

## **Treaty Primer: The *Indian Act* (1876)**

Building on Confederation and the attempt to set aside Treaty relationships was a legislative agenda put forward by the Government of Canada to marginalize and assimilate Indigenous Peoples into the newly created Dominion of Canada. The process was begun before well before Confederation with laws like the [1857 Gradual Civilization Act](#) and the colonial government in Canada fundamentally and unilaterally changed the relationships with the British Crown.

All of this culminated with the **1876 Indian Act**, a piece of legislation that consolidated all the different laws into one omnibus bill. [The \*Indian Act\* remains the principal law through which the federal government administers Indigenous People living on reserves including Indian status, Elected Councils and the management of reserve land and most aspects of funding for Indigenous communities.](#)

As described in *The Final Report of the Truth and Reconciliation Commission*:

*... the Indian Act sought to place First Nations individuals and communities, their lands, and their finances under federal government control. Real authority on a reserve rested not with the elected band chiefs and councils, whose powers were already limited and who could be dismissed by the government, but with the federally appointed Indian agents.<sup>23</sup> From its beginning in 1876, the Act, in effect, made Indians wards of the state, unable to vote in provincial or federal elections or enter the professions if they did not surrender their status, and severely limited their freedom to participate in spiritual and cultural practices. It restricted how they could sell the produce from their farms and prevented them from taking on debt without either government approval or the surrender of their legal status as Indians. Rather than protecting Indian land, the Act became the instrument through which reserves were drastically reduced in size or relocated.<sup>1</sup>*

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<sup>1</sup> Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The History, Part 1 Origins to 1939* (Winnipeg, MB: Truth and Reconciliation Commission of Canada, 2015), 110.



- This legal definition was replaced in 1985 with one that recognized **Blood Quantum**. Essentially, "Indian Status" (as defined by the Indian Act) was conferred through blood and could be diluted by marrying a "non-Status Indian." Learn more (including an explanation of why Indigenous People do not want to give up status even though it deprives them of rights) here: [https://indigenousfoundations.arts.ubc.ca/indian\\_status/](https://indigenousfoundations.arts.ubc.ca/indian_status/)
- You have to be a "Status Indian" in order to live on reserve or receive any funding guaranteed by Treaty (including education and healthcare). Put simply, if you are not a "Status Indian" the Government of Canada considers you **enfranchised** and **assimilated** into the Canadian body politic. Historically, Indigenous People would lose their status for a variety of reasons determined by the Canadian Government including: Serving in the military, achieving a university or college degree, entering into a recognized profession (doctor, lawyer), or leaving a reserve without permission (re: The Pass System). Until 1960 a "Status Indian" became enfranchised the moment they voted in a Canadian election, therefore relinquishing their status.
- Following a ruling by the Supreme Court of Canada delivered April 5<sup>th</sup>, 1939, **Inuit** were to be considered as "Indians" under Section 91(24) of the *British North America Act*, placing them within the jurisdiction of the federal government. Although not mentioned in the *Indian Act*, Inuit have been subjected to assimilationist policies outlined in the legislation.
- **Métis** were also excluded from the *Indian Act*, although a 2016 unanimous ruling by the Supreme Court of Canada - *Daniels v. Canada (Indian Affairs and Northern Development)* - declared "Métis and non-status Indians are 'Indians' under s. 91(24)."<sup>2</sup>
- Learn more about "Status Indians": <https://www.cbc.ca/news/indigenous/indian-status-5-things-you-need-to-know-1.2744870>

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<sup>2</sup> Daniels v. Canada (Indian Affairs and Northern Development), 2016 SCC 12 (CanLII), [2016] 1 SCR 99, <<https://canlii.ca/t/gpft>>, retrieved on 2024-04-14.

## Reserves and Elected Councils:

- The *Indian Act* created **reserves**, which is land set aside, or reserved, for “Status Indians,” and are administered by the Crown<sup>3</sup> (Minister of Crown-Indigenous Relations). Reserves exist under the jurisdiction of the federal government and are administered through the *Indian Act*.

Here is the legal description of a reserve in the modern *Indian Act*:

### Reserves to be held for use and benefit of Indians

**18 (1)** Subject to this Act, reserves are held by **His Majesty** for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

### ELECTIONS OF CHIEFS AND BAND COUNCILS

Elected councils      **74. (1)** Whenever he deems it advisable for the good government of a band, the Minister may declare by order that after a day to be named therein the council of the band, consisting of a chief and councillors, shall be selected by elections to be held in accordance with this Act.

- Regardless of an Indigenous Nation's pre-existing governance structure, the *Indian Act* imposed **Elected Councils** on all of Canada's 600+ reserves. These Elected Councils are accountable to and funded by the Department of Crown-Indigenous Relations and Northern Affairs Canada and their powers are explicitly laid out in the *Indian Act*. Here are the modern - and rather narrow - powers of Elected Councils detailed in the legislation:

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<sup>3</sup> Officially held by “His Majesty In Right of Canada.”

**By-laws**

**81 (1)** The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely,

(a) to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases;

(b) the regulation of traffic;

(c) the observance of law and order;

(d) the prevention of disorderly conduct and nuisances;

(e) the protection against and prevention of trespass by cattle and other domestic animals, the establishment of pounds, the appointment of pound-keepers, the regulation of their duties and the provision for fees and charges for their services;

(f) the construction and maintenance of watercourses, roads, bridges, ditches, fences and other local works;

(g) the dividing of the reserve or a portion thereof into zones and the prohibition of the construction or maintenance of any class of buildings or the carrying on of any class of business, trade or calling in any zone;

(h) the regulation of the construction, repair and use of buildings, whether owned by the band or by individual members of the band;

(i) the survey and allotment of reserve lands among the members of the band and the establishment of a register of Certificates of Possession and Certificates of Occupation relating to allotments and the setting apart of reserve lands for common use, if authority therefor has been granted under section 60;

(j) the destruction and control of noxious weeds;

(k) the regulation of bee-keeping and poultry raising;

(l) the construction and regulation of the use of public wells, cisterns, reservoirs and other water supplies;

(m) the control or prohibition of public games, sports, races, athletic contests and other amusements;

(n) the regulation of the conduct and activities of hawkers, peddlers or others who enter the reserve to buy, sell or otherwise deal in wares or merchandise;

(o) the preservation, protection and management of fur-bearing animals, fish and other game on the reserve;

(p) the removal and punishment of persons trespassing on the reserve or frequenting the reserve for prohibited purposes;

*“The Indian Act is one of the most demoralizing things you will ever encounter if elected on reserve.”*

- Former Chief Dave Mowat, Alderville First Nation

- Elected Councils DO NOT have jurisdiction over traditional territory, or Treaty territories. They are creations of the *Indian Act* and only have authority within a reserve and are accountable to the Department of Crown-Indigenous Relations and Northern Affairs Canada.
  - All funds given to reserves must be approved by the Government of Canada, via the **Department of Crown-Indigenous Relations and Northern Affairs Canada** and the **Department of Indigenous Services**.

- Enforcement by the Chief and Council over areas of their jurisdiction, including by-laws, is a huge issue. Most Indigenous Nations do not have access to police, by-law officers, and powers of taxation.<sup>4</sup> Where they do, the *Indian Act* ensures that they are dependant on federal funding in order for them to operate properly.

Requesting assistance from nearby municipal and provincial police forces can be problematic (particularly concerning funding and Indigenous sovereignty), or can even create conflicts of interest within the colonial system, since reserves operate within the federal order of government.

Living within the federal jurisdiction means that, unless through special agreements subject to the *Indian Act*, Indigenous People on reserve are not provided the same access to services that are under the jurisdiction of provincial governments like education or healthcare.

- The right to live on reserve land remains at the discretion of the Minister of Crown-Indigenous Relations and Northern Affairs Canada.
- Each reserve used to have a representative, called an "**Indian Agent**," of the Ministry of Indian Affairs (Crown-Indigenous Relations) that lived on reserve - everything revolved around them (for example: The Indian Agent had final approval over all spending by the Elected Council). Indian Agents still exist, although they no longer go by that title or live on reserve (they now inhabit cubicles in office blocks).

*“How can you be sovereign with no ability to police, no mechanisms for enforcement, no ability to promote independent economic development, no control over your own land?”*

- Former Chief Dave Mowat, Alderville First Nation

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<sup>4</sup> Dr. Amber Meadow Adams points out that some Indigenous communities have access to their own traditional methods of enforcement, which don't look anything like Euro-Canadian structures, and can be very effective.

Important Note: The Reserve System and Elected Councils mandated by the *Indian Act* have existed in Canada for 150 years, and despite their original purpose to degrade Indigenous People's ability to exercise self-government, they have become places of resistance and resilience. Rather than passively submitting to the *Indian Act*, Indigenous Peoples have worked within the imposed colonial system to ensure that – a century and a half later – reserves remain islands of nationhood.<sup>5</sup>

### Other points:

- Ceremonies and other critical protocols were banned by the *Indian Act* until 1951. Example: Potlatches and Sun Dances were outlawed in 1884, and at one point the wearing of traditional clothing, and all traditional dances, were prohibited. Persons who were caught celebrating these events could be imprisoned.

Rick Hill makes the point: “The same intention is still part of the *Ontario Education Act* as teachers are charged with fostering Judeo-Christian values.”

### Duties of a Teacher (under the *Ontario Education Act*):

264 (1)(c) *to inculcate by precept and example respect for religion and the principles of Judaeo-Christian morality and the highest regard for truth, justice, loyalty, love of country, humanity, benevolence, sobriety, industry, frugality, purity, temperance and all other virtues;*<sup>6</sup>

- The *Indian Act* controls the financial transactions of Indigenous Peoples. Sales and purchase transactions were strictly monitored under the **Permit System** (an unconstitutional system brought in by John A. Macdonald and part of the *Indian Act* until 1995). Under the permit system "Status Indians" needed a permit to:
  1. leave the reserve
  2. sell a load of hay, firewood, lime, charcoal
  3. sell produce grown on the Reserve
  4. buy groceries or clothes
  5. sell cattle and grain

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<sup>5</sup> Dr. Amber Meadow Adams points out “A lot of this depends on how the specific Indigenous nation’s traditional government was structured. For many Anishinaabe communities, for example, wherein traditional governments were smaller and more flexible, in reflection of a smaller population, communities can, and did, graft the notional requirements for band councils onto what they were already doing. They could hide their traditional governments in plain sight this way.”

<sup>6</sup> Education Act, RSO 1990, c E.2, s 264, <<https://canlii.ca/t/2c0#sec264>>, retrieved on 2024-04-14.

and . . .

- **The *Indian Act* provided one of the systems needed for the formalization of Canada's Residential School Program during the late 19<sup>th</sup> century (particularly after 1894).**<sup>7</sup> The impact of the residential schools advocated by the Department of Indian Affairs are characterized by the following headings given within *The Final Report of the Truth and Reconciliation Commission*:
  - The attack on children
  - The attack on Aboriginal families
  - The attack on Aboriginal languages, culture, and spirituality
  - The attack on Aboriginal nations<sup>8</sup>

**11.** *The Indian Act* is hereby amended by adding the following sections thereto :—

“**137.** The Governor in Council may make regulations, either general or affecting the Indians of any province or of any named band, to secure the compulsory attendance of children at school.

“ 2. Such regulations, in addition to any other provisions deemed expedient, may provide for the arrest and conveyance to school, and detention there, of truant children and of children who are prevented by their parents or guardians from attending: and such regulations may provide for the punishment, upon summary conviction, by fine or imprisonment, or both, of parents and guardians, or persons having the charge of children, who fail, refuse or neglect to cause such children to attend school.”

*1894 amendments to the Indian Act*

**10.** (1) Every Indian child between the ages of seven and fifteen years who is physically able shall attend such day, industrial or boarding school as may be designated by the Superintendent General for the full periods during which such school is open each year.

*1920 amendment to the Indian Act making attendance at day, industrial, or residential schools mandatory.*

<sup>7</sup> Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The History, Part 1 Origins to 1939* (Winnipeg, MB: Truth and Reconciliation Commission of Canada, 2015), 201-204.

<sup>8</sup> *Ibid*, 162-167.



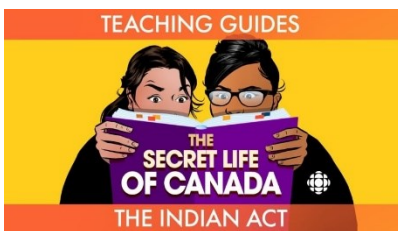
The *Final Report of the Truth and Reconciliation Commission* includes a [comprehensive history of residential schools in Canada](#).

- There is so much more - [check out the Act for yourself](#). This provision of the *Indian Act* (Section 119, subsection 6) remained on the books until 2014:<sup>9</sup>

Take into custody

(6) A truant officer may take into custody a child whom he believes on reasonable grounds to be absent from school contrary to this Act and may convey the child to school, using as much force as the circumstances require.

R.S., 1985, c. I-5, s. 119; R.S., 1985, c. 32 (1st Supp.), s. 21.



Another excellent resource that explores the *Indian Act* (complete with a Teaching Guide) is the CBC podcast [The Secret Life of Canada](#).

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<sup>9</sup> *Indian Act*, RSC 1985, c I-5, s 119, <<https://canlii.ca/t/7vhk#sec119>>, retrieved on 2024-03-02

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