# "We must teach the Indian what law is": The laws of Indian Residential Schools in Canada

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*... we have been pampering and coaxing the Indians; that we must take a new course, we must vindicate the position of the white man, we must teach the Indians what law is*[2]

*Above all ... Europe's conquest of the New World was a legal enterprise.*[3]

*The Canadian government pursued this policy of cultural genocide because it wished to divest itself of its legal and financial obligations to Aboriginal people and gain control over their land and resources. If every Aboriginal person had been "absorbed into the body politic," there would be no reserves, no Treaties, and no Aboriginal rights.*[4]

## 1. Introduction

I was talking with a friend, explaining some of the history of Indian Residential Schools. I described the circumstances of residential schools by saying "we did this" and "we did that". He asked me, why do you keep saying "we" did this? The answer is simple: everything that happened at Indian Residential Schools was approved by "our" elected representatives. It was all done by law and with the support of our legal system. This was not a rogue policy implemented by out-of-control, secretive bureaucrats and churchmen and no one else knew what was going on. This was official, government, Parliament-approved law. What our elected representatives did, "we" did.

In addition, until recently, the European descendants who ruled Canada were overwhelmingly church-going Christians. Not only were Indian Residential Schools the policy of our elected leaders, they were also the policy of "our" church leaders. Sure, Canadians do not attend church so much any more, and the idea that church leaders represent "us" is fading away, but this is only recent history. For almost all of the history of Indian Residential Schools, our churches were "us". What our churches did, "we" did.

If "we" are proud of the various achievements through Canadian history, our military successes, our athletic successes, our international successes at the United Nations and peace-keeping, our inventions and medical discoveries, and on and on, if "we" are proud about all of those, we cannot run away from an entire century of Indian Residential Schools and pretend this was not something that "we" did. We cannot lay the blame solely at the feet of Indian agents and commissioners and school principals and bishops. "We" have to own this history too. And "we" includes our entire legal system.

The idea for this paper started when I asked myself: why were there so few court cases against the Indian Residential Schools, and what changed to explain all the thousands of court cases that suddenly began in the 1990s?

The answer to this question is that the Indian Residential School system was the law. The legal system could not very well defend indigenous children and families when the legal system was being used to attack them. In addition, Canada's legal system was appalling in its callousness to vulnerable people of all kinds. Canada's legal system was barbaric and uncivilized. It was not until after World War II that Canada's legal system began its excruciatingly gradual civilization, a process that is still not complete today, but at least it became civilized enough by the 1990s that it would tolerate lawsuits concerning abuses at Indian Residential Schools.

The idea for this paper was also motivated because, as fulsome as the TRC final report is, I found it difficult to understand (and remember) which laws created the Indian Residential Schools and when those laws came into effect. Thus, I chose to select excerpts from the TRC report that touched on this topic and arrange them chronologically.

As you read about these laws, remember always that every bit of funding that the Government of Canada provided to churches in order to operate the Indian Residential Schools was approved by

Parliament through law – specifically, through annual appropriation statutes. The principle of "no taxation without representation" means that only our elected representatives can authorize taxes to be imposed and expenses to be incurred by our government officials. There is no list of these annual appropriate statutes; they are annual and generally involve the approval of all government expenditures for a given year in a single Act of Parliament, although frequently there are additional laws to approve even more spending if the first appropriation law is not sufficient.

In addition to enacting the *Indian Act* and its various amendments, Parliament was well aware that the Act permitted the Governor-in-Council to create regulations under the Act, and the regulations made by Cabinet (Governor-in-Council) were never a secret.

Further, there were numerous statements by Ministers and Prime Ministers in Parliament, parliamentary committees of many types to study Indian Affairs and specific issues relating to the *Indian Act,* and annual reports from the Department of Indian Affairs.

Our elected representatives were as well-informed about what was going on in the residential schools as they chose to be. The Canadian public cared about our treatment of children in those schools as much as the public chose to. Silence and ignorance in the face of abuse is never neutral. Silence and ignorance always favours oppression, whether it is a school yard bully, a church dealing with allegations of child abuse or government discrimination.

This paper will draw extensively on quotes, extracts and information from the Truth and Reconciliation Commission's Final Report but will not include the citations from the TRC report. In particular, this paper relies on Volume One, Part One of the Truth and Reconciliation Commission's Final Report: *Canada's Residential Schools: The History*, Part One, Origins to 1939."[5] For the citations, please refer to the TRC report.

It is also a purpose of this paper to introduce readers to the full TRC final report, at least by presenting various excerpts from the report, organized along a new theme (in this case, the laws creating the Indian Residential Schools). It is my hope that introducing readers to small parts of the TRC full report will entice them to look more closely at the entire TRC report.

Whenever a report is written, choices must be made how to organize the report around specific subject matters. I make no criticism of the TRC for the choices it made. In this paper, I simply wanted to use the TRC's text and findings grouped in a new way, this time to focus on the chronological development of laws creating and enforcing Indian Residential Schools.

A note about quotation marks in my paper. Where I have indented a long quote (e.g. from the TRC report), I have changed the TRC's quotations marks from " …" to single quotes ' …'. Where the quotations appear in text that is not indented, I have left the "…".

When reading this paper, it is essential to understand what is NOT in this paper. The TRC Final Report is a massive undertaking – the most complete, best documented research ever into Indian Residential Schools. The TRC report includes chapters on child labour, inadequate food, infectious diseases, fires, inadequate quality of education and children who died in the schools. The TRC report includes chapters on: "discipline" (physical force used against children); covering up of sexual abuse within the schools; student-on-student bullying; children who died while running away from the schools; and so much more.

The excerpts I have chosen involve some interaction with Canada's justice system. Most corporal punishment did not. Covering up of sexual abuse did not get to the justice system. Dying by the

thousands due to infectious diseases did not get to the justice system. I urge the reader: do not think that what I present in this paper is a comprehensive study of abuses against students. It is not. Instead, it is an attempt to select excerpts that most clearly demonstrate the relationship between Canada's law and justice system and the Indian Residential Schools.

In a separate paper, I detailed the criminal prosecutions that arose from Indian Residential Schools, copying freely from the TRC report. That paper is limited to the cases that made it to court.[6] In another paper I detailed the different changes in the laws that finally made it possible in 1990 for the civil law suits to begin.[7] In another paper I will detail the actual civil court cases that made it to court[8]. In a future paper, I will provide more details than I provide here on the laws in Canada relating to the imposition of white supremacy through the doctrine of discovery[9]. In this paper, I focus on detailing the actual laws and regulations that were enacted. I do not focus on the myriad ways that laws were ignored or the laws that did not yet exist to protect the children.

Throughout the period of Indian Residential Schools, Parliament funded the schools, entered into contracts with the churches, issued annual and other reports, appeared before Parliamentary committees and enacted a variety of laws, especially a seeming endless number of amendments to the *Indian Act*, always with the intent of imposing more and more control over Indians and removing their ability to control any of their resources, lands, spirituality, children or self-government. Throughout this entire period, the Royal Canadian Mounted Police were in a monumental conflict of interest: they were to enforce Parliament's laws and intentions regarding Indian Residential Schools, they were to force children into the schools and prevent them from leaving. They did virtually nothing to protect the children in the schools from a dizzying variety of abuses.

**2. 1496-1812: John Cabot to Hudson's Bay Company to the war of 1812; Tecumseh is the last relevant indigenous military ally**

In my opinion, the modern state of Canada began in 1496 when the English King Henry VII gave a charter to Zuan Chabotto and his sons to "discover" Canada. The charter was effectively a law declaring that whichever white, European, Christian country "discovered" Canada became the legal owners. I plan to explore the story of what came before 1496, and the evolution of the idea of white Christian supremacy over the entire world, and the laws of discovery in Canada, in a separate paper in the future[10]. But for now, I will give just a very brief summary of important legal events leading up to the creation of Indian Residential Schools. The basic point is that the idea of subjugating indigenous peoples has a very long history and Indian Residential Schools were just one part of that history. Indian Residential Schools were not an outlier or exceptional in how white Christians thought of indigenous peoples.

In 1496, King Henry VII gave letters patent to John Cabot (Zuan Chabotto) and his sons, "to find, discover and investigate whatsoever islands, countries, regions or provinces of heathens and infidels, in whatsoever part of the world placed, which before this time were unknown to all Christians". The King authorized Cabot to "conquer, occupy and possess" whatever they might discover, thereby "acquiring for us the dominion, title and jurisdiction" in those lands, and requiring Cabot to pay to the King one fifth of all capital he acquired through these voyages.[11] This was followed by Jacques Cartier becoming the first European to describe and map the Gulf of St. Lawrence between 1534 and 1542, claiming the territory for the King of France. In 1540, Francis I gave Jacques Cartier a commission, expressing "the desire to hear and learn about several countries said to be inhabited, and others in the possession of savages, living without knowledge of God or use of reason" and sending Cartier for the purposes of: "instructing them in the love and fear of God and his sacred law and Christian doctrine, with the intention of taking

them back to those countries with a fair number of our subjects of good will, in order the more easily to lead the other peoples of those countries to a belief in our Holy Faith."[12]

The battle for Canada between England and France, the idea of imposing Christianity on inferior peoples and the idea that indigenous peoples had no role to play in the legal taking of their lands was in place.

In 1583, the first English laws made in North America were declared by Governor Humphrey Gilbert in Newfoundland. The three laws were that the public exercise of religion shall be according to the Church of England; the second that it would be high treason for any individual to prejudice the Queen's right of possession to the claimed lands; and the third that "if any person should utter words sounding to the dishonour of her Majestie, he should loose his ears, and have his ship and goods confiscate".[13]

In 1606, King James I issued the royal charter establishing the Virginia Company and giving the company the right to colonize that part of America "not now actually possessed by any Christian prince or people" and to propagate Christianity "to such People, as yet live in Darkness and miserable Ignorance of the true knowledge and worship of God, and may in time bring the Infidels and Savages, living in those parts, to human Civility".[14]

In 1608, in *Calvin's Case* (1608), 77 E.R. 377, Lord Chief Justice Edward Coke ruled:

> … there is a diversity between a conquest of a kingdom of a Christian King, and the conquest of a kingdom of an Infidel; for if a King come to a Christian kingdom by conquest, … he may at his pleasure alter and change the Laws of that kingdom, but until he doth make an alteration of those Laws, the ancient Laws of that kingdom remain. But if a Christian King should conquer a kingdom of an Infidel, and bring them under his subjection, there *ipso facto* the Laws of the Infidel are abrogated, for that they be not only against Christianity, but against the Law of God and of Nature, contained in the Decalogue [the Ten Commandments]; and in that case, until certain Laws be established amongst them, the King by himself, and such Judges as he shall appoint, shall judge them and their causes according to natural equity, in such sort as Kings in ancient time did with their kingdoms, before any certain Municipal Laws were given as before hath been said.[15]

In 1612, Thomas Button "discovered" the lands on the western shore of Hudson Bay and claimed those lands for England, while he and his men were trying to find Henry Hudson[16] and the Northwest Passage.

In 1622, *Barkham's Case* became perhaps the first important indigenous court case in North America. Barkham in Virginia tried to have affirmed a grant of land given to him by the Virginia governor on condition of consent by the local Aboriginal leader, Opechancanough. Barkham traveled to London for final confirmation of the deed. The directors of the Virginia Company, sitting in London as a court that had been granted jurisdiction by the king, invalidated the grant on the grounds that the Virginia governor had no right to grant the lands without permission from the Company, and further, had no right to make any grant conditional on Aboriginal consent. Based on the right of discovery, Aboriginal Americans did not legally own the land that they had inhabited for thousands of years. Rather, the English government alone, through its representatives and laws, controlled all the land in Virginia and had the authority to distribute it.[17]

Later that century, two Frenchmen, Radisson and des Groseilliers, discovered a wealth of fur in the interior of the continent – north and west of the Great Lakes – accessible via Hudson Bay. The

French and Americans would not back them, so they went to England. In 1670, the King of England claimed to be the owner of the all of the land and gave more than 2.4 million square kilometers to 18 Englishmen who were the first investors and owners of "the Governor and Company of Adventurers of England trading into Hudsons Bay".[18] These Englishmen did no adventuring, only their money and their employees did. The Hudson's Bay Company Charter included a monopoly over trade everywhere that rivers emptied into Hudson Bay, as well as land and mineral rights. The Charter also gave to the company law-making and governing authority over the land, so long as it was consistent with the laws of England. Although "the Charter expressly stated that indigenous people were to be left to govern themselves... the Company resolved disputes with the Aboriginals in terms of criminal law."[19] The Manitoba Court of Appeal believes that this particular grant of land to the Hudson's Bay Company is history that is known by "every Canadian schoolboy or girl".[20]

In 1690, British author John Locke wrote *Two Treatises of Government*, which described a distinction between things held in common, which no one owned, and private ownership, which was created by adding something more than nature. This was used by others as a justification for taking indigenous lands.[21]

Over the years, England and France had skirmishes over who controlled Hudson Bay, while they were fighting each other in Europe and other places. The 1697 *Treaty of Ryswick* and the 1713 *Treaty of Utrecht* both dealt with certain claims to Hudson Bay (among other matters). These were followed by the battle on the Plains of Abraham in 1759, the French articles of capitulation in 1760 (which is the first historical event that the Ontario Court of Appeal thought worth mentioning when discussing the oath to the Queen), and finally, England and France signed the Treaty of Paris in February 1763, which gave possession of parts of New France and Louisiana to Great Britain and ended the Seven Years' War.

Joan Holmes wrote about the origins of the *Indian Act* and points out that about half of the First Nations in Canada signed formal treaty agreements from 1701 to 1923.

> The terms and circumstances of the treaties vary, however, there are certain important consistencies. With the exception of some items that were to be distributed for a limited time period, the language of treaties speak of perpetual obligations and responsibilities. The First Nation signatories did not relinquish their authority or leadership, nor did they agree to abandon their traditional systems of political or social organization and self-determination.
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> There is no record of them giving up the right to their spiritual and religious practices, nor did they agree to day to day management of their affairs by an outside government and none of the written accounts record any discussion of the *Indian Act* being applied to the signatory First Nations. …
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> The failure to implement the spirit and intent of treaties through domestic legislation has led to the primacy of the *Indian Act* in Crown-First Nations relations, including treaty relations which the *Indian Act* was not designed to address.[22]

Holmes points out that early relationships between the British and First Nations were conducted on a nation to nation basis through trade and military alliances. Britain's primary focus saw indigenous peoples as military allies and potential adversaries during the period of the war between England and France, the American revolution, and the War of 1812. After the War of 1812, indigenous peoples stopped being relevant as military allies or adversaries. England turned its attention to taking indigenous lands for settlement by white Christians. England's objective in

its relationship with indigenous peoples was to remove them to remote villages to get them out of the way of a white take-over of their lands. Treaties changed from peace and friendship to cessions of vast territories of land. England decided to limit its financial exposure under these treaties by requiring the local population of the English colony to pay for any promises made to First Nations.

*The Royal Proclamation 1763*

After the Treaty of Paris was signed in 1763, Chief Pontiac convinced a number of Ottawas, Ojibwas, Potawatomis and Hurons to join him in an attempt to seize Fort Detroit and drive out the British from their homelands. The siege at Detroit started in May. On July 31, the Aboriginal warriors defeated the British in the Battle of Bloody Run. However, the siege resulted in a stalemate. The siege was lifted at the end of October, Pontiac left Detroit and moved south to continue his attempt to resist British expansion over Aboriginal lands.

Most tribes had sided with the French because of British encroachments on Aboriginal lands. "In an effort to keep some tribes from aligning with the French, Britain prohibited colonists from settling on tribal land or hunting grounds west of the Appalachian mountains, a policy that kept the strategically located Iroquois Confederacy in the British camp. After the war was won, the Crown concluded that it could not trust the colonists not to encroach on Indian lands, so it promulgated King George III's Royal Proclamation"[23] in October 1763.

The Royal Proclamation created four colonial governments in North America "which are under Our immediate Government" and giving them permission to pass laws "as near as may be agreeable to the Laws of England" and establishing courts, all subject to the laws of England, with appeals to the Privy Council in England.

The Royal Proclamation gave land to certain British officers and others: "To every Person having the Rank of a Field Officer, Five thousand Acres. — To every Captain, Three thousand Acres. — To every Subaltern or Staff Officer, Two thousand Acres. — To every Non-Commission Officer, Two hundred Acres. — To every Private Man, Fifty Acres. We do likewise authorize and require the Governors and Commanders in Chief of all Our said Colonies upon the Continent of North America, to grant the like Quantities of Land, and upon the same Conditions, to such Reduced Officers of Our Navy, of like Rank, as served on Board Our Ships of War in North America".[24]

The Royal Proclamation asserted that only the King (or his representatives) could authorize the purchase of Aboriginal lands. Private land speculators and the local government authorities in the colonies in North America would be excluded from those purchases, except to the extent permitted by the King.

The Royal Proclamation prohibited what we now call Americans from expanding westward past a fixed boundary. These rules, as well as taxes imposed on Americans to pay for British forts, troops, supervision and enforcement of these rules – in other words, taxes paid by Americans to pay for their British overlords preventing them from buying indigenous lands and expanding westward – soon led to the American Revolution of 1776.

On the one hand, the Proclamation was an acknowledgment of indigenous peoples and title. On the other hand, giving the Crown a monopoly on land purchases from indigenous peoples effectively eliminated the ability of indigenous peoples to decide for themselves how to deal with their lands, ensured there would be no competition between potential buyers for the lands, and ultimately ensured that instead of selling relatively small amounts of land, the entirety of the

lands would be "surrendered" to the Crown in various ways. And of course, it asserted that white Christian law would be the law of the land. Despite all of its interference with indigenous sovereignty in relation to the lands, the Royal Proclamation is called a kind of "Indian bill of rights" by the "courts of the conqueror" and even the "Indian *Magna Carta*".[25] It is almost as though the English taking of Canada was some form of gift to Canada's indigenous peoples.[26]

The first comprehensive scheme for an Indian Department was contained in the Plan for the Future Management of Indian Affairs in 1764.[27]

In 1765-1769, Sir William Blackstone published the *Commentaries on the Laws of England* which became one of the most important sources of the contents of English law. Blackstone wrote: "That the King can do no wrong, is a necessary and fundamental principle of the English constitution." This statement of the law prevented any kind of lawsuit against the Government of Canada relating to Indian Residential Schools until the Government finally enacted the federal *Crown Liability Act* in 1951.[28] Even then, it would take another 40 years before it became realistically possible for IRS lawsuits to come forward.

To end the War of 1812, the United States and Great Britain entered negotiations. Great Britain originally proposed an Indian state in the American Northwest Territory (the area from Ohio to Wisconsin) as a buffer between the U.S. and Great Britain. The Americans rejected this proposal. They explained the American policy toward acquisition of Indian lands:

> The United States, while intending never to acquire lands from the Indians otherwise than peaceably, and with their free consent, are fully determined, in that manner, progressively, and in proportion as their growing population may require, to reclaim from the state of nature, and to bring into cultivation every portion of the territory contained within their acknowledged boundaries.[29]

The British abandoned its indigenous allies led by Tecumseh and signed the Treaty of Ghent to end the war of 1812 with no loss of territory for either the U.S. or Great Britain. This is why it is sometimes said that there was no winner of the war of 1812. But by far, the losers of the war of 1812 were the indigenous peoples of North America. It may be said that Tecumseh was the last relevant indigenous person as far as the European colonialists were concerned; the last indigenous perosn that Europeans wanted and respected as an ally and treated as an equal head of state.[30]

**3. 1823-1870: the 1823 decision in *Johnson v. M'Intosh*; the policy to "civilize"; the 1857 *Gradual Civilization Act*; the 1867 *British North America Act*; the 1870 purchase of western Canada from Hudson's Bay Company**

Holmes reports on the early urge to "civilize" indigenous peoples:

> Pressure to obtain lands for settlement and the distressed condition of much of the aboriginal population brought about various schemes to 'improve' their lives during the tenures of Lieutenant-Governors Sir Peregrine Maitland (1818-1828) and Sir John Colborne (1828-1836). These plans were influenced by the rise of philanthropic liberalism and evangelical Christian movements which advocated the 'advancement and civilization' of Indians. The underlying ideology of these movements, which predominated from around 1828 to 1839, was that while aboriginal people deserved protection and basic rights, they were in an inferior stage of spiritual, mental and social development and needed to be raised up by the adoption of Christian values. … Armed with the blessing of the Imperial Government and a Parliamentary Grant a 'civilization' program under the Indian Department was approved in

> November 1829. … As part of the restructuring the Indian Department was transferred from military to civil jurisdiction while remaining an Imperial responsibility.[31]

Every policy justification for Indian Residential Schools is revealed in the above passage. The policy justification was in place in early 1800s.

In 1821, the English Parliament enacted the *Act for Regulating the Fur Trade and Establishing a Civil and Criminal Jurisdiction within Certain Parts of North America*, and it forced the North West Company of Montreal and the Hudson's Bay Company to merge as to put an end to the often-violent competition. "Their combined territory was extended by a licence to the North-Western Territory, which reached to the Arctic Ocean in the north and, with the creation of the Columbia Department in the Pacific Northwest, to the Pacific Ocean in the west… its trade covered 7,770,000 km$^2$ (3,000,000 sq mi)."[32] The English Parliament put time limits on the Company's Charter; it was renewed for a period of 21 years. The term was renewed for another 21 years in 1838.

In 1822, there was a trial in Upper Canada (Ontario) of Shawanakiskie for having murdered an indigenous woman in the streets of Amhertsburg, Ontario. This case raised an important legal question: did English laws apply to cases involving only indigenous persons? Although convicted at trial and sentenced to death, the judge was uncertain about an argument raised at the trial: that the accused had only avenged the murder of a parent which was a custom sanctioned by indigenous law, that the exercise of indigenous laws and customs was guaranteed by treaty, and therefore indigenous persons were immune from legal proceedings in such circumstances. After a search of the Indian Department's records, in November1825, Lieutenant Governor Maitland reported to the Home Office in England that there did not appear to be any treaty to support the idea that an indigenous person is not subject to the law for offences committed against another indigenous person. The English Home Department quickly concluded that there was nothing to prevent the law from taking its course and left it to the officials in Ontario to decide whether or not execute Shawanakiskie, which they did.[33]

In 1823, the United States Supreme Court issued perhaps the most important legal decision on the doctrine of discovery: *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823)[34]. This decision influenced the major indigenous title cases in the U.S., Canada, Australia and New Zealand. The decision continues to be cited and argued by the Government of Canada and relied on by Canada's non-indigenous courts. If anything "cemented" England's sovereignty over Canada, it was this American court decision.[35]

The case was a travesty of justice in many ways, based on an altered British legal opinion concerning India and a fabricated dispute claiming there were two competing titles to the same land, with at least one of the titles apparently being acquired fraudulently. In fact, the parcels of land in question were not concerning the same lands – there was no conflict of titles that needed to be resolved. The "plaintiff" and "defendant" were in collusion with each other for the purpose of finding ways to acquire indigenous lands that the government would enforce and recognize.[36]

In *Johnson v. M'Intosh*, and several that followed, the United States Supreme Court applied the doctrine of discovery in order to justify American sovereignty over the land, including in what is now the United States of America, and to prevent indigenous people from selling land to anyone other than the government. The court held that:

- The principle of discovery was acknowledged by all Europeans because it was in their interests to do so.

- The nation making the "discovery" had "the sole right of acquiring the soil and establishing settlements on it."
- The rule regulated the relations among the competing interests of European powers.
- The original inhabitants had the right to retain possession of their land, but were without any powers of alienation other than to the "discoverers" who had obtained exclusive title by virtue of making the "discovery."[37]

It must be stated that the U.S. Supreme Court did not pretend that the taking of indigenous lands was "law" in some way:

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land and cannot be questioned.[38]

Thus, indigenous people had no right to question in a court of the conqueror the assertion of Anglo-American sovereignty over indigenous lands.

> We will not enter into the controversy whether agriculturists, merchants, and manufacturers have a right on abstract principles to expel hunters from the territory they possess or to contract their limits. *Conquest gives a title which the courts of the conqueror cannot deny*, [my emphasis] whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted. The British government, which was then our government and whose rights have passed to the United States, asserted title to all the lands occupied by Indians within the chartered limits of the British colonies. It asserted also a limited sovereignty over them and the exclusive right of extinguishing the title which occupancy gave to them. These claims have been maintained and established as far west as the River Mississippi by the sword. The title to a vast portion of the lands we now hold originates in them. It is not for the courts of this country to question the validity of this title or to sustain one which is incompatible with it.[39]

Notice carefully the phrase, "courts of the conqueror," used by Chief Justice Marshall. For all its harshness, at least it was plain spoken.

The application of law in the district of western Canada known as Assiniboia, approximately current day southern Manitoba, developed slowly between the 1820s and the 1860s. At first, indigenous people in the district were not subject to this jurisdiction, at least not completely. Thus, a murder of one indigenous person by another in 1824 produced a trial and a reprimand from the governor, but no punishment. After the reorganization of the colony's local government in 1835, however, a regular police and judicial system was set in place and all residents of the community, including indigenous people, became subject to this jurisdiction as far as "British" residents were concerned. A resolution of the council declared in 1837 that, "the evidence of an Indian be considered valid and be admitted as such in all Courts of this settlement," implying that indigenous testimony had not been accepted before.[40] Local magistrates, several of whom were Métis, presided over the district courts. A higher court, the General Quarterly Court of Assiniboia, was instituted as well and it too had a number of Métis magistrates.

The 1845 case of *Capenesseweet* is of particular importance when discussing the imposition of English laws on indigenous peoples in the west. The laws of Assiniboia never made any mention of hunting or trade, but they stated, in keeping with the Hudson Bay Company's Charter of 1670, that indigenous people were beyond their jurisdiction. Further, serious criminal cases were to be tried in the provinces of Upper and Lower Canada. However, the local judicial official ignored these jurisdictional limits in the *Capenesseweet* and *Sayer* cases.

The *Capenesseweet* case involved a murder of a Sioux by a Saulteaux. In this instance, the father of the victim, Patunga-okay-snay, had murdered the father of Capenesseweet. Capenesseweet was accused of murdering Patunga-okay-snay in revenge, (A review of the evidence given in the trial suggests it was unclear whether it was Capenesseweet or his brother who killed Patunga-okay-snay.) The Court of Assiniboia did not have the jurisdiction to hear this case since it was a crime exclusively involving indigenous people. It had nothing to do with Company business. Alternatively, if the Canadian courts did have the right to prosecute Capenesseweet, the case should have been tried in the Courts of Upper Canada. However, the Recorder (judge) in Assiniboia, Adam Thom, proceeded to decide the case and pass a death sentence on Capenesseweet, who was then executed. Only a few months later in the case of *The Public Interest v. Peter Hayden*, a non-indigenous person who pleaded guilty to killing another was sentenced to a mere fine of one shilling and to give security for his good behaviour for the next two years. The discrimination and harsh application of English law against indigenous peoples was established, and laid bare for all to see.

Meanwhile, in 1830, jurisdiction over "Indian" matters was transferred from the military authorities to the civilian governors of both Lower and Upper Canada.[41] A dozen years later, the Governor General of British North America, Sir John Bagot,

> commissioned a review of the colony's Aboriginal policy. The report of the policy review, which has become known as the "Bagot Commission," concluded in 1844 that the civilization policy had failed. Not for the last time, day schools were judged to be ineffective: attendance was irregular, the curriculum was irrelevant, and the influence of the parents was seen to be too strong. Pointing to what it believed to be successful boarding schools for Indigenous people in both Sierra Leone and Missouri, the commission endorsed the establishment of industrial boarding schools established in partnership with the churches. …
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> Although the report recommended industrial schools, it contained no measures for paying for them. To find the money to support them, Bagot's successor as governor general, Sir Charles Metcalfe, discontinued the supply of ammunition to several Aboriginal communities. The funds saved in this manner were to be divided among the proposed boarding schools. This move, as a subsequent government report noted, benefited only the bands that sent children to those schools. The other tribes, including the 'Amherstburgh Indians, the Six Nations, and the Mohawks of the Bay of Quinté,' did not receive compensation for the loss of the ammunition supply, which was part of their Treaty annuity.[42]

Holmes details that the English colony of Canada began passing legislation concerning the protection of indigenous lands starting in 1839, 1849 and 1850, with legislation in 1850 providing the first definition of who the colony accepted and defined as being indigenous.[43] The first definition was the most expansive and was amended in 1851 and narrowly applied since then.

> These definitions were used to decide who could live on Indian land and have their property protected from seizure, taxation and trespass. These limitations were ostensibly legislated to

> protect Indian lands from being taken over by designing white men, however, their long-term effect was mostly to separate Indian women and children from their reserve communities.[44]

In 1857, the colony of Canada enacted the *Act for the Gradual Civilization of the Indian Tribes in the Canadas*, which demonstrated the Crown's intention to erode and control indigenous peoples, remove their legal rights and integrate them into white society. The preamble of the Act states:

> Whereas it is desirable to encourage the progress of Civilization among the Indian Tribes in this Province, and the gradual removal of all legal distinctions between them and Her Majesty's other Canadian Subjects, and to facilitate the acquisition of property and of the rights accompanying it, by such Individual Members of the said Tribes as shall be found to desire such encouragement and to have deserved it …[45]

Holmes explains that

> the preamble reveals the ideological basis of all the Indian affairs legislation that presumed Indian society and culture to be inferior to the settler society and assumed that individuals would seek to attain the status of Her Majesty's other subjects. The act also provided for the piecemeal dismantling of reserves by allowing enfranchised Indians to convert parcels of reserve land into fee simple lands.[46]

Another Indian law was passed in 1860.[47] Then in 1867, Canada was created by England's *British North America Act*, in which education is within the exclusive jurisdiction of provinces; however, that same Act states that the federal government has exclusive jurisdiction over indigenous people. It was the federal power that was used to make education of indigenous people a federal jurisdiction.[48] This ensured that the indigenous people would have a separate and unequal system of education, subject to completely different policies, regulations, and funding formula from anything the provinces were doing.

More Indian laws were passed in 1868[49] and in 1869.[50] Holmes explains that a series of Acts and Orders-in-Council between 1871 and 1874 extended Indian legislation into Canada's newly acquired territories. Note that Rupert's Land and the North-west Territories were acquired by the Government of England from the Hudson's Bay Company in 1870 and then given to the new country of Canada by the Government of England. The King of England had "given" the land to the Hudson's Bay Company in 1670 and in the 1800s the Parliament of England expanded the gifts of lands to the Hudson's Bay Company; the lands were not acquired from indigenous peoples.

In 1870, the new country of Canada arranged for England to buy all of western Canada from the Hudson's Bay Company and give it to the dominion of Canada. The HBC would receive £300,000 in cash compensation (paid by Canada to England and from England to the HBC, although England guaranteed a loan to Canada for that amount); 1/20 of all lands to be surveyed in the Fertile Belt – an area bounded by the Winnipeg River in the east, the 49th parallel in the south, the Rockies in the west and the North Saskatchewan River in the north (HBC retained 120 million acres). In addition, HBC would receive lands around each of its posts (50,000 acres) and would be guaranteed the right to continue its trade without hindrance or any special taxation or tariffs.[51]

During the Treaty 3 talks, Chief Ma-we-do-pe-nais reminded Morris [Canada's Treaty Commissioner at the time], "The white man has robbed us of our riches, and we don't wish to

give them up again without getting something in their place." He said he could hear the sound of gold rustling beneath the land that Treaty commissioners sought. First Nations people were unwilling to accept that the Hudson's Bay Company had had any right to transfer their land to Canada. During the negotiation of Treaty 4, Pis Qua of the Plains Saulteaux confronted a Hudson's Bay Company official, telling him, "You told me you had sold our land for so much money, £300,000. We want that money." When offered 640 acres (259 hectares) per family in 1874, Pitikwahanapiwiyin (Poundmaker) responded, "This is our land! It isn't a piece of pemmican to be cut off and given in little pieces back to us. It is ours and we will take what we want." Mistahimaskwa (Big Bear) famously said that for First Nations people, post-Treaty life would be like having "the rope to be about my neck," the life of a tethered animal.[52] Needless to say, England did not pay indigenous peoples for the lands that were "owned" by the Hudson's Bay Company and "bought" by England and "given" to Canada.

During this time, the local population in what is now called Manitoba insisted on negotiations that would lead to Manitoba joining Canada as a province. Louis Riel was their leader. The negotiations created a new constitutional document, the *Manitoba Act*, which legislated the binding commitments for Manitoba to join Canada as a province.

HBC forwarded the executed Deed to England's Colonial Office on May 7, 1870. On May 11, Canada's London representative instructed its bankers to pay the compensation owed to HBC, which had been on deposit since November. In Ottawa, the *Manitoba Act,* which contained all of the rights demanded by the local population, except amnesty for the actions taken by the provisional government, was enacted and Royal Assent given on May 12, 1870. Finally, on June 22nd the Queen accepted the Surrender from HBC. The following day, June 23rd, an Order in Council was passed transferring Rupert's Land and the North West Territories to Canada, effective July 15th, 1870. The effect of the Deed of Surrender was immediate. The *Manitoba Act* came into effect the very same day, July 15, 1870.

The Deed of Surrender is a British document, an agreement between a British company and the British Crown. As a result it resides in Britain at the Public Records Office in Kew. But it is second only to the *British North America Act* in its significance to the ownership and governance of Canada.[53]

Prime Minister John A. Macdonald told political ally George-Étienne Cartier: "No explanation it appears has been made of the arrangement by which the country is to be handed over … All these poor people know is that Canada has bought the country from the Hudson's Bay Company and that they are handed over like a flock of sheep to us."[54] In fact, the Hudson's Bay Company's Governor in Red River, William Mactavish, said to a friend: "Am I still the governor? It seems that everything gets settled in London, but they don't tell me anything."[55]

Despite having settled affairs with the Hudson's Bay Company, and agreeing with the leaders of the Red River Colony on the provisions and enactment of the *Manitoba Act*, the Canadian government nonetheless decided to send a military expedition of 1,200 troops in the late summer of 1870, the Wolseley Expedition, to the Red River Colony, mostly to appease those in Ontario who hated Riel, French and Catholics. Riel intended to greet them on their arrival at Red River, but was warned that he would be in mortal danger, and so he became a fugitive and fled to the United States. Three times he was elected to represent Manitoba in the federal Parliament, and he even once sneaked into Ottawa to sign the register of Members of Parliament. But the federal Parliament refused to allow the elected representative of Manitoba to have a seat and ensured he would remain a fugitive.[56]

In the meantime, the Métis in Red River were harassed, and some even murdered. Many Canadians are familiar with the name of Thomas Scott, but almost no Canadians are familiar with the name Elzéar Goulet.

> On 3 March 1870, Elzéar served as a member of the court martial for Thomas Scott, who was accused of treason against the provisional government in the Red River. Scott was an Orangeman who had recently immigrated to Red River from Upper Canada and protested violently against Métis land rights. Scott not only was in support of the Canadian government's claiming of Métis land to be redistributed to Ontario immigrants, but voiced racist and anti-Catholic sentiments.

In an attempt to demonstrate to the Canadian government the resolve of the people of Red River to protect their lands and insist on their rights, "[o]n the day following the trial, Elzéar, with other members of the court, escorted Scott outside the walls of Upper Fort Garry and executed him by firing squad." After the arrival of the Wolseley Expedition, many Métis associated with the provisional government had fled Red River in fear of violent retaliation from the Expedition. Goulet chose to stay. One day later in 1870, he was chased by a mob until he dove into the Red River where he was stoned and drowned. There were no arrests for his murder. During the same period another Métis and an Irish-American were killed and two others, one of whom was André Nault, badly beaten, by unidentified assailants. Other Métis understood the message.[57]

The promises in the *Manitoba Act* were ignored over the years. Four of the members of Scott's jury were murdered, Métis lands were stolen, the Métis were harassed, and many left the settlement.[58] Among the obligations in the Act was to provide 1.4 million acres (5,666 square kilometres) to the Métis. The Supreme Court of Canada ruled in 2013 that:

> s. 31 of the *Manitoba Act* constitutes a constitutional obligation to the Métis people of Manitoba, an Aboriginal people, to provide the Métis children with allotments of land. The immediate purpose of the obligation was to give the Métis children a head start over the expected influx of settlers from the east. Its broader purpose was to reconcile the Métis' Aboriginal interests in the Manitoba territory with the assertion of Crown sovereignty over the area that was to become the province of Manitoba. The obligation enshrined in s. 31 of the *Manitoba Act* did not impose a fiduciary or trust duty on the government. However, as a solemn constitutional obligation to the Métis people of Manitoba aimed at reconciling their Aboriginal interests with sovereignty, it engaged the honour of the Crown. This required the government to act with diligence in pursuit of the fulfillment of the promise. On the findings of the trial judge, the Crown failed to do so and the obligation to the Métis children remained largely unfulfilled. The Métis claim based on the honour of the Crown is not barred by the law of limitations or the equitable doctrine of laches. We therefore conclude that the Métis are entitled to a declaration that Canada failed to implement s. 31 as required by the honour of the Crown.[59]

While the government was ignoring its obligations to the Métis over the issue of 5,666 $km^2$ of land, the Hudson's Bay Company's 485,825 $km^2$ of land would prove to be immensely lucrative. For the next 50 years, profit from the sale of these lands would be the Company's primary source of revenue. How lucky for them that they were the "owners" of all this land given to them by the King of England in 1670. How lucky for them that they did not have to share any of their profits with the original owners of the land, the indigenous peoples. How unfortunate for the Métis that their constitutionally guaranteed lands were not delivered.

Another obligation in the *Manitoba Act* was to respect French language rights in education, and to ensure the use of both English and French in democratic governance. These obligations were also ignored starting in 1890, as confirmed by the Supreme Court of Canada in 1985. It is remarkable the extent to which Manitoba ignored its legal obligations. The *Official Language Act, 1890* was challenged before the Manitoba courts soon after it was enacted and was ruled unconstitutional in 1892 by Judge Prud'hom`me of the County Court of St. Boniface, in *Pellant v. Hebert*.[60] This ruling was not followed by the Legislature or the Government of Manitoba. In 1909, the *Official Language Act, 1890* was again challenged in Manitoba Courts and again ruled unconstitutional: *Bertrand v. Dussault*.[61] The government simply ignored these decisions; so much for the rule of law. In 1976, a third attack was mounted against the *Official Language Act, 1890* leading to a unanimous decision by the Supreme Court of Canada in 1979 that Manitoba's *Official Language Act* of 1890 was unconstitutional.[62] Still, Manitoba would not obey the law and two more unanimous Supreme Court of Canada decisions were issued, first in 1985 in *Re Manitoba Language Rights*[63], and then in 1986 in *Bilodeau v. A.G. (Man.)*.[64] It was only then that Manitoba finally began to comply with its constitutional obligations concerning the French language as set out in the 1870 *Manitoba Act*.

It is astonishing to me that at the same time that French Canadians in western Canada were having their own language illegally oppressed, French-speaking teachers and staff were in Indian Residential Schools destroying indigenous languages and forcing children to learn English.

**4. 1871 and following: numbered treaties and the treaty right to education**

All Canadians need to understand that treaties with indigenous peoples are "law". They are not something that needs separate legislation before they become law. No matter how often the treaty provisions are ignored by the Canadian legal system, the treaties never stop being law. The Truth and Reconciliation Commission writes the following about treaties and education:

> From the Canadian perspective, the most significant elements in the Treaties— which have come to be known as the 'Numbered Treaties'—were the written provisions by which the First Nations agreed to 'cede, release, surrender, and yield' their land to the Crown. The provisions varied from Treaty to Treaty, but they generally included funds for hunting and fishing supplies, agricultural assistance, yearly payments for band members (annuities), a promise to pay for schools or teachers, and an amount of reserve lands based on the population of the band.
>
> The successful negotiation of the Treaties was essential to any assertion of Canadian sovereignty over the West. The federal government, at various times, was alerted by Indian Commissioner Wemyss Simpson, and by successive lieutenant-governors Adams Archibald and Alexander Morris, to the necessity of responding to First Nation requests to negotiate Treaties. Despite their worsening economic position, Aboriginal people remained a significant force. Morris warned Ottawa in 1873 that a pact among the Cree, Siksika, and Assiniboine could create a military force of 5,000. Even more worrying was the possibility that Tatanka-Iyotanka (Sitting Bull) might bring about an alliance between the Hunkpapa Lakota and the Prairie First Nations. The only alternative to negotiating Treaties was to subdue the First Nations militarily, but that would have been a very costly proposition. In 1870, when the entire Canadian government budget was $19 million, the United States was spending more than that—$20 million a year—on its Indian Wars alone. Despite all these pressures, the government took a slow and piecemeal approach to Treaty making.

The government policy was to assert its sovereignty over Aboriginal land, but to delay Treaty making until the land was actually needed for economic development. Treaties 1 (1871), 2 (1871), 3 (1873), 4 (1874), 6 (1876), and 7 (1877)—the Prairie Treaties—were signed to clear the way for the railway and open the West to immigration. The development of a commercial fishery on Lake Winnipeg and the expansion of a steamboat network along the Saskatchewan River created the need for Treaty 5 (1875). Later Treaties followed the same pattern. Treaty 8 (1899, with significant adhesions in 1900 and 1901) was negotiated to facilitate the exploitation of the Klondike gold fields. Treaties 9 (1905) and 10 (1906) and a significant set of adhesions to Treaty 5 (1908 to 1910) were responses to the growth of resource industries in northern Ontario, Manitoba, and Saskatchewan. Treaty 11 (1921) was in large measure prompted by the discovery of crude oil in the Northwest Territories.

…

Each Treaty contained education provisions. Under Treaty 1, "Her Majesty agrees to maintain a school on each reserve hereby made whenever the Indians of the reserve should desire it." In Treaty 2, the nearly identical commitment is "to maintain a school in each reserve hereby made, whenever the Indians of the reserve shall desire it." In Treaty 3, the commitment is "to maintain schools for instruction in such reserves hereby made as to Her Government of Her Dominion of Canada may seem advisable whenever the Indians of the reserve shall desire it." In Treaty 4, it is 'to maintain a school in the reserve allotted to each band as soon as they settle on said reserve and are prepared for a teacher.' In Treaty 5 and Treaty 6, the commitment is 'to maintain schools for instruction in such reserves hereby made as to Her Government of the Dominion of Canada may seem advisable, whenever the Indians of the reserve shall desire it.' The Treaty 7 commitment is 'to pay the salary of such teachers to instruct the children of said Indians as to her Government of Canada may seem advisable, when said Indians are settled on their reserve and shall desire teachers.' (With slight variation, this commitment was used in the last four numbered Treaties, which were negotiated in the late nineteenth and early twentieth centuries.)

There is no evidence that the government initially intended to include schools in the Treaties. The original draft for Treaty 1 and Treaty 2 contained no education provisions. The correspondence between Indian Affairs Minister Alexander Campbell and Treaty Commissioner Morris, in preparation for the negotiation of Treaty 3, dealt only with annuities and the initial cash payment. Two weeks before Treaty 3 talks started, Morris telegraphed Ottawa, asking, 'Presume reserves to be granted to Indians but have no instruction—What about support of Schools? Indians generally anxious to learn, on this subject, I believe it to be good policy to promote education of children especially if limited annuities be adopted.' It was Chief Ka-Katche-way of the Lac Seul band who, in the negotiation of Treaty 3, initially raised the demand for a school-master 'to teach their children the knowledge of the white man.' During the Treaty 4 talks, Morris said, 'Whenever you go to a Reserve, the Queen will be ready to give you a school and a schoolmaster.' During the Treaty 6 negotiations, the Cree twice included a request for schoolteachers in lists of proposed changes to the government officer. In 1880, Morris described the promise of schools as an important element of the Treaties that was deserving of being pressed with the utmost energy. The new generation can be trained in the habits and ways of civilized life—prepared to encounter the difficulties with which they will be surrounded, by the influx of settlers, and fitted for maintaining themselves as tillers of the soil. The erection of a school-house on a reserve will be attended with slight expense, and the Indians would often give their labour towards its construction.

By signing Treaties, First Nations strove to address their immediate concerns and establish the foundation of their nation-to-nation relationship with the Canadian state. They had secured their rights prior to the arrival of large numbers of settlers; their economic independence was guaranteed through provisions that allowed them to hunt, trap, and fish; they would receive support while making a transition to farming; and their children would gain access to formal schooling. The Treaties had created a sacred relationship in which both parties had ongoing obligations. In coming years, it would become apparent that Canada's understanding, and implementation, of its Treaty obligations was far more constrained.

The test of Canada's willingness to fulfill its Treaty obligations was not long in coming. The crisis caused by the rapid collapse of the North American buffalo population in the late 1870s forced First Nations living in the southern 'settlement belt' to turn to the federal government for support. The government was completely unprepared, and largely unwilling to fulfill its obligations. The near extinction of the buffalo was the result of a complex set of changes: the expansion of the Métis buffalo hunt during the mid-nineteenth century, the introduction of repeating rifles to the hunt, the role of American sport hunters, and the increasing demand for buffalo hides by eastern industries. The movement of the US trade in buffalo robes and hides into the West after the end of the American Civil War marked a dramatic transformation in the process, as the hunt became a slaughter. Another factor in the decline of buffalo populations was the attempt by the US military to stop the movement of the herds into Canada. This policy was intended to deprive Chief Sitting Bull's Dakota, who had taken refuge in Canada after the battle of the Little Big Horn in 1877, of a food source.

Many First Nations people devoted considerable effort to farming during this period. Their attempts to establish independent farming communities were frustrated by the poor quality of the lands they had been forced onto, inadequate implements, inferior seed and livestock, as well as early frosts and insect infestation. Often, the federal government simply refused to supply promised farm implements. Indian Commissioner Joseph Provencher 'justified' this refusal in 1877 with these words:

> It has been the constant practice of the Indians to say that they were ready to receive every article, cattle, implements, that they may be entitled to, in certain conditions, according to the Treaties. But I would strongly recommend that no such engagements should be fulfilled before the Indians have really showed that whatever article is given to them shall not be wasted or traded.

Successful farming on the Prairies was not an easy or certain endeavour for anyone. Many European settlers, who were more familiar with contemporary agricultural techniques, struggled and often failed to be successful. Several decades of experimentation were needed to develop the crops, implements, and technologies that would be suitable to the Prairies. It has been estimated that almost four in ten prairie homesteaders were forced to abandon their farms in the period from 1870 to 1931.

There were only a handful of Indian agents and farm instructors appointed to assist tens of thousands of First Nations people in making the transition to an agricultural way of life. Many of the farm instructors were political appointees with little knowledge of farming, Aboriginal people, or western agricultural conditions. Some of them were not above trying to use the position to enrich themselves when issuing supply contracts. Others came to view Aboriginal farmers with hostility, confusing the payment of federal Treaty obligations with undeserved charity. They did not recognize the different circumstances faced by First Nations people who were prohibited from staking homesteads as they had been allowed to do. [While

> the law was giving farms away to white settlers, the law also prohibited giving privately owned farms to indigenous persons.] In addition, Aboriginal people were often restricted to less land than settlers had; they could not take out loans against their land, and often had trouble convincing merchants to extend them credit. As well, they needed the permission of the Indian agent to sell or barter their animals and produce. Many Aboriginal people were forced back into hunting because they were not being provided with enough support to farm. When the hunt failed, they had to turn to the government for relief. The cost of that assistance was over half a million dollars in 1882. While John A. Macdonald defended the expense, saying it was cheaper to feed the First Nations people than to fight them, the reality was that in the 1880s, the threat of starvation became an instrument of government policy. In 1883, the federal government reduced the Indian Affairs budget, leading to a reduction in relief payments. Not satisfied with the level of control that threats of starvation gave him, Indian Commissioner Edgar Dewdney attempted to implement a policy of what he called 'sheer compulsion,' using the Mounted Police to arrest First Nations leaders and disrupt Aboriginal government. By 1884, North-West Mounted Police Superintendent L. N. F. Crozier complained to Ottawa that the government's cut in rations seemed to be designed to discover just how little food a man needed to be able to work and subsist. If the government did not feed the people with whom it had made Treaty, he warned, it would soon have to fight them. All these pressures led to a number of near-violent confrontations between First Nations people and government representatives. The impact of famine and disease was devastating. According to one contemporary estimate, between 1880 and 1885, the First Nations population on the Prairies dropped by more than a third—from 32,000 to 20,000.[65]

While starvation and destitution were stalking the land and Canada was refusing to fulfill its treaty obligations to provide relief, Canada was also willing to lie to indigenous peoples about what kind of schooling they would receive under the treaties.

> At the Treaty 1 talks, Archibald said that although the Queen thought it best for her 'red children' to 'adopt the habits of the whites,' she had 'no idea of compelling you to do so. This she leaves to your choice, and you need not live like the white man unless you can be persuaded to do so of your own free will.' This promise was at odds with the laws of the time, which limited First Nations participation in all aspects of Canadian society unless they went through the process of enfranchisement—which did require them to 'live like the white man.' In coming years, First Nations people would be compelled to send their children to residential schools, where those children would also be made to 'live like the white man.'[66]
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> …
>
> Deputy Minister of Indian Affairs Lawrence Vankoughnet outlined the government's responsibilities to fund First Nations education in an 1882 memorandum to Prime Minister Sir John A. Macdonald. (In addition to being prime minister, Macdonald was also the minister responsible for Indian Affairs.) Vankoughnet took the position that while the Treaties said the government was bound to maintain schools, it did not have to construct them. Furthermore, in his view, maintenance did not include salaries for teachers or school supplies. By 1882, the government was prepared to contribute $100 towards school construction if the First Nation cut the logs and put up the walls. Often, this was not necessary because missionaries had already constructed a school. Vankoughnet noted that in the future the government might consider erecting schools on reserves, but these should be as inexpensive as possible, 'compatible with comfort and convenience.'[67]
>
> …

Ahchacoosahcootakoopits, or Star Blanket, was the chief of the Star Blanket Band in the File Hills area of southern Saskatchewan. He should not be confused with another chief known as Star Blanket or Ahtahkakoop (Atakakup). Ahchacoosahcootakoopits was the son of Wapiimoosetoosus, one of the Cree chiefs who signed Treaty 4. He had been part of the 1884 movement to seek Treaty improvements, and was arrested but never charged after the 1885 North-West Rebellion. Star Blanket opposed Indian agent efforts to repress the Sun Dance, to amalgamate four bands in the File Hills area, and to send children to residential schools. As a result, the federal government deposed him, giving as its grounds his 'incompetency.' The band refused to accept the government decision and refused to co-operate with the Indian agent. In 1895, Star Blanket was restored to office. At the same time, he agreed to allow one of his sons to attend the residential school in Regina under the conditions that his hair not be cut, and that he would be exempted from religious studies, military drill, or the brass band. In 1898, the federal government once more threatened to depose him for not sending more of his children to residential school. So intense was the conflict between the government and Star Blanket that, in 1898, the federal deputy minister of Indian Affairs thought it significant enough to relate in his annual report that 'Star Blanket, who so long persistently opposed sending children from his band to school, has during the last month, allowed three to go, two to Qu'Appelle, and one to the boarding school here.' Star Blanket successfully resisted government efforts to have the band surrender some of its land for the File Hills Colony that Indian Commissioner W. M. Graham was developing for former residential school students. Into the early twentieth century, Star Blanket continued to campaign to have the government live up to its Treaty commitments. His 1912 letter to the Duke of Connaught, then governor general, gives eloquent expression to his sense of betrayal.

> We have waited patiently for many years for a chance to speak to some one who would carry a message to the Government and our white brothers in the east. The first part of our message Great Chief is one of Good wishes and peace to yourself first and then to the Government. For as I was born with two legs and as these two legs have not yet quarreled, so I wish to live in peace with the white people. When I was in middle life the Government of the Great White Mother sent some wise men to ask us to give them much land. A large camp of Indians was made near Qu'Appelle and there the Government and Indians after much talking signed a treaty, on paper and much was promised as well. One of these papers has been carefully kept by us, and by it we Indians gave to the Government a large piece of land and held back for ourselves some small pieces as Reserves. In the treaty we made then the Government promised to make a School for every band of Indians on their own Reserve, but instead little children are torn from their mothers' arms or homes by the police or Government Agents and taking [sic] sometimes hundreds of miles to large Schools perhaps to take sick and die when their family cannot see them. The little Ants which live in the earth love their young ones and wish to have them in their homes. Surely us red men are not smaller than these Ants.

Indian Affairs official Martin Benson prepared a disingenuous response to this letter. He acknowledged that Treaty 4 did oblige the government to 'maintain a school in the reserve,' but then said that the educational needs of the children on Star Blanket's reserve were being met by the Qu'Appelle industrial school and a boarding school 'in the immediate vicinity of the reserve.'[68]

…

> In 1876, Chief Peyasiw-awasis (Thunderchild), along with Mistahimaskwa (Big Bear) and a number of other chiefs, rejected Treaty 6, which covered parts of central Alberta and Saskatchewan. However, after the collapse of the buffalo hunt, he signed the Treaty in 1879. He was a strong advocate of First Nations' Treaty rights and traditional cultural practices. He was against having a Roman Catholic school on his reserve, and eventually led a movement to tear the school down. He was not an opponent of schooling, but wanted it to be within First Nations control. Under government pressure, he allowed the Catholics to re-establish the school. He was jailed in 1897 for participating in a give-away dance. In later years, the government threatened to depose him for his support of traditional practices.[69]
>
> …
>
> Residential schools were an essential element in the federal government's policy of using enfranchisement to eliminate Aboriginal governments and its own responsibilities to Aboriginal people. It was conceived of, and implemented by, the same people who confined Aboriginal people to reserves, declined to fulfill Treaty obligations, outlawed cultural practices, and, in 1885, had either executed or jailed many of the Prairies' First Nations leaders.[70]
>
> …
>
> In May 1946, the federal government struck the Special Joint Committee of the Senate and House of Commons Appointed to Examine and Consider *The Indian Act*. Among the issues that it was specifically charged with examining was the operation of day and residential schools. … In his presentation to the committee, Indian Affairs secretary T. R. L. MacInnes argued that the Treaty provisions were largely archaic and imposed few legal obligations on the government.
>
> These views were challenged by Aboriginal leaders, who stressed the need for improvements in employment, housing, health, and education, and also the need to respect Aboriginal rights. Andrew Paull, representing the North American Indian Brotherhood, presented a detailed critique of both the joint committee and government policy in June 1946. He pointed to the lack of Aboriginal people on the joint committee, which he called 'a committee investigating yourselves.' Among the government failings Paull identified were:
>
> - the violation of Treaty rights
> - the fact that First Nations people had no input in defining who were and were not band members
> - the fact that individuals could be enfranchised without their consent
> - the negative impact of schools run by religious denominations
> - the lack of First Nations people in Parliament
> - the lack of First Nations people working for Indian Affairs
> - the lack of band council control over local affairs[71]

Indigenous peoples wanted education for their children and they wanted the schools in their home communities. This was their treaty right. It was denied to them.

A Nova Scotia County Court held in 1929 that a 1752 treaty with the Micmacs was legally meaningless, basing this on a distinction between a "civilized nation" and "uncivilized people or savages."[72]

All along it has been and continues to be the Canadian legal system that is undergoing an exceptionally slow and gradual civilization, with much more civilizing still needed.[73]

**5. 1873 and 1876: the North-West Mounted Police are created; the first *Indian Act*; giving away indigenous lands; oppression set in concrete**

The TRC reports:

> In the North-West Territories, Indian Affairs officials worked closely with the North-West Mounted Police, which had been established in 1873. Modelled on the Royal Irish Constabulary, the Mounted Police was intended to establish order on the Prairies, paving the way for settlement and the construction of the railway. Its immediate tasks were to control American whiskey traders who had begun to operate in Canada, and to establish a relationship with Aboriginal people as a prelude to their eventual 'civilization.' The police were empowered to administer British and Canadian laws—laws that had been neither made nor approved by people who lived in the North-West. The commissioner of the force held an automatic seat on the Territorial Council that had been established to govern the territory, and police force members served as magistrates. As a result, the Mounted Police was involved in passing legislation, policing, and the judicial system. From the time of their arrival in the West, police were present at all the Treaty negotiations, serving as a silent reminder of Canada's military potential.[74]

The first *Indian Act* was enacted in 1876.[75] The new law provided power to the Superintendent General to lease lands and issue location tickets for reserve lands, in specified circumstances, without the consent of the First Nation.

Amendments followed in 1880, 1886, 1887, 1894, 1906 and 1911. The definition of who Canada would accept as being an Indian was made more restrictive, traditional forms of self-government were destroyed and replaced by an imposed elective system with important powers over the local government given to Indian affairs officials and it became easier to expropriate indigenous lands. The Truth and Reconciliation Commission's report summarizes as follows:

> Federal government responsibility for 'Indians, and lands reserved for Indians' came from Section 91 (24) of the *British North America Act* (now the *Constitution Act of 1867)*. In Parliament, Canada's first prime minister, Sir John A. Macdonald, described the government's responsibility to Indians as one of 'guardianship as of persons underage, incapable of the management of their own affairs.' This official attitude demonstrates the backward steps taken in Aboriginal policy since the days when First Nations were seen as respected and important allies whose support was to be sought and maintained.
>
> Even though the legislation referred to as the '*Indian Act*' was not adopted until 1876, the Canadian parliament began regulating the lives of Aboriginal people shortly after Confederation. In 1868, the government adopted the *Act to provide for the organization of the Department of the Secretary of State of Canada and for the Administration of the Affairs of the Indians*. This law essentially incorporated much of the previous Province of Canada's legislation regarding Indian people, applying it to the country as a whole. This practice of adopting pre-Confederation approaches was continued in 1869, when Parliament adopted *An Act for the gradual enfranchisement of Indians*. This Act gave Canada the authority to

- issue location titles or tickets for tracts of reserve land (these tickets associated individuals with specific tracts of land. This was the first step to private ownership of land and the dissolution of the reserves.);
- establish elected band councils (whose bylaws had to be approved by the federal government);
- remove from office those band councilors believed to be unfit for reasons of dishonesty, intemperance, or immorality;
- grant to any Indian who 'appears to be a safe and suitable person for becoming a proprietor of land' a 'life estate in the land which has been or may be allotted to him within the Reserve belonging to the tribe band or body of which he is a member'; and
- require an Indian woman who married 'any other than an Indian' to 'cease to be an Indian within the meaning of this Act.' Furthermore, the children of such marriage would not 'be considered as Indians within the meaning of this Act.'

Writing about these two Acts in 1870, Deputy Superintendent General of Indian Affairs William Spragge made it clear that the purpose of the legislation was to undermine First Nations' self-government and foster assimilation.

> The Acts framed in the years 1868 and 1869, relating to Indian affairs, were designed to lead the Indian people by degrees to mingle with the white race in the ordinary avocations of life. It was intended to afford facilities for electing, for a limited period, members of bands to manage, as a Council, local matters; that intelligent and educated men, recognized as chiefs, should carry out the wishes of the male members of mature years in each band, who should be fairly represented in the conduct of their internal affairs.
>
> Thus establishing a responsible, for an irresponsible system, this provision, by law, was designed to pave the way to the establishment of simple municipal institutions.

When it was adopted in 1876, the *Indian Act* (formally *An Act to amend and consolidate the laws respecting Indians*) brought together all the laws dealing with Indians into a single piece of legislation. It contained the following key provisions.

*It defined Indians*: An Indian was a male of Indian blood belonging to a tribe. His wife and children were also Indians. Indian women lost their status as Indians under the Act if they married a non-Indian. Furthermore, her children by such a marriage would not have status. This discriminatory provision ignored traditional Aboriginal marriage practices and was to have a long-lasting disruptive impact on Aboriginal families and communities.

*It defined Indian bands:* A band was defined legally as a body of Indians holding land or a reserve in common 'of which the legal title is vested in the Crown,' or for whom funds were held in trust.

*It regulated the sale of Indian lands*: Reserve lands were held in trust by the Crown and could not be mortgaged or seized for debts. This land could be surrendered only to the Crown and only if a majority of male adult band members approved of the surrender at a special meeting. Each surrender required the approval of the minister. As a disincentive for the band to surrender land for immediate gain, no more than 10% of the sale money was paid directly to the band and the rest was held in trust.

*It defined acceptable forms of band government:* Despite the fact that Aboriginal people governed themselves in a wide variety of ways across the country, the *Indian Act* sought to establish a system of an elected chief and council on reserves. Although hereditary chiefs (or 'life chiefs,' as the Act described them) living at the time of the Act could hold their position until death or resignation, the minister could dismiss the band council or councillors for dishonesty, intemperance, immorality, or incompetency. Much like municipalities, band councils were given responsibility for roads, bridges, schools, public buildings, granting of lots, and suppression of vice on reserves.

*It placed limitations on Indian people:* For example, they could not acquire home- steads in Manitoba or the North-West Territories.

*It sought enfranchisement as an ultimate goal*: Under the Act, a band member seeking enfranchisement had to have band approval and been granted an allotment of land from his or her band. The individual would also have to convince Indian Affairs of his or her 'integrity, morality and sobriety.' At the end of a three-year probationary period, such a person would (if their conduct were judged to be satisfactory) receive reserve land. Also, a band member who earned a university degree, qualified as a doctor or lawyer, teacher, or was ordained as a Christian priest, was to be enfranchised.

Enfranchisement did not, in itself, grant an entitlement to vote, which, during much of this period, was subject to provincial regulation. Rather, it removed all distinctions between the legal rights and liabilities of Indians and those of other British subjects, as Canadians were still British subjects. In applying for enfranchisement, an Indian had to abandon reserve and Treaty rights. He would then receive an allotment of reserve lands, which would be subject to assessment and taxation.

If this policy were successful, the federal government would gradually eliminate its obligations to individual Indians as well as its Treaty obligations. It directly impacted the reserves, since it was meant to break them up. It affected the Treaties, because if there were no status Indians, there were no more Treaty obligations. The policy was never popular with First Nations peoples. Between 1857 and 1920, other than women who lost their Indian status upon marriage, only 250 'Indians' were enfranchised.

…

Politicians justified the *Indian Act* as a necessary instrument for protecting First Nations people from exploitation while civilizing them, but, in reality, it was a tool for the autocratic administration of their lives. In the coming years, the Act was regularly amended to further strengthen the government's ability to control Indian people. For example, in the years prior to 1900, the Act was amended to

- give the minister of Indian Affairs the power to replace traditional leadership with elected councils (If a traditionally selected leadership was replaced in this way by an elected council, the elected council was to serve as the official representative of the band.) (1880);
- allow for the denial of band membership to children born out of wedlock (1880);
- allow the minister to ban anyone deposed from office from seeking re-election for a period of three years (1895);
- authorize Indian agents as justices of the peace (1881);

- make it a crime to induce 'three or more Indians, non-treaty Indians, or half-breeds apparently acting in concert,
  - To make any request or demand of any agent or servant of the Government in a riotous, routous, disorderly or threatening manner, or in a manner calculated to cause a breach of the peace; or—
  - To do an act calculated to cause a breach of the peace.' (1884);
- give the minister the power to outlaw the sale or gifting of certain kinds of ammunition to Indians in Manitoba and the North-West Territories (1884);
- make it illegal to participate in traditional West Coast First Nations ceremonies (the Potlatch ceremony and Tamanawas dance) (1884);
- allow the minister to enfranchise a man without band approval (1884);
- allow the Department of Indian Affairs to prohibit or regulate the sale (or any other form of exchange) by any Indian or Indian band of grain and root crops and other produce grown on reserves in western Canada (1881);
- make the game laws of Manitoba and the Territories applicable to Indians (1890);
- give the minister increasing authority to lease lands without band consent (1894, 1895, 1898);
- forbid ceremonies that included the giving away of 'money, goods or articles' or 'the wounding mutilation of the dead or living body of any human being or animal' (1895); and
- increase the minister's ability to spend band funds without band approval (1898).

In short, 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. 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.

The *Indian Act* remained the dominant piece of Aboriginal legislation in Canada, but other key pieces of legislation that had implications for Aboriginal people were adopted in the nineteenth century. The *Electoral Franchise Act* of 1885, for example, gave the vote to adult male Indians over the age of twenty-one, living in eastern Canada, who possessed improved land on reserves. Prior to the adoption of this Act, federal voting rights were established by provincial laws, which meant that Indians who met property qualifications were allowed to vote in some provinces but not in others. When the federal Act was repealed in 1898, provincial governments were once more given the right to determine who could vote in federal elections. They used this power to deny or restrict the voting rights of First Nations people. It would not be until 1960 that First Nations people received the unqualified right to vote in federal elections in Canada.[76]

As the buffalo herds were destroyed, treaties signed, and reserves created, it was time for Canada to make the indigenous lands available to white immigrants. This was done through the *Dominion Lands Act*,[77] among other methods. At the same time, the Parliament of Canada enacted laws to

ensure that Indians would not be given the same opportunities. Under s. 70 of the 1876 *Indian Act*, Indians were prohibited from homesteading on the prairies.

> In addition, most of the western treaties allowed for a maximum of 160 acres or 1 square mile per family of five (and proportionally less for smaller families) whereas federal homestead laws allowed free land grants ranging from 160 to 320 acres per head of family. Section 70 of the 1876 *Indian Act* would seem clearly to represent a further aspect of the isolationist policy for unenfranchised Indians; i.e., the privileges and benefits generally available to the rest of society were to be withheld as inducements for these Indians to abandon their distinctive identities and adopt European ways.
>
> Section 10 of the 1876 Act made it even clearer that a western Indian could not acquire a 'free' grant of Crown lands other than through a share of reserve land. Under this provision, any improved land possessed by an individual Indian that was to be included or surrounded by a reserve would simply be merged with the reserve land. The Indian then had the same 'privilege' as an Indian holding under a reserve location ticket.
>
> The prohibition against Indian homesteading remained in effect until the Act was repealed in 1951.
>
> **…**
>
> Further restrictions were placed on the property rights of western Indians by section 1 of *An Act to Amend 'The Indian Act, 1880,'* which prohibited the sale of agricultural products grown on reserves in the Territories, Manitoba or the District of Keewatin, except in accordance with government regulations. Though some Members objected, Prime Minister Macdonald defended the provision as a measure to prevent the sale of goods 'for liquor or other worthless items.' This provision was retained in the 1888 Act and an Order in Council was passed the same year prohibiting the sale of agricultural products by western Indians without the consent of an Indian agent. A statutory amendment to this effect was passed in 1930 and a similar prohibition applying to all Indians was enacted in 1941, restricting the sale of wild animals and furs. The agricultural products provision remained unchanged until sections 32 and 33 of the 1951 Act broadened its application to all Indians and made such transactions void unless approved by the Superintendent in writing. However, the Minister could exempt individual bands and individual band members.[78]

**6. 1883: Parliament begins funding (under-funding) Indian Residential Schools**

Before the residential school system was created, the Government of Canada appointed a Nicholas Flood Davin to conduct a one-person inquiry into the US boarding-school system. He was appointed in January 1879 and completed his report in March 1879. He had been defeated as a Conservative candidate in 1878 and this was a political appointment by the newly elected Conservative government. He had no background within indigenous peoples.

> Davin certainly saw no need to provide the First Nations of the West with any input into the sorts of schools that were established, let alone give them the type of control that the Five Civilized Nations exercised in the United States. He thought it had been an error and an affront to Canada's dignity to have included schools in the Treaties, since 'it should have been assumed that government would attend to its proper and pressing business in this important issue.' More importantly, by including education in the Treaties, Davin thought the government had mistakenly given First Nations leaders such as Henry Prince in Manitoba the

> belief that they 'had some right to a voice regarding the character and management of the schools as well as regarding the initiatory step of their establishment.' These decisions should be made by government, he thought, and not according to the 'designing predilections of a Chief.'
>
> …
>
> He believed the focus had to be on raising the children away from the parents, and that 'if anything is to be done with the Indian, we must catch him very young.' Once caught, they were to be 'kept constantly within the circle of civilized conditions,' which, in his opinion, required boarding schools. Were it not for the fact that many of the First Nations and Métis populations of the Northwest were still migratory, Davin would have recommended 'an extensive application of the principle of industrial boarding schools.' Instead, he recommended an extension of support for the church-run schools, which he described as 'monuments of religious zeal and heroic self-sacrifice.' These schools had the additional virtue, in his eyes, of being economical, since they recruit 'an enthusiastic person, with, therefore, a motive power beyond anything pecuniary remuneration could supply.' Davin acknowledged that a central element of the education to be provided would be the destruction of Aboriginal spirituality. Since all civilizations were based on religion, it would be inexcusable, he thought, to do away with Aboriginal faith 'without supplying a better.'[79]

A few years later, Parliament created the Indian Residential Schools. The TRC describes the creation of the government sponsored Indian Residential Schools:

> In large measure, most of the administrative costs of the Department of Indian Affairs in the late nineteenth and early twentieth centuries remained as they had been since before Confederation, covered with money from the sale of First Nations land and from the sale of seized timber that had been illegally cut on First Nations land. Funding for industrial schools, however, would have to come from Parliament. In the spring of 1883, Public Works Minister Hector Langevin presented a budget to the House of Commons, based on Dewdney's estimates. He argued that
>
> > if you wish to educate these children you must separate them from their parents during the time that they are being educated. If you leave them in the family they may know how to read and write, but they still remain savages, whereas by separating them in the way proposed, they acquire the habits and tastes—it is to be hoped only the good tastes—of civilized people.
>
> Parliament approved $43,000 in spending for the establishment of three new industrial schools. This decision was made at the same time as the federal government was reducing its spending on relief for First Nations in the West.[80]

For every single year of the operation of Indian Residential Schools, Parliament enacted an appropriation statute that authorized the spending of taxpayer funds for Indian Residential Schools, as well as all other Indian Affairs and indeed Government of Canada expenditures. Appropriation statutes are laws enacted by our elected representatives. Want to stop a government program? Parliament can stop funding it. Want the program to continue? Keep passing laws to fund them.

> In July, the federal Cabinet adopted an Order-in-Council authorizing the establishment of three industrial schools. The Battleford school was to be located in the former residence of

the lieutenant-governor to the North-West Territories (Dewdney's former residence), and its religious orientation was to be Protestant. Anglican minister Thomas Clarke was to be principal, and his salary was to be $1,200 a year. When a sufficient number of students were recruited, some were to be taught trades other than agriculture, the two most likely being carpentry and blacksmithing. Dewdney was in charge of deciding where students came from, whether 'one tribe, or differently from all the bands in a given area.' The other two schools were to be located in Qu'Appelle and in Treaty 7 territory. Archbishop Taché of St. Boniface was authorized to appoint the principal of the Qu'Appelle school and Bishop Grandin of St. Albert was to appoint the Treaty 7 principal. The Catholics were advised to seek out a person 'possessed not only of erudition but of administrative ability.' Dewdney was to oversee the construction of the Qu'Appelle school, the cost of which was not to exceed $6,000. The Qu'Appelle school was to have the same staff complement as the Battleford school. Dewdney was advised to be guided by Davin's report in establishing the residential schools.

The Battleford school opened on December 1, 1883. It was the beginning of a new era in Canadian residential schooling. Before then, most of the initiative for residential schooling had come from the churches. They had built the schools, hired the staff, recruited the students, and made and enforced most of the policy. The federal government had limited itself to providing grants of usually no more than $300 a year. But, by establishing the three industrial schools in the North-West, the government was accepting responsibility for the creation of a system of residential schools. The schools were created on the basis of a government-commissioned report, and were intended to meet government policy goals, not those of the churches. And, while administered by the churches, the new schools were fully funded by the government. The system grew rapidly. By 1900, there were twenty-two industrial schools and thirty-nine boarding schools. In the twentieth century, the distinction between the two types of schools was abandoned and, by the 1920s, they were all called 'residential schools.' The system remained in operation for another seventy years, until the mid-1990s.

…

The attack on Aboriginal children was the most obvious and grievous failing of the residential school system. For children, life in the schools was lonely and alien. Supervision was limited, life was highly regimented, and buildings were poorly located, poorly built, and poorly maintained. The staff was limited in numbers, often poorly trained, and not adequately supervised. The schools often were poorly heated and poorly ventilated, the diet was meagre and of poor quality, and the discipline was harsh. Aboriginal culture was disdained and languages were suppressed. The educational goals of the schools were limited and confused, and usually reflected a low regard for the intellectual capabilities of Aboriginal people. For the students, education and mechanical training too often gave way to the drudgery of doing the chores necessary to make the schools self-sustaining—a fantasy that government officials indulged in for over a half-century. Child neglect was institutionalized, and the lack of supervision created situations where students were prey to sexual and physical abuse.

These things did not just happen: they were the result of government decisions. In July 1883, Prime Minister Macdonald wrote to Public Works Minister Langevin that the two Roman Catholic schools were to be 'of the simplest & cheapest construction.' Macdonald thought that in two or three years' time, the cost of building materials would have dropped to the point where the government could authorize 'permanent buildings in brick.' In reality, once buildings were constructed, they often continued in operation until they burned or fell down.

> Dewdney closed his July 1883 letter of instructions to Battleford principal Thomas Clarke with the message, 'I need scarcely inform you that the strictest economy must be practised in all particulars.' Problems soon arose from placing the Battleford school in what had once been a private residence, a decision intended to save money. In June 1884, Principal Clarke reported that 'the need of having a good supply of water near the Institution is daily becoming more urgent.' The closest water supply was from the river, which was almost a kilometre away at the bottom of a steep hill.[81]
>
> …
>
> Perhaps the most definitive expression of the rationale behind the war on Aboriginal families came from Prime Minister Macdonald, who told the House of Commons in 1883:
>
> > When the school is on the reserve the child lives with its parents, who are savages; he is surrounded by savages, and though he may learn to read and write his habits, and training and mode of thought are Indian. He is simply a savage who can read and write. It has been strongly pressed on myself, as the head of the Department, that Indian children should be withdrawn as much as possible from the parental influence, and the only way to do that would be to put them in central training industrial schools where they will acquire the habits and modes of thought of white men.[82]
>
> The refusal to accept the legitimacy of Aboriginal culture as constituting a valid civilization is reflected in Davin's claim that residential schools were required if children were to be 'kept constantly within the circle of civilized conditions.' Dewdney recycled this language in his annual report for 1883: 'we must take charge of the youth and keep him constantly within the circle of civilization.' Both Davin and Dewdney argued that education would make Aboriginal people self-sufficient, but they also expressed racist views in the way they perceived Aboriginal people's natural abilities. In the same 1883 annual report, Dewdney repeated Davin's claim that Aboriginal people had 'inherited aversion to toil.' Dewdney's only change was to substitute the word 'labour' for 'toil.' To overcome this supposed aversion to toil, the schools were operated on a highly regimented system that equated labour with spiritual grace. The program of studies the government issued in the mid-1890s stressed, 'Every effort must be made to induce pupils to speak English, and to teach them to understand it; unless they do the whole work of the teacher is likely to be wasted.'[83]
>
> …
>
> Indeed, in his 1883 annual report, Macdonald acknowledged that the government was aware it was introducing a form of education that Aboriginal people did not support. 'The Indians,' he wrote, 'show a reluctance to have their children separated from them.' He expected that initially the schools would be filled with 'orphans and children who have no natural protectors.'[84]

Parliament was well aware of the purposes of the Indian Residential Schools. The TRC continues:

> In an 1888 parliamentary debate over the provision of $14,000 for the construction of two additional industrial schools in Manitoba, Sir Richard Cartwright, a member of the Liberal opposition, inquired as to the purpose of the schools. Prime Minister (and Indian Affairs minister) Sir John A. Macdonald told him:

> General industrial purposes. It is found that the common schools are of comparatively little value. The young Indian learns to read and write, and then goes back to his tribe, and again becomes a savage. The object is to get the young men and the children severed from the tribe as much as possible, and civilise them and give them a trade. There is also provision made for girls.

When Cartwright asked if the students went back to their reserve after graduation, Macdonald said, 'No, we endeavor to discountenance that as much as possible.' Graduates, he said, could get homesteads, and 'if they can get white women or educated Indian women as wives, they sever themselves from their tribes.' [In fact, the *Indian Act* was amended to prohibit Indians from getting homesteads; meanwhile, homesteads were being given away for free to white immigrants.]

The following year, in his annual report, Minister of Indian Affairs Edgar Dewdney wrote:

> The boarding school dissociates the Indian child from the deleterious home influences to which he would be otherwise subjected. It reclaims him from the uncivilized state in which he has been brought up. It brings him into contact from day to day with all that tends to effect a change in his views and habits of life. By precept and example he is taught to endeavour to excel in what will be most useful to him.

This view was shared by bureaucrats and missionaries. In 1894, Deputy Minister of Indian Affairs Hayter Reed wrote:

> Experience has proved that the industrial and boarding schools are productive of the best results in Indian education. At the ordinary day school the children are under the influence of their teacher for only a short time each day and after school hours they merge again with the life of the reserve. It can readily be seen that, no matter how earnest a teacher may be, his control over his pupils must be very limited under such conditions. But in the boarding or industrial schools the pupils are removed for a long period from the leadings of this uncivilized life and receive constant care and attention. It is therefore in the interest of the Indians that these institutions should be kept in an efficient state as it is in their success that the solution of the Indian problem lies.

Father Joseph Hugonnard, the first principal of the Qu'Appelle school, wrote that 'if it were difficult or impossible to civilize and convert the savages born and bred with paganism, there was a way to civilize and Christianize their children, especially if one could get them out of that pagan environment and place them and teach them in a school with the goal of making them into good citizens and good Christians.'

Edward Matheson, the Anglican principal of the Battleford school, wrote in 1899:

> The boarding or industrial school system—away from the reserves, if possible— is the sure way to solve the long debated 'Indian Problem'. It is the way to civilize the Indian and merge him into the corporate life of the country—his true and proper destiny. He has given ample proof of this where he has had a fair opportunity. Most of those educated in these schools do not wish to return to reserve life, but to strike out amongst the settlers and make their own way.

In a similar vein, the Reverend Alexander Sutherland, general secretary of the Methodist Church of Canada's Missionary Department, wrote:

> Experience convinces us that the only way in which the Indian of the Country can be permanently elevated and thoroughly civilized is by removing the children from the surroundings of Indian home life, and keeping them separated long enough to form those habits of order, industry, and systematic effort, which they will never learn at home. He thought the girls should be kept at school for five years and the boys for six years, during which time they would not go home. 'The return of the children to their homes, even temporarily, has a bad effect.'
>
> These statements from government and church officials make it abundantly clear that the overall purpose of residential schooling was to separate children from their parents and their culture so they could be 'civilized' and 'Christianized.' Once so transformed, they could be enfranchised. They would no longer be 'Indians,' either culturally or legally, and would have no special claim on the state for support. It was expected they would be self-supporting because the schools would have instilled in them an industrial work discipline. But, other than these overall goals, there was little unanimity, less policy, and scant regulation.[85]

The Indian Residential Schools era had begun, being only part of the general legislative goals to remove indigenous peoples from their lands, remove indigenous children from their parents, "civilize" indigenous peoples, destroy their sense of self-government and self-worth, destroy their spirituality and their languages. In addition, the schools that were part of this effort would be run on a lowest possible cost basis.

**7. Hitting children in school is not criminal assault**

> *The Truth and Reconciliation Commission of Canada has yet to locate a single, system-wide, directive on discipline [i.e. corporal punishment] that applies to this historical period. [i.e. before 1953]*[86]

Canada's criminal law of assault began with the application of the laws in England. England's criminal law was established by the common law: court decisions. English criminal law permitted the hitting of children. A landmark case in 1860 made this clear. The case is *R. v. Hopley* (commonly known as the Eastbourne manslaughter). According to the Wikipedia entry, the case concerned:

> the death of 15-year-old Reginald Cancellor (some sources give his name as Chancellor and his age as 13 or 14) at the hands of his teacher, Thomas Hopley. …Cancellor was not a good student, with contemporary sources suggesting he 'had water on the brain' and describing him as 'stolid and stupid'. Hopley, the teacher, attributed Cancellor's failure to learn to stubbornness. On 18 April 1860 he asked the boy's father for permission to use 'severe corporal punishment' to obtain compliance, with permission being granted two days later. Hopley did not possess the cane traditionally used to administer corporal punishment to students, so instead he used a skipping rope and a walking stick. … Hopley was arrested and charged with manslaughter. He was found guilty at trial and sentenced to four years in prison, although he insisted that his actions were justifiable and that he was not guilty of any crime. … The case became an important legal precedent in the United Kingdom for discussions of corporal punishment in schools and reasonable limits on discipline. … Hopley was convicted of manslaughter, not murder, because of his position as a schoolteacher 'endowed with parental authority'. Sir Alexander Cockburn, the Chief Justice of the Court of King's Bench, presented a summary of the decision:[87]

> By the law of England, a parent or a schoolmaster (who for this purpose represents the parent and has the parental authority delegated to him), may for the purpose of correcting what is evil in the child, inflict moderate and reasonable corporal punishment, always, however, with the condition, that it is moderate and reasonable. If it be administered for the gratification of passion or of rage, or if it be immoderate or excessive in its nature or degree, or if it be protracted beyond the child's powers of endurance, or with an instrument unfitted for the purpose and calculated to produce danger to life and limb: in all such cases the punishment is excessive, the violence unlawful, and if evil consequences to life or limb ensue, then the person inflicting it is answerable to the law, and if death ensues it will be manslaughter.[88]

The Department of Indian Affairs did not have a policy defining when, how or who could hit the children in Indian Residential Schools until the 1950s, and what feeble directions were given were not enforced. The Truth and Reconciliation Commission explains:

> The churches and religious orders that operated the schools had strong and interrelated conceptions of order, discipline, obedience, and sin. They believed that human beings were fallen, sinful creatures who had to earn salvation through mastery of their nature by obedience to God. The approach to discipline in schools was based in scripture: corporal punishment was a biblically authorized way of keeping order and of bringing children to the righteous path.
>
> Nineteenth-century educational bureaucrats such as Egerton Ryerson were critical of excessive force in the school, but even he believed that the 'best Teacher, like the best Parent, will seldom resort to the Rod; but there are occasions when it cannot be wisely avoided.' Ryerson, a leading figure in the Methodist Church, believed that opposition to corporal punishment was 'contrary to Scripture.' The birch rod was the staple disciplinary tool of the first half of the nineteenth century. In the 1880s, at the Central School East in Ottawa, there was an average of sixty strappings a month. At the Jesse Ketchum public school in Toronto in 1888, students were strapped for such offences as 'fighting, misbehaving in line, lying, eating in school, neglecting to correct wrong work, shooting peas in the classroom, going home when told to remain, long continued carelessness and general bad conduct.' At that school, a strapping was between four and twelve beatings on the palm of the hand. The strap was still in use a half century later: in 1933, the strap was administered to 1,500 Toronto school students.
>
> Provincial governments provided public schoolteachers with only limited guidance as to how children were to be disciplined. In 1863 in New Brunswick, the department of education urged teachers to 'exercise such discipline as would be pursued by a judicious parent in his family.' The 1891 Ontario *Education Act* instructed teachers not to exceed measures that would be taken by a 'kind, firm, and judicious parent.'[89]

In 1892, Canada enacted its *Criminal Code*, which included s. 55: **"**It is lawful for every parent, or person in the place of a parent, schoolmaster or master, to use force by way of correction towards any child, pupil or apprentice under his care, provided that such force is reasonable under the circumstances."[90] It can be seen that this is simply a continuation of what was said in the *Hopley* case in 1860. Even in 2017, the *Criminal Code* s. 43 states: "Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances."[91] In other words, the law has not changed more than 150 years later.

The TRC continues:

> Teachers who went beyond these boundaries could be charged with assault under the *Criminal Code*. Canadian courts had ruled that corporal punishment could not be unreasonable, exceed the severity of the offence, or be carried out with malice. Teachers who hit students on the head or took other actions that could lead to permanent physical harm ran the risk of conviction. Courts also ruled that discipline was not excessive if the teacher had an honest belief that the student had committed an offence and that belief was supported by probable grounds. While corporal punishment was an accepted part of education and child rearing in Euro-Canadian society, the courts had placed limits on its use. However, historically, corporal punishment did not have this same level of acceptability among Aboriginal people. And, in many cases, residential schools imposed punishments on Aboriginal children that were in excess of the norms that would be accepted even in Euro-Canadian society at that time. The large number of recorded parental complaints, coupled with the schools' ongoing difficulty in recruiting students, is evidence of occasions where discipline imposed by the schools exceeded what would have been acceptable in either Aboriginal or European communities.
>
> Although the schools felt justified in using discipline, including corporal punishment, to establish and maintain order, Indian Affairs never provided system-wide guidelines or regulations that placed limits on the use of discipline. Instead, instructions were provided on a case-by-case basis. This was so in the 1880s and it still continued in the 1930s. Indian Affairs officials were aware that, since the beginning of residential schools, staff members were using corporal punishment. In 1885, Albert Lacombe, the principal of the High River school in what is now Alberta, wrote in the Indian Affairs annual report:
>
> > We have found by past experience that it is impossible to control and manage these Indian boys by mere advice and kind reprimand. If we have not some system of coercion to enforce order, and at least a little school discipline, then I assure you it will be very hard to conduct the school with that measure of success which, it was hoped, would attend its establishment.[92]

The TRC reports on the following case from 1896:

> Sometimes, conflict broke out into the open. In the spring of 1896, Brandon principal John Semmens sought advice from Indian Commissioner Amédée Forget about how to deal with a group of rebellious students. One boy had 'collared' and threatened a staff member, and, on separate occasions, two others had challenged another staff member to a fight. Semmens had been able to obtain apologies from the students in each case, but he feared that they might 'combine and give trouble to all concerned. It may be necessary to handcuff or imprison if the ordinary corrective influences fail us.' Without reference to any specific policy, Forget recommended that, in the face of repeated behaviour of this kind, Semmens would be justified in punishing the boy by depriving him of a holiday, placing him on a 'simple diet,' or, 'as a last resort, unless the boy had great provocation, by corporal punishment.' This 'should not be more severe than a strapping on the hand, which should be administered in the presence of the whole school, and after such a full explanation of the case as will leave no doubt in the mind of any one as to the justice and necessity of the course pursued.' Forget's letter did place limits on where blows could be landed when punishing students. It did not

> limit the number of blows. It also incorporated humiliation into the punishment process by having the student strapped in front of the entire school population.
>
> By the time Semmens had received Forget's advice, the situation had escalated: at the principal's request, three boys had been arrested for attacking a staff member. Semmens had recommended that the sentence be only one night in duration, but the magistrate, angered by the boys' defiance in court, sentenced them to a week in jail.[93]

The TRC states:

> The Truth and Reconciliation Commission of Canada has yet to locate a single, system-wide, directive on discipline that applies to this historical period. [before 1953] The churches and, more specifically, individual principals were left to develop their own policies. When these policies attracted unwanted attention, the government might step in and demand that the policy be changed or that the principal be dismissed. In many cases, the churches refused to comply with such instructions.[94]

The TRC confirms: "although no staff member was prosecuted or convicted for abusing students at residential schools during this period (from 1867 to 1939), it is clear that such abuse took place."[95]

Hitting children was permitted by law and was a common practice at Indian Residential Schools.

**8. Indian Residential Schools illegally make decisions about medical treatments for the children in the schools**

> *A 1981 legal opinion … concluded that 'neither the Indian Act nor any regulation thereunder nor any other federal statute of which we are aware provides a legislative basis for the delegation of parental rights and responsibilities of an Indian child to the Crown or any agency thereof.*[96]

The question of who had the legal right and power to consent to medical treatments for indigenous children at residential schools would have arisen from the very beginning of the schools. However, the TRC discusses the issue in its History, Part 2, beginning in 1940. The TRC reports:

> Attitudes and regulations regarding consent for the provision of medical care and participation in research studies underwent significant change in the last half of the twentieth century. Not surprisingly, the issue was a particularly vexing one for Indian Affairs, which traditionally had demonstrated limited respect for Aboriginal parents and their views. It had long been the department's position that parents relinquished their rights to guardianship when they enrolled their children in a residential school. The residential school 'Application for Admission' forms in use in 1940 required parents to acknowledge that their child was to remain at school "under the guardianship of the principal for such term as the Minister of Mines and Resources may deem proper.' That wording was still in use at the beginning of 1963 (although, in 1951, the reference to the Minister of Mines and Resources had been changed to the Minister of Citizenship and Immigration).
>
> Although this wording implied a wide-ranging authority, it had no legal basis in the *Indian Act*, or in other legislation. It could not be seen as a surrender of legal guardianship. At most, it may have amounted to a revocable parental grant of authority for the principal to have legal

authority to make medical and other parental types of decisions for the child while in the school. The record does make it clear that from the 1940s onward, Indian Affairs officials began to seek parental granting of authority in a number of instances involving medical care. For example, it was the practice not to transfer students to sanatoria without parental consent. In 1940, the mother of a child at the Fort Frances, Ontario, school declined to give her consent to have her daughter treated at a sanatorium. A nurse's decision in 1946 to send children from the Grouard, Alberta, school to a hospital in Edmonton without prior consultation with the parents drew criticism from Oblate officials. In her own defence, the nurse said she thought she was acting in keeping with health department policy to remove children with tuberculosis from schools quickly. Health officials instructed the Indian agent in the region that it was department policy 'not to use compulsion to procure the removal of a tuberculous Indian to this hospital nor to bring an Indian child to the hospital without the parent's consent.'

…

There appears to have been recognition that consent was required for non-emergency surgeries. In 1943, the Blue Quills, Alberta, school administration assured Indian Affairs that it had acquired parental consent for five girls who were in need of surgery. Two years later, an Indian agent was informed that he could arrange a tonsillectomy for students at the Edmonton, Alberta, school if the parents provided their consent. In recommending that the local Indian agent arrange tonsillectomies for four students at the Shingwauk Home at Sault Ste. Marie, Indian Health Services official W. L. Falconer recommended in 1946 that, 'if at all possible,' the agent should obtain the permission of the parents.

Less care appears to have been shown in securing consent for immunizations. In 1945, a nurse asked if it was necessary to get parental consent prior to immunizing children against smallpox, scarlet fever, typhoid, diphtheria, and whooping cough. She said that although a smallpox vaccination was mandatory for First Nations children, she could find no direction regarding the other immunizations. She noted that it was the practice 'in the White Schools to obtain written consent but it would make the Inoculations of Indian Children very spotty and difficult.' Acting on what he said was the direction of Indian and Northern Health Services official P. E. Moore, medical superintendent Dr. W. S. Barclay had not been obtaining the consent of parents prior to administering the anti-tuberculosis vaccine BCG at residential schools in British Columbia in the mid- to late 1940s. He said he always obtained 'the preliminary agreement of the Principal.' In 1955, a Northern Affairs official, who was organizing a polio immunization program in the Northwest Territories, agreed that parental consent should be acquired prior to the immunization of their children, and he prepared a form for parents to sign. At the same time, he wrote, 'Where the parents are not available to sign the consent, I do not think the child should go without vaccination, however. The medical officer will have to use his own discretion in cases of that nature.'

A Canadian court decision in the early 1960s held that only a parent or legal guardian could sign or delegate responsibility for a medical procedure. Under this ruling, a legal guardian was either a parent 'or an individual into whose care a child is placed by court proceedings.' Since the admission form was not a legal transfer of guardianship, a federal legal adviser recommended in 1961 that the application form be redrafted to include the following paragraph:

> I hereby make application for the admission of the above child into the residential school shown, to remain therein under the guardianship of the principal for such term as the

> Minister of Citizenship and Immigration may deem proper and I hereby give the principal express permission to authorize such medical and dental treatment as he, in his discretion, deems necessary.

A separate paragraph was eventually added to the admission form, which conformed to the legal advisor's recommendation. A note on the form added:

> The signature of the responsible parent or guardian on the application givesthe principal permission to authorize such medical and dental treatment as he in his discretion deems necessary, this covers both preventive and emergency treatment, but in all cases involving an operation, an endeavour should be made to obtain the parent's consent.

Since the parents of students who had been admitted in previous years did not sign new admission forms each year, an additional form, dealing solely with the authorization of treatment, was prepared for the parents of children who were returning to school. Indian Affairs also instructed principals to accept returning students, even if the parents refused to sign the form. This worried Henry Cook, the head of the Anglican Indian School Administration. He pointed out that the principal was not the legal guardian and therefore could not legally authorize medical or dental treatment. He felt that no principal should be compelled to accept a student if the parents had not signed over to that principal the authority to approve medical treatment for their child.

In commenting on the changes, one Indian Affairs official noted that in the case of orphans, 'some of these children have spent all most [sic] all their childhood in Residential schools, they have no official recognized guardian and it is extremely difficult to trace any members of the family at the Uncle or Aunt level.' In the case of three children at the Shingwauk school who had no legal guardian, Indian Affairs recommended that the consent form be signed by the 'friend or relative' who took care of them when they were not in school. If no such person existed, the Indian Affairs officials were instructed 'to authorize ordinary or medical treatment. In the event of emergency treatment involving an operation, presumably the medical authorities would accept the responsibility of performing such an operation.' Cook had predicted that the policy of allowing children to be admitted without a signed medical consent form would give rise to problems: he was correct. By November 1962, the Kuper Island school had admitted twenty-nine students for whom it did not have medical consent forms. More than half of the students at the Mission school did not have signed medical consents on file in 1963. As a result, school officials felt that they could not provide the students with polio vaccine, as part of an anti-polio campaign.

In 1967, Indian Affairs introduced a second form to be completed by the parents (or legal guardians) of children applying for admission to residential school. This was called the 'Application for Admission to Pupil Residence.' It required the parent to

> entrust to the Crown Jurisdiction and guardianship of this pupil from the date the pupil leaves his/her home officially in transit to the Pupil Residence and until such time as the said pupil is returned to my custody or some other place as may be authorized by me. Guardianship of this pupil can be delegated by the Crown in providing for this pupil's welfare, education, medical and social engagements.
>
> I hereby delegate to the Crown authority to act so far as is necessary for the welfare and behaviour of the pupil, and I further agree to remove said pupil from the Pupil Residence when requested to do so by the Administrator of a Contract Pupil Residence or the

> Regional Superintendent of Schools in charge of a Government-operated Pupil Residence.

The form also required the parent to give 'full consent to the attending Physician and Hospital Staff to carry out any form of examination, test, treatment or operation' on the child 'that they may deem necessary and do therefore absolve them from any consequence thereof.' This form granted the government guardianship and the right to delegate that guardianship, while previous forms had granted the guardianship to the principal. For the first time, the form absolved caregivers of the consequences of medical treatment they provided.

The new form did not replace the old one, but appears to have been used in addition to it. Both forms were used by the same institutions at the same time, and were in use until 1976. In 1977, both forms were, rather confusingly, renamed the 'Application for Admission to Student Residence/Group Home.' One form was only slightly amended, essentially only adding the parenthetical phrase 'Group Home' after the phrase 'Student Residence.'

The other form carried a more significant change: a time limit had been placed on the period in which the child was being placed under the administrator's guardianship. The form read that the parent agreed to place the child 'under the guardianship of the Administrator for a period of 12 (twelve) months or for such a term as the Minister of Indian Affairs and Northern Development may deem proper.' The parent also gave the administrator permission 'to authorize (on my behalf) such medical and dental treatment as becomes necessary from time-to-time.'

On the basis of such documents, the administrators of the student residences were believed to have the authority to give consent for tuberculin testing and vaccination of students who lived in residence.

Despite the use of this increasingly detailed language in the admission forms— and the language absolving doctors and hospital staff of responsibility for the consequences of treatment—by the early 1980s, hospitals were increasingly unwilling to rely upon the consent of a residence administrator. A 1981 legal opinion by R. B. Laschuk, the solicitor for the Regina General Hospital, concluded that 'neither the *Indian Act* nor any regulation thereunder nor any other federal statute of which we are aware provides a legislative basis for the delegation of parental rights and responsibilities of an Indian child to the Crown or any agency thereof.' The opinion observed that although the application forms

> appear to delegate to the Crown (and Crown in turn having a further power of delegation) jurisdiction and guardianship of the child, including the provision for the child's medical needs, we do not believe that any specific individual under the power of delegation is 'in loco parentis' [in the place of the parent] to the child. While the administrator of the school may indeed have the temporary custody and control of such child, we do not believe that he is constituted either the parent or the guardian and accordingly, we do not believe that a consent signed by the administrator would qualify as the consent required under s.55 of the Hospital Standards Regulations, nor under the requirements of an informed consent generally.

The regulations referred to under the Saskatchewan *Hospital Standards Act* required that doctors obtain written consent from the parent or the child's legal guardian unless a state of emergency existed. The authorization signed by the parent on admission was not deemed to be sufficient under this regulation.

Indian Affairs acknowledged that 'the *Indian Act*, or any Federal statute as far as we know, does not provide for the delegation of parental rights and responsibilities of an Indian child to the Crown or it's [sic] agent.' (Section 52 of the *Indian Act* did authorize the minister to administer or provide for the administration of property to which 'infant children of Indians are entitled' and to appoint a guardian for this purpose. But this was not a guardian who would take the place of a parent in all aspects of a child's life.)

The federal government instructed student residence administrators in Saskatchewan that

> even though the administrator has been assigned temporary custody control [sic] of a child he must make every attempt to secure consent of parent [sic] in cases of elective surgery. If written consent is physically impossible to obtain, verbal consent (by telephone—dated and witnessed) should be obtained in order that the administrator and hospital and staff can be protected from possible legal liability where the necessity of an informed consent exists.

The administrator of the Duck Lake residence, D. Seesequasis, pointed out that hospitals were requiring that consents be signed on the day of elective surgery. Not only were most parents of children at the residence unable to be at the hospital on the day of surgery, he wrote, but also 'most of our parents do not have telephones and even if we were to pick up parents for the purposes of signing their children into a hospital, the time and miles just to achive [sic] this are enormous.' In the previous nine years, he had signed all consent forms for elective surgery. 'Now,' he wrote, 'I really do not know what to do.'

By the early 1980s, many of the schools were being operated by First Nations education authorities, especially in southern Canadian provinces. Some of these authorities developed their own application forms. The Duck Lake residence had a residence-specific form by 1983.

It stated that the child was to

> remain under the guardianship of the Administrator and delegate(s) thereof who are hereby authorized to provide such Child's education and welfare, including the making of such travel arrangements and providing such discipline as may in absolute discretion of the Administrator and delegate(s) be required, for such term as the administrator may deem proper.

The form also gave the 'Administrator, Assistant Administrator, Nurse or Supervisor' permission to sign, 'as the lawful custodian and lawful guardian of my son/daughter while the same is registered as a student' at the residence, 'all medical forms, authorizations or releases' that are 'required to accommodate the full and proper medical treatment of my son/daughter, including without restrictions or waivers.' The parent reserved the right to revoke this authorization in writing. It appears that parents applying to have their children admitted to the Duck Lake residence also had to fill out an Indian Affairs application form that transferred guardianship to the Crown. The Gordon's, Saskatchewan, school, which was not under First Nations management, used a similarly worded application form in the 1990s, without the section relating to doctors and hospital staff. Evidence suggests that in the two previous decades, it was the practice, at least of that school, to get parental permission for most medical and dental services. Before students could participate in a program of fluoride mouth rinses operated by the Saskatchewan government in the 1980s, their parents had to

> provide signed consent. The school also required parents to provide consent for visits to specialists in the 1980s and for tonsillectomies in the 1990s.
>
> All the same, in 1986, the administrator of the Gordon's residence continued to state that, as the legal guardian of the children, he was authorized to give consent for medical treatment of students, including immunization.
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> Forms for schools in the Northwest Territories differed from those used in the rest of Canada. Prior to the late 1950s, students with status under the *Indian Act* were admitted using forms that employed the same language as the forms in the rest of the country. The admission form for students who did not have status under the *Indian Act* in the Northwest Territories in the 1920s and 1930s—usually orphans or destitute children—committed them to the school for as long as the Department of the Interior deemed proper. The form made no mention of guardianship or medical treatment. The establishment of the large hostel system at the end of the 1950s led to the adoption of a new form for all students. The form in use in 1960, for example, made no mention of guardianship or medical treatment. Under the form in use in 1971, the parent agreed that 'the guardianship of this child may be delegated by the Government of the Northwest Territories in the course of providing for his welfare, education, medical needs and social and sports engagements, including approved travel incidental thereto.' The parent was also required to 'give full consent to the attending Physician and Hospital Staff in cases of emergency to carry out any form of examination, test, treatment or operation that they deemed necessary for my child's welfare and therefore absolve them from any consequences thereto. Parents are to be contacted as soon as possible.' With only slight amendment, the form was still in use in 1993.[97]

Although a 1981 legal opinion found that there had never been a legal basis for residential school administrators making decisions about the medical treatment of the children in the schools, that is how the schools were conducted for their entire history, at least until 1981.

**9. 1884: indigenous ceremonies prohibited by law; 1885 Riel Rebellion and the beginning of the illegal pass system**

Almost immediately after creating Indian Residential Schools, Canada then enacted other laws to make indigenous ceremonies illegal. The TRC reports:

> Restrictions were also placed on Aboriginal spiritual practices during this period. Ceremonies such as the Potlatch in British Columbia and the Thirst Dance (usually called the "Sun Dance" by government officials) on the Prairies played an important role in the lives of Aboriginal people. Such ceremonies served to redistribute surplus, demonstrate status, cement and renew alliances, mark important events such as marriages or the assumption of position, and strengthen the bond with spiritual forces.
>
> Missionaries attacked them as 'pagan rites,' and government officials objected to the fact that they undermined the accumulation of private property, took people away from agricultural pursuits, brought together bands they were trying to keep separate, and strengthened the status of traditional leaders and Elders. Those missionaries involved in residential schooling played a central role in lobbying for the suppression of the Potlatch and the Sun Dance, arguing that the ceremonies undid much of the work that had been accomplished in the schools. The Reverend Albert H. Hall at Alert Bay in 1896 framed the debate with the succinct 'It is school versus potlatch.' To Archdeacon J. W. Tims, who ran an Anglican

boarding school in Alberta, the Sun Dance was 'that great heathen festival.' On his first encounter of it, he recalled, 'If I ever felt the hopelessness of a task set me to do it was then.'

An 1884 amendment to the *Indian Act* first banned the Potlatch, and Prairie 'give-away dances,' as they were often termed by government officials, were banned in 1895. Government officials were instructed to prosecute only as a last resort. But they often came under pressure from missionaries to take action. In 1897, five people were arrested at the Thunderchild Reserve in what is now Saskatchewan for holding a give-away dance. Three were sentenced to two months in jail. The commander of the Mounted Police at Battleford thought the jail terms too harsh and worked to secure early releases for the men, who were all elderly. In 1897, the Blackfoot agreed to shorten the number of days devoted to the ceremonies and to not include some of the practices, such as ritual piercing, that were specifically banned by legislation. Indian Commissioner Amédée Forget, however, would not abandon the department's requirement that the tongues of slaughtered cattle be either removed or split, making them unavailable for consumption at the ceremonies, which he viewed as being immoral and heathen.[98]

…

In 1884, the federal drive to suppress Aboriginal spirituality took an aggressive turn when the Potlatch ceremonies of the First Nations of the Pacific coast were banned. These ceremonies served to redistribute surplus, demonstrate status, cement and renew alliances, mark important events such as marriages or the assumption of position, and strengthen the relationship with spiritual forces.

Thomas Crosby, a Methodist missionary who eventually established a boarding school in Port Simpson, was a strong opponent of the Potlatch ceremony, as was the Anglican missionary William Duncan in nearby Metlakatla. Like other missionaries, they recruited the converts they had made among Aboriginal people to the missionary war against Aboriginal culture. In 1883, Christian First Nations people from British Columbia's north coast submitted a petition calling on the federal government to ban the Potlatch. The petition had been drafted with the assistance of Crosby and another Methodist missionary, A. E. Green, a future Indian Affairs official. The following year, Roman Catholic missionary and future Kuper Island school principal George Donckele and Methodist missionary Cornelius Bryant both supported Cowichan-area Indian agent William Lomas's recommendation that the Potlatch be suppressed.

Donckele said that parents who participated in the Potlatches were left impoverished, and had to withdraw their children from day schools in the winter to accompany them in a search for food. Bryant said, 'The Church and school cannot flourish where the 'Potlatching' holds sway.' Shortly thereafter, the government introduced an amendment to the *Indian Act* that made participation in a Potlatch or Tamanawas dance (another west coast First Nations ceremony) a misdemeanour, punishable by two to six months in jail. The amendment simply named the ceremonies and provided no further description as to what they constituted.

As a result of this vagueness, early efforts to enforce the law foundered. British Columbia Chief Justice Sir Mathew Begbie not only overturned the first conviction obtained under the law, but also ruled that because the law did not adequately define what a Potlatch was, it was essentially unenforceable.

On the Prairies, the missionaries who established residential schools in the late nineteenth century were also strong opponents of Aboriginal spiritual ceremonies such as the Thirst Dance (often referred to by officials as the 'Sun Dance'). Austin McKitrick, who taught at the Methodist school in Morley in what is now Alberta, was appalled when he realized that students from his school were re-enacting Sun Dances in their play. Not only did they pierce their breasts with sewing pins, they also insisted 'the sun dance was the right and good way to worship the Great Spirit.' Albert Lacombe, the founding principal of the Roman Catholic school at High River in what is now Alberta, called on the minister of Indian Affairs to end the Sun Dance, which he described as an 'ugly feast' and 'barbarian show.'

Not all government officials favoured the banning of ceremonies. Indian Commissioner Edgar Dewdney wrote in 1884 that he believed the Sun Dance would 'gradually die out; and it will be better to allow it to do so, without using strong measures to prevent its celebration as many of the old Indians, who generally inaugurate the dance, attach great importance to it.' Hayter Reed took a more aggressive approach. He believed that the ceremonies tended 'to create a spirit of insubordination among the young men of the bands.' When he was an Indian agent in the 1880s, he attempted to prevent them from taking place. Reed was appointed deputy minister of Indian Affairs in 1893. Two years later, the *Indian Act* was amended to make it easier to convict people who participated in the Potlatch. The amended Act included a more extensive definition of the types of dances and ceremonies that were to be outlawed. These included ceremonies that involved the giving or gifting of money and goods, or the wounding or mutilation of humans or animals. These amendments allowed the *Indian Act* to be used to suppress not only the Potlatch in British Columbia, but also a variety of ceremonies that were observed on the Prairies, including Thirst Dances. In enforcing the law, Indian agents were encouraged to persuade First Nations people to abandon their traditional ceremonies, using prosecution as a last resort. The British Columbia Indian superintendent, A. W. Vowell, informed his staff that the law should be enforced carefully—and not too strictly. As a result, in that province, it appears that there was only one conviction for a Potlatch in the decade following the 1895 amendment. Much of the pressure that Vowell came under to enforce the law more aggressively came from school officials. When Kuper Island principal Donckele reported in 1897 that a 'tamanawas dance' had been held, Vowell concluded that the ceremony 'was of a most orderly nature' and no prosecution would be authorized. Six years later, Vowell threatened to clamp down on dancing in the Kuper Island area unless parents sent their children to school. At Cape Mudge, a Methodist missionary who believed that dances were keeping children out of school nearly precipitated a violent confrontation when he sought to have two men arrested under the Potlatch laws. The prosecution, which Vowell had not approved of, failed for lack of evidence.

On the Prairies, Indian agents also were instructed to use prosecution as a last resort. Despite this, the 1895 amendments ushered in an era of prosecution and repression. In some cases, persuasion was little more than a veiled threat: Indian agent A. McNeill in what is now Saskatchewan recognized that it was the presence of the Mounted Police, and not his arguments, that dissuaded the File Hills Cree from conducting a ceremony in 1896. In addition, the pass system, which had been implemented without legislative authority, was used to prevent First Nations people from travelling to ceremonies being held at other reserves.

Qu'Appelle school principal Joseph Hugonnard felt the dances were 'adverse to Christianity and civilization.' In 1896, he applauded the government for its 1895 amendments, and reported that there had been no Sun Dances in the previous year. He said, 'Great credit is due the agents for their firmness in the suppression of these performances.'

Aboriginal people associated the schools with the attacks on their culture. In 1902, the principal of the File Hills school, Mr. Sinclair, was informed by a First Nations man that 'the Indians on the File Hill reserves were going to attack and destroy the Indian school, in revenge for the Agent having pulled down a building they used as a dance house.' An Indian Affairs official could discover no foundation to the threat, but he did note in a report to the Mounted Police that Chief Piapot had just 'served a term in the goal [sic] here, for resisting the Police in the execution of their duty.' He suspected Piapot—who was in his mid-eighties—of continuing to be a troublemaker, adding he thought the 'Indians' resented the radical changes the Indian agent had made on local reserves.

Aboriginal resistance to the ban took several forms. In some communities, particularly those distant from any Indian Affairs officials, the ceremonies continued to be held openly. In other cases, they were held in secret. In others, they were celebrated under new names, often as a sports day. And, in other cases, they were modified in an effort to fall within the limits of the law. First Nations people also lobbied politicians about the inherent unfairness of a law that suppressed their religious freedom.

Emerging Aboriginal political organizations generally did not support the efforts to resist the Potlatch laws, since much of their leadership was made up of people who had gone to residential schools and converted to Christianity.

Incomplete records make it difficult to determine how many people were arrested on the Prairies after the 1895 amendment. In 1897, five people were arrested at the Thunderchild Reserve for holding a 'give-away dance.' Three were sentenced to two months in jail. The local Mounted Police officer thought the jail terms too harsh and worked with Indian Commissioner Amédée Forget to secure early releases for the men, who were all elderly. Records show only two prosecutions in 1900, but thirty-six for 1902 and ten for the following year. In addition, chiefs were deposed by Indian Affairs for their involvement in dances, and men in their eighties and nineties were given jail sentences. In 1903, the organizer of a dance on the Muscowpetung Reserve received a three-month sentence. The following year, the organizer of a dance at Fishing Lakes received a two-month sentence. The man convicted was more than ninety years old.

In some cases, Indian agents resorted to extra-legal measures to enforce the law. In 1900, the Indian agent on the Blood Reserve cut off a man's food rations for participating in a Sun Dance. The man, Wolf Tail, slaughtered one of his herd of cattle to make up for the loss. The agent escalated the conflict by seizing the rest of the herd, but had to return it after Wolf Tail took legal action.

In 1903, alarmed by a recent acquittal of a First Nations man charged with participating in a dance, Qu'Appelle principal Hugonnard believed that government efforts needed to be intensified. He called for 'the total suppression of these dances and pagan practices.' Hugonnard stressed that the purpose of the schools was to transform the students from 'savages to civilized individuals.' Unfortunately, many graduates were, he felt, returning to their 'pagan habits.' Hugonnard took the position that Aboriginal people were being expected to attain, in one generation, a state of civilization that was practised by 'the most favoured white nations after centuries of gradual evolution from their original savage condition.' How, he asked, could the young generation overcome the 'pagan habits, customs, and superstitions and mode of life' that still held sway on the reserve? These habits, he wrote, 'must be eradicated, or at least suppressed.' He challenged those who might think this harsh to visit a

dance ‘where graduates of these schools were present and see them nearly nude, painted and decked out in feathers and beads, dancing like demented individuals and indulging in all kinds of debauchery.’ In his opinion, Indian Affairs needed to adopt a strong uniform policy, ‘totally prohibiting dancing and its attendant pow-wows.’ Indian Commissioner David Laird shared the letter with three Protestant missionaries in Winnipeg, who fully endorsed Hugonnard’s request.

When Duncan Campbell Scott became deputy minister of Indian Affairs in 1913, he initiated an intensified enforcement of the laws suppressing First Nations ceremonies. In the case of the Potlatch, he believed the government should suppress ‘this wasteful aboriginal custom.’ In October 1913, Scott instructed Indian agents to ‘in every way possible discourage gatherings which tend to destroy the civilizing influence of the education imparted to Indian children at schools, and which work against the proper influence of agents and farming instructors.’ He also reminded them that dances involving ‘the giving away features and the wounding or mutilation of bodies’ were illegal. Much of the impetus to renew the enforcement of the anti-Potlatch legislation came from A. E. Green, a former Methodist missionary, who was the Indian Affairs schools inspector in British Columbia. In 1913, British Columbia Indian agent W. M. Halliday laid charges against Alert Bay men for their participation in a Potlatch. Their initial hearing of the case was presided over by A. W. Corker, who was not only the local justice of the peace, but also principal of the Alert Bay industrial school. Two men convicted of violating the anti-Potlatch law were given suspended sentences. Prosecutions in 1915 also resulted in suspended sentences and acquittals. The light sentences led to an increase in Potlatch activity in the Alert Bay area.

School principals continued to play a role in the suppression of Potlatches and Sun Dances. In 1914, Billy August complained about the role that the Ahousaht principal and missionary John Ross had played in the jailing of four people, including August’s wife, for their participation in a Potlatch. According to the letter, ‘Mr. Ross to do so, put them into Jail, those four Ahousat Indians. Mr. Ross is not good teaching for the Children he is a Policeman all over the west coast Indians they know he is a Policeman.’ August requested that Ross be replaced, noting that he felt the local Catholic missionary was superior to the Presbyterian missionary. In responding to the criticisms, Ross said:

> For some time I have taken an active part in the suppression of intertribal potlatching. I was the first on the West Coast to lay information before the authorities of a breach of the Indian Act in regard to the custom. In spite of warning from the Indian Agent Cox and myself, the Ahousaht Tribe gave a potlatch to the Keleomaht Tribe Nov. 20th. As it was the first offense four Indians paid the cost, $7.25 and were let out with a warning that if they were found guilty on a second offense they would be sent to jail.

Indian agent Charles Cox came to Ross’s defence, saying that while four people had been arrested and taken to Clayoquot for trial, they were never jailed. The complaints from August were, in his words, ‘foolish and meaningless.’ Cox added that he was ‘somewhat in sympathy with the Indians,’ but when it came to the prohibition of the Potlatch, he intended to continue to enforce the law. He concluded, ‘The more one does for these people, the more abuse one gets from them.’ The inspector of Indian agencies, W. E. Ditchburn, also examined the case for the department and reached conclusions similar to Cox’s, noting that another cause of complaint was Ross’s refusal to allow local boys to play baseball on the school field on Sunday, since it would ‘desecrate the Sabbath,’ a refusal that, in Ditchburn’s view, was ‘perfectly justified.’

> The government school officials also believed that the cultural practices interfered in the effectiveness of the schools. In 1917, school inspector Markle was concerned that students at the Roman Catholic school on the Blood Reserve in Alberta were 'too much engrossed in the society doings on the reserve to give attention to their studies.' The problem was common, he said, at schools located on reserves and 'where Indians have inherited the dance craze. The Superior of the Cluny, Alberta, school made a like complaint to me last Monday. She stated that the big boys apparently though [sic] of little else and were constantly running away from the school to attend these dances, of which there has been two or three weekly.'[99]
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> …
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> Indian Affairs officials believed the courts had been too lenient in the way they had handled these cases. In response, in 1918, the federal government amended the *Indian Act*: breaking the law by participating in banned ceremonies became a summary, rather than an indictable, offence. Now, instead of the cases being tried by local magistrates, who tended to take a broader approach to the interpretation of the Act, the charges would be laid by Indian agents, who would then, acting in their capacity as justices of the peace, pass judgment on them. In the following year, Indian agent Halliday, acting as a justice of the peace, sentenced two men to two months in jail, the minimum jail term allowed under the Act. The case against four other men that year was adjourned when they, and over seventy other Kwakiutl people, promised not to participate in future Potlatches. The practice continued, however, and in 1920, eight men were sentenced to two months in prison. Charles Nowell was prosecuted, convicted, and imprisoned for his involvement in a Potlatch in 1921. The following year, twenty-two people were sentenced to between two and six months in jail for their participation in a Potlatch. While they awaited transportation to Oakalla prison near Vancouver, they were held in the Alert Bay residential school.[100]
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> …
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> Dances were not the only Aboriginal practice that school principals sought government support in suppressing. In 1898, the principal of the Alberni Girls' Home urged the federal government to support local efforts 'to have the Indian doctors done away with.' Indian Affairs officials took a dim view of traditional healers. However, it was not illegal to practise medicine without a licence in Canada, providing the patient was not harmed and the service was provided for free. A reciprocal exchange of goods was part of the healing ceremony, but these ceremonies were generally held in private, making prosecution nearly impossible. As part of their schooling, residential school students were told to spurn traditional healers. The fact that members of her family had sought the help of a traditional Carrier First Nation healer in the summer of 1927 filled Fraser Lake, British Columbia, student Mary John with dread: 'I could imagine Sister Superior with the willow switch, standing me up in front of the whole school and thrashing me because my relatives believed they could be healed in the Carrier way.' It was not until after she left the Fraser Lake school that she attended her first Potlatch ceremony, one held to commemorate the placing of a tombstone over a family member's grave.[101]

The 1885 Riel Rebellion was a protest against the violations of the 1870 *Manitoba Act* and the living conditions of indigenous peoples on the prairies in the 1880s. Without going into the details of the Riel Rebellion [the TRC report provides a summary of the Rebellion], here is how the TRC reported how the criminal law was used after the rebellion.

In private correspondence, Prime Minister Macdonald noted that the prospect of an Indian war had been intentionally allowed to 'assume large proportions in the public eye. This has been done however for our own purposes, and I think wisely done.' The federal purposes were simple: the First Nations leaders were portrayed as traitors in order to justify a suppression of First Nations governments. With this knowledge, and in order to more effectively suppress their leadership, the federal government chose to treat the First Nations' actions as treason. Over eighty First Nations people were put on trial for their activities in the spring of 1885. The translation at the trials was usually inadequate or non-existent, the cases were often circumstantial, and the sentences were excessively punitive. Even though Dewdney was aware that there was little evidence to link Pitikwahanapiwiyin and Mistahimaskwa to the rebellion, he expressed satisfaction at their conviction on charges of treason-felony. In 1885, a court in Battleford convicted eleven First Nations men of murder; three had their death sentences commuted, and the other eight were executed on November 27, 1885. Macdonald believed the public executions would 'convince the Red Man that the White man governs.' To press home the message, Dewdney arranged to have First Nations people present at the hangings. The witnesses kept the memory of the event alive, speaking of the courage displayed on the gallows and the anger the community felt over the government refusal to release the bodies for a traditional burial.

In the wake of 1885, there was no more talk of letting First Nations people choose whether they wished to live like white people. They were to be assimilated, and if they chose not to be assimilated, their children would be taken from them and assimilated. In 1887, John A. Macdonald expressed the government position bluntly, stating that the 'great aim of our legislation ... has been to do away with the tribal system and assimilate the Indian people in all respects with the inhabitants of the Dominion, as speedily as they are fit for the change.'[102]

…

In August 1885, Reed introduced the pass system, apparently without government authorization, informing Dewdney:

> I am adopting the system of keeping the Indians on their respective Reserves and not allowing any [to] leave them without passes—I know this is hardly supportable by any legal enactment but we must do many things which can only be supported by common sense and by what may be for the general good. I get the police to send out daily and send any Indians without passes back to their reserves.

The following year, Reed, still without any legislative authority, issued pass books to Indian agents. The fact that the pass system was to apply to all First Nations people on reserves is apparent from Reed's instruction to agents that, when issuing a pass, they indicate whether the recipient had been disloyal in 1885. While the administration of the pass system varied from place to place and time to time, it was used, without any basis in law, to monitor, control, and limit the activities of Aboriginal people.

In an 1889 report, Reed, by then Indian commissioner, described his policy as one of 'destroying the tribal or communist system,' replacing it with 'a spirit of individual responsibility.' In other words, he was extending to all First Nations the treatment he had recommended for rebels. Enforced cultural change, leading to enfranchisement, remained the goal.

> If the Indian is to become a source of profit to the country it is clear that he must be amalgamated with the white population. Before this can be done he must not only be trained to some occupation, the pursuit of which will enable him to support himself, but he must be imbued with the white man's spirit and impregnated by his ideas. The end in view in the policy adopted for the treatment of our wards is to lead them, step by step, to provide for their own requirements, through their industry, and while doing so, to inculcate a spirit of self-reliance and independence which will fit them for enfranchisement, and the enjoyment of all the privileges, as well as the responsibilities of citizenship.

The destruction of the 'tribal system' had implications for First Nations agriculture. The government was suspicious of all co-operative and community measures, including the community ownership of farm technology and livestock. Reed believed that First Nations people would develop the ability to continue to support themselves by their own means once, in the not-too-distant future, they were all enfranchised, if they practised peasant agriculture that did not depend on technology. Indian agents first allocated First Nations farmers forty-acre (sixteen-hectare) lots and scattered the lots throughout the reserve to discourage the development of community cohesion. Even when the practice of subdivision was ended in the early 1890s, Aboriginal settlers were restricted to farming only on the already subdivided parts of the reserve. The requirement that First Nations people receive the Indian agent's approval to sell their produce off-reserve was a demeaning restriction that hindered economic development. Put in place in the 1880s, it was still operative in the 1920s, when, according to Eleanor Brass, the agent on the File Hill reserve 'handled all the finances of the reserve and we couldn't sell a bushel of grain, a cow or a horse without getting a permit first.' Edward Ahenakew recalled in his memoirs how a First Nations farmer might have to spend a day or two, which he might otherwise be using to farm, in hunting down the Indian agent on another reserve in order to receive permission to sell a load of hay to feed his family, a frustrating and humiliating process.[103]

…

From the 1880s onward, the federal government acted decisively to jail First Nations leaders, disarm them, control their movements, limit the authority of their governments, ban their spiritual practices, and control their economic activities. It also chose to intervene decisively in family life through the establishment of residential schools. It was in 1883, the same year that the government cut rations on the Prairies, that the first of a series of residential industrial schools opened its doors, operated by a government-and-church partnership. Those schools, modelled on schools for delinquent and criminal youth, represented a betrayal rather than a fulfillment of the Treaty promises to provide on-reserve education. Their story is the darkest, longest, and most chilling chapter in the history of the colonization of Aboriginal peoples. The federal government's determination to have as cheap an Indian policy as possible, coupled with the church's drive to enrol and convert as many children as possible, meant that the schools were sites of hunger, overwork, danger and disease, limited education, and, in tens of thousands of cases, physical, sexual, and psychological abuse and neglect.[104]

Let's read about a particularly odd criminal case in 1892 reported by the TRC:

> Paul Durieu, who had come to the west coast as a priest in 1854, played a central role in the development of Catholic missions and schools in what was to become British Columbia. He worked in Esquimalt and Kamloops before being made the assistant to Bishop Louis-Joseph d'Herbomez at New Westminster in 1864. There, he served as the director of St. Mary's

Mission. He was appointed Bishop of New Westminster in 1890, holding the position until his death in 1899.

Durieu has been credited with the establishment of what has been termed the 'Durieu System,' a form of church-run government of First Nations communities. The system, which was not original to Durieu, was in fact an Oblate effort to follow the Jesuit *reducciones* in North America. The reducciones were church-governed communities intended to separate Indigenous people from their traditional ways of life and from settlers, who were viewed as sources of corruption. It was a hierarchical model, in which the missionary was in total control of the reduccione.

Fellow Oblate E. M. Bunoz credited Durieu and his system with creating 'an Indian state ruled by the Indian, for the Indian, with the Indian under the directive authority of the Bishop and the local priests as supervisors.' It was, in reality, far from being an Aboriginal government. In the communities in which Durieu and the Oblates established this system, the laws were 'the commandments of God, the precepts of the Church, the laws of the state when in conformity with the laws of the Church, the Indian Act, [and] the bylaws enacted by local Indian government.' The local priest presided over the court that enforced these laws, with punishment ranging from 'the lash, the fine, black fast [a highly rigorous fast] up to a short prayer.' The chief elected under the provisions of the *Indian Act* was viewed as being merely an honorary chief, with real authority resting with the 'Eucharistic Chief' appointed by Durieu—and whom Durieu could depose. Others involved in administering the system were appointed sub-chiefs, watchmen, catechists, police officers (in some cases), and bell-ringers (referred to as 'cloche men'). These officials kept undesirable colonists, particularly liquor traders, away from the community and enforced discipline on First Nations community members. According to Bunoz, under the system,

> late rising was not tolerated. They were all up at the first bell and at the second bell they all went to Church to say their morning prayer. Then breakfast and they went to their respective work. In the evening the bell called them again for their prayer in common. Later on at a proper hour, according to the season, the curfew was sounded; and all lights went out in a few moments.

The Durieu System's authority was called into question when, in 1892, the church-sponsored court on the Lillooet Reserve sentenced a young man and woman to a public flogging for having engaged in intercourse outside of marriage. The sentence was approved by an Oblate priest, Eugène-Casimir Chirouse. The young woman was flogged a second time shortly afterwards, this time for leaving the reserve with a group of young men and women. The case was reported to the local magistrate, who had the court members and Chirouse arrested. All were convicted at a trial in county court. Chirouse was sentenced to a year in jail, the chief of the court to six months, and the rest of the court to two months. After a campaign led by Catholic Bishop John Lemmens, federal justice minister John Thompson dismissed all the charges. Durieu's successor as Bishop of New Westminster, Augustin Dontenwill, questioned the effectiveness of the system, which he viewed as being overly harsh. As a result, the system—whose efficiency was in all likelihood exaggerated by its supporters—fell into decline. Chirouse's career, however, did not. He became principal of the Mission school in the 1890s and remained involved in the school's operation until the 1920s. Durieu also supported the establishment of residential schools at Catholic missions.

The first of these schools opened at St. Mary's Mission in 1863. The principles of the Durieu System structured the students' daily life. Although the forty-two boys the school initially

> recruited were given an introduction to reading, writing, and arithmetic, they spent much of their time in the fields, gardening and farming. The punishments employed included additional school work, being required to kneel for a period of time, confinement, isolation, humiliation, and corporal punishment. Rewards were given for good behaviour—these might be prizes or honours, such as the right to be referred to as the 'Captain of Holy Angels.' From the late 1860s onwards, the school had a brass band, which was used in part to impress Europeans with the capability of First Nations students.[105]

So this 1892 case (not arising within a residential school context) resulted in flogging an indigenous man and woman followed by charges and convictions against their abusers that were dismissed by the Canadian Minister of Justice. The local priest who had been sentenced to a year in jail in this case went on to be principal of the Mission school and remained involved in its operation for decades to come. The legal system's control and punishment of indigenous women is in full display here. It is simply part of a pattern that began before confederation and continues today. There has not been a single day during Canada's history that the law has not discriminated against indigenous women, usually in multiple ways.[106]

The above summary of laws affecting indigenous peoples in Canada leading up to the residential school system shows that everything needed to implement and enforce the Indian Residential Schools system was consistent with the ideas of legislated and legally enforced white supremacy and control over indigenous peoples for at least fifty years before the government formally imposed the residential school system on indigenous peoples.

**10. 1884-1893: using law to force children into Indian Residential Schools:**

> *Since the 1890s, Indian Affairs had been refusing to allow parents to withdraw children after voluntarily enrolling them, on the basis of the consent form that was signed at the time of admission. In the 1950s, the form said the student would remain in the school 'for such term as the Minister of Mines and Resources may deem proper.' ... However, an Indian Affairs legal adviser pointed to an 1892 Justice Department legal opinion that the provisions in admission forms lacked any legal basis. The father could not be prosecuted under the Indian Act, unless the minister responsible for Indian Affairs were to specifically designate that she attend the residential school, a power that was provided for in Section 117 of the Indian Act.*[107]

There were only a few laws concerning education for indigenous peoples leading to the late 1880s.

> The 1869 *Act for the gradual enfranchisement of Indians* contained a provision that allowed band councils to frame rules and regulations for 'the construction of and maintaining in repair of school houses, council houses and other Indian public buildings.' Before they could be put into effect, those rules and regulations required the approval of the federal government. Adopted into the 1876 *Indian Act*, this was the Act's first significant educational provision. An 1880 amendment allowed bands to select the religious denomination of schoolteachers. There was a significant restriction on this provision: the teacher had to be of the same Christian faith as the majority of the band members. The amendment also provided that members of the minority Christian faith, be they 'Catholic or Protestant,' had the right to establish their own school. A decision to establish a school for those on the reserve who were members of a non-dominant Christian faith and a decision on the faith of the teacher were both subject to federal government approval.[108]

From that point forward, the focus of laws about Indian Residential Schools was on how to force children into the schools, how to intimidate and prosecute parents who would not send their children to the schools, how to keep the children in the schools and how to use the police to enforce attendance. The TRC reports:

> Parental resistance to industrial schools was so strong that it actually contributed to the failure and eventual closure of most of the industrial schools on the Prairies. From 1884 onwards, the government put in place an increasingly restrictive set of laws and regulations regarding enrolment and discharge. Many school and government officials were either not well versed in the laws and regulations governing enrolment, or disregarded them. It is clear that, on occasion, officials exceeded the authority granted them by the *Indian Act* and related regulations.
>
> Parents often were compelled to send their children to residential school because federal policy decisions had robbed them of alternatives. For example, federal decisions not to build day schools, or decisions to close the existing day schools, meant that parents who were committed to seeing that their children would get an education were forced to send them to residential school. The federal government's unwillingness to invest in First Nations economic development, particularly on the Prairies, meant that many families existed in a state of dire poverty and were sometimes dependent on government-supplied relief rations. In such conditions, parents might send their children to school in hopes they would be properly fed and cared for there. In some cases, federal officials denied relief rations to parents in need who refused to send their children to school. The enrolment problems in the schools would have been worse if the schools were not also serving as child-welfare facilities, taking in orphans, the sick, and children whose families were judged to be unable to care for them.
>
> The federal government's First Nations education policy was devised and put in place by men who already made regular use of compulsion in their dealings with First Nations people. When he was the Indian commissioner, Edgar Dewdney used compulsion and the withholding of rations to disrupt a First Nations campaign to negotiate Treaty revisions and establish a First Nations homeland. Dewdney used the 1885 North-West Rebellion as a pretext for persecuting much of the First Nations leadership, despite the fact that the vast majority of First Nations leaders and their people did not participate in the uprising. When he was the assistant Indian commissioner, Hayter Reed advocated and implemented the pass policy. Under this policy, which had no legal authority, First Nations people on the Prairies had to seek government permission to leave their reserve. In the absence of a legal basis for the policy, the government charged individuals who left their reserve without a pass with 'trespass.' In other cases, it denied rations to those who did not comply with the pass policy. Amendments to the *Indian Act,* which banned the traditional Potlatch ceremony on the west coast as well as various sacred dances on the Prairies, are other examples of the policy of compulsion. Between 1900 and 1904, there were at least fifty arrests and twenty convictions for violations of the laws against dancing. One of the convicted, Chief Piapot, then in his mid-eighties, was sentenced to two months in jail.
>
> In 1884, the *Indian Act* was amended to give First Nations band councils responsibility for 'the attendance at school of children between the ages of six and fifteen years.' This was the first reference to school attendance in the *Indian Act*. At the time, only four provinces—Ontario, British Columbia, Nova Scotia, and Prince Edward Island—had any compulsory education laws. The Ontario law of the day required that children between the ages of seven and twelve attend school for at least four months a year. British Columbia's law required six months of attendance, and Prince Edward Island's required twelve weeks.

> Almost immediately after the industrial schools were established, principals began calling on the government to institute some form of compulsory enrolment. It took Qu'Appelle principal Joseph Hugonnard a year to recruit the thirty students he was initially authorized to enrol. As early as 1885, High River school principal Albert Lacombe urged Indian Affairs 'to bring pressure in some way to bear upon those Indians who refuse their children, as by threatening to deprive them of their rations.' In 1886, Hugonnard reported that a recent recruiting expedition to three reserves had netted him only the promise of two new students. 'The objections of the Indians are that they do not like to send their children away nor to have them attended to by a doctor, nor to let them work, and also to their taking the habits of the white people.'
>
> In 1888, Robert Ashton, the principal of the Mohawk Institute, reported that in the previous year, twenty-one boys and twenty girls had left the institution. The average length of attendance had been two and three-quarter years for boys and two and one-quarter years for girls. In light of the fact that most students were leaving school long before they could derive 'much lasting advantage from the course of training provided,' Ashton recommended that the government require parents to commit their children to the school for specific periods of time.
>
> When he was Indian commissioner, Edgar Dewdney thought that compulsory attendance was inevitable, but recommended it not be introduced immediately. 'As Indians become amenable to restraints on their reserves,' he wrote, 'attendance should be made compulsory.' Hayter Reed, his successor as Indian commissioner, was also initially cautious. In 1889, he said, 'The time is approaching, when pressure will doubtless have to be brought to bear upon Indian parents to compel them to send their children to school, but this must be done with great caution, and very gradually.' He noted that he had, in certain circumstances—Battleford, for example—'given instruction to Agents to bring pressure to bear, and I will act in the same direction wherever and whenever I feel satisfied that to do so will be attended with good results.' By 1892, he had become much more aggressive, recommending that the government enact legislation that would require 'children being retained in Industrial Schools pending the Department's pleasure.' Deputy Minister Lawrence Vankoughnet rejected that idea; he did not think the Indians of the North West are sufficiently advanced in civilization to render such drastic measures advisable, as respects the control by the Dep't—which it actually would be—of their children. 'As you are aware, Indians are particularly sensitive in respect to their children and the Dep't is preparing them gradually for the more stringent measure of compulsory education by endeavouring to induce the Chiefs and Headmen of the different Bands to co-operate with the Indian Agent for the passage of rules and regulations under the Indian Act rendering attendance at the schools compulsory on the part of Indian parents.'
>
> The only real question under debate was when—not if—parents would be compelled to send their children to residential schools.[109]

More specific laws and regulations concerning Indian Residential Schools were slow in coming.

> It was not until 1889 that Indian Affairs officials recognized that 'it would be well to have a code of Regulations, with which the Church authorities should be asked to comply, in obtaining children for their Schools, and in applying for the Grant.' Despite this belated recognition, no such code was developed at that time.[110]
>
> …

> In 1891, the government rejected a suggestion from Anglican Church officials that it provide 'leading Indians on Reserves' with the details of vacation and discharge policy. Deputy Minister Hayter Reed explained he would make all school regulations known to 'Agents, Church authorities, and Teachers, but so far as Indians are concerned, I think it will be best to deal with them, in so far as matters, such as the one now under consideration, are concerned, individually, as each case presents itself.' And, if those leaders thought to make trouble, the children attending residential schools would serve as hostages. One year after the 1885 rebellion, school inspector Andsell Macrae commented that 'it is unlikely that any Tribe or Tribes would give trouble of a serious nature to the Government whose members had children completely under Government control.' This is the sort of coercive and threatening language that would be used to describe a colonial educational system. It reminds us that Canada's national policy on Aboriginal education was at heart a colonial policy.[111]

The Government's preoccupation in law, regulation, orders-in-council and use of police force was in forcing children into schools and keeping them there.

> But, if there was debate about recruitment, there was none about whether parents should be allowed to withdraw their children from the schools once they were there. In 1891, officials in Ottawa were concerned that students at industrial schools, particularly at Qu'Appelle, were being withdrawn long before they could have learned a trade. Reed was instructed to ensure that 'no pupils shall be admitted to or taken from or allowed to leave any of the institutions without your express authority having been obtained.' Reed felt that Hugonnard was giving in too easily to parental requests to remove their children from the school. He visited the school at the same time that a group of parents were seeking to remove six children from the school. 'By the exercise of firmness I convinced each of the applicants that they must leave their children unmolested and the Principal's eyes were opened to the fact that resistance would accomplish all I claimed.' Reed told Hugonnard that if he felt himself unequal to the task of refusing parents, in the future, he should simply send for him.[112]

**11. 1892: Order-in-Council establishing per capita rates for Indian Residential Schools**

*The expectation was that the underpaid labour of missionaries and the free labour of students would compensate for the inadequacy of the per capita grants the government provided.*[113]

Funding Indian Residential Schools was always a contentious issue and under-funding was a deadly hazard for the children. In 1892, the federal Cabinet established a funding formula for the schools.

> An 1892 Order-in-Council had established per capita rates for existing industrial schools. It stated nothing more than, in exchange for the grants, 'the management shall agree to conform to the rules of the Indian Department, as laid down from time to time, and to keep the schools at a certain standard of instruction, dietary and domestic comfort.' The 1910 contract that set out the responsibilities of the government and churches for the operation of boarding schools obliged the churches to provide students with 'subsistence ... necessary to their personal comfort and safety.'
>
> When each industrial school was established, Indian Affairs would develop a dietary table or scale. This scale would set out the expected annual consumption of specific foods. According to Indian Affairs official Martin Benson, these were used to prepare the initial estimates for

> the cost of operating the schools, and were 'never intended to apply to schools on the per capita basis and it is not now, and never was, enforced in such schools.'[114]
>
> …
>
> Once it became apparent that the type of system that government officials had envisioned would cost far more than politicians were prepared to fund, the government largely abandoned the system to the churches. The expectation was that the underpaid labour of missionaries and the free labour of students would compensate for the inadequacy of the per capita grants the government provided. The reality was that chronic underfunding led in the early twentieth century to a health crisis in the schools and a financial crisis for the missionary societies. The government, with the support of leading figures in the Protestant churches, sought to dramatically reduce the number of residential schools, replacing them with day schools. Opposition from the Roman Catholic Church and Protestant missionaries in western Canada blocked this effort. Instead, the federal government finally implemented a significant increase to the per capita grant received by boarding schools and attempted to impose basic health standards for the schools. This resulted in a short-term improvement. However, the wartime inflation eroded the value of the grant increase, and the grant was actually reduced during the Great Depression. By the end of the 1930s, Indian Affairs officials recognized that the per capita grants were too low and that the per capita system itself was an ineffective funding mechanism, since it bore no relation to costs. Not surprisingly, parents resisted sending their children to underfunded, unhealthy, and often distant schools. It was only in the area of attendance that the government had developed any regulatory powers—and, as time passed, these became increasingly authoritarian in nature.[115]

The per capita funding model continued from 1892 until the 1950s.

**12. 1894: first regulations for Indian Residential Schools; forcing children into the residential schools, prohibiting them from leaving school, prosecuting run-aways, corporal punishment**

> *Indian Affairs never developed anything approaching the education acts and regulations by which provincial governments administered public schools.*[116]
>
> *Indian Affairs officials were not prepared to inform parents of their rights, or to order that a school principal return children to their parents, even though, in taking them by force, he had overstepped his authority.*[117]
>
> *"In several cases pupils who have deserted have been charged with the theft of their clothing, which is the property of the government."*[118]
>
> *the government's discharge policy for students who had been voluntarily enrolled had no legal basis*[119]

The TRC reports:

> It was not until 1894 that the government adopted any regulations under the *Indian Act* for First Nations education—and these dealt solely with attendance. Issues such as training, housing, health, discipline, food, and clothing were most commonly addressed on an uncoordinated, case-by-case, basis. Even then, as late as 1897, Martin Benson could write,

'No regulations have been adopted or issued by the Department applicable to all its schools, as had been done by the Provincial Governments.' Indian Affairs never developed anything approaching the education acts and regulations by which provincial governments administered public schools.[120]

…

**The *Indian Act* amendments and regulations of 1894**

In 1893, Lawrence Vankoughnet was forced into retirement and Hayter Reed was elevated to the position of deputy minister of Indian Affairs. Reed was then able to put his more aggressive policies into practice. In 1894, he reported that parental opposition to sending their children to boarding schools had decreased to the point where the government felt justified in the introduction, 'without fear of exciting undue hostility, of measures for securing compulsory attendance at schools.' In that year, the *Indian Act* was amended to authorize the government to make regulations 'to secure the compulsory attendance of children at school. These regulations could be applied to 'the Indians of any province or of any named band.' The amendments also authorized the government to establish 'an industrial school or a boarding school for Indians.' (The schools were, of course, already in existence.) The government was also authorized to commit to these schools 'children of Indian blood under the age of sixteen years.' Once committed, they could be kept there until they reached the age of eighteen.

Under the authority of this amendment, the government adopted its first school-related regulations, the *Regulations Relating to the Education of Indian Children.* These regulations stated: 'All Indian children between the ages of seven and sixteen shall attend a day school on the reserve on which they reside for the full term during which the school is open each year.' Exemptions were allowed if the child was being instructed elsewhere, if the child was sick or otherwise unable to attend school, if there was no school within two miles (3.2 kilometres) for children under ten years old, or within three miles (4.8 kilometres) for children over ten, if the child had been excused from attending school to assist in farm or domestic work at home, or if the child had already passed a high school entrance examination.

Indian agents were authorized to appoint truant officers, who would have 'police powers.' The truant officers were to investigate cases of non-attendance, and could lay complaints against non-compliant parents with justices of the peace or Indian agents. Refusal to comply with the order of a truant officer was punishable by a fine of up to $2, ten days in jail, or both.

Most of the regulations dealt with day school attendance. However, if an Indian agent or justice of the peace thought that any 'Indian child between six and sixteen years of age is not being properly cared for or educated, and that the parent, guardian or other person having charge or control of such child, is unfit or unwilling to provide for the child's education,' he could issue an order to place the child 'in an industrial or boarding school, in which there may be a vacancy for such child.' In Manitoba and the North-West Territories, such an order could be issued without the need to give any notice to the 'parent, guardian or other person having charge or control of such child.' In the rest of the country, prior notice was required and, if the parents requested, an inquiry could be held before the child's committal. Under these orders, a child could be committed to residential schools until the age of eighteen.

If a child placed in the school under these regulations left a residential school without permission, or did not return at a promised time, school officials could get a warrant from an

Indian agent or a justice of the peace authorizing them (or a police officer, truant officer, or employee of the school or Indian Affairs) to 'search for and take such child back to the school in which it had been previously placed.' With a warrant, one could enter—by force if need be—any house, building, or place named in the warrant and remove the child. Even without a warrant, Indian Affairs employees and constables had the authority to arrest a student in the act of escaping from a residential school and return the child to the school.

The regulations specifically identified twenty-three industrial residential schools: four in Ontario, four in Manitoba, four in what is now Saskatchewan, four in what is now Alberta, and seven in British Columbia. The regulations also specified eighteen boarding schools: three in Manitoba, seven in what is now Saskatchewan, six in what is now Alberta, and two in British Columbia. The decision to list the specific schools created enforcement problems in later years as some schools closed and new ones were not specifically listed in the regulations.

In 1895, Regulation 12 was amended. Previously, it had authorized the search for, and return of, any student who had been placed in the school; that is, children who, Indian Affairs had concluded, were not 'being properly cared for or educated.' It was amended to allow for the return to the school of *all* truant students, including those who had been voluntarily placed in the school. Enrolment—at least on paper—was still voluntary; discharge would be much more difficult to obtain.

Reed made sure that these newly granted powers were put into force. Shortly after they were adopted, he instructed the assistant Indian commissioner, 'Power is given by these regulations to bring back deserters and you are at liberty to exercise your discretion about putting them into force.' Reed also instructed, 'Schools which have not their full complement of pupils, such as Battleford and Regina, can now be filled and the Department would like you to communicate with our Agents with a view to securing orphans to all vacancies.'

When parents in northern Manitoba resisted sending their children to the Methodist industrial school in Brandon, Reed instructed the school's principal to call the parents' attention to *Indian Act* provisions 'for the compulsory education of Indian children.' He said that although the department was reluctant to enforce the regulations, it would do so unless parents demonstrated 'their willingness to have their children educated.' He suggested the parents could take comfort from the fact that, although students would not be allowed to leave at their own will once they were admitted, their parents would be allowed to visit them at school.

Threats were part of the government arsenal. In 1895, when members of the Arrows Band in what is now Saskatchewan refused to send their children away to boarding school, the Indian agent told them

> if they would not let them go willingly that in all probability the Department would take them by force and send them to whatever school was thought best. The consequence was that when paying Treaty there on the 22nd inst. the Indians offered me all their children if I would place them in the Duck Lake Boarding School.

The government followed up on its threats. In 1896, an Indian agent asked if it was necessary to conduct a trial before returning a child to the school. Reed argued that the regulation

> allowed a child to be returned to a school on the basis of a warrant issued in relation to the regulation.
>
> Reed was far from satisfied with the results of the campaign of enforcement he had initiated. His 1896 annual report contained a warning: 'In some localities persuasive powers have failed to obtain such an attendance as the number of children would warrant, so it may yet become incumbent upon the department to adopt more stringent measures to secure increased attendance.' Through his campaign against day schools, he also worked to limit parental options.[121]
>
> …
>
> The 1894 *Indian Act* regulations authorized the government to retain the Treaty annuity due to children committed to a residential school and spend the money for the child's education or benefit. In the nineteenth century, the Canadian postal system, like many postal systems in industrial countries, offered small-scale, secure savings accounts. Separate postal-savings accounts were established for each student, and the Treaty payments owing to children attending industrial and boarding schools were deposited into these accounts. In many cases, the money the students earned while working at the school or for local farmers was also deposited in these accounts. In 1897, Indian Commissioner A. E. Forget provided instructions to Indian agents and principals as to how students could go about withdrawing this money. The circumstances under which the student was leaving the school had to be described in an application for withdrawal, as well as the 'object for which the money was intended to be used.' The applications for withdrawal were to be sent to Indian Affairs in Ottawa.[122]

The 1894 regulations

> Simply ignored the existence of non-Christian parents. The regulations stated that 'no Protestant child shall be placed in a Roman Catholic school, or in a school conducted under Roman Catholic auspices; and no Roman Catholic child shall be placed in a Protestant school, or in a school conducted under Protestant auspices.' The language of supposed parental choice had given way to a policy under which children were, or were to become, either Protestant or Catholic. Left unresolved was the question of who would determine a child's denomination—and who could alter that denomination. This policy was incorporated directly into the *Indian Act* in 1920.[123]

The criminal justice system was used to enforce attendance at Indian Residential Schools.

> Running away was not in itself a crime. However, most students were wearing school-issued clothing when they ran away. In 1894, the North-West Mounted Police annual report stated, 'In several cases pupils who have deserted have been charged with the theft of their clothing, which is the property of the government. This has had a salutary effect in checking desertions from these institutions.' In coming years, principals occasionally sought to have runaways prosecuted for theft. Red Deer principal C. E. Somerset had lost control of the school in 1896. He said there was, among the students, 'a spirit of insubordination manifest and several desertions have taken place.' To assert his authority, he identified one boy as 'the ringleader,' and had the Mounted Police arrest him and charge him with 'leaving with clothing belonging to the Indian Department.' The police held the boy for two nights and one day before returning him to the school. That same year, the principal of the Mohawk Institute tried without success to have boys prosecuted for the theft of the clothes they were wearing when they ran away.[124]

Remember: as soon as children arrived at the school, the school took away their clothes and any other belongings from home and replaced them with school clothes. The schools took their hair. The schools took their names. The schools took their languages and their religions. The schools took their innocence. The schools took the children. The schools took the lives of thousands of children. No one ever charged the schools, the churches or the people of Canada with theft.

> After 1894, children who had been enrolled in a residential school (or had been placed there by government order because it was felt that they were not being properly cared for by their parents) but were refusing to show up at school were termed to be 'truant.' Under the *Indian Act* and its regulations, they could be returned to the school against their will. Children who ran away from residential schools were also considered to be truants. Parents who supported their children in their truancy were liable to prosecution.
>
> Section 12 of the regulations adopted under the 1894 amendments to the *Indian Act* gave Indian agents and justices of the peace the authority to issue a warrant for the return of truant residential school students. The warrants could be granted to 'any policeman or constable, or to any truant officer appointed under these regulations, or to the Principal of any industrial or boarding school, or to any employee of the Department of Indian Affairs.'[125]
>
> …

While forcing children into the schools was important, so was prohibiting them from leaving the schools.

> As early as 1891, it was government policy to require parental consent for admission to residential school whenever the parents of one faith wanted to have their child educated at a school operated by a different church. Samuel Lucas, the Indian agent on the Sarcee Reserve in what is now Alberta, reported in 1893 that 'eight parents or guardians have signed an agreement to give up their children for an indefinite time.' In 1895, A. E. Forget, then the assistant Indian commissioner for the Northwest, issued a circular to all industrial school principals and Indian agents, instructing them that 'in all cases of pupils admitted into Boarding and Industrial Schools it is desired that a written application for such admission be taken from the parents by the Agents, Principal, or other official to whom the application is made.' Ottawa would provide blank application forms for this purpose.
>
> Onion Lake Roman Catholic principal W. Comiré wrote in 1897 that parents 'seem unwilling to sign the forms of application for admission required by the department. They prefer to keep the liberty of leaving or withdrawing their children from the school at will.' By 1892, the department required that all parents sign an admission form when they enrolled their children in a residential school. In signing the form, parents gave their consent that 'the Principal or head teacher of the Institution for the time being shall be the guardian' of the child. In that year, the Department of Justice provided Indian Affairs with a legal opinion to the effect that 'the fact of a parent having signed such an application is not sufficient to warrant the forcible arrest against the parents' will of a truant child who has been admitted to an Industrial School pursuant to the application.' It was held that, without legislative authority, no form could provide school authorities with the power of arrest. Despite this warning, Indian Affairs would continue to enforce policies regarding attendance for which it had no legal authority well into the twentieth century.

> The form in use in 1900 stipulated that the parent was making application for admission 'for such term as the Department of Indian Affairs may deem proper.' The form also still required parents to consent to the provision that the 'principal or head teacher of the institution for the time being shall be the guardian of the said child.'[126]

The criminal law continued to be useless in preventing any kind of abuse.

> In 1897, when a former school employee complained that the principal of the Rupert's Land school in Manitoba was taking liberties with female students, Indian Commissioner Amédée Forget conducted a brief inspection, which led him to conclude that while it might have been imprudent, there was no reason to believe there were any criminal intentions in the principal's behaviour. It would be another year before a different commissioner reacted to fresh complaints by firing the principal.[127]

The TRC continues on the topic of forcing children into the schools, including by threatening and removing chosen leaders.

> Efforts to force First Nations children to attend residential schools also led the federal government to interfere directly with First Nations governments. The cases of Wahpeemakwa (White Bear) and Ahchacoosahcootakoopits (Star Blanket), in what is now Saskatchewan, stand as examples of the government's willingness to disrupt and ignore First Nations government.
>
> In the 1880s, Wahpeemakwa was the chief of a Saulteaux-Cree band in the Moose Mountain area of Saskatchewan. Under his leadership, the band members limited the role of missionaries, and many refused to send their children to school, particularly to the residential schools. An Anglican attempt to establish a school on the reserve failed in 1885. Although Indian Affairs removed Wahpeemakwa from his position as chief in 1889, he remained an influential figure. Indian agent David Halpin reported in 1897:
>
> > It is very difficult to get the parents to allow the children to be sent away to school, more especially those Indians who are in any way connected with the deposed chief White Bear and his sons, who will have nothing to do with anything in the shape of education, and who try to live as they did before treaty was made with the North-west Indians, and they will hardly allow any one to talk on the subject of education to them and simply say that their 'God' did not intend them to be educated like white people; they will not allow that there would be any benefit to be derived from having their children taught, and say they would much prefer to see their little ones dead than at school.
>
> The federal government removed Wahpeemakwa's son Kah-pah-pah-mah-am-wa-ko-we-ko-chin from his position as headman in September 1897. This move also back fired, and the band continued to refuse to co-operate with the government.
>
> Eventually, Wahpeemakwa was restored as chief. At the same time, departmental secretary J. D. McLean rejected Wahpeemakwa's request for a day school on the reserve, because 'it would prove a hindrance to the work of getting children into the Industrial Schools.' Halpin later reported, 'White Bear, since his reinstatement by the department as chief, has not been so much against having children educated, but he still holds back with regard to allowing them to be sent far from home to school.'[128]

[I provide the excerpt relating to Ahchacoosahcootakoopits (Star Blanket) above in section 4. 1871 and following: numbered treaties and the treaty right to education]

…

> At the request of the principal or Indian agent, a police officer could be dispatched to return a child. In 1899, an Indian agent noted that at Mission, British Columbia, a father had 'positively refused to compel his son to return to the school.' In order to force his attendance, it would be necessary to have a constable arrest the boy and arrange his rail transport back to the school. While the officers might incorporate this work into their usual patrols of First Nations reserves, in other cases, they made special trips, travelling by car, horse, train, and sometimes boat. In the Maritimes, on at least one occasion during this period, a tracking dog was used to look for runaway children. In the course of searching for a child, the officers could use their authority under the *Indian Act* to enter and search homes. For example, in the town of Lebret, Saskatchewan, 'all the houses were checked' by the police as part of a search for two runaways from the File Hills school in 1935.[129]

The regulations were not always complied with and the government chose not to inform parents of their legal rights.

> At Qu'Appelle, [Roman Catholic Principal Father] Hugonnard took matters into his own hands. In 1901, he was accused of 'stealing' boys of the She-Sheep's Band and taking them to school by force. The mother of two of the boys, known as the 'Widow Penna,' told Indian agent Magnus Begg, 'The Rev. gentlemen and the two policemen overtook her about 25 miles from Qu'Appelle and 40 miles from the Reserve, and without speaking to her, told the police to put the boys in the waggon [sic], she said the eldest boy clung to her but they pulled him away.'
>
> When Begg told her she could visit her boys at the school, she said the 'distance was too long, the snow too deep, and she was sick and wanted her children back.' Other band members told Begg that 'there would be trouble' as a result of Hugonnard's treatment of the boys. He took this to mean that the police would have difficulty in retrieving runaways from the school. When band members asked if Hugonnard's actions were legal or approved by the Indian commissioner, Begg told them he did not know. In a letter to Indian Commissioner David Laird, he noted that under Section 9 of the 1894 regulations, 'a child may be committed by a Justice of the Peace or an Indian Agent without giving notice. The Rev. Father Hugonnard is neither, but of course I did not read this part of the section to the Indians.'
>
> Hugonnard claimed he had a warrant from a Fort Qu'Appelle justice of the peace authorizing him to take two boys into custody. He did so because the boy's mother was a widow and 'with her wandering mode of life she could not bring the children up properly, and utterly refused to send them to any school.' He also said he had been asked to take the boys into custody by the boys' brother-in-law, who had been supporting the family. Laird pointed out to Hugonnard that it was government policy not to apply the regulations to families living in the Indian agency from which he had taken the boys. Indian Affairs officials were not prepared to inform parents of their rights, or to order that a school principal return children to their parents, even though, in taking them by force, he had overstepped his authority.[130]

…

**The death of Duncan Sticks: Williams Lake, 1902**

On February 8, 1902, nine boys ran away from the Williams Lake, British Columbia, school shortly after lunch. A teacher chased after them, and later organized a search that returned eight of the boys to the school. The principal, Henry Boening, was not at the school at the time, but when he returned at 5:00 p.m., he was informed that the ninth boy, eight-year-old Duncan Sticks, was still missing. Boening later stated that he did not send out a search party because he expected that Sticks would find shelter under a haystack for the night. Boening did spend the night looking for four other boys who had run away in a separate incident that day. The following day, he sent a school staff member to a First Nations settlement 'to see if he could get some Indians to go after the boy.' Later that day, a local man, Antonio Boitano, found Sticks frozen to death.

The coroner initially opposed holding an investigation into the death, reportedly saying that 'he thought the Government would not allow the expenses as he could see nothing to warrant an enquiry.' However, a local businessman named E. C. Gibson and a former teacher named Brophy lobbied for an inquiry. Brophy claimed to have kept a record of the mistreatment of students at the school. The local Indian Affairs representative, E. Bell, doubted its accuracy. He viewed Brophy, who had been fired for absence from the school, as untrustworthy. Bell gave this report of his investigation into why students were running away:

> I examined the boys as to their reasons for running away from School and the only reason they gave me was 'the teacher whips us.' I asked them if it was the Principal they said no asked if he whipped their head they said 'no' only on the legs. The teacher showed me his book where a record of all the chastisements the pupils get is kept and I must say they are slight indeed compared to the time I went to school. I asked the boys why they were whipped and the reply was 'When we don't have our lessons.' I have frequent letters from the parents of the boys who have been running away from this institution asking me to find out why the boys run off claiming they cannot do so from their children. My own opinion is there is no good reason for their absconding only the wild nature of the Indian hates confinement as they are well fed and cared for.

In late February 1902, a coroner finally conducted an investigation. The inquiry heard from several students who complained about the food and the discipline at the school. Eleven-year-old Mary Sticks, sister of the boy who died, stated:

> The sisters scold me all the time—they gave me bad food—the beef was rotten I couldent [sic] eat it—they kept it over and gave it to me next meal—they tied my hands and blindfolded me and gave me nothing to eat for a day. My hands were tied with a piece of rag behind my back. I saw them strike Ellen Batiste across the face with a strap and I afterwards saw a bandage on her face. I ran away from the school last fall and came home no one came after me from the school. I was brought back to the school by my father. I was never allowed to speak to my brother at the school, and dont [sic] know how he was treated.

Christine Haines, who had been at the school for five years, told the coroner:

> I ran away twice from the school because the sisters dident [sic] treat me good— they gave me rotten food to eat and punished me for not eating it—the meat and soup were rotten and tasted so bad they made the girls sick sometimes—I have been sick from eating it—they shut me up in a room by myself for 3 days and gave me bread and water

> —the room was cold and dark—they beat me with a strap, sometimes on the face, and sometime took my clothes off and beat me. This is the reason I ran away.

Fifteen-year-old Ellen Charlie told the coroner she ran away 'four times because the Sisters and the Fathers did not treat me good; they gave us bad food which was fit only for pigs, the meat was rotten, and had a bad smell and taste.' As punishment, she said, 'they would sometimes lock me in a room and make me kneel down for half an hour or an hour. They once kept me locked up for a week—they gave me some work to do. They sometimes whipped me with a strap on the face and sometimes stripped me and whipped me.'

Ellen Batiste, who had been a student at the school for nine years, stated that she had been whipped for talking to another girl. On that occasion, a sister 'hit me with a strap on the head several times but did not hurt me very much.' Ten-year- old Francis, a boy who had run away with Sticks, said he had been horsewhipped by Principal Boening for throwing rocks at the school fence. He said that 'the whip left blue marks on my legs, and my legs hurt me.' Another boy, twelve-year-old Louis, said he had run away a number of times in the past because 'they whipped him all the time.' He said he was always whipped on the legs, never on the face or head. Augustine, another boy who had run away with Sticks, said he ran away because 'the teacher whipped me with a strap on the legs for not knowing my lessons.' Duncan's father, Johnny Sticks, told the inquest that his son had been at the school for three and a half years. He told the inquiry:

> I was glad for him to be at the school. He ran away from the school about a year ago and was found on the road and brought to the Rancherie—he had two companions with him. He gave as his reason for running away that he did not get sufficient food and that they whipped him too much—he said he was beaten with a quirt [a riding whip]—he said the food was bad and he could not eat it, and he was allowed no other food until he had eaten it. He was sick when he arrived home and when he got better I brought him back to school—I made no complaint to the fathers at the Mission about his treatment.

Mr. Sticks had not been informed that his son had run away on February 8. If he had been told, he said, he would 'have gone at once and hunted for him.'

Joseph Fahey, a teacher at the school, said he had sometimes punished Sticks for not finishing his lessons, adding that he 'never punished him severely—used a leather strap across the legs —seldom exceeded 6 blows.'

Principal Boening had taken over the school less than a year earlier. In a statement prepared for the inquiry, he wrote that, for the last nine months, boys had been regularly running away from the school. He said that when he tried to find out why they were running away, the only reason they had given was the poor quality of the food. He said he had

> never known the teacher punish [sic] the boys with undue severity or too frequently, and the strap which he uses I do not think too severe. I sometimes have occasion to administer corporal punishment to the boys myself for special faults, and I use a strap similar to that used by the teacher—I have used on perhaps 3 occasions a saddle whip or quirt to punish boys for immorality—I limit myself on these occasions to 8, 10 or 12 blows across the back outside of the clothes on the seat, and on only one occasion have I punished several boys after taking off their coats and then used the ordinary strap.

He said the punishment of the girls was left to the discretion of the sister superior, but he knew of no unduly severe punishment being given to the girls.

> I have never known of a girl being confined alone in a room for a week, or being whipped with a strap across the face, at least since my arrival, though I am aware of such a case occurring in the past. No child has ever been confined in a dark room since my arrival, though I have heard from others that cases of the kind have occurred in former times.

The sister superior, Sister Euphresia, said:

> The girls sometimes have to be whipped with a strap—generally on the back, sometimes on the hands, and on the occasion when Ellen Batiste was hit on the head, she raised her hands to her head and the blow took part effect on the head unintentionally—I found fault with the Sister on that occasion and I believe it has never occurred since. Sometimes girls are shut up in a room for serious faults for periods varying from a few hours to 10 to 12 days—this is the longest time—this latter has only happened once, they are fed on bread and tea, or water at breakfast when confined as above and get the ordinary school diet for their other meals. If a girl is whipped it is always done outside some of their clothes.

Deputy Chief Little Pete told the inquest that although he had been glad when the school was established, he now felt that 'ill treatment is the cause of the deceased running away and meeting his death.' The coroner's jury concluded that Sticks died of 'exposure and exhaustion from want of food and fire, after a long walk through deep snow.' The jurors also said the issue of discipline and food at the school should be addressed by an independent inquiry. No such independent inquiry was held, although the Indian superintendent for British Columba, A. W. Vowell, did interview several boys and girls at the school. He concluded that nothing he was told reflected 'in any serious way upon the management.' What he was told was the following:

- One boy 'was whipped on the legs with a strap by the teacher for not knowing his lessons.'
- One boy 'ran away because the teacher whipped him on the legs.'
- Another boy 'ran away because he was punished in like manner.'
- Another boy 'ran away because he did not get enough food, and also because he was whipped on the legs.'
- Another boy 'repeated what the last boy said.'
- One girl ran away because she had been 'whipped at school for talking to another girl'—in the course of the whipping, which was meant to be administered to her hands, she held her hands close to her head and was hit on the head.
- 'Other girls' said that they ran away because 'they wanted freedom of restraint from the school discipline and wanted a chance to play with the boys.' (The superintendent described these as 'foolish excuses.')

Vowell wrote that he thought the older boys ran away because they thought they could get jobs and make money, and the younger students accompanied them, 'wishing to appear brave.' He also said that the former teacher, Bridger, was creating problems by making 'the most serious charges against the Management.' He spoke with Christine Haines and Ellen Charlie, two of the girls who had testified at the inquest. They 'both persisted in stating that the meat was bad in the soup and that at times the bread was like putty. Ellen Charlie said she was whipped sometimes for talking to and looking at the boys; whipped on her hands mostly,

sometimes her clothes were turned up.' The superintendent added that Christine Haines and Ellen Charlie had been discharged from the school for 'bad conduct.' The principal told him that, because a number of boys wet their beds at night, the principal had taken to refusing to allow them any water after the evening meal. The inspector told him this 'was bordering on cruelty,' to which the principal replied that 'in most cases they were not actually in need of a drink but took it out of mischief.' In the wake of the tragedy, Indian Affairs issued no policy recommendations—neither specifically to the school nor generally to all principals—that provided directions on food, punishment, or the policy to be pursued when students ran away. The complaints of former staff and students were discounted or dismissed. There was no question that students were subjected to corporal punishment, and that, at least on some occasions, this punishment was administered with a riding whip. Superintendent Vowell made no effort to determine if all other forms of discipline had been tested before the supposedly 'last resort' of corporal punishment was administered.[131]

…

In some cases, Indian Affairs refused to discharge children who had been voluntarily enrolled until they turned eighteen. In 1903, when the government refused to discharge two brothers who were over fifteen, the students ran away from the Middlechurch school. They were apprehended and returned to the school on the basis of a warrant issued under the 1894 regulations. Their father, William Cameron, went to court and got a writ of habeas corpus. Normally, such a writ requires that the person under arrest be brought before a court. According to Martin Benson, Judge Richards of the Manitoba Court of Queen's Bench found on the father's behalf, and wrote, 'the regulations for the detention of children until they reach the age of 18 years do not apply to children who have been voluntarily placed in the school and that to such children the parents have a right to get them out of the school at any time they wish to demand them.'

In other words, the government's discharge policy for students who had been voluntarily enrolled had no legal basis. But this court victory did not change the policy. In 1907, it was still government policy that children, whether voluntarily enrolled by their parents or committed under the provisions of the *Indian Act*, could not be removed without the minister's permission. In his report for the year ending March 31, 1910, Duncan Campbell Scott, then superintendent of Indian Education, wrote that 'pupils of residential schools are not usually allowed to leave the institutions until they reach the age of 18.' Clearly, the government was willing to ignore court rulings.

For their part, the churches thought the discharge policy was not strict enough. Principal Father Hugonnard thought that eighteen was too low a discharge age, and that 'many who go back to pure Indian surroundings will be liable to lose many of the benefits of the education they have received.' He believed students should be discharged only 'when the character is sufficiently formed, and when there is reasonable hope of the ex-pupil not lapsing into an uncivilized mode of life.' In 1904, Dr. Sutherland, the general secretary of the Methodist Missionary Society, lobbied the federal government to increase the discharge age from eighteen to twenty-one.

In the early twentieth century, British Columbia Indian agent A. W. Neill observed that school-discharge policies effectively discouraged parents from enrolling their children. While many wanted to see their children get some schooling, he wrote in 1906, parents 'think the time is too long to be separated from them. They would agree to part with them for, say five years, but think that to put a child into the school at seven or eight years of age, and not get it

out again until it is eighteen years old is too long.' He made the same point five years later, observing that the system of keeping the children in until they are 18 years of age is against the success of the school. It makes parents reluctant to sign them in, it leads to trouble in the maintenance of order and discipline in the school, and too often tends to lower the vitality of the pupils, so that the health of ex-pupils is often found to be undermined.

Neill's reports not only highlight parental resistance to enrolling their children, but they also demonstrate the degree to which the government and the schools ignored the legal rights of parents when it came to discharging students. Until 1908, the federal school regulations set the maximum age for compulsory school attendance for Aboriginal children at sixteen. In that year, the age was lowered to fifteen. While the regulation allowed the government to commit a child to a residential school until the age of eighteen, that was only in situations where it had been concluded that the child was being neglected or was not being properly educated. These conditions would not apply when parents were voluntarily enrolling a child. Yet, it is clear from Neill's letters that British Columbia schools and Indian Affairs had taken the position that even voluntarily enrolled children would not be discharged until they were eighteen.[132]

…

While parents clearly preferred boarding schools as an alternative to the more distant industrial schools, they also resisted the boarding schools. In 1906, J. R. Matheson, the principal of the Anglican boarding school at Onion Lake, lamented:

> The teacher or Missionary is entirely powerless in the matter of persuading or forcing the parents to send their children to school. The Indians either simply laugh or point blank refuse, or in some instances take the children away or coax them to run away after they have been in the school for some time, and all efforts to get them back are utterly futile.

He wrote that schools were languishing because government officials were "afraid to enforce the law, or there is no law for them to enforce. Which is it?"

Limitations with the existing regulations also were becoming apparent. In 1903, J. A. J. McKenna, the assistant Indian commissioner of the North-West Territories, wrote to the department:

> The Principal of the Boarding School at Norway House experiences great difficulty in retaining children at school. The Indians through mere caprice insist on taking their children away at all seasons. I find that the school is not mentioned in section 8 of the Regulations and that therefore the Principal has no authority to retain the pupils. His hands would be strengthened if it were known that he had a legal right to keep children in school. I would therefore recommend that the section be amended by adding the name of the school.

He pointed out that at least fourteen schools were not listed in the regulations and were therefore in the same situation.[133]

…

In 1908, the government adopted a new set of regulations that addressed the ambiguities in the 1894 regulations. In 1908, *Regulations Relating to the Education of Indian Children*

> removed 'police powers' from truant officers, (it had been determined that the *Indian Act* did not provide the authority to grant such powers) but of course police officers continued to have police powers.[134]

Canadian laws and regulations were enacted to force indigenous children into the under-funded, unhealthy schools that gave them completely discriminatory and minimal education. The details of the laws were ignored to force more children into the schools and to prevent them from leaving the schools. The RCMP were widely used to enforce these "laws" while at the same time they were ignoring numerous abuses of the children within the schools.

**13. 1907: Canada's national crime**

*It is quite within the mark to say that fifty per cent of the children who passed through these schools did not live to benefit from the education which they had received therein.*[135]

*"This alone [the high death rates] does not justify a change in the policy of this Department, which is geared towards the final solution of our Indian Problem."*[136]

*In doing nothing to obviate the preventable causes of death, brings the Department with unpleasant nearness to the charge of manslaughter.*[137]

Many students of Indian Residential Schools will be familiar with the description of Indian Residential Schools as being "a national crime". This phrase refers to a 1922 publication by Dr. Peter Bryce.[138] In turn, the 1922 publication is primarily about health inspections of residential schools carried out by Bryce and especially his report of 1907. Anyone who wishes to summarize or comment on Bryce's work needs to know the most detailed and accurate review of his work, how it was publicly reported in 1907, the details of Bryce's career and the specific details of what he found and said (his report has been badly misquoted and misunderstood in certain aspects in subsequent publications). The most detailed and accurate review of his work is in the TRC's final report.[139] In any event, the phrase "national crime" is not a reference to the IRS criminal cases, although the choice of the title by Dr. Bryce is a strong allegation of criminal negligence causing death and failure to provide the necessities of life.

> The Honourable S.H. Blake, a lawyer conducting a review of Anglican mission work, who was an influential force in the negotiations, characterized the situation in the schools for the Minister, Frank Oliver, in the most blunt fashion: 'The appalling number of deaths among the younger children appeals loudly to the guardians of our Indians. In doing nothing to obviate the preventable causes of death, brings the Department with unpleasant nearness to the charge of manslaughter.'[140]

Of course, no such charges were ever laid against anyone.

**14. 1910: the contract, under-funding and government control entrenched**

The TRC reports:

> In 1910, per capita rates for boarding schools had not been increased since 1891: they were $60 for schools in eastern Canada and $72 for schools in the West and North. The new agreement divided the country into three divisions: Eastern, Western, and Northern. The divisions did not break down along provincial boundaries; for example, Ontario had schools in all three divisions. There was a single per capita rate for the Northern Division schools of

$125, but in the Eastern Division, the rates could vary between $80 and $100, and in the West, they could vary between $100 and $125. The difference in the divisional rates was intended to reflect the higher cost of supplies in the West and the North. Although they represented an increase, the new boarding school per capita rates were still below the rates granted to industrial schools under the 1892 Order-in-Council.

The schools themselves were to be divided into three classes: A, B, and C. (See Table 11.5.) Class A schools were church-owned schools in good condition, and would receive the maximum grant for their division. They had to have substantial buildings in a good state of repair, with a full basement, a stone or cement foundation, a plentiful supply of pure water throughout the building, a proper system of sanitation, hospital accommodation for students with infectious diseases or tuberculosis, modern ventilation, adequate space in dormitories and classrooms for the number of students enrolled, modern heating, and a sufficient land base for farming and gardening. Class B schools were government-owned schools. They would have to meet the same requirements as Class A schools, but would receive only the minimum per capita grant for their division. Class C schools were church schools that, while 'sanitary and kept in a good state of repair,' did not meet all the requirements of a Class A school. These schools, which were required to have hospital accommodation, modern ventilation, adequate classroom and dormitory space, and an agricultural land base, would receive the minimum per capita grant. Schools that upgraded from Class C to A would receive an increase in funding.

The classification system reflects the poor state of the boarding schools of the day: of the existing sixty-one schools, forty-one were in the lowest class, Class C. Further, the haphazard nature of the expansion of the boarding school system in the West can be seen from the fact that seven of the twelve Class A schools were in Ontario. The average per capita grant under this system was $115.

…

Under the provisions of the contract, the churches agreed to 'support, maintain, and educate' a specific number of students. They were not to admit any child under the age of seven and required permission from Indian Affairs to keep a child who was over the age of eighteen. No child was to be admitted without the approval of Indian Affairs and a doctor's examination ('where practicable'). The contract limited the schools to children of specific bands. 'Half-breed' children could not be admitted unless a sufficient number of 'Indian children' could not be obtained.

The schools also had to be operated according to regulations adopted by the government. The government could determine the number of 'teachers, officers, and employees' who were required at the school. Teachers had to be able to 'speak and write the English language fluently and correctly and possess such other qualifications as in the opinion of the Superintendent General may be necessary.' There was no similar provision for French in the contract. The teachers and officers had to be qualified to

> give the pupils religious instruction at proper times; to instruct the male pupils of the said school in gardening, farming, and care of stock, or such other industries as are suitable to their local requirements; to instruct female pupils in cooking, laundry work, needlework, general housewifery and dairy work, where such dairy work can be carried on; to teach all the pupils in the ordinary branches of an English education; to teach calisthenics, physical drill and re drill; to teach the effects of alcoholic drinks and narcotics on the

> human system; and how to live in a healthy manner; to instruct the older advanced pupils in the duties and privileges of British citizenship, explaining to them the fundamental principles of the government of Canada, and training them in such knowledge and appreciation of Canada as will inspire them with respect and affection for the country and its laws.

Despite this long list of required skills, there was no requirement that teachers would have formal training. The contract also allowed Indian Affairs to require the church to remove, 'for cause,' any 'teacher, officer, employee or pupil.'

Students were to be given sufficient clothing, food, lodging, and accommodation for their 'comfort and safety.' With certain exceptions, the churches were to provide tools and equipment. Students and their clothes were to be kept clean and vermin-free, and the schools were to be free from flies, insects, and vermin.

Classes were to be held five days a week and 'industrial exercises' were to be held six days a week. There could be no more than one month of vacation, which was to be taken between July 1 and October 1 each year. During that month, children were allowed to visit their homes, but Indian Affairs would 'not pay any part of the transportation either going or returning.' The schools were instructed to observe the King's Birthday, Victoria Day, Dominion Day, and Thanksgiving Day. The churches were to provide reports as required and allow Indian Affairs representatives to conduct 'thorough and complete' inspections of the schools. Indian Affairs could also order the churches to make needed changes or alterations to the schools.

The contract placed only three obligations on Indian Affairs: to make quarterly payments based on the school's enrolment; to provide medicine, schoolbooks, stationery, and school 'appliances'; and to maintain any government-owned buildings in good repair and to provide for sanitation and 'sanitary appliances.' If the government believed a church was not adhering to the provisions of the contract, the contract could be cancelled with six months' notice.

**The 1910 contract and beyond**

The 1910 contract went into effect on April 11, 1911, and was intended to run for five years. In the first few years after the contract was signed, the federal government spent $150,000 a year upgrading many of the Class C schools. This spending ended with the commencement of the First World War in 1914. When the contract lapsed in 1916, no effort was made to negotiate a new one. However, the government and churches continued to operate as if the contract was still in effect, and, when new schools opened, it was used as the template for an operating agreement between the church organization and the government.

…

The fact that schools were penalized if they did not have full enrolment was also an ongoing issue. In 1922, the Manitoba Provincial Council of the Oblates pointed out that never in the history of the Pine Creek school had there been a year in which the church received the full amount that would have been allocated if it had recruited its allotted enrolment. In 1938, the Oblates estimated that running a school with a pupilage of less than 125 was economically unsound, based on the current per capita grant, and a figure of 150 was ideal. At the time,

only one of the schools it operated (at Qu'Appelle) had a pupilage of over 125. Five of its schools had pupilages of less than 100.

Between the ongoing need to cover school deficits and the government's increasingly ad hoc approach to school funding, the classification system developed in the 1910 contract had broken down by the 1920s. In 1924, the federal government did away with the regional divisions and classes, and a per capita rate was set for each school. For example, in 1927, there were five different rates for thirteen United Church schools in western Canada: $145, $155, $160, $170, and $175. (The United Church had been created in 1925 through a merger of the Methodist Church, the Congregationalist Church, and many Presbyterian congregations. In the process, the United Church assumed responsibility for all Methodist schools and all but two Presbyterian schools.) At the same time, there were at least three rates for Catholic schools in Alberta: $140, $155, and $170. By 1931, the average grant was $175 (up from $115 in 1911).

…

In 1932, without any prior consultation, the federal government cut per capita grants by 10%. The cut was imposed in March and made retroactive to January. The rate was cut again the following year by another 5%. In response to protests, Indian Affairs director Harold McGill wrote that not only would the cuts be maintained, but it also might be necessary to make more cuts in the future. He said, 'I can offer no assurance that anything can be done in the way of building new schools or rebuilding those that have been destroyed by fire.' The government announced in 1935 that it would be partially reversing the reductions, but, in the face of worsening economic conditions, it cut the per capita grant once more in 1936.

…

The Canadian residential school system could operate on such a low per capita grant because of the low wages it paid staff of religious orders, the value of the output of the farms from student labour, the clothing donated by many missionary societies, and the supplementary financial contributions of mission societies. In 1938, for example, the Presbyterian Church contributed an additional $7,745 to the operation of the Birtle school.

…

The 1910 contract between the federal government and the churches, which had established a per capita funding agreement for three different classes and locations of boarding schools, and established the respective responsibilities of government and the churches for the schools, also sidestepped the question of teacher qualification. The school managers, according to the contract, were not to employ, except for a period not exceeding six months, any teacher or instructor until evidence satisfactory to the Superintendent General has been submitted to him that such teacher or instructor is able to converse with the pupils under his charge in English and is able to speak and write the English language fluently and correctly and possess such other qualifications as in the opinion of the Superintendent General may be necessary.

The contract also required that the schools provide 'teachers and officers qualified to give the pupils religious instruction at proper times.' These were minimal requirements that would allow for the continued hiring of untrained teachers.

> The schools had a great deal of trouble recruiting staff even though formal requirements were not in place. After his 1908 tour of schools and reserves in western Canada, Indian Affairs inspector F. H. Paget reported that at the Battleford, Saskatchewan, school, 'Frequent changes in the staff at this school has not been to its advantage.' The problem was not with the principal, but with the fact that 'more profitable employment is available in the District and, furthermore, the salaries paid are not as high as are paid in other public institutions.' At the Anglican school on the Blood Reserve in Alberta, there were four vacant staff positions. Paget observed, 'Great difficulty is experienced in retaining an efficient staff upon the small salaries which are offered and until our schools can offer as high salaries as are paid at other Public Institutions this difficulty will not disappear.'
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> …
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> The government's response to discipline-related problems remained piecemeal, vague, and contradictory. The absence of any overall regulations, standards, or policies meant that government officials had to draw their conclusions about whether discipline had been excessive based on their own instincts and prejudices. Their judgment also would have been affected by the belief that decisions that favoured parents' complaints would serve only to weaken the authority of the system. Disciplinary policies were clearly in the hands of the schools, despite the fact that the 1910 contract between the federal government and the churches provided the government with the authority to impose any regulations on the schools that it deemed necessary.[141]

As for providing adequate education for the students, the Indian Affairs annual report for 1914 acknowledged that 'whenever possible the services of teachers with professional qualifications are secured for the Indian schools,' but the reality was that, in many locations, 'it has been found difficult to secure teachers with certificates.' No meaningful policy regarding teacher qualifications was put in place or enforced until the 1950s.[142]

From a legal point of view, it is essential to note that the Indian Residential Schools were created and funded by Government, and included a contract with the sub-contractors that clearly provided the Government with the authority to impose any regulations on the schools that it deemed necessary. These facts are all that is needed to establish the liability of the Government for any abuses that occurred within the schools. It is outrageous that even in 2017, the Government of Canada, through its lawyers at Justice Canada, continue to argue that there were Indian Residential Schools for which Canada was not legally liable.

**15. Fire traps, lack of fire regulations, arson**

*For much of their history, Canadian residential schools operated outside the jurisdiction of existing fire regulations.*[143]

If the children could not avoid being enrolled in the schools, could not be discharged from the schools and could not run away from the schools, then they could try to burn the schools down.

> Deliberately setting fire to a public building with the intention to damage or destroy it can be seen as an act of wanton vandalism or the symptom of a psychiatric disorder. It also can be a very dangerous and risky form of protest. The record indicates that at least twenty-five fires were either suspected or proven to have been deliberately set by students. It is impossible to put an exact figure on the number of fires that were deliberately set or to know why they were

> set. Some suspicions probably were unjustified; some other attempts to set fire to a building probably were never detected. When they were, the consequences for students could be significant. In some cases, individuals were tried and convicted for their involvement in these fires. In others, they were not charged, but were punished by school officials. Often, the students had admitted to their involvement and were not represented by legal counsel. Although the evidence is limited, it does not appear likely that the students who made these admissions did so in the presence of their parents or a responsible adult.[144]
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> …
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> With regard to fire safety, the government failed in both policy and implementation. It was slow in developing fire-safety policies and incapable of enforcing them. Low levels of funding meant that many of the buildings were poorly built and poorly maintained, and were potential fire traps. The harsh discipline and jail-like nature of life in the schools meant that many students sought to run away. To prevent this, many schools deliberately ignored government instructions in relation to fire drills and fire escapes. In other cases, the system bred such hostility that some students were driven to attempt to destroy the schools by fire.[145]
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> …
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> The boy who attempted to burn down the Shingwauk Home in 1889 was sentenced to a year at the reformatory at Penetanguishene, Ontario. Three of the boys involved in setting the fires at the Mohawk Institute in 1903 were sent to the Mimico, Ontario, industrial school for between three and five years. A fourth boy was sentenced to the Kingston, Ontario, penitentiary for three years.[146]
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> …
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> According to a report written three decades after the fact, the boys who had been charged with burning down the Saint-Paul-des-Métis school in 1905 were pardoned. The boy who set fire to the Mount Elgin school barn in 1908 was turned over to the authorities for prosecution. Two students who admitted to setting fire twice to the Crowstand, Saskatchewan, school were sent in 1913 to the Manitoba Industrial School for Boys (a home for delinquent boys operated by the Manitoba government). One of the students who attempted to burn down the Duck Lake school in 1917 was sent to a reformatory school. The two boys who set fire to the Anglican school in Onion Lake, Saskatchewan, were sentenced to five months in jail.[147]

The TRC report provides much more information about the setting of fires and the criminal charges and other punishments brought against students, in both Part One and Part Two of the TRC's History volume. Concerning the law, or lack of law, concerning building codes, the TRC reports:

> For much of their history, Canadian residential schools operated outside the jurisdiction of existing fire regulations. Constitutionally, provincial governments had responsibility for establishing and enforcing building codes, but, prior to the 1970s, they delegated this responsibility to municipalities. The result was a multiplicity of conflicting codes—or, in some cases, a complete lack of regulation. Many residential schools were located in remote rural and northern locations that didn't have municipal government, building codes, or fire inspectors. In 1941, the National Research Council (NRC) published a National Building Code. It was not until 1963 that the NRC developed a companion National Fire Code. Neither

of these codes had legal standing. Instead, they were meant to be used by municipalities as a model for their building codes. It was only through a slow and uneven process that municipalities adopted these codes. In 1973, eight provinces took responsibility for building codes away from the municipalities, issuing province-wide regulations based on the National Building Code.

Although they lacked legal force, the federal codes were used as a basis to assess conditions in residential schools and to make recommendations for improvements. By the late 1950s, the Dominion Fire Commissioner's office, a branch of the federal government, examined all the preliminary designs on buildings designed by the Department of Public Works, and approved final working drawings. In 1957, Indian Affairs recommended that the plans for a classroom block at the Mission, British Columbia, school not be based on the plans for the dormitory built for the Hobbema, Alberta, school. Since the Mission school would be located on the fringe of Greater Vancouver, it was thought 'a fire resisting construction would be more suitable.' This suggests that the construction of the Hobbema dormitory did not use re-resistant construction technologies.

Throughout the 1950s and 1960s, federal and provincial fire marshals began to pay increasing attention to the residential schools. Not surprisingly, they judged the schools to be overcrowded fire traps. The standard recommendation was the installation of expensive sprinkler systems. In 1950, for example, the Nova Scotia fire marshal recommended that a sprinkler system be installed in the Shubenacadie school. Indian Affairs official Philip Phelan in effect rejected the fire marshal's recommendation, telling the school principal that Indian Affairs had not installed sprinklers in any of its residential schools. By this time, the federal government was committed to closing the system down and usually tried to bargain for time. In many cases, schools were allowed to stay in operation if they installed smoke and heat detectors and reduced enrolment. These compromises were also based on an understanding that the school would close in a few years.[148]

The lack of fire regulations and criminal prosecutions for arson were just part of the legal background to Indian Residential Schools.

## 16. 1913-14: the first IRS court cases: civil damages for punishments inflicted on Hazel and Ruth Miller; no conviction of staff member having sex with school girls

### The confinement of Hazel and Ruth Miller: The Mohawk Institute, 1913

In 1913, eleven-year-old Hazel Miller and her thirteen-year-old sister Ruth were confined to the school's punishment cell after running away from the Mohawk Institute. There, they were also subjected to corporal punishment and had their hair cut short. Their father, acting through a law firm he had hired, asked for an investigation into conditions at the school. In making the request, his lawyers stated that children are being punished from time to time in a shameful manner for trifling offences and that they are treated from time to time as though they were criminals. For instance, boys are whipped until they are cut, girls have had their hair cut off close to the scalp, and parents are not allowed to see their children if they (the children) happen to be under punishment at the time.

Deputy Minister Duncan Campbell Scott advised the Indian Affairs minister that there was no need for an investigation, since the father, George Miller, was a Baptist and was simply motivated by denominational jealousy against an Anglican-run school. Scott did acknowledge that the rules governing discipline at the school were 'antiquated,' and that he had set in

motion measures to improve them. He noted that the children were 'whipped with a strap allowed by the Department of Education in Ontario.' At this point, Scott expressed his personal view: 'I do not believe in striking Indian children from [sic] any consideration whatever. If children resident in the schools prove themselves continuously so untractable as to require physical punishment, they should be discharged from the school. This school is not a reformatory.'

The Truth and Reconciliation Commission of Canada has not found any evidence that Scott ever ordered the sort of ban on corporal punishment that would have been consistent with the views he expressed to the minister. Scott informed the parents' lawyers that, while it might be necessary to make 'minor improvements in discipline and dietary,' there was no need for an investigation. They were, he added, free to take the case to court. He advised the minister that, by taking this stand, 'we will not hear very much more about the matter.' He was also concerned with saving face: holding an independent inquiry 'would only be considered a triumph, first of these men personally, and second of their faction.'

The suit proceeded, although the government attempted to frustrate its progress. The Six Nations council had offered to support the girls' parents by making a $100 deposit with their law firm. Indian Affairs refused to allow this expenditure of band funds, deeming the case a 'personal matter.' By this time, Scott had reviewed the school's disciplinary code in detail, and concluded it was 'too severe.' However, he felt, 'this has been in use so long in the Mohawk Institute that it is difficult to change it.' The best he could report to the minister was, 'As time goes on it will be possible perhaps to relax it.' In the same letter, he described the Mohawk Institute as 'one of our best conducted schools.' These were words he might come to regret.

The case went to trial in April 1914. According to the *Brantford Expositor*, Ruth Miller testified that she

> had run away from the Institute because she did not like the food. When brought back she was put in the cell on the third floor, which was 3 feet by 6 feet, with a little hole in the door. There was no light, no bed and no chair. In this she remained for three days, getting bread and water on Sunday. Her hair was cut off on Monday. She was put on the black list, having to walk in a ring in place of playing, and not being allowed to talk to the other girls. She tried to get away a second time, but was caught. She got a birching the next day, receiving thirteen stripes on the bare back while laying face downwards on a bed, from Miss Weatherall. The latter had been told to give her 12, but she gave her 13. After that for a week and a half it was hard for her to sit down. She had never received such a whipping before for it was hard. Her back was black and blue and had red marks.

Principal Nelles Ashton said that although the whip had been used in the past, upon his becoming principal, he had 'ordered that the whip be prohibited to any officer.' He stated that he did instruct Weatherall to 'whip' Ruth Miller but that he had not instructed her 'how it was to be done.' Ashton maintained that Ruth had been punished with a strap. Weatherall had left the school and was living in Medicine Hat. As a result, she was not called to testify. Other students testified that the punishment had been administered with a strap, not a whip, and gave lower counts as to the number of blows that were inflicted.

The court dismissed the claim for damages for cropping the girls' hair and for providing them with poor food. However, the court awarded Ruth Miller's father $100 in damages for the school's imprisoning her for three days on a water diet and $300 for the physical punishment

> to which she had been subjected. Ashton, who had been principal since 1911, was replaced that year. On his departure, Indian Affairs official Martin Benson inspected the school and concluded that the pupils 'are disciplined to death. What is needed at this school is an entire change of system, as the one inaugurated by Mr. Ashton has been too long in existence.' Although the next principal, C. M. Turnell, did relax discipline at the school, his time in office was only four years.[149]
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> …
>
> No matter what the European standards of the day might have been, residential school discipline clearly violated the norms by which Aboriginal parents expected their children to be treated. In her memoirs, Louise Moine recounted an incident in which a student at the Qu'Appelle school complained to her parents about being strapped. The girl's mother 'marched right down to the playroom where she confronted the Sister by shaking her fist at her and telling her off in Sioux. The Sister, fearing abuse, held her cross up in front of the woman but she knocked it out of the Sister's hand.'
>
> Principals recognized they were violating parental norms, but concluded that such norms were 'inappropriate.' In 1922, Andrew Paull, the corresponding secretary of the Allied Tribes of British Columbia, wrote to W. E. Ditchburn, the chief inspector of Indian agencies in British Columbia, to complain that the principal of the Alberni industrial school, Mr. Currie, 'unmercifully whips the boys on their backs, which is objected to as well as Mr. Curry fighting and kicking the boys for the purpose of correction. It is further reported that Mr. Curry gets extremely mad at the slightest provocation, and whips or hits the boys with his fists, or chokes them.' Currie said he thought himself to be 'patient, kind and lenient with every child who shows any attempt at obedience to the rules, but certain offences must be dealt with firmly.' But, he said, Aboriginal parents never punished their children. 'The result is that when the teacher does it they magnify the thing to appear that the child was being murdered.'
>
> In the absence of guidelines and directives, individual principals decided for themselves what was and was not appropriate. When principals, or perhaps other staff members, changed, the pattern of discipline also changed, resulting in inconsistency within schools from year to year, and from school to school.[150]

The first criminal case identified by the TRC was from 1914 and involved a school farm instructor H. Everett who confessed to the school principal that Everett had been having sex with some of the female students. (He confessed after a co-worker discovered this.) The principal told Everett to leave town on that night's train. However, students complained to their parents who reported it to the police and a warrant was issued for Everett's arrest, who was no longer in the area by that time. There is no further information about this case.[151]

**17. 1920 amendments to *Indian Act*, more forcing children into the schools, more hitting**

While these issues were occurring at the residential schools, Canada was busy amending the *Indian Act* in various ways to make life, farming, culture, self-government and freedom of religion for indigenous peoples ever more difficult. In 1906, the Act was amended to establish incentives to encourage First Nations people to approve the sale of treaty land. In 1911, the Act was amended to allow for the removal of First Nations people from a reserve that was next to, or within, a town of more than 8,000 people. Another amendment that same year allowed for the expropriation of reserve land. An amendment in 1914 prohibited First Nations people from

participating "in any Indian dance outside the bounds of his own reserve." Amendments in 1910 and 1914 tightened provisions restricting First Nations people's ability to sell livestock without government permission. In 1917, the *Migratory Birds Convention Act* undermined indigenous hunting rights. In 1920, the federal government reneged on its commitment to protect indigenous land rights in British Columbia.[152]

On occasion, the government recognized it was acting without lawful authority concerning forcing children to stay in school. Rather than stopping its practices, it amended the law to make its practices legal.

> The government's weak legal position on discharge was underscored in 1918 when federal Deputy Minister of Justice E. L. Newcombe informed Indian Affairs that the powers under Section 12 of the 1894 regulations applied only to students who had been committed to the schools because it was believed the child was 'being not properly cared for or neglected.' In order for the government to have the legal authority to force Aboriginal students to stay in school longer, he recommended that the regulations be amended to ensure that even when 'a parent or guardian voluntarily surrenders the child to the industrial school,' the 'child shall then be held in all respects as if committed.' Although the regulation was not amended at that time, Newcombe's letter helped pave the way for significant changes to the *Indian Act* in 1920.[153]
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> …
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> In 1919, the churches intensified their pressure for enforcement of compulsory attendance. In apparent response, Assistant Deputy Minister A. F. MacKenzie sent out a circular to Indian Affairs staff, stating that parents who did not send their children to school 'shall not be regarded as being eligible for relief or other assistance from the Department.' In 1920, the Anglican Church complained that the Indian agent did not provide support to the church in its efforts to recruit students to its boarding school in the Pas. In one instance, T. B. R. Westgate, the field secretary for the Missionary Society of the Church of England in Canada, said that students were not delivered to the school until five months after their admittance had been approved. In another case, two boys had been placed in the schools 'because they were a nuisance on the reserve.' This continuing pressure from the churches, coupled with the growing realization that the government lacked the legislative authority for its current discharge policy, led to a complete rewrite of the education section of the *Indian Act* in 1920. Under the new provisions:
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> > 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. Provided, however, that such school shall be the nearest available school of the kind required, and that no Protestant child shall be assigned to a Roman Catholic school or a school conducted under Roman Catholic auspices, and no Roman Catholic child shall be assigned to a Protestant school or a school conducted under Protestant auspices.
> >
> > (2) The Superintendent General may appoint any officer or person to be a truant officer to enforce the attendance of Indian children at school, and for such purpose a truant officer shall be vested with the powers of a peace officer, and shall have authority to enter any place where he has reason to believe there are Indian children between the ages of seven and fifteen years, and when requested by the Indian agent, a school teacher or the chief of

> a band shall examine into any case of truancy, shall warn the truants, their parents or guardians or the person with whom any Indian child resides, of the consequences of truancy, and notify the parent, guardian or such person in writing to cause the child to attend school.
>
> (3) Any parent, guardian or person with whom an Indian child is residing who fails to cause such child, being between the ages aforesaid, to attend school as required by this section after having received three days notice so to do by a truant officer shall, on the complaint of the truant officer, be liable on summary conviction before a justice of the peace or Indian agent to a fine of not more than two dollars and costs, or imprisonment for a period not exceeding ten days or both, and such child may be arrested without a warrant and conveyed to school by the truant officer: Provided that no parent or other person shall be liable to such penalties if such child, (*a*) is unable to attend school by reason of sickness or other unavoidable cause; (*b*) has passed the entrance examination for high schools; or, (*c*) has been excused in writing by the Indian agent or teacher for temporary absence to assist in husbandry or urgent and necessary household duties.

It should be noted that the 1920 amendment did not make residential schooling compulsory for all First Nations children. The provision stipulated that students 'shall attend such day, industrial *or* boarding school' (italics added). Indeed, the federal government never constructed a sufficient number of residential schools to accommodate all First Nations children. Where, in the past, the federal government could commit a child to residential school only if it judged that she or he was not 'being properly cared for or educated,' the new amendment gave it the authority to compel any First Nations student to attend residential school. It also made it legal to keep the child in that school until they turned fifteen. (However, the department was to take the position that the Act gave it the right to keep children in school until they turned sixteen.)

Scott recognized that the amendments had significantly increased the government's power of compulsion. In his annual report, he wrote:

> Prior to the passing of these amendments the Act did not give the Governor in Council power to make regulations enforcing the residence and attendance of Indian children at residential schools, as the department could only commit to a residential school when a day school is provided, and the child does not attend.
>
> The recent amendments give the department control and remove from the Indian parent the responsibility for the care and education of his child, and the best interests of the Indians are promoted and fully protected. The clauses apply to every Indian child over the age of seven and under the age of fifteen.[154]

…

In 1920, this authority was incorporated directly into the *Indian Act*. Amendments gave truant officers the authority to 'enter any place' where they believed there to be a truant child. Truant officers were to investigate cases 'when requested by the Indian agent, a school teacher or the chief of a band.' A truant child could now be arrested without a warrant and returned to school. Parents or guardians who did not comply with the order of a truant officer faced fines of 'not more than two dollars and costs, or imprisonment for a period not exceeding ten days or both.' In 1927, Duncan Campbell Scott announced that under the

> authority of the *Indian Act,* all Royal Canadian Mounted Police officers and constables were appointed truant officers. This was formalized by an amendment to the *Indian Act* in 1933.[155]
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> …
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> By the 1920s, Indian Affairs had called on the federal Department of Justice officials to provide a definition for Protestant and Catholic children. According to the officials, a Protestant child was 'one born of Protestant parents or one whose father or widowed mother has decided to have him or her educated in a Protestant school or a school conducted under Protestant auspices.' Catholic parents were similarly defined. From 1922 onwards, the Indian Affairs policy was that it would not place the child of a Catholic father in a Protestant school without an affidavit from the father, and neither would it place the child of a Protestant father in a Catholic school.[156]

Notice the discrimination against mothers. It is the father's religion that counted.

> The compulsory approach to schooling adopted in the *Indian Act* amendment of 1920 was but one of a series of measures aimed at enforcing the assimilation of Aboriginal people. A 1920 amendment allowed the federal government to strip people of their status under the *Indian Act* without their permission. The government took this step because the previous policy of voluntary enfranchisement had failed: between 1867 and 1920, in all of Canada, only 162 families, comprising 360 persons, had given up their Indian status through this process. First Nations people had a far deeper attachment to their Aboriginal identity than the federal government had realized.
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> In testimony before a parliamentary committee examining proposed amendments to the *Indian Act*, Deputy Minister Scott outlined the department's long-term goals. Having worked for Indian Affairs for thirty years, he expressed those goals in personal terms:
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> > I want to get rid of the Indian problem. I do not think as a matter of fact, that this country ought to continuously protect a class of people who are able to stand alone. That is my whole point. I do not want to pass into the citizens' class people who are paupers. That is not the intention of the Bill. But after one hundred years, after being in close contact with civilization it is enervating to the individual or to a band to continue in that state of tutelage, when he or they are able to take their position as British citizens or Canadian citizens, to support themselves, and stand alone. That has been the whole purpose of Indian education and advancement since the earliest times. One of the very earliest enactments was to provide for the enfranchisement of the Indian. So it was written into our law that the Indian was eventually to become enfranchised.
>
> Scott stated that although it might be years before the process of enfranchisement was complete, 'our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian question, and no Indian Department that is the whole object of this Bill.'
>
> Scott's testimony is a clear statement of colonial policy. First Nations people were not members of nations with whom Canada had a relationship: they were a problem. In the process of gaining control over Aboriginal land and resources, the Canadian government had assumed a series of obligations to Aboriginal people. In Scott's mind, the role of Indian Affairs was not to administer these obligations—which, when they were being negotiated, had been described to Aboriginal people as being part of an ongoing, indeed, eternal,

> relationship—but to terminate them. The best way to do this was to eliminate First Nations identity—in all its legal and cultural forms—thus bringing to an end all obligations. The government now had the power to rob adults of their status and to rob parents of their children.
>
> The fact that the 1920 amendments addressed both enfranchisement and education demonstrates that the ongoing colonization of Aboriginal people was not limited to education.[157]

Here is another example of how the criminal law worked to enforce the residential schools system.

> After the death of a student at the Elizabeth Long Home in Kitamaat in 1922, parents withdrew their children from the school, which was operated by the Methodist Church. According to a Mounted Police investigation, virtually every member of the community signed a petition demanding the dismissal of the entire school staff. The petition claimed that the children 'had been compelled to eat rotten fish and oat meal with worms in it.' The principal, Ida Clarke, acknowledged 'it was often impossible to obtain fresh meat or fish; but the children always have sufficient food to eat.' At a public meeting held on the issue, an Indian Affairs official said that the parents had no right to withdraw their children, having signed a contract 'for them to remain there.' The First Nations people responded that 'the contract with the school was to the effect that the children would be well cared for, provided with sufficient clothing, food etc.' At the end of the meeting, the parents agreed to return their children to the school on the condition that the principal 'sign her name to a paper before us that she would see that the children got all the food they wanted, that they would be well cared for, and be supplied with sufficient clothing.' She signed the paper and the conflict was defused. In this instance, resistance came at a price: John Adams, who had protested, was convicted, in the words of the Indian agent, of 'having used insulting language' to one of the school staff. His sentence was stiff: two months in jail or a fine of $20. He paid the fine.[158]
>
> …
>
> Although students could be withdrawn from school once they reached the age of sixteen, in the 1920s, the government policy was to encourage parents to keep their children in school until they turned eighteen. Russell T. Ferrier, the director of education for the department, wrote, 'Indian Agents, principals and others interested in Indian education are urged to make every possible endeavor to persuade parents to leave their children in school for a longer period than prescribed by the Act.'
>
> In a 1927 letter to an Indian agent, Ferrier wrote that 'you will realize that the majority of residential school pupils will considerably benefit by remaining in such schools until they are eighteen years of age or even older—this is especially true of the girls for reasons which will readily suggest themselves to you.' Departmental secretary J. D. McLean maintained the same approach, instructing the principal of the Presbyterian school in Kenora, Ontario, to ensure that 'every effort is bent to have those who should remain longer stay until they are 18 years of age.' If parents were to request the discharge of students who were sixteen or seventeen, McLean advised the principal to tell them that 'the matter will have to be referred to the Department.'

While Ferrier and McLean were advocating a policy of persuasion and delay, Indian Commissioner William Graham, the senior Indian Affairs official on the Prairies, essentially took the law into his own hands. It was his policy to refuse to grant a discharge to any student under the age of eighteen. His practice came to light only in 1926 when he complained to Ottawa that the principal of the Joussard, Alberta, school was discharging students at the age of sixteen. Graham called this 'an irregular proceeding and contrary to the Regulations of the Department, which required the education of Indian children up to the age of eighteen.' He said he had been careful to guard against granting applications from other schools to discharge students before they reached the age of eighteen. When McLean pointed out that the *Indian Act* provided for compulsory attendance only for children between the ages of seven to fifteen, Graham responded that while he was well aware of the *Indian Act* provisions, he thought the government had a regulation 'whereby we were expected to keep children in school until the age of eighteen.' He said this regulation was similar to the regulation that required band members to request passes from the Indian agent before leaving the reserve, although he was also well aware there was no formal regulation regarding passes. The impact of Graham's personal policy making was significant to many First Nations families. According to his report, he received at least 100 applications a year from parents who were seeking to have their children discharged once they turned sixteen. By this, his own evidence, at least 100 First Nations youth a year were being illegally required to attend residential school against the will of their families.[159]

…

The *Indian Act* continued to be amended in ways to oppress indigenous people beyond the residential school context. In 1927, the *Indian Act* was amended to prevent anyone from collecting money from Indians for the pursuit of legal claims against the government without the consent of Indian Affairs.[160]

…

In 1928, Indian agent J. Waddy wrote that at the Anglican school in The Pas, 'hardly a day goes bye [sic] that one or more do not take leave on their own account. The fault is hard to spot, but I think it is mostly from a lot of those nearing the age of eighteen trying to get away before their time expires.' In 1928, the legal age of discharge was not eighteen, but fifteen, suggesting that there was no legal authority to keep the boy in school after that age.[161]

…

Meanwhile, the churches continued to believe that attendance regulations were not being enforced with sufficient vigour. At their 1925 convention, the principals of Catholic residential schools passed a resolution that, since some parents 'show negligence or repugnance to send their children to school or encourage truancy,' the federal government be requested to enforce the compulsory attendance provisions of the *Indian Act*. They maintained their opposition to day schools, asking that none be constructed 'within the recruiting grounds of a residential school.' Fifteen months later, in 1927, all Royal Canadian Mounted Police (RCMP) officers and constables were appointed truant officers. From then on, the RCMP was with increasing regularity called upon to return runaway students and to compel parents to send their children to residential schools. In 1928, an Indian agent had a parent from the Blood Reserve jailed for refusing to send his children to school.[162]

The same year that a parent from the Blood Reserve was jailed for refusing to send his children to school saw what appears to be the first criminal prosecution for abuse at an IRS, at the Indian Residential School for the Blood Reserve, in 1928.

## 18. 1928: An important case permitting the hitting of children; more forcing children into the schools; more hitting; more runaways

### Rapid blows to the face: Cardston, 1928 and 1934

On the morning of January 9, 1928, a long-simmering conflict between Edwin Smith, the school gardener at the Roman Catholic school in Cardston, Alberta, and seventeen-year-old Albert Many Fingers erupted in violence. During the winters, Smith assisted the boiler operator and the school disciplinarian. According to Smith, he and Many Fingers initially came into conflict because the boy spent a considerable amount of time flirting with the female students working in the kitchen, laundry, and bakery, all of which were located near the boiler room. Smith told Many Fingers to stop this behaviour. Instead, the boy was defiant, at times insulting Smith in such a way that, according to Smith, 'no white man would take from another; not speaking of an Indian.' According to Smith, Many Fingers also told a student of his intent to fight Smith. Smith took his complaints to the principal, E. Ruaux, who said it would only increase the boy's contempt for Smith if the principal strapped him on Smith's request. Having taken all he could stand, on January 9, Smith told Many Fingers to stay behind when the other students went to breakfast. In his own words, Smith told Many Fingers that 'since he thought himself a better man than I, the time has arrived to show it. He was given the same chance that I had myself. I hit him a few times and the result was a bleeding nose. When I saw that he was making no attempt at striking back, I quit.'

Many Fingers ran away and complained to his parents, who wanted to launch a prosecution. The local Indian agent, J. E. Pugh, first became aware of the incident when the principal informed him that Many Fingers had run away. However, it was not until Many Fingers's father approached him about laying charges against Smith that Pugh found out about the assault. When Pugh went to the school, Smith was absent on leave. The principal confirmed that Smith had challenged Many Fingers to fight and had bloodied his nose. Pugh wrote, 'While dealing with the matter, I stated that the Department, as far as I knew, would not countenance the striking of a boy by fists, and stated that I thought the proper method should be by the use of a regulation strap.' In future cases, he expected that any school employee who struck a student would be dismissed. Pugh informed Duncan Campbell Scott of the affair, saying he hoped to keep the matter out of the courts and noting that the family was still seeking a prosecution. Scott agreed it would be best to avoid any publicity, but recommended that Smith be fired.

Principal Ruaux, however, chose to support his staff. He accused Pugh of taking the family's side because the school was Roman Catholic. He said the Indian agent had no business involving himself in anything other than the physical operation of the school. Scott supported Pugh, saying that in light of the 'unwarranted assault' on the student and the principal's unwillingness to dismiss Smith, Pugh should not take any steps to stop the family from having a charge laid. The Mounted Police officer who conducted the investigation noted that Smith made a 'futile attempt to justify his activities by saying that this was the only way to enforce obedience, which is obviously ridiculous.' The case went to trial on February 25, 1928, and, based on the evidence, including Smith's testimony that he had challenged Many Fingers to a fight, police magistrate J. W. Low convicted Smith of assault. In his decision, he said, 'I think that the accused stepped outside the bounds of his official position, when he

invited Albert Many Fingers to fight. This in my opinion was not discipline.' Smith was given the choice of paying a $10 fine or spending ten days in jail.

Instead, he successfully appealed the verdict. In overturning the conviction, Judge A. M. MacDonald recast the key facts of the incident. Whereas all the evidence to this point, including a written statement from Smith, showed that Smith had challenged Many Fingers to a fight, in MacDonald's version of events, Smith told Many Fingers that he had been disobedient in the past and was still disobedient—even though none of the evidence reported from the original trial indicated that Many Fingers had been disobedient on the morning of the fight—and he was going to be punished. 'Other words then passed between them and Many Fingers, seeing that he was about to be punished, assumed a fighting attitude with closed fists. Upon his so doing Smith struck him three rapid blows about the face and head with his fists, causing his nose to bleed.'

MacDonald transformed the whole affair back into a matter of discipline, adding that Smith had the right to punish any pupil for violating school rules. In determining whether the force was reasonable or not, MacDonald quoted the testimony of the Reverend William R. Hanes, whom he described as having 'considerable experience in the management of Indian Schools.' Hanes had testified that if a student had ever attempted to fight with him, he would 'knock him down and then take him to the principal.' In reaching this decision, the judge made no effort to determine if the school had a discipline policy or whether Smith's actions were consistent with the policy. On reading the decision, Deputy Minister Scott wrote to the head of the Oblate order in Alberta, saying he was still opposed to the form of punishment that had been carried out and might still be requesting that Smith be dismissed.

Relations between Ruaux, the principal, and Pugh, the Indian agent, remained tense. Late in 1928, when a father returned his runaway son to the school, he asked that he not be whipped. The principal told him he would do so unless the Indian agent prohibited the punishment. Pugh complained to Ottawa that it was not fair for the principal to burden him with the decision, adding he preferred to 'deal with the Indians strictly according to the Act.'

Six years later, complaints were raised once more about Father Ruaux's treatment of another boy at the school, Willie Big Head. In the principal's opinion, Big Head was a troublemaker whose inability to control his temper was bound to land him in trouble. One day in 1934, when the boys were leaving the school chapel, Ruaux noticed that Big Head had his hands in his pockets. A letter from the Oblate headquarters in Ottawa, defending Ruaux's actions, gives the following account of what happened next when the principal asked Willie to take his hands out of his pockets.

> The boy answered in a mumbling way which the principal did not understand. The Principal repeated the order. Same mumbling. The father left the chapel with the boy and asked him four times: 'Have you anything to say?' No answer. A fifth question—the same—was asked. No answer but then the boy took the Principal by the wrist. The Principal took hold of the boy's hand and held his thumb. Scuffling followed. Kindly note that boys and girls had stopped and were watching the scene. The principal seeing that it was time to act if he did not want to lose authority and escape a black eye (his own words) put his hand in the hair of the boy (not pulling) who covered his face with his arms. The father then struck his arms 3 or 4 times with his fist, not touching directly his face or head. Then he left him, the boy being apparently subdued. But the father noticing that he was nose bleeding [sic] sent him to wash his face and told him to behave in the future. Then, through the advice of one of the chiefs' (Edward Red Crow) adopted son (a

> bastard and a sneak father called him) Willie jumped from a window five feet from the door (showing that after all his supposed injured arm was not too bad) and ran to his home.
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> Indian agent Pugh was informed of the event and had Big Head examined by a doctor. According to the principal's unnamed Oblate defender, the doctor 'could not say that the nose was broken,' and, within a few days, the 'black around the eyes had disappeared.' A police investigation did not lead to charges being laid, but the principal believed that the Indian agent, acting on anti-Catholic bias, had met with the local chiefs to agitate for the appointment of a new school principal. In complaining about this action to his superiors, Ruaux asked, 'What business do they [the chiefs] have in the government of his school?' In his report on the matter, the Indian agent said the chief and council had come to him to request the principal's dismissal, noting that the boy's father was so angry that he did not trust himself to speak to the principal. In May, Indian Affairs Deputy Minister Harold McGill instructed Pugh to inform the chief and council that 'this matter had been taken up with the Church authorities, and I feel assured that a similar difficulty will not again occur at the Blood School.' He went on, 'As intimated in my letter of March 28th, last, I feel that it would be in the best interests of all parties concerned to allow the matter to drop.' The government had the authority both to request and to enforce the dismissal of any staff member, and made use of this authority in other situations. In this case, it chose not to do so, even though it was apparent to government officials that Ruaux engaged in, and encouraged, the excessive disciplining of students.[163]

The various amendments to the *Indian Act* that have been described in this paper are examples and do not constitute the full list of measures adopted. The government made continual incremental reductions in band authority and incursions into every aspect of Aboriginal life—including the right to visit pool halls (which was restricted in 1930). As Scott's biographer, Brian Titley, commented:

> It would be tedious to recount in detail the various amendments to the *Indian Act* that were instituted between 1920 and Scott's retirement [in 1932]. Like those that preceded them, they tended to increase the power of the department while concomitantly, weakening the autonomy of the Indians.
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> …
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> In 1930, the *Indian Act* was amended to increase the discharge age from fifteen to sixteen. The minister was allowed to order that a child be kept in school until he or she turned eighteen if it was thought 'it would be detrimental to any particular Indian child to have it discharged from school on attaining the full age of sixteen years.' In this case, the government was legalizing its existing practice. As Scott wrote in the 1931 annual report, 'the usual practice at Indian Residential Schools is to encourage pupils to remain until they are 17 or 18.' Departmental director of education Ferrier struck a different, more moderate, note and explained to T. B. R. Westgate of the Missionary Society of the Church of England in Canada, 'It is not intended that compulsion to the 18th birthday be applied to all Indian children or even to a large number.' Instead, he said, it was to be used only 'when home conditions very strongly suggested such action.'[164]

Meanwhile, also in 1930, the principal at the Birtle, Manitoba school was 'honourably acquitted' at his trial for 'immoral conduct'. Two of his accusers were given prison sentences and a third one had her teaching certificate removed.[165] Another prosecution occurred in 1931 against the

principal of the school at Norway House, Manitoba. Again, this involved a punch to the head with a fist. The principal was acquitted.[166]

While staff were being acquitted, children were not.

> In 1930, the Roman Catholic church at Pine Creek, Manitoba, was destroyed by fire, and four attempts were made to burn down the nearby Pine Creek school. Two boys confessed to setting the fires, although one of them did not do so until he had been promised that, aside from being expelled from the school, he would not be punished. Thomas Baird, the Indian Affairs official investigating the case, decided that 'no good purpose could be gained by laying a charge of arson' and recommended the matter be left to 'church authorities to deal with the boys as they may see fit.' Despite the promise that no action would be taken, the Oblates requested that one of the boys be prosecuted. In the end, both were charged. The principal arranged for the release of one boy, but the other boy, who had been told he would not be prosecuted, was convicted and given a two-year suspended sentence. The principal thought the sentence was too lenient and inquired if he could be prosecuted a second time.
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> Two students were convicted for their roles in the 1930 fire at Cross Lake, Manitoba, that left thirteen people dead. One student was convicted of conspiracy and given what was described as a 'short term of imprisonment.' The other student was a minor at the time the Cross Lake fire was set. His case was transferred from juvenile to adult court. He pleaded guilty to the charge of arson and was given a life sentence. Indian Affairs declined to appoint a lawyer to represent him, saying this was done only in 'charges of murder.' In 1939, eight years after his conviction, Indian Affairs also declined to support his application for parole, saying he had served only 'a comparatively short' portion of his sentence.[167]
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> …
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> Nelson Hughes said that he took part in setting the 1930 Cross Lake, Manitoba, fire because the principal was always punishing him. After Nelson's conviction for conspiracy (he was acquitted of the charge of arson) in setting the fire, his lawyer, John L. Ross, called upon the federal solicitor general to hold 'a full and complete investigation ... as to why two school boys should set a school on fire.' He said the evidence presented in court showed that 'every boy in that school had a hatred of the officers in charge there. Such a condition is not right, nor is it moral in an Indian school.' He suggested that, had the trial been held in northern Manitoba, 'perhaps the Court and jury would have agreed with my contention that the State had failed in its duty to the Indian and half-breed of the North Country.'[168]
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> …
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> Coercive measures were used throughout the 1930s to compel attendance. In 1931, Mrs. John Chakita (alternately Tchakta) visited the Thunderchild school in Delmas, Saskatchewan, and, against the desire of both the principal and the sisters, removed her daughter Mary, who, she said, was suffering from poor health at the school. The local Indian agent chastised the principal and ordered him to seek the girl's return.
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> When the principal's efforts failed, the Indian agent, S. L. Macdonald, obtained a court summons ordering the mother to return the girl to school. The following year, the Indian agent sent a letter to a member of the Moosomin Band that said, 'The Principal of the Delmas School has made a complaint that you have not returned your boy to the School.' The father

> was told, 'Please see that this boy is taken back to the school at once, as if it is found necessary to use the Police, you will be liable as well as have to pay the expenses of the action.'[169]

While enforcement activities of these kinds were ongoing, the *Indian Act* was amended in 1933 to incorporate the appointment of Mounted Police officers as truant officers, reflecting their 1927 appointment.[170] Once again, for truant powers, as with discharge policies, the government and Canada's legal system was not especially fussy about whether an illegal practice developed. They would just make a law later that would paper over any governmental illegality.

Fires and punishment for children continued: "In 1933, two girls attempted to set the Roman Catholic school at Cluny, Alberta, on fire. As a result, they were transferred to the Home of the Good Shepherd in Edmonton."[171]

The challenge of runaways continued.

> One girl ran away from the Sandy Bay, Manitoba, school on three different occasions in 1933. The third time, she took some school clothing with her: a dress, a hat, and a pair of pants. School principal O. Chagnon had her charged with 'theft and truancy.' She was located by the Mounted Police and taken to court. Because the items of clothing were returned, Chagnon asked that no further action be taken. The case was adjourned indefinitely; as the police report noted, this meant that 'in the event of this girl giving further trouble, she could then be dealt with in this connection also.'[172]
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> …
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> Although the involuntary enfranchisement provision was repealed in 1922, it was revived in slightly different form in 1933 when the minister of Indian Affairs was given the power to enfranchise individuals. Women who married individuals without status continued to lose their status with consent. … Aboriginal people also faced numerous barriers to getting the right to vote. For example, the *Dominion Franchise Act* of 1934 explicitly disqualified Indian persons living on reserves and Inuit people from voting in federal elections.[173]
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> …
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> Into the 1930s, the federal government policy had been to frustrate Aboriginal political organizations and subject them to police surveillance. For example, Indian Affairs had attempted to strip F. O. Loft, the leader of the League of Indians, of his Indian status, and considered prosecuting him under the provision of the *Indian Act* prohibiting the raising of funds to pursue claims against the government. In 1934, when John Tootoosis, a leader of the League of Indians of Western Canada, travelled to the Driftpile Reserve in Alberta, he was picked up by the Mounted Police in Edmonton and told that if he persisted in his journey, he ran the risk of being arrested for trespass. On another occasion, when Tootoosis asked an Indian Affairs official for twelve copies of the *Indian Act*, he was presented with two copies and an explanation that it was not considered necessary to give it 'wide distribution.' He was told that if people wanted to know more about the Act, they could ask their Indian agent.[174]
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> …
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> **Thrashed on their bare backs: Shubenacadie, 1934**

In the spring of 1934, $53.44 was stolen from a locked drawer in a cabinet in the office of the mother superior of the Shubenacadie, Nova Scotia, school. Chocolate boxes taken from another locked drawer were scattered. The sister who discovered the theft made some inquiries and located one boy who admitted to taking $2 from the drawer. She took her findings to Principal J. P. Mackey. The principal called both the Royal Canadian Mounted Police (RCMP) and the institute's carpenter. Inquiries at village stores revealed that a number of boys had been purchasing cake, candy, tobacco, knives, and chewing gum. Some of these items turned up in a search of the beds and the toilet room. Several boys were questioned: some admitted involvement in the theft; some denied it. Eight of them, including some who denied involvement, were punished that day. They were thrashed on their bare backs with a seven-thonged strap that was specially made by the school carpenter. After a few more days of investigation, eleven more boys were thrashed and had their hair clipped. Most were put on a bread-and-water diet for two days. Most of the strapping was done by Edward McLeod, the carpenter, because Mackey was ill. McLeod later said that he gave most of the boys five strokes of the strap, which, he said, was intended to sting but not bruise. The local RCMP official, L. Thurston, was present for the initial round of punishment, and said he did not see any blood.

The story was reported in the local papers. When alarmed parents showed up at the school, Mackey prevented them from seeing their children because he 'did not think it prudent they should see the children and talk the matter among them.' Sufficient public attention was devoted to the matter that the federal government appointed L. A. Audette, a retired judge of the Exchequer Court of Canada, to conduct an inquiry into the event. He held two days of hearings in June 1934, two and a half months after the boys were thrashed.

On the first day of the hearing, Dr. Daniel McInnes examined ten of the boys. In the case of one boy, he said he discovered 'noticeable linear marks, of about the width of a lead pencil, three or four inches long, on the right side of the abdomen. I think the skin would necessarily be broken to cause these marks and are liable to be permanent scars.' He said they could have been produced by the strap used to thrash the boys. All but one of the other boys had marks. In two cases, he said it appeared that the skin had been cut.

All nineteen boys testified. Some admitted to stealing the money, and others admitted to having been given money, or goods that had been purchased with money they knew to be stolen. Some, including Leonard Tennass, Joseph Toney, Edward Socobie, Ben Bernard, Jack Stephens, Peter Lafford, and Edward Poulette, said they had been thrashed until they bled. In his testimony, Mackey said that the boys did not complain at the time, although one of the younger boys, who received two strokes of the strap, cried. He said he was not aware of any blood on the strap. He also denied rumours that the strap had been soaked in vinegar.

In his report, Judge Audette wrote that 'punishment must be measured according to the gravity of the offence and not overlooking the complex intelligence of these boys who have all been brought up in the life of Indians.' Since 'all human governments rest in the last resort upon physical paid [sic],' it was well for the students to 'realize through experience this ineluctable fact.' The thrashing was, in short, not only a punishment, but also a 'benefit,' an education into the foundations of civilization.

Audette pointed out that the *Criminal Code* allowed for the use of force in the correction of a child, 'provided such force is reasonable under the circumstances.' To him, the strap 'or what it represents, is an absolute necessity in a school.'

The judge suggested that being strapped was simply a rite of passage. He asked, 'Where is the man who in his boyhood has gone to a school and managed to get through without having a taste of the strap? If he did he must have been a true saint or a clever hypocrite who has been able to deceive his teachers.' More significantly, he made the point that the principal and school could not afford to look weak in the eyes of the students: 'A weak punishment to these Indian pupils would have had no effect, would have been turned into derision and they would have laughed at it.'

Judge Audette said that a firm, determined exercise of authority was required, since 'Indians, in terms of civilization, are children, having human minds just emerging from barbarism.' A few lines later, however, Audette argued, 'If strap, cane and birch are used in the white man's schools, as a fair human expedient, why can it not be resorted to with the Indians?' As to the marks the strapping had left on the backs of some students, Audette wrote that 'flesh differs. Some skin or flesh has more or less resistance than others. Some skin will take imprints much easier than others. That is well known. For instance, Toney and Tennass received the same number of strokes and delivered by the same person, McLeod, yet one showed marks and the other did not.' In short, if the boys were injured, the fault lay with them and their thin skin, not with the person who was inflicting the punishment.

Judge Audette provided the principal with a complete exoneration:

> Far from finding fault with the Principal of the School for what he has done, he should be commended and congratulated for carefully investigating the conduct of his pupils and finding all the culprits and punishing them in a commensurate manner. How could order, discipline and good behavior be maintained in the School if he were to have acted otherwise than he did?

No mention is made of the fact that there was good reason to believe that Mackey punished the innocent with the guilty. In addition, Audette made no effort to determine if there were any rules to guide the principal in how students were to be disciplined or if those rules had been transgressed.[175]

…

In 1935, James Gideon and his wife, of Missanabie, Ontario, refused to return their twelve- and fifteen-year-old daughters to the Chapleau school after the Christmas holidays. Mr. Gideon claimed that 'he could give them better care at home than they would receive in school.' The local Indian agent dispatched a Mounted Police officer to the Gideons' home and the children were returned to the school. In August of 1939 in Manitoba, Portage la Prairie principal Joseph Jones visited the home of a boy from the Roseau River Reserve who had not returned to school that fall. The boy refused to go back and his father would not send him. Acting in the capacity of a truant officer, a Mounted Police officer served the father with a notice that if he did not send his son back to school in three days, he would be charged under the *Indian Act*. Within two days, the boy had been sent to the school.[176]

…

Students who ran away numerous times also could be charged under the *Juvenile Delinquents Act*. In such cases, they could be sentenced to a reformatory until they turned twenty-one. In 1935, two years after she was charged with theft, the girl at Sandy Bay was brought up on

> charges under the *Juvenile Delinquents Act*. Two boys ran away from the Mount Elgin school in the fall of 1937. After searching for them on their home reserve, the Mounted Police located the boys walking along a railway track, headed for Melbourne, Ontario. They were returned to the school. One of the boys, aged twelve, ran away in March 1939, only to be returned again by the Mounted Police. Within days, he ran away again, taking some school clothing with him. He was arrested and charged with being 'incorrigible.' The arresting officer thought his mother likely had been 'encouraging the boy to truant.' He described the boy as coming from 'a very poor and filthy type of Indian.' In court, the boy, due to his 'lack of intelligence,' was not asked to plead. Because the boy promised to attend school without giving 'further trouble in future,' Mount Elgin principal Oliver Strapp asked that the boy be given another opportunity. Further trouble ensued, and Strapp discharged the boy in the fall of 1939. On an application from his mother, he was declared 'incorrigible' in 1940, and spent part of that summer in the Observation Home of the London and Middlesex Juvenile Court. From there, the Mounted Police escorted him to the Chapleau residential school in Ontario.[177]
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> …
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> In June 1936, Mounted Police constable R. D. Toews tracked Gilbert Beaulieu, a truant from the Sandy Bay school, to the camp of a Métis man north of Langruth, Manitoba. Toews reported that 'on seeing the uniform,' Beaulieu 'took to the bush and although I chased him about a mile and a half east thru the bush I was unable to apprehend him.' Toews then went to the camp of the boy's father, who said 'he would not assist the police in getting his boy.' After discussing the matter with the local Indian agent, it was decided not to look further for the boy until school reopened at the end of summer. On September 24, Toews discovered that young Beaulieu was being sheltered by Sandy Bay Chief Louis Prince. By the time he got to the chief's house, Gilbert had fled once more. Beaulieu's father was there, however. This time, he told the constable, 'You can go to hell. I'm boss here.' When Toews later tried to serve the boy's mother with a notification under the school attendance provisions of the *Indian Act*, she refused to accept it, on the advice of Chief Prince. Officer Toews placed it on the ground in front of Beaulieu's mother, only to have Chief Prince pick it up and throw it in the police car. The chief then told the constable he had no business on the reserve. On Toews's recommendation, Chief Prince was charged with obstructing a police officer. Gilbert's father was charged with failing to return a truant child to school. Gilbert was finally taken into custody at his father's camp on October 20. From there, he was sent to the distant Lestock, Saskatchewan, school. His father was fined $2, plus $5.75 in court costs. Either unable or unwilling to pay the fine, he spent ten days in jail.[178]
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> …
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> In 1936, the principal of the Fraser Lake school in British Columbia was reprimanded by Indian Affairs for allowing Chief Maxine George to withdraw his son from the school to do work at home. Indian agent R. H. Moore noted, 'In view of the fact that we had to prosecute Maxine to get his boy into the school in the first place as well as many other inconveniences to this Department, I cannot help but feel that it was unwise to allow this boy to return to his parents.'

In 1936, the *Indian Act* was amended to allow the government to apply existing provincial game laws, weed-control laws, and motor vehicle laws to reserves.

In October 1937, the police visited the Poundmaker Reserve on behalf of the school, and told the parents of seven children who had not returned to school the previous month to send their children to school. Within five days, all the children were back in school.

…

Indian Affairs found itself locked in a series of conflicts with parents in northern Alberta in the late 1930s. In April 1935, John Gambler and his wife visited their two daughters at the Desmarais, Alberta, school. According to Principal L. Beuglet, Gambler said that he and his wife 'were lonesome without their children and wished to bring them back' to their home in Crossing Lake, Alberta. When Beuglet objected, 'the parents walked away with their children, threatening to shoot whomsoever would endeavour to stop them from taking their children back home.' A local magistrate, who had attempted to stop Gambler from removing his children, said that Gambler had 'not actually threatened them but had given them to understand he would use force if necessary to take his children.' Beuglet wanted Indian Affairs to have the RCMP enforce the return of the girls to the school, fearing that if forceful action was not taken, other parents might follow his example. Indian Affairs official M. Christianson was, however, reluctant to dispatch the police. The distance that police officers would have to travel was considerable, the roads were poor, and the likelihood of locating Gambler was uncertain. The expense of such an expedition would also be charged back to Indian Affairs. Rather than authorizing a costly police expedition, Christianson wrote to Calling Lake storekeeper J. H. McIntosh, asking him to tell Gambler to return his children to the school. In his letter to McIntosh, Christian wrote, 'I wish to bring to your attention that an Indian by the name of Gambler' had gone to the Desmarais school and 'took his two daughters out of the school without the permission of the principal.' However, this was not the first that McIntosh had heard of this matter. One month earlier, Indian agent N. P. L'Heureux had written a letter to McIntosh, informing him of the events at the school. He then went on to write:

> As the above mentioned J. B. Gambler is in receipt of a monthly ration, I have to order that same be cut off entirely until such time as I am able to reverse my decision. This cannot be expected until the children are back in school at Wabasca and Gambler's amends presented to the Principal and Magistrate there.

L'Heureux, apparently without the approval of his superiors, was attempting to starve the Gamblers into sending their daughters to school. Gambler, it appears, was not dependent on relief rations. He had not returned his children by February 1, 1938, when L'Heureux wrote the RCMP, asking when a patrol might visit Calling Lake and take the children to the school. The RCMP was not prepared to undertake such a mission, which would have involved the leasing of a plane, since Indian Affairs was not prepared to reimburse its costs. In July 1938, L'Heureux sent Gambler a letter telling him that if he did not send the two daughters he had withdrawn (by then fourteen and eleven years of age) and two younger daughters to the Desmarais school on September 1, 'a charge will be preferred against you under the Indian Act' and his children would be 'conveyed to school under escort of the Royal Canadian Mounted Police.' In its review of the records, the Truth and Reconciliation Commission of Canada has not located any court records to indicate that such prosecution ever took place. However, it was not until October 1940 that Gambler enrolled his two youngest daughters in the Desmarais school.

L'Heureux used the threat of prosecution against other families in this period. In January 1938, he reported that Agnes Cunningham (also referred to as Mrs. Frank Kissaynees-

Cardinal) had been refusing since September to send her daughter, Florence Cardinal, to the Joussard, Alberta, school. In October 1937, she had told L'Heureux that 'the reason she would not send her child to school was because 'they learn nothing in those schools.'' L'Heureux had the RCMP serve her with a notice requiring her to bring her daughter to the school. She ignored it, and a second notice was served on her in December. By January, L'Heureux was seeking permission to have the case taken to court. He also wanted John Felix Beaver brought up on similar charges for failing to enrol a child in school. He argued that if the cases were not prosecuted, other parents would withhold their children from school. At the end of January, Indian Affairs had decided to prosecute Mrs. Frank Kissaynees-Cardinal and John Felix Beaver. The Indian Affairs superintendent of Welfare and Training, R. A. Hoey, advised Alberta government officials that Indian Affairs was 'not anxious to register either fines or jail sentences on parents but our primary desire is to have the children given an opportunity of obtaining an education.' While it is not clear if the cases ever went to court, in April 1938, Florence's father, Frank Cardinal- Kissaynees, who supposedly had favoured her admission to Joussard, signed an application for admission to school. L'Heureux also threatened Wanakew Cardinal (also known as Francis) with prosecution in 1938 unless he returned his granddaughter to the Desmarais school. Sergeant D. E. Forsland was unable to locate Cardinal when he attempted to serve him with a notice to return the girl. Forsland noted that, in his opinion, the girl 'had been taken out of school under the in influences of Jean Baptiste Gambler.'[179]

…

In 1938, Chief Ed Poor Man and Head Man Jim Worm asked for the discharge of three children from the Poor Man Reserve who were attending the Gordon's Reserve school in Saskatchewan. In their letter, the men complained that the 'children are running away twice from the School ever since they had holidays, and they are getting bread and water for 2 weeks for punishment.' It was not, they said, 'fair how these kids are treated.' Principal R. W. Frayling gave a similar account of how he treated the runaways. 'I strapped them once, put them on Bread and Water and had their hair cut short, which is only done for truancy.' After that, he said, he confined them in the infirmary. After reviewing the matter, Thomas Robertson, the inspector of Indian agencies for Saskatchewan, concluded that the punishment was not 'unreasonable [sic] severe.' Indian Affairs departmental secretary T. R. L. MacInnes did advise the principal that 'while it is doubtful' that cutting the girls' hair 'constitutes assault in a legal sense at the same time it is felt that you should adopt some other method of enforcing discipline.' Once again, the department ignored the opportunity to provide a clear, system-wide directive on a disciplinary matter. The issue recurred the following year at the Chapleau school. There, Principal A. J. Vale reported to Indian Affairs, 'The three girls who got on the train have run away before and were punished by having their hair clipped short. It does not appear to have been effective. They were also severely strapped and will be again when they return.'

The schools would continue to cut hair as a punishment, parents would complain, and the government would continue not to take a clear stand.[180]

…

By the end of this era, the discharge policy was still solidly in place. On March 16, 1939, acting Indian agent J. D. Caldwell wrote to a parent that unless he returned his child to the Kuper Island school within four days, he would be prosecuted under the *Indian Act*. In July 1939, W. C. Lewies, a lawyer in Chatham, Ontario, wrote to Indian Affairs about the case of

> Muriel Stonefish, who was a student at Mount Elgin. She had not been allowed to return home for the summer holiday because she had been truant on at least two occasions during the school year. Her mother, Flora Powless, had contacted Lewies to see if he could arrange her discharge from the school. Lewies wrote the department that it was his understanding that the parents had voluntarily placed their daughter in the school. Since there was no order placing Stonefish in the school, Lewies argued that she was 'virtually being kept a prisoner at the Mount Elgin Indian Residential School.'[181]

As can be seen from the above excerpts of the TRC report, the law, the courts and the RCMP only ever operated in one direction: forcing children into the schools, keeping them there, removing parental authority, defending school officials and prosecuting children.

**19. 1939: The first criminal convictions for abuse in Indian Residential Schools: two school girls are convicted; more forcing children into the schools**

*it would be … exceedingly dangerous to accept responsibility for claims that may be made from time to time against institutions for the operation or administration of which we are not responsible*[182]

In 1939, two female students were charged with assaulting a third girl at the Mount Elgin school so badly that she was confined to bed for a week. The girls pleaded guilty and each received a two-year suspended sentence.[183] It would seem that the first criminal convictions relating Indian Residential Schools were imposed against two indigenous schoolgirls.

On the other hand, the government was anxious to avoid any idea of legal responsibility.

> In 1942, a group of boys from the Brandon, Manitoba, school discovered that a house near the school was empty. They began to take food from the school to the house on Saturdays, and, using the wood stove in the house, prepare themselves meals. In March of that year, they accidentally set the house on fire. Nine boys were arrested and charged with delinquency. Since it was felt that the boys had not realized the potential consequences of using the stove, the case against them was adjourned. Instead, they were turned over to the school principal for punishment. When the owner of the property sought compensation, Indian Affairs director Harold McGill took the position that Indian Affairs was not liable for the damages, since the school was operated by the United Church. 'It would,' he wrote, 'be in our judgment exceedingly dangerous to accept responsibility for claims that may be made from time to time against institutions for the operation or administration of which we are not responsible.'[184]

Getting students to return to school in the fall was another legal challenge.

> If the persistence of runaways was a sign of ongoing student dissatisfaction with residential school life, difficulties in getting students to return to school in the fall was an indication of continuing parental resistance to residential schools.
>
> Two weeks after the start of the 1940 school year, fifty-four students had yet to return to the Fraser Lake, British Columbia, school. The police were called in and, by October 2, twenty-five of the truant students had been returned to school. Three years later, RCMP Corporal L. F. Fielder, at the request of Indian Affairs, visited the Fort Fraser and Stella reserves to warn parents that they should send their children to the Fraser Lake school. In 1946, the parents of seventy students had refused to return their children to the same school. Their grievances included 'the time spent by the pupils in manual labour, and religious instruction.' In

addition, they wished to see day schools established in their communities. Some parents had hired a Prince George, British Columbia, lawyer to take their case. The Indian agent recruited the assistance of the local Mounted Police detachment, and, after threatening parents with prosecution, had cut the number of truants down to thirty-five by the first week in October 1946. It was proposed that 'action will shortly be taken under the Indian Act, against some of the parents of the Stony Creek Band who have not returned their children to school.'

Although it was common to threaten parents with prosecution, there were those people in Indian Affairs who recommended against pursuing prosecutions. This was particularly the case after the 1941 policy directive instructing principals to seek the assistance of the Mounted Police in the case of truancy only as a last resort. In 1942, Indian Affairs official A. G. Hamilton reported that there were thirty-five children on the Sandy Bay Reserve in Manitoba who were not attending school. Although the principal of the Sandy Bay school was 'anxious to take these children in,' Hamilton commented, 'These Indians are difficult to handle and for the present I think it would be a mistake to use force.' In 1942, the Beauval, Saskatchewan, school was having trouble recruiting its full complement of students. The superintendent of Welfare and Training, R. A. Hoey, wrote that he was 'aware, of course, that there is this year an acute labour shortage in the province of Saskatchewan and it may be difficult to arrange for the return of the senior pupils.' But, if the students did not return, he recommended that 'the desirability of imposing the penalties for which provision has been made in the Act should be carefully considered.'

Hoey continued to caution against the use of the police. In November 1943, the principal of the Moose Fort, Ontario, school requested that the Mounted Police be used to enforce compulsory attendance. In response, R. A. Hoey wrote:

> Experience has taught us that whenever compulsion has been exercised,—andit has been exercised quite frequently throughout the years, in attempts to maintain regularity of attendance at Indian day and residential schools—the results have been invariably disappointing. Attempts on the part of the R.C.M.P. to enforce attendance have erected the impression in the minds of a great many Indian parents that our residential schools are penal institutions, established, not for the benefit or education of their children, but to punish them. This feeling or attitude on the part of Indians has become so widespread that we have been recently asked by the Commissioner of the R.C.M.P. not to use his constables as truant officers and that, if we must use them, to use them sparingly.

Hoey argued that it would be possible to reduce the parents' antagonism to the schools by establishing 'courses of study more attractive to Indians and more effectively designed to meet the needs of the Indian population.'

In 1943, the principal of the Hobbema, Alberta, school proposed that at the beginning of the school year, he would visit all the families that did not send their children to school. If that failed to convince them to send their children, he and the Indian agent would pay the parents a second visit. Only at that point would they take 'more severe measures.' Through this approach, he hoped to avoid involving the Mounted Police in truancy cases.

It is clear, however, that the police were still being asked to help return students in the fall. In October 1945, H. A. R. Gagnon, the assistant commissioner of the RCMP, wrote a letter to the director of the Indian Affairs branch, complaining that the Indian agent at Cardston had just turned over fifty-one cases of truancy to the force. Gagnon said it would be more appropriate for Indian Affairs to appoint a truant officer.

In August 1945, parents from the Little Pine Reserve in Saskatchewan refused to send their children to the Anglican St. Alban's school in Prince Albert. In a letter of protest, three of the fathers wrote that children from the community had returned home

> for the holidays in ragged cloths [sic] and some with shoes not fit to wear and many sizes too large for them. One of the girls had sores all down her legs and could walk only with difficulty. Our children had told us that the food is very poor at times and not in sufficient quantity, and being compelled to eat weather [sic] they wanted to or not. Further, our children tell us that Rev Ellis says some very bad things to them—one time telling all the students that 'don't you know that I could kill you all and throw you into the ash pit—and not even bother to bury you' and that he has kicked and abused them.

The parents also pointed out that the school was overcrowded and that some of the students got 'only a half a day's schooling in order to make room for the rest.' Their preference was for their children to attend the day school on the reserve.

In response, Indian agent J. Bryce visited the school. He concluded that the students were well fed and well clothed, and showed no sign of 'fear or resentment.' Indian Affairs official C. S. Bell then went out to the Little Pine Reserve, where he 'warned the parents that the children were to return to school.' When he was told the parents would not send their children back, he returned with the Mounted Police and 'rounded up eight absentee children.'

The show of force did little to address the truancy problem at the school. Three years later, Bernard Neary, the superintendent for education for Indian Affairs, asked J. P. B. Ostrander, a regional department official, to investigate why so many children were running away from the Prince Albert school. A report from a local Indian Affairs official that fall stated, 'Two-thirds of the staff are old and decrepit. Organized games and sports have been lacking, which has resulted in a steady stream of children, boys and girls, running away.' In October, Principal F. W. Fisher wrote, 'Since September 5th, my car has travelled 2400 miles, two thirds of which at least, were in connection with trying to get children back to school. I am really in despair. Many of these runaway have been off four or five times.'

Indian Affairs official C. A. F. Clark thought the recruiting process at the school was reminiscent of the 'church-owned mission school stage of development when parents were induced rather than required to put their children in school.' The principal had spent much of the fall recruiting students. Parents also complained that their children were poorly fed, clothed, and cleaned, and removed them from the school. John Tootoosis and other First Nations leaders had also visited to investigate the conditions of the school. This development led Clark to recommend that parents should be restricted 'to visiting their children in a place appointed therefor, and anyone other than a departmental official who wants to do any investigating should first have the permission of the Superintendent.' The *Indian Act* of the day stated, 'The chief and council of any band that has children in a school shall have the right to inspect such school at such reasonable time as may be agreed upon by the Indian agent and the principal of the school.' However, the amended *Indian Act* adopted in 1951, three years after Clark made his recommendation, no longer contained such a provision for school inspection by chief and council.

Twenty-nine students were truant from the Morley, Alberta, school in October 1947. As well, in the first quarter of the 1948 school year, there were fifty truancy cases at the Hobbema school. By the end of March, all but five of these students were back in school. Since those

five were all over fifteen years of age and the school was filled to capacity, the principal and the Indian agent had decided not to force them to return to school.

In March of 1946, Indian agent J. E. Pugh prepared a report on truancy at the Anglican and Roman Catholic schools in Cardston, Alberta. He noted that parents of students from the Blood Reserve were keeping their children out of the residential schools. One band councillor, Joe Bullshields, told him that 'the reason it was so difficult to get the children into School, was, that the Indians looked upon the School as a penitentiary.' When Indian Affairs official C. A. F. Clark visited the Anglican school at Cardston in 1949, he found that there were 92 students present in a school with an authorized enrolment of 200. He wrote, 'There are children on the reserve enough to fill the school, which has three empty classrooms.' Clark attended a meeting of the Blood Band Council, where he was told parents were reluctant to send their children to the school because the principal was not a clergyman and was 'rough' with the children, the students were not fed enough bread, and 'the teachers are not very skilful [sic].' Clark told them that Pitts was an authorized lay reader in the Anglican Church, and an experienced teacher and principal. He also said he had reminded Pitts of the department's rules regarding discipline. He promised an increase in the bread ration and said that 'better teachers are in prospect.'

Indian Affairs official G. H. Gooderham conducted a follow-up visit. He said that the school was

> neither clean nor tidy and the principal was none too clean or tidy himself. He appears to be a pleasant enough young man but I was not very highly impressed. As for the teaching staff, three additional teachers have been familiar faces at other Institutions; two of them had at one time been at the Edmonton Residential School and Mr. Staley had to let them out because they were inefficient. The third, an elderly gentleman, was at the Old Sun School at one time. He may have been a fairly good teacher at one time but his classroom was so untidy and so disorganized that I fear he is getting very poor results.

He noted that many parents were not sending their children to the school, and concluded that if Councillor Bullshields's negative assessment of the principal reflected 'the opinion of the majority of Anglican members of the Band, then Mr. Pitts is a failure and should be replaced.' It was not until 1952, in the wake of continuing criticism, that Pitts resigned his position at the school.

In defending himself against allegations from Pitts that local Indian Affairs staff had not done enough to ensure that truant students were forced to attend school, Indian agent Ralph Ragan painted a picture of the process by which Indian Affairs rounded up students who did not report to school. In late November, Ragan wrote:

> We have our Indian Scout, Rufus Good Striker, out since September bringing in truants to St. Paul's [the Anglican school in Cardston], and working alone and among his own people he has done a fair job. Due to a shortage of staff here and the largest and most cumbersome harvest on the Reserve this year with its terrific accounting problems due to the wheat quota, Mr. Pitts had been advised that more staff could not be spared for truants until this was finalized. On November 10th we saw daylight ahead and in a letter to Mr. Gooderham designated the week of November 17th for an all-out drive on truants with all trucks and staff that could be spared. The Superintendent's car and two light delivery trucks with five members of the staff were out beginning the 17th.

> In May 1943, Mounted Police officer W. E. Needham prepared a brief report on why he thought students were continually running away from Mount Elgin near London, Ontario. When he returned students to the school, he had asked them why they had left. The answers were brief, usually to the effect that the student did not like it there or felt unfairly treated. Needham wrote that, from his observations, 'the discipline is too severe, also these children have very little or no recreation, and with help so scarce they are obliged to do the majority of the farm work, resulting in these children being overworked.' Each winter, he wrote, the students have to unload several railcar loads of coal. In his opinion, this was work 'that is much too heavy for them.' He said there were a number of children at the school who were over the age of sixteen and should have had the legal right to leave. 'They are kept at school to assist in the farm work, thus engendering in their minds somewhat of a rebellious spirit.'[185]

In 1944, the farm instructor at the Cluny, Alberta school was charged with assault for punching a student in the face causing his nose to bleed. The instructor pleaded not guilty and was acquitted.[186]

In 1945, a female student at the Grayson, Saskatchewan school tried to slip out of the school to meet some boys. For punishment, her hair was cut. The girl's parents came to the school to remove their daughter and her two sisters. An altercation arose between the mother and one of the supervisors. The mother was convicted of assault and fined $1 plus $4.50 in costs; the father was convicted under the *Indian Act* provisions regarding truancy and fined $1 plus $4.75 in costs.[187]

**20. 1951: amendments to *Indian Act*; 1953 policy on how to hit kids; 1953 regulations; 1957 replacement of per capita funding with "controlled cost" funding; 1961 contract with the churches; illegally forcing children to stay in school**

> *Indian Affairs will not give any advice or assistance in pressing any such claims.*[188]

The 1950s were momentous years for Indian Residential Schools. A major revision to the *Indian Act* occurred in 1951, the federal government finally adopted a policy on corporal punishment, there were new regulations, a new funding formula and a new contract with the churches (although signed in 1961, it was developed in the 1950s). In addition, the Government of Canada was transferring Indian children into the provincial school systems and the gradual closing of the schools began.

> In its final report, issued in 1949, the Special Joint Committee of the Senate and House of Commons Appointed to Examine and Consider *The Indian Act* made only two recommendations in regards to education.
>
> > Your Committee recommends the revision of those sections of the Act which pertain to education, in order to prepare Indian children to take their places as citizens.
> >
> > Your Committee, therefore, recommends that wherever and whenever possible Indian children should be educated in association with other children.
>
> These two recommendations are really one recommendation. The first one defined the goal, which had remained unchanged since 1883: assimilation. The second laid the groundwork for the method: what would come to be called 'integration.' Under the integration policy, First Nations students were to be shifted from Indian Affairs schools to public schools. Since residential schools played only a small role in provincial education systems, the committee

was—silently—calling for the end of the residential schools.

The Special Joint Committee's recommendations formed the basis of the first section of the 1951 *Indian Act* provisions dealing with education:

The Governor in Council may authorize the Minister, in accordance with this Act,

(a) to establish, operate and maintain schools for Indian children,

(b) to enter into agreements on behalf of His Majesty for the education in accordance with this Act of Indian children, with

(i) the government of a province
(ii) the council of the Northwest Territories
(iii) the council of the Yukon Territory
(iv) a public or separate school board
(v) a religious or charitable organization.

The Roman Catholic Church opposed the provisions that allowed the minister to enter into contracts with provincial and territorial governments and school boards. It was felt that these measures compromised the provisions in the Act that guaranteed that Roman Catholic students would not be sent to schools operated under the Protestants.

From 1951 onwards, the government focus would be on making the fullest use of the powers authorized in subsection (b): the power to contract out its responsibility for the provision of First Nations and Inuit education. The 1951 *Indian Act*, the first major revision to the Act in decades, contained only nine other sections dealing with education: four dealt with attendance, truancy, and expulsion; three affirmed the rights of the Roman Catholic and Protestant churches (still making no mention of Aboriginal spirituality); one outlined the minister's authority; and one was a set of definitions. It made only passing reference to residential schools.[189]

…

It should be noted that just as Aboriginal people had been granted no input into the Indian Affairs school system, they had little ability to influence the provincial schools. People with status under the *Indian Act* did not get the right to vote in British Columbia until 1949; in Manitoba, 1952; in Ontario, 1954; in Saskatchewan, 1960; in Alberta, 1965; and in Québec, 1969. They were given the right to vote in Canadian elections in 1960, and the Inuit were given the vote in 1950. As late as the mid-1960s, First Nations people did not have the right to participate in school-board elections— either as voters or candidates—in Ontario and New Brunswick.

It is obvious from the figures that from 1950 onward, residential schooling played an increasingly smaller role in First Nations education. This was far from uncontroversial, and was part of a larger set of conflicts between the federal government and the churches—most particularly, the Roman Catholic Church.

**Inter-denominational conflict**

By the late 1930s, senior Indian Affairs officials had concluded that the country's residential

> schools were inadequate, inefficient, and ineffective. They were convinced that the future lay in the establishment of day schools. The 1951 amendments to the *Indian Act* gave them the authority to enter into contracts to have First Nations children educated in provincial schools. Despite this, the number of First Nations students living in residences did not begin to decline until the mid-1960s. As late as 1970–71, there were 6,000 students living in residence. There were numerous reasons for the slowness of the decline in the use of residential schooling. As noted earlier, one of the key reasons was the lack of classroom alternatives. There were, however, other factors. Among them was the fact that the churches involved in the operation of the schools, particularly the Anglican and Roman Catholic churches, considered the schools to be part of their overall missionary work. In carrying out this work, the churches viewed each other—and the government—with suspicion and hostility. The result was often the duplication of services in the same region, costly and divisive conflicts between churches over individual students, and the continuation of substandard schools. The level of hostility between the Catholic Church and the federal government reached such proportions that at one point, government officials considered charging a Catholic principal with fraud, while Catholics viewed themselves as participating in a struggle akin to warfare.[190]

**1953: Hitting children according to policy**

The TRC continues:

> **A policy at last**
>
> On April 14, 1953, Philip Phelan, the Indian Affairs superintendent of education, sent out a 'statement of policy regarding school discipline, with particular reference to corporal punishment at Indian schools.' The key points read as follows:
>
> > Any form of punishment tending to humiliate a pupil is to be avoided. This policy applies alike to the use of sarcasm or to the employment of practices calculated to produce distinctive changes in appearance or dress.
> >
> > It is generally-approved practice for teachers to abstain from physical contacts with pupils either in anger or affection. Children's reports of such contacts have sometimes been so exaggerated as to make the teacher's position untenable.
> >
> > In any event there must be no corporal punishment of a pupil who is suspected to be suffering from any physical or mental ailment which corporal punishment may aggravate.
> >
> > Before resorting to the use of corporal punishment, the principal or the teacher in charge must be convinced that no other approved form of punishment will have the necessary punitive and corrective effects. The educator must be sure that the pupil was aware of doing wrong. The presence of such a factor as premeditation, deliberate repetition or heedlessness of consequences may sometimes justify a more serious view and the use of corporal punishment.
> >
> > The principal or teacher in charge of a school will decide whether corporal punishment is to be used and will personally administer it in the presence of a witness at a time selected to avoid disturbing the school programme. The witness should be a staff member of the same sex as the pupil who is to be punished; the matron at a residential school should witness the corporal punishment of a girl. Only the strap as issued to the principal or teacher in charge will be used. It will be applied only to the palm of the hand.

> In a special book reserved for the purpose a record will be kept of every occasion of corporal punishment. This record will show the date, the name of the pupil, a description of the offence, the number of strokes on either hand, and will be signed by the person who used the strap and by the witness.

The rule relating to changes in appearance should have banned the cropping of hair. The other rules should have ensured that only the principal or the teacher in charge of the school administered corporal punishment. Corporal punishment was to take the form of strapping on the palm of the hand, delivered in front of a witness of the same sex as the student being strapped. Since humiliation was to be avoided, students were not to be strapped in public. No limits were placed on the number of strokes that could be administered when a student was strapped. These, at least, were the rules.

This is the first set of disciplinary regulations developed by Indian Affairs that the Truth and Reconciliation Commission of Canada is certain were widely distributed within the residential school system. They were, for example, included in the 1958 Indian Affairs field manual.

However, these rules had no legal force. Those rules that did have legal force, the *Regulations with Respect to Teaching, Education, Inspection, and Discipline for Indian Residential Schools* developed under the *Indian Act* in 1953, had little to say about discipline. Principals were to assume the 'responsibilities of parents or guardian with respect to the welfare and discipline of the pupils under his charge.' Students were to 'conform to the rules for the conduct and behaviour of pupils while on or near the school premises or any premises where any activity of the school is taking place.'[191]

…

When the question was whether to allow the families of Indian Residential School children to sue the government, the Department of Indian Affairs was not forthcoming.

The federal government regularly claimed guardianship over residential school students. However, a 1956 vehicle accident involving a truckload of Aboriginal cadets underscores how quickly the federal government was prepared to step away from the responsibilities of such claims to guardianship if they conflicted with financial interests. In November of that year, an army truck carrying forty cadets from the Cranbrook, British Columbia, school overturned. The driver of the truck was killed. He had been, in the opinion of Indian Affairs official J. S. Dunn, 'undoubtedly under the influence of alcohol and driving at an excessive speed when he lost control of the truck.' All the students suffered shock, and contusions and abrasions to the face and head. They were taken to a local hospital, where twenty-eight were released after examination and twelve were hospitalized. One additional boy was hospitalized the next day. Three months later, one of the students, John Terbasket, was still in hospital, and a second student, Judy George, was complaining of ongoing headaches. The Canadian army had agreed to pay all hospital bills and replace broken eyeglasses. Terbasket, who suffered from cracked ribs, eventually required surgery and was released from hospital in February 1957.

Andrew Paull, the leader of the North American Indian Brotherhood, raised the question as to whether Indian Affairs should pursue a lawsuit on behalf of the injured students. Dunn believed the army would be found to have been negligent in its care of the students. He was,

in fact, amazed that none of them had been killed. Indian Affairs' legal counsel advised against suing the Department of National Defence, since it would involve one branch of the government suing another. However, he said there was no reason why the Indian agent could not advise the parents to consult a local lawyer if they wished to 'seek recovery from the Crown.' He added that Indian Affairs might 'as a matter of policy, believe some contribution' to the parents' legal costs was appropriate. However, contrary to the financial aspects of that legal advice, Indian Affairs Director H. M. Jones gave instructions that Indian Affairs 'will not give any advice or assistance in pressing any such claims. Any parent or guardian may be informed, however, that if he wishes to venture a claim, he should consult a solicitor in private practice. The department will not contribute to the payment of the solicitor's fees.[192]

…

In October 1953, parents from the Whitedog Reserve in northwestern Ontario backed up their argument for a day school as an alternative to the Presbyterian school in Kenora with complaints about the 'ill treatment of our children' at the school. 'They are locked up for punishment and they hate that so much that they run away very frequently which places them in great danger of accidents before they finally reach their homes.'

Government officials sometimes seemed unable to understand why parents did not want to send their children to school. In 1954, Norman Paterson, the superintendent for the Kenora Indian Agency, wrote that he had 'persistently and patiently tried to get from the Chief and Councillors some valid reason' as to why parents at the Whitedog Reserve were not enrolling their children in residential school. He thought the reason may have been that a number of children who ran away from schools in Kenora 'had met with difficulties getting back to the Reserve,' including, as in the case previously noted, the runaway student who was so severely frozen that he had to have his leg amputated. Paterson does not appear to have viewed these 'difficulties' as a 'valid' concern for parents to withhold their children from the school.

Not surprisingly, the school in northwestern Ontario had problems with recruitment as well as with runaways. In the fall of 1953, sixty-three students were truant from the Presbyterian school in Kenora. Some of them had not been to school in two or three years. By November, there were still at least fourteen students not in attendance.[193]

…

Since the 1890s, Indian Affairs had been refusing to allow parents to withdraw children after voluntarily enrolling them, on the basis of the consent form that was signed at the time of admission. In the 1950s, the form said the student would remain in the school 'for such term as the Minister of Mines and Resources may deem proper.' However, in 1952, the department discovered that the form had no legal standing. The issue arose when an eight-year-old girl left the Squamish, British Columbia, school and returned to her father's home. She continued to attend the school as a day student. Indian Affairs concluded that she was 'running around the Mission Reserve till all hours of the night owing to the lack of proper home supervision.' It sought to have the Mounted Police prosecute her father under Section 118 of the *Indian Act*. That section made it an offence to ignore an order to 'cause the child to attend school.' The Indian Affairs case was complicated by the fact that the girl was, in fact, attending school. It rested its argument that she be returned to the residential school on the fact that when the girl had been enrolled in school, her father had agreed that she should remain in school until the minister deemed it proper that she be discharged.

However, an Indian Affairs legal adviser pointed to an 1892 Justice Department legal opinion that the provisions in admission forms lacked any legal basis. The father could not be prosecuted under the *Indian Act*, unless the minister responsible for Indian Affairs were to specifically designate that she attend the residential school, a power that was provided for in Section 117 of the *Indian Act*. The immediate situation was resolved by the girl's return to the residential school. However, Indian Affairs officials were left with the uncomfortable realization that the admission form, which had long served as the basis of their truancy policy, had no legal standing. As the Indian commissioner for British Columbia, W. S. Arneil, wrote, 'It seems, therefore, that no action can be taken to return a child to a residential school unless the Minister specifically designates the school as the one the child should attend.' Despite this realization, no amendments were made to the *Indian Act* to address this issue.[194]

…

In January 1953, the Indian residential school regulations (*Regulations With Respect to Teaching, Education, Inspection, and Discipline for Indian Residential Schools, Made and Established by the Superintendent General of Indian Affairs Pursuant to Paragraph [a] of Section 114 of the Indian Act*) came into force. In many ways, the regulations were simply a restatement of previous policies: they also represented an attempt by Indian Affairs to exert control over the schools.

The schools were to follow the provincial curriculum and the number of classroom hours was to be determined by the curriculum. The texts were to be the provincial texts and there could be no more than a half-hour of religious instruction a day. Students could not be admitted without Indian Affairs' approval. Indian Affairs could also order the removal of a student. Students could not be suspended, expelled, or discharged without Indian Affairs' approval. Every case of truancy was to be reported to Indian Affairs, and the principal was to take prompt action to ensure the return of truant students. The only condition under which students could be removed from the school without Indian Affairs' approval was when the principal was acting on medical advice.

The principal of every school was required to maintain acceptable standards in relation to staff, enrolment, nutrition, clothing, accommodation, utilities, classroom activities, recreation, counselling, relations with parents, and record keeping and accounting for the funds, stock, and equipment. The principal was to 'assume the responsibilities of parent or guardian with respect to the welfare and discipline of the pupils under his charge.' Although the admission form for residential school application from this period required parents to place their child under the guardianship of the principal, this requirement had no basis in the *Indian Act*'s education provisions. Pupils were required to 'conform to the rules for the conduct and behaviour of pupils while on or near the school premises or on any premises where any activity of the school is taking place.'

In 1954 and again in 1957, the federal government further increased the overall level of funding to residential schools. In both cases, it did so by also assuming greater control over how the money was spent. Starting in September 1954, the federal government 'took over responsibility for the employment of teaching staff at all government-owned residential schools.' At the same time, the teachers were still under the day-to-day authority of the school principals—who remained church employees. In this arrangement, the teachers could also be required to provide a half-hour a day of religious instruction. According to Indian

Affairs, the move brought teachers' pay more in accord with revised salary rates in effect for other federal public servants and for teachers employed in schools operated under provincial jurisdiction. The salary ranges for all classifications and grades were increased, annual increments for certain classifications were raised, and a change was made in the requirements for certain classifications. It is expected the revision will assist the Branch to secure certificated and experienced teachers for all positions.

The move was also in keeping with Indian Affairs' preference for asserting greater control over how money was being spent. Since it had assumed the costs of teachers' salaries, Indian Affairs reduced the overall per capita grants to the residential schools by 5%.

The move created complications for the Roman Catholic schools, where most of the teachers were members of religious orders. In 1958, the Oblates reached an agreement with the federal government under which religious staff members would be considered as one body and no specific salary would be assigned to specific individuals. The Oblates also proposed that 'the Sisters would continue to work for the Oblates as before and not directly for the Government as it had been proposed.'

In 1957, Indian Affairs replaced the per capita system with what was termed a 'controlled cost' funding system. The intent of the change, according to Deputy Minister Laval Fortier, was to strengthen Indian Affairs' control over the schools and to 'remove the financial difficulties now being encountered by certain schools.' The new method would 'result in a substantial increase in cost, but it must be pointed out that this was inevitable in any event,' due to rising costs. The new formula would not apply to the ten (largely Roman Catholic) church-owned schools, since these schools admitted 'non-Indian' (in most cases, Métis) pupils.

Fortier's description of the reasons for adopting the new funding system constitute a very frank admission of the system's failure to that date. He wrote that under the per capita system,

1) There is no uniformity in the standards maintained at the residential schools such as the quality of management and operational staff, quantity and quality of food and clothing supplied to pupils and the general upkeep of premises and facilities.

2) The Department is not able to exercise any control over the manner in which these funds are expended. This applies particularly to items mentioned in1 above and also to capital expenditures. Under the per capita grant system there has been no clear definition of authority with regard to building maintenance, renovations and additions to buildings. In many instances, major projects which fall under the above categories have been undertaken by the church authorities without reference to the Department. In many instances the work would not pass engineering standards.

3) The Department has been under constant and continual pressure from the heads of religious denominations and individual principals of schools for increases in the per capita grant rate. Due to the lack of control over the manner in which the funds are expended, it has been difficult, if not impossible, to determine a fair and adequate grant for each school.

4) The per capita grant system is, in effect, a system of making outright donations to the religious denominations, with the principal having unlimited control over the manner in which these funds are expended. In some instances the principals are not good administrators, and it is felt the funds are not being used in the wisest manner.

The new funding model retained elements of the per capita system and was initially described as a 'new system of establishing per capita grants.' In the past, the schools had been expected to pay for a wide range of costs out of a single per capita grant that had little connection to costs. Under the new system, different budget categories were created; they all had funding ceilings that were related to cost and enrolment.

For example, schools were divided into different classifications, depending on the size of their enrolment. In turn, a salary ceiling was set for each institution. Similarly, food and clothing ceilings were developed per student. Initially, food, clothing, and freight costs were to be based on the previous year's expenditures. Capital costs and major repairs were to become the direct responsibility of the government. The government also took over responsibility for the supply of all major equipment; the purchase of such equipment was to be authorized in advance. Since school farms tended to operate at a loss, the federal government intended to 'dispose gradually of these farms,' or at least those that were losing money. Schools with more than 250 students were provided with funding to hire a practical nurse. Transportation costs, including the cost of returning students to their home communities at holiday times, were to be covered by the federal government. Actual expenditures on telephone, fuel, and light were to be reimbursed, as were expenditures on household maintenance items and building repairs up to $1,500 per school per year, but not exceeding $200 for any single project. Although church officials were receptive to the new model, they worried that the various funding ceilings were being set at levels that were too low.

In October 1957, the Treasury Board approved the new funding system, retroactive to the beginning of the calendar year. In approving the policy, the Treasury Board acknowledged with approval the 'present policy of restricting the use of the residential schools in view of the high cost of this type of education.' It encouraged Indian Affairs to 'continue with and intensify its efforts to limit the number of residential schools.'

The new funding formula was accompanied by the negotiation of a set of agreements between the government and the churches. Those contracts gave the minister responsible for Indian Affairs 'a very substantial degree of control' over the operation of the schools. Such control was needed, it was later argued, because 'the standards in many of the church-operated schools had been scandalously low.' However, by taking over more responsibility for the schools, the government was placing itself in a situation where it could close the schools with less opposition. The details of the contracts were not finalized until 1961. They required that the schools be operated according to government-issued 'rules, regulations, directives and instructions.' The contracts were entered into with the Oblates of Mary Immaculate, the Missionary Society of the Anglican Church of Canada, the Board of Home Missions of the United Church of Canada, and the Women's Missionary Society (Western Division) of the Presbyterian Church in Canada.

The Oblates viewed the move to the new system as the precursor to a loss of control over the schools. An internal Oblate paper asked if the contract (and the funding system) was the 'thin

edge of a wedge' that would eventually push them out of 'the education of Indian children.' It was argued that the wedge had already been inserted, either when the church sold most of its schools to the government, or when the government began paying teachers' salaries. Overall, the Oblates were hesitant to sign the contract, 'not so much because of what it contains as because of what it lacks, i.e. anything which guarantees us a real part to play in the education of Indian children.' At the same time, they recognized that there was an advantage in having a contract 'by which the Government promises and obligates itself to do something definite.'

The change had a real impact on the schools. Residential school funding increased from $8,718,771 in 1957–58 to $11,405,931 in 1958–59, an increase of 23%.

The per capita system lingered on at church-owned schools, leading to regular requests to increase funding. In 1967, the Indian Affairs education director, R. F. Davey, was supporting an Oblate request to increase the per capita grant to the Christie, British Columbia, school from $650 a year to $830. Davey pointed out that under the existing grant, the school could not attract competent teachers or pay its operating staff a minimum of $1.25 an hour. The situation was further complicated by the fact that in order to comply with a fire marshal's directive, the school was being obliged to reduce its enrolment. Davey also pointed out that for similar reasons, Indian Affairs had increased the grant to the Fort Albany, Ontario, school to $830 a year.

From 1940 to 1960, when the new contracts were negotiated, residential school enrolment remained relatively static. It was 8,774 in 1940–41 and was 9,109 in 1959–60. However, there had been dramatic growth in enrolment in Indian Affairs day schools and in provincial government day schools. Enrolment in Indian Affairs day schools in 1940–41 was 8,651. By 1959–60, it was 18,812. The most significant change in enrolment was in a category that had not even existed twenty years earlier: the number of First Nations students enrolled in grades One to Thirteen in provincial, private, and territorial schools. This figure in 1959–60 was 9,006: just 100 fewer than the number of students attending residential schools. These students were the ones who were being educated under the government's integration policy. It was through the further extension of this policy that the federal government intended to bring residential schooling to an end.[195]

Runaways were considered to be juvenile delinquents.

Under the 1951 amendments to the *Indian Act,* children who were expelled or suspended, or refused to attend school regularly, were deemed juvenile delinquents under the *Juvenile Delinquents Act*. Judges had considerable discretion in the sentencing of juvenile delinquents: they could fine them, place them in foster care, and even have them placed in an industrial school or reformatory until they were twenty-one. Therefore, discharge from residential school did not necessarily lead to more freedom; sometimes, it led to less. In 1953, the principal of the Presbyterian school in Kenora informed the father of two boys who had just run away that if 'there is further trouble with them, I am prepared to recommend that they be placed in an institution for delinquent children.'

After being determined to be an 'habitual truant' at the Fort Frances school, Joanne Perrault was committed in 1958 to the St. Mary's Training School for Girls in Toronto (available documents do not indicate the type of court that imposed this sentence). In 1958, a fourteen-year-old girl ran away from the Shingwauk Home and then went to the police, stating that she had been picked up by men and raped. When the police took her to hospital to be examined

by a doctor, she refused to co-operate. She was then returned to the school. The events repeated themselves five days later, although, on that occasion, the police returned her directly to the school. In the documents it has reviewed, the Truth and Reconciliation Commission of Canada has not found evidence of any further investigation into her allegations. Principal Roy Phillips recorded that he was 'somewhat doubtful of its truth, as she each time told several untruths in connection with the incident.' Phillips became convinced the girl was suffering from a mental disorder. As a result, she was brought before a magistrate and committed for an indefinite period to a training school for girls in Galt, Ontario.

In 1959, the principal of the Pine Creek, Manitoba, school expelled two girls who, he believed, had organized four other girls to join them in running away from the school. It was felt the two exerted a negative in influence over the other students. The principal recommended that they be transferred to a 'correction home.'

Senior Indian Affairs official R. F. Battle informed an Alberta Indian Affairs superintendent in 1959 that although it was 'possible to treat persistent truants as juvenile delinquents,' the Juvenile Offenders Branch was 'reluctant to take such severe action.' Similarly, in that year, Indian Affairs instructed field staff that it was 'reluctant to give authority for the prosecution of attendance cases in which the pupil concerned is over 15 years of age.' Despite this, prosecutions did take place.

In 1961, a Manitoba provincial court judge passed sentence on seven boys convicted of truancy from the Birtle school. Six of them were sent to different residential schools, under police escort, and required to report to the local Mounted Police detachment every two weeks. The seventh was given a two-year sentence at the Portage la Prairie Home for Boys.

Indian Affairs also threatened to prosecute people who provided shelter to run-away students. Meridith Astakeesic ran away from the Birtle school several times, usually going to the home of Stella Blackie on the Birdtail Reserve. Indian Affairs official D. A. H. Nield advised Blackie in 1965 that

> if the parents or grandparents do not keep their child in school, we have no alternative but to lay a charge against you under Section 118 of the Indian Act. May we suggest that when this lad comes to you looking for food and shelter that you take a strap to him or punish him in some way rather than encouraging him to run away from school.

It is unclear from the letter what Blackie's relationship was to Astakeesic, but Nield noted that 'the mother of this boy is unable to keep him in either day or residential school.'[196]

**21. 1966-1996: the law accidentally brings the residential schools to an end; 1966 Canadian Labour Relations Board decision that Indian Residential Schools employees are federal government employees; transfer of IRS to Government of Canada; closure of the schools**

*In the process [of changing the funding contract], the government was unintentionally laying the groundwork for a Canadian labour board decision that would declare that virtually all school employees were, in essence, government employees. This ruling led to a restructuring of the government–church relationship in 1969.*[197]

*a confidential government legal opinion had concluded that because the contracts between the churches and the government gave the government considerable powers over how the schools were to be operated, then the churches were essentially 'agents of the Crown.'*[198]

*The closure of residential schools, which commenced in earnest in 1970, depended on a dramatic increase of the number of children being taken into care by child-welfare agencies.*[199]

The ending of residential schools took forever. However, the world was changing after World War II, and in unbearable slowness, Canada's legal system gradually became civilized enough that it was possible to bring prosecutions and civil lawsuits against the abuses of the residential schools. I discuss the ever-so-gradual civilization of Canada's legal system in a separate paper.[200] I discuss the prosecutions relating to residential school abuses in yet another paper.[201] Note that despite the few successful prosecutions for abuses at the schools, the sentences while the residential schools were still in operation were appallingly light and the risk of prosecution produced no changes in how the schools operated.

> During the period from 1940 to 1973, by which time the federal government had dramatically reduced the number of residential schools in Canada and was committed to closing the rest, the government's policy goals remained largely unchanged. Aboriginal policy was subject to two investigations by joint committees of Parliament: one major academic survey, and a consultative process led by a cabinet minister. The *Indian Act* underwent a major revision (1951) that stripped out many of its compulsory measures while retaining the commitment to assimilation. In 1969, the federal government issued a policy document—the White Paper—that ignored virtually everything First Nations people had been telling the government about Treaty and Aboriginal rights. The goals of the White Paper amounted to a continuation and an acceleration of the policies enunciated by Duncan Campbell Scott in 1920.[202]
>
> …
>
> The closure of residential schools, which commenced in earnest in 1970, depended on a dramatic increase of the number of children being taken into care by child-welfare agencies.[203]
>
> …
>
> Under Section 87 of the 1951 *Indian Act*, the government of Canada had sought to transfer responsibility for delivering child-welfare services for people with status under the *Indian Act* to provincial authorities. In coming years, agreements were reached between the federal government and a number of provincial child-welfare agencies to extend child-welfare services to reserves. Provincial governments maintained that the federal government was obliged to pay for these services and conflicts over the level of funding restricted the types of services available.
>
> Once agreements were put into place, the number of First Nations children being apprehended by provincial children's aid societies began to climb. In 1955, only 29 of the 3,433 children in care in British Columbia were of First Nations ancestry. An informal agreement was reached with the British Columbia government in 1962, under which the federal government paid 100% of the costs of child protection and child-in-care costs. By 1964, the number of First Nations children in the care of provincial agencies had jumped to

> 1,446. In less than a decade, First Nations children had become a third of the province's child-welfare caseload.[204]

Meanwhile, a labour tribunal decision that ruled that Indian residential school teachers were actually federal employees was the thing that really ended the residential schools.

> When the government did take over full responsibility for the schools in 1969, it did not do so as the result of a deliberate policy decision, but in response to a federal labour board ruling that forced it to live up to the consequences of its own actions.[205]
>
> …
>
> The funding formula that the federal government adopted in 1957 allowed it to exert greater control over how government funds were spent at residential schools. Under the new system, the government established the amounts that were to be spent on salaries at government-owned schools, and negotiated contracts that also gave it considerable control over the operation of the schools. In the process, the government was unintentionally laying the groundwork for a Canadian labour board decision that would declare that virtually all school employees were, in essence, government employees. This ruling led to a restructuring of the government–church relationship in 1969.
>
> The labour board's decision was triggered by a 1965 Canadian Union of Public Employees (CUPE) organizing drive at a number of residential schools. Initially, the campaign, which focused on the non-teaching staff members, prompted the federal government to examine the working conditions at the schools. (Teaching staff had been government employees since the government took over the direct payment of their salaries in 1954.) The study revealed the following in the case of the non-clerical domestic staff:
>
> - There were usually no written contracts governing the hiring of employees by the religious organizations that administered the schools.
> - Most employees were hired for ten months of the year.
> - There were no standard daily hours of work.
> - There were paid vacations, transportation to remote locations, pension plans, reduced accommodation rates, payment of health premiums and unemployment insurance benefits, and special allowances for employees in remote locations.
> - The pay and benefits were lower than those provided by the federal government for people it employed in other sections of the civil service who were performing similar duties.
>
> It was estimated that if the school employees were to be compensated at rates similar to government employees, costs would rise by $750,000. In its public statements, the federal government took the position that these 'domestic employees' at the schools were employed by the churches. However, a confidential government legal opinion had concluded that because the contracts between the churches and the government gave the government considerable powers over how the schools were to be operated, then the churches were essentially 'agents of the Crown.' According to the legal opinion, this meant that the

domestic staff members at the schools were Crown employees. Despite having this advice, the government continued to maintain that domestic staff members were church employees.

In February 1966, a question was asked in Parliament as to whether the *Canada Labour Code* applied to the residential schools and residences, and whether wages were paid that were less than the federal minimum of $1.25 an hour. Arthur Laing, the minister responsible for Indian Affairs, said that the application of the provisions of the labour code to school employees was being considered. He said that all staff members, other than teachers, were church employees. However, he said that the principals had been informed that the minimum wage at the schools was $1.25 an hour.

The CUPE organizing campaign operated on the premise that the individual schools were the employers. In such a case, the worker and the employer were subject to the provisions of the federal *Industrial Disputes Investigation Act* (IDIA)—an Act that did not apply to direct government employees (Crown employees). It was under the provisions of this Act that the union applied for the right to represent employees at the Fort Frances, Ontario, school. In the fall of 1966, the Canada Labour Relations Board rejected the CUPE application. The board ruled that the school staff members were effectively Crown employees and, as such, were not subject to the provisions of the IDIA. The labour board's decision did not mean the staff members could not be unionized: it just delayed the prospect. In 1968, the Public Service Alliance of Canada claimed the right to represent the staff under the provisions of the newly adopted federal *Public Service Staff Relations Act*.

The transfer of responsibility for employees from the churches to the federal government would amount to a transfer of administration of the schools as well. It would also void the existing contracts between the churches and the government. It would take three years of negotiations before the implications of the labour board decision were fully resolved.

The government and the churches were left with two options.

1) Return to the per capita grant system. This system, which gave the churches greater flexibility as to how the grant was spent, would allow the churches to argue that the school staff members were employed by the churches, not by the government.

2) Accept the labour ruling that the school staff members, including the principals, worked for the federal government. This would amount to an acceptance of a federal government takeover of the schools.

When government and church officials met to consider these options, United Church officials opposed the first option, since it would 'tend to surrender all the ground gained in the past nine years, in terms of maintaining standards of child care and control of expenditures.' According to a United Church document, 'the Protestant representatives at least were unwilling to consider seriously a return to the former system.'

It was generally recognized that the second option would lead to a significant improvement in the pay, working conditions, and benefits of the school employees. Church representatives feared that without the power to hire and fire employees, they would lose control of the schools. They also feared that 'the Christian atmosphere of the residences might suffer.' Both the United and Anglican churches indicated that they were considering withdrawing from residential schooling. Although they did not do so immediately, their involvement declined rapidly after 1969. The Roman Catholic Church, however, remained firmly committed to

> residential schooling. Indian Affairs official R. F. Davey concluded that while the 'prospect of adding 1400 more staff to the establishment is frightening,' it would be easier to close the schools in the future if the staff members were government employees.
>
> Assistant Deputy Minister R. F. Battle noted that bringing the school principals into the public service would be a complicated matter, since many of them were members of religious orders. He thought it would be possible to exempt their hiring from federal regulations. Once hired, the principals would continue to take direction from the church on all matters of spiritual philosophy, but 'in all other matters relating to the operation of the school, the principals would take direction from the Department.' This, from Battle's perspective, was a helpful development, since 'at the present time, some principals feel under no obligation to support government policy.'
>
> Eventually, agreements were reached with the churches that provided for the transfer of staff to the civil service while allowing the churches to continue to appoint the residence administrator. This, however, required an exemption from the Public Service Commission—an exemption that the commission was originally unwilling to provide. While the government favoured the takeover, it recognized that it could not immediately staff and operate the more than fifty institutions that were affected by the decision. In the short term, it wanted the church officials to stay on as administrators. The Public Service Commission eventually agreed to exempt approximately 200 administrators and child-care supervisors from all provisions of the *Public Service Employment Act* (PSEA) for a two-year period. It was recognized that the churches might choose to end their involvement with the residences, but Deputy Minister J. A. MacDonald believed that such a move 'would not cause the serious administrative problem that would occur if the churches were to pull out now.' Under the arrangement, the residence administrators remained church employees. They would have the authority to nominate the child-care workers, who would have to be approved by the department. All other staff members were to be appointed according to the PSEA. By this time, it was estimated that the takeover costs would be in the range of $2 million.[206]

The churches, especially the Catholic church, had no interest in losing control of "their" employees and the federal government had no interest in paying residential school staff proper wages and ensuring proper working conditions. The law had come to the rescue of indigenous children, sort of, accidentally. Now that it really was too expensive and complicated for the government and the churches to run the schools, it was time to turn the schools over to the Indians! Although the numbers of schools rapidly declined, the process of getting to the closure of the final school dragged out over thirty years. In the meantime, Canada enacted a *Bill of Rights* (1960) a *Canadian Human Rights Act* (1977) and a constitutionally entrenched *Charter of Rights and Freedoms* (1982). None of those laws helped any student or former student at an Indian residential school.

**22. Will the law that permits hitting children ever end?**

The Toronto School Board abolished corporal punishment in 1971. The following provinces banned corporal punishment in schools after that:

- British Columbia - 1973
- Nova Scotia - 1989
- New Brunswick - 1990
- Yukon - 1990

- Prince Edward Island - 1993
- Northwest Territories - 1995
- Nunavut - 1995
- Newfoundland and Labrador - 1997
- Quebec - 1998

The Government of Canada never did ban corporal punishment from the Indian Residential Schools.

In 1991, Canada ratified the United Nations *Convention on the Rights of the Child*, article 19 of which mandates the protection of children from all forms of physical or mental violence, injury or abuse. However, the fact remains that the Canadian *Criminal Code* and the Supreme Court of Canada and continue to condone some uses of corporal punishment against children.

Thus, for the entire duration of Indian Residential Schools, hitting children has always been legal, providing the hitting was "reasonable". There is no case where anyone was ever convicted of unreasonable hitting of children while the schools continued to operate. There are a handful of convictions from Fort Albany/St. Anne's Indian Residential School in the late 1990s. One of the nuns at the school, Sister Anna Wesley, was convicted in the spring of 1999 of three charges of administering a noxious substance and five counts of assault. Judge Robert Boissoneault imposed no sentence on the seventy-two-year-old woman, saying that in her case, the conviction was punishment enough. Jane Kakeychewan, a nun, was convicted of assault in 1998 and given a conditional sentence. Marcel Blais was convicted on one charge of indecent assault but did not serve time in prison. John Rodrique pleaded guilty to five counts of indecent assault and was sentenced to eighteen months in jail. Claude Lambert pleaded guilty to indecent assault and was sentenced to eight months in prison. Charges against Claude Chenier were dropped because the complainant did not appear in court. John Cushing was acquitted of indecent assault. None of the documents made available to the Truth and Reconciliation Commission of Canada indicate that charges were ever laid in relation to the use of the electric chair.[207]

In 2004, the Supreme Court of Canada considered whether s. 43 of the *Criminal Code* is constitutional or whether it violates the *Canadian Charter of Rights and Freedoms*. McLachlin C.J. recited the history of s. 43 at para. 65 of her judgment (including a minor amendment in 1952). Further, the Chief Justice noted that ideas of what is "reasonable" have changed and the interpretation and application of the law have been unclear and inconsistent over time.

> 36. Determining what is "reasonable under the circumstances" in the case of child discipline is also assisted by social consensus and expert evidence on what constitutes reasonable corrective discipline. The criminal law often uses the concept of reasonableness to accommodate evolving mores and avoid successive "fine-tuning" amendments. It is implicit in this technique that current social consensus on what is reasonable may be considered. It is wrong for caregivers or judges to apply their own subjective notions of what is reasonable; s. 43 demands an objective appraisal based on current learning and consensus. Substantial consensus, particularly when supported by expert evidence, can provide guidance and reduce the danger of arbitrary, subjective decision making.
>
> 37. Based on the evidence currently before the Court, there are significant areas of agreement among the experts on both sides of the issue (trial decision, at para. 17). Corporal punishment of children under two years is harmful to them, and has no corrective value given the cognitive limitations of children under two years of age. Corporal punishment of teenagers is

> harmful, because it can induce aggressive or antisocial behaviour. Corporal punishment using objects, such as rulers or belts, is physically and emotionally harmful. Corporal punishment which involves slaps or blows to the head is harmful. These types of punishment, we may conclude, will not be reasonable.
>
> 38. Contemporary social consensus is that, while teachers may sometimes use corrective force to remove children from classrooms or secure compliance with instructions, the use of corporal punishment by teachers is not acceptable.
>
> 39. … It must be conceded at the outset that judicial decisions on s. 43 in the past have sometimes been unclear and inconsistent, sending a muddled message as to what is and is not permitted. In many cases discussed by Arbour J., judges failed to acknowledge the evolutive nature of the standard of reasonableness, and gave undue authority to outdated conceptions of reasonable correction. On occasion, judges erroneously applied their own subjective views on what constitutes reasonable discipline — views as varied as different judges' backgrounds. In addition, charges of assaultive discipline were seldom viewed as sufficiently serious to merit in-depth research and expert evidence or the appeals which might have permitted a unified national standard to emerge.[208]

The Supreme Court declared s. 43 is constitutional, but provided confusing and little-known guidance about how to hit children reasonably. Thus, even today in 2017, Canada's *Criminal Code* continues to permit the hitting of children. There is no other group who are exempted from the criminal offense of assault.

Even though s. 43 expressly permits school teachers to hit children, the Supreme Court says they cannot.

The Supreme Court says that what is reasonable and what is not reasonable changes over time depending on expert reports. Who could ever know what is reasonable at any given time?

The Department of Justice Canada summarizes the Supreme Court decision as follows:

- The use of force to correct a child is only allowed to help the child learn and can never be used in anger.
- The child must be between two years old and twelve years old.
- The force used must be reasonable and its impact only 'transitory and trifling'.
- The person must not use an object, such as a ruler or belt, when applying the force.
- The person must not hit or slap the child's head.
- The seriousness of what happened or what the child did is not relevant.
- Using reasonable force to restrain a child may be acceptable in some circumstances.
- Hitting a child in anger or in retaliation for something a child did is not considered reasonable and is against the law.[209]

How many parents are aware that hitting a child who is less than 24 months is always unreasonable but hitting one who is 25 months might be reasonable?

Who would know that hitting a child of 25 months might be reasonable but hitting a teenager will never be reasonable?

Who would know that slapping a child's face is never reasonable but forcibly confining them or hitting their bottoms might be reasonable?

Who would know that when a parent hits a child, it is not the parent's opinion of what is reasonable but the opinion of a "substantial consensus, particularly when supported by expert evidence"? Where would a parent find out what that consensus is, especially in the heat of a moment?

Just as importantly, what child is going to debate, let alone prevent, the reasonableness of the assaults being made against them? How could a child ever use the law to protect themselves?

In 2012, the United Nations Committee on the Rights of the Child expressed its grave concern about Canada's position on corporal punishment:

> 44. The Committee is gravely concerned that corporal punishment is condoned by law in the State party under Section 43 of the Criminal Code. Furthermore, the Committee notes with regret that the 2004 Supreme Court decision Canadian Foundation for Children, Youth and the Law v. Canada, while stipulating that corporal punishment is only justified in cases of 'minor corrective force of a transitory and trifling nature,' upheld the law. Furthermore, the Committee is concerned that the legalization of corporal punishment can lead to other forms of violence. 45. The Committee urges the State party to repeal Section 43 of the Criminal Code to remove existing authorization of the use of 'reasonable force' in disciplining children and explicitly prohibit all forms of violence against all age groups of children, however light, within the family, in schools and in other institutions where children may be placed[210]. …

Also in 2012, Canada's leading medical journal, the *Canadian Medical Association Journal*, called s. 43 an "anachronistic excuse for poor parenting...Parents need to be re-educated as to how to discipline their children," wrote John Fletcher, editor-in-chief of the Journal, in an editorial calling for the repeal of Section 43, a controversial passage in the *Criminal Code* that authorizes spanking provided it is "reasonable under the circumstances...To have a specific code excusing parents is to suggest that assault by a parent is a normal and accepted part of bringing up children," he wrote, adding that Section 43 is "a constant excuse for parents to cling to an ineffective method of child discipline." In 1939, Dr. Allan Ray Dafoe of the CMA boasted to a conference in Washington State that under his supervision, Quebec's famous Dionne quintuplets had never been spanked.[211]

See the letter from the Canadian Bar Association in 2014 urging the federal government to address the recommendations of the United Nations Committee on the Rights of the Child[212]

In 2014, the United Nations Committee on the Rights of the Child addressed the issue of the responsibility of the Vatican as a sovereign entity and what distinction, if any, should be made between promises made by the Vatican to respect to the United Nations Convention on the Rights of the Child, compared to the responsibility of all of the rest of the Roman Catholic Church outside of the Vatican territory. The Committee spoke at some length about child sexual abuse within the Catholic church and the failure of the church to adequately address the crisis.[213] Within its comments, the Committee also addressed the issue of corporal punishment as taught, understood and administered by the Catholic church. This is what the Committee had to say about corporal punishment in its "Concluding observations on the second periodic report of the Holy See, January 31, 2014, Document: CRC/C/VAT/CO/2"[214]

8. The Committee is aware of the dual nature of the Holy See's ratification of the Convention as the Government of the Vatican City State, and also as a sovereign subject of international law having an original, non-derived legal personality independent of any territorial authority or jurisdiction. While being fully conscious that bishops and major superiors of religious institutes do not act as representatives or delegates of the Roman Pontiff, the Committee nevertheless notes that subordinates in Catholic religious orders are bound by obedience to the Pope in accordance with Canons 331 and 590. The Committee therefore reminds the Holy See that by ratifying the Convention, it has committed itself to implementing the Convention not only on the territory of the Vatican City State but also as the supreme power of the Catholic Church through individuals and institutions placed under its authority. …

13. While welcoming the Holy See's approach to ensuring that the legislation of the Vatican City State complies with the Convention, the Committee regrets that the same approach has not been followed in relation to its internal laws, including Canon Law. The Committee is also concerned that some of the rules of Canon Law are not in conformity with the provisions of the Convention, in particular those relating to children's rights to be protected against discrimination, violence and all forms of sexual exploitation and sexual abuse.

14. The Committee recommends that the Holy See undertake a comprehensive review of its normative framework, in particular Canon Law, with a view to ensuring its full compliance with the Convention. …

31. The Committee is concerned that the Holy See restrictively interprets children's right to express their views in all matters affecting them, as well as their rights to freedom of expression, association and religion. The Committee is also concerned that the Holy See continues to view the rights enshrined in article 12 of the Convention as undermining the rights and duties of parents. …

39. The Committee welcomes the statement during the interactive dialogue that the delegation of the Holy See will take the proposal of banning corporal punishment of children in all settings back for consideration. However, the Committee is concerned that while corporal punishment, including ritual beatings of children, has been and remains widespread in some Catholic institutions and reached endemic levels in certain countries, as revealed notably by the Ryan Commission in Ireland, the Holy See still does not consider corporal punishment as being prohibited by the Convention and has therefore not enacted guidelines and rules clearly banning corporal punishment of children in Catholic schools, in all Catholic institutions working with and for children, as well as in the home.

40. The Committee reminds the Holy See that all forms of violence against children, however light, are unacceptable and that the Convention leaves no room for any level of violence against children. The Committee also reminds the Holy See of its obligation under article 19 of the Convention to take all appropriate measures to protect the child from all forms of physical or mental violence. The Committee urges the Holy See to:

(a) Explicitly oppose all corporal punishment in childrearing, in the same way it opposes torture and other cruel, inhuman or degrading treatment or punishment;

(b) Amend both Canon Law and Vatican City State laws to explicitly prohibit all corporal punishment of children, including within the family;

> (c) Establish mechanisms to effectively enforce this ban in all Catholic schools and institutions working with and for children as well as on the territory of the Vatican City State and to ensure accountability for violence against children; and
>
> (d) Make use of its authority to promote positive, non-violent and participatory forms of child-rearing, and ensure that an interpretation of Scripture as not condoning corporal punishment is reflected in Church teaching and other activities and incorporated into all theological education and training.

The Vatican responded that it "regret[s] to see in some points of the Concluding Observations an attempt to interfere with Catholic Church teaching on the dignity of human person and in the exercise of religious freedom." The Holy See reiterated "its commitment to defending and protecting the rights of the child, in line with the principles promoted by the Convention on the Rights of the Child and according to the moral and religious values offered by Catholic doctrine."[215]

*A national consensus of experts (580 organizations and counting!): the Joint Statement on Physical Punishment of Children and Youth*

There is a joint statement that reviews the expert evidence and human rights issues and recommends repeal of s. 43.

> Based on an extensive review of research, the Joint Statement provides an overview of the developmental outcomes associated with the use of physical punishment. The evidence is clear and compelling — physical punishment of children and youth plays no useful role in their upbringing and poses only risks to their development. The conclusion is equally compelling — parents should be strongly encouraged to develop alternative and positive approaches to discipline.
>
> The pre-publication electronic edition of the *Joint Statement* was endorsed by 138 Canadian organizations concerned with the well-being of children and youth and, by invitation, a number of distinguished Canadians. These endorsers were acknowledged in the first printed edition of the *Joint Statement* launched at CHEO on September 29, 2004. At this update of the webpage, 580 organizations and several more distinguished Canadians are acknowledged for their endorsements. They are listed in the PDF ...
>
> The Truth and Reconciliation Commission of Canada, in its Call to Action #6, recommended that s. 43 be repealed. Senator Murray Sinclair, former chair of the TRC, is currently (spring 2017) leading a Bill in the Senate to have s. 43 repealed.[216]

**23. Conclusion**

The idea for this paper started with the question: why did it take so long for residential school cases to come to court. One part of the answer was that the residential schools were the law. How could the schools be unlawful? So I decided to provide a history of what those laws were.

In this paper I present the laws that created Indian Residential Schools and that enforced them. I have tried to do this in a mostly chronological history. This paper relies and quotes extensively from the research of the Truth and Reconciliation Commission of Canada. All of the TRC excerpts have their own extensive citations to the original archival documents within the TRC report.

In a separate paper, I describe the few court cases where a person was charged with criminal abuse at an Indian Residential School.[217]

The law continued to be used against Indian Residential School children long after the schools were closed. In a separate paper, I describe gradual changes made to Canada's legal system that finally made it possible for residential school cases to come to court.[218]

The Government of Canada and the churches fought against lawsuits for fifteen years before finally agreeing to a Settlement Agreement. In a future paper, I will examine all of those civil court cases. In another future paper, I will discuss how we arrived at the Settlement Agreement.

Canadians funded and staffed the Settlement Agreement, which is a process that has been ignored in various ways since 2005. Although the Settlement Agreement has not been complied with in some respects, Canada and the churches will probably not suffer any consequences from that fact. I have already published a paper that describes many of the ways that the Settlement Agreement has not been complied with.[219] I will publish a future paper on document production where the Settlement Agreement was not complied with.

Nonetheless, it is true that more than $5 Billion has been paid in varying amounts to more than 80,000 former students; paid almost entirely by Canadian taxpayers with extremely limited amounts paid by the churches.

Canadians elected the officials who created the schools. The elected representatives of Canadians chose to enact laws that underfunded the schools; failed to provide alternative education choices for indigenous parents; chose to permit hitting of children, chose to make laws and allow regulations that forced children into these schools; chose to pass laws that attacked indigenous governments in various ways; chose to enact laws that prohibit indigenous people from using lawyers and the courts to defend their rights; chose a legal system that had no prohibitions against discrimination until the schools were almost closed; chose to enact laws, and to allow Canada's national police force, to force indigenous children into Indian Residential Schools and made it extremely difficult for those children to leave the schools. Canadians funded the government lawyers who fought against Indian Residential School survivors in court between 1990 and 2005. When it was inconvenient, we ignored the law, we pretended to have lawful authority, we prevented indigenous peoples from learning what the laws were, we prevented them from having legal representation or any reasonable chance at using our legal system to protect themselves.

Indian Residential Schools were not created by bureaucrats and churchmen acting on a secret agenda that Canadians did not know about. Canadians create statues (e.g. John A. Macdonald) and name universities (e.g. Ryerson University) and buildings (e.g. Langevin Block) and airports for our elected and appointed representatives who, elected by us and by our parents and grand-parents, created, funded and enforced the outrageous, callous, harmful system of quasi-education we call Indian Residential Schools. It was our religion and our religious leaders, who we funded, and where we went to church, that implemented the desires of our elected representatives. There was nothing "Indian" about the schools; white men (and a few women) created the schools, taught in the schools, hit the children in the schools, captured children and forced them into the schools. In every way that is important, Canadians, we, did this.

We taught the Indian what law means to us. It is a very ugly thing.

1 Former General Counsel, Truth and Reconciliation Commission of Canada; former Executive Secretary, Manitoba Aboriginal Justice Inquiry; former Department of Justice Canada lawyer. This paper borrows greatly from the final report of the Truth and Reconciliation Commission. All of McMahon's papers can be found on the Social Sciences Research Network: <https://ssrn.com/author=2573042>

2 Canada. Parliament. House of Commons, Debates, 5th Parl., 3rd Sess., vol. 4 (1885): 3118. Quote from Prime Minister John A. Mcdonald, accessible online at: <https://parl.canadiana.ca/view/oop.debates_HOC0503_04/2>

3 Robert A. Williams Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest*, (Oxford University Press, 1990) p. 6

4 Truth and Reconciliation Commission, *Canada's Residential Schools: The History, Part 1 Origins to 1939 The Final Report of the Truth and Reconciliation Commission of Canada Volume 1* (2015), p. 4 <https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Volume_1_History_Part_1_English_Web.pdf>

5 TRC History Part 1 (2015)

6 Thomas McMahon, "Indian Residential Schools were a Crime and Canada's Criminal Justice System Could Not have Cared Less: The IRS Criminal Court Cases," (26 January 2017). Available at SSRN: <https://ssrn.com/abstract=2906518> ; see also: Thomas McMahon, "Canada's Legal System Hates Indigenous Women" (21 October 2016). Available at SSRN: <https://ssrn.com/abstract=2852544>

7 Thomas McMahon, "Why Did It Take So Long for Indian Residential School Claims to Come to Court? The Excruciatingly Gradual Civilization of Canada's Legal System," (27 January 2017). Available at SSRN: <https://ssrn.com/abstract=2844543>

8 Since published: Thomas McMahon, "Canada's Law of White Supremacy: 1496-1791," (15 September 2023). Available at SSRN: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4572402>, second paper detailing post 1791 to be published as part of an ongoing series of papers detailing the history of laws and court decisions relating to the creation, operation and closure of Canada's Indian Residential Schools, the criminal and civil court cases arising out of the Indian Residential Schools, the major events in the history of Canada's legal system that eventually made it possible for lawsuits for the abuses of Indian Residential Schools to be brought to court, the events that led to the Indian Residential Schools Settlement Agreement, and the court decisions and operational issues that resulted from the Settlement Agreement. These papers include a series that seek to explain how Canada could have considered Indian Residential Schools to be justified in the first place. All of McMahon's papers can be found on the Social Sciences Research Network: <https://ssrn.com/author=2573042>

9 Since published: Thomas McMahon, "The Great Commission, Papal Bulls and the Doctrine of Discovery: from the 4th Century to Current Law" (21 September 2021). Available at SSRN: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4572402>. This paper is part of the above mentioned series, which contains further papers surrounding the doctrine of discovery, notably discussing why the doctrine did not contribute to Indian Residential Schools to the magnitude with which it is treated throught the calls to action and many discussions on the topic, and detailing what the true doctrines leading to the IRS were.

10 Since published: Thomas McMahon, "Origins of White Supremacy: The Only 'Doctrine' That Actually Matters" (18 May 2022), available at SSRN: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4110207> and Thomas McMahon, "The Origins of Modern International Law: A Vocabulary for Justifying White Supremacist Colonialism" (6 August 2022), available at SSRN: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4180890>

11 H.P. Biggar, ed., *The Precursors of Jacques Cartier 1497-1534: A Collection of Documents relating to the Early History of the Dominion of Canada* (Government Printing Bureau 1911) 7-10. Accessed online at: <http://www.heritage.nf.ca/exploration/1496patent.html>

12 «le désir d'entendre et avoir connaissance de plusieurs pays qu'on dit inhabités, et autres être possédés par gens sauvages, vivants sans connaissance de Dieu et sans usage de raison»; for the purpose of «les faisant instruire en l'amour et crainte de Dieu et de sa sainte loi et doctrine chrétienne, en intention de les faire remener ès dits pays en compagnie de bon nombre de nos sujets de bonne volonté, afin de plus facilement induire les autres peuples d'iceux pays à croire en notre sainte foi»
"Commission de François 1er à Jacques Cartier pour l'établissement du Canada, 17 octobre 1540" Online: La Bibliothèque indépendantiste (23 January 2011) <http://biblio.republiquelibre.org/Commission_de_Fran%C3%A7ois_1er_%C3%A0_Jacques_Cartier_pour_l%27%C3%A9tablissement_du_Canada,_17_octobre_1540>

13 Robert Williams Jr., *The American Indian in Western Legal Thought: The discourses of conquest*, (Oxford University Press, 1990) at p. 163

14 Robert Williams Jr., "Columbus' Legacy: Law as an instrument of racial discrimination against indigenous peoples' rights of self-determination," (1991) 8 *Arizona Journal of International and Comparative Law* 51 at p. 69; and Williams Jr., (1990) at p. 201

15 Calvin's Case 77 ER 377 (1608) Co Rep 1a, Tin. 6 Jac. 1. Accessible online at: <http://www.commonlii.org/int/cases/EngR/1572/64.pdf> and quoted in John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*," (1999) 37 *Osgoode Hall Law Journal* 537 at p. 561 and note 127

16 "In 1611, after wintering on the shore of James Bay, Hudson wanted to press on to the west, but most of his crew mutinied. The mutineers cast Hudson, his son and seven others adrift; the Hudsons, and those cast off at their side, were never seen again." "Henry Hudson" Online: Wikipedia (22 November 2023) <https://en.wikipedia.org/wiki/Henry_Hudson> accessed on December 17, 2016

17 Robert J. Miller, *Native America, Discovered and Conquered: Thomas Jefferson, Lewis and Clark, and Manifest Destiny*, (University of Nebraska Press, 2008) at p. 30

18 *The Old West – the Canadians*, Time-Life Books, 1977, at p. 21-22

19 Kwesi Baffoe "Cultural Eclipse: The Effect on the Aboriginal Peoples in Manitoba," (2004) 5 *Tribal Law Journal 1*, p. 7. Accessible online at: <https://digitalrepository.unm.edu/tlj/vol5/iss1/3/>

20 *Manitoba Métis Federation Inc. v. Canada (Attorney General) et al.,* 2010 MBCA 71 (CanLII), <https://canlii.ca/t/2bgpf>, at para. 19

21 For a more nuanced examination of Locke's theories and for an argument that Locke defended Aboriginal title, see Paul Corcoran, "John Locke on the Possession of Land: Native Title vs. the 'Principle' of *Vacuum domilicium,*" Australasian Political Studies Association Annual Conference, 24th-26th September 2007 <http://digital.library.adelaide.edu.au/dspace/bitstream/2440/44958/1/hdl_44958.pdf>

22 Joan Holmes, "The Original Intentions of the *Indian Act*," (2002) prepared for a conference held in Ottawa by the Pacific Business and Law Institute, April 17-18, 2002, accessible online at: <https://docslib.org/doc/3727890/the-original-intentions-of-the-indian-act>

23 Michael C. Blumm, "Retracing the Discovery Doctrine: Aboriginal title, tribal sovereignty, and their significance to treaty-making and modern natural resources policy in Indian country," (2004) 28 *Vermont Law Review* 713 at p. 722

24 George R, Proclamation, 7 October 1763 (3 Geo III): RSC 1985, App II, No 1, accessible online at: <https://www.uottawa.ca/about-us/official-languages-bilingualism-institute/clmc/linguistic-history/historic-documents/royal-proclamation-1763>

25 The *Magna Carta* was an English law first written in 1215. The chief significance of the *Magna Carta* is that it limits the powers of the king over English nobility and bishops. It became both a symbol and model for written constitutional government, as opposed to rule by king's decree, and a symbol and model of individual rights and liberties guaranteed by law.

26 *Calder v. Canada (A.G.)* (1973), 34 D.L.R. (3d) 145 (S.C.C.) at 203, cited in *McAteer et al. v. Canada (A.G.)*, 2013 ONSC 5895 at para. 64

27 Holmes (2002)

28 A summary of part of the history of the maxim can be found in *Arishenkoff v. British Columbia*, 2005 BCCA 481. In fact, the meaning of the maxim has changed over the centuries. Some have suggested that its original meaning related to the time when King Henry III ascended to the throne at the age of nine and all royal powers were exercised by others, and thus, the child king literally could not commit a wrong. Guy Seidman, "The origins of accountability: Everything I know about the Sovereign's immunity, I learned from Henry III," (2005) 49 *St. Louis Law Journal* 393. See also Anthony Gray, "Immunity of the Crown from statute and suit," (2010) *Canberra Law Review* 1

29 Charles M. Gates, "The West in American Diplomacy, 1812–1815," (1940) 26 *Mississippi Valley Historical Review* 4 at p. 507

30 Donald E. Graves, "Who really won the war of 1812?," 20 *Canada's History*

31 Holmes (2002)

32 "Hudson's Bay Company" Online: Wikipedia (11 January 2024) <https://en.wikipedia.org/wiki/Hudson%27s_Bay_Company>

33 Russell C. Smandych, "The Exclusionary Effect of Colonial Law: Indigenous Peoples and English Law in Western Canda, 1670-1870," Chapter 4, in Louis Knafla and Jonathan Swainger eds., *Law and Societies in the Canadian Prairie West, 1670-1940*, (UBC Press, 2005) at p. 132

34 *Johnson and Graham's lessee v. William M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823)

35 *McAteer v. Canada (Attorney General),* 2014 ONCA 578, accessible online at <http://canlii.ca/t/g8kld>; the Ontario Court of Appeal states that British rule was "cemented" by the 1760 capitulation of France to England in 1760, at para. 35

36 Eric Kades, "History and Interpretation of the Great Case of Johnson v. M'Intosh," (2001) 19 *Law and History Review 1*, at p. 67, accessible online at <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1050&context=facpubs> and Lindsay Robertson, *Conquest by Law*: *How the Discovery of America dispossessed Indigenous Peoples of their Lands*, (Oxford University Press, 2005)

37 A.C. Hamilton and C. M. Sinclair, "Aboriginal and Treaty Rights," Chapter 5, in The Aboriginal Justice Implementation Commission, *Report of the Aboriginal Justice Inquiry, Volume 1: The Justice System and Aboriginal People*, (1991), accessible online at<http://www.ajic.mb.ca/volumel/chapter5.html>

38 *Johnson* at p. 591. See also *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) at p. 543: "It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over

the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors." And at p. 543: "But power, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin; because holding it in our recollection might shed some light on our existing pretensions." And at p. 544-545: "[t]he extravagant and absurd idea, that the feeble settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man."

39 *Johnson* at p. 588-589.

40 A.C. Hamilton and C. M. Sinclair, "An Historical Overview," The Aboriginal Justice Implementation Commission, *Report of the Aboriginal Justice Inquiry, Volume 1: The Justice System and Aboriginal People*, (1991) accessible online at <http://www.ajic.mb.ca/volumel/chapter3.html>

41 Sean Darcy, "The Evolution of the Department of Indian Affairs' Central Registry Record-Keeping Systems: 1872-1984," (2004) *Archivaria* 58, at p. 161-171. Read the abstract of this article in *Archivaria* <http://journals.sfu.ca/archivar/index.php/archivaria/article/view/12482>, and Sean Darcy "The Red and Black Series: Administration of the First Nations: 1782-1844" (20 June 2006), Online: Library and Archives Canada <https://www.collectionscanada.gc.ca/aboriginal-heritage/020016-2002-e.html>

42 TRC History Part 1 (2015) at pp. 74-75

43 *An Act for the better protection of the lands and property of the Indians in Lower Canada,* S.C. 1850, c. 42 (13 & 14 Vict.), s. V

44 See further: Thomas McMahon, "Canada's Legal System Hates Indigenous Women" (5 March 2017), accessible online at <https://ssrn.com/abstract=2852544>

45 *An Act for the Gradual Civilization of the Indian Tribes in the Canadas*. S.C. 1857, c. 6 (20 Vict.)

46 Holmes (2002)

47 *An Act respecting the Management of the Indian Lands and Property*, S.C.1860, c. 151 (23 Vict.)

48 TRC History Part 1 (2015) at p. 151

49 *An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, S.C. 1868, c. 42 (31 Vict.)

50 *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*, S.C. 1869, c. 6 (32-33 Vict.)

51 Ogden Tanner, *The Old West – the Canadians*, (Time-Life Books, 1977), p. 140. See also "Deed of Surrender" Online: Hudson's Bay Company History Foundation <http://www.hbcheritage.ca/hbcheritage/history/week/the-deed-of-surrender>

52 TRC History Part 1 (2015) at pp. 119-120

53 For all text re: HBC Deed of Surrender, see "Deed of Surrender" Online: Hudson's Bay Company History Foundation

54 "Canada buys Rupert's Land," Online: CBC Learning, Canada: A People's History, CBC Learning <http://www.cbc.ca/history/EPCONTENTSE1EP9CH1PA3LE.html>

55 Tanner at p. 140

56 "He was elected in the federal riding of Provencher in a by-election in October 1873. Riel was re-elected in the February 1874 general election, at which point he travelled to Ottawa and signed the members' register at the House of Commons. But before taking his seat, he was expelled from the House on a motion introduced by the Ontario Orange leader Mackenzie Bowell. Although re-elected in a constituency by-election in Provencher in September 1874, Riel delayed in taking his seat and was later expelled from the House." "Louis Riel," Online: The Canadian Encyclopedia (12 January 2024) <http://www.thecanadianencyclopedia.ca/en/article/louis-riel>

57 Jérôme Marchildon, "Manitoba History: The Story of Elzéar Goulet," 65 *Manitoba Historical Society* <http://www.mhs.mb.ca/docs/mb_history/65/goulet_e.shtml>; and J.A. Jackson, "Elzéar Goulet," Online: Dictionary of Canadian Biography, <http://www.biographi.ca/en/bio/goulet_elzear_9E.html>

58 Tanner at. pp. 145-150

59 *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 (CanLII) <http://canlii.ca/t/fwfft> , at para. 9

60 First published in *Le Manitoba* (a French language newspaper), *Pellant v. Hebert*, St. Boniface Co. Ct., March 9, 1892, reported at (1981), 12 *R.G.D*. 242

61 January 30, 1909, County Court of St. Boniface (unreported), reproduced in *Re Forest and Registrar of Court of Appeal of Manitoba* (1977), 77 D.L.R. (3d) 445 (Man. C.A.), at pp. 458-62

62 *Attorney General of Manitoba v. Forest*, 1979 CanLII 242 (SCC), [1979] 2 SCF 1032 <https://canlii.ca/t/1z78s>

63 *Re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 SCR 721, <https://canlii.ca/t/1ftz1>

64 *Bilodeau v. A.G. (Man.)*, 1986 CanLII 64 (SCC), [1986] 1 SCR 449, <https://canlii.ca/t/1ftt6>

65 TRC History Part 1 (2015) at pp. 121-124

66 TRC History Part 1 (2015) at p. 119
67 TRC History Part 1 (2015) at p. 152
68 TRC History Part 1 (2015) at pp. 253-254
69 TRC History Part 1 (2015) at p. 178
70 TRC History Part 1 (2015) at p. 191
71 Truth and Reconciliation Commission, *Canada's Residential Schools: The History*, *Part 2, 1939 to 2000, Truth and Reconciliation Commission's Final Report, volume 1,*," at. pp. 15-16 (2015) Accessible online at: <https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Volume_1_History_Part_2_English_Web.pdf>
72 *R. v. Syliboy* (1929), 1 DLR 307 (N.S. County Court)
73 See McMahon (27 January 2017)
74 TRC History Part 1 (2015) at. p. 112
75 *An Act to amend and consolidate the laws respecting Indians,* SC 1876, 39 Vict, c 18
76 TRC History Part 1 (2015) at pp. 106-110
77 "Dominion Lands Act" Online: Wikipedia (12 January 2024) <https://en.wikipedia.org/wiki/Dominion_Lands_Act>
78 Wendy Moss and Elaine Gardner-O'Toole, "Aboriginal People: History of Discriminatory Laws," Online: Government of Canada Publications (November 1986, revised November 1991), <http://publications.gc.ca/Collection-R/LoPBdP/BP/bp175-e.htm>
79 TRC History Part 1 (2015) at pp. 154-157
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81 TRC History Part 1 (2015) at pp. 161-162
82 TRC History Part 1 (2015) at p. 164
83 TRC History Part 1 (2015) at p. 165
84 TRC History Part 1 (2015) at p. 167
85 TRC History Part 1 (2015) at pp. 199-200
86 TRC History Part 1 (2015) at p. 532
87 "Eastbourne Manslaughter" Online: Wikipedia (15 July 2023) <https://en.wikipedia.org/wiki/Eastbourne_manslaughter>
88 The actual court decision can be found here: *R. v. Hopley*, [1860] English and Welsh Courts Miscellaneous J73 (11 January 1860); (1860) 2 F&F 202, 175 ER 1024; <http://www.bailii.org/ew/cases/Misc/1860/J73.html>
89 TRC History Part 1 (2015) at pp. 519-520
90 Criminal Code, 1892, 55-56 Vict, ch. 29 s 55 <https://www.canadiana.ca/view/oocihm.9_02094/48> [s 55 at p. 46]
91 Criminal Code, RSC 1985, c C-46, s 43, <https://canlii.ca/t/7vf2#sec43>
92 TRC History Part 1 (2015) at pp. 519-520
93 TRC History Part 1 (2015) at p. 530
94 TRC History Part 1 (2015) at p. 532
95 TRC History Part 1 (2015) at p. 559
96 TRC History Part 1 (2015) at p. 224
97 TRC History Part 1 (2015) at pp. 220-227
98 TRC History Part 1 (2015) at pp. 130-131
99 TRC History Part 1 (2015) at pp. 635-640
100 TRC History Part 1 (2015) at p. 640
101 TRC History Part 1 (2015) at p. 641
102 TRC History Part 1 (2015) at p. 126
103 TRC History Part 1 (2015) at pp. 127-128
104 TRC History Part 1 (2015) at p. 131
105 TRC History Part 1 (2015) at pp. 98-100
106 McMahon (2016).
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150 TRC History Part 1 (2015) at pp. 523-524
151 TRC History Part 1 (2015) at p. 564
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164 TRC History Part 1 (2015) at p. 285
165 TRC History Part 1 (2015) at p. 564
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201 McMahon (26 January 2017)
202 TRC History Part 2 (2015) at pp. 13-14
203 TRC History Part 2 (2015) at p. 172. The "sixties scoop" in which many thousands of indigenous children were adopted out of their families and communities began at the same time that Canada was trying to close the schools. The sixties scoop is a different story, and one that is in active litigation at the time of writing.
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209 "Criminal Law and Managing Children's Behaviour" Online: Government of Canada (8 December 2021) <http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/mcb-cce/index.html>
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<http://www.ncregister.com/daily-news/u.n.-committees-effort-to-teach-theology-to-the-holy-see-caught-us-by-surpr/>

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219 Thomas McMahon, "The Final Abuse of Indian Residential School Children: Deleting Their Names, Erasing Their Voices and Destroying Their Records after They Have Died and without Their Consent" (8 March 2017). Available at SSRN <https://ssrn.com/abstract=2812298>