SHORTCUTS
Essential, accessible information for self-determining First Nations

September 2024

This series is intended to provide high level and short, easy to read information about some very complex issues. It should not be used as a substitute for expert advice. Links to sources and further reading suggestions are provided throughout for further exploration of the issues.

Indian Act: Devolution and Opt-In Legislation

By Julie Williams, Inherent Rights Fellow, Centre for First Nations Governance and Rebuilding First Nations Governance, Carleton University

Self-Governing or Self-Administering?

The Canadian Constitution recognizes and provides for differing sources of authority and accountability for governing First Nations. Through the *Constitution Act, 1982,* the inherent right of self-government is recognized under Section 35, whereas delegated authority exists through the *Indian Act* under Section 91 (24). Given these two very different sources of legal authority, every decision and action a First Nation takes should be undertaken with the full breadth of understanding the source of its authority and accountability.

When First Nations governance exists from an inherent rights position under Section 35, the authority and accountabilities are with the people - the citizens of the Nation. Inherent rights governance is grounded in the existence of First Nations peoples' organization as sovereign nations on their territories prior to the arrival of Europeans. Pre-contact, this included property rights, responsibilities for lands, decision-making authority over culture, families, economies and laws, etc. These rights were never lost nor extinguished (Centre for First Nations Governance, Our Inherent Rights, 2024).

In practice, self-government ensures that a First Nation's culture and values are reflected through self-defined laws, policies, and institutions. Governing systems, social and educational programs, and societal structures are built and function from their cultural worldview and are defined by the citizens. Leadership gets their authority from and are accountable to the citizens. A sovereign self-governing nation does not seek authority or permission from another nation on matters of governance such as law-making, financial expenditures or the use of their lands.

In contrast, Section 91 (24) of the Constitution gives the Parliament of Canada the authority to make laws about First Nations people, the most significant of which is the *Indian Act*. Self-

administration occurs when Canada delegates that authority to administer programs and services to First Nation band councils. In practice, this means First Nations take on the duties to deliver services like education, create by-laws and undertake certain financial administration, but are constrained by the laws and policies set by Canada and the provinces. For example, under the *Indian Act*, First Nations children on reserve go to schools that are run by their band, but they must learn the provincial or territorial curriculum. The spending of funds to deliver programs must adhere to federal rules and are accompanied by extensive reporting requirements where the First Nation's primary accountability is to Canada through the Minister of Indigenous Services Canada, not to their citizens.

Despite Section 35 recognizing and affirming existing Aboriginal and Treaty Rights, which includes the right of self-government, most First Nations in Canada continue to be administered under the rules of the *Indian Act*. In the last 42 years only 43 Indigenous nations (Indigenous includes First Nations, Inuit and Metis) have concluded some form of self-government agreement (Crown Indigenous Relations and Northern Affairs Canada, 2024). For perspective, there are over 630 First Nations communities in Canada.

What is Devolution?

Devolution is the process by which the federal government of Canada delegates its authority and transfers the administration of programs and services on reserve to *Indian Act* band councils. Simply put, "Devolution is essentially a downloading process in which a program's operations are shifted to the local level, producing what can be called self-administration or perhaps self-management" (Rae, 2009, 7). Through this process Canada maintains legal and policy control as the Minister of Indigenous Services Canada and Minister of Crown Indigenous Relations and Northern Affairs (and their predecessors) continue to retain the authority to define the terms, standards, conditions and funding accountabilities related to essential services and land management on reserve.

The process of devolution is expected to accelerate. The preamble of the *Department of Indigenous Services Act, 2019* says "…whereas it is appropriate to establish a Department of Indigenous Services and that the Department …implements the gradual transfer of departmental responsibilities to Indigenous organizations…"; indicating that First Nations can expect pressure from the federal government to take on more self-administration. Instead of creating enabling self-government frameworks and legislation, Canada has been iterating approaches to self-administration for decades.

See Appendix A for a timeline that shows the roots of this process go back more than 70 years

Opt-In Legislation is Not Inherent Rights Self-Government

There are numerous federal laws that allow band councils to choose different governance frameworks. By "opting-out" of certain sections of the *Indian Act* and replacing them by "opting-

in" to these laws, band councils are provided greater flexibility in these areas of governance. Opt-in laws include:

- *First Nations Lands Management Act* (FNLMA) replaced in 2022 by the *Framework Agreement on First Nation Land Management Act (FAFNLMA)*
- *First Nations Oil and Gas and Moneys Management Act* (FNOGMMA)
- *First Nations Fiscal Management Act, 2005* (FMA)
- *First Nations Elections Act* (FNEA).

While these Acts offer First Nations councils some ability to exercise authority and establish some law-making authority, they fall short of being grounded in or enabling the inherent right of self-government. The federal government of Canada retains final authority and accountability mechanisms instead of accountabilities being to the citizens (the rights holders) of the First Nations.

Framework Agreement on First Nations Land Management Act

For First Nations who opt into the *Framework Agreement on First Nations Land Management Act* (FAFNLMA) multiple provisions of the *Indian Act* regarding land management and revenue moneys do not apply. The First Nation must first, however, enter into an agreement with the Minister of Crown-Indigenous Relations and Northern Affairs Canada in accordance with the framework agreement before they can develop a land code to replace those provisions of the *Indian Act*.

Section 4.1.2 of the Framework Agreement underlines that "Any reserve, **title to which is vested in Canada**, and managed by a First Nation under a land code, **will continue to be vested in Canada** for the use and benefit of the respective First Nation for which it was set apart". (Framework Agreement on First Nation Land Management, 2022. Emphasis added.) Under inherent rights jurisdiction a First Nation would have the legal authority and a clear mandate from citizens to develop its own laws and policies over its territory, with meaningful government-to-government consultation to reach accommodation to reconcile competing interests. (Centre for First Nations Governance, 2020). The FAFNLMA is limited only to reserve lands. It falls short of recognizing title to reserve land as the Crown continues to retain it, while giving the band the ability to manage and develop reserve lands.

First Nations Oil and Gas and Moneys Management Act

The *First Nations Oil and Gas and Moneys Management Act 2005* (FNOGMMA), has similar provisions to the Lands Management Act. The legislation facilitates the transfer of control of oil, gas and other moneys to First Nations. Functionally - aside from provisions pertaining to oil and gas - it allows a First Nation to opt-out of the *Indian Act* moneys management provisions for greater self-management of revenue and capital assets by the First Nation. To do this the First Nation is required to develop a financial code that specifies how it will hold money, how it will spend money, how it will be accountable for that expenditure, how conflicts of interest will be

disclosed and provisions for amending the financial code (Centre for First Nations Governance, 2024). However, title to lands on which revenues are generated remains with the Crown.

The *First Nations Fiscal Management Act*

The purpose of the *First Nations Fiscal Management Act 2005* (FMA) is to create real property taxation powers for First Nations and to secure long-term financing of capital assets. It also creates First Nations financial institutions such as: First Nations Tax Commission (FNTC), First Nations Financial Management Board (FMB) and First Nations Finance Authority (FNFA). Through the FMA First Nations can also apply for the 10-year funding grant which affords them greater fiscal flexibility, reduced reporting and secure funding for 10 years with annual funding increases. The 10-Year Grant was established as part of the "New Fiscal Relationship" co-developed between the Assembly of First Nations and federal government as an interim step to creating more financial flexibility for First Nations, while understanding that more significant changes are required in the fiscal relationship between First Nations and federal government (Centre for First Nations Governance, 2024)[1].

The FMA enables First Nations to make laws respecting financial administration, charge for municipal-type services, and it allows for borrowing from the First Nations Finance Authority. However, a First Nations' financial administration laws must be approved by the FMB, an organization that is accountable to the Minister of Crown-Indigenous Relations and Northern Affairs Canada. It requires First Nations to adopt a range of governance policies that are highly regulated and largely pre-determined by the FMB, severely restricting the law-making authority the legislation provides to First Nations.

In addition, the First Nation must make their audited financial report available to members of the First Nation, the First Nations financial institutions created by the act (FNTC, FMB, FNFA) as well as the Minister of Crown-Indigenous Relations and Northern Affairs Canada (S 14.2 *First Nations Fiscal Management Act*, 2005). Chief and Council are accountable to the financial institutions created under this legislation, with the FMB having significant authority such as recommending amendments to the band's laws or changes to their expenditures, budgets and financial management system. If their finances are found unacceptable, the First Nation can lose control of their financial management.

The examination of accountabilities of this legislation reveals a lack of true self-government. Ultimately the accountabilities circle back to the Minister of Crown-Indigenous Relations and Northern Affairs Canada.

[1] Rather than requiring reapplication and extensive reporting every year for funding to deliver programs and services, in 2020 Canada began experimenting with providing 10-year grants to a limited number of qualifying First Nations. A 10-year grant allows a First Nation to make longer-term decisions and plans. For further explanation of how it's administered: https://fnfmb.com/en/services/10-year-grant

Currently, 363 First Nations - over half of First Nations in Canada - participate in the FMA (Schedule subsection 2(1) and (3), *First Nations Fiscal Management Act, 2005*).

The *First Nations Elections Act*

The *First Nations Elections Act* (FNEA) replaces section 74 of the *Indian Act*, which regulated Chief and Council elections. However, under FNEA the ability to establish an election code remains subject to the approval of the Minister of Indigenous Services Canada. While the act does allow for longer terms of 4 years, and increasing the number of councillors within certain limits, an election can be contested through the federal court or a provincial superior court. These bodies may set aside the contested election (Section 33, *First Nations Elections Act, 2014*). Again, the Minister of Indigenous Services Canada retains final approval, and elections can be overturned within Canadian legal structures rather than First Nations legal structures founded on First Nations legal principles.

Conclusions

Devolution and the development of opt-in legislation have not been entirely lacking in benefits. They have created more capacity and infrastructure within First Nations bands while allowing local service delivery and more resources to enter communities. This has meant greater control and a more stable financial footing, allowing Bands to more appropriately support membership. But it is important to recognize that they do not enable self-government grounded in inherent rights.

These laws, while they may have been developed in consultation with First Nations, were enacted by the Parliament of Canada using its authority under Section 91(24) of the *Constitution Act and* include numerous requirements for approval or accountabilities that circle back to the Minister of Indigenous Services Canada or Crown-Indigenous Relations and Northern Affairs Canada. As such, they offer only greater self-administration on the continuum of devolution and delegation.

More importantly perhaps, we may ask why the inherent rights movement among First Nations has declined instead of strengthened in the last 4 decades? Rae (2009) posits that devolution is inadequate as the main mechanism to support self-government and that it may act as a "quagmire" that creates programs and models that are too constrained to be culturally based or effective. It entrenches dysfunctional governance structures and creates inertia and obstacles to change that can be damaging to the proper evolution of self-government (Rae, 2009).

It is entirely within the rights of each First Nation to determine what their best steps are to developing greater autonomy. But a critical analysis of government mandates, legislation and policies will only strengthen long-term planning and strategy as First Nations continue to aspire to inherent rights self-government.

Appendix A

Devolution Timeline

1950s

All programs and services were delivered by the federal government to First Nations on reserve. Parliament began to recognize that First Nations peoples on reserves were not receiving the social programs that Canadian citizens received from the provinces and territories (Metallic, 2016).

In a cultural shift following the Second World War, amendments to the *Indian Act* included: removal of the ban on ceremonies and dances, including the Potlatch. There was a lift on the ban on pursuing land claims which allowed for enabling court cases. Band councils received more powers to act like municipal-style governments.

1960s

Hawthorn Report sought to end the special relationship between Canada and First Nations and recommended provinces and territories to deliver services on reserve. It was met by significant resistance and was not fully endorsed.

The federal government's **White Paper** sought to: *repeal the Indian Act, transfer service delivery to provinces* (Department of Indian Affairs and Northern Development [DIAND], 1969) and proposed to further the federal approach to forced assimilation (Rae, 2009).

1970s

The **White Paper** was vehemently rejected by First Nations and spurred an Indigenous Rights Movement defined by inherent rights to lands and self-government.

Concurrently, devolution began to form as a deliberate policy approach in response to the political calls by First Nations to control their own affairs and a federal government desire to de-centralize service delivery on reserve (DIAND, 1993). Devolution began as program delivery shifted to band councils beginning with income assistance and education and then in later years on to child welfare, policing and some health care programs (Rae, 2009).

1980s

Special House Committee on Indian Self-Government released "The Penner Report" strongly criticizing devolution as the Minister maintained financial control mechanisms, imposed significant accountability and monitoring burdens and thereby inhibited First Nations self-government (Prince, 1994).

Indigenous rights movement succeeded in seeing treaty and aboriginal rights recognized and affirmed in Section 35 (1) of the *Constitution Act, 1982*.

	Under the Mulroney government program devolution was positioned as a "gateway" to First Nations self-government with delegation to administer programs and services from Indian Affairs on one end and self-government on the other. The process included the creation of new funding agreements (Metallic, 2016). A government leaked paper known as the "Buffalo Jump" revealed plans to transfer federal responsibilities for First Nations to provinces and communities while seeking to transform them into municipalities (Yellowhead Institute, 2021).
1990s	Federal government's Inherent Right Policy Framework enables some comprehensive self-government agreements and sectoral self-government agreements in education. The framework recognized self-government as an inherent Aboriginal right but required negotiation and approval (Rae, 2009).
	Delgamuukw-Gisdayway 1997 (aka Delgamuukw v. British Columbia, 1997) Supreme Court of Canada decision identified that Aboriginal title includes the right of a First Nation to choose how land can be used, implying the right to self-government (Centre for First Nations Governance, Aboriginal Case Law in Canada, 2024).
1999	*First Nations Land Management Act* (FNLMA)
2005	*First Nations Oil and Gas and Moneys Management Act* (FNOGMMA) *First Nations Fiscal Management Act* (FNFMA)
2014	*First Nations Elections Act* (FNEA)
2019	10-Year Grant mechanism announced: https://fnfmb.com/en/services/10-year-grant

Read More

Centre for First Nations Governance. (2020). The Indian Act vs Self-Determination. https://carleton.ca/rfng/wp-content/uploads/Indian-Act-vs.-Self-Determination.pdf

Centre for First Nations Governance. (n.d.) *Our Inherent Rights*. Retrieved August 4, 2024 from https://fngovernance.org/our-inherent-rights/

Crown Indigenous Relations and Northern Affairs Canada. (2004, March). *Self-Government*. https://www.rcaanc-cirnac.gc.ca/eng/1100100032275/1529354547314#chp3

Department of Indian Affairs and Northern Development. (1993). *DIAND's evolution from direct service delivery to a funding agency*. Ottawa: Royal Commission on Aboriginal Peoples.

Department of Indian Affairs and Northern Development. (1969). *Statement of the Government of Canada on Indian Policy, 1969* https://nctr.ca/wp-content/uploads/2021/01/1969-The-White-Paper.pdf

Indigenous Services Canada. (2022, May 7) *First Nations Oil and Gas and Moneys Management Act*. https://www.sac-isc.gc.ca/eng/1100100032341/1581870840468

Metallic, Naiomi. (2016) *The Broad Implications of the First Nation Caring Society Decision: Dealing a Deathblow to the Current System of Program Delivery (CSPD) On-Reserve & Clearing the Path to Self-Government*. [Masters in Law Major Research Paper, Osgood Hall Law School of York University] https://digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=2182&context=scholarly_works

Prince, M.J. (1994). Federal expenditures and First Nations experiences. In Phillips, S.D. (Ed.), *How Ottawa spends 1994–95: Making Change* (261–300). Ottawa: Carleton University Press.

Rae, J. (2009) Program delivery devolution: A stepping stone or quagmire for First Nations? *Indigenous Law Journal* 7(2), 1-44. https://jps.library.utoronto.ca/index.php/ilj/article/view/27659

Yellowhead Institute. (n.d.). *Service Devolution and Fiscal Federalism: A Short History of Canada Actively Avoiding Responsibility* Retrieved July 28, 2024 from https://yellowheadinstitute.org/resources/service-devolution-fiscal-federalism-2/

Legislative references

First Nations Elections Act, S.C. 2014, c.5 (2014). https://laws-lois.justice.gc.ca/eng/acts/F-11.65/FullText.html

First Nations Fiscal Management Act, S.C. 2005, c.9 (2005). https://laws-lois.justice.gc.ca/eng/acts/F-11.67/FullText.html

First Nations Oil and Gas and Moneys Management Act, S.C. 2005, c.48 (2005). https://laws-lois.justice.gc.ca/eng/acts/F-11.9/FullText.html

Framework Agreement on First Nations Land Management Act, S.C. 2002, c.19, s.121 (2022). https://laws-lois.justice.gc.ca/eng/acts/f-31.46/FullText.htmlsm-2/