



# RESEARCH BRIEF RFNG | Rebuilding First Nations Governance

## Locked up and looking for a way out - First Nation policy control as a path out of the Indian Act maze

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The following is a summary of a journal article of the same title.

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### Overview:

First Nations in Canada can move beyond the constraints of the Indian Act and exercise their inherent right to self-government through policy development and control. The research article outlines a practical process for First Nations to review their existing policies, understand their legal authority, and realign policy to reflect their own cultures, values, and priorities. It argues that taking control of policymaking can address community needs more effectively, reduce reliance on federal control, and build a stronger foundation for governance.

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### Key Themes and Important Ideas:

1. The Indian Act is a complex multi-dimensional maze that impedes effective self-governance

- **Historical disruption and colonial intent:** The Indian Act (1876) disrupted the self-governing capacity of First Nations, often forcefully, with the colonial aim to solve “the Indian problem” through forced assimilation and to take over Indigenous lands for settlement.
- **Persistent control and lack of autonomy:** Despite constitutional recognition of inherent self-government rights since 1982, the Indian Act still governs most aspects of First Nations' lives. Among approximately 630 First Nations in Canada, fewer than 40 are part of self-government agreements with Canada. The majority remain under the Indian Act and the administrative authority of Indigenous Services Canada.
- **Delegated authority vs. inherent right government:** While Canada has delegated some governing responsibilities (e.g., program delivery) to First Nations, it has not ceded policy and financial authority. The operating budgets of a First Nation are most often made up of individual program funds that they must apply for (usually to different program officers across government) and report on every year, with terms and conditions of spending set by the federal government. These financial manacles and the administrative burden sap capacity and trap leaders in an accountability relationship to Ottawa rather than to their own people.
- **Jurisdictional gaps and overlaps:** The Indian Act, coupled with other federal and provincial laws (Section 88 of the Act states provincial laws apply on reserves), creates a policy governance mess, with jurisdictional gaps and overlaps not of the First Nations' own making. This can lead to denials and delays in key government services and funds and is at the heart of persistent socio-economic disparities compared to other Canadians.

## 2. Clear-eyed exercise of the inherent right to self-government is the path forward

- **Pre-existing sovereignty:** First Nations' governing authority predates the creation of Canada and is 'inherent', arising from their status as sovereign, independent nations before colonization. Section 35 of the Constitution merely recognizes and affirms existing Aboriginal and Treaty rights - including the right to self-government – it does not create them.
- **"The best defence of sovereignty is to exercise it effectively":** The paper advocates for First Nations to take back their authority to make their own decisions in their own ways as they did before the Indian Act imposed the chief and council system. This means displacing federal and provincial jurisdiction in many areas of reserve life by exercising their inherent rights.
- **UNDRIP and domestic legislative advances:** The official adoption of UNDRIP principles and specific legislation like “An Act respecting First Nations, Inuit and Métis children, youth and families (S.C. 2019, c.24)” further advances inherent rights, creating new mechanisms to recognize and implement specific self-government jurisdiction.
- **Two-fold challenge:** Becoming self-governing requires First Nations to reconstitute their nation by rebuilding their own laws and governing systems based on cultural values and priorities. But at the same time, they must work hard to remove themselves from the

policies, machinery and ways of thinking and behaving that the Indian Act has built up around them.

### 3. Policy control as a practical tool for self-determination

- **First Nations have a long history of policymaking.** Traditionally, people used creation stories, protocols, ceremonies and other traditional means to govern themselves and their relationships with all other beings and with the land.
- **Policy reviews as a tool for change:** First Nations can start to take back this policy power by assessing the current state of their governance and administration policies. The article describes the policy review process in three separate First Nations communities, consisting of an inventory, content analysis and legislative mapping, along with supportive workshops.
- **Revealing the path through the Indian Act maze:** The policy review process helped leaders see the construction of the legal and policy maze they are in, identify what is imposed and what is missing and explore their roles and responsibilities. It helped break challenges down into manageable pieces and choices for action to start carving a path to self-determination.

#### Common Issues and Observations from the Policy Reviews:

- **A "mixed model" of source of authority:** The reviews revealed that all three participating First Nations had a mixed model of policy structure. Most policies were made under Indian Act authority, but each had at least one policy exercising their inherent right. Some policies had elements of both authorities.
- **"Missing" policies and accountability gap:** There were gaps in First Nations' own policies for critical service areas like health and social services, where Canada dictates through its funding agreements what can be spent on who and for what. The lack of policy transparency has often led to community conflict, with community members feeling that band council or administration decisions are arbitrary or playing favorites.
- **Inherent rights laws made under Indian Act authority:** Some policies intended to assert inherent rights were legislated as an Indian Act band council, not as a First Nation government authorized by the rights-holders (the citizen). This has practical and legal implications, including limited force beyond reserve boundaries and potential challenges in Canadian courts.
- **Lack of cultural match:** With few exceptions, existing policies did not reflect or transmit the values of the First Nation in any meaningful way. The paper points to other research that shows Indigenous nations succeed best when there is a cultural match between the nation and their governing structures and policies. As one First Nation partner asks, "If we just do things the way the colonizer does them, then what is the point of being self-governing?"

## Conclusion: Advantages of a Policy Path to Self-Government:

Policymaking is, ultimately, the major task of a government. First Nations have the power now to set their own policy direction through their inherent right to self-government. By actively using this power, nations can break through the obstacles and dead ends within the Indian Act maze to put their nations on a new path towards self-determination. Advantages to a policy approach include:

- **Incremental and prioritized change:** Policy development can be done incrementally and according to priority of need, making it a manageable approach, especially when change capacity is modest or community fear of change might be high.
- **Reflection of culture and values:** Updating or creating new policies offers a relatively quick way to start reflecting culture, values and traditions in everyday governance.
- **Community engagement and trust building:** Well-executed policy development processes engage community in finding possible solutions, which then strengthens the likelihood of the policy's success. Successful policies build trust and confidence within the community and its leadership.
- **Strengthened position with others:** A good policy foundation puts leaders in a much stronger position when dealing with outside interests or pressures.

