First Nations and the Canadian State:

Autonomy and Accountability in the Building of Self-Government

by

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ABSTRACT

The thesis provides a historiography of the development of liberal democratic institutions governing First Nations in Canada. Cultural and political assimilation are present throughout the history of First Nations' relations with the Canadian State, and currently, the political agenda of the Canadian government is one that emphasizes political assimilation. The idea that First Nations' political and administrative relations with the Canadian government have been characterized as a relationship of tutelage and an unequal relationship of power has implications for issues surrounding self-government. Specifically, the hierarchical decision-making structure of the political institutions governing First Nations, which has been effective for implementing assimilation policies, now poses problems for local communities exercising self-government in terms of securing accountability from their leadership. Current federal self-government policy does not affirm the claim that First Nations are historically distinct peoples with unique political and legal rights. On the contrary, self-government policy can potentially diminish the special status of First Nations and suggests a strong unwillingness of the federal government to recognize peoples rights of Aboriginal peoples.

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CHAPTER ONE

INTRODUCTION

This thesis examines an ongoing discourse about First Nations' self-government and seeks to make explicit the "hidden" dimensions of the federal government's position on that issue. I will argue that the current willingness of the federal government to address self-government can be understood in terms of a new political climate which, however, has not changed a fundamental policy of assimilation. Moreover, I will argue that the agenda of political assimilation that underlies federal self-government policy will have negative consequences for the autonomy of First Nations to govern their own affairs.

Moreover, this thesis explores the self-government discourse of First Nations in which the inherent authority to govern their own affairs is the foundation of self-government. This is a fundamentally different form of authority from delegated authority under which most First Nations' governments function according to the rules of the *Indian Act* (1951), Sections 81-86. I will consider the claim that the unique political and legal relationship of First Nations entitles them to a degree of political autonomy from the Canadian State. I will draw some conclusions as to how the problem of these differing perspectives might be resolved. I will argue that an increase in the autonomy of First Nations' political institutions should be accompanied by a strengthened system of local political accountability.

This analysis of self-government emphasizes the importance of the historical

context of First Nations-government relations in shaping the contemporary situation in which claims to self-government are made. The thesis begins with a historical overview of government policy respecting Indians and identifies both shifts in predominant points of view and continuity in Indian policy. In Chapter II, particular attention is given to an examination of the political institutions that mediate relations between First Nations and the state, and it is argued that they were structured in a way that facilitated the cultural and political assimilation of First Nations. In this chapter, cultural and political assimilation, which frequently emerges as a project of nation-building and state formation (Bauman 1991:141), is seen as a mainstay of Canadian Indian policy. The policy and practice of tutelage that predominates Indigenous-government relations (Paine 1977; Dyck 1991) is, I will argue, a fundamental means by which the state effects assimilation. Tutelage refers to a relationship of guardianship and is characterized by disciplined instruction (Dyck 1991:24) and subtle coercion (Paine 1977:78). Practices of tutelage are embedded in the administrative and political structures that mediate relations between First Nations and the Canadian State. The unequal relationship of power inherent to the notion of tutelage makes it an effective vehicle for the project of assimilation. Clearly, the consequences of tutelage for First Nation's peoples were detrimental because they involved the disempowerment of Aboriginal social and political structures.

Chapter III explores in greater historical detail how relations of tutelage characterize specific Canadian policies regarding Indians. In particular, the segregation of political institutions for Indians was an instrument of tutelage, which enabled the

intensive regulation of the affairs of First Nations by federal officials. A shift in federal policy in the post-war era toward the integration of segregated legislative and bureaucratic structures (Gibbins and Ponting 1986:23-4; Dyck 1991:107) was contiguous with the project of assimilation of First Nations peoples into the Canadian body politic.

Chapter III also explores how gender discrimination articulates with racial and cultural domination in the project of assimilation. This section on gender discrimination in the *Indian Act* and attempts to remedy it in the *1985 Amendment* serves to illustrate some of the ongoing problems involved when "self-governing" powers are assumed from within the current system of Indian administration. Gender discrimination in the legal definition of an Indian has resulted in the exclusion of some women from Indian status and, like the enfranchisement policies of the *Indian Act*, advanced the project of assimilation of First Nations into Canadian society. In this chapter I will argue that First Nations will assume responsibility for the problem of gender discrimination in the Indian Act and its assimilatory effects if self-government replicates the existing administrative structures of the federal government. Following the *1985 Amendment to the Indian Act* there emerged allegations by First Nations women of gender discrimination at the community level, which has occurred as a result of restrictive residency by-laws enacted by band councils (Holmes 1986:18; Moss 1990:281-2). As band governments have become responsible for administering a system with limited resources, it is argued by some that they are compelled to exclude some individuals (see Blackfoot Tribal Council, also NWAC et al., 1990:38) whose assimilation into non-Aboriginal society is ultimately hastened.

Chapter IV critically examines the *Inherent Right Policy* (Canada 1995) of the Liberal Government and argues that it has not changed fundamentally from the position of previous governments. Self-government policy will be evaluated in terms of both the source of the authority of Aboriginal governments and the degree of autonomy it grants them from interference by the Canadian state. I will argue that although there is a solid political and legal basis to Aboriginal claims to an inherent right to self-government, as a historically enduring and existing right (Clark 1990; Fleras 1992:65), Canadian policy does not reflect that right. Until recently, self-government policy (see DIAND 1982a, 1982b, 1987, 1990; Opekokew 1987:33; Frideres 1988:351-2) could be seen as merely a devolution of responsibilities within existing administrative and political structures. However, devolution is not *self-government* because it incorporates First Nations into a hierarchical political structure in which First Nations communities have minimal autonomy from federal and provincial mandates (see Valentine 1980:76; Dyck 1991:147; Boldt 1993:128; Fleras 1996:161). Although the present self-government policy of the Liberal Government claims to recognize the inherent right, it can be argued that it still has assimilation as a central focus. Political assimilation is evident in this policy's move to integrate First Nations governments into the "normal" provincial-municipal structure of service delivery. Likewise, the government's apparent view that the empowerment of First Nations in terms of jurisdictional authority relieves the government of its special fiduciary relationship with First Nations (see Canada 1995:12) is a position that promotes political assimilation.

Moreover, in this chapter I will critically examine the process by which the

government has proceeded with its strategy to establish self-government through political negotiation and legislative empowerment, without an explicit reference to self-government in the Constitution. The Liberal *Inherent Right Policy* states a willingness to entrench the inherent right to self-government as a treaty right within the Constitution once politically negotiated self-government agreements are reached (Canada 1995:3). By this process, the federal government retains the authority to approve the terms of self-government prior to its Constitutional entrenchment. This process itself is inconsistent with the view held by many First Nations that self-government is an inherent right by virtue of First Nations' sovereignty.

A study of the *Manitoba Framework Agreement* (1994) provides an opportunity to explore how the Federal Liberal Government intends to implement its *Inherent Right Policy*. It also provides an opportunity to explore how First Nations assert their claim to inherent self-governing rights by identifying themselves as and negotiating as nations (see Nepinak 1996; Okimow and Peterson 1996:5; Ferguson 1997). In the discourse of Manitoba First Nations self-government rights and treaty rights are frequently co-terminous. In referring to the treaties, First Nations assert their status as nations and an associated federal fiduciary obligation, which in effect challenges the assimilatory aspects of federal self-government policy.

Chapter V is a response to the need for strengthened local political accountability of First Nations governments in the development of self-government. This chapter clarifies the debate over the application of individual rights legislation to First Nations governments as a means of ensuring their accountability and argues in favour of the

protection of both individual and collective rights of First Nations peoples. However, I argue that the justice system is, for a variety of reasons discussed in this chapter, a culturally inappropriate and inaccessible means for the protection of the civil rights of First Nations peoples and for ensuring accountability from their governments. In this chapter, First Nations' cultural and ideological views of leadership and dispute resolution are explored as the basis for the development of a system of leadership accountability. It is crucial that self-government, if it is to be meaningful, be rooted in traditional values and practices that empower the *people*, such as consensus-building and community participation in decision-making.

Terminology and Methodology

Finally, a few words about terminology and methodology. The term *sovereignty* is understood by many First Nations' peoples as inherent right that exists regardless of the dictates of international and common law, and Canadian government policy (RCAP 1996:108, 110). First Nations' sovereignty has a historical basis in the diplomatic relations between First Nations and Europeans during the periods of initial contact and early settlement (RCAP 1996:110). The concept of First Nations' sovereignty differs from the European political concept of sovereignty that connotes state independence and authority. The ultimate political authority of the sovereign state in Western political thought is fundamentally at odds with Indigenous understandings and practices of governance in which political authority rests with the people (see Boldt 1984 for a critique of the notion of Aboriginal sovereignty). In this thesis, First Nations'

sovereignty refers to a more general notion of the right to self-determination, similar to Bruce Clark's (1990) notion of "Native Liberty" within the boundaries of the sovereign Canadian State.

I have chosen to use the self-ascribed term "First Nations" in referring to Canadian Indigenous peoples usually identified as "Indians." I have chosen "First Nations" because it is a political term that conceptualizes Indigenous peoples as historically distinct peoples with a corresponding and unique set of rights in Canada. This thesis addresses issues of self-government as they pertain primarily to First Nations communities administered by the *Indian Act*. This approach may be limited because it does not necessarily reflect the loosely bound and fluid nature of "the reserve community." In his analysis of the socio-economic system of the Coast Salish, Wayne Suttles (1960:296) described a loosely organized social network that consisted of several communities with close links through kinship and marriage relations. Inter-community co-operation was a fundamental component of the larger social network and socio-economic system (Suttles 1960:302, 304). Suttles article illustrates that First Nation tribes and communities are not discrete social entities with definite boundaries between them (Suttles 1960:296).

However, this analysis concerns primarily "Indians." This approach is necessary for two reasons. First, there are significant political differences between First Nations and other Indigenous groups in that the structures of domination of First Nations peoples, who are defined as "status" Indians for the purpose of administering the *Indian Act* and the reserve system, are unique to First Nations. Second, this analysis focuses on "the

reserve community" as the primary social unit that would comprise self-governing political bodies. Individual communities may have social and cultural links with other communities, distinguishing them as tribes or nations, and they may form political structures at these levels. However, for pragmatic reasons this thesis is limited to an analysis of local government. The band, or more precisely, reserve community is amenable to the implementation of self-government because its members occupy an exclusive land base from which to govern themselves. For the sake of simplicity, the analysis of self-government at the community level does not distinguish between treaty and non-treaty nations except where reference to specific treaties is made.

CHAPTER TWO

ASSIMILATION AND THE NATION-STATE: PRACTICES OF TUTELAGE IN CANADIAN INDIAN POLICY

In this chapter, enduring social and cultural patterns and practices which emerge from historical events and which continue to shape social and political relations within First Nations communities and between First Nations and government agencies, are identified. In particular, the interdependent projects of protection, civilization and assimilation which have developed within Canadian policy (Tobias 1976; Smith 1993) are enduring forces in the oppression of First Nations peoples. The practice of tutelage (Honigmann and Honigmann 1965; Paine 1977; Dyck 1991), and the asymmetrical relationship of power inherent to it, is a pervasive feature of government policy that gives effect to these projects. Although the discourses of First Nations' oppression may vary among different historical contexts, there is continuity to these principles and practices which continue to operate in Canadian Indian policy.

Zygmunt Bauman's (1991) exploration of the history of Jewish-German assimilation in the late nineteenth-early twentieth centuries provides an instructive parallel to the assimilation of First Nations peoples in Canada. Bauman argues that the assumption of cultural homogeneity which is imperative to the concept of the nation-state and a concomitant effort by the state to disempower cultural collectivities are driving forces in the establishment of the nation-state (1991:104, 141). The disempowerment of First Nations as cultural collectivities within the Canadian state was effected, in part, by

the establishment of rules for band government in the *Indian Act (1876)*, Sections 61-63. By bringing individuals under the control of state agencies, tribal political relations were weakened and the federal government's project of cultural regulation was fostered (Buchanan 1995:14-15, 81). The merging of concepts of cultural conformity and political rights which occurs in the nationalization of the state (Bauman 1991:142) also occurs in Canadian Indian policy through the establishment of band government (Buchanan 1995:81) and through enfranchisement policy in particular. The defining of the cultural Other as inferior is the fundamental basis and justification for processes of assimilation. A superior-White/inferior-Native dichotomy can thus be traced throughout the history of Indigenous-White relations in Canada.

The chapter begins with a brief historical overview of anthropology's relationship to Canadian Indian policy. This section provides a critique of some of the basic assumptions upon which the discourses of tutelage and assimilation are based. Attention is given to anthropology's role in the reification of particular discursive constructions of Indianness. Much of this critical examination of anthropology comes from within the discipline itself, indicating an awareness that historically anthropology's relationship to Indian policy is, from the perspective of First Nations, troubling. However, recently anthropology has offered valuable insight into First Nation-government relations. One of the merits of anthropological investigation discussed in this chapter is its recognition of historic patterns and firmly entrenched administrative practices that continue to influence political relations.

Literature Review: Anthropology and Canadian Indian Policy

Daniel Francis argues that the *vanishing Indian* was the dominant discursive construction of First Nations in Canadian culture during the latter half of the nineteenth century and which persisted until the Second World War (1992:23, 57). It was widely believed that Natives were literally disappearing, declining in numbers due to disease and starvation. However, the idea that the Indian, constructed in the image of the noble savage, was disappearing, was also a widely held belief. The *vanishing Indian* was believed to be a regrettable yet inevitable consequence of the expansion of European settlement (Francis 1992:23, 58).

The discourse of the Indian constructed as the historical, traditional Indian of the past was inevitably that of the *vanishing Indian*. Any departure from this image was interpreted as a loss of culture and tradition. The static image of Indianness ensured that the Indian would disappear as he adapted to the changing social and economic conditions of industrial expansion. Moreover, the discourse is strategic in that it offers assimilation as a natural and inevitable process, since Indians could not really be *Indians* in the modern world (Francis 1992:58-9). Assimilation was believed to be in the Indian's best interest since he was otherwise doomed to extinction (Francis 1992:58).

Anthropology reflected this prevailing belief that traditional aboriginal cultures would soon disappear by absorption into the larger industrial society and during the nineteenth century a genre of ethnography emerged which aimed to document remaining *authentic* Indigenous ways of life before their immanent disappearance (Dyck and Waldram 1993:8). Diamond Jenness' well-known work, *The Indians of Canada* (1932),

is representative of this genre of anthropology. Jenness viewed the negative consequences of industrial expansion on First Nations as indicative of their inevitable extinction and speculated that it was "(d)oubtless all the tribes will disappear" (1932:264). Anthropology, which focussed on disappearing *traditional* cultures, failed to account for the circumstances of their disappearance: unequal economic relations and government administration based upon a system of "coercive tutelage" (Dyck 1991; Dyck and Waldram 1993:8-9) which had the ultimate goal of cultural assimilation.

With the emergence of the post-colonial welfare state in Canada following WWII and increasing public awareness of the poor socio-economic conditions of reserve Indians, a trend developed within anthropology which focussed on relations between First Nations peoples and state institutions as a means of better understanding the social and economic marginalization of reserve Indians. The initial response by both academics and politicians to critiques of a repressive Indian administration system was a policy to eliminate segregated bureaucratic structures and accelerate the integration of Indians into Canadian society (Dyck and Waldram 1993:9). Jenness' later work explicitly supported the assimilation policies of the Canadian government. Recommendations to utilize Inuit labour in the extraction of natural resources in the north (Jenness 1962:168) was conceived both as a solution to the "problem" of Inuit unemployment and social welfare dependence (see Jenness 1962:157) and, a contribution to the "progress of Canada" through industrialization (Jenness 1962:169). Tutelage of the Inuit in the ways of Euro-Canadians and their inevitable assimilation (Jenness 1962:175), in Jenness' view, could be effectively achieved through Inuit relocation and settlement into colonies (Jenness

1962:175-6). The settlement of Inuit into colonies in the South would provide a tool for their tutelage, because they could be watched over "as zealously as a sergeant watches the 'other ranks' who have been committed to his charge" (Jenness 1962:176).

Within the past few decades, anthropologists have given greater attention to evaluating the government's Indian administration system and, based on a critical appraisal of the mandate and practices of the Indian Affairs Department, anthropologists have made public policy recommendations for improving the living conditions of First Nations peoples (see Jenness 1964; Hawthorn and Tremblay 1967). As a departure from earlier anthropological inquiry, an analytical perspective has emerged that critically examines processes of colonization, and emphasizes their debilitating effects on First Nations (Tobias 1976; Weaver 1981; Asch 1984; Dyck 1991; Dickason 1992; Tanner 1983). These processes of colonization include the policy of wardship, excessive government administration and other practices of intensive regulation. This shift in focus within Canadian anthropology is reflective of both changes in relations of domination globally, such as decolonization and an intensification of imperialism in new forms, and specific political events that changed First Nations-state relations significantly. Political relations began to change in 1969 with the release of the government's *White Paper* (Weaver 1981; Dyck 1990:42, Dyck and Waldram 1993:10) which aimed to intensify the federal project of political and cultural assimilation but elicited strong opposition from First Nations leaders (see Cardinal 1969). *The White Paper*, as well as the recognition of Aboriginal title in the 1973 Calder case (Asch 1988:51) and the inclusion of Aboriginal rights in the Constitution in 1982 (Boldt and Long 1985:11-12) prompted "new

aboriginal definitions on aboriginal issues" (Dyck 1990:42). Anthropological research reflected these changes as its focus shifted toward political issues and First Nations-state relationships (Dyck 1990:42; Dyck and Waldram 1993:6, 11). Anthropologists sought to demonstrate the relevance of their research to the needs of First Nations communities. The changing role of anthropologists is reflected in their work as consultants for First Nations organizations, or as advocates for Aboriginal rights and self-determination (Dyck 1990:43; Dyck and Waldram 1993:6).

The past few decades of Canadian anthropology offer significant contributions to the field of Native studies. Anthropology recognizes historical context in First Nations-state relations as essential to an understanding of the contemporary circumstances of First Nations communities. As Dyck (1990:46) observes, "ethnographic studies have demonstrated that historical patterns of administrative coercion are not merely items of political rhetoric but historically ingrained patterns and predispositions which continue to constrain and shape social and political integration within native communities." However, Buchanan (1995:36) argues that much of the anthropological literature addressing First Nations-state relations, typically centres upon federal legislation, administration and policy. The static nature of such an approach fails to address the enduring nature of administrative and legislative practices.

In this light, Tobias' (1976) identification of the policies of protection, assimilation and civilization in Canadian Indian policy, while instructive for this thesis, fails to recognize the persistent and interdependent nature of these policy *projects*. Derek G. Smith (1993:7) argues that the distinct historical periods to which Tobias allocates the

policies of protection, assimilation, and civilization is problematic. Smith views this conceptualization as obscuring the potent and abiding nature of these practices which transcends a concept of historical periods. Protection, civilization and assimilation, which aim ultimately at the infusion of Euro-Canadian norms and values into First Nations cultures, are projects that occur simultaneously and are not readily divided into discrete time periods.

These projects are evident in band government, as they are in the reserve system and the residential school system, among others. The policy of protection is seen in the establishment of the separate political routines of band government and the separate administrative system legislated by the *Indian Act*. Assimilation occurs by the replacement of traditional political systems with municipal-style band governments. And the principle of civilization is evident in the education of First Nations in the practices of the liberal democratic institutions of the Canadian State (Buchanan 1995:22).

The concept of "tutelage" is particularly relevant here. The notion of tutelage as a prominent force in government-Indigenous relations is mobilized by John and Irma Honigmann in an ethnography based upon their fieldwork in Frobisher Bay, *Eskimo Townsmen* (1965). In their analysis, tutelage is conceived as a necessity of Inuit adaptation to the modern world, and an expedient means of achieving "cultural transformation" (1965:160). Tutelage occurs according to Euro-Canadian laws and administrative policies (Honigmann and Honigmann 1965:159), and in a context where Euro-Canadians hold a position of considerable power; they are both tutors (government officials, employers, police, judges, teachers) (1965:157), and models of a way of life

that tutelage practices urge *Eskimos* to emulate (Honigmann and Honigmann 1965:160). The Honigmanns' uncritically support the goal of assimilation, as "cultural transformation," as the objective of tutelage practices. They argue that intense tutelage relations, in which individuals are rewarded for *appropriate* behaviour and punished for deviant behaviour (1965:157), are an "important" (1965:157) and "most efficient learning situation" (1965:225).

Moreover, the Honigmanns (1965:225) uphold the "ideal of promoting the Eskimo's progress" as the motivating force in relations of tutelage. The assumption of the superiority of Euro-Canadian culture and the implied inferiority of Inuit cultures is embodied by the notion of "progress." These assumptions are apparent in the Hongimanns' belief that cultural transformation of *Eskimo Townsmen* is a "success" (1965:161) in a large part due to the primal nature and *simplicity* of the *Eskimo*'s culture. "The previous culture's stripped-down nature itself promotes change. With less to unlearn, no vested interests to be placed in jeopardy by new learning, and little of a hallowed tradition to conflict with new behaviour, change can go fast" (Honigmann and Honigmann 1965:161).

Robert Paine, in The White Arctic (1977) and Noel Dyck (1991) in *What is the Indian Problem?* provide critiques of the assumption that tutelage necessitates Inuit and First Nations adaptation to a modern way of life. These critical studies argue that tutelage, based as it is on cultural conformity, involves an unequal relationship of power and status between the tutor and the tutored (Paine 1977:79-80; Dyck 1991:24 see also Vallee 1962:128-9) which has a negative effect on Indigenous-*White* relations. Tutelage

refers to a relationship of guardianship or protection of an individual or group of individuals over another, and is characterized by the "disciplined instruction" of the pupil by the guardian (Dyck 1991:24). Clearly, there is an unequal balance of power in this relationship, in which the criteria of content and of standards for disciplined instruction are established entirely by the guardian/protector. With respect to Canada's Indians, tutelage is a permanent relationship which Indians, as pupils, share with government agencies and institutions, as guardians (Dyck 1991:24).

Both Paine's (1977) and Dyck's (1991) studies emphasize that there is an element of coercion to practices of tutelage, where cultural conformity is rewarded and deviation is actively discouraged (Paine 1977:78-9; Dyck 1991:30). Dyck (1991:28-30) refers to this condition as "coercive tutelage." "The instruments of power have included the usual range of state controlled or assisted mechanisms for exercising control, including the use of physical force, material goods, legislative sanctions and bureaucratic structures" (Dyck 1991:30).

Paine draws a parallel between Inuit-White relations in the north and the caretaker role of government agencies in a low-income Boston neighbourhood, observed by Gans (1962:143-4). Gans argues that care taking is not an act of benevolence but an assertion of expertise and status in which clients are subordinated (Gans 1962:143-4; see Paine 1977:86). Paine explores how the distribution of welfare in the context of tutelage relations in the north subordinates Inuit clients and argues that government welfare programs themselves perpetuate Inuit dependence. The irony of this situation is, Paine asserts, that Whites negatively perceive Inuit welfare dependence while at the same time

they are responsible for the management and administration of welfare programs (Paine 1977:85). Their perpetuation of Inuit dependence permits Whites to maintain a care-taking role in exchange for Inuit acceptance of "middle-class" values (Paine 1977:86; see Vallee 1962).

While Dyck recognizes the enduring nature of the practice of tutelage historically, he also insists upon the historical specificity of tutelage practices. Thus, although the discourse of First Nations 'inferiority' may change from century to century (Dyck 1991:26), and the mobilization of mechanisms for exercising control may vary within differing contexts (Dyck 1991:28), the essential principles of tutelage have remained consistent and potent. That is, the continuing belief in the inferiority of First Nations peoples has maintained the necessary conditions for the practice of tutelage (Dyck 1991:29).

Assimilation and Coercive Tutelage

Assimilation, in Bauman's (1991) analysis, emerges as a project of modernity in a context of the *nationalization of the state*. Bauman refers to the *nationalization of the state* as an attempt to unite culturally a population within a shared territory and jurisdiction (1991:141). An assumption of uniformity or homogeneity is integral to the concept of the nation-state, and thus the emergence of modern nation-states involved the disempowerment of collectivities and of communal ways of living (Bauman 1991:104, 141). Uniformity emerged as a defining feature of the modern state, as is evident in its principle of uniform law, and its ideal that its citizens are indistinguishable from one

another (Bauman 1991:105).

The promotion of uniformity, also involves the defining of chaos, and thus difference in negative contrast to uniformity. The distinctive traits of cultural collectivities are identified as illegitimate, and subversive. The labelling of distinctive traits as *foreign* is a process of assimilation and was an integral part of the nation-state's drive toward the construction of homogeneity (Bauman 1991:105).

The construction of cultural homogeneity is inevitably challenged by the existence of heterogeneous cultural collectivities embodied by the nation-state. This challenge to cultural homogeneity was viewed as a challenge to the political unity of the state and prompted the state's attack on autonomous cultural collectivities within the nation-state and an intolerance of cultural difference (Bauman 1991:141). Subjects of the nation-state were compelled to conform to the dominant cultural pattern as a prerequisite for their political acceptance, or for rights to citizenship. Thus, the *nationalization of the state* merges the issues of citizenship and cultural conformity (Bauman 1991:142).

This drive toward uniformity, and the disempowerment of cultural collectivities is evident in the historical context of nation building in Canada. In his MA thesis, Colin Buchanan (1995) shows how the introduction of elective band government within First Nations communities involved an intensification of relations of power which facilitated the projects of protection, civilization and assimilation. These projects of Indian policy are advanced by practices of tutelage in which Euro-Canadian norms and values are taught and First Nations are incorporated into the political institutions of the Canadian

state (see Paine 1977 and Dyck 1991).

Bauman's (1991:104)) notion that the disempowerment of cultural collectivities involves the conscious control of social processes is evident in the practice of tutelage (Paine 1977) and the policy of wardship (La Violette 1961:11-17) which have developed with the Canadian Indian administration. In combination with the reserve system, the policy of wardship was intended to prepare Indians for Canadian citizenship (La Violette 1961:15). Wardship disempowered the social authority of traditional political systems, allowing for an intensification of control over the social and political routines of First Nations peoples and their eventual replacement with the liberal democratic institutions of the Canadian state (Buchanan 1995:81, 89, 94). The policy of wardship has persisted throughout Canadian Indian policy as a means of promoting Canadian ideals of citizenship among Indians; the *1951 Amendment to the Indian Act* provided for the conversion of reserves into municipalities (La Violette 1961:15).

Buchanan (1995:14-16) conceptualizes the state as a process of rule, by which forms of cultural relations are regulated. From this perspective, state formation is a project of cultural regulation, aimed at the disempowerment of cultural forms other than the dominant cultural form. The regulation and normalization of cultural practices in state formation tends to homogenize social relations. Buchanan shows how the introduction of band government served to reconstitute communal tribal relations into social relations primarily between individuals and state agencies. The introduction of this liberal democratic institution effectively re-established First Nations peoples as a uniform population. Moreover, Buchanan's (1995:15) understanding of state formation

as a project of cultural regulation embodies Bauman's (1991:142) notion that the nationalization of the state involves a convergence of concepts of political rights and cultural conformity. This convergence is evident in the establishment of band government, which as an exercise in the regulation of cultural practice, was designed to prepare First Nations peoples for full citizenship.

Bauman (1991:105-6) argues that the defining of cultural difference as foreign and inferior is a prerequisite of assimilation (Bauman 1991:105-6). In his analysis of the nationalization of the state in Germany involved discrimination against foreign sectors and that the state-administered body justified its discrimination on the basis of their very *foreignness (Bauman 1991:105)*. The practice of tutelage which shapes relations between Canadian government institutions and First Nations peoples also relies on the dichotomy of superiority/inferiority. Tutelage, refers to the "disciplined instruction" of a pupil by a guardian, and clearly involves an asymmetrical power relationship in which the criteria of and standards of instruction are not negotiable (Dyck 1991:25). This unequal power relationship is deemed legitimate by a presumption of the cultural superiority of both European and Euro-Canadian societies over First Nations societies. The presumed superiority of Euro-Canadian society necessarily implies the inferiority of First Nations and thus the relationship is a symbiotic one; the denigration of *Indianness* is a celebration of *Whiteness* and vice versa (Dyck 1991:25-6).

The project of assimilation was directly aimed at the disempowerment of alternative institutions of social control (Bauman 1991:104, 141). This goal was effectively achieved by a strategy to entice individuals independently to abandon their

communities of origin, which were collectively labelled as inferior. An offer of acceptance was extended only to individuals who were willing to accept the devaluative image of their Indianness and to embrace the values of Euro-Canadian society (Dyck 1991:27). With the inferiority of First Nations cultures believed to be an indisputable fact, there is an implication that the motives of the instructors are benevolent. By devaluing Indianness, tutelage agents can claim to be *helping* First Nations peoples by training them in the *superior* ways of Euro-Canadian society and encouraging them to abandon their own customs and beliefs (Dyck 1991:26-27).

By defining entire collectivities as inferior, yet extending an offer of acceptance to individuals willing to embrace the values of the dominant group, assimilation undermined the social authority of those collectivities and essentially made them powerless to contest the existing structure of domination (Bauman 1991:106). While on the one hand cultural assimilation was an "offer" extended to individuals only, and on the other, political discrimination was applied to entire collectivities, discrimination against acculturated individuals continued by their association with the "alien" community (Bauman 1991:142). The apparent tolerance of individuals is related directly to the intolerance of collectivities and their distinguishing values and traits. The appearance of tolerance, the appearance of benevolence, which is integral to the liberal political program, serves to conceal the intolerance, or the presumption of inferiority, of *foreign* values and of difference (Bauman 1991:107).

Conclusion

Bauman (1991:141) identifies processes of cultural and political assimilation which occur in the context of the nationalization of the state. Cultural homogeneity emerges as integral to the political unity of the nation-state (Bauman 1991:141), and thus the nationalization of the state involves the disempowerment of cultural collectivities and communal ways of living (Bauman 1991:104). This drive toward cultural homogeneity is evident in state formation in Canada.

The disempowerment of autonomous First Nations collectivities and their incorporation into the liberal democratic institutions of the Canadian State was facilitated by the policy of wardship (La Violette 1961:11-17). The underlying logic of wardship is the presumed inferiority of First Nations cultures, which provides the ideological justification for the seizure of control over First Nations' social and political processes (Dyck 1991:25). As Buchanan (1995:81, 89, 94) demonstrates, the introduction of band government was a fundamental means by which federal authorities intensified relations of domination over First Nations peoples.

The incorporation of band governments into a hierarchical bureaucratic structure in which decision-making authority rests with senior government officials, brought First Nations under the direct control of the Indian administration (Buchanan 1995; Valentine 1980:75). As we will see in the following chapters, this principle of delegation of authority from above remains a salient feature of self-government legislation. Moreover, the federal legislative approach to the implementation of self-government serves to integrate First Nations' governments further into the liberal democratic institutions of the

Canadian state, envisioning them essentially as municipalities (Clark 1990:9; Boldt 1993:81).

CHAPTER THREE

ASSIMILATION: FROM SEGREGATION TO INTEGRATION

Introduction

This chapter is an overview of Canadian Indian policy and provides a more detailed historical context for exploring the concepts of tutelage and assimilation discussed in the previous chapter. Major standpoints in Indian policy are identified and specific policy initiatives are interpreted in relation to the national political agenda and Canadian cultural values and attitudes of the time. This historiography of Indian policy serves to illustrate that the current federal agenda of political assimilation, which will be discussed at length in Chapter IV, is contiguous with several of the aims and objectives of Indian policy historically. The chapter begins with an examination of political and legal segregation of Indians in Canadian Indian policy.

Political-Legal Segregation and Relations of Domination

The roots of Canadian Indian policy pre-date Confederation. During the seventeenth and eighteenth centuries the Netherlands, Spain, England and France fought for economic and military control over North America, and military alliances with Indigenous peoples were essential to achieving these goals (Tobias 1976:13; Satzewich and Wotherspoon 1993:19). In the eighteenth century the British Crown became aware that Aboriginal peoples were increasingly making alliances with the French due, in part, to the encroachment of English colonists on Indigenous lands (Tobias 1976:13).

Following the British victory over the French in the Seven Years War, and wishing to maintain allies with First Nations peoples, the British Crown established that lands which had not been formally ceded by First Nations were to come under the sovereign protection of the Crown and were not to be granted to new settlers. These initiatives were instituted in the *Royal Proclamation* (1763), which established the "paternal care" of Aboriginal peoples by the Crown (Tobias 1976:14; Richardson 1993:50-51; Satzewich and Wotherspoon 1993:20).

The shift from mercantile to industrial capitalism during the nineteenth century correspondingly changed relations between the Crown and First Nations peoples. This shift involved a move from the extract and export activities of the fur trade to the development of commercial agriculture and secondary manufacturing (Satzewich and Wotherspoon 1993:21). As the fur trade diminished and agriculture developed, First Nations were no longer important economic allies to the Europeans (Tobias 1976:15). The *Royal Proclamation* (1763), which may be understood as a policy which recognized Aboriginal title to land, became incompatible with the industrial capitalist mode of production that had developed during the nineteenth century. The demand of industrial capitalism for privately owned land required the Crown to enter land surrender treaties with First Nations (Satzewich and Wotherspoon 1993:21) and attempts to settle First Nations into agricultural communities were effected through the establishment of reserves (Tobias 1976:15).

After Confederation, the federal government continued to pursue the goals of protection, civilization and assimilation that the British Crown had developed (Tobias

1976:15). In order to achieve these goals, the federal government claimed exclusive authority over "Indians and land reserved for Indians" in the *British North America Act* (1867). The *Indian Act* (1876), which became the basis for all subsequent legislation governing Indians, consolidated existing legislation concerning Indians and Indian lands (see D.G. Smith 1975:xxiii). The *Indian Act* is pervasive in the extent to which it has an impact on the lives of Indians, as well as in the powers it extends to the federal government and its administrators (Gibbins and Ponting 1986:19-22). The administration of Indians through a single government and a single government department has continued to concentrate authority within the federal bureaucracy, thereby enabling relations of tutelage and intensive social control over Indians (Gibbins and Ponting 1986:22-23; Satzewich and Wotherspoon 1993:29). The administrative structures for Indians legislated by the *Indian Act* provided an effective means for the tutelage of Indians in Canadian political institutions (Dyck 1990:30; Boldt 1993:80).

The segregation of politico-legal structures for Indians was based upon the assumption that Indians were incapable of governing their own affairs and from the outset were seen as a transitory stage in the cultural and political assimilation of Indians into Canadian society (La Violette 1961:15; Jamieson 1978:38; Gibbins and Ponting 1986:26; Satzewich and Wotherspoon 1993:31). As early as 1869, with the *Gradual Enfranchisement Act*, the federal government began to introduce legislation that would require First Nations governments to conform to the Canadian electoral system. The *Gradual Enfranchisement Act, 1869* (sections 10-12) outlined a process for the election of a Chief and council whose outcome was subject to the approval of the

Superintendent-General, as were any decisions they made with the restrictive by-law making power they were granted (Buchanan 1995:97-8). Subsequent legislation, *The Indian Advancement Act* (1884), was introduced in addition to the *Indian Act* and served to entrench band government more deeply as a political institution by separating provisions for elected band government from the *Indian Act*. *The Indian Advancement Act* also limited the authority of the Chiefs and increased governmental involvement in band affairs by reducing the term of office and by dividing the reserve into electoral wards (Buchanan 1995:102-3).

By granting band councils limited decision-making powers, the federal government intended to familiarize First Nations with the functions and activities of municipal institutions (see La Violette 1961:15) with the hope that they would eventually "learn" (a form of tutelage), how to take responsibility for their own affairs. The objective of the political assimilation of First Nations through the incorporation of band councils into a municipal structure is evidenced by remarks made by Superintendent General Sir John A. Macdonald in the early 1880's,

> It is hoped that a system may be adopted which will have the effect of accustoming the Indian to the modes of government prevalent in the White communities surrounding them, and that it will prepare them for earlier amalgamation with the general population of the country (Canada, *Department of Indian Affairs Annual Report* 1881:xlvii).

The erosion of First Nations' political organization and its replacement with an institutional structure was conceived as an expedient means by which First Nations could be incorporated into Canadian political frameworks (Buchanan 1995:93).

Bureaucratic Action and Rational Efficiency

In *Modernity and the Holocaust* (1989), Zygmunt Bauman argues that modern forms of state power, in particular the modern bureaucracy, provided an effective means for the implementation of racist ideologies (Bauman 1989:76), because bureaucratic patterns of action enable the dissociation of the objectives of the bureaucracy from moral evaluation (Bauman 1989:98). The dispersal of responsibility in bureaucratic modes of action is attributed to two fundamental processes: a functional and hierarchical division of labour, and a prevalence of rationality and efficiency of action (Bauman 1989:98, 74) through the organization of routines and obedience to authority (Bauman 1989:90).

The division of labour "creates a distance between most of the contributors to the final outcome of collective activity and the outcome itself" (Bauman 1989:98). This distance is widened in a functional division of labour, wherein the tasks are "multifinal;" functional tasks are separated from each other and can then be re-organized to produce more than one end-result (Bauman 1989:100). "By itself, the function is devoid of meaning, and the meaning which will eventually be bestowed on it is in no way pre-empted by the actions of its perpetrators. It will be 'the others' who will some time, somewhere, decide that meaning" (Bauman 1989:100).

The distance created between the bureaucrat's actions from the overall objectives of the bureaucracy of which he is a part, serves to establish the bureaucrat's own act as an end in itself (Bauman 1989:101). The failure to identify bureaucratic action as a means to something other than itself results in the evaluation of bureaucratic performance

according to criteria geared strictly toward "the technical success of the bureaucratic operation" (Bauman 1989:101). Bauman refers to the bureaucratic tendency toward rationality and efficiency of action as the triumph of technical, over moral, responsibility (Bauman 1989:101).

The effect of these processes of distantiation in bureaucratic forms of action is that they enable the dehumanization of the objects of bureaucratic action (Bauman 1989:102). Dehumanization involves the reduction of the objects of administration to a set of purely quantitative measures (Bauman 1989:102). The interests of dehumanized objects, having no claim to subjectivity, are irrelevant to bureaucratic routines and procedures (Bauman 1989:104) and thus non-compliance with the administration is perceived primarily as an obstruction to "the smooth flow of bureaucratic routine" (Bauman 1989:103).

Band governments were incorporated into a hierarchical bureaucratic structure in which decision-making authority rested with senior federal government officials and as such, the federal government was able to gain greater control over First Nations (Valentine 1980:75). Band councils and Chiefs were given very little decision-making authority and operated fundamentally as "advisory bodies" to government officials responsible for the administration of their affairs. Within this bureaucratic structure, the majority of First Nations peoples were virtually excluded from the decision-making process, and moreover there was no means of expressing concerns to senior government officials (Valentine 1980:75-6).

Devolution of the Indian Administration

Federal tutelage in the form of separate legal status and a separate and pervasive administrative system had become unacceptable to the Canadian public in the emergent political climate of decolonization which followed the Second World War (Dyck 1991:104:117; DIAND 1966:344). "The program of coercive tutelage that had been undertaken to protect, civilize and assimilate Indians ... suddenly seemed archaic, ineffective and indefensible" (Dyck 1991:104). In response to increasing public dissatisfaction with the poor socio-economic conditions of Indians on reserves and the federal Indian administration, federal officials sought to eliminate Indian status and Indian reserves (Dyck 1991:105; Dyck and Waldram 1993:9). Although the federal system of coercive tutelage had come under public scrutiny, the underlying assumption that assimilation and incorporation into Canadian society was in the best interest of Indians remained a salient feature of federal policy and popular opinion (Dyck 1991:107, 117). The *1951 Amendment to the Indian Act* was significant in removing regulations regarding First Nations' cultural affairs, however, for the most part, the Department retained its sweeping powers and its policy of assimilation, which was then termed "integration" (Gibbins and Ponting 1986:23-24).

Following WWII, the assimilation programme emerged in federal policy as a strategy of integration and self-sufficiency, and a commitment to formal equality (DIAND 1966:344; Fleras 1996:158). In the 1960's, DIAND began a trend toward the devolution of service delivery to Indian bands as it gradually withdrew from direct service delivery (Fleras 1996:158). "Indian Affairs evolved into a largely

custodial/regulatory agency whose primary role as a "money-moving" agency was to allocate funds on the basis of compliance with organizational directives" (Fleras 1996:161; see Frideres 1988; Weaver 1990). Thus despite post-war era efforts to reduce the excessive regulation that had become characteristic of the Indian administration, relations of tutelage still dominated First Nations-state relations. The limited authority of band councils to influence federal program priorities meant that they had largely become local-level managers of the bureaucracy of Indian Affairs (Valentine 1980:75, 114; Dyck 1991:147; Boldt 1993:109). An asymmetrical structural relationship characterized by economic dependence and delegated authority enabled tutelage by making First Nations governments accountable to government agencies outside the community (Valentine 1980:76; Dyck 1991:144-5, 147; Boldt 1993:128).

Current federal policy demonstrates a continuation of the assimilation project, which is being achieved through policies to integrate separate political and administrative structures for Indians into the existing federal-provincial framework of services and legislation (Boldt 1993:81). This is occurring through the devolution of jurisdictional authority for service delivery to the provinces and administrative responsibility to local governments (Boldt 1993:81). The *Hawthorn Report* (Hawthorn et al., 1966) in which the findings of an intensive national survey were published, raised concern about the autonomy of First Nations governments in a provincial-municipal framework of service delivery. The Report argued that because the provinces have constitutional autonomy in determining the variety and extent of the services it delivers to Indians (Hawthorn et al., 1966:356), the autonomy of local government declines as it assumes the role of

administering services funded by provincial conditional grants (Hawthorn et al., 1966:289).

Valentine (1980) outlines various strategies of political and institutional assimilation which involve the incorporation of local First Nations governments into a provincial-municipal government structure. Valentine suggests that part of the process of integrating band governments into a municipal-type structure is the strengthening of band government by increasing their decision-making authority and powers. At the same time, administrative responsibilities of the principal bureaucracy are distributed among provincial or territorial regional bureaucratic centres, and First Nations government are incorporated into existing provincial or territorial government frameworks (Valentine 1980:114).

Federal policy directives to devolve jurisdictional responsibility for services for Indians to the provinces was initially resisted by the provinces and led to debate over jurisdictional responsibility for Indians (Pratt 1989:31). Specifically, jurisdictional ambiguity arose over the responsibilities of the provinces and the federal government in the areas of health and welfare for Indians (Weaver 1993a:76-77). The federal government's perspective is that although the *Constitution Act*, Section 91(24) gives the federal government the authority to enact legislation regarding "Indians and land reserved for Indians," it does not require the federal government to provide social services to Indians living on reserves (Pratt 1989:21). The provinces, which are responsible for the provision of human social services according to the *Constitution Act*, Section 92 have argued that the special relationship between the federal government and

First Nations requires the federal government to provide the financial support for Indians living on reserve (Pratt 1989:22). The jurisdictional bifurcation created by sections 91(24) and 92 of the *Constitution Act* has allowed both federal and provincial governments to refuse to extend some services to Indians living on reserves (Scott 1994:92, 94). This situation has resulted in under funding and inaccessibility of human social services for Indians (Hawthorn et al., 1966:346, 348; Scott 1994:93).

The *Hawthorn Report* (Hawthorn et al., 1966) addressed the question of federal and provincial jurisdictional responsibilities with respect to Indians (1966:344-358, 386-403). In brief, the report encouraged the continuation of special status for First Nations (1966:397), which it termed "citizens plus" status (1966:396), and argued that legal equality with other Canadians alone would not achieve, but would rather likely hinder the development of socio-economic equality for First Nations (1966:391-2, 397, 399). The authors of the report saw no reason why special status should prevent the provinces from delivering health and welfare services to Indians residing on reserves (1966:386-7). In contrast, the report recommended greater involvement of the provinces in Indian affairs (Hawthorn et al., 1966:386-403, see Weaver 1993a:79).

The *White Paper* (DIAND 1969), introduced by the newly elected Liberal Government of Pierre Trudeau, with its strong liberal values of individualism and equality (Weaver 1993a:88) was explicit in its pursuit of political assimilation. In contrast to the recommendations of the *Hawthorn Report*, the *White Paper* proposed the elimination of special legal status for Indians, and the repeal of the *Indian Act*. The government termed these proposals as an attempt to remove "the legislative and

constitutional bases of discrimination" (DIAND 1969:6). The stated objective of this proposal was to provide Indians with an opportunity for full and equal participation in Canadian society. The repeal of the Indian Act also meant the elimination of the DIAND, and the transfer of responsibility for federally administered programs for Indians to the provinces and other federal departments. Federal funding for Indian programs would initially be transferred to the provinces, with the intention that eventually the provinces would assume full financial responsibility for services for Indians (DIAND 1969:6,9).

Integration of First Nations' Political Organizations

A significant component of the assimilation project is the federal government's integration strategy, which also encompassed efforts to integrate First Nations' national and provincial political organizations into the bureaucracy of Indian Affairs (Valentine 1980:99). Following the *White Paper*, provincial and territorial organizations began to receive federal funding, and several organizations entered contracts with the federal government in which they received grants to administer federal service programs. However, with practices of tutelage firmly entrenched in the Indian administration, First Nations leaders soon realized that these arrangements exposed them to the coercive tactics of government officials when their policy initiatives differed from the federal agenda (Dyck 1991:112-3).

The establishment of joint committees in the 1970's was another attempt to achieve political assimilation, through the incorporation of First Nations' political

organizations into the federal bureaucracy. Within the joint cabinet-First Nations committee structure, the primary role of First Nations' leaders was to perform duties for the bureaucracy, rather than to negotiate as equals with officials of the bureaucracy (Valentine 1980:99-100). In the mid-1970's the National Indian Brotherhood formed a joint NIB-Cabinet committee with the federal government, with the hope of participating in the policy-making process. However, the NIB withdrew from the committee in 1978 because it felt that the federal agenda was dominating the consultation process (Dyck 1991:114). Such attempts to incorporate First Nations' leadership into the bureaucracy via joint committee structures, as well as federal funding of First Nations' organizations, were part of a federal integration strategy designed to achieve the political assimilation of First Nations.

Privatization of Reserve Land

The privatization of reserve lands is a process of assimilation because it serves to entrench the value of individualism among First Nations (Boldt 1993:123). The establishment of a system whereby individuals may claim allotments of communally held reserve lands with a "Certificate of Possession" is provided under sections 20-29 of the *Indian Act* (1951). The subdivision of reserve land into lots began with *An Act for the Gradual Enfranchisement of Indians* (1869), Sections 1-2, and this provision was later incorporated into the *Indian Act* (1876), Sections 4-10. This system operates in a manner essentially the same as private ownership (Boldt 1993:123).

The *White Paper* proposed the transfer of control over Indian lands, which are

held in trust by the Crown, to Indians by granting them title to Indian lands. However, this provision of title to land was conditional upon the requirement that Indians pay provincial taxes in return for the delivery of services delivered by the provinces. The government suggested that the only means by which Indians were to gain autonomy was through the payment of taxes. As stated in the *White Paper*, "(w)hen the Indian people see that they can own and fully control land is to accept taxation the way other Canadians do, they will make that decision" (DIAND 1969:12). First Nations' leaders across the country strongly opposed the *White Paper* (see Cardinal 1969). Although its stated objectives were to end discrimination and provide First Nations with "equal opportunity" to participate in Canadian society, the *White Paper* clearly exposes the government project of assimilation, both political and cultural, of Indians into Canadian society.

Recently the federal government has again introduced legislation that represents a move toward the privatization of reserve land. The *Amendment to the Indian Act* (Bill C-79), which was introduced in Parliament in December 1996 by then Indian Affairs Minister Ron Irwin, were designed primarily to facilitate economic development of First Nations' land. This legislation removes restrictive laws governing land use by bands on issues ranging from development to environmental standards (*Winnipeg Free Press*, December 19, 1996:A14). A contentious amendment concerns a provision that permits "lending institutions to use leased land on reserves as security for loans. Ottawa says the reserve land itself could not be seized or mortgaged, but a lender could foreclose on the term left on the lease" (Oosterom 1996:A7; see Spence 1996a:3). Some bands supported the amendments to the *Indian Act* (*Winnipeg Free Press*, December 19, 1996:A14),

particularly bands which have had difficulty obtaining a loan in the past (Oosterom 1996:A7). As noted in the *Winnipeg Sun*, December 11, 1996, the *Indian Act Amendments* are seen as benefiting only those bands with valuable land and resources, several of which are the wealthier urban bands.

However, some First Nations' Chiefs compare Bill C-79 to the 1969 *White Paper* proposal to transfer reserve land title to individual First Nations' members. These proposals do not reflect the collective interest of First Nations in the land (Spence 1996a:3) and are seen by Ovide Mercredi as another government policy on "how Indians can be assimilated" (Demas 1997:3). Mercredi, former National Chief of the Assembly of First Nations, opposed the legislation, stating that the amendments concerning property, which reflect white society's view of property for development or investment, are a threat to Aboriginal identity (Oosterom 1996:A7).

Since neither traditional means of redistributing wealth, nor a taxation system for redistributing wealth accrued from individual possession of land are practised in reserve communities (Boldt 1993:127), the privatization of communal lands is particularly apt to create class disparity. Such class disparity in First Nation communities is characterized by an elite class comprised of landowners, politicians and bureaucrats and a lower-class majority with few means of participating in the decision-making processes (Boldt 1993:127). Economic development on Indian reserves has tended to establish an elite political class. The band political system is readily able to meet the interests of the elite class, which is frequently responsible for the management of band affairs (Marule 1984:41). Moreover, as the availability of unclaimed reserve land decreases, the

exclusion of legitimate heirs from access to communal land is inevitable (Boldt 1993:145-6). These problems created by the entrenchment of an elite class in reserve communities is addressed in greater detail in Chapter V.

Gender Discrimination and the Projects of Protection and Assimilation

The defining of *Indians* in law for the purpose of administering the *Indian Act* was essential to the implementation of the governmental projects of protection and assimilation. The protective approach the Canadian government has taken in its relationship with First Nations peoples has had the effect of excluding some. In order to achieve better management of First Nations peoples and their lands, it was necessary to define who was an Indian. The first legal definition of an Indian occurred in an Act of 1850 for the purpose of determining entitlement to First Nations' land in Lower Canada (Tobias 1976:15; Vasquez Garcia 1995:158). Thus it became necessary to define a group whose members had the right to use a specified land base (Weaver 1983:61; Chartrand 1991:18; Isaac 1995:400). The *Indian Act* (1876 sections 3.3-3.5; 1880 sections 2, 11-14; 1951 sections 5-17) definition of an Indian has created a group of "status Indians," and a group of "non-status Indians" who are excluded from the legal definition of Indian. The practice of defining Indian status necessarily excludes some individuals and has the effect of facilitating their political and cultural assimilation into Canadian society.

The creation of a category of non-status Indians has also been a result of the enfranchisement efforts of the Canadian government. The enfranchisement provisions of the *Indian Acts* were intended to advance such a policy of assimilation. In 1857, prior to

Confederation, *An Act to Encourage the Gradual Enfranchisement of the Indian Tribes in this Province, and to Amend the Laws Respecting Indians* was introduced that encouraged Indians to assimilate by enfranchisement, thereby eventually eliminating the distinct legal status of Indians (Tobias 1976:16; Richardson 1993:61). This *Act* stipulated that a plot of reserve land and money would be allotted to Indian men (Section 7) as incentive for them to enfranchise and relinquish their distinct legal status as Indians (Section 3). Indian women and their dependent children were to be enfranchised with their husbands (Section 8). The Canadian federal government adopted these enfranchisement policies of the British Crown in the passage of *An Act for the Gradual Enfranchisement of Indians* (1869), Sections 16 and 17 (Richardson 1993:62). Although the conditions of enfranchisement have been modified in the *Indian Acts* over the years (1876 sections 86-94; 1880 sections 99-107; 1951 109-113), enfranchisement remained a feature of the *Indian Act* (Tobias 1976:22-36) until 1985 when it was dropped from the legislation (Richardson 1993:104).

Gender discrimination in the legal definition of an Indian, which has denied some women of Indian status, can be understood not only as a reflection of the "patriarchal" bias of the colonizing culture, but also within the context of protection and assimilation of First Nations peoples. Gender discrimination was legislated in 1869, in *An Act for the Gradual Enfranchisement of Indians*, Section 6, by stipulating the Indian women who married non-Indian men lose their Indian status. This provision was intended to protect Indian lands from encroachment by European, male settlers (Weaver 1993b:59). Further, the same Section of the *Gradual Enfranchisement Act* stipulated that the band

membership of an Indian woman married to an Indian man of a band other than her own, was automatically transferred to her husband's band and she lost membership in her home community (Weaver 1983:58). These provisions, which were later incorporated into the *Indian Act* [1876 Section 3(c)(d); 1951 Sections 12(1)(b) and 14] have had the effect of systemically excluding First Nations' women from band membership and access to reserve land.

Gender discrimination in the *Indian Act* also had the effect of systemically excluding women from band politics. The prominent function of the family in First Nations' political organization traditionally, which provided an opportunity for women to participate in decision-making (RCAP 1996:122) was displaced with the imposition of *Indian Act* forms of government. Presently, First Nations women remain largely excluded from band politics. Women's organizations based in Winnipeg, the Indigenous Women's Collective and the Aboriginal Women's Unity Coalition condemn the *Indian Act* system of government for silencing the political voices of women and for lacking an appeal process in its decision-making structure (RCAP 1996:124). First Nations women are apprehensive about certain forms of self-government, particularly those advanced by the federal government (RCAP 1996:125) because they involve decision-making processes which will continue to marginalize women (RCAP 1996:124).

The denial of the rights of women deemed non-status led First Nations women to challenge the gender discriminatory provisions of the *Indian Act* in the early 1970's. Jeannette Lavell and Yvonne Bedard brought their cases to the Supreme Court of Canada challenging section 12(1)(b) of the *Indian Act* 1951. These women argued that this

section of the *Indian Act* violated their rights to "equality before the law" granted by the *Canadian Bill of Rights*. However, in 1973 the Supreme Court ruled against Lavell and Bedard, stating that Section 12(1)(b) applied equally to all Indian women, and therefore did not violate the right to "equality before the law" (Isaac 1995:402).

First Nations political organizations opposed individual human rights legislation as a means of protecting gender equality because, in the context of legal struggle, individual human rights legislation threatens the collective political rights which are fundamental to the self-determination of First Nations. The National Indian Brotherhood opposed attempts by First Nations women to challenge gender discrimination in the *Indian Act* because it was concerned that a Supreme Court decision giving precedence to the *Bill of Rights* over the *Indian Act* would undermine the legal basis for the collective special status of First Nations Peoples (Cardinal 1979:45; Opekokew 1986:4). Thus when the Lavell-Bedard case was brought to the Supreme Court of Canada challenging section 12(1)(b), some First Nations' leaders believed that the government was being given the opportunity to advance their agenda of assimilation of First Nations peoples (Cardinal 1979:45).

However, public pressure to end discrimination against Indian women mounted as section 12(1)(b) received international attention when Sandra Lovelace brought her case to the United Nations Human Rights Committee. The Human Rights Committee ruled that Canada was in breach of the *International Covenant on Civil and Political Rights* (Isaac 1995:402). The successful campaign by First Nations women to amend the discriminatory sections of the *Indian Act* led to the introduction in 1982 of the *Charter of*

Rights and Freedoms into the Constitution, granting equality to individuals "without discrimination based on race, national or ethnic origin, ...(or) sex...". In addition, the recognition of "existing aboriginal and treaty rights of the aboriginal peoples of Canada" was entrenched in the *Constitution Act* (1982), thus protecting the collective special status of Aboriginal peoples. With these amendments, the federal government was compelled to revise the *Indian Act*.

The *1985 Amendment to the Indian Act* (Bill C-31) eliminated blatant discrimination, such as the provisions in section 12 (1)(b) of the *Indian Act* that traced Indian status by male descent. In addition, the *Act* was amended to allow women and their children who had lost their status under the previous provisions to be reinstated for Indian status, and, in cases where band membership was denied to Indian women as a result of their marriages to non-Indian men, their rights to band membership were restored. Generally, these changes are viewed as a positive first-step toward gender equality in Canadian Indian legislation.

However, some reinstated band members [mostly women who had lost their status under the *Indian Act* Section 12(1)(b) (Holmes 1987:8-9)] allege that they have been discriminated against by the leadership of their communities (NWAC et al., 1990:29-31). Increased control over band membership, which was granted to bands under the revised Indian Act, has enabled bands to apply by-laws that effectively prevent reinstated persons from gaining band membership and access to services (Moss 1990:281-2). For example, although a "12(1)(b) woman" may be eligible under the revised *Indian Act* to reside on a reserve with her dependent children, residency by-laws

can limit the rights of her spouse and children (Holmes 1986:18).

The right to determine band membership was provided for in Bill C-31 in order to satisfy First Nations' leaders who had expressed opposition to the automatic reinstatement provisions of the Bill. Male- dominated political organizations, such as the Assembly of First Nations, voiced concerns that "compulsory reinstatement violated the self-determination of citizenship" (Weaver 1993b:121). As such, the *1985 Amendments to the Indian Act* can be seen as a compromise between self-government interests and gender equality interests (Weaver 1993b:115).

Claims to self-determination are certainly understandable, since the financial and land based problems of reinstatement were left to be dealt with by the bands. Thus, economic concerns were also raised as a reason for opposition to the reinstatement of persons to band membership. Several Indian bands lack adequate financial resources to meet the needs of reinstated band members. Housing shortages and inadequate land bases are problems on many reserves. As the *Aboriginal Inquiry on the Impacts of Bill C-31* reports (NWAC et al., 1990), in many communities, inadequate land bases and financial resources would not accommodate additional housing. Federal housing subsidy covers only half the cost of each housing unit. Therefore, many bands would have been forced into a larger deficit if they were required to cover the cost of additional houses being built with Bill C-31 housing subsidies (NWAC et al., 1990:38). Without any guarantee of continued financial support or additional lands to accommodate additional band members (Holmes 1986:35; Green 1985:90), the federal government has exacerbated the conditions under which band governments are compelled to enact

restrictive residency by-laws.

Opposition by First Nations' leaders to the reinstatement provisions of the *1985 Amendments to the Indian Act* was expressed as a conflict between individual rights/gender equality interests and collective rights/self-determination interests (Moss 1990:288). The conflict between returning band members and reserve communities is framed as a conflict between the rights of the collective community to cultural cohesiveness and already limited resources, and the rights of individuals to access to these cultural and land resources.

However, the framing of this argument as one of the rights of individuals opposed to the rights of the collective is problematic here. I have emphasized in this thesis that colonial political structures and assimilatory processes systemically discriminate against women and as such the discourse which merges the issues of gender equality and individual rights is problematic in that it implies that gender discrimination occurs as isolated incidents against individuals, that it is not a collective issue too. Those who advocate the prominence of collective over individual rights (Opekokew 1986:16) do not adequately account for the systemic discrimination against women whose rights are advanced as individual rights. In the context of gender discrimination in the *Indian Act* and efforts to remedy it in Bill C-31, the argument that some individuals will have to make sacrifices for the well-being and cultural preservation of the collective (see Opekokew 1986:18) is problematic; it is problematic because the individuals who would be making the sacrifices, including the right to reside on reserve, are primarily women, systemically marginalized as a category and not individuals experiencing isolated

incidents of discrimination as the framing of the conflict as one of collective versus individual rights implies.

Recognizing that collective rights are imperative to the survival of First Nations' cultures, it is important also to consider whether traditional notions of the collective are able to protect women in contemporary First Nations' communities, where colonial/patriarchal political and social structures, and values exist (McIvor 1994:10). Women's organizations fear that the welfare of individuals is not assured in contemporary communities because colonialism has eroded the traditional social structures upon which collective rights are based (NWAC, Discussion Paper:12). Moreover, the question arises of what should happen when *tradition* infringes upon the rights of individuals? Some First Nations women are sceptical that a return to *traditional* government would remedy the inequitable treatment of women. When *politicians invoke tradition* they must ask, whose tradition? If traditional government is based upon "tradition defined, structured and implemented by the same men who now routinely marginalize and victimize (First Nations' women) for political activism" (RCAP 1996:125), it will provide little in the way of social change for First Nations women.

Conclusions

The federal government's objective of assimilation, and attenuation of its fiduciary obligations, is undertaken in part by the defining of First Nations peoples and status and non-status Indians. The requirement of the federal government that Indians reside on reserves to receive benefits also serves this purpose. By separating Indian

status from band membership in the 1985 *Amendment*, as well as by providing increased control over membership to bands, the federal government has handed the task of excluding some individuals from access to limited resources, to band governments. It can be argued that in this way, First Nations have assumed responsibility for administering a system that is fundamentally rooted in a policy of assimilation. The empowerment of band governments to administer federally designed and funded programs and services, and the authority to determine band membership, is a process which on the one hand is viewed by the federal government as an important step toward self-government; however, this devolution of authority is occurring within a structure that is deeply entrenched in relations of tutelage. In the following chapter, I will explore how federal self-government policy is an instrument of political assimilation of First Nations governments, and how this policy differs from the perspectives of First Nations as they envision self-government and their relationship with the Canadian state.

CHAPTER FOUR

NATION-TO-NATION: THE INHERENT RIGHT AND FEDERAL SELF-GOVERNMENT POLICY

As I argue throughout this thesis, federal Indian policy has been historically and continues to be a policy of assimilation. Political assimilation is evident in recent federal policy initiatives that advocate a form of self-government that furthers the gradual elimination of its special political and legal relationship with First Nations. The Liberal Government of Jean Chretien (see Canada 1995) pursues "normalization" of federal-provincial mandates with respect to Indians and the incorporation of legislatively empowered First Nations' governments into this framework. The federal government's insistence on establishing self-government by political negotiation and legislative change is consistent with its objective of minimizing both the special status of First Nations as historically distinct peoples, and corresponding federal fiduciary obligations.

This chapter also examines briefly how Canadian policy-making with respect to Indians is shaped by "national interests" as these are defined by the federal government; federal self-government policy is driven largely by the economic mandates of the federal and provincial governments (Boldt 1993:67-9). The economic priorities of the federal government are a critical factor in the formulation of social policy, both in general, and as it affects First Nations in particular (Mahon 1977:175-177; Nicholson 1984:63; Prince 1987:269; Boldt 1993:72). Federal self-government policy reflects a larger trend toward debureaucratization of the federal social policy agenda, serving to reduce federal expenditures on social development.

Finally, this chapter explores the perspectives of First Nations in Manitoba who have engaged in political self-government negotiations with the Liberal Government, according to the terms of the *Manitoba Framework Agreement* (1994). The inherent right of self-government, the desire to negotiate with the federal government as nations, and the fulfilment of treaty obligations are prominent issues in the self-government discourse of Manitoba First Nations that provide a challenge to the assimilatory aspects of federal self-government policy.

The Inherent Right of Self-Government

The right to self-government, is believed by many First Nations to be an inherent right, which exists by virtue of the diplomatic relations between Indigenous and European Nations in the period of early contact and settlement (see Clark 1990:3-4, 37-8; Fleras and Elliott 1992:25). The right to self-determination was recognized by the British Crown in the *Royal Proclamation (1763)*, which stated that "the several Nations or Tribes of Indians... should not be molested or disturbed" on unceded lands "reserved" in trust by the Crown. Since it has never been specifically repealed, the *Royal Proclamation* provides a legal basis for Aboriginal claims to nationhood status and corresponding Aboriginal rights (Clark 1990:7-8, 38; Satzewich and Wotherspoon 1993:20). Although federal and provincial legislation (common law) has been enacted that is inconsistent with the right to self-government, the colonial governments were never vested with the authority to change the imperial government's policy concerning

Aboriginal rights (Clark 1990:38). Thus, the right can not be extinguished by acts of Parliament (Clark 1990:8-9, 38; Fleras and Elliott 1992:56-7; RCAP 1996:16), and as such, it is an *existing* right that has remained intact since pre-contact times (Clark 1990:38,196). The constitutional right of self-government, then, is the right to freedom from interference in the independent jurisdiction of First Nations over their internal affairs (Clark 1990:196). As distinct nations within Canadian confederation, several First Nations seek to re-establish relations with the federal government on a government-to-government basis (Fleras 1992:57). This would require the establishment of First Nations' governments as a "third order of government" that is constitutionally equivalent to that of the provinces (Fleras and Elliott 1992:56; Whittington 1995:10; RCAP 1996; Fleras 1996:152).

The Treaties are Nation-to-Nation

There are differing understandings between First Nations and the federal government concerning the meaning of the treaties. The oral traditions of First Nations suggest that the verbal agreements and written record of the treaties differed significantly (Satzewich and Wotherspoon 1993:22). Treaty Nations contend that the treaties they made with the British Crown affirm their claim to nationhood status and sovereignty (RCAP 1996:19). The treaties were an agreement to share lands, and although First Nations imparted their *exclusive* authority of lands, the treaties recognized and affirmed their title to ancestral lands (RCAP 1996:19). However, the Crown maintains that First Nations peoples acknowledged the sovereignty and authority of the Crown in the treaties,

and that Aboriginal rights and title were extinguished by the treaties in exchange for specific rights which are delineated in the written text of treaties (RCAP 1996:19, 45). An interpretation of the treaties according to their *original spirit and intent* requires admission that the cross-cultural nature of the treaties led to differing understandings of issues such as aboriginal title at the time the treaties were signed (Satzewich and Wotherspoon 1993:22-5); thus, the free and informed consent of the treaty Nations to the extinguishment of their rights was *not* obtained in treaty agreements (RCAP 1996:42).

Canadian courts have given support to the argument that the treaties should be interpreted according to their *original spirit and intent*. The courts have ruled that "historical treaties are to be given large and liberal interpretation in light of the understanding of the Aboriginal party at the time of entering into the treaty" (RCAP 1996:34). Canadian law recognizes that the treaties are agreements between the Crown and treaty Nations, in which the Crown has a trust-like relationship with First Nations. The enduring nature of this trust-like relationship between the Crown and treaty Nations is affirmed by constitutional recognition of treaty rights in section 35(1) of the *Constitution Act*, (1982), (RCAP 1996:20, 37). With this rendering of the treaties in Canadian law, the Crown is obliged to take action to restore the partnership expressed in the historical treaties, in its current relationship with the treaty Nations (RCAP 1996:43).

Treaty Nations argue that by virtue of making treaties with the Crown, they acted as nations with the right and power to govern themselves and that the Crown recognized them as such by making treaties with them (RCAP 1996:47-8). Therefore the right to self-determination, which includes the right to self-government, is implied in the treaty

relationship (RCAP 1996:73). However, non-Aboriginal governments and courts have questioned whether self-government is a treaty right on the basis that the inherent right to self-government is not explicitly acknowledged in the written texts of the treaties (RCAP 1996:49). The strict adherence to the written text is not in keeping with the *original spirit and intent* of the treaties, which rather affirms the inherent right of treaty Nations to be self-governing (RCAP 1996:73).

Section 91(24) of the Constitution Act

The *Constitution Act* (1867), assigned exclusive jurisdiction over "Indians and lands reserved for Indians" to the federal government. The federal government generally holds the position that it has the Constitutional power, but not a responsibility, to legislate matters and provide programs for First Nations peoples (Pratt 1989:21; DIAND 1966:348, 386). The federal government maintains that it has the discretion to exercise its legislative authority according to the budgetary mandates of federal policy. In other words, the federal government maintains that it has the authority to discontinue or change federal programs unilaterally by legislative amendment without neglecting any legal obligations (Pratt 1989:21). Relying on this interpretation of section 91(24), the federal government has reduced expenditures for programs for on-reserve Indians as a matter of government policy (Pratt 1989:22-23).

However, judicial and constitutional decisions do not support the argument that section 91(24) "is a mere grant of power which can be applied (or not applied) purely in accordance with federal government policy" (Pratt 1989:45). An interpretation of

section 91(24) as providing a guarantee of federal responsibility for Aboriginal affairs was supported in 1983 by the inclusion of section 35.1 of the *Constitution*, which requires a Constitutional Conference with Aboriginal representation prior to any amendment of section 91(24) of the *Constitution Act* (Pratt 1989:44-5). This requirement suggests that section 91(24) is more than a grant of legislative power to the federal government, but a federal responsibility for Aboriginal peoples (Pratt 1989:45).

Section 91(24) is significant because many First Nations argue that it is the embodiment of a special relationship they have with the Crown (Pratt 1989:23; Boldt 1993:79). The special relationship has its origins in the *Royal Proclamation*, in which the policy of protection of lands occupied by Indians was established. The legal status of Indians as wards of the state during the late nineteenth and early twentieth centuries raises the possibility of a trust-like fiduciary relationship with the Crown. The fiduciary relationship essentially refers to political and legal obligations of protection and trust (Pratt 1989:23). While this relationship is a political one, recent judicial decisions have established that legal rights flow from the relationship (Pratt 1989:25).

In *Guerin v. The Queen* (1984), the Supreme Court of Canada characterized the special relationship as a fiduciary one. The case, which concerned a dispute over the terms of a lease of reserve land, established that

> (t)he existence of Indian title as an independent legal interest in land predating the *Royal Proclamation of 1763*, combined with the Crown's undertaking in the Proclamation (and in subsequent legislation) of a responsibility to protect the Indian interest from exploitation gives rise to the fiduciary relationship in relation to land dealings (Pratt 1989:28).

The *Guerin* decisions describe a fiduciary relationship that is significantly

different from earlier relations of wardship. "Unlike a ward, the band was not an incompetent at the mercy of its guardian's discretion, but a body capable of directing and confining that discretion" (Pratt 1989:29).

Pratt suggests that *Guerin* provides a firm basis for extension of the fiduciary obligation of the Crown beyond land rights (Pratt 1989:28). Some First Nations argue that the special relationship ought to include federal financial responsibility for programs for Indians, which they demand that the federal government continue to honour (Pratt 1989:23).

Constitutional Entrenchment of the Inherent Right of Self-Government

Constitutional entrenchment of the inherent right to self-government is a pivotal issue in the current restructuring of Aboriginal-state relations (Fleras 1996:166). Recognition of "existing aboriginal and treaty rights" in the *Constitution Act of 1982* did not make explicit reference to the issue of self-government. In the series of Constitutional conferences between 1983 and 1987, Aboriginal leaders sought constitutional entrenchment of an explicit statement that self-government is an inherent right of Aboriginal peoples (Platiel 1987:D8; Frideres 1988:347; Cassidy and Bish 1989:16; Fleras and Elliott 1992:65). However, the federal and provincial governments refused to endorse constitutional recognition of an undefined inherent right to self-government (Canada 1991; see Fleras 1996:153), advocating instead negotiation of the specified powers and terms of self-government prior to its constitutional entrenchment (Opekokew 1987:33; Platiel 1987:D8; Fleras and Elliott 1992:66). This approach to

implementing self-government, as I will argue in more depth later in this chapter, is inconsistent with the perspective that the right to self-government is an inherent and *existing* right.

The problem with politically negotiated legislative agreements is that they can be amended unilaterally, without the consent of the First Nations parties involved (see Whittington 1995:10). Constitutional entrenchment of the right to self-government would provide legal protection, enforceable through the courts, for First Nations' governments to exercise self-governing powers (Opekokew 1987:36; Platiel 1987:D8; Fleras and Elliott 1992:66; Whittington 1995:6).

The "National Interest" and Institutional Assimilation

Canadian Indian policy occurs within a broader policy-making context in which the dominance of the 'national interest' subverts the interests of First Nations (Boldt 1993:67, 69). The 'national interest' is an ideological construct which coincides with the hegemony of the Canadian establishment (Mahon 1977:170). "It is used to create the illusion that there exists a national homogeneity of interests, and that government policies are designed to promote these interests" (Boldt 1993:67). The abstract notion of "the economy," like "the national interest" is part of an ideology that obscures the real processes and structure of the *capitalist* economy in which capitalist interests are advanced (Mahon 1977:172).

Prevailing economic interests play an integral role in the development of federal social policy (Prince 1987:269). The Department of Finance has dominance over other

federal departments, whose mandates and budgets must be approved by the Department of Finance before departmental polices may be implemented (Mahon 1977:175-177; Prince 1987:269). Recent restructuring within the federal government has further increased the power of the Department of Finance and the Treasury Board Secretariat to assert economic interests in the development of the social policy agenda (Prince 1987:269). Indian interests are a low priority on the national agenda (Mahon 1977:190-91; Nicholson 1984:63; Boldt 1993:75) and are subordinate to federal-provincial economic and social mandates with which First Nations' interests compete in the making of Canadian policy (Mahon 1977:175-177; Nicholson 1984:63; Prince 1987:269; Boldt 1993:69-72). The low priority of Aboriginal interests within the federal government is evident in the shuffling of responsibility for Indians Affairs among various government departments according to federal agendas at the time. In the 1930's, the Department of Indian Affairs was moved to the Department of Mines when the government was interested in exploiting resources on Indian lands (Nicholson 1984:59). In the 1950's federal responsibility for Indians was moved to the Department of Citizenship and Immigration when the government's main agenda was assimilation (Nicholson 1984:59; Satzewich and Wotherspoon 1993:240). The subordination of Indian interests to economic interests is evident in the establishment of the Department of Indian and Northern Affairs in 1966. DIAND is structured to represent the competing interests of Indian peoples and large corporations interested in the exploitation of northern resources, which increasingly prevail over the aspirations of Aboriginal peoples in the formulation of federal policy (see Mahon 1977:190-91).

The institutional assimilation of First Nations into the Canadian body politic (Boldt 1993:79-82), as part of a process which has diminished the special status of First Nations, serves the 'national interest' by aiming to curtail federal expenditures. Aboriginal, Treaty and Constitutional rights, as well as the maintenance of a separate administrative structure for Indians, incurs significant federal liabilities. The federal government has continued to seek to reduce these expenses by transferring legislative and fiscal responsibility for Indians to the provinces (Nicholson 1984:62; Cassidy and Bish 1989:9-10). Proposals, such as those in the 1969 *White Paper*, to dismantle the Indian Affairs Department and repeal the Indian Act reflect in part the larger government policy of reducing expenditures (Fleras and Elliott 1992:51) and are criticized as mere "off loading (of) departmental functions under the guise of Aboriginal empowerment" (Fleras 1996:153). Dismantling proposals and the devolution of responsibility to the provinces and First Nations communities are a significant part of the federal policies to downsize the bureaucracy of DIAND, and to reduce federal expenditures on programs for and statutory obligations to Indians (Weaver 1993a:92-3). As such, dismantling proposals are consistent with the trend toward federal government downsizing of the public sector (Fleras 1996:154), debureaucratization of the federal social policy making process, and a reduction of expenditures in social development (Prince 1987:270). The 'national interest' is currently reflected in these policies of fiscal restraint and debureaucratization of the social policy making process (Prince 1987:270), and has a negative impact on the aspirations of First Nations peoples.

Constitutional Normalization

The integration of segregated institutional structures is accompanied by a move toward constitutional normalization, in which federal-provincial power sharing arrangements in the administration of services for Indians are made consistent with federal and provincial mandates for other Canadians (Boldt 1993:82). Efforts directed at constitutional normalization have persisted in policy initiatives since the well known *White Paper* proposals to transfer responsibility for the delivery of services to Indians to the provinces (Nicholson 1984:60; Cassidy and Bish 1989:9-10; Clancy 1990:28-9). Self-government initiatives to transfer responsibility for the delivery of social programs to First Nations' communities and to dismantle the Indian Affairs Department have been accompanied by initiatives to delegate increasing authority to the provinces, and to transfer responsibilities from DIAND to other government departments (Fleras and Elliott 1992:49). Constitutional normalization is being implemented through federal-provincial bilateral agreements in which services such as education, health, welfare and economic development, which normally come under provincial jurisdiction according to section 92 of the *Constitution* are extended to apply to Indians as all Canadians (Boldt 1993:80, 82). The broadening of provincial jurisdiction over Indians has been enabled by the introduction of section 88 of the *Indian Act* in 1951, which states that provincial "laws of general application" apply to Indians in the province provided that they are not inconsistent with the provisions of the *Indian Act* (Pratt 1989:32).

These moves, and the federal government's desire to enter tripartite self-government agreements with the provinces and First Nations peoples (Canada 1991)

suggest that the federal government is attempting to establish self-government structures that incorporate municipal, provincial and federal jurisdictions (Clark 1990:9; Fleras and Elliott 1992:48). Some First Nations are concerned that the trend toward devolution of responsibility to the provinces will allow the federal government to avoid its obligations in legal, constitutional and treaty agreements (Pratt 1989:21; Boldt 1993:80; Fleras 1996:155). Increased provincial responsibility for program delivery has been the result of the federal government's desire to reduce federal expenditures involved in maintaining a separate administrative structure for Indians (Pratt 1989:22-23) and as such, the trend toward devolution to the provinces serves the 'national interest' of fiscal restraint.

Federal Self-Government Policy

With the failure of the constitutional entrenchment of the inherent right, the federal government has proceeded with its mandate to implement practical self-government arrangements by political negotiation and legislative empowerment (Long, Little Bear and Boldt 1984:69, 72; Frideres 1988:351-2; Long and Boldt 1988:17; Clark 1990:9). Within the past two decades, self-government legislation has enabled local communities to exercise greater decision-making powers in terms of control over the delivery of local programs. Block funding arrangements have been implemented which allow local communities greater freedom to set their own priorities and manage local services and programs (DIAND 1993; Satzewich and Wotherspoon 1993:235; Fleras 1996:167). However, legislative-based self-government arrangements, which have been advocated by the federal government since the 1970's (Long, Little Bear, Boldt 1984:69),

promote First Nations' governments as municipal-style governments that are subordinate to provincial mandates and with authority delegated by Canadian Parliament. Federal legislative-based self-government policy does not meet demands for a third level of government but rather seeks to establish First Nations' governments as municipal style governments subordinate to provincial mandates (Long, Little Bear, Boldt 1984:73; Frideres 1988:344, 348, 352; DIAND 1990; Clark 1990:10; Fleras and Elliott 1992:52, 59).

The Liberal Government of Jean Chretien has acknowledged claims by First Nations to the right of self-government, expressing a willingness to recognize constitutionally the inherent right to self-government as an existing treaty right (Canada 1995:8). However, despite the stated recognition of First Nations as a "distinctive society" and First Nations' demands for control over their internal affairs, the federal government refuses to accept self-government as derived from a separate source of authority and implemented through parallel government institutions (Fleras 1996:169-70). One reason for this refusal may be that there are uncertainties involved in the recognition of peoples' rights, which are seen as being incompatible with the liberal notion of equality of individuals to which the Canadian government adheres. The Federal Liberal Government's (1995) self-government policy is consistent with the goals of previous government policy to implement practical self-government arrangements by legislative authority and within the existing constitutional structure.

The Inherent Right Policy (1995) of the Liberal Government

The Liberal Government's self-government policy, entitled *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, recognizes the inherent right of self-government as an existing right within section 35 of the Constitution Act and seeks to give practical effect to that right through negotiated self-government agreements (Canada 1995:5). The federal government views negotiations between governments and Aboriginal peoples as a more effective means of implementing the inherent right than litigation over the inherent right, which would still require negotiations over the details of self-government arrangements (Canada 1995:3). "Under the federal approach, the central objective of negotiations will be to reach agreements on self-government as opposed to legal definitions on the inherent right" (Canada 1995:5). Former Chief of the Assembly of First Nations, Ovide Mercredi, criticized the *Inherent Right Policy* because it establishes negotiated agreements as the only process through which self-government rights may be secured, (AFN 1995) through which such rights are indeed delegated rather than recognized as inherent.

Successive governments since 1987 have expressed a willingness to recognize rights established within negotiated self-government agreements as treaty rights, either through the establishment of new treaties or as additions to existing treaties (Whittington 1995:10; see Canada 1995:8). The Liberal Government takes this position, recognizing that obligations outlined in treaties are legally binding and constitutionally protected within the meaning of section 35 of the *Constitution Act*, 1982. Matters deemed

fundamental to self-government, such as a listing of Aboriginal jurisdictions and authorities, and the relationship between Aboriginal and provincial and federal laws would be considered suitable for constitutional protection (Canada 1995:8). Despite its stated position on constitutional entrenchment, the federal government has, so far, failed to ratify a self-government agreement that has been entrenched as a section 35 treaty (see Whittington, 1995:10, also INAC 1997).

The federal government maintains that Aboriginal jurisdiction and authority over some matters is necessary in the implementation of the inherent right. It views the range of jurisdiction or authority of First Nations' governments to be negotiated under self-government arrangements as those "matters that are internal to the group, integral to its distinct culture, and essential to its operation as a government or institution" (Canada 1995:5). Some areas that this may include are the establishment of governing structures and constitutions, education, health, social services, housing, administration and enforcement of Aboriginal laws, land and natural resources management (Canada 1995:5-6).

Despite the significance of federal recognition of Aboriginal jurisdictional authority in meeting demands for self-government, Aboriginal jurisdiction remains subordinate to provincial and federal mandates, in keeping with the objective of constitutional normalization. The federal government maintains that federal and provincial governments will retain primary jurisdiction over areas that are not considered internal only to the Aboriginal group in question. Although the federal government is willing to concede jurisdiction in some areas, federal and provincial laws would apply if

they come into conflict with Aboriginal laws. Some areas which this may include are administration of justice issues, environmental protection, fisheries and migratory birds co-management, and gaming (Canada 1995:6).

In keeping with previous federal self-government initiatives, the Liberal Government advocates a tripartite process for self-government negotiations because provincial participation is a necessity in negotiations over matters which would normally come under provincial jurisdiction (Canada 1995:4). In some situations, a double-bilateral process may be considered appropriate for negotiations (Canada 1995:23). Rarely will bilateral negotiations between the federal government and Aboriginal groups be pursued because of the legal uncertainties involved in agreements made without provincial participation. Bilateral agreements would be restricted exclusively to matters within federal jurisdiction and would not have the constitutional stature of treaties (Canada 1995:24). The government's insistence on provincial involvement disregards the exclusive fiduciary responsibility of the federal government (AFN 1995).

The objective of constitutional normalization is further evident in the federal position that all levels of government, federal, provincial and territorial, and Aboriginal governments should contribute to the financing of self-government. The federal government recognizes that it has primary, but not sole responsibility for on-reserve Indians and Inuit, while the provinces have primary but not sole responsibility for other Aboriginal peoples. Cost-sharing agreements between provincial/territorial governments and the federal government must be established before the federal government will engage in substantive self-government negotiations (Canada 1995:14). First Nations'

political organizations have, in the past, opposed the requirement of provincial approval of self-government agreements, fearing that provinces would also be responsible for enacting the agreements thereby expanding their legislative authority over Indians (Opekokew 1987:37).

The government's aim of securing cost-sharing arrangements with provincial and Aboriginal governments is part of its ultimate goal of reducing both federal financial responsibility for and federal fiduciary obligations to First Nations. The Liberal policy clearly states that self-government arrangements must be "consistent with the overall social and economic policies and priorities of governments" (Canada 1995:14) and as such the financing of self-government is dependent upon the budgetary mandates of federal, provincial and territorial, and Aboriginal governments (Canada 1995:14). Aboriginal governments are expected to generate their own financial resources in order that they may gradually operate with less reliance on federal and provincial transfers (Canada 1995:15). Mercredi argues that past government policies have obstructed First Nations' efforts to raise their own source of revenues (AFN 1995). The *Indian Act* and federal and provincial legislation have been significant barriers to the economic independence of First Nations peoples. Mercredi refers to the taxation guidelines imposed on Aboriginal businesses on January 1, 1995, and provincial efforts to curtail gaming operations on reserves as recent examples of federal and provincial government policy obstructing First Nations' efforts to raise revenues for their people (AFN 1995).

While on the one hand the federal government recognizes that it has primary responsibility for First Nations peoples, the *Inherent Right Policy* states that self-

government will change the historic, fiduciary relationship Aboriginal peoples have with the federal government. The federal government's position is that an increase in the exercise of Aboriginal jurisdiction and authority within Aboriginal communities should be accompanied by an increase in their financial responsibility for the exercise of those powers. The government states, "(t)here is no justifiable basis for the Government to retain fiduciary obligations in relations to subject matters over which it has relinquished its control and over which an Aboriginal government or institution has, correspondingly, assumed control" (Canada 1995:12). Clearly, this position contradicts the view advanced in this thesis that the fiduciary relationship between First Nations and the federal Crown is an enduring relationship that can not be extinguished by acts of Parliament.

The Manitoba Framework Agreement Initiative

On December 7, 1994, sixty First Nations in Manitoba signed an agreement with the Government of Canada, represented by then Minister of Indian and Northern Affairs, the Honourable Ron Irwin, to begin the dismantling of the Department of Indian Affairs in Manitoba. The agreement, known as the *Framework Agreement Initiative* (FAI), establishes a process by which the dismantling of the departmental structures of Indian Affairs which affect Manitoba First Nations and the transfer of jurisdictions to Manitoba First Nations will be negotiated. This objective includes the legal empowerment of First Nations' governments to exercise jurisdiction and authority (FAI 1994:2) and the repeal or amendment of the *Indian Act* as it applies to First Nations in Manitoba (FAI 1994:5).

The FAI delineates a process for the negotiation of a self-government agreement which is consistent with the Liberal Government's *Inherent Right Policy*. Like this policy, the FAI mobilizes self-governing powers within the framework of the existing Constitutional structure. This means that the authority of First Nations governments in Manitoba will be consistent with Section 35 of the *Constitution Act, 1982*, and that the Crown will, accordingly, maintain its fiduciary responsibility to First Nations (FAI 1994:5-6). This approach does not meet recommendations that First Nations' governments be constitutionally empowered as a "third order of government" in Canada. However, the FAI is problematic in that the funding of First Nations' governments remains subject to the fiscal priorities of the federal government. Levels of funding will be determined according to "the obligations of the federal government to First Nations, federal government resources, federal fiscal and budgetary management requirements, (and) historical levels of funding provided to First Nations in Manitoba...." (FAI 1994:6).

Delegated Authority and Full Jurisdiction

Although the FAI aims to implement self-government within the framework of the existing Constitution, the Assembly of Manitoba Chiefs is pursuing a self-government agreement in which First Nations would exercise full jurisdictional authority rather than delegated authority. The transfer of authority over programs by legislation of Parliament does not give First Nations legal jurisdiction. Such a move would allow First Nations to exercise authority delegated by the federal government, which would retain legal jurisdiction and the power to amend program requirements unilaterally. Delegated

authority is no more than administrative control over program delivery (Okimow and Peterson 1996:5). A self-government agreement based upon delegated authority would mean continued provincial jurisdictional authority over matters affecting First Nations. First Nations' governments would be required to conform to provincial standards of service delivery, and the province would maintain its jurisdictional authority over programs such as education under the Canadian *Constitution* and section 88 of the *Indian Act* (*Peoples' Decision*, November 1997:5).

Former Grand Chief of the Assembly of Manitoba Chiefs, Phil Fontaine, says that the FAI offers First Nations the opportunity to exercise more than mere responsibility for the delivery of programs designed by the federal government, but greater jurisdictional authority. Fontaine observed that Manitoba First Nations already administer 80 percent of federal programs for First Nations, and that the FAI is about First Nations exercising law-making and law-enforcing powers in the managing of their affairs (Roberts 1994:A1).

The Assembly of Manitoba Chiefs views the exercise of full jurisdiction as integral to implementation of the inherent right of self-government. "Jurisdiction is the power to pass laws and to administer them including developing and delivering programs and services to First Nations peoples" (Okimow and Peterson 1996:5). The FAI clearly states that the restoration of jurisdictions to Manitoba First Nations should be "consistent with the inherent right of self-government" (FAI 1994:5).

Full jurisdiction requires the establishment of governmental structures which would control and distribute resources within First Nations communities. According to

the FAI, the individual First Nation would be the fundamental unit of First Nations government, although some functions of First Nations' government may be performed at other levels. First Nations' governments will perform legislative, executive, administrative and judicial functions consistent with the terms of the agreements (FAI 1994:6). Ken Young, legal counsel for the Assembly of Manitoba Chiefs envisions "a central aboriginal government with its own laws, courts, police and executive body" as an outcome of the FAI negotiations (Chow 1996:A5). A central government and administrative structure would share jurisdictional powers with regional and individual levels of First Nations' governments (*Council Fire*, December 1996:6). These government structures would include electoral, legislative, executive, administrative and judicial functions (Okimow and Peterson 1996:5). Primary authority would remain with local First Nations governments, who might decide to give certain powers to a central First Nations government (*Council Fire*, December 1996:6).

The Role of the Provinces in the Framework Agreement

In keeping with the *Inherent Right Policy*, the *Framework Agreement* states how the province of Manitoba will be included in the negotiations. The province will be invited to participate in the process when the federal government and First Nations both agree that provincial participation is acceptable, such as in the negotiation over matters which generally fall under provincial jurisdiction (FAI 1994:8). The role of the provinces in the negotiation of self-government agreements has been a contentious issue among First Nations in the FAI consultation process. Disagreement revolves around the

legal necessity of provincial involvement in a self-government agreement based upon full Aboriginal jurisdiction because of the Canadian Constitutional structure. The constitutional jurisdiction of provincial governments over matters such as education, justice, natural resources and gaming (under sections 92 and 93) means that negotiations of power-sharing involving these matters will necessarily require provincial participation (Lett 1995b:A3). Federal Constitutional jurisdiction over "Indians and lands reserved for Indians" [under section 91(24)] creates a constitutional bifurcation which means that in order for First Nations to assume full jurisdictional authority over education, First Nations governments will have to negotiate with both the federal and provincial governments (Okimow and Peterson 1997:5).

However, Manitoba First Nations' leaders oppose provincial participation in negotiations with the federal government over matters which come under provincial jurisdiction. At a special assembly on education in January, 1997, the Assembly of Manitoba Chiefs passed a resolution that they would not accept any provincial involvement in the *Education Framework Agreement*. Manitoba Chiefs see education as a treaty right, and many Chiefs argued that because the treaties were signed on a nation-to-nation basis, the FAI should also proceed on a nation-to-nation basis. Therefore, there is no role for the province in the *Education Agreement* (Nepinak 1996:5; Ferguson 1997:1).

The federal government maintains that provincial involvement is necessary because education comes under provincial jurisdiction. Phil Fontaine, former Grand Chief of the Assembly of Manitoba Chiefs (AMC), warned the Chiefs that because

education comes under provincial jurisdiction, the provinces could legally challenge an agreement made between First Nations and the federal government (Nepinak 1996:5; Ferguson 1997:1). Fontaine suggested that a double-bilateral agreement, "where First Nations make a deal with the federal government and the federal government then makes a deal with the province" (Ferguson 1997:1) is an alternative approach to direct provincial involvement in the *Education Framework Agreement* However, the Manitoba Chiefs rejected this proposal in favour of no provincial involvement whatsoever (Ferguson 1997:1).

The Assembly of Manitoba Chiefs suggested that in order to avoid the involvement of the provinces in the negotiations a constitutionally protected modern day treaty could be established. Such a treaty would detail the government structure for the exercise of full jurisdiction by First Nations (Okimow and Peterson 1996:5). However, Manitoba Chiefs are, for the most part, reluctant to engage in modern day treaties with the federal government. Some Manitoba Chiefs question why the federal government should agree to negotiate constitutionally protected "treaty-like arrangements" in order to establish First Nations' governments, when there are already existing treaties that the government could recognize if it wanted (*Peoples' Decision*, March 1996:12).

Alternatively, the Assembly of Manitoba Chiefs acknowledged that the inherent right is an existing right, independent of the dictates of the Canadian government, and as such provincial authority contained in the Constitution can be bypassed by First Nations, whose inherent right exists outside of the Canadian constitutional structure (Okimow and Peterson 1996:5). This position is taken by Chief Louis Stevenson of the Peguis First

Nation, who argues that First Nations should not concern themselves with provincial challenge to self-government agreements, such as the *Education Agreement*, because constitutional responsibility for treaty rights lies with the Crown in right of the Government of Canada (see Ferguson 1997:1).

For its part, the province of Manitoba responded to the announcement of the FAI with concerns over future financial arrangements. The province was particularly concerned that it would be left with much of the financial burden of the new arrangements, and that First Nations' governments might find themselves in a position where they are unable to deliver necessary services to their communities without needed financial support (Roberts 1994:A1).

The Framework Agreement and Constitutional Entrenchment

The FAI states that Aboriginal, Treaty, and Constitutional rights of First Nations, including the inherent right of self-government, are fundamental to the arrangements which will emerge from the negotiation process, and that the Treaty Rights of First Nations will, by mutual consent, be re-interpreted to address contemporary circumstances without deviating from the *original spirit and intent* of the Treaties (FAI 1994:5). Manitoba Chiefs view the fulfilment of the treaties as fundamental to the implementation of the inherent right to self-government. There is disagreement, however, on the process by which both treaty rights and the inherent right are to be implemented in the FAI. Fontaine explained that the FAI is treaty-based because it establishes a process for the negotiation of the jurisdictional arrangements of self-government, and the jurisdictional

arrangements themselves commit the federal government to honour its treaty obligations. Constitutional entrenchment of the agreed upon jurisdictional arrangements will ensure the inherent right of First Nations to govern themselves (Fontaine 1996:8).

By this approach Manitoba First Nations are engaging in a political negotiation process rather than a legal process through the courts (*Peoples' Decision*, March 1996:2). The process of implementing self-government via political negotiations is at odds with Mercredi's conviction that constitutional entrenchment of the inherent right to self-government is necessary for the establishment of self-government arrangements (*Satzewich and Wotherspoon 1993:231; Globe and Mail*, March 11,1994:A6). The entrenchment of self-government rights in the Constitution has been an objective of the AFN since its establishment in 1980 (Satzewich and Wotherspoon 1993:231). Mercredi criticized the *Inherent Rights Policy* because it establishes negotiated agreements as the only process through which self-government rights may be secured rather than constitutional entrenchment (AFN 1995). Mercredi does not support dismantling projects such as the framework agreements, because he believes it is a mistake to mix dismantling and treaties. Dismantling projects are part of the federal self-government policy that is based largely upon delegated powers (*Peoples' Decision*, March 1996:6).

The relationship between the *Inherent Right Policy* and the *Framework Agreement* has been a concern for First Nations leaders. The federal government's position is that the *Inherent Right Policy* takes precedence over the *Framework Agreement* (*Peoples Decision*, March 1996:2). These concerns were also raised by Chiefs of the Treaty 3 Grand Council at a meeting with DIAND officials and the

Assembly of Manitoba Chiefs in February, 1996. DIAND reaffirmed its position at this meeting that the *Inherent Right Policy* applies to the *Framework Agreement*. However, Ken Young, legal advisor to the Assembly of Manitoba Chiefs, stated that the First Nations of Manitoba would not be bound to the government's *Inherent Right Policy*, and that this position was supported by provisions within the agreement itself. Specifically, Young refers to the Memorandum of Understanding and the principles of the agreement as supporting the goal of a central government recognized by First Nations peoples of Manitoba (*Peoples' Decision*, March 1996:2). However, memoranda of understanding are not legally binding agreements. Thus, some Chiefs are concerned that there is no legal protection for First Nations if the federal government fails to meet its obligations in negotiated agreements (*Peoples' Decision*, March 1996:2).

Moreover, Manitoba Chiefs are concerned that there is no assurance that treaty rights will be recognized and implemented in the *Framework Agreement* process. They point out that DIAND's position that the agreement is not treaty-based, and that DIAND's refusal to discuss treaties is in contrast to the Assembly of Manitoba Chiefs' understanding that the agreement is based on the treaties (*Peoples' Decision*, March 1996:12). The Federal Government's approach has been to avoid these contentious issues, which it will address only once the negotiated agreements are in place. The Assembly of Manitoba Chiefs has already encountered difficulties with the political negotiation process in negotiating the fast-track subjects of the *Framework Agreement*: education, emergency services, capital management, and child and family services. From the perspective of the First Nations co-ordinators of the *Education Framework*

Agreement, the negotiations are based upon the conviction that education is a treaty right (Spence 1996b:1). However, Mendel Schnitzer, representing DIAND, refused to discuss the government's position on education as a treaty right. The issue of treaty rights has been left to settle at a later date, which the Federal Government intends to deal with in the final stages of the agreement (Spence 1996b:12). However as the Assembly of Manitoba Chiefs says, "We can't have an agreement on education without dealing with governance, jurisdiction, and inherent rights" (Chow 1996:A5).

The federal government's refusal in 1995 to acknowledge healthcare as a treaty right leads First Nations' Chiefs to be sceptical about the federal government's willingness to acknowledge treaty rights in the final stages of the *Framework Agreement* process (see Spence 1996c:2). Manitoba First Nations and the Federal Government failed to reach an agreement for the transfer of control over the delivery of healthcare services to Manitoba First Nations in February 1995. The Agreement would have begun negotiation of the transfer of $84 million of federal resources to spend annually on the delivery of healthcare services (Lett 1995a). The disagreement revolves around whether health care is recognized as a treaty right or as a matter of government policy. Originally, the Agreement acknowledged health services to First Nations as "an inviolable treaty obligation" (Redekop 1995). However, insistence by the Privy Council Office that the Agreement be amended to say that health care was not a treaty right, but simply an agreement to improve health services for First Nations in Manitoba (Redekop 1995), resulted in a refusal of the Manitoba Chiefs to sign the Agreement. Part of the disagreement stems from differing interpretations of Treaty 6, in which provision for a

"medicine chest" is an obligation of the Crown (Lett 1995a). Recognition of health care as a treaty right would commit the federal government to provide consistent levels of funding (Lett 19995a; Redekop 1995) and to negotiate in good faith as to the suitable contemporary meaning of "medicine chest"; however, as a matter of government policy the federal government would retain the authority to alter both funding levels and the terms of the Agreement unilaterally (Redekop 1995, Lett 1995a).

Local Accountability

As the *Manitoba Framework Agreement Initiative* (FAI) proceeds with negotiations over how First Nations' governments will be structured to exercise jurisdictional authority over their own affairs, accountability will become a critical issue. The FAI is only in the preliminary stages of designing governmental structures which would have the jurisdictional authority to control and distribute resources among and within First Nations communities. The Assembly of Manitoba Chiefs envisions "a central aboriginal government with its own laws, courts, police and executive body" as an outcome of the *Framework Agreement* negotiations (Chow 1996:A5). A central government and administrative structure would share jurisdictional powers with regional and individual First Nations levels of governments (*Council Fire*, December 1996:6). In keeping with the principle of community autonomy (see Marule 1984:42), primary authority would remain with local First Nations' governments, who would delegate authority over specified matters to a central First Nations' government (*Council Fire*, December 1996:6).

Manitoba First Nations leaders are grappling with fundamental questions concerning how systems of political accountability will be established. Ideally, mechanisms of accountability would provide opportunity for debate and the development of consensus in the establishment and administration of laws (*Council Fire*, December 1996:6). The Assembly of Manitoba Chiefs proposes that tribunals be established to resolve both intergovernmental jurisdictional disputes and disputes internal to the community; however the question of what criteria would be considered in resolving disputes remains presently unanswered (Okimow and Peterson 1996:5; *Council Fire*, December 1996:6). There is some concern among Manitoba First Nations that traditional processes and forms of government are not the central focus of the FAI (Muswaggon 1996:7). There is concern that elders feel left out of the FAI process (Maytwayashing 1996:2, 4). There is criticism of the FAI mandate to train a select group of First Nations peoples in the operations of federal departments responsible for administering the affairs of First Nations. To some, this practice is an indication of the danger that self-government will merely imitate a system which does not work for First Nations peoples. Meaningful self-government comes from within First Nations cultures and is based upon traditional practices of governance (see Muswaggon 1996:7).

Conclusions

The project of assimilation is evident in current Canadian Indian policy. *Institutional assimilation* is being achieved by the elimination of separate institutional structures for Indians, and their integration into provincial frameworks of service

delivery (Boldt 1993:79). Federal policies to dismantle the federal bureaucracy of Indian Affairs through actions such as the *Manitoba Framework Agreement*, to devolve jurisdiction for First Nations to the provinces, and to make easier the economic development of First Nations land through amendments to the *Indian Act* (Bill C-79) bear marked similarity to the assimilatory proposals of the *1969 White Paper* (see Spence 1996a:3; Demas 1997:3). These policies to "normalize" political relations between federal, provincial, and First Nations governments and the attenuation of Indian "special status" which they are designed to achieve, reflect a prevailing program of assimilation.

Although the *Manitoba Framework Agreement* provides gains in autonomy for Manitoba First Nations in terms of jurisdictional authority over some areas, the source of this authority remains contested terrain. Current federal self-government policy of the Liberal Government demonstrates a continuation of the federal government's preference for political negotiation and legislative empowerment over legal definitions of self-government as the means of implementing self-government (Canada 1995:3). Although the Liberal Government expresses a willingness to constitutionally entrench self-governing powers, including jurisdictional authority over some matters (Canada 1995:8), there is no explicit agreement on the issues of the inherent right or treaty rights. Claims by the federal government of a willingness to recognize the inherent right to self-government have been made only as a matter of government policy and as Mercredi points out, "a political assertion that the inherent right exists is meaningless" (Seguin 1994:A1).

Moreover, the Government's policy pursues self-government negotiations with

First Nations communities at provincial, treaty or regional levels rather than by a unitary process for all First Nations. By seeking separate self-government agreements the Government aims "to ensure that Aboriginal peoples are never recognized as a people but small communities with no legally-grounded historical ties" (AFN 1995). Thus, the process by which the federal government has agreed to recognize self-government rights, through political negotiation, and its refusal to acknowledge historical treaties as the source of existing treaty rights, raise serious doubt that the inherent right, as conceptualized by First Nations, will be legally recognized by the federal government. The Federal Government has already demonstrated an unwillingness to recognize areas such as education and healthcare as federal treaty obligations (Redekop 1995; Lett 1995; Spence 1996b:1), confirming the concerns of Manitoba Chiefs.

The treaties and the nation-to-nation relationship they represent, are key elements in the approach of First Nations to self-government. The nation-to-nation relationship reflected in treaty-making implicitly recognizes First Nations' sovereignty, and therefore the treaties provide a suitable basis for the legal implementation of First Nations' governments (see Seguin 1994:A10). This is the approach taken by Manitoba First Nations in the negotiation of self-government agreements. Manitoba First Nations Chiefs have insisted upon the recognition of specific matters under negotiation, such as education and healthcare, as treaty rights (Redekop 1995; Spence 1996b:1), and they have opposed provincial participation in negotiation over these matters because they with to maintain the nation-to-nation relationship in which the treaty obligations were made (Nepinak 1996:5; Ferguson 1997:1). Manitoba First Nations view the fulfilment of the

treaties as essential to the implementation of the inherent right of self-government.

CHAPTER FIVE

LOCAL ACCOUNTABILITY: THE CRUX OF MEANINGFUL SELF-GOVERNMENT

Indian Act Governments and Political Accountability

European-Western political systems, in which authority is delegated from above have had detrimental consequences for First Nations, particularly among the prairie nations where decision-making by consensus is a strong tradition (Marule 1984:36). The institutionalization of *Indian Act* governments disempowered traditional systems of accountability and had the result of creating divisions within communities. The electoral system, in which the greatest number of votes elects a candidate is particularly problematic because it permits large families to dominate band councils and exclude other families from the decision-making process (RCAP 1996:133, 136). For some First Nations peoples such a system lacks legitimacy "when a leader can be chosen, for example, from a list of three candidates and be declared winner despite up to 66% of the people voting against him" (RCAP 1996:136). Consensual political systems were replaced by the *Indian Act* system in which only elected chiefs and councillors have a political voice; the voices of elders, women and youth are silenced (RCAP 1996:124).

Band government facilitates an emerging economic class disparity in many reserve communities, where "elite interests are well served by the kind of political and economic system advocated by the Department of Indian Affairs" (Marule 1984:41). Where there exists an elite group which enjoys the privilege of advancing its self-interest

through the management of band affairs, there is resistance to the development of government based upon traditional philosophies which would empower the people and require accountability from their leadership (Marule 1984:41). There is a fear that self-government will exacerbate the social and economic disparity between a *ruling-elite* and a lower-class majority within reserve communities if self-government is assumed within colonial political structures rather than emerging from traditions which facilitate community participation in decision-making (see Marule 1984:41; Boldt 1993:129).

The relative absence of a system of political accountability through which decisions can be appealed by community members is a product of the assimilating function of band government (discussed at length in chapters II and III), which involves the incorporation of bands into a "top-down" bureaucratic decision-making structure. Within this hierarchical structure band government is accountable primarily to the federal bureaucracy responsible for administering its affairs, rather than to its electorate. Funding arrangements with First Nations provide for the approval of program objectives and standards of service delivery by Parliament (DIAND 1996:17). The federal government ensures that First Nations comply with the terms and conditions of the funding agreements through annual financial audits and program evaluations.

The ministerial accountability (accountability to Parliament) of First Nations governments has greater force than local accountability. This situation has not been alleviated by departmental initiatives to increase local autonomy through devolution of the Indian administration to First Nations because devolution initiatives are constrained by the overriding economic mandate of the senior federal bureaucracy. In recent years,

the federal government has implemented more stringent accountability requirements for the use of public funds (see Canada 1995:14; DIAND 1996:16). DIAND's policies to strengthen the ministerial accountability of First Nations' governments are a response to the directives of the Treasury Board and Office of the Auditor General (DIAND 1996:49). The central bureaucracy has criticized the DIAND's practice of entering "fixed-volume" Alternative Funding Arrangements (AFA's) with First Nations and has recommended that compliance, monitoring and accountability frameworks of funding arrangements be strengthened, particularly with respect to the Social Assistance Program and First Nations Child and Family Services (DIAND 1996:29). Rigorous monitoring and compliance measures have been partially responsible for a significant reduction of the Indian and Inuit Affairs Program's growth in expenditures in recent years (DIAND 1996:50). The federal economic mandate to reduce expenditures through strengthened financial accountability to Parliament effectively contradicts the federal government's stated willingness to recognize and give practical effect to the inherent right of self-government (Canada 1995).

The *Indian Act* system of government has contributed to the development of class disparity and the political disempowerment of women within many reserve communities. These inequities, in which a small number benefits, exist as a result of the hierarchical and exclusionary decision-making structure of band government. Self-government is frequently offered as the solution to alleviating these inequities and improving the social and material conditions of the lives of First Nations peoples. However, self-government can only address these issues if it provides for the participation of the community in

decision-making. The accountability of leadership to the community must be strengthened if self-government is to function as an expression of the self-determination of First Nations peoples.

Individual and Collective Rights, and the *Charter of Rights and Freedoms*

A contentious issue among and between First Nations leaders and federal officials has been the application of the *Charter of Rights and Freedoms* to First Nations governments as a means of ensuring their accountability. The Federal Government's *Inherent Right Policy* advances the *Charter of Rights and Freedoms* as the legislation which would ensure the accountability of First Nations governments exercising jurisdiction under self-government agreements (Canada 1995:4). First Nations leaders object to the individualistic frame of reference of the *Charter* as undermining the integral role of the collectivity within First Nations cultures. The focus on the individual does not account for cultural difference of and among First Nations peoples. The federal government's insistence on imposing individual rights legislation on First Nations is another process of institutional assimilation whereby the decolonization of Aboriginal peoples is occurring in line with Western liberal principles of individual rights and opportunity (Boldt 1993:83). The rhetoric of emancipation through equality of individual opportunity serves the 'national interest' by undermining First Nations claims to peoples rights, which are in legal terms applicable only to collectivities and not Indians as individuals (Boldt 1993:84-5). Provincial and federal insistence that the *Charter of Rights and Freedoms*, with its individualistic terms of reference, guide the

decolonization process represent the 'national interest' more than it represents efforts to empower First Nations' peoples (Boldt 1993:85).

Although First Nations' opposition to the overriding individualism of the *Charter* is well founded, the necessity of human rights legislation that protects equality for women is a reality that must be addressed by First Nations leaders. The Native Women's Association of Canada (NWAC) challenges the claim that individual rights are fundamentally at odds with the importance of the collective in First Nations' cultures (see McIvor 1994:1-3). Individual and collective rights are not necessarily opposed to one another. Rights are more frequently assigned to individuals than they are to groups or collectivities because the logical form of rights discourse is individualistic (Bartholomew and Hunt 1990:8). However, although the logical form of rights discourse is individualistic, theoretically there is no reason why a viable discourse of group or collective rights is not possible (Bartholomew and Hunt 1990:8). Reformulating rights discourses in a manner that emphasizes collective rights (Bartholomew and Hunt 1990:18) can advance collective interests.

Other rights limit all rights, individual and collective. Rights are abstract in the sense that anyone can claim them, on any issue, and the onus to demonstrate why a group or individual should, for the sake of the community, be denied a specific right, rests with opponents of that right. Justification for limiting rights is an integral part of democratic process (Bartholomew and Hunt 1990:17). When individual and group rights come into conflict, one may be subordinated to the other for the sake of the welfare of the community (see Van Dyke 1977:350; Svensson 1980:436).

Although the *Charter* does accommodate collective rights by protecting the "aboriginal treaty or other rights and freedoms of the aboriginal peoples" (section 25) from challenge based on the *Charter*, there is still considerable apprehension among First Nations' leaders that the protection of individual rights delineated in the *Charter* would take precedence over the traditional laws and customs of the First Nations (Manitoba 1991:334). This is a legitimate concern. However, it is clear that both individual and collective rights of First Nations peoples are in need of protection. The development of an *Aboriginal Charter of Rights and Freedoms* which would protect civil liberties insofar as they do not infringe upon the collective rights of Aboriginal peoples (see Manitoba 1991:335) would alleviate some of the apparent tension between individual and collective rights.

The Legal System: An Inappropriate Means of Dispute Resolution

Regardless of criticisms of its overly individualistic frame of reference, the *Charter* is an inappropriate vehicle for addressing grievances and effecting social change within First Nations communities. The view that social change occurs fundamentally through the legal recognition of rights which can then be protected by the courts is the liberal "myth of rights" (Hunt 1990:309). Legal strategies directed toward achieving formal equality are ineffective at bringing about genuine social change (Bartholomew and Hunt 1990:30), which occurs in arenas other than and in addition to the discourses of law. For these reasons, legal rights protection such as the *Charter* ought not to be the *primary* means by which accountability of First Nations governments is ensured.

There are a number of reasons why the legal system is an inappropriate means of addressing disputes within First Nations communities. The Canadian legal system is a culturally foreign system whose imposition on First Nations peoples is largely a negative experience (Manitoba 1991:252). Systemic discrimination against Aboriginal peoples within the justice system is reflected in an over representation of Aboriginal peoples incarcerated in penal institutions and an under representation of Aboriginal peoples as administrators of justice (Manitoba 1991:253). A general mistrust of the system and serious doubt concerning its ability to resolve conflicts results in an unwillingness of individuals to utilize the justice system as a means of addressing both civil and familial legal problems (Manitoba 1991:253).

The inability of the Canadian justice system to resolve conflicts within First Nations' communities arises in part from the application of culturally foreign values and adversarial processes in the delivery of justice. The justice system does not readily accommodate traditional values and practices which aim to restore peace within the community (Manitoba 1991:253). The philosophy of the Canadian justice system emphasizes the punishment of deviant behaviour as a means of ensuring conformity and the well-being of other members of society (Manitoba 1991:22; Dickson-Gilmore 1992:486). First Nations' justice systems are oriented toward restoring peace through reconciliation of the offender with the person(s) wronged. This emphasis on atonement and restitution are not reflected in the Canadian justice system (Manitoba 1991:27, 36; Dickson-Gilmore 1992:486). Incarceration or probation as the consequence for an offence essentially relieves the offender of his or her responsibility for restitution to the

victim (Manitoba 1991:37).

Another reason why the legal system lacks legitimacy for many First Nations peoples is because community members are marginalized from the processes by which justice is administered. First Nations' processes of dispute resolution provide an opportunity for all interested parties to offer their opinions and advice on the matter. This is very different from the legal system, where only select witnesses may testify on subjects deemed admissible by the court and where questions can be asked in a manner that dictates the answers (Manitoba 1991:36). Moreover, community involvement in administering justice is further obstructed by the tendency for court hearings to take place outside the community in which the offence occurred. As such, justice is delivered according to cultural values and practices which have little relevance in many First Nations' communities (Manitoba 1991:253).

Finally, socio-economic barriers exist which make the legal system inaccessible to many First Nations peoples, particularly as a means of pursuing protection of one's civil rights. This is because civil matters are generally adjudicated only in urban centres which means that many First Nations peoples who can not afford the expense of travelling are unable to pursue their legal rights (Manitoba 1991:254).

If the legal system is an inaccessible and ineffective means of resolving disputes between community members and of ensuring civil rights and accountability of government, it is essential, then, to consider how government accountability can be strengthened and developed in the context of First Nations' self-government. The remainder of this chapter addresses this question and argues that government

accountability and dispute resolution mechanisms that are based upon traditional philosophies of leadership and community, particularly the value of consensus-building in decision-making, are crucial to the development of a meaningful self-government.

Traditional Philosophies as the Foundation of Self-Government

Rather than adopt the top-down hierarchical structure of European-Western political systems, as advanced by federal policy, some First Nations peoples propose that traditional decision-making processes be revitalized in the development of First Nations' government (see Marule 1984:41; RCAP 1996:115). "Reassertion of the peoples' authority is a critical issue if Indian government is to have any real meaning" (Marule 1984:41). It is argued by some that the empowerment of First Nations peoples can be achieved through a revival of consensual political systems and traditional systems of leadership and leadership selection. Traditionally, accountability of leadership was embedded in the political system, through community participation in decision making and leadership selection. Leadership was based upon the premise that authority to carry out specified responsibilities could be collectively delegated to a leader who had earned the respect of the entire group (Marule 1984:36; Mansfield 1993:346). Frequently leadership positions were held temporarily and leadership functions were often dispersed among community members (Marule 1984:36; Mansfield 1993:346; RCAP 1996:131). Under this system of leadership authority always remains with the peoples (Marule 1984:36).

An essential process in the empowerment of First Nations peoples is decision

making which provides for the participation of all community members on matters of common interest (Marule 1984:36; RCAP 1996:135). Within many First Nations, despite variety in their forms of government, the process of consensus decision-making is a fundamental component of traditional government (Mansfield 1993:347; RCAP 1996:134-5). Consensus decision-making is a cultural tradition which provides the most effective and appropriate means of establishing First Nations' community self-government (see RCAP 1996:134). Among most First Nations, the family is the basic decision-making unit where discussion begins and all family members can participate (RCAP 1996:135). The central role of the family as an autonomous decision-making structure was particularly characteristic of First Nations that historically had a decentralized system of government (Mansfield 1993:339; RCAP 1996:134). The family-based consensus process, although it has been displaced by the elective system, should be fostered as a means of leadership accountability by making community decision making accessible to families (RCAP 1996:136). Accessibility of decision-making structures is necessary for First Nations' governments to represent collective interests adequately and thereby gain legitimacy among their members (RCAP 1996:136).

Strengthening Local Political Authority and Accountability

Marule proposes that First Nations establish a political system of tribal confederacies which would enhance the peoples' authority by situating political authority ultimately at the local level, within the family-clan group and/or band community

(1984:41-42). When authority resides in the smallest political unit traditional systems of leadership and consensus in decision-making can be revitalized. Band constituents in whom ultimate political authority is vested would delegate the authority of larger political units, such as tribal councils and tribal confederacies. In accordance with tradition, both tribal councils and confederacies would function with specified responsibilities and limited authority to address matters of shared concern to individual bands (Marule 1984:42).

Larger political units such as tribal confederacies which encompass several smaller communities would serve a co-ordinating function (Marule 1984:41) which is essential to the establishment of a First Nations' "political unit which can negotiate effectively with the government of Canada" (Marule 1984:42). In the process of establishing a united body of First Nations that can voice shared concerns it is critical that the autonomy of local communities, which is an essential quality of traditional governments, not be diminished (Marule 1984:42). The tendency toward "rule by bureaucracy" characteristic of the DIAND is curtailed by the delegated nature of tribal government authority, which would remain with the people (Marule 19884:42).

Restorative Justice: Tribal Courts and Peacemaker Courts

Initiatives in the field of restorative justice which promote tradition-based systems of justice provide insight into the question of how traditional accountability mechanisms can be established in First Nations' communities. The tribal court system in the United States was recommended by the *Manitoba Aboriginal Justice Inquiry* as a

model for the development of Aboriginal courts in Manitoba (Manitoba 1991:268-298).

The "domestic dependent nationhood" status of First Nations in relation to the American federal government involves recognition of a significant degree of First Nations sovereignty and has enabled tribes in the United States to retain greater control over their internal affairs than First Nations in Canada (Manitoba 1991:271; Griffiths and Yerbury 1984:157). In 1934 the *Indian Reorganization Act* (IRA) empowered First Nations to establish tribal courts through the enactment of their own tribal constitutions and laws. Although tribal constitutions and laws are subject to the approval of the Bureau of Indian Affairs, in practice tribal courts have largely unlimited jurisdiction in both civil and criminal matters involving tribal members (Manitoba 1991:278, 280).

The *Manitoba Aboriginal Justice Inquiry* suggested that tribal courts, based as they are upon tribal laws, are able to address a broader range of issues than are traditional means of dispute resolution (Manitoba 1991:294). Members perceive the tribal courts as a means of protecting their cultures through the development and application of their own laws and customs (Manitoba 1991:296). However, there are limitations to the tribal court system. First, some tribal courts are criticized for being influenced by local political forces, although this problem is being remedied "through tribal constitutional provisions which guarantee the separation of the judiciary from the legislative and executive arms of tribal government" (Manitoba 1991:295). Second, tribal courts are primarily structured upon the Anglo-American legal system and with some exceptions, have not drawn extensively on traditional means of dispute resolution. However, the higher degree of institutional flexibility of tribal courts has enabled some tribes to

develop contemporary traditional justice systems which emphasize mediation and consensus-building (Manitoba 1991:297). The Western legal structure of tribal courts poses the threat that tribal courts will become over-professionalized and result in the exclusion of First Nations members from the justice process (Manitoba 1991:295). These criticisms of the tribal court system point to discrepancies between the adversarial approach of the common law system and traditional values of harmony and reconciliation (Manitoba 1991:296). However, the *Manitoba Aboriginal Justice Inquiry* concludes that tribal governments can effectively bridge the distance between the disparate Anglo-American legal system and traditional justice systems.

The Saddle Lake First Nation in Alberta has proposed a system of justice that appears similar in some respects to the American Tribal Courts. According to this proposed system, a "tribunal of jurors" with powers established by chief and council through statutes would be established to resolve disputes (Harding and Spence 1991:19). The Saddle Lake Tribe seeks to establish complete jurisdictional and functional control over criminal and civil matters upon the territory of the tribe (Harding and Spence 1991:20).

Peacemaker Courts

The establishment of traditional Peacemaker Courts by some First Nations in the United States and Canada is an example of restorative justice which is designed to return responsibility for the administration of justice to the community. The Navajo Peacemaker Court is perhaps the most widely known and highly developed modern

traditional justice system. Unlike the process of adjudication in the Anglo-American legal system, in which decisions are made in a hierarchical structure and enforced using coercion (Bluehouse and Zion 1993:328), the process of mediation used in the Peacemaker Court emphasizes persuasion and guidance as a means of restoring harmony between the disputants (Bluehouse, Zion 1993:332, 329). Traditional Navajo systems of justice are based upon the clan system in which clan members play a key role in resolving disputes and restoring the unity of the clan. The authority of the peacemaker is not coercive, but rather persuasive and based upon respect for traditional Navajo values and the peacemaker's knowledge of them (Bluehouse and Zion 1993:335, 332). The peacemaker court is a more appropriate system of justice for First Nations communities because it emphasizes reconciliation and group solidarity using elements of mediation and arbitration which involve the disputants as active participants in the process (Bluehouse and Zion 1993:335).

The Navajo Peacemaker Court is a model for other First Nations who want to re-establish the community's role in the administration of justice. The structure of the peacemaker court is based upon key values which are shared by many First Nations peoples. The persuasive or influential role of the peacemaker is typical of traditional leadership systems in many First Nations where coercive authority is a foreign concept (Bluehouse and Zion 1993:332). The peacemaker court provides a forum in which cultural values are taught and disputes can be resolved according to the traditional values of the Nations utilizing them.

Some First Nations in Canada have proposed systems of justice that incorporate

elements of the Peacemaker Court. The Mohawk Nation at Kahnawake has proposed that a Longhouse justice system be implemented in its community. In this clan-based system, clan leaders would hold a community council to hear and resolve disputes (Dickson-Gilmore 1992::486-487). Similarly, the Saddle Lake First Nation in Alberta has proposed that a Peacemaker be established to work in conjunction with the "Tribunal of Jurors" discussed above (Harding and Spence 1991:19).

The tradition of peacemaking in restorative justice can also be expanded to function as a system of political accountability of First Nations' governments. Delia Opekokew (1986) proposes that peacemaker tribunals could be established using elements of peacemaker courts to provide an appeal and review process of band council decisions affecting the community (Opekokew 1986:22). Peacemaker tribunals would also be oriented toward reconciliation through mediation (Opekokew 1986:18) and would review decisions in light of their own cultural values (Opekokew 1986:22); thus knowledge of the language and culture of the community is the most important quality of a peacemaker (Opekokew 1986:18).

In order for Peacemaker tribunals to gain legitimacy among community members as a mechanism of political accountability they must be free to operate at a distance from the band council or First Nations' government. The independence of Peacemaker tribunals can be accommodated by implementing a consensual system of selecting peacemakers, rather than having them function as appointees of the band council (see Opekokew 1986:18). The Teslin Tlingit Government in the Yukon, which has restored its traditional clan-based system of government, has established a justice council which is

comprised of the five clan leaders, thereby dispersing decision-making authority equally among the clans within the community (RCAP 1996:259). Each clan, which selects its own leaders to participate in the various legislative, executive, justice functions of the Teslin Tlingit government, also has its own peacemaker court to ensure further accountability from their leadership (RCAP 1996:259).

Peacemaker Courts are an appropriate means of dispute resolution because the responsibility for the administration of justice rests with the community, and can involve clan and family members. Moreover, peacemaking is appropriate because it emphasizes the importance of group solidarity, which is reflected in the objectives of reconciliation and restoration of peace between disputants. Peacemaker tribunals, which would provide a process of appeal and review of government decisions, would make decisions based upon the cultural values of the community affected by them. A First Nations *Charter*, which protects both individual and collective rights and which is endorsed by the community, could provide a guide for the Peacemaker tribunals. The combination of peacemaker tribunals and a traditional system of leadership in which leadership functions are dispersed among community members, such as the clan-system of government of the Teslin Tlingit First Nation, has the potential to provide a significant degree of leadership accountability.

CHAPTER VI

CONCLUSION

Chapters II and III of this thesis emphasize that the legislative and bureaucratic structures administering Indians are instruments of domination through which the combined projects of protection, civilization, and assimilation work. The federal government claimed exclusive constitutional jurisdiction over Indians in section 91(24) of the *Constitution Act*, (1867), and enacted legislation, the *Indian Act*, (1876), that is pervasive both to the extent that it regulates the social, political and economic conditions of the lives of First Nations peoples, and to the extent that it grants sweeping powers to the Indian Affairs Branch of the federal government. This legal and political structure concentrated political authority in a way that facilitated intensive social control over First Nations peoples (Gibbins and Ponting 1986:22-23; Satzewich and Wotherspoon 1993:29).

Assimilation in particular has been historically, and continues to be, a pervasive feature of Canadian Indian policy. The segregation of institutional structures governing Indians gave rise to a system of tutelage and intensive cultural regulation which was designed to assimilate and to eliminate the special status of First Nations peoples (see Jamieson 1978:38; Gibbins and Ponting 1986:26; Satzewich and Wotherspoon 1993:31). In the post-war era, when the Canadian public had given the federal program of tutelage and the intensive government regulation of Indians critical appraisal, the federal government accelerated its program of assimilation through its *integration* policy. This policy, which was oriented toward the elimination of the legal structures segregating

Indians, Indian status, and Indian reserves (Dyck and Waldram 1993:9), reflected a prevailing commitment to formal equality (Fleras 1996:158) as the solution to the poor socio-economic conditions of Indian reserves. Proposals to eliminate the special legal status of Indians and to repeal the *Indian Act* re-emerged in the 1969 *White Paper*, and were likewise cloaked in a discourse based on the premise that the removal of the legal basis of discrimination would provide equal opportunity for Indian participation in Canadian society (DIAND 1969:6, 9).

The existence of separate legislative and bureaucratic structures for Indians lends support to First Nations' claims to special political and legal status. The special trust relationship of First Nations with the federal Crown is established in the *Royal Proclamation* (1763), in which the "several Nations or Tribes of Indians ... should not be molested or disturbed" on unceded territory being "reserved" Crown land. This special relationship is further recognized in section 91(24) of the *Constitution Act* (1867), in which the federal government is allotted exclusive jurisdiction over "Indians and lands reserved for Indians" (Clark 1990:51). Despite resentment of the *Indian Act* and its administration as obstacles to self-determination, the *Indian Act* and the constitutional basis of special status are valued for providing First Nations with special rights (Weaver 1993:82). The term "citizens plus" has been applied to and adopted by First Nations to signify this special status (see Weaver 1993:91). The term was initially coined in the *Hawthorn Report*, wherein it meant that "in addition to the normal rights and duties of citizenship, Indians possess certain additional rights as charter members of the Canadian community" (Hawthorn 1967:6). First Nations argue that their trust relationship with the

Crown includes federal financial responsibility for programs for Indians, and they demand that the federal government continues to honour these obligations (Pratt 1989:23).

Constitutional and judicial decisions suggest that section 91(24) ensures federal responsibility for Aboriginal peoples as a part of their trust relationship. Section 91(24) is more than a grant of legislative power to the federal government which can be applied or not applied strictly as a matter of government policy (Pratt 1989:45). However, the federal government has ignored this interpretation of Section 91(24) and has eliminated and downsized federal programs for Indians through legislative amendment without acknowledging any neglect of its fiduciary obligations (Pratt 1989:21). Currently Indian special status is being undermined by federal "self-government" policies that aim to devolve administrative powers to Indian bands and to transfer jurisdictional authority over Indians to the provinces.

The federal government views devolution of administrative responsibility for programs financed and regulated by the federal government to Indian bands as an assumption of "self-governing" responsibilities. However, devolution functions to incorporate First Nations into the Canadian political structure, and as such it is actually a mechanism of assimilation. Moreover, devolution is a process by which First Nations assume responsibility for administering the very system which functions to promote their assimilation. This was the result of the *1985 Amendments to the Indian Act*, which aimed to remedy gender discrimination in the *Act* but which ultimately had the effect of empowering bands to exclude reinstated members from residing on reserve, some of

which were compelled to do so because of inadequate resources to accommodate them.

Constitutional normalization is evident in federal self-government policies that advocate the transfer of federal constitutional jurisdiction over Indians to the provinces. The *Inherent Right Policy* (Canada 1995) seeks to share the cost of self-government between federal, provincial and local Aboriginal levels of government (Canada 1995:14). As such, this Liberal policy is consistent with the objective of constitutional normalization which is part of the federal strategy to relinquish its fiduciary responsibility for Indians. Moreover, the federal government's position that self-government must be consistent with the social and economic mandates of federal and provincial governments (Canada 1995:14) means that there is a significant probability that the autonomy of First Nations' governments will be severely restricted under these self-government arrangements. The Federal Liberal Government does recognize the need for Aboriginal jurisdictional authority over some matters. However, according to the *Inherent Right Policy*, Aboriginal jurisdiction is subordinate to provincial and federal mandates in that provincial and federal laws would apply if they came into conflict with Aboriginal laws (Canada 1995:6).

First Nations' leaders involved in the *Manitoba Framework Agreement* oppose provincial participation in the self-government negotiations over matters that come under provincial jurisdiction. First Nations maintain that the treaties they made with the British Crown obligate the federal government to honour its treaty responsibilities. The nation-to-nation relationship of treaty-making leaves no role for the provinces in the self-government negotiations (Nepinak 1996:5; Ferguson 1997:1).

Constitutional Entrenchment of the Inherent Right

Aboriginal political leaders have been engaged in an on-going struggle for the constitutional entrenchment of an explicit statement that self-government is an inherent right of Aboriginal peoples (Frideres 1988:347; Cassidy and Bish 1989:16). However, the federal and provincial governments have refused to endorse constitutional recognition of an undefined right to self-government (Canada 1991). Rather, the federal government has repeatedly demonstrated a preference for political negotiation over the terms of self-government prior to their constitutional entrenchment, and for the legislative empowerment of First Nations governments within the existing federal-provincial framework of services and legislation (Frideres 1988:351-2; Long and Boldt 1988:17; Clark 1990:10). Legislative-based self-government policy does not recognize the inherent right of self-government as an independent source of authority from which independent government institutions can be developed in the implementation of self-government. Moreover, legislative-based agreements are problematic for First Nations because the federal government can unilaterally amend them.

The Liberal Government's *Inherent Right Policy* (1995) gives the appearance of accepting that First Nations are a distinctive peoples in its stated willingness to constitutionally entrench the inherent right of self-government as a treaty right. However, the Liberal Government's policy does not deviate from previous policy in that it is only willing to entrench self-government rights once politically negotiated self-government agreements have been reached. The *Inherent Right Policy* seeks practical

self-government arrangements enacted by legislative authority of Parliament and within the existing constitutional structure (Canada 1995:3).

First Nations in Manitoba are engaging in political negotiations over the terms of self-government through the *Framework Agreement*, even without any constitutional reference to the inherent right to self-government. The process of negotiating the terms of self-government prior to their constitutional entrenchment as treaty rights and as inherent rights is inconsistent with the notion that the inherent right is an existing right of First Nations as historically distinct peoples in the founding of Canada.

Without an explicit reference to self-government in the Constitution, First Nations leaders fear that there is no legal protection for them if the federal government fails to meet its obligations in the negotiated agreements (*Peoples' Decision* 1996:2). The refusal of the federal Liberal Government to recognize health care and education as treaty rights raises doubts about the integrity of the federal government's commitment to recognizing the inherent right as a treaty right within section 35 of the Constitution Act (see Canada 1995:3).

The recognition of health care and education as treaty rights would require the federal government to provide consistent levels of funding over these areas. However, as matters of government policy, the levels of funding and the terms of funding agreements can be unilaterally altered by the federal government (see Redekop 1995:A1; Lett 1995a:A3). The willingness of the Liberal Government to recognize the inherent right has been expressed only as a matter of government policy and is therefore not a legally binding claim for the current regime or for successive governments (see Seguin

1994:A1).

Autonomy and Accountability as Related Issues

This thesis has also raised accountability of First Nations' governments exercising self-government powers as a parallel and related issue to the autonomy of First Nations' governments. The incorporation of First Nations into the hierarchical decision-making structure of the DIAND through the establishment of band government (Valentine 1980:75; Buchanan 1995:97-8) and the rigorous accountability requirements of band governments for the use of public funds creates a situation in which there is a weak structure of local political accountability. Devolution has failed to increase local autonomy because the federal government has also strengthened the accountability requirements for the use of public funds. This is particularly true of the First Nations Social Assistance Program and Child and Family Services (DIAND 1996:29) which are the two areas that First Nations have assumed the greatest responsibility for administering. The situation in which accountability to Parliament is paramount over accountability to the band's electorate must be reversed under self-government in order for First Nations' peoples to reassert their political authority. This thesis advocates a form of self-government that is autonomous from the Canadian governments in governing local affairs, and which has a strengthened system of local political accountability that provides an opportunity for all community members to participate in decision-making. However, the devolution of the Indian administration to bands through the hierarchical decision-making structure of the DIAND continues to marginalize the

majority of First Nations *peoples* from decision-making processes (Boldt 1993:129).

The hierarchical authority structure of band government, and the resultant divisions and factions it creates within reserve communities is a fundamental problem with local First Nations' government as it exists among most communities. The electoral *Indian Act* system of government is criticized for vesting political authority in a small number of elected individuals, and thereby excluding the majority of band members from decision-making processes. Economic development of communally held reserve land tends to establish an elite group because the hierarchical authority structure of band government allows it to advance its own self-interest (Marule 1984:41). Gender discrimination in the *Indian Act* historically excluded women from band politics, which today are largely male-dominated and continue in practice to marginalize the political voices of women. The class/gender divisions created by *Indian Act* governments have negative consequences for most First Nations peoples who have no means of infiltrating local politics or appealing decisions that affect the community as a whole.

It is precisely because self-government, conceived of as a means of exercising the right of self-determination (see RCAP 1996:108-109) is so frequently offered as the answer to improving the socio-economic conditions of Indian reserves that the question of how self-government will be different is so crucial. If self-government is not structured to accommodate community participation in decision-making and leadership accountability, class/gender inequities will likely be perpetuated and ultimately self-government may risk its own demise because it will lack legitimacy for most First Nations peoples.

Areas for Further Research

This thesis began with a critical evaluation of the relationship between anthropology and public policy respecting Indians historically. However, there has emerged within the discipline an approach to public policy that aims to improve relations between First Nations and the nation-state (Dyck and Waldram 1993:19). Anthropology, with its distinct participatory-observation mode of ethnographic inquiry and its emphasis on a holistic approach to understanding specific phenomenon is well positioned to produce research that is relevant to the development of public policy (Dyck and Waldram 1993:25, 28). Moreover, in comparison to other disciplines, anthropology has more often tended to consider the impacts of particular policies at the local level (Dyck and Waldram 1993:18). Recently, the ethnographic tradition of participatory-observation has been modified to accommodate "community-based" methodologies in which the people under investigation are actively involved in the planning and analysis of the research (Dyck and Waldram 1993:26).

This thesis points to the benefits of community-based research which would consider the viability of particular political structures as the basis of First Nations institutions exercising self-government powers. While the thesis points to the necessity of strengthened systems of political accountability, it explores only briefly the actual structures and mechanisms that can be employed to this end. This is in part because cultural variance among First Nations suggests that different political structures would be implemented according to the traditions of the communities utilizing them. Thus a

community-based approach is needed. Moreover, I have argued that self-government should be based upon traditional systems of government and therefore it must necessarily emerge from the grassroots. Participatory-Action Research would provide a locally determined means of measuring the success of political accountability.

Another area for further investigation is the policy-making processes of the federal government. Chapter IV briefly addressed this issue, and argued that the autonomy of the Indian Affairs Branch to implement policies is significantly limited by the mandate of the senior federal bureaucracy. This Chapter has not, however, made any suggestions as to how this problem might be resolved. In particular, an analysis of public policy-making with respect to Indians is relevant in addressing the question of how First Nations can negotiate the terms of self-government with federal officials. There are several interests competing with Aboriginal interests in the making of Indian policy that are given priority within the federal bureaucracy. Clearly, decision-making structures within the framework of the federal bureaucracy itself pose obstacles to the implementation of self-government. This is a problem that this thesis does not address but which is an area for further research.

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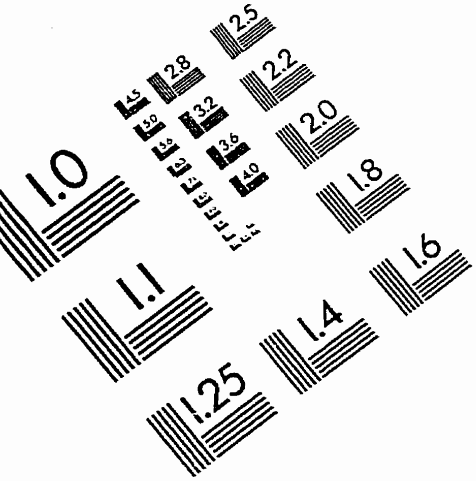

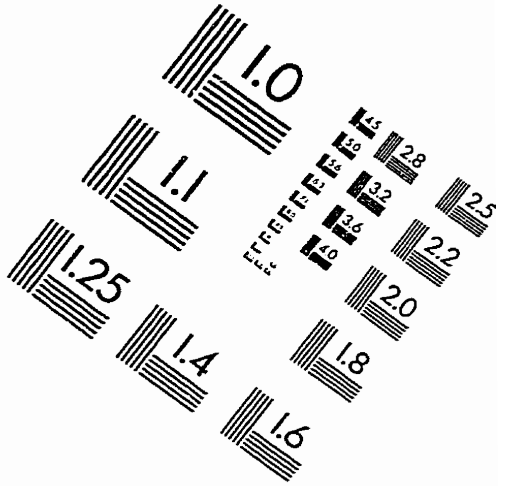

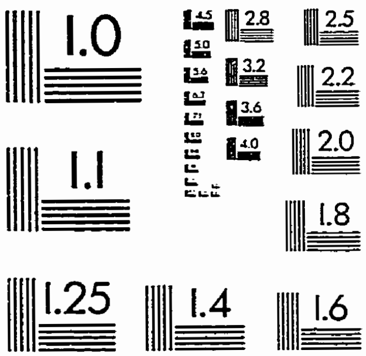

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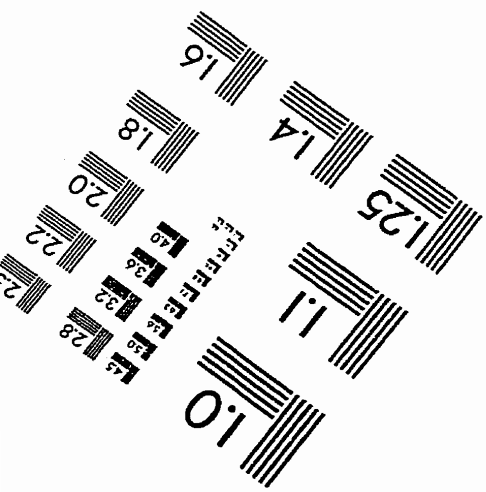

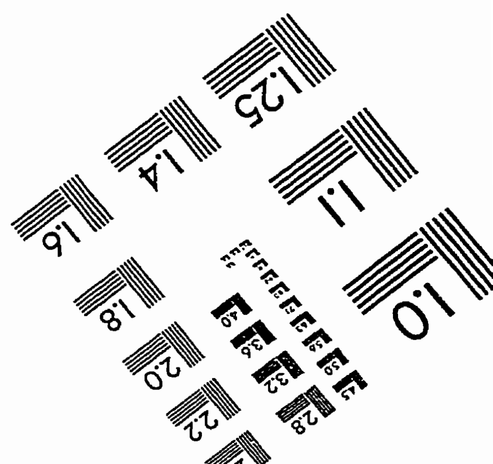

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