no place outside the Tobique reserve where she can access a like community. It ruled that to deny Sandra Lovelace the right to reside on the reserve does not seem "reasonable, or necessary to preserve the identity of the tribe" (Lovelace 1981 para. 17).

Finally Change, or Is It?

In 1985, after the Lovelace decision and coming into force of the Charter's equality guarantees, Canada passed legislation (Bill C-31) to change the registration provisions of the Indian Act. A new section, 6(1)(c), affirmed eligibility for status of all of those who had qualified for it under the old legislation. Women who had lost status when they married non-Indians were made eligible to return to status under s. 6(1)(c).

However, Bill C-31 worsened women's situation by replacing the one-parent
rule for determining status. Instead of keeping that rule, and allowing either the mother or the father to confer full status on a child, Bill C-31 enacted a new two-parent rule. From 1985 on, under s. 6(1)(f), a person was registrable as an Indian only if both of his or her parents were eligible for status under s. 6(1). The only exception was the new s. 6(2), which allowed registration of those who had one parent registered or registrable under s. 6(1) of the Act. The children of women restored to status under s. 6(1)(c) acquired their status under s. 6(2), as they had only one Indian parent. However, this status was short-term; the section was nicknamed the “second-generation cut-off,” because status derived under s. 6(2) did not count for purposes of the two-parent rule. Those restored to status under s. 6(2) would have to parent with a registered Indian in order to be able to pass along status.

Brownlie (2005: 167) tells us that by World War II, the Department of Indian Affairs had been forced to abandon its campaign to enforce European-style patriarchal marriage. However, the two-parent rule is actually the crowning achievement of this campaign: it compels an Indian Act family modelled after the monogamous patriarchal Victorian family, with two status Indian parents and no crossing of race lines in the production of offspring. It is deeply disturbing that this is the result of “reform” efforts driven by contemporary human rights instruments in Canada and at the international level.

The insidious effect of the two-parent rule is made worse by the way Canada applies the rule in cases where paternity is unstated or unacknowledged. Although nothing in Bill C-31 provided that this be done, Canada changed its policy to require the signature of the father on the birth form and other forms proving paternity. Without this signature, the child’s registration would be determined solely on the basis of the mother’s entitlement (Mann 2005: 1, 5–6). A mother who is herself registered under s. 6(2) is not able to register her child at all. A mother who is registered under s. 6(1) is able to register her child under s. 6(2), but that child will be unable to confer status on their offspring.

Many difficulties have been identified with this practice. If pregnancy was the result of abuse, incest or rape, the mother could be unwilling or unable to identify the father. A father may not want to acknowledge paternity because of concerns about being held financially responsible for the child. Where the relationship has been unstable or abusive, the mother may worry about the father asserting a right to custody or access. Privacy concerns may influence whether the father is willing to disclose paternity, or the mother is willing to ask that he do so, especially if the father is in a relationship with someone else (Mann 2005: 11–12). Difficulties also arise because of lack of knowledge about the requirements or other practical barriers to compliance, which mean that even where the father is prepared to acknowledge paternity, the paperwork may not reach the Registrar in time to permit the appropriate registration (Clarworthy 2004: 239–30; 234–43).

Most fundamentally, the policy on unstated or unacknowledged paternity is a retreat from previous versions of the Act. Until 1951, community acceptance of a child born out of wedlock would entitle the child to registration. After 1951, the mother’s status was sufficient, unless there was actual proof that the father was not an Indian; the burden of proof was on the party seeking to disentitle the child. Now, the government presumes that the father is not a registered Indian if his identity is unknown. Moreover, under the present system, a mother registered under s. 6(2) has no right to transmit status. Under the old Act, any mother with status could pass it on to her child.

Once again, this time under the pretence of compliance with human rights guarantees, Canada has placed the Victorian yoke on the Indian woman’s neck. It has done so despite the fact that by 2013, the disabilities imposed upon an “illegitimate” child (and the status of illegitimacy itself) have been removed from the common law and legislation in virtually all jurisdictions in Canada. By contrast, the Indian Act is making more severe the consequences for a child of having unmarried parents or an unknown father.

Between April 17, 1985, and December 31, 1999, 37,000 children with unstated paternity were born to women registered under s. 6(1), about 19 percent of the children born to s. 6(1) registered women during that period. About 30 percent of the children with unstated paternity were born to mothers under twenty years of age. It has been estimated that as many as 13,000 children born in this period to women registered under s. 6(2) may be ineligible for registration (Mann 2005: 8).

By extrapolating this figure forward to 2012, Lynn Gehl (2012: 194) calculates that since 1985 as many as 25,000 such children have been unregistered. She describes the unstated paternity policy as genocidal (Gehl 2013).

Sharon McVor of the Lower Nicola Indian Band, and her son Jacob Grismer, challenged under the Canadian Charter of Rights and Freedoms the system of conferring status introduced in 1985. Their litigation is described in detail elsewhere in this volume (Brodsky), and has not yet been resolved at its final level of appeal. Importantly, both the British Columbia Court of Appeal and the Government of Canada responded to the narrowest possible construction of the McVor/Grismer claim and of the Act’s discriminatory history (Standing Committee on Aboriginal Affairs and Northern Development 2010, Issue 007: 3).

The desired change is straightforward and simple. Sharon McVor, Jacob Grismer and Lynn Gehl all advocate affirmation of the status of all persons descended from either the male or the female line (Standing Committee on Aboriginal Affairs and Northern Development 2010, Issue 008: 3–4; Gehl 2006: 186). Instead of accepting this straightforward repair of past discrimination, Canada enacted Bill C-3, the Gender Equity in Registration Act in 2010 after the decision in the McVor case. That law merely made one more generation eligible for status, while leaving in place the historical effects of preferring the male line of descent for over a hundred years and the exclusionary effect of the two-parent rule.
Creating a Population of Prey

The profile of violence against Indigenous women corresponds closely to the profile of the treatment accorded women under the Indian Act. Under the Act, women have experienced repeated exile, whether to residential school, to remote reserves, or from their reserves when they marry non-Indian men or experience marital violence or breakdown. Children are exiled when their mothers deviate from narrowly prescribed norms. This statutory dispossession both causes and mirrors the dispossession of those who find themselves in urban enclaves of poverty. The theme of exile and dispossession under the Act echoes, as well, the remote and marginal sites where women are murdered, kidnapped or found; they wind up there in death, just as in life they had to pass through there on the way to, or from, their isolated reserves. The indifference toward missing and murdered women in today's Canada mirrors the official indifference to the fate of Indigenous women who were expelled from their families and communities upon marriage to non-Indians. That missing and murdered Indigenous women are not seen as members of families by the press and public recalls to mind the strenuous efforts made by Canada to separate women from their extended and their immediate families by means of the Indian Act's marrying out rules and the residential schools. The stereotype of "easy squaw" (Acoose 1995: 39), the "objects with no human value beyond sexual gratification" (AJI 1991: 52), attached to Indigenous women who have been assaulted or murdered is exactly the same as the stereotype of rampant sexuality upon which the Indian Act's treatment of women is based, as part of colonization. While not the cause of the stereotype, the Indian Act's affirmation of it as a basis for government policy has made it virtually immune from social influences that might change or erode it. Moreover, the constraining Victorian family model in the Indian Act, justified by the image of Indigenous women as needing control, has fractured families and impoverished and oppressed women for over a century, creating conditions of acute vulnerability.

Finally, given the history of the Indian Act, it should come as no surprise that Indigenous women are preyed upon in disproportionate numbers: they were expelled from the "rule of law" (however debased) that was the reserve system if they married a non-Indian, they were denied access to legal rights on the reserve right up until 2013, because Victorian wives do not have legal rights, and, for a substantial period, Canada withheld from them access to human rights law as a recourse against gender-based discrimination. Canada has demonstrated for over a century that it does not consider Indigenous women appropriate beneficiaries of the rule of law. Law is to be used only to control and confine them.

The treatment of women under the Indian Act is the archetype and model for the treatment of Indigenous women generally and has created of each woman a population of prey. Women whose peoples have never been subject to the Indian Act, like the Métis and Inuit, suffer the same kinds of violation and oppression as do the women who have been ruled by the Indian Act for over a century. The Act captured the racist and misogynist attitudes which Victorian-era settlers and colonial administrators had toward all Indigenous peoples, gave them a safe home and carried them forward through time. Decade after decade, application of the Indian Act validated those invidious ideas, which should have been subjected to the change processes of a maturing constitutional democracy. From their secure hideaway in the Indian Act, where they were refreshed and renewed year after year, these poisonous notions continued to infect our treatment of all Indigenous women, down to the present day, even though they should long ago have been thrown on the scrap heap. Until Canada signals a change in its official view of Indigenous women by changing the Indian Act, Indigenous women will continue to suffer violence to a disproportionate degree.

References
Beyond Borders Inc. 2007. Newsletter No. 10 (Spring). Winnipeg.
Status of Women Canada.


Statutes
An Act to Amend the Indian Act, Statutes of Canada 1956, c. 40.
An Act to amend the Indian Act, Statutes of Canada 1985, c. 27 (Bill C-31).
The Canadian Bill of Rights, Statutes of Canada 1960, c. 44.
Constitution Act, 1867, United Kingdom, 30 & 31 Victoria, c.3.
Family Homes on Reserves and Matrimonial Interests on Reserves Act, Statutes of Canada 2013, c. 20.
Gender Equity in Registration Act, Statutes of Canada 2010, c. 18.
Indian Act, 1876, Statutes of Canada 1876, c. 18.
Indian Act, 1880, Statutes of Canada 1880, c. 28.
Indian Act, Revised Statutes of Canada 1886, c. 43.
Indian Act, Revised Statutes of Canada 1906, c. 81.
Indian Act, Revised Statutes of Canada 1927, c. 98.
Indian Act, Statutes of Canada 1951, c. 29.
Indian Act, Revised Statutes of Canada 1985, c. 1-5.

Parliamentary Hearings
Standing Committee on Aboriginal Affairs and Northern Development. April 1, 2010. Evidence. AAND, Number 007.
Standing Committee on Aboriginal Affairs and Northern Development. April 13, 2010. Evidence. AAND, Number 008.
Standing Committee on Indian Affairs and Northern Development, September 20, 1992. Minutes of Proceedings and Evidence; Issue No. 58 (Includes Committee’s Sixth Report to the House of Commons, i.e. First Report of the Sub-Committee on Indian Women and the Indian Act, Chair, Keith Penner).
Standing Committee on Justice and Legal Affairs, 1977, Minutes of Proceedings and Evidence, Issue No. 6A.
Sub-committee on Indian Women and the Indian Act of the Standing Committee on Indian Affairs and Northern Development, September 17, 1982, Minutes of Proceedings and Evidence, Issue No. 4.

International Instruments
Convention on the Elimination of All Forms of Discrimination Against Women. Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, entry into force 3 September 1981, in accordance with article 27(1).
International Covenant on Civil and Political Rights. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with article 49.


Universal Declaration of Human Rights, Adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948.