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THE *INDIAN ACT* AND THE GENDERED "LOGIC OF ELIMINATION"

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ABSTRACT

One central feature of the *Indian Act*, still in force today, is the federal government's unilateral power to define who is legally recognized as an "Indian." For most of the act's history, First Nations women who married non-status men lost their status, could not transmit it to their children and were forced to leave their communities. In contrast, First Nations men retained their status and could transmit it to their non-status wives and their children. This article examines this legislated regime of gender-based discrimination and argues that it exemplifies how structural violence against Indigenous women has always been integral to Canada's settler colonial fabric. To support this argument, it traces the trajectory of the "marry out" rule from pre-confederation laws through the 1951 reform of the *Indian Act*. The article then demonstrates how the imposition of a Victorian model of gender relations undermined Indigenous women's roles and advanced settler colonialism. Finally, it shows how gender-differentiated harms persist despite the formal repeal of the discriminatory provisions in 1985. The article concludes by underscoring the

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need for a gendered lens in evaluating the legacy of the *Indian Act*, particularly as efforts to harmonize Canadian law with the *United Nations Declaration on the Rights of Indigenous Peoples* raise fundamental questions about the act's future.

* * *

RÉSUMÉ

L'une des principales caractéristiques de la *Loi sur les Indiens*, encore en vigueur aujourd'hui, est le pouvoir unilatéral du gouvernement fédéral de déterminer qui est légalement reconnu comme « Indien ». Pendant la majeure partie de l'histoire de cette loi, les femmes des Premières Nations qui épousaient un homme sans statut perdaient le leur, ne pouvaient pas le transmettre à leurs enfants et étaient contraintes de quitter leur communauté. À l'inverse, les hommes des Premières Nations conservaient leur statut et pouvaient le transmettre à leur épouse non inscrite ainsi qu'à leurs enfants. Le présent article examine ce régime législatif de discrimination fondée sur le sexe et soutient qu'il illustre comment la violence structurelle exercée contre les femmes autochtones a toujours été au cœur du projet colonial canadien. Pour étayer cette thèse, il retrace l'évolution de la politique d'exclusion des femmes par le mariage, des lois préconfédératives jusqu'à la réforme de la *Loi sur les Indiens* en 1951. Il démontre ensuite comment l'imposition d'un modèle victorien des rapports de genre a fragilisé le rôle des femmes autochtones et a favorisé le colonialisme de peuplement. Finalement, il montre que les préjudices différenciés selon le genre persistent malgré l'abrogation formelle des dispositions discriminatoires en 1985. L'article conclut en soulignant la nécessité d'adopter une perspective de genre pour évaluer l'héritage de la *Loi sur les Indiens*, particulièrement à l'heure où les efforts d'harmonisation du droit canadien avec la *Déclaration des Nations Unies sur les droits des peuples autochtones* soulèvent des questions fondamentales quant à l'avenir de cette loi.

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INTRODUCTION

At the roots of Canada's colonial history is the subjugation of Indigenous peoples through the adoption of laws based on racist ideologies.[1] The *Indian Act* has been the centrepiece of this process. The codification of "Indianness" allowed the racialization of diverse Indigenous societies as "Indians"[2] divided into "bands." As explained by Cree scholar Val Napoleon, "[t]he colonially created entity called a band is [a]historic and bears no relationship to the larger nation or its ancient cultural systems of governance, land tenure, laws, or citizenship."[3] Moreover, the creation of the "Indian" as a legal category "that could be granted or withheld, according to the needs of the settler society"[4] served to emphasize racial differences and uphold racist ideologies premised on European superiority and "Indian" inferiority. Tellingly, until 1951, the term "person" was defined in the *Indian Act* as "an individual other than an Indian."[5] This dehumanization, in turn, permitted the justification of brutal assimilationist policies.[6]

However, reckoning with the legacy of the *Indian Act* solely through the lens of race misses a foundational aspect of Canada's settler colonialism: the transformation of gender relations within Indigenous societies. At the core of the act is the unilateral determination by the federal government of who qualifies as "Indian" under Canadian law. For most of the act's history, this determination discriminated against women. For

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1 Bonita Lawrence, "Gender, Race, and the Regulation of Native Identity in Canada and the US: An Overview" (2003) 18:2 Hypatia 3 at 5.

2 The term "Indian" is used strictly to refer to the legal category enshrined in the *Indian Act* (RSC 1985, c I-5 [*Indian Act* 1985]). The author, however, acknowledges that it is an archaic, colonial term that ought not to be used or understood as a synonym for "Indigenous."

3 Val Napoleon, "Extinction by Number: Colonialism Made Easy" (2001) 16:1 CJLS 113 at 126.

4 Lawrence, *supra* note 1 at 7.

5 *The Indian Act, 1876*, SC 1876, c 18, s 3(12) [*Indian Act* 1876]; *The Indian Act, 1880*, SC 1880, c 28, s 2(12) [*Indian Act* 1880]; *The Indian Act*, RSC 1886, c 43, s 2(c) [*Indian Act* 1886]; *Indian Act*, RSC 1906, c 81, s 2(c) [*Indian Act* 1906]; *Indian Act*, RSC 1927, c 98, s 2(i) [*Indian Act* 1927].

6 Lawrence, *supra* note 1 at 7–8.

half of the act's history, the definition of the term "Indian" read as follows:

> "Indian" means
>
> Any male person of Indian blood reputed to belong to a particular band;
>
> Any child of such person;
>
> Any woman who is or was lawfully married to such person.[7]

This definition is premised on a gender hierarchy. A woman's access to "Indianness" was contingent upon her marriage to an "Indian." The implications were multiple, including the exclusion of women from band governance and decision-making.[8] Moreover, upon marriage to a man who was not an "Indian," a woman "cease[d] to be an Indian in any respect within the meaning of this Act."[9] If a woman married an "Indian" member of another band, she "cease[d] to be a member of the band to which she formerly belonged and [became] a member of the band ... of which her husband [was] a member."[10] In short, under the *Indian Act*, the social place and roles of women were reduced to being their husbands' shadows. Coupled with the definition of "person" to the exclusion of "Indians," it becomes evident that, from the onset, Canadian law positioned Indigenous women "as the most disenfranchised segment of society, [placing them] at the receiving end of not only physical and sexual violence, but also structural, political and economic violence, all of which reinforce and reproduce one another."[11]

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7 *Indian Act* 1876, *supra* note 5, s 3(3); *Indian Act* 1880, *supra* note 5, s 2(3); *Indian Act* 1886, *supra* note 5, s 2(h); *Indian Act* 1906, *supra* note 5, s 2(f); *Indian Act* 1927, *supra* note 5, s 2(d).

8 Only adult male members of the band were entitled to vote in band council elections and to hold office as chief or councillor (see *Indian Act* 1876, *supra* note 5, s 61). It was only in 1951 that First Nations women were granted the right to vote in band council elections and to be eligible to be nominated as chief or councillor (*The Indian Act*, SC 1951, c 29, s 76 [*Indian Act* 1951]).

9 *Indian Act* 1876, *supra* note 5, s 3(3)(c).

10 *Ibid*, s 3(3)(d).

11 Rauna Kuokkanen, "Globalization as Racialized, Sexualized Violence: The Case of Indigenous Women" (2008) 10:2 Intl Feminist J Politics 216 at 220 [Kuokkanen, "Globalization"].

As the *Indian Act* turns 150 years old, it is time to come to terms with its lasting impacts on Indigenous[12] women.[13] By taking a historical outlook to tell the story of how the *Indian Act* explicitly discriminated against First Nations women for most of its existence, this paper seeks to illustrate that structural violence against Indigenous women constitutes an integral part of Canada's colonial fabric. It argues that, while this discriminatory treatment was certainly a product of the settler state's own patriarchal values, there was more to it. Indigenous women's role as givers of life and their "ability to produce future generations and ensure the continuance of [their] people" pose a symbolic and physical threat to the settler colonial project.[14] As such, this paper posits that the *Indian Act*'s

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12 In this article, the term "Indigenous" is used, as it is the term chosen by the Indigenous representatives who participated in the negotiation of the *United Nations Declaration on the Rights of Indigenous Peoples*, UNGA, 61st Sess, UN Doc A/61/53 (2007) Annex [*UNDRIP*]. In Canada, the Constitution uses the term "Aboriginal," which is defined as including "the Indian, Inuit and Métis peoples of Canada" (see *Constitution Act, 1982*, s 35(2), being Schedule B of the *Canada Act 1982* (UK), 1982, c 11). However, "Indigenous" has become, in recent years, the preferred umbrella term in the Canadian context as well. While the *Indian Act* was never applied to Métis and Inuit peoples, the author chose to use the expression "Indigenous women" because the article is premised on the postulate that, while the gender-based discrimination in the *Indian Act* was only aimed at First Nations women, the detrimental ramifications of this policy, as a manifestation of settler colonialism, have impacted and continue to cause prejudice to all Indigenous women.

13 The term "women" is used in an inclusive fashion and encompasses all Indigenous persons who identify and/or navigate the world being gendered as such. For the sake of conciseness, the term "women" is used to refer to women of all ages, instead of the commonly used expression "Indigenous women and girls." The choice to limit the discussion to women is in no way intended to minimize the consequences of colonialism on other Indigenous persons, but rather to highlight the particular ways in which colonialism has targeted and impacted Indigenous women.

14 D Memee Lavell-Harvard & Jennifer Brant, "Introduction: Forever Loved" in D Memee Lavell-Harvard & Jennifer Brant, eds, *Forever Loved: Exposing the Hidden Crisis of Missing and Murdered Indigenous Women and Girls in Canada* (Bradford, ON: Demeter Press, 2016) 1 at 4. See also Andrea Smith, *Conquest: Sexual Violence and American Indian Genocide* (Durham, NC: Duke University Press, 2015) at 79; Winona Stevenson, "Colonialism and First Nations Women in Canada" in Martin J. Cannon and Lina Sunseri, eds, *Racism, Colonialism and Indigeneity in Canada: A Reader*, (Oxford: Oxford University Press, 2011) 44; Mary Eberts, "Victoria's Secret: How to Make a Population of Prey" in Joyce Green, ed, *Indivisible: Indigenous Human Rights* (Halifax: Fernwood, 2014) 144 at 150–51 [Eberts, "Victoria's Secret"] [Green, *Indivisible*].

historical regime of admissibility to "Indian Status" exemplifies how the marginalization of Indigenous women has been a key strategy of the settler colonial project in Canada.

To do so, it will present how the state established, maintained and defended, during a century and a half, a legislated regime of discrimination, a regime that is no stranger to the contemporary vulnerabilities of Indigenous women in Canada. It will start by explaining the mechanics of the legislated exclusion of Indigenous women through marriage. It will then expose how the imposition of a Victorian model of gender relations served the colonial project, while profoundly disrupting the roles of Indigenous women within Indigenous societies. Lastly, it will discuss the contemporary ramifications of this policy of exclusion through marriage, even after the abrogation of the legislated discrimination.

I. MANUFACTURED MARGINALIZATION: THE *INDIAN ACT* AND THE EXCLUSION OF WOMEN

Understanding the marginalization of Indigenous women through the *Indian Act* requires looking first at the colonial period prior to confederation. In 1857, the fifth parliament of the Province of Canada adopted *An Act to encourage the gradual civilization of the Indian Tribes in this Province*.[15] This new law amended a 1850 legislation that prohibited the purchase of land from "Indians" without Crown consent.[16] According to its preamble, the *Gradual Civilization Act* sought to "encourage the progress of Civilization among the Indian Tribes in this Province, and the gradual removal of all legal distinctions between [Indian Tribes] and Her Majesty's other Canadian subjects, and to facilitate the acquisition of property and of the rights accompanying it."[17] To achieve this end, the new law elaborated a process called "enfranchisement," by which an "Indian" would cease to be considered a member of his band in exchange for full citizenship status.

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15 *An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians*, S Prov C 1857 (20 Vict), c 26 [*Gradual Civilization Act*].

16 *Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury*, S Prov C 1850 (13 & 14 Vic), c 74.

17 *Gradual Civilization Act*, *supra* note 15, Preamble.

The process was voluntary and open to men between the ages of twenty-one and forty years old. The criteria used by the colonial authorities were: the ability to speak English or French, be reasonably well educated by colonial standards, be free of debt, and be considered of good moral character by a commission of settler examiners.[18] Once enfranchised, they would be entitled to "a piece of land not exceeding fifty acres out of the lands reserved or set apart for the use of this Tribe, and also a sum of money equal to the principal of his share of the annuities and other yearly revenues receivable by or for the use of such tribe."[19] Wives and children were automatically enfranchised, regardless of their wishes and without receiving a share of reserve lands like men.[20]

The policy of enfranchisement was premised on the "logic of elimination"[21] in that it sought the removal of all legal distinctions between Indigenous peoples and settlers to achieve the disappearance of Indigenous nations as distinct social and political entities. It was designed to reduce the numbers of "Indians" and, as a result, to gradually extinguish "reserve lands."[22] Most importantly, it was an attack on the social cohesion of Indigenous nations. As noted by the Royal Commission on Aboriginal Peoples (RCAP), the enfranchisement policy "was a threat to the integrity and land base of communities, an attempt to 'break them to pieces.'"[23]

This was foundational for the settler colonial project. In the words of James Tully, "the essence of internal colonisation ... is the appropriation of the land, resources and jurisdiction of the indigenous peoples ... for the territorial foundation of the dominant society itself."[24] The

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18 *Ibid*, s IV.

19 *Ibid*, s VII.

20 *Ibid*, s VIII. Wives and children would however be entitled to their shares of annuities or annual sums payable to the tribe (*ibid*, s IX).

21 See Patrick Wolfe, "Settler Colonialism and the Elimination of the Native" (2006) 8:4 J Genocide Research 387.

22 *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1, Catalogue No Z1-1991/1-1E-PDF (Ottawa: Supply and Services Canada, 1996) at 138 [RCAP].

23 *Ibid*.

24 James Tully, "The Struggles of Indigenous Peoples for and of Freedom" in Duncan Ivison, Paul Patton & Will Sanders, eds, *Political Theory and the Rights of Indigenous Peoples* (Cambridge, UK: Cambridge University Press, 2000) 36 at 39.

disappearance of the legal distinctions between "Indians" versus settlers and "reserve lands" versus lands opened to colonization would result in the elimination of the challenges Indigenous nations posed to the settler claim to sovereignty and territory. However, the enfranchisement policy, in its voluntary form, failed. In twenty years, only one Indigenous man chose this route.[25] The success of the settler colonial project commanded more effective assimilationist policies. While in the first iteration of enfranchisement, Indigenous women were only "collateral damage", they soon became a direct target.

Confederation drastically (and unilaterally) transformed the relationship between the state and Indigenous peoples.[26] In 1867, the Constitution of the Dominion of Canada turned "Indians and Lands reserved for the Indians" into objects of the exclusive legislative authority of Parliament.[27] To reduce the numbers of people that fell under federal jurisdiction, the term "Indian" ought to be defined as narrowly as possible. As explained by Mary Eberts: "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."[28]

As such, two years after confederation, the new parliament adopted *An Act for the gradual enfranchisement of Indians*.[29] This law marked the formal integration of the "logic of elimination" through assimilation into Canadian law.[30] The policy of voluntary enfranchisement instituted in the 1857 *Gradual Civilization Act* was continued. Yet, a whole new policy was incorporated into the law: the exclusion of Indigenous women from their

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25 RCAP, *supra* note 22 at 138. The refusal to apply for enfranchisement has been argued to be a form of passive resistance (see JR Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada*, revised ed (Toronto: University of Toronto Press, 1991) at 206).

26 Miller, *supra* note 25 at 165.

27 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(24), reprinted in RSC 1985, Appendix II, No 5.

28 Eberts, "Victoria's Secret", *supra* note 14 at 148.

29 *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42*, SC 1869, c 6 [*Gradual Enfranchisement Act*].

30 RCAP, *supra* note 22 at 166.

band through marriage. The act provided that an "Indian" woman who married a "non-Indian" man lost her status and band membership, as would any children of that marriage.[31] Meanwhile, Indigenous men who married women without status remained "Indians" under Canadian law and could transmit that status to their wife and children. The underlying goal of this new act was "more control over Indians, more efficient and thus more economical management of Indian affairs during the transition to civilization and eventual assimilation."[32]

By the time the first iteration of the *Indian Act* was adopted in 1876, the stage was set. The exclusion of women through marriage became a central piece of the "logic of elimination" that animated the unilateral definition of who qualified as an "Indian" under Canadian law. The *Indian Act* consolidated different pieces of legislation aimed at Indigenous peoples into a single law designed to uniformize their relationship to the settler state in a profoundly paternalistic manner. This newly imposed homogenizing relationship rested on the three interrelated functions that founded the Crown's policy towards "Indians": (1) assimilation, (2) cost efficient management of Indian affairs and lands, and (3) a restrictive definition of "Indianness."[33]

The act attacked Indigenous nations on numerous fronts to achieve the settler colonial goals. As highlighted in the RCAP final report, "[t]he *Indian Act* further facilitated the imposition of the government's assimilative will by insisting on conformity with Canadian social mores and providing penalties for non-compliance."[34] Traditional structures of governance and decision-making were dismantled to make place for the imposed band system. Indigenous economies were controlled through policies such as the pass system and the permit system, which respectively allowed government officials to regulate movement into and from reserves, while imposing licencing requirements for economic activities,

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31 "[A]ny Indian woman marrying any other than an Indian, shall cease to be an Indian within the meaning of this Act, nor shall the children issue of such marriage be considered as Indians within the meaning of this Act" (see *Gradual Enfranchisement Act*, *supra* note 29, s 6).

32 Canadian Advisory Council on the Status of Women, *Indian Women and the Law in Canada: Citizens Minus*, by Kathleen Jamieson, Catalogue No LW31-2/1978 (Ottawa: Minister of Supply and Services Canada, April 1978) at 32.

33 *Ibid* at 28.

34 RCAP, *supra* note 22 at 171.

which dramatically restricted Indigenous peoples' access to key economic sectors, creating dependency on government funding.[35] Cultural practices were criminalized[36] and attendance to residential "schools"[37] was rendered mandatory.[38] While our focus is on the definition of "Indianness," it is important not to underestimate how all facets of the *Indian Act* have had gendered impacts.

In addition to continuing the policy of excluding women through marriage, first adopted in the 1869 *Gradual Enfranchisement Act*, the *Indian Act* expanded the enfranchisement policy by rendering it compulsory in some circumstances. Any man who graduated from university, became a Christian minister, a doctor or a lawyer, or served in the armed forces, automatically ceased to be an "Indian" in the eyes of Canadian law.[39] Again, his wife and children were also enfranchised. In the words of Audra Simpson, "[t]he Indian Act of 1876, the overarching 'law' of Indians in Canada, legally 'made' and 'unmade' Indians and their rights in a Western, specifically Victorian, model of patrilineal descent (and rule) that attempted to order their winnowed territories."[40] Considering that once a woman lost status by "marrying out," all of her descendants were

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35 *Ibid* at 169.

36 In 1884, the federal government imposed a ban on potlatch and criminalized participation because it considered the practice to be an impediment to the Christianization and the assimilation of Indigenous peoples (*ibid* at 73–76, 169). See especially *An Act further to amend the "Indian Act, 1880"*, SC 1884, c 27, s 3.

37 As the Truth and Reconciliation Commission of Canada described it:

> Canada's residential school system for [Indigenous] children was an education system in name only for much of its existence. The residential schools were created for the purpose of separating [Indigenous] children from their families, in order to minimize and weaken family ties and cultural linkages, and to indoctrinate children into a new culture—the culture of the legally dominant Euro-Christian Canadian society (see Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, Catalogue No IR4-7/2015E-PDF (Winnipeg: TRC, 2015), Preface).

38 *An Act to amend the Indian Act*, SC 1919–20, c 50, s 1. See also *Indian Act* 1927, *supra* note 5, s 10(1).

39 *Indian Act* 1876, *supra* note 5, ss 86(1), 88.

40 Audra Simpson, *Mohawk Interruptus: Political Life Across the Borders of Settler States* (Durham, NC: Duke University Press, 2014) at 10.

also alienated from their Indigeneity, "the scale of cultural genocide caused by gender discrimination becomes massive."[41]

In 1951, the *Indian Act* was substantially reformed. However, women's entitlement to status continued to be contingent upon their husbands' admissibility.[42] Until then, band lists were decentralized. Federal officials would keep records of band memberships and treaty distribution lists. In some instances, the women who lost status through marriage could receive an informal ID card known as a "red ticket," which allowed them to continue living on reserve and receiving treaty payments.[43] This practice ceased with the 1951 reform. As explained in the RCAP final report, "the definition of Indian status and control of band membership remained in non-Indian hands, and the definitions were actually tightened up for financial reasons by introducing an Indian register as a centralized record of those entitled to registration as Indian (and to the receipt of federal benefits)."[44] While First Nations women were finally granted the right to vote in band council elections and to hold office, the centralized record of those entitled to "Indian" status reinforced the exclusion of the women who "married out."[45] Not only were all remaining informal links to their community severed, but women were also forcefully

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41 Lawrence, *supra* note 1 at 9. In a 1999 report, it was estimated that between 1876 and 1985 approximately 25,000 persons lost status because of these measures (see Native Women's Association of Canada, "The Background to Bill C-31" (Background paper distributed at the 2nd National Conference on Bill C-31, May 1999) [unpublished], cited in Napoleon, *supra* note 3 at 117, nn 18, 20). Another estimate suggests that just between 1958 and 1968, more than 100,000 women and their children lost status as a result of the marry-out provisions of the *Indian Act* (see Bob Joseph, *21 Things You May Not Know About the Indian Act: Helping Canadians Make Reconciliation with Indigenous Peoples a Reality* (Port Coquitlam, BC: Indigenous Relations Press, 2018) at ch 2, n 9, citing Dr Peggy J Blair, *Rights of Aboriginal Women On- and Off-Reserve*, Fact Sheet (Vancouver: Scow Institute, 2005) at 1, online (pdf): <scow-archive.libraries.coop> [perma.cc/FV6H-TLMG]).

42 *Indian Act* 1951, *supra* note 8, s 10.

43 RCAP, *supra* note 22 at 177.

44 *Ibid* at 311.

45 *Indian Act* 1951, *supra* note 8, s 12(1)(b).

enfranchised upon marriage to non-status men.[46] The RCAP described this process as "statutory banishment."[47]

Furthermore, the reform introduced another form of gender-based discrimination. Prior to 1951, the "illegitimate" children of a band member became members of their parent's band, but could be "at any time, excluded from the membership thereof by the Superintendent General."[48] After 1951, the entitlement to status of a child born outside of marriage depended on the child's gender. The act provided that a "male person who is a direct descendant in the male line of a male person [with status]" was deemed entitled to be registered. Consequently, the male children of "Indian" men could obtain status, regardless of their parents' marital situation.[49] Yet, only the "legitimate" female children of men with status could be added to the registry.[50] Meanwhile, the "illegitimate" child of a woman with status was entitled to registration, "unless the Registrar [was] satisfied that the father of the child was not an Indian."[51] The amendments also introduced the "Double Mother Rule," whereby a child born after the 1951 reform would lose status at twenty-one years old if both his mother and paternal grandmother had married into status.[52] Lastly, wives (and minor unmarried children) continued to be

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46 *Ibid*, s 108(2). In 1956, this provision was amended to include, notably, the enfranchisement of children of women who married out (see *An Act to amend the Indian Act*, SC 1956, c 40, s 108(2) [*Indian Act* 1956]).

47 RCAP, *supra* note 22 at 278.

48 *Indian Act* 1927, *supra* note 5, s 12. See also *Indian Act* 1876, *supra* note 5, s 3(3)(a); *Indian Act* 1880, *supra* note 5, s 10; *Indian Act* 1886, *supra* note 5, s 9; *Indian Act* 1906, *supra* note 5, s 12.

49 *Indian Act* 1951, *supra* note 8, s 11(c).

50 *Ibid*, s 11(d).

51 *Ibid*, s 11(e). After 1956, the "illegitimate" children of women with status were presumed to have a status father, unless this presumption was protested: "The addition to a Band List of the name of an illegitimate child described in paragraph (e) of section 11 may be protested at any time within twelve months after the addition, and if upon the protest it is decided that the father of the child was not an Indian, the child is not entitled to be registered under paragraph (e) of section 11" (see *Indian Act* 1956, *supra* note 46, s 3(2)).

52 *Indian Act* 1951, *supra* note 8, s 12(1)(iv).

enfranchised with their husbands, regardless of their wishes.[53] These policies remained in force until 1985.

II. CREATING "VICTORIAN WIVES": SUBJUGATING WOMEN, UNDERMINING INDIGENOUS MOTHERHOOD

The ramifications of the "marry-out" policy were numerous. Immediately after their marriage, women were forced to leave their community. They could no longer possess property on the reserve, included through inheritance from their relatives. As they were no longer considered band members, they could not participate anymore in their community's political and social life. Furthermore, access to cultural and social services was denied. Upon divorce, separation or the death of their spouse, the excluded women could not return to their community. If they did, they faced evictions. The exclusion followed them even after death, prohibiting them to be buried on the reserve with their families and ancestors.[54] In sum, the exclusion of women through the "marry-out" policy contributed to the economic marginalization and the social isolation of Indigenous women.

Moreover, the *Indian Act* played a central role in the imposition of a model of gender relations that was foreign to Indigenous family and governance structures. The act left Indigenous women with two options. They could marry an "Indian" man and live within their community in conventional Victorian unions. Alternatively, they could marry a settler man and be forced to follow them off reserve. In either scenario, women were expected to be good subservient wives. As such, the "marry out policy" contributed to the imposition of a gender hierarchy.

The imposition of the Victorian model of gender relations was also crucial to the furthering of settler colonialism. Under the pretext of "civilizing" Indigenous peoples, the federal government pursued to fragment Indigenous nations into small, government-dependent communities, modeled after Victorian villages. By reformatting Indigenous families according to the Victorian model of gender relations—where the man was

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53 *Ibid*, s 108(1). Unmarried women have also been pressured into "voluntary" enfranchisement, although this was not contemplated by the *Indian Act* (see generally *Hele v Attorney General of Canada*, 2020 QCCS 2406).

54 Jamieson, *supra* note 32 at 72.

positioned as the patriarch and the woman as his dependent and obedient wife—the Canadian state sought to reduce the financial burden arising from its exclusive jurisdiction over "Indians and lands reserved for Indians."

Meanwhile, the implementation of the band system resulted in both the de jure and de facto exclusion of Indigenous women from leadership, governance, and decision-making processes. Undermining the social status of Indigenous women was crucial to the furthering of settler colonialism.[55] As explained by Kathryn Magee Labelle, "[c]lan mothers stood at odds with the male-dominated European systems of hierarchy, so dismantling female power became critical in colonial conquest."[56] As such, expelling Indigenous women from their nations and replacing them with settler women constituted a strategy to undermine Indigenous peoples' political, cultural, and societal structures, to the benefit of colonial ideologies underpinned by cultural values aligned with an agrarian, property-based economy that relies on a system of inheritance through the male line.

While it is crucial to recognize the diversity of Indigenous nations – and to avoid both essentializing and romanticizing pre-contact realities[57]—it is nonetheless clear that settler colonial laws, policies, and practices grounded in ideologies of white, male, Christian, and European superiority, profoundly disrupted Indigenous gender relations and traditional societal structures. In short, constructing Victorian wives through legislation served to reorganize Indigenous societies around agriculture. This in turn would facilitate the assimilation of Indigenous peoples into settler society. This scheme was premised on the belief in the inherent inferiority of Indigenous peoples, and on the Victorian patriarchal ideal that a woman's proper place is under the dominion of a man. Thus, the imposition of a gender hierarchy within Indigenous communities functioned not only as an instrument of patriarchal control, but also as a

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55 Lawrence, *supra* note 1 at 5.

56 Kathryn Magee Labelle in collaboration with the members of the We^{n}dat/Wa^{n}dat Women's Advisory Council, *Daughters of Aataentsic: Life Stories from Seven Generations*, McGill-Queen's Indigenous and Northern Studies, vol 101 (Montreal: McGill-Queen's University Press, 2021) at 4.

57 Darcy Lindberg & Jessica Asch, *Gender Inside Indigenous Law Toolkit* (Victoria, BC: Indigenous Law Research Unit, 2016) at 14–15, 25, online (pdf): <ilru.ca> [perma.cc/MC48-UAFU].

deliberate mechanism of colonial dominance.[58] It was not incidental; it was instrumental to the settler colonial objective of eliminating Indigenous peoples as distinct political and social entities through their assimilation into the dominant Euro-Christian society.

The entrenchment of private property and patrilineal descent required the regulation and repression of Indigenous women's sexuality.[59] The legislated discrimination in the *Indian Act* played a crucial role in constructing Indigenous women as lascivious, shameless and unmaternal. Pursuant to the dominant ideology prevailing during the Victorian period, men's and women's roles were sharply defined. The two sexes were conceived as inhabiting separate spheres, whereby women, physically weaker than men but morally superior, were to be confined to the domestic sphere, while men occupied the public sphere. Women were thus expected to desire marriage and motherhood. Women seeking sexual pleasures were cast as deviant. Consequently, Victorian society-constructed meanings about female sexuality rested upon the dichotomy of virgin (normalcy) and whore (deviancy), which in turn served as a tool of enforcement of patriarchal control over women's sexuality and more largely women's roles within society. Feminist scholars have described the ideology underlining this dichotomy as designed to reinforce patriarchy and unequal gender roles, to control women's sexuality, and to undermine their agency.[60]

The projection of colonial ideals of womanhood onto Indigenous societies served to mark the boundary between "savagism" and "civility."[61] The core Madonna-whore binary upon which is founded the patriarchal Victorian model was combined with racist ideologies to produce a dualistic representation of Indigenous womanhood. On the one hand, the

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58 Kuokkanen, "Globalization", *supra* note 11 at 220; Smith, *supra* note 14 at 23.

59 Jamieson, *supra* note 32 at 13.

60 See especially Browyn Kara Conrad, "Neo-Institutionalism, Social Movements, and the Cultural Reproduction of a Mentalité: Promise Keepers Reconstruct the Madonna/Whore Complex" (2006) 47:2 Sociological Q 305; Cathy Young, "The New Madonna/Whore Syndrome: Feminism, Sexuality, and Sexual Harassment" (1993) 38:1 NYL Sch L Rev 257; Naomi Wolf, *Promiscuities: The Secret Struggle for Womanhood* (New York: Random House, 1997); Joan S Forbes, "Disciplining Women in Contemporary Discourses of Sexuality" (1996) 5:2 J Gender Studies 177 at 179.

61 David D Smits, "The 'Squaw Drudge': A Prime Index of Savagism" (1982) 29:4 Ethnohistory 281 at 298.

"noble savagess" was portrayed as a virginal "Pocahontas"-like "Indian princess," naturally innocent and predisposed to Christian conversion and assimilation. On the other hand, the "ignoble savagess" was depicted as violent, morally deviant, sexually promiscuous, and resistant to "civilized" norms.[62] The deployment of sexist and racist stereotypes—which framed Indigenous women as hypersexual, immoral, incapable, and in need of control—was essential to the justification of colonialism.[63]

The systematic assault on the social status of Indigenous women—particularly through dehumanizing and hypersexualized stereotypes—served to justify their legal and political disenfranchisement. As Mary Eberts highlights, "the constricting 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."[64] This long-standing legislative discrimination has fostered systemic poverty and insecurity among Indigenous women by forcibly displacing them from their communities and undermining their familial and social relationships. In other words, the legal codification of such stereotypes played a central role in devaluing the lives of Indigenous women within settler society.

Meanwhile, patriarchal norms embedded within the *Indian Act* gradually permeated Indigenous communities, further reinforcing the marginalization and disempowerment of Indigenous women.[65] As Joyce Green explains, "[d]enied band membership, meaningful exercise of Aboriginal and treaty rights and, perhaps most importantly, denied the right

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62 Stevenson, *supra* note 14 at 45–48. See also Dr Janice Acoose-Miswonigeesikokwe, *Iskwewak Kah' Ki Yaw Ni Wahkomakanak: Neither Indian Princesses nor Easy Squaws*, 2nd ed, CSPI Series in Indigenous Studies (Toronto: Women's Press, 2016); Sherry L Smith, "Beyond Princess and Squaw: Army Officers' Perceptions of Indian Women" in Susan Armitage & Elizabeth Jameson, eds, *The Women's West* (Norman, Okla: University of Oklahoma Press, 1987) 63 at 65.

63 Eberts, "Victoria's Secret", *supra* note 14 at 149–50.

64 *Ibid* at 158.

65 For discussion on the internalization of colonial policies and practices and the related reluctance of Indigenous leadership and institutions to address discrimination and violence against Indigenous women, see Rauna Kuokkanen, "Gendered Violence and Politics in Indigenous Communities: The Cases of Aboriginal People in Canada and the Sámi in Scandinavia" (2015) 17:2 Intl Feminist J Politics 271 [Kuokkanen, "Gendered Violence"].

to practise identity by living and raising children in their own communities, the affected women and their children are exiled to the dominant society where, thanks to racism, they are seen forever as 'Indian.'"[66] This legal exile not only severed Indigenous women's ties to their lands, families, and cultures but also subjected them and their descendants to the dual burdens of racialized exclusion and gendered oppression within settler society.

Indigenous women were also seen as a direct challenge to the settler colonial "logic of elimination," because of their role as givers of life and their "ability to produce future generations and ensure the continuance of [their] people."[67] The alleged hypersexuality of Indigenous women was used to depict them as an inappropriate influence for their children. Consequently, while the *Indian Act* imposed a Victorian model of gender relation, it is crucial to highlight a fundamental distinction. In settler society, mothers were entrusted with the responsibility of child-rearing, although they lacked formal legal authority. In contrast, per the *Indian Act,* Indigenous children were not meant to be raised by their mothers. Instead, they were to be removed and placed in residential "schools," institutions explicitly designed to indoctrinate them with settler values and norms.[68] Alternatively, Indigenous women who "married out" were permitted to raise their children, but only after being stripped of their legal status of "Indians." As such, the *Indian Act* contributed to the delegitimization of Indigenous motherhood.

The same stereotypes that once justified the imposition of the Victorian family model continue to legitimize the removal of Indigenous children from their families, cultures, and nations. As explained by Chickasaw scholar Elizabeth Rule,

> The success of these efforts—residential schools, sterilizations, foster care schemes, and adoption abuse—relied on the delegitimization of Indigenous motherhood as a precursor to remove Indigenous children from their cultures and nations and raise them instead within EuroCanadian families, or to prevent those

66 Joyce Green, "Canaries in the Mines of Citizenship: Indian Women in Canada" (2001) 34:4 Can J Political Science 715 at 737.

67 Lavell-Harvard & Brant, *supra* note 14 at 4.

68 Eberts, "Victoria's Secret", *supra* note 14 at 149.

> children from existing in the first place. In this way, attacks on Indigenous motherhood functioned as a form of gendered violence in service of settler colonialism.[69]

In other words, contemporary forms of institutional violence against Indigenous motherhood—such as coerced sterilizations[70] and "birth alerts"[71]—are rooted in longstanding racist and sexist ideologies that

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69 Elizabeth Rule, "Seals, Selfies, and the Settler State: Indigenous Motherhood and Gendered Violence in Canada" (2018) 70:4 Am Q 741 at 750.

70 A report published in 2017 by the Saskatchewan Health Authority documenting the experiences of sixteen Indigenous women who reported being coerced into having a tubal ligation during or immediately after childbirth in the province's hospitals between 2005 and 2010 showed that tubal ligations were carried out without the women's knowledge or real understanding of what was happening, or even after an express refusal that was ignored (see Dr Yvonne Boyer & Dr Judith Bartlett, *External Review: Tubal Ligation in the Saskatoon Health Region; The Lived Experience of Aboriginal Women* (Saskatoon: Saskatchewan Regional Health Authority, 2017)). While the report documents sixteen individual cases in Saskatchewan, it is unknown how many Indigenous women have been subjected to forced sterilization across Canada in recent years. However, a class action was launched in October 2017 and hundreds of Indigenous women from seven different provinces and territories contacted the lawyer leading the case, claiming to have been sterilized without free, prior and informed consent, often in very troubling circumstances of coercion (see Standing Senate Committee on Human Rights, *Forced and Coerced Sterilization of Persons in Canada* (June 2021) at 18–20 (Chair: Salma Ataullahjan)). Moreover, a research project conducted in Quebec between May 2021 and January 2022 gathered the testimony of thirty-five Indigenous women from five different nations, of which twenty-two reported imposed sterilization between 1980 and 2019. The sterilizations were carried out in a hurry, often in the context of childbirth and the majority of the research participants reported being between the ages of seventeen and thirty-three when they were subjected to imposed sterilization. In most cases, the procedure was conducted without a signed consent form and, even when a consent form was signed, the participants explained that the information provided by the medical staff was either unclear or incorrect (see Suzy Basile & Patricia Bouchard, *Free and Informed Consent and Imposed Sterilizations Among First Nations and Inuit Women in Quebec* (Wendake, QC: First Nations of Quebec and Labrador Health and Social Services Commission, 2022)). During the second phase of the research project, conducted in Quebec between 2023–2024, ninety-seven new testimonies were collected, of which fifty-five reported imposed sterilization between 1974 and 2022 (see Suzy Basile, *Obstetric and Gynecological Violence and Imposed Sterilizations among First Nations Women in Quebec: Research Report – Phase II* (Wendake, QC: First Nations of Quebec and Labrador Health and Social Services Commission, 2026)).

71 As noted by a report:

portray Indigenous women as hypersexual, irresponsible, and inherently unfit to parent. In that sense, the sexist stereotypes embedded in the "married out" policy have broader implications that extend to all Indigenous women.

In sum, the differential treatment of Indigenous men and women under the *Indian Act* reflects both the patriarchal logic of the settler state and its broader colonial ambitions. Indigenous women were not only positioned as subordinate and as the chattel of men, but also as existential threats to the colonial order. Their forced expulsion from their nations—and their replacement by settler women—functioned as a deliberate strategy to erode Indigenous political, cultural, and social structures in service of colonial domination. Similarly, portraying Indigenous women as

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> Birth alerts are notifications that flag expectant parents to hospitals in advance of a child's birth when it is believed that the newborn may be at risk of harm and in need of protection are delivery. Birth alerts are typically issued by child welfare workers without the knowledge or consent of the expectant parents. The alerts prompts the hospital staff to contact child welfare authorities as soon as the baby is born and could result in the baby being removed from the care of its mother (see Marina Sistovaris et al, *The Efficacy of Birth Alerts: Fact Sheet* (Toronto: Policy Bench, Fraser Mustard Institute of Human Development, University of Toronto, 2022) at 1).

Statistics show that this practice disproportionately targets Indigenous mothers. The National Inquiry into Missing and Murdered Indigenous Women and Girls described the practice as a "racist and discriminatory ... gross violation of the rights of the child, the mother and the community" and called for the "immediate end to the practice of targeting and apprehending infants (hospital alerts or birth alerts) from Indigenous mothers rights after they give birth" (see National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1a, Catalogue No CP32-163/2-1-2019E-PDF (Vancouver: Privy Council Office, 2019) at 355, 364–68 [MMIWG, *Reclaiming Power and Place*, vol 1a]; National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1b, Catalogue No CP32-163/2-2-2019E-PDF (Vancouver: Privy Council Office, 2019) at 195, para 12.8 [MMIWG, *Reclaiming Power and Place*, vol 1b]). Between 2019 and 2022, nine provinces stopped using birth alerts, resulting in a marked reduction of newborn apprehensions; however, advocates warn that addressing the overrepresentation of Indigenous children in child welfare services requires addressing root causes linked to colonialism and systemic racism (see Kelly Geraldine Malone, "Ending Birth Alerts a 'Red Herring' That Doesn't Address Root Causes of Child Apprehension", *CBC News* (19 September 2022), online: <cbc.ca> [perma.cc/C4XK-XZL6]).

hypersexual and unfit to parent legitimized colonial control over their domestic and reproductive lives.[72] In this sense, the systemic discrimination faced by Indigenous women was—and continues to be—foundational to the structure and persistence of settler colonialism.[73]

III. CONTEMPORARY RAMIFICATIONS: THE GENDERED IMPACTS OF A SEEMINGLY NEUTRAL LAW

For over decades, Indigenous women mobilized against the discriminatory regime of "Indian" status admissibility enshrined in the *Indian Act*. Through political and legal activism, they demanded "Indian Rights for Indian Women."[74] On the political front, their activism led notably to a recommendation in the final report of the Royal Commission on the Status of Women in Canada in 1970 for the immediate amendment of the *Indian Act* to repeal the discriminatory sections so that Indigenous women and men could enjoy equal rights.[75] On the judicial front, two Indigenous women fought in court to challenge their loss of status upon marriage to a "non-Indian."

First, Jeannette Corbiere Lavell challenged the law on the grounds of discrimination by reason of sex. She alleged that the "marry-out" rule violated the equality clause of the 1960 *Canadian Bill of Rights*.[76] Second, Yvonne Bedard, from the Six Nations of the Grand River, sought to return to the reserve with her children to live in a house inherited from her mother, but the band council refused to grant her permission to reside on

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72 Rule, *supra* note 69 at 747.

73 Robyn Bourgeois, "Generations of Genocide: The Historical and Sociological Context of Missing and Murdered Indigenous Women and Girls" in Kim Anderson, Maria Campbell & Christi Belcourt, eds, *Keetsahnak: Our Missing and Murdered Indigenous Sisters* (Edmonton: University of Alberta Press, 2018) 65 at 68–70.

74 This was the name of a grassroots campaign led by Indigenous women activists such as Mary Two-Axe Early that was founded in 1967. Actions included submitting a brief to the Royal Commission on the Status of Women and speaking out at the International Women's Year conference in Mexico in 1975 (see Jamieson, *supra* note 32 at 35). See generally as told to Janet Silman, *Enough is Enough: Aboriginal Women Speak Out* (Toronto: Women's Press, 1987).

75 *Report of the Royal Commission on the Status of Women in Canada*, Catalogue No CP32-96/1970E-PDF (Ottawa: Privy Council Office, 1970) (Chair: Florence Bird) at 238.

76 *Re Lavell and Attorney-General of Canada*, 1971 CanLII 1984 (FCA), rev'd *Attorney General of Canada v Lavell,* 1973 CanLII 175 (SCC) [*Lavell* SCC].

the reserve, as she was no longer legally entitled to inherit property, having lost her status through marriage, although she was separated.[77] Both cases were heard jointly before the Supreme Court of Canada. In 1974, the Court ruled that the *Bill of Rights* protected equality of treatment in the enforcement and application of the laws of Canada, and that no such inequality was at play, because all First Nations women were treated the same upon marriage to a non-status man.[78]

Following the Supreme Court's ruling, Sandra Lovelace Nicholas, a Maliseet Woman from the Tobique First Nation, brought the issue to the United Nations. Sandra Lovelace Nicholas had lost her status through marriage. When her marriage ended, she returned to the reserve, but since she was no longer registered, the band council refused to give her a subsidized house on their land and denied her access to healthcare and education for her children. In 1981, the United Nations Human Rights Committee concluded that by denying Lovelace the right to reside on her reserve, the *Indian Act* violated her right to access her culture and language, which constituted an unjustified interference with article 27 of the *International Covenant on Civil and Political Rights*.[79]

That same year, Canada ratified the *United Nations Convention on the Elimination of All Forms of Discrimination against Women*.[80] Also, and importantly, the right to equality enshrined in the *Canadian Charter of Rights and Freedoms* (*Charter*) was set to come into effect three years after the *Constitution Act of 1982*.[81] Consequently, in 1985, Parliament adopted Bill C-31, *An Act to amend the Indian Act*, which reformed the rules on admissibility to status.[82] The amendments also divorced the rules on

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77 *Bedard v Isaac et al* (1971), [1972] 2 OR 391 at 397, 1971 CanLII 601 (ON H Ct J), rev'd *Lavell* SCC, *supra* note 76.

78 *Lavell* SCC, *supra* note 76 at 1372–73.

79 *Sandra Lovelace v Canada*, UNHRC, 13th Sess, UN Doc CCPR/C/13/D/24/1977 (1981) HRC Comm No 024/1977.

80 *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981, accession by Canada 10 December 1981).

81 *Canadian Charter of Rights and Freedoms*, s 32(2), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

82 Bill C-31, *An Act to Amend the Indian Act*, 1st Sess, 33rd Parl, 1985, (assented to 28 June 1985), RSC 1985, c 27 [*Bill C-31*].

admissibility to status from the rules on band membership.[83] As such, First Nations could now assume control of their band lists and develop their own membership codes. This came as a compromise to appease the criticisms from (the mostly male) First Nations leadership about the reinstatement of the "marr[y] out" women, seen as outsiders with "weak cultural affiliation" who would imperil the struggle for self-determination.[84]

Entitlement to registration was detailed at section 6, which comprises two subsections. All those who were registered or entitled to be registered immediately prior to 17 April 1985 were entitled to registration under paragraph 6(1)(a) of the act. The women who lost status due to the "marry out rule" regained entitlement to registration under paragraph 6(1)(c) of the act. However, their children were registered under subsection 6(2) of the act. That is because the 1985 amendments also introduced the "second generation cut-off rule" as a way to perpetuate the "logic of elimination" despite the abrogation of the "marry out" rule.[85] While prior to 1985, the *Indian Act* provided for a one (male) parent rule, following the amendments, "the two-parent rule ... 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."[86]

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83 *Ibid*, s 10.

84 Kuokkanen, "Gendered Violence", *supra* note 65 at 275–76. See also Joyce Audry Green, *Exploring Identity and Citizenship: Aboriginal Women, Bill C-31 and the Sawridge Case* (PhD Thesis, University of Alberta, 1997) [unpublished] at 74, 90–91. This fear by First Nations leaders must be understood in the context of the 1969 White Paper, where the federal government proposed the termination of all special rights for "Indians" and the repealing of the *Indian Act*:

> Generally, however, Indian attitudes were rooted in much broader legal concerns over the special status of Indian people in Canadian society and the preservation of Indian culture and land. Indian groups feared that the Lavell and Bedard cases could lead to the abolition of the entire *Indian Act*, which would in turn lead to the disappearance of the Indian reserve system and the destruction of the Indian way of life (see Gerard Hartley, "The Search for Consensus: A Legislative History of Bill C-31, 1969–1985" in Jerry P White et al, eds, *Aboriginal Policy Research Series*, vol 5, *Moving Forward, Making a Difference* (Toronto: Thompson Educational Publishing, 2013) 5 at 7).

85 See Martin Cannon, "Revisiting Histories of Legal Assimilation, Racialized Injustice and the Future of Indian Status in Canada" in White et al, *supra* note 84, 35 at 41–42.

86 Eberts, "Victoria's Secret", *supra* note 14 at 156.

By virtue of this new policy, after two consecutive generations of one "non-Indian" parent, the third generation is no longer entitled to registration. This is the result of the introduction of two distinct subsections, which operate as follows: those with two "Indian" parents are registered under subsection 6(1), while those with only one parent registered under subsection 6(1) will be registered under subsection 6(2). Consequently, someone registered under subsection 6(2) cannot transmit status to his or her children if the other parent is non-status. As a result, after two generations of "mixed parentage," the subsequent generations are no longer entitled to registration. The distinction made within the act between those born from two status parents and those born with only one, namely subsections 6(1) and 6(2), resulted in an "Indian Status" policy whose operation runs counter to the findings of the Human Rights Committee in the *Lovelace* case.[87]

It soon became evident that the concomitant effects of the reinstatement of the women who "married out" under a different paragraph as those who had status prior to the 1985 amendments and the introduction of a "second generation cut-off" rule resulted in a lessened ability for the reinstated women to transmit status to their descendants. Notably, in its fourth periodic report on Canada, the United Nations Human Rights Committee wrote:

> The Committee is concerned about ongoing discrimination against [Indigenous] women. Following the adoption of the Committee's Views in the Lovelace case in July 1981, amendments were introduced to the Indian Act in 1985. Although the Indian status of women who had lost status because of marriage was reinstituted, this amendment affects only the woman and her children, not subsequent generations, which may still be denied membership in the community.[88]

In 2007, lawyer and activist Dr. Sharon McIvor of the Nlaka'pamuk Nation and her son, Jacob Grismer, challenged the act, alleging that

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87 Andrew M Robinson, "Boomerang or Backfire?: Have We Been Telling the Wrong Story About *Lovelace v. Canada* and the Effectiveness of the ICCPR?" (2007) 14:1 Can Foreign Pol'y J 31 at 43.

88 *Consideration of reports submitted by States parties under article 40 of the Covenant: Concluding Observations of the Human Rights Committee; Canada*, UNHRC, 65th Sess, UN Doc CCPR/C/79/Add.105 (1999) at para 19.

reinstated women could not pass on entitlement to status to their grandchildren to the same extent as men in their position. Prior to 1985, McIvor was not registered as an "Indian."[89] She applied for status under the 1985 amendments on behalf of herself and her children. Two decades later, she was found to be entitled to registration under paragraph 6(1)(c), as the daughter of two parents entitled to status who would have been deprived of it by virtue of her marriage prior to 1985. Her children were registered under subsection 6(2).[90] Consequently, Grismer's children with a non-status woman (McIvor's grandchildren) were not entitled to registration by virtue of the "second generation cut-off rule."

The plaintiffs argued that if McIvor had a hypothetical brother who married a non-status woman, he would not have lost her entitlement to status upon marriage prior to 1985. Consequently, following the 1985 amendments, he and his son (Grismer's cousin) would have been entitled to registration under paragraph 6(1)(a), and his grandchildren (his son's children with a non-status spouse) could be registered under subsection 6(2). The Attorney General responded, in essence, (a) that government cannot be required to enact legislation that seeks to remedy more than one hundred years of discrimination, (b) that the *Charter* cannot be applied retrospectively, (c) that it is sufficient for Parliament to enact non-discriminatory provisions going forward, and (d) that the new regime is generous in reinstating the right to status to certain groups of people.[91]

The Court of Appeal of British Columbia ruled that section 6 of the *Indian Act* infringed upon the plaintiffs' rights to equality provision under section 15 of the *Charter*. However, the court of appeal's finding of discrimination was narrow. It disagreed with the trial judge that this was a case of discrimination against those with matrilineal as opposed to patrilineal descent. The court rather chose to focus specifically on the discriminatory treatment of the plaintiffs on the basis of McIvor's sex. It found

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89 Sharon McIvor was not registered prior to 1985, because she believed she was not entitled to status, given that both of her parents had non-status fathers. However, neither set of grandparents were married, such that her parents might have been considered the illegitimate child a women entitled to status (see *McIvor v Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153 at paras 37–39 [*McIvor* CA], leave to appeal to SCC refused, 2009 CanLII 61383 (SCC)).

90 *McIvor et al v The Registrar, Indian and Northern Affairs Canada et al*, 2007 BCSC 26 at para 27.

91 *McIvor* CA, *supra* note 89 at para 12.

the unequal treatment of the plaintiffs with regard to the ability to transmit status to be discriminatory and concluded that the infringement of section 15 could not be justified by section 1 of the *Charter* because of the enhanced status given to those to whom the Double Mother Rule previously applied.[92] Nonetheless, the differential treatment resulting from vested rights from the old regime was deemed justifiable by the court of appeal.[93]

The federal government's response failed to adequately remove the inequities built into the law. The 2010 *Gender Equity in Indian Registration Act* (Bill C-3)[94] was purposely tailored to narrowly focus on remedying the court of appeal's narrow finding of discrimination. The amendments only allowed those in a rigorously similar situation to Grismer to be able to obtain registration under new subsection 6(1)(c.1), namely those who fulfilled the following criteria: (1) their mother's name was removed from the registry (or a band list prior to 1951) because of her marriage; (2) their other parent was not entitled to registration (or was not an "Indian" prior to 1951 if he died before the creation of the registry); (3) they were born before the marriage that resulted in the exclusion of the women or after that marriage but before the 1985 amendments; and (4) they had a child after the 1951 amendments with someone who is not entitled to status.[95] As the 2010 amendments did not seek to address comprehensively all the gender-based inequalities, although it was clear and obvious that the act was still contrary to the *Charter*,[96] it did not take long before the issue was back in court and once again found in violation of the *Charter*.

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92 The Court of Appeal overturned the trial judge's finding with regard to the extent of the *Charter* violation, concluding that "sections 6(1)(a) and 6(1)(c) of the *Indian Act* violate the *Charter* to the extent that they grant individuals to whom the Double Mother Rule applied greater rights than they would have had under s. 12(1)(a)(iv) of the former legislation" (see *ibid* at para 161). McIvor and Grismer's application for leave to appeal before the Supreme Court of Canada was dismissed with cost in 2009 (see *Sharon Donna McIvor and Charles Jacob Grismer v Registrar, Indian and Northern Affairs Canada and Attorney General of Canada*, 2009 CanLII 61383 (SCC)).

93 *McIvor*, *supra* note 89 at paras 126–27, 132, 140, 151.

94 SC 2010, c 18 [*Bill C-3*].

95 *Ibid*, s 2(3).

96 Eberts, "Victoria's Secret", *supra* note 14 at 157. See also Gwen Brodsky "McIvor v. Canada: Legislated Patriarchy Meets Aboriginal Women's Equality Rights" in

Three members of the Abénakis of Odanak First Nation challenged section 6 of the *Indian Act* on the basis that it infringed upon their rights to equality under section 15 of the *Charter*.[97] The case involved two distinct scenarios,[98] but all plaintiffs argued that the *Indian Act* provisions on admissibility to status were discriminatory because they perpetuated a stereotype that the "Indian" identity of women and their descendants is not as worthy of consideration or value as that of "Indian" men and their descendants.[99] The Attorney General responded that the plaintiffs lacked standing, that section 6 of the *Indian Act* was non-discriminatory and that, even if such discrimination existed, it would be justified by section 1 of the *Charter*.[100]

The Superior Court of Quebec disagreed. It concluded that section 6 of the *Indian Act* unjustifiably infringed upon the plaintiff's right to equality and declared paragraphs 6(1)(a)(c) and (f) and subsection 6(2) of the act inoperative, with an eighteen-month suspension. The court was however critical of the legislature's choice in 2010 to only address the specific situation of the parties in the *McIvor* case and invited the legislator to seek

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Green, *Indivisible*, *supra* note 14, 100; Mary Eberts, "*McIvor*: Justice Delayed—Again", Case Comment (2010) 9:1 Indigenous LJ 15 at 41.

97 *Descheneaux c Canada (Procureur Général)*, 2015 QCCS 3555.

98 Stéphane Descheneaux is the grandson of a woman who lost status through marriage in 1935. His mother was born without status and married a non-status man. Descheneaux was born without status in 1968. In 1985, his grandmother was reinstated under section 6(1)(c) and his mother was registered under section 6(2). Descheneaux remained without status. Then, following the 2010 amendments, his mother was able to be registered under 6(1)(c.1), so he obtained registration under section 6(2). His children, whose mother is non-status, were not entitled to registration because of the "second generation cut off rule." He argued that if his grandmother had been a man, he would have been able to transmit status to his children. Susan Yantha was born in 1954 to a status father and a non-status mother who were not married. As the "illegitimate" daughter of an "Indian" she is not entitled to status, but she would have been if she had been male. Her daughter, Tammy, was born in 1972. Her father was a non-status father. In 1985, Susan obtained status under section 6(2). She claimed discrimination in comparison with the "illegitimate" male child of a status father and a non-status mother between the 1951 and the 1985 amendments. Tammy claimed discrimination in comparison with the children of such a man with regard to her entitlement to registration and her ability to transmit status to her children (see *ibid* at paras 55–69).

99 *Ibid* at paras 59, 65.

100 *Ibid* at paras 73–74.

to remedy all the other discriminatory situations arising from the admissibility provisions in the *Indian Act*.[101] Nevertheless, the court found that it was bound by the BC Court of Appeal decision in the *McIvor* case.[102] As such, it did not address the broader question of discrimination against those of matrilineal descent and the perpetuation of the stereotyping of women's indigenousness as of lesser value than men's.

Bill S-3, *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général)*, was adopted in 2017.[103] However, the implementation occurred in two phases. First, some amendments to the *Indian Act* came into force immediately after the adoption of the bill. These amendments essentially corrected the inequities found by the Quebec Superior Court in the two scenarios at the heart of the *Descheneaux* case. Then, between 2018 and 2019, the federal government undertook what it called the "Collaborative Process on Indian Registration, Band Membership and First Nation Citizenship." The report to parliament was presented in June 2019[104] and, on 15 August 2019, Bill S-3 was fully brought into force.[105] Since 2020, the federal government considers that "the provisions in section 6 of the *Indian Act* no longer privilege one sex or gender over another."[106] However, these amendments have been criticized for their complexity.[107] The Native Women's Association of Canada described section 6 of the *Indian Act* post–Bill S-3 as "convoluted, complicated and unreadable without reference to pre-1985 versions of the Act which are not easily available," such that "the wording of

101 *Ibid* at paras 235–44.

102 *Ibid* at para 97.

103 *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c Canada (Procureur général)*, SC 2017, c 25 [*Bill S-3*].

104 Crown-Indigenous Relations and Northern Affairs Canada, *Collaborative Process on Indian Registration, Band Membership and First Nation Citizenship: Report to Parliament*, Catalogue No R5-719/3-2019E-PDF (Gatineau: Canada, June 2019).

105 Notably, the 1951 cut-off was removed and paragraph 6(1)(c) was repealed as a whole and replaced by a new paragraph, 6(1)(a) (see *Indian Act* 1985, *supra* note 2, s 6(1)(a).

106 Indigenous Services Canada, *The Final Report to Parliament on the Review of S-3* (Ottawa: Indigenous Services Canada, 24 December 2020), online: <sac-isc.gc.ca> [perma.cc/FNG4-K9YK].

107 Pam Palmater, "What You Need to Know About Sharon McIvor's Major UN Victory on Indian Status" (January 2019), online: <pampalmater.com> [perma.cc/B564-48J9] ("*S-3* [has] created a complex mess of criteria almost impossible to understand").

the registration provisions is not conducive to the understanding necessary for individuals to determine whether they are entitled to status."[108]

Moreover, despite the official government position, Indigenous women's activism did not cease. Notably, following the 2010 Court of Appeal of British Columbia ruling, Sharon McIvor and Jacob Grismer filed a complaint to the United Nations Human Rights Committee, alleging that the gender-based hierarchy embedded within section 6 of the *Indian Act* violates articles 26 and 27, read in conjunction with articles 2(1) and 3 of the *International Covenant on Civil and Political Rights*. In 2019, the committee concluded that the claimants were entitled to an effective remedy and outlined the following state obligations:

> (a) to ensure that section 6(1)(a) of the 1985 revision of the Indian Act, or of that Act as amended, is interpreted to allow registration by all persons, including the authors, who previously were not entitled to be registered under section 6(1)(a) solely as a result of preferential treatment accorded to Indian men over Indian women born prior to 17 April 1985 and to patrilineal descendants over matrilineal descendants born prior to that date; and (b) to take steps to address residual discrimination within First Nations communities arising from the legal discrimination based on sex in the Indian Act. Additionally, the State party is under the obligation to take steps to avoid similar violations in the future.[109]

Additionally, the situation of women who were involuntarily enfranchised pursuant to their husbands' enfranchisement was not corrected by Bill S-3.[110] This remaining inequity in the law led to further litigation.[111] Moreover, the "second-generation cut-off" continues to be vividly

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108 The Native Women's Association of Canada, *Final Report: Indigenous Gender-Based Analysis of Bill S-3 and the Registration Provisions of the Indian Act* (Ottawa: The Native Women's Association of Canada, 2022) at 25 [The Native Women's Association of Canada, *Analysis of Bill S-3*]. See also Standing Senate Committee on Aboriginal Peoples, *Make It Stop!: Ending the Remaining Discrimination in Indian Registration: Interim Report of the Standing Senate Committee on Aboriginal Peoples* (Ottawa: Senate of Canada, June 2022) (Chair: Brian Francis) at 26.

109 *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No 2020/2010*, UNHRC, 124th Sess, UN Doc CCPR/C/124/D/2020/2010 (2019) at 17.

110 *Indian Act* 1985, *supra* note 2, s 6(1)(d).

111 *Nicholas v Attorney General (Canada)*, 2025 BCSC 1596.

criticized. Projections have shown that within seventy-five years, over half of Indigenous individuals and fifteen of every sixteen children born to First Nations parents are expected to be non-entitled to status.[112]

In July 2025, Indigenous Services Canada published the collective findings and recommendations heard from the Indigenous Advisory Process, resulting from consultations with seventeen national, regional, youth and women's Indigenous organizations.[113] Numerous participants characterized the second-generation cut-off "as assimilation, resulting in future generations losing status should they parent with someone who is not entitled under the *Indian Act*."[114] Indigenous women's organisations also continued to insist on the fact that, despite the progress made with Bill S-3, gender-based discrimination continues to have long lasting impacts on First Nations women and their descendants. These differential impacts include "a loss of culture, the right to own and inherit property on reserve, poverty due to being cut off from community supports and resources that come with status entitlement, and the exclusion of their descendants from the community," *inter alia*.[115]

Furthermore, the "second generation cut-off" rule has been shown to have disproportionate adverse impacts on women. For instance, if a pregnancy puts the mother at risk of violence or social ostracization, she will be faced with the dilemma of whether to declare the father to ensure her child's entitled to status, despite the risks to her safety, even when the

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112 Michelle Spolnik, *The Second-Generation Cut-Off: Effect on Indigenous People in Canada* (MPP Capstone Project, University of Calgary, 2021) [unpublished] at 19.

113 Indigenous Services Canada, *The Collaborative Process on the Second-Generation Cut-off and Section 10 Voting Thresholds* (Ottawa: Indigenous Services Canada, 18 November 2025), online: <sac-isc.gc.ca> [perma.cc/T2Q5-CBS2]. Bill S-2, which would amend the *Indian Act*'s registration provisions, is currently under consideration by Parliament. If passed, the "second-generation cut-off rule" will notably be removed and replaced by a one-parent rule. However, this change would only come into force twelve months after the bill's adoption (see Bill S-2, *An Act to amend the Indian Act (new registration entitlements)*, 1st Sess, 45th Parl, 2025, cls 4(2)(4)(5), 12 (second reading 27 February 2026)).

114 Indigenous Services Canada, *What We Heard: Indigenous Advisory Process Final Recommendations and Feedback* (Ottawa: Indigenous Services Canada, 27 January 2026), online: <sac-isc.gc.ca> [perma.cc/L3TD-BDSL].

115 *Ibid*.

pregnancy is the result of sexual violence.[116] Such burden does not exist for men. Moreover, despite the lowering of the burden of evidence and the removal of the presumption of "non-status" in the case of unknown or unstated parentage following the adoption of Bill S-3, the reality is that the proof of identity of a parent remains more difficult for a mother than for a father.[117] Ironically, the 1985 amendments eliminate the one right that a woman had under the prior versions of the *Indian Act*, namely, the possibility of passing status to her child when the father was unknown or undeclared.[118] Additionally, given the ongoing influence of the Victorian family model, women often find themselves with the primary responsibility for child rearing. Consequently, the incidental impacts of a child not being eligible for status—such as not being able to take the band-funded school bus or to access other band services—rest disproportionately on First Nations mothers' shoulders.[119] In short, while the *Indian Act* no longer explicitly discriminates against women, the gendered impacts remain and the perpetuation of the "logic of elimination" continues to disproportionately be Indigenous women's burden.

Lastly, adequate reparations for 150 years of gender-based discrimination were never provided to the women and their descendants who were excluded by the discriminatory registration regime, whether the historical (pre-1985) legislated discrimination or the contemporary (post-1985) differential treatment. This is in part due to the fact that at each legislative amendments of the admissibility provisions of the *Indian Act*, non-liability clauses were included.[120] Consequently, women and their descendants are prevented by law from claiming or receiving compensation,

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116 The Native Women's Association of Canada, *Ongoing Indian Act Inequity Issues: Second Generation Cut-Off Rule* (Ottawa: The Native Women's Association of Canada, 2017–2018) at 4; Sharon McIvor, Shelagh Day & Pamela Palmater, "Brief to the Senate Committee on Aboriginal Peoples: Study on Bill S-3" (2022) at 2–3, online (pdf): <fafia-afai.org> [perma.cc/9RJF-L9YX].

117 The Native Women's Association of Canada, *Analysis of Bill S-3*, *supra* note 108 at 37–38.

118 Since 1985, the mother has the onus of establishing that the father of the child is a status person. Between 1951 and 1985, in the case of an undeclared or unknown paternity, the father was presumed to be an "Indian" unless the State could prove otherwise (see *Indian Act* 1951, *supra* note 8, s 11(e)).

119 McIvor, Day & Palmater, *supra* note 116 at 3.

120 *Bill S-3*, *supra* note 103, ss 10–10.1; *Bill C-3*, *supra* note 94, s 9; Bill C-31, *supra* note 82, s 21.

damages or indemnity for the prejudice endured due to the discrimination enshrined in the *Indian Act*, despite the fact that the right to adequate, effective and prompt reparations is a basic principle of international human rights law.[121] In 2024, the United Nations Committee on the Elimination of Discrimination against Women described these clauses as "restricting access to comprehensive reparations for the violation of human rights of First Nations women and their descendants" and urged Canada to develop a mechanism to address reparation claims.[122] In addition to bearing the burden of fighting for decades for their right to equity, Indigenous women are denied their human right to reparation.

CONCLUSION

The deep wounds left as a result of one hundred and fifty years of legislated discrimination are visible in the persistent economic marginalization, social isolation and overall devaluing of the lives and roles of Indigenous women. They tell the story of how settler colonialism has sought from the start to undermine Indigenous women's existence and reproductive capacities in order to advance the goal of the "elimination of the Native."[123] Consequently, to understand the vulnerabilities of Indigenous women to all forms of violence today, it is essential to conduct the analysis of the legacy of the *Indian Act* for Indigenous women through the prism of their position at the confluence of both mechanisms of oppression, namely race and gender, as they operated in the framework of settler colonialism.[124] "This context necessitates a rethinking of violence levelled against Indigenous women throughout Canada and demands a new conceptual framework in which such violence must be understood as both an immediate threat to Indigenous women's lives and a systematic

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121 Éloïse Décoste, "Femmes autochtones et discrimination au Canada : analyse du droit à la réparation des peuples autochtones à la lumière de la notion de fait internationalement illicite à caractère continu" (2022) 35:2 RQDI 195 at 229–31. See also Standing Senate Committee on Aboriginal Peoples, *supra* note 108 at 32–35.

122 *Concluding observations on the tenth periodic report of Canada*, UNCEDAW, UN Doc CEDAW/C/CAN/CO/10 (2024) at para 32.

123 Wolfe, *supra* note 21.

124 Kuokkanen, "Globalization", *supra* note 11 at 218, citing Kimberlé Williams Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" in Kimberlé Crenshaw et al, eds, *Critical Race Theory: The Key Writings that Formed the Movement* (New York: New Press, 1995) 357.

attack on Indigenous nations and cultures."[125] It was and still is the very existence of Indigenous women that is at stake; it is also Indigenous motherhood.

On 3 June 2019, the National Inquiry into Missing and Murdered Indigenous Women and Girls—mandated to report on the systemic causes of all forms of violence against Indigenous women and girls in Canada[126]—presented its findings and recommendations. After holding 24 hearings and statement-gathering events across Canada and hearing 2,386 survivors, family members and loved ones, frontline service providers, representatives of Indigenous organizations, scholars, legal experts and Indigenous leaders, the commissioners concluded that today's epidemic of violence against Indigenous women is deeply entangled in the country's colonial history and amounts to genocide.[127] In their words, "[c]olonization sought to displace women from [their] roles [within Indigenous societies] and, in time, served to silence their leadership

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125 Rule, *supra* note 69 at 749.

126 MMIWG, *Reclaiming Power and Place*, vol 1a, *supra* note 71 at 57.

127 As noted by the National Inquiry into Missing and Murdered Indigenous Women and Girls:

> The significant, persistent, and deliberate pattern of systemic racial and gendered human rights and Indigenous rights violations and abuses—perpetuated historically and maintained today by the Canadian state, designed to displace Indigenous Peoples from their land, social structures, and governance and to eradicate their existence as Nations, communities, families and individuals—is the cause of the disappearances, murders, and violence against Indigenous women, girls and 2SLGBTQQIA people, and is genocide. This colonialism, discrimination, and genocide explains [*sic*] the high rates of violence against Indigenous women, girls, and 2SLGBTQQIA people (see MMIWG, *Reclaiming Power and Place,* vol 1b, *supra* note 71 at 174).

See also *A Legal Analysis of Genocide: Supplementary Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, Catalogue No CP32-163/3-2019E-PDF (Vancouver: Privy Council Office, 2019):

> [the] root cause of the violence perpetrated against Indigenous women [is nothing less than genocide], not only because of the genocidal acts that were and still are perpetrated against them, but also because of all the societal vulnerabilities it fosters, which leads to deaths and disappearances and which permeates all aspects of Canadian society today (at 8).

through the transformation of community structures, attitudes, and mechanisms for decision making, primarily through the *Indian Act*."[128]

The commissioners' findings highlighted two interconnected factors that explain over-representation and under-protection of Indigenous women as victims of violence in Canada: social and economic marginalization and the enduring influence of racist and sexist stereotyping. Together, these forces have created conditions in which violence against Indigenous women is more likely to occur and less likely to be addressed. In that sense, the effects of a hundred and fifty years of legislated discrimination radiate in ways that impact all Indigenous women today, regardless of whether they "married out" or not. Nevertheless, all the ramifications of historical and ongoing forms of colonial violence against Indigenous women orchestrated through the *Indian Act* remain understudied. The legislated discrimination against Indigenous women tells only a part of the story. As the *Indian Act* "celebrates" its 150 years, the time is opportune to reckon with the full legacy of the *Indian Act* for Indigenous women.

Since 2021, the federal government has been mandated by law to "take all measures necessary to ensure that the laws of Canada are consistent with the [*United Nations Declaration on the Rights of Indigenous Peoples*]"[129] and to do so "in consultation and cooperation with Indigenous peoples."[130] The *United Nations Declaration on the Rights of Indigenous Peoples Act*'s preamble notably states that:

> the implementation of the Declaration must include concrete measures to address injustices, combat prejudice and eliminate all forms of violence, racism and discrimination, including systemic racism and discrimination, against Indigenous peoples and Indigenous elders, youth, children, women, men, persons with disabilities and gender-diverse persons and two-spirit persons.[131]

As Parliament moves along in harmonizing Canadian law with the declaration, the *Indian Act* will inevitably be subjected to enhanced scrutiny.

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128 MMIWG, *Reclaiming Power and Place*, vol 1a, *supra* note 71 at 167.

129 *UNDRIP*, *supra* note 12.

130 *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14, s 5.

131 *Ibid*, Preamble, para 8.

The unilateral determination by the state of who qualifies as an "Indian" under Canadian law is a pillar upon which the whole *Indian Act* regime rests. Yet, it is at odds with the core principle of the declaration, namely the right to self-determination. As explained by the United Nations Expert Mechanism on the Rights of Indigenous peoples, "self-determination is exercised as a collective right belonging to the indigenous group, membership of which is based on self-identification and collective acceptance of group members without discrimination."[132] Moreover, the declaration forbids forced assimilation and demands redress for any form of forced assimilation or integration.[133] It also requires full protection and guarantees against all forms of violence and discrimination against Indigenous women and children.[134] In such a context, thinking about the *Indian Act*'s future necessitates taking a hard look at its past and present through a gendered lens.

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132 Expert Mechanism on the Rights of Indigenous Peoples, *Efforts to Implement the United Nations Declaration on the Rights of Indigenous Peoples: Indigenous Peoples and the Right to Self-Determination*, UNHRC, 48th Sess, UN Doc A/HRC/48/75 (2021) at para 13.

133 *UNDRIP*, *supra* note 12, art 8.

134 *Ibid*, art 22(2).