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THE INHERENT RIGHT POLICY:
A BLENDING OF OLD AND NEW PARADIGM IDEAS

by
Christine Loth, BA

A thesis submitted to
the Faculty of Graduate Studies and Research
in partial fulfilment of
the requirements for the degree of

Master of Arts

Department of Canadian Studies

Carleton University
Ottawa, Ontario
November 8, 1996
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the degree of Master of Arts

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ABSTRACT

The purpose of this research is to examine whether or not a new Aboriginal self government policy paradigm has emerged. In August 1995, the federal government released a new policy on Aboriginal self government entitled The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self Government. In adopting this policy the federal government acted on its promise to implement self government for Aboriginal people and views this policy as the cornerstone of its approach to build new partnerships with Aboriginal people. The intent of this thesis is to demonstrate that while this policy is representative of a shift in the self government policy paradigm it does not represent a new paradigm. An examination of this policy will show that while ideologically it represents a new policy approach to implementing self government for Aboriginal people it falls short of creating a new self government policy paradigm.

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- Appendix C Interview Questions
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ABBREVIATIONS

ADM	Assistant Deputy Minister
AFN	Alternative Funding Arrangements
AFN	Assembly of First Nations
CAP	Congress of Aboriginal People (Formerly NCC)
CBSG	Community Based Self Government
DIAND	Department of Indian Affairs and Northern Development
DOF	Department of Finance
DOJ	Department of Justice
FPRO	Federal Provincial Relations Office
FMC	First Ministers Conference
FTP	Flexible Transfer Payment
HC	Health Canada
HRDC	Human Resources Development Canada
IAP	Indian and Inuit Affairs Program
IST	Industry, Science and Technology
IPC	Inuit Tapirisat of Canada
JBNQA	James Bay and Northern Quebec Agreement
MIAND	Minister of Indian Affairs and Northern Development
MNC	Metis National Council
MMF	Manitoba Metis Federation
NAHA	National Aboriginal Housing Association
NAPC	National Association of Friendship Centres
NCC	Native Council of Canada
NFN	Negotiating First Nations
NWAC	Native Women's Association of Canada
PCO	Privy Council Office
RCAP	Royal Commission on Aboriginal Peoples
TB	Treasury Board

CHAPTER ONE: THEORETICAL FRAMEWORK

The IR policy needs examination from a policy-making perspective. Thus, it is essential to define the parameters of the field of public policy. A common definition of public policy is cited as: "whatever governments choose to do or not to do" (Brooks, 1993:12). While public policy does result in either action or inaction on the part of the government, this definition neglects to define the true dynamics of policy-making in that it does not delineate the nature, source and scope of public policy. A clearer definition would be one that defines public policy as: "a set of interrelated decisions taken by a political actor or group of actors concerning the selection of goals and the means of achieving them and that in principle these decisions should be within the power of these actors to achieve" (Doern & Phidd, 1992:XX). Public policy then in practical terms represents the goals or mandate of the political actors or government which adopts them. In adopting a public policy a government is setting forth its plan for how a particular mandate should be implemented.

How is public policy created? Is it created within a rational environment in which policy makers devise policy as a logical response to issues of government and public concern, or is it an ad hoc reactive response? The most commonly cited theoretical approaches to public policy are: rational, incremental, pluralist, public choice, environmental determinism and class-corporalist. What follows is a very

government has failed to adequately address the issues confronting Aboriginal people (Weaver 1996, 1997; Weaver 1994; Gordon et al. 1994). In response to the call to re-construct the self-government policy paradigm, the current federal government has adopted the new IR policy approach to self-government, but does this particular policy really offer a new approach to self-government? Does the IR policy approach alter the status quo or merely tinker with it? Is this policy approach representative of a new self-government policy paradigm?

This thesis will assess the IR policy to determine whether or not this policy responds to the call for a new paradigm. It will demonstrate that a paradigm shift which began in the 1980s has been furthered with this policy approach. However, it will show that the IR policy does not represent a new self-government policy paradigm. Instead, it will be demonstrated that the IR policy represents a convergence of old and new paradigm ideas.

In addition, this thesis will assess those factors that have influenced the development of the IR policy. I will examine the ideas on which the policy is premised, the roles of those involved in its development and the process in which it was developed. The principal questions that will be addressed within this thesis are: Does this policy correspond with the overall Aboriginal policy objectives of the federal government? Does this policy respond to the desires of Aboriginal people? and How is the IR policy different from previous policy approaches?

Chapter Three will explore the development of the IR policy. An examination of the roles of the various policy actors will demonstrate that there is not a unified vision of Aboriginal self-government. However, this chapter will also demonstrate that there are several common principles which influenced the federal government's development of the IR policy. Based on this analysis, I will later argue that in developing the IR policy, the federal government focussed more on the perspectives and interests of non-Aboriginal groups than it did on those of Aboriginal groups.

Chapter Four will examine the IR policy and outlines its major elements. This chapter will explore the main ideas of the policy and those ideologies, paradigms and objectives in which it is rooted. The critical assessment conducted in this chapter will demonstrate that the IR policy approach merely linkers with previous self-government policy approaches and does not represent a new policy paradigm.

The final chapter of this thesis will summarize my argument that the IR policy is not representative of a new Aboriginal self-government policy paradigm. It will also outline policy issues that need to be further explored and make recommendations for changes to the IR policy framework.

Throughout Chapter Two the term 'Indian' has been used rather frequently. The reason for the use of this term relates to the fact that the documents examined within this section refer to the term 'Indian'. When the term Aboriginal is used within Chapter Two, it is done within the context of my own analysis or because the documents under examination did so. If the term Indian is used, it is done to maintain consistency with the choice of the author(s) of the documents under examination.

Limitations

In an attempt to establish a new relationship with Aboriginal people, the federal government has undertaken other initiatives such as Manitoba Dismantling² and the creation of Nunavut³. However, the focus of this thesis will only be to examine the IR policy.

A primary constraint of the research conducted in this thesis is that there is a general lack of information available on the IR policy. An attempt was made to gain access to the perspectives and policy analysis conducted by several national Aboriginal organizations. The following organizations were contacted for information

² On December 7, 1994, a framework agreement was signed to begin the process of dismantling the operations of the DIAND as they affect First Nations in Manitoba. The framework agreement establishes two other objectives: to develop and recognize Manitoba First Nations governments' authorities and institutions, and to restore to Manitoba First Nations governments the jurisdictions currently held by the DIAND and other federal departments (Canada, 1995:7)

³ Passed on June 10, 1993, the *Nunavut Act* establishes the legal framework for the Nunavut territory and government. The territory and Government of Nunavut will be established April 1, 1999, and will have jurisdictional powers and institutions similar to those of the territorial governments (DIAND, 1996, Info. Sheet).

concerning their perspective on the policy: AFN, CAP, MNC, ITC and NWAC. This search for information yielded limited results. At the time of writing, the AFN was the only one of these organizations to have conducted an in-depth analysis of the policy. Consequently, the analysis in this thesis conducted on the perspective of Aboriginal groups has been based on press releases, media accounts and the limited policy analysis available.

It is extremely difficult to gain access to the level of involvement of structural organizations such as the Prime Minister and his Cabinet in the development of public policy. Consequently, this research has focused on the roles of the bureaucracy, interest groups, provincial structures and policy communities.

The implementation of self-government is very closely tied to economic development and land claim settlements. However, due to the sheer breadth of these issues, it is not possible to examine them within the scope of this thesis. While I acknowledge the importance of these issues to the implementation of self-government in Aboriginal communities, the purpose of this thesis is to examine self-government from a policy-making perspective.

The scope of this thesis limits the discussion of self-government to the period from 1983 to the present. The choice to begin the discussion in 1983 is based on the release in that year of the "House of Commons Report of the Special Committee on Indian Self-Government in Canada" (Penner Report). This report is seen as a key point of change in the direction of policy-making with respect to

self-government (Gibbins and Ponting, 1984; Cassidy and Bish, 1989).

Perspective

This thesis is written from the perspective of a non-Aboriginal studying Aboriginal issues and working within the Aboriginal policy field. The ideas presented in this thesis do not, nor should they, claim to speak for Aboriginal people. In my academic endeavours, I have come to acquire an understanding (limited, of course, by my own background) of the history of Aboriginal people in Canada and a respect for their desire to change their relationship with the federal government. It is from this perspective then that I have assessed the IR policy and its development.

Methodology

The research for this thesis has been conducted from an interdisciplinary approach and has focussed on the following disciplines: history, public administration and political science. I have gathered my research primarily from four sources: government documents and reports, published materials, newspaper articles and personal interviews. To develop the theoretical and historical sections of this thesis, I rely primarily on published materials for my research. In conducting my analysis of the IR policy, I rely on a combination of both government documents and reports and published materials. Within the discussion of the framework in which this policy was created, I rely on information obtained through

personal interviews, newspaper and magazine articles and some published material.

Interviews were conducted by the author with federal officials who were involved in the development of the IR policy or who are currently involved in implementing it. The interviews were conducted on a confidential basis with the assurance given by me that those interviewed would not be directly quoted. A list of the questions asked in these interviews can be found in Appendix B.

Outline of Chapters

Chapter One will develop the theoretical framework of this study. Within this chapter, I will outline the theoretical frameworks of Richard Simeon and Bruce Doern and Richard Phidd for studying the development of public policy. In addition, this chapter will examine Thomas Kuhn's theory of the paradigm shift. Building on the theoretical approaches of Simeon, Doern and Phidd and Kuhn, I will conclude this chapter with the development of my own conceptual framework through which to assess the IR policy.

Chapter Two will examine the federal government's failed constitutional, legislative and administrative attempts to implement Aboriginal self-government. Beginning with a brief discussion of the *Constitution Act, 1982* this examination of the previous fifteen years of self-government discussion and debate will demonstrate that during this period, an ideological shift of the self-government policy paradigm began.

Chapter Three will explore the development of the IR policy. An examination of the roles of the various policy actors will demonstrate that there is not a unified vision of Aboriginal self-government. However, this chapter will also demonstrate that there are several common principles which influenced the federal government's development of the IR policy. Based on this analysis, I will later argue that in developing the IR policy, the federal government focussed more on the perspectives and interests of non-Aboriginal groups than it did on those of Aboriginal groups.

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How is public policy created? Is it created within a rational environment in which policy makers devise policy as a logical response to issues of government and public concern, or is it an ad hoc reactive response? The most commonly cited theoretical approaches to public policy are: rational, incremental, pluralist, public choice, environmental determinism and class-corporalist. What follows is a very

brief summary of the ideological premise of each of these theoretical approaches.

The rational approach to public policy maintains that policy makers have a clear set of policy goals which they pursue through the most efficient means. In contrast, incremental policy-making is what Charles Lindblom referred to as "the science of muddling through" (Jackson and Jackson, 1986). Rather than responding to a clear set of policy goals, incremental policy-making examines existing policies and seeks options to alter the status quo. The pluralist approach views public policy as the result of competing ideological approaches of individuals and groups, while the public choice theoretical model bases policy decisions on the self-interest of politicians and decision makers. The environmental determinism approach seeks to explore the development of policies through an examination of their relationship to broader policy goals within international, national and regional policy fields. Finally, the class corporatist approach, rooted in Marxist theory, defines all social and political relationships on the basis of class relationships, as determined by a conflict between capital and labour (Jackson and Jackson, 1986; Doern and Phidd, 1992; Brooks, 1993). The preceding brief overview of five theoretical approaches to public policy has served to offer a theoretical framework in which to begin an analysis of public policy. However, a brief examination of each of these approaches demonstrates that when viewed in isolation none of these theoretical frameworks fully explains the dynamics of the public policy-making process. Public policy is not created within a vacuum; a multiplicity of factors come into play through policy

development. The most obvious factors are: history; the political climate in which the policy is developed; the goals of the government in power, and the role and objectives of the political actors involved in the creation of the policy (Simeon, 1976; Doern and Pnidd, 1992; Brooks 1993). In analysing public policy, one cannot simply examine these factors in isolation from each other. A thorough policy analysis needs to examine how the relationship between each of these various factors affects the development of public policy.

In a 1976 article entitled "Studying Public Policy", published in the Canadian Journal of Political Science, Richard Simeon offers a framework in which to begin to examine public policy. Simeon argues that public policy is in essence an act of public administration and therefore the roles of bureaucrats and politicians must be examined. However, the policy making process must be examined within a broader political framework that includes such factors as: "prevailing ideologies, assumptions and values, structures of power and influence and patterns of conflict and division" (Simeon, 1976:549). Whereas, the dominant theoretical approaches to public policy often examine political, social and economic forces in isolation from each other Simeon argues that public policy emerges from a combination of these factors. For Simeon, public policy is not merely a matter of problem solving. Rather he defines it as: "a matter of choice in which resources are limited and in which goals and objectives differ and cannot easily be weighed against each other...Hence policy-making is a matter of conflict" (Simeon, 1976:550).

In "Studying Public Policy", Simeon offers guidelines in which to conduct a policy analysis. He argues that any analysis must be conducted across space and time so that one can determine what forces have led up to a particular policy outcome. An examination must be conducted of the individuals and decision makers involved. However, this analysis must also include an assessment of "the influences which shape the alternatives they consider, the assumptions they make and the kinds of actions they take" (Simeon, 1976:554-555). Finally, he advises that while conducting a case study is important to analysing a particular policy, this assessment must be done within the broader framework of a government's overall agenda. Taking from these guidelines, Simeon offers a framework in which to study public policy which he terms a "funnel of causality" (Simeon, 1976:556). This framework proposes a study of public policy at three different levels: 1) the policy process, comprised of the interaction and bargaining between politicians, bureaucrats and interest groups; 2) how the distribution of power, the dominant ideologies and the structure of political institutions affect this process; and 3) the resources and constraints placed upon the policy process as dictated by the socio-economic environment (Simeon, 1976). Within this analytical framework all three levels of analysis are relevant; however, their level of importance in affecting public policy outcomes increases as the funnel narrows (Jackson and Jackson, 1986). The following diagram graphically depicts Simeon's framework.

Figure: 1 "Funnel of Causality" (Jackson and Jackson, 1986:587)

Interplay Approach: Ideas, Structure and Process

Following the guidelines of public policy analysis as outlined by Richard Simeon, I have chosen to base the theoretical framework of this thesis on an approach which encapsulates these principles. Bruce Doern and Richard Phidd's analytical framework known as the "Interplay Approach" examines the inter relation between ideas, structure and process and therefore provides a realistic framework in which to analyse the IR policy. Doern and Phidd's theoretical approach, categorized by Stephen Brooks in his text Public Policy in Canada as "liberal-pluralist" (Brooks, 1993:32), allows for the examination of the actual environment in which policies are developed. It allows not only for an examination of the competing ideologies within

the field of Aboriginal policy, but also for an examination of the mandate of the government under which the policy was developed and the social and economic climate in which the policy was adopted.

The approach of Doern and Phidd, while referring to the basic ideas of the dominant theories, is one that relies upon the interplay of ideas, structure and process. This approach is an "eclectic framework that stresses the interaction of society's dominant ideas, the structures of government and the private sector, including the individuals who control them, and the processes that characterize the policy process" (Brooks, 1993:31-32). Doern and Phidd define their approach as follows:

Ideas refer to the desired end states, the sense of public purposefulness, that individuals and groups seek to obtain through state action, or often through preventing the state from acting. *Structure* refers to the main organizations through which and by which policy is influenced and made. Structure encompasses both the organizations of the state and the organizations of many private and cooperative institutions. It is not merely a synonym for dry bureaucracies. Rather, structure is also composed of an array of statutes, programs, headquarters and field entities, and people and employees with diverse views of how their organization is behaving and ought to behave. *Process* refers to the regularized rhythms, relationships and behaviour flowing from the inherent nature of policy-and-decision making activity in any modern government, especially those flowing from the basic instruments of governing (spending, taxation and regulation) (Doern & Phidd, 1992:xvi).

The interplay approach allows for the discussion of ideas at four different levels of thought: ideologies, dominant ideologies, paradigms and specific objectives. Ideologies in this context refers to the dominant 'isms' of political thought:

liberalism, conservatism and socialism. An analysis of the ideology of the government in power is important not because it causes a public policy choice, but because it can "help to foreclose certain policy options or reduce levels of commitment to particular courses of action and to particular ideas" (Doern and Phidd, 1992:38). Because each of these ideologies is represented in varying degrees within the main Canadian political parties, each party will advocate different policy approaches and they will evaluate these approaches according to a different set of criteria. Dominant ideas refer to: efficiency, individual liberty, stability, redistribution and equality, equity, national identity and regional diversity. According to Doern and Phidd these ideas are constant within the development of public policy. They "influence political debate and the 'evaluation' of public policy regardless of the particular preferences stated in the legislation or the ministerial speech accompanying the particular policy or decision" (Doern and Phidd, 1992:41). Paradigms refer to the overall objectives and approach of a particular policy field, in this case Aboriginal policy regarding self government. Finally, the analysis of the specific objectives refers to an assessment of where a particular public policy fits into the overall broad policy objectives of the government in power (ie. fiscal restraint or national unity).

Within the interplay approach the structural organizations that Doern and Phidd advise should be examined within a public policy analysis are the roles of: the Prime Minister and his Cabinet, the lead Minister for the policy, the department in

which the policy was developed interest groups who lobbied for or against the policy, the provincial governments and policy communities. For the purposes of this research, my analysis will focus on the bureaucracy, interest groups, provincial structures and policy communities.

Finally, the process section of the interplay theory allows for an assessment of how a policy moves through the government process. This assessment includes an examination of how governments set priorities, as well as how government expenditures and regulatory measures affect the development of public policy. The following diagram depicts the interplay approach:

IDEAS	STRUCTURE	PROCESS
●Ideologies	●Prime Minister	●Priority-Setting
●Dominant Ideas	●Cabinet	●Expenditure
●Paradigms	●Executive	●Taxation
●Specific Objectives	Bureaucracy	●Regulatory
	●Interest Groups	●Public Enterprise
	●Provincial Structures	
	●Policy Communities	

Figure: 2 "The Components of the Interplay Approach" (Doern and Phidd, 1992:xvii)

Under the rubric of 'ideas' the analysis of the IR policy conducted in this thesis will concentrate on: the ideological framework of the Liberal government and their policy platform as outlined in the 'Red Book'; the dominant ideas of Aboriginal and non-Aboriginal Canadians, as well as, politicians and bureaucrats with respect to

Aboriginal policy and self-government, the present paradigm of Aboriginal policy, more specifically the principles and assumptions which guide it, and the overall broad policy objectives that are associated with the adoption of this policy. Within the section of this thesis that will analyse the structural organizations that have affected the development of this policy the roles and objectives of the following will be examined: the federal government, provincial governments, the national Aboriginal organizations and policy communities. Finally, the analysis within the process section of the interplay approach will examine where this policy fits into the overall policy agenda and the instruments that affected or restricted this policy approach (e.g. expenditure and regulatory instruments).

Policy Paradigm

In addition to analysing the process for developing Aboriginal self-government policy, this thesis will demonstrate that the IR policy represents a convergence of old and new paradigm ideas. For my discussion of paradigms, I rely on Thomas Kuhn's concept of the paradigm shift, as outlined in his text The Structure of Scientific Revolutions. Kuhn developed this theory in an attempt to explain scientific development, more specifically the evolution of scientific knowledge. In his work, Kuhn examined the scientific community and attempted to use the concept of the paradigm shift to explain how new discoveries in science occur and how these new discoveries alter a scientist's approach to problem solving (Kuhn, 1970). The

basic premise of the theory of the paradigm shift can be effectively applied to an explanation of the evolution of Aboriginal policy. In this regard, I have drawn upon the theses of academics who have studied the development of Aboriginal policy within this conceptual framework, most notably those of Sally Weaver and Anne Marie Mawhiney. The term paradigm as defined by Kuhn refers to "the entire constellation of beliefs, values, techniques, and so on shared by the members of a given community" (Kuhn, 1970:175). The community or paradigm under examination within this study is the federal government and its approach to the development of public policy concerning Aboriginal self-government. According to Kuhn's theory, a paradigm shift occurs when "one reality is so completely transformed to another that a complete change or 'revolution' occurs" (Kuhn, 1970:85). Once this occurs previous ideological beliefs and social policies are no longer applicable and therefore must be re-developed in order to correspond to the new ideological framework.

A paradigm shift is not necessarily a short-term process. According to Kuhn "the awareness of a need to reconstruct the paradigm can be present for a long time, and with significant turmoil or crisis before any change occurs" (Kuhn, 1970:85). It is only at the point that the new ideology or concept is integrated into the societal beliefs that a paradigm shift will occur. In her text Towards Aboriginal Self-Government, Anne Marie Mawhiney argued that "from the mid-nineteenth century until 1969, the paradigm of government-Indian relations continued to be

constructed so that the federal government maintained hegemony⁴ over status peoples" (Mawhiney, 1994:92). Despite the fact that during this period there were attempts by Aboriginal people to articulate their ideological concept of self-government, the ideological approach of the federal government remained dominant. An analysis of Mawhiney's study which examines paradigm shifts as a consequence of counter-hegemony⁵ appears to demonstrate that a paradigm shift is a two-stage approach:

Once the ideas, realities, ways of thinking and living of the subordinate group become visible to dominant group members, a shift in understanding has to occur before these ideas become assimilated and existing social practices can be reconsidered in light of the new information or knowledge. This shift in understanding occurs first at the individual level, when individuals become persuaded to the alternate ways of thinking suggested by the subordinate group to the point that their view or reality becomes congruent with that of the subordinate group. At this point a paradigm shift at the individual level has occurred. When enough have experienced the paradigm shift so that institutions start to adjust their ways of responding to subordinate groups, historical social practices may finally be dismantled and replaced with ones based on the new paradigm that has emerged as a consequence of counter-hegemony (Mawhiney, 1994:93-94).

Mawhiney explains this two-staged approach as being a shift at the individual level followed by a shift at the institutional level, resulting in a change in social practices. Using Mawhiney's hypothesis as a basis, I postulate that there are two stages

⁴ Hegemony is defined as: "...an order in which a certain way of life and thought is dominant, in which one concept of reality is diffused throughout society in all its institutional and private manifestations, informing in its spirit all taste, morality, customs, religious and political principles, and all social relations particularly in their intellectual and moral connotation" (Mawhiney, 1994:9).

⁵ Counter-hegemony is defined as: "resistance to parts or all of a social measure...the failure of a social measure to achieve its intended goal - as defined by the dominant group - due to active or passive resistance by the subordinate group because of a clash in ideology or values" (Mawhiney, 1994:11).

required for the emergence of a new paradigm. The first stage is an ideological shift, followed by a shift in the policy framework. The end result being the emergence of a new paradigm. Based on this analysis, the following diagram depicts what I view as the ideal continuum for the development of a new policy paradigm.

Based on this continuum, this thesis will demonstrate that following the constitutional recognition of Aboriginal people in 1982, an ideological shift occurred in the way the federal government views the concept of self-government between 1982 and 1992. However, as Chapter Four will demonstrate this ideological shift has not led to a successful completion of the resolution stage. It will be argued that the IR policy framework does not represent a shift in the self-government policy paradigm. Rather, it will be demonstrated that this policy represents a convergence of old and new paradigm ideas. Consequently, the revolution phase has not yet been reached thus, a new policy paradigm has not emerged.

Conclusion

This chapter has outlined the theoretical approach of this thesis. What

follows in Chapter Two is a summary of how the federal government has approached the issue of self-government since 1982. This historical assessment provides an overview of the ideas, structures and processes that have historically defined the self-government policy paradigm.

CHAPTER TWO: HISTORICAL CONTEXT

In order to understand the contemporary context of self-government and the climate in which the IR policy was developed, recent historical approaches to self-government must first be examined. Through an examination of the previous ideas, structures and processes that dominated the self-government policy field, a better understanding of the philosophical and ideological basis of the IR policy will be developed. This historical examination begins with the period immediately following the *Constitution Act, 1982* in which Aboriginal rights came to be constitutionally recognized. This historical summary will show that over the past fifteen years the first stage of a shift in the self-government policy paradigm has occurred. This shift is premised upon a changing ideological approach towards self-government that has occurred throughout the period under examination. The ideological change that occurred throughout this period and the methods that were used to try to implement self-government have played an integral role in the development of the IR policy.

Throughout this fifteen year period the federal government has taken a 'three-track' approach to addressing the issue of self-government. The first track was based on discussions and negotiations aimed at constitutionally entrenching the inherent right of self-government. The second track focused on the practical implementation of self-government at the community level. Finally, the third track

concentrated on the devolution of administrative responsibilities to Aboriginal people. The following is a summary of how each of these tracks proceeded throughout this fifteen year period.

The Constitutional Track

Constitution Act, 1982

Following intense lobbying by Aboriginal groups, including a trip the British Parliament in protest (Hawkes, 1989), the final version of the *Constitution Act, 1982*⁶ contained three sections pertaining directly to Aboriginal peoples (See Appendix B). Respectively, sections 25, 35 and 37 guarantee that Aboriginal rights will be protected by the Charter, recognize existing Aboriginal rights and allow for at least two constitutional conferences to be held between the First Ministers and Aboriginal leaders to discuss "constitutional matters that directly affect Aboriginal people" (*Constitution Act, 1982*).

The recognition of Aboriginal rights within the Constitution represented a dramatic shift in the philosophical approach that had been taken by the federal government. Historically, the federal approach towards Aboriginal people was based on the ideological belief of assimilation and this approach culminated in the federal

⁶ "The *Constitution Act, 1982* patriated the *British North America Act, 1867*, established a formula for future constitutional amendments, and entrenched the Charter of Rights and Freedoms" (Gibbons, 1986:302).

White Paper of 1969.⁷ The recognition and protection of Aboriginal rights in the *Constitution Act, 1982* represented the first time the federal government acknowledged in the Constitution the existence of rights for Aboriginal people (Jhappan, 1993:228). Sections 25, 35 and 37 of the *Constitution Act, 1982* represent the beginning of an ideological shift on the part of the federal government.

The Penner Report

In an attempt to begin defining what was meant by Aboriginal rights, in particular what Aboriginal peoples hoped to achieve with self-government, a Special Parliamentary Committee on Indian Self-Government was appointed in December 1982.⁸ The goal of the Committee was "to examine the government of Canada's total financial and other relationships" with Indian peoples (Canada, 1983:3). The mandate of the committee was to assess the existing relationship between the federal government and Indian people and make recommendations as to how this

⁷ In June 1969, the federal government released the White Paper "which proposed a global termination of all special treatment of Indians, including the *Indian Act* (Weaver, 1981:4). The ideological premise of the White Paper was based on then Prime Minister Trudeau's notion of a 'just society', in which all citizens should be treated equally. It was argued that special rights were the cause of the social problems experienced by Indian people. By making everyone equal it was thought that the poverty and social ills in Indian communities would be eradicated. "The goal of equality was to be achieved by terminating the special legislation and bureaucracy that had developed over the past century to deal with Indians, and by transferring to the provinces the responsibility for administering services to Indians" (Weaver, 1981:4). Under the White Paper Indian people would no longer receive special rights, rather they would receive the same rights and benefits as other Canadians.

⁸ This was an all-party committee that was chaired by Liberal MP. Keith Penner and comprised of six other members of parliament who represented ridings that had a significant number of Aboriginal constituents. As well, representatives of three of the national Aboriginal organizations (Robert Jamieson, AFN; Sandra Issac, NWAC; and Bill Wilson, NCC) were invited to work with the Committee as ex-officio or liaison members (Mawhiney, 1994).

relationship should be developed in the future

The main achievement of the Penner Report was the fact that it resulted in the legitimization of the concept of self-government for Indian people:

...by virtue of the all-party agreement manifested in the committee's unanimous recommendations, the concept of Indian self government received a major boost in legitimacy among non Indian politicians and government bureaucrats (Ponting, 1986:320-321).

The report consisted of 58 recommendations which isolated the "need for a major restructuring of the relationship between Indians and the rest of Canadian society" (Ponting, 1986:327). The basic premise of its recommendations were that the federal government recognize the right to self government, entrench this right within the constitution and thereby enable Indian people to exercise greater control over their lives, in particular in the areas of health, education and welfare (Weaver, 1984; Gibbins and Ponting, 1984; Tennant, 1984).

According to Frank Cassidy and Richard Bish the recommendations of the Penner Report "presented the basis for a significant departure from current federal policies regarding Indian governments" (Cassidy & Bish, 1989:16). The shift in the paradigm of federal-Indian relations recommended by the Penner Report was two-fold: first, in the ideological sense in that the committee had unanimously endorsed the concept of self-government for Indian people and had presented this opinion in accordance with demands and perceptions of Indian people; and second, in a practical sense in that they indicated that self-government should not be implemented as a municipal form of government as was previously the federal policy

approach (Cassidy and Bish, 1989:16-19). Rather, the committee's recommendations sought to increase the power and authority of Indian people. The committee recognized an existing right to self-government thus indicating that the right to self-government would not be delegated by Parliament. The committee also recommended that the power and authority of Aboriginal governments be defined by the individual First Nations (Tennant, 1984). If implemented the recommendations of the Penner Report would have resulted in a shift in the policy paradigm regarding self-government. This shift would have resulted in a relationship based on equality and consequently would have terminated the paternalistic control of the federal government over Aboriginal people (Mawhiney, 1994). While the recommendations of the Penner Report were never adopted by the federal government, the report itself and the process in which it was developed achieved three significant things: it raised the profile of Aboriginal issues; the committee worked in consultation with Aboriginal people; and the recommendations called for the recognition and constitutional entrenchment of an inherent right to self-government.

The Response of the Government

The official Government Response to the Penner Report acknowledged that "the Special Committee process undoubtedly marks an important turning point in Federal-Indian relations in Canada" (Canada, 1984:foreword). However, it did not accept the recommendations of the Committee as to how self-government should be

implemented. The Government Response outlined that "the Government intends to introduce in Parliament legislation based on the principles and elements set out below to establish a framework for those Indian First Nations that wish to govern themselves and their lands..." (Canada, 1984:3) In short, the federal view towards self-government was still based on the perception that it would be defined and delegated by the federal government. Thus, the Government Response maintained the new ideological approach that recognized Aboriginal rights; however, it did not serve to establish a shift in the way that Aboriginal policy was applied to the concept of self-government.

The Penner Report had called for increased control for Aboriginal people through self-government, whereas the Government Response maintained that "the services provided for Indian peoples would still be controlled through legislative and political means by the federal government" (Canada, 1984:4) In its response, the federal government endorsed the notion of increased powers for Aboriginal people, yet it maintained that ultimately the decisions about how these powers would be used would be subject to the approval of the federal government. Reluctant to enforce the recommendations of the Penner Report, the Government Response served to maintain the existing relationship between the federal government and registered Indians. Ultimate control over the lives of Indian people would continue to rest within the authority and jurisdiction of the federal government, unless otherwise delegated by an Act of Parliament (Mawhiney, 1994).

The First Ministers' Conferences, 1983 1987

Following the guidelines set out in section 37 of the *Constitution Act, 1982* the first of the First Ministers' Conferences (FMC) on Aboriginal Constitutional Matters was held in March 1983. Of the four conferences that would be held concerning Aboriginal Constitutional Matters, this first conference would be the most successful. The 1983 FMC resulted in the signing of a Constitutional Accord by the federal government, nine provinces (except Quebec), the territorial governments, and representatives of the four national Aboriginal associations. This Accord resulted in the undertaking of the necessary procedures to amend sections 35 and 37(1) of the *Constitution Act, 1982*. Section 37(1) was amended to allow for additional FMC's to address Aboriginal constitutional proposals before April 17, 1987 and section 35 was amended to include the following. "subsection (3), stating that in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired ; and subsection (4), addressing the thorny gender equality issue by guaranteeing Aboriginal and treaty rights in section 35(1) 'equally to male and female persons'" (Behiels, 1989:415). An additional amendment was made to section 37 to obtain a permanent constitutional commitment that, before any amendments were made to certain provisions of the Constitution dealing with Aboriginal peoples, Aboriginal leaders would be invited to an FMC to participate in the discussion on such amendments. The constitutional changes agreed to in the Accord were

proclaimed in June 1984, as the Constitution Amendment Proclamation, 1983.⁹

Three other FMC's took place regarding Aboriginal issues (1984, 1985, 1987). At each of these conferences, the central issue of discussion was the constitutional recognition of the Aboriginal right of self government. Amongst the delegates at these conferences there was general agreement concerning the need to proceed with attempting to define self-government. However, there was little agreement concerning the issues of whether or not the right of self government was inherent or delegated, how it would be financed, or what would be the role of the provinces and the courts (Hawkes and Devine, 1991). The final FMC on Aboriginal Constitutional Matters took place in March 1987. Despite a united effort on the part of the national Aboriginal organizations to introduce a Joint Aboriginal Proposal for Self-Government, the 1987 conference marked the end of the section 37 process which had been unable to achieve agreement to authorize a constitutional amendment regarding self-government.

The Meech Lake Accord

Shortly following the last FMC on Aboriginal Issues, the First Ministers agreed upon a constitutional accord which defined the rights of Quebec as a 'distinct society'. In terms of priority-setting and the overall federal policy agenda,

⁹ This amendment remains the only amendment to the Constitution under the 7/50 amending procedure. This formula requires that constitutional amendments receive the consent of at least 7 of the 10 provinces representing at least 50% of the population.

constitutionally recognizing Quebec as a 'distinct society' superseded the constitutional recognition of Aboriginal rights. Constitutional recognition for Aboriginal rights which had been impossible to achieve was suddenly possible when it came to recognizing the rights of Quebec.

At the time of the Meech Lake Accord, the constitutional recognition of Aboriginal rights was not a priority for the federal government. However, Aboriginal people were able to use the ratification process of the Accord as a vehicle to highlight their desire to have their rights constitutionally entrenched. Aboriginal groups objected to the Meech Lake Accord on the premise that the Accord directly affected the interests of Aboriginal people, yet they had not been consulted (Hawkes and Devine, 1991). They "rejected the two-nation conception of Canada" (Behiels, 1989:416) that was reinforced by the Accord and many of its main clauses which had the potential to seriously jeopardize the ability of Aboriginal groups to have their interests addressed in the future¹⁰

Over the course of the three years required to ratify the Accord, Aboriginal groups lobbied the federal government for an amendment to the Accord intended to recognize and affirm Aboriginal rights. However, despite their efforts the Accord was

¹⁰ The expansion of the unanimity formula to include national institutions and the creation of new provinces would have forever impeded the recognition of the right of Aboriginal people to self-government and the ability of the Yukon and the North West Territories, which have significant Aboriginal populations, to become full fledged provinces. The provincial veto would also have affected the future of Aboriginal people in Canada for it would have allowed provinces the right to potentially block any legislation dealing with Aboriginal issues from the House and the Senate. Perhaps the most damaging effect of the Accord on Aboriginal people was the fact that it did not renew section 37 of the Charter. Under section 50 of the Accord, Aboriginal people would have been forced to approach the federal government annually to get their issues on the constitutional agenda (Behiels, 1989; Hawkes and Devine, 1991; Hall, 1989)

to be ratified in its original state. As the June 23, 1990, deadline for the ratification process¹¹ of the Accord approached, Aboriginal people would have to seek an alternate means of asserting their rights. Elijah Harper, a Cree and a member of the Manitoba legislature used a technical objection to prevent voting on the Accord in the Manitoba Legislative Assembly on the final day of the ratification period. Consequently, the Meech Lake Accord died on the order paper of the Manitoba Legislature. If the federal government would not constitutionally recognize the rights of Aboriginal people, then Aboriginal people would not allow the passage of constitutional amendments which ignored their rights.

While the Meech Lake Accord did not serve to constitutionally recognize the right of Aboriginal people to self government, the events which transpired around it did serve to reinforce the necessity that the federal government address the issue. "One of the principal explanations for the inclusion of Aboriginal demands for self government [in the Charlottetown Accord] involves the role of Aboriginal peoples in the death of the Meech Lake Accord" (Jhappan, 1993:230). The actions of Elijah Harper and those who supported him (both Aboriginal and non Aboriginal) forced the federal government to include Aboriginal people in their next round of constitutional discussions.

¹¹ The ratification process for the Accord stipulated that it had to be passed by the House of Commons as well as all ten provincial legislatures.

The Charlottetown Accord

The events following the fall of the Meech Lake Accord prompted the federal government to make a final attempt at resolving the constitutional crisis. The Charlottetown Accord was intended to end the Canadian constitutional crisis. Learning from the failure of the Meech Lake Accord, this new Accord was developed following extensive negotiations with the provinces, territories and four of the national Aboriginal organizations (Canada, 1992). The Charlottetown Accord responded to the demands of Aboriginal people by calling for the constitutional recognition of their inherent right of self-government, as well as outlining an appropriate mechanism for this right to be implemented.

According to Radha Jhappan, "the Charlottetown Accord would have signalled a massive change and considerable improvement in the constitutional position of Aboriginal peoples" (Jhappan, 1993:230). An overview of the various clauses of the Charlottetown Accord demonstrates the extent to which Aboriginal rights had been recognized and safeguarded within the Accord. The Accord stated that "The Constitution should be amended to recognize that the Aboriginal peoples of Canada have the inherent right of self-government within Canada" (Canada, 1992:14). This right of self-government was to be interpreted as a third order of government and it was to apply equally to all Aboriginal people of Canada. In addition, the Accord constitutionally committed the federal and provincial governments to negotiating this right of self-government with Aboriginal people at their request. As outlined in

the Accord, the intent of these negotiations would be to focus on "the implementation of the right of self-government including issues of jurisdiction, lands and resources, and economic and fiscal arrangements" (Canada, 1992:15).

There were several clauses within the Charlottetown Accord that would have limited the inherent right of self-government. Most notably, the Accord outlined that "the Canadian Charter of Rights and Freedoms should apply immediately to governments of Aboriginal peoples" (Canada, 1992:15). Historically, Aboriginal people have objected to the Charter on the basis that its premise is the recognition of individual rights while consequently limiting the collective rights of Aboriginal people. Within the Accord, however, Aboriginal governments were to have access to section 33 of the *Constitution Act, 1982* (the notwithstanding clause) which could be used to exempt their laws from the provisions of the Charter. The Accord provided that "federal and provincial laws will continue to apply until they are displaced by laws passed by governments of Aboriginal peoples pursuant to their authority" (Canada, 1992:16). Finally, the Accord also stipulated that "the specific constitutional provision on the commitment to negotiate land should not create new Aboriginal rights to land" (Canada, 1992:15). This same provision, however, guaranteed existing Aboriginal and treaty rights to land. Despite these limitations, the Charlottetown Accord marked a new level in the recognition of the right of Aboriginal people to self-government.

The Charlottetown Accord was put to a national referendum on October 26,

1992, at which time it failed to garner the approval of a majority of Canadian voters¹². Despite its ultimate rejection, the provisions of the Charlottetown Accord regarding Aboriginal people are representative of the shifting paradigm of Aboriginal policy concerning self-government:

At a philosophical level, several of its key provisions are indicative of the transformation of Aboriginal constitutional discourse in recent years and its acceptance by political elites. In particular, the concept of an inherent right to self-government enshrines collective rights and is an implicit recognition of Aboriginal nationhood and sovereignty (Jhappan, 1993:230).

The Charlottetown Accord marked the first time in the long history of constitutional discussions regarding self-government that the federal government recognized the inherent right of self-government. As will be shown in Chapter Four, the premise and provisions of the Charlottetown Accord play an important role in the development of the IR policy approach.

While the provisions of the Accord are said to represent a shift in the federal government's ideological approach to self-government, it is important to note that Aboriginal people voted overwhelmingly against the Accord. The constitutional process centred on the national Aboriginal organizations and was marred by the competing agendas of the various different actors (i.e. federal government, provincial and territorial governments and Aboriginal organizations). While the Accord itself represents an innovative framework for altering the Canadian governing structure,

¹² At the request of the AFN, Elections Canada provided a tabulation of how Aboriginal people voted in the referendum, where possible. The Inuit voted 75 percent in favour of the Accord while 62.1 percent of on-reserve Indians voted against it. It was not possible for Elections Canada to provide data on how Métis and urban Native people voted (Smith, 1993).

the process through which it was developed may well have attributed to the rejection of it. The constitutional amendment process was not only a very lengthy exercise, it was also an extremely controversial one, in particular for Aboriginal people. It has been said that one of the primary reasons that Aboriginal people did not vote in favour of the Charlottetown Accord was because its development process did not involve 'grassroots people' enough (Smith, 1993). The fact that the constitutional process focused on the national Aboriginal organizations, in particular the AFN, raised concerns over how beneficial the Accord would be for Aboriginal communities. NWAC objected to the Accord on the basis that it did not represent the best interests of Native women and children. Other Aboriginal groups rejected it on the basis that only the agenda of the AFN had been represented while the interests of treaty First Nations and Métis people had not been recognized. Finally, other Aboriginal groups felt that the interests of Aboriginal people were better served by the status quo (Smith, 1994). While the reasons discussed here for the rejection of the Accord do not represent the positions of all Aboriginal people on the Charlottetown Accord, they reinforce some of the failings of the constitutional process and offer recommendations to the federal government for implementing self-government in the future.

The Legislative Track

The second track to implementing self-government that has been attempted

over the years is the legislative track. Between 1983 and 1992, the federal government sought to negotiate formal self-government agreements with specific communities. The intention here was that through the negotiation process the two sides would be able to come to some common ground, and perhaps overcome some of the ideological and practical barriers that had historically marred the process of implementing self-government. During the 1980s, the first two significant self-government agreements were achieved, the *Cree-Naskapi (of Quebec) Act* and the *Sechelt Indian Band Self-Government Act*. Neither of these acts was intended to become the model for future self-government agreements; however, they each have contributed to establishing a framework for future self-government discussions. The policy approach of the federal government during the negotiation of each of these Acts remained the contingent rights approach, in that self-government agreements and the right of self-government were contingent upon formal recognition through an Act of Parliament.

The *Cree-Naskapi (of Quebec) Act* came into effect in 1984 as the result of negotiations that had been on-going since the early 1970s¹³. This Act provided for the establishment of a local governing structure for eight Cree bands and one Naskapi band. The Act replaces the *Indian Act* (except for defining who is an 'Indian') for the purposes of municipal government and land management, thus

¹³ The 1975 James Bay and Northern Quebec Agreement (JBNQA) and the inclusion of the Naskapi in this agreement with the 1978 North Eastern Quebec Agreement, provided for the adoption of legislation concerning local government for those communities affected by the JBNQA. The result of this provision was the *Cree-Naskapi Act* 1984 (Issac, 1991)

allowing for a greater degree of self-management and control. Within its provisions, the bands are given the status of corporations with the authority "to enact by-laws in relation to health, public order, land use, local taxation, local services, businesses, environmental protection, and hunting, fishing and trapping" (Evans, 1987:4). While the Act allows for administration and governance of issues that affect the daily lives of the communities under this regulatory body, certain band by-laws, in particular in the areas of local taxation and hunting, fishing and trapping, remain subject to the approval of the Governor in Council (Evans, 1987). The federal and provincial governments continue to maintain jurisdiction over resource development and expropriation. Thus, while the band councils are politically responsible to their members, they remain financially accountable to the federal government and in some areas their level of authority is dictated by the federal government.

The second self-government agreement negotiated in Canada was the *Sechelt Indian Band Self-Government Act*. Like the *Cree-Naskapi (of Quebec) Act* it is a delegated self-government agreement that resulted from negotiations with the federal and provincial governments and was then implemented through legislation. The Act was the result of ten years of negotiations with the federal government and replaced the *Indian Act* in all respects:

Under the Act, the federal government transferred direct ownership of an area of crown land to the Sechelt Band and delegated legislative jurisdiction to the Band Council in respect of 21 enumerated matters including: access to and residence on Sechelt lands, zoning and land use planning; local taxation; education; social welfare and health services, the preservation and management of resources; roads; the operation of business; and matters

related to good government of the Band (Evans, 1987:14).

The *Sechelt Act* provides for the adoption of a constitution under which the decision-making procedures of the Sechelt government are defined, whereas the powers and jurisdiction of the government are defined within the *Sechelt Act* legislation. The Sechelt band also negotiated separately with the government of British Columbia over the same ten year period. In April 1987, the provincial legislature passed the *Sechelt Indian Government Enabling Act* which provided for the Sechelt band to have by law making authority equivalent to a municipality (Evans, 1987).

While the *Cree-Naskapi Act* outlines the powers of the local government in great detail, the *Sechelt Act* provides a framework for local decision-making (Graham, 1987). The *Sechelt Act* provides for much greater financial flexibility for the Sechelt bands. Whereas, the Cree bands are politically accountable to their members and financially accountable to the federal government, the Sechelt bands are both politically and financially accountable to their members. Under the *Sechelt Act*, the band government receives a block transfer of funds that they are free to disperse amongst their various programs as per the needs of their communities. The only requirement of the agreement is that an audit is submitted annually. It should be noted as well that the *Sechelt Act* specifically defined the federal contribution of funds for the first five years (Graham, 1987).

Despite the fact that the *Sechelt Act* offers increased control over community

planning and development and financial resources, this self government agreement has been severely criticized by Aboriginal leaders. The general fear of Aboriginal leaders is that Sechelt would be used as the federal framework for future self government agreements. However, the *Sechelt Act* does not represent what most Aboriginal leaders feel is necessary for true self government. As previously mentioned, the *Sechelt Act* offers only a delegated authority and the governing structure which has been developed is "a hybrid of federal and provincial laws existing at the whim of federal and provincial politicians" (Smith, 1994). The Sechelt government draws its jurisdictional authority from a combination of federal and provincial laws and it is this intergovernmental dimension of the *Sechelt Act* that has been criticized by Aboriginal leaders. The Sechelt agreement offers only a municipal level of jurisdictional authority rather than the third level of government with an independent jurisdictional base that is sought by Aboriginal people. Consequently, it is not seen to recognize true Aboriginal self government. Rather it is viewed as an attempt by the federal and provincial governments to demonstrate that self-government can be successfully achieved without being entrenched in the Constitution (Cassidy and Bish, 1989).

Despite the fact that this form of municipal government did not respond to the desires of Aboriginal people, as predicted, the federal government initiated a self-government policy approach based on many of the same principles represented in the Sechelt agreement. In April 1986, the federal government adopted a new

policy approach towards implementing self-government. The policy entitled the Community Based Self-Government (CBSG) Negotiations "aims to advance self-government at the local level within a negotiated legislative framework" (Evans, 1989:13). The intent of the federal government in adopting this policy approach was to move the issue of self-government outside of the realm of constitutional discussions and "create an independent legislative base for individual self-government agreements by passing a specific Act of Parliament in each case" (Graham, 1987:54). The CBSG policy was undertaken as an interim measure to implementing self-government. At the time of its inception, the federal government maintained its commitment to continue constitutional discussions to achieve an amendment that would recognize Aboriginal self-government within the Constitution. The CBSG policy then was implemented as an alternative option for those communities who wished to negotiate self-government at the community level, until a constitutional amendment could be achieved. In proceeding on its legislative track to implementing self-government, the federal government hoped to be able to achieve several self-government agreements which in turn would generate an accelerated interest in implementing self-government at a legislative level (Boldt, 1993). What follows is a brief overview of the process and its objectives.

The premise of the CBSG policy was that once a Band had decided it wanted to initiate a form of local government it would approach the federal government to begin to negotiate a self-government agreement. This agreement would be

developed within the framework of the existing Constitution, and would later be ratified by both the community and Parliament. In keeping with the recommendations of the Penner Report, this policy recognized that "Self government agreements [would be] tailored to meet the unique political, social and cultural circumstances of each community and lead to significantly greater accountability by First Nations governments to their own people rather than to federal authorities" (Canada, 1993:Information). The federal government policy statement outlined that its intent was to negotiate self government agreements that would increase the authority of Aboriginal people in areas such as: institutions and procedures of government, membership, legal status and capacity, land and resource management, financial arrangements, education, health, social and welfare services, culture, environment and the administration of justice (Canada, 1993). The federal government cites both the *Cree-Naskapi (of Quebec) Act* and the *Sechelt Indian Band Self-Government Act* as successful community self-government initiatives¹⁴.

Self-government agreements implemented under the CBSC policy would have resulted in what has been termed 'quasi-municipal' styles of government (Ponting, 1986). In keeping with the federal government's perspective on self-government, the source of self-government under this policy was delegated authority by an Act of Parliament. The scope of self-government agreements reached under this policy would be circumscribed. This essentially means that the power of First Nations

¹⁴ It should be noted that each of these agreements was reached in principle before the federal government released its CBSC policy

governments would be limited by the terms outlined in the negotiated agreement. Under this policy, First Nations governments would remain subordinate to federal and provincial laws and authorities for the CBSG policy clearly stated that; "community self government negotiations and/or arrangements will not alter the division of powers between the federal and provincial governments" (Canada, 1988a:1). The design of the policy was such that every element of community-based government was to be negotiated on a tri-partite basis and implemented through enabling legislation once the agreement had been ratified by the federal and provincial governments and the community. Under this policy approach, the DIAND funded 102 proposals to begin self-government negotiations, representing approximately 400 communities (DIAND, 1993). However, not one self-government agreement was reached throughout the duration of this policy.

Legislative attempts by the federal government to implement self-government have generally not responded to the overall goals and objectives of Aboriginal people. The CBSG policy approach is said to have been beneficial in that it allowed First Nations communities to develop a better understanding of their own view of self-government through the development of the initial proposal to commence negotiations with the DIAND and throughout the negotiation process (DIAND, 1993). However, overall the CBSG policy approach has been severely criticized. Some critics of the policy have argued that this policy approach offered no real direction towards achieving self-government. Instead, "Community self-government was seen as

something to buy time, a bridge between the impending collapse of the Aboriginal constitutional talks and their inevitable resurrection somewhere down the road" (Smith, 1994:98).

In February 1993, an Audit of the CBSG program was completed for the DIAND¹⁵ by the private consulting firm of Young & Wilshire Management Consultants. The overall findings of this audit indicate that the CBSG policy was not a successful framework in which to implement self government. This review demonstrated that serious weaknesses existed in the federal government's policy approach and that in order for self-government to be achieved changes needed to be made to both the policy framework and the implementation process.

In its review, Young and Wilshire found that the only positive aspect of the policy was that it provided funding to Aboriginal communities that enabled them to develop a clearer vision of what self government means for them. The negative aspects of the policy process uncovered in this review far outweighed this single benefit. In interviews with First Nations communities it was found that the CBSG process was: "too long given that some issues can be agreed to very quickly; insufficient in terms of the time made available for the substantive phase; insufficient in terms of funding levels available for implementation; limited in scope; too rigid; too legalistic; and very intimidating" (DIAND, 1994:7). The results of the audit also found that the provinces were equally frustrated with the policy and felt

¹⁵ This audit report was not released to the public until March 30, 1994.

that Aboriginal issues, in particular self-government, are a federal responsibility and should be treated as such. As well, some provinces felt that the CBSC process obligated them to be involved in negotiations that had a pre-determined process and agenda to which they had not agreed to at the outset.

One of the principle problems uncovered through this audit was the lack of clarity surrounding jurisdictional issues. The report recommended that the federal government policy be restructured in a manner that enables them to manage a policy approach that includes all jurisdictions (i.e. the department, other federal departments and the provinces), so as to reflect the First Nations' perspective of self-government (DIAND, 1994). The auditors also recommended that more options be available to First Nations in self-government negotiations to allow for an accelerated response to specific needs. The CBSC policy was designed in a manner that dictated that negotiations had to occur in all areas and agreement reached before a self-government agreement could be finalized. Some First Nations, however, only seek jurisdictional authority in a particular area and may not want or be able to implement a broad self-governing structure. Thus, the self-government policy should be flexible enough to allow First Nations to decide what type of agreement would best meet their needs. The final recommendation to be discussed here concerns the funding of self-government. Young and Wilshire's audit found that there were several weaknesses in the policy framework concerning the issue of funding: 1) the lack of a funding formula and criteria; 2) the inappropriateness of

the funding mechanism; and 3) the lack of financial information on the funding limits for a particular community (DIAND, 1993). The restructuring of funding arrangements and the availability of financial resources are essential to changing the relationship between Aboriginal people and the federal government.

Consequently, an effective self-government policy approach needs to have a clear funding framework and designated financial resources.

Overall, the CBSG policy has been an ineffective policy approach to implementing self-government: "After spending six years and \$30.0 million in contributions, the funding program has yet to achieve its key deliverable: self-government acts..." (DIAND, 1993:ii). While hundreds of First Nations were involved in self-government negotiations at some level under the CBSG policy, not one self-government agreement was achieved since its inception in 1986. As the audit demonstrates, there are several areas in which the policy framework is weak and these weaknesses were recognized by all parties involved (First Nations, the federal government and the provincial governments).

The Administrative Track

In addition to the constitutional and legislative attempts to implement self-government, the federal government also began throughout this period to devolve its administrative responsibilities for Aboriginal people. The devolution initiative undertaken by the DIAND focused on the transfer of responsibility for the delivery of

programs and services to the direct control of First Nations. By no means did this devolution initiative constitute self-government for First Nations for the design of these programs and services continued to be based on federal government guidelines and principles. However, this initiative can be viewed as a stepping stone to self-government in that it offered First Nations increased control over the administration and financing of programs and services.

Devolution

The devolution process began in 1956 with the first transfers of education programs and was accelerated throughout the 1970s and 1980s (DIAND, 1996). In the 1980s the DIAND began to focus more on the development of its devolution policy as a result of several significant factors: the Penner Report's critique of the DIAND; the notion that the DIAND's programs needed to be managed more effectively; and the 1986 Auditor General's report which criticized both the DIAND and Band administration of programs and services (Doern, 1994). According to the Penner Report, the manner in which the DIAND funded First Nations inhibited the development of self-government (Prince, 1994). It is on this premise then that the DIAND began to develop a devolution policy which would alter the manner in which First Nations programs and services were funded. In 1986, the DIAND gained approval from the TB for a comprehensive five-year devolution plan. This devolution plan was based on the creation of four new funding mechanisms to effect the

transfer of financial resources to First Nations: Contributions; Flexible Transfer Payments (FTPs); Alternative Funding Arrangements (AFAs); and Grants. In restructuring its funding arrangements in this manner, the objective was to establish or expand the accountability of First Nations in order to eventually be able to move towards self-government.

Since the implementation of this plan, significant devolution has occurred among the DIAND expenditures for Indian programs (DIAND, 1993). Between the 1985 - 1986 and 1991 - 1992 fiscal years, the percentage of expenditures for the IAP portion of the DIAND's budget administered by First Nations increased from 62.1 percent to 77.3 percent. This devolution plan has also resulted in a 42 percent decrease in the authorized person years in this program area from 4,463 to 2,608 between 1982 - 1983 and 1992 - 1993 (DIAND, 1993). As the figures demonstrate, the DIAND's devolution plan has been fairly successful, however, its end result is not the self-government that is desired by Aboriginal people. In contrast, many Aboriginal groups view the achievements of the devolution policy "as notional since it appears to them more as a sop for policy failure in the larger realms of the constitution, self-government and treaty claims" (Doern, 1994).

As a result of the federal government's devolution policy a limited amount of evolutionary progress has been made. Devolution has altered the DIAND's funding structure, increased the control of First Nations over how their funding is distributed and modified the accountability relationship between First Nations and

the federal government (Prince, 1994). Thus, the principle goals of the devolution policy which were to empower First Nations, reduce the administrative responsibilities of the federal government and emphasize the accountability of First Nations have largely been met. However, First Nations continue to exercise powers and levels of control that are delegated by the federal government. Devolution is not self-government. First Nations have been able to increase their administrative responsibility for programs and services, but the federal government has retained ultimate control over the purse strings. Via this third policy track, the relationship between the federal government and Aboriginal people has begun to change and it has been a relatively successful initiative on which to build new policies for implementing self-government.

Overview: Ideas, Structures and Processes

The historical period under examination in this chapter began with a reluctance on the part of the federal government to address the issue of self-government and ended with an ideological acceptance of the concept of an inherent right of self-government. Concepts that in 1982 seemed unacceptable to the federal government had come to be widely accepted by 1992 and were even adopted within the text of the Charlottetown Accord (Jhappan, 1993). What happened throughout this period to account for this ideological shift?

There are several factors to which this ideological change can be attributed.

Throughout this period there was an emerging counter-hegemonic force that was articulated by the lobbying efforts of Aboriginal people to have their rights constitutionally entrenched and encapsulated in the events of the Meech Lake Accord (Weaver, 1990; Jhappan, 1993). This period is marked by the success of Aboriginal people to place the issue of self-government on the federal government's constitutional agenda. This historical period began with a reluctance by the federal government to address the constitutional demands of Aboriginal people and ended with an ideological acceptance of their constitutional rights. This landmark ideological shift can be attributed to an emerging Aboriginal nationalism and lobbying effort which served to enforce the need to develop a new Aboriginal policy paradigm (Weaver, 1990).

The role played by the Canadian courts throughout this period also attributes to this ideological shift. Prior to 1982, there was a general refusal on the part of the federal government, provincial governments and Canadian courts to recognize the rights of Aboriginal people (Imai et al, 1993). However, due to changes in the *Constitution Act, 1982* the decision of Canadian courts have increasingly recognized the existence of Aboriginal rights. Throughout this historical period, the Supreme Court decisions in the cases of *Guerin*, *Sioui*, *Simon* and *Sparrow* have played an important role in the legitimization of an inherent right of self government for Aboriginal people (Jhappan, 1993). Court decisions, such as these, recognizing the existence of Aboriginal rights have served to increase the political leverage of

Aboriginal people and they have created an uncertainty over what these decisions mean for the future of Aboriginal policy (Doern, 1994).

Policy communities have also played an important role in the development of this ideological shift. Reports such as the Penner and Coolican reports of the 1980s and interim reports of the Royal Commission on Aboriginal People (RCAP)¹⁶, marked a new era in the conceptualization of Aboriginal issues and set new standards for the way in which the relationship between the federal government and Aboriginal people was analysed (Weaver, 1990). Reports such as these were written with the intent of promoting a better understanding of the issues affecting Aboriginal people. Whether written on self-government, land claims, justice or health issues, each of these reports have been written in consultation with Aboriginal people and have attempted to articulate future possibilities for the recognition and implementation of Aboriginal rights and concerns in Aboriginal policy. Throughout this period it has come to be accepted that no longer will the 'status quo' be acceptable for addressing the concerns of Aboriginal people. Policy communities have been very instrumental in assessing the previous role of the federal government regarding self-government and suggesting policy alternatives for the future¹⁷.

¹⁶ On August 26, 1991, by Order of the Privy Council the Royal Commission on Aboriginal People was established. The mandate of the Commission indicates that, "The Commission of Inquiry should investigate the evolution of the relationship among Aboriginal peoples (Indian, Inuit and Métis), the Canadian government, and Canadian society as a whole. It should propose specific solutions, rooted in domestic and international experience, to the problems which have plagued those relationships and which confront Aboriginal peoples today" (RCAP, 1992:27)

¹⁷ For critiques on past policy approaches and recommendations for future policy initiatives see Weaver, 1990, Boldt, 1993; Smith, 1993, RCAP, 1993, RCAP, 1994; Doern, 1994, Hyllon, 1994; Lenihan et al. 1994 and

Each of the approaches that have been attempted throughout this fifteen year period have focused on different structural organizations. At the constitutional level, both Prime Ministers Trudeau and Mulroney and their respective Cabinets undertook tripartite negotiations to examine the possibility of constitutionally recognizing the inherent right of self-government. The legislative approach to implementing self-government focused on the bureaucratic level, mainly within the DIAND. Finally, the devolution process was a DIAND initiative which focused on the transfer of administrative responsibility and increased control over the financing of programs and services to First Nations.

In light of this three-tracked approach the decision making arenas and machinery for Aboriginal policy have shifted and changed throughout this period. An office of Aboriginal Constitutional Affairs was established with the Federal Provincial Relations Office (FPRO) at the Privy Council Office (PCO) in the mid 1980s. It is within this office that the primary role of the federal government regarding Aboriginal constitutional issues rested during both sets of constitutional negotiations. The DIAND also played a role during these negotiations, but it was only one of several federal players (Doern, 1994). On the legislative track, the DIAND and its various Ministers played a key role as it sought to adopt policy approaches that would implement self-government at the community level. The CBSG policy is an example of what Bruce Doern refers to as a micro-level policy approach in that it is centred

on one federal department (Doern, 1994). It was a DIAND policy whose intent was to focus on achieving demonstrable progress in the area of self-government. The department wanted progress, however, that would not threaten the overall political, constitutional or budgetary agenda (Doern, 1994). Similarly, the DIAND played a key role in on the development and implementation of the administrative track. While the administrative responsibility and financial control of programs and services was devolved to First Nations by other federal government departments (e.g. HRDC, IST and HC), the principal department in implementing the devolution plan was the DIAND. Throughout this period the provinces also played an important structural role and were actively involved in self-government discussions and negotiations on all three tracks.

When the overall priority-setting of the national agenda is examined during this period, the ability of Aboriginal people to organize for the recognition of the inherent right of self-government and its implementation is overshadowed by other national issues. As assessment of the Throne and Budget Speeches throughout this period "shows that for neither the Trudeau nor Mulroney years were Aboriginal issues a frequently articulated concern" (Doern, 1994:38). Most notably, the issue of self-government has been overshadowed by federal government priorities such as: constitutional change, deficit reduction, economic renewal and deregulation and privatization. At times throughout this period, Aboriginal people were able to insert their concerns into the overall policy agenda of the federal government. In

particular, Aboriginal people were able to use the federal government preoccupation with constitutional change to assert their goal for constitutional recognition of the inherent right of self-government. However, overall it has been concluded, "that for virtually all of this period Aboriginal issues, even at their highest moments in the political sun, were still a moderate to low priority" (Doern, 1994:37)

Conclusion

The period from 1982-1992 examined in this historical overview, represented a time of dramatic change in how non-Aboriginals, bureaucrats and politicians viewed the issue of self-government. During this period, there occurred an ideological shift in how the issue of Aboriginal self-government was traditionally viewed. However, this ideological shift did not result in a shift in the policy paradigm towards Aboriginal self-government.

This chapter has examined the development of views of self-government, as well as the various structures and processes that have been utilized in an attempt to implement self-government for Aboriginal people. The Charlottetown Accord marked an ideological turning point in how the federal government viewed the concept of self-government and the right of self-government for Aboriginal people: "...despite the Accord's ultimate defeat, what is exceptional is that constitutional entrenchment of such a far-reaching bundle of rights was contemplated at all" (Jhappan, 1993:226). While this ideological shift did not result in the constitutional

entrenchment or the implementation of self-government it is a solid foundation upon which future policy decisions can be based

According to an assessment of federal Aboriginal policy conducted by Bruce Doern "federal Aboriginal policy as a whole during this period has been characterized by only episodic attention to Aboriginal needs and by a slow recognition that both policies and approaches to how policy was made, had to change to become more integrated" (Doern, 1994:12). Throughout much of this period, Aboriginal people and the federal government were at ideological odds regarding self-government. The goal of Aboriginal people throughout this period was to achieve constitutional entrenchment of the right of self-government. However, the federal government responded by adopting a 'three track' approach which did not successfully address Aboriginal concerns.

As was noted in the introduction to this chapter, this historical period marks the completion of the re-evaluation stage on the policy paradigm continuum. It was during this period that the federal government and Aboriginal people came to accept a similar ideological position on self-government: that Aboriginal people have an inherent right of self-government. In addition, the events that occurred during this period have resulted in a more consultative approach on the part of the federal government to address Aboriginal issues (Doern, 1994). Despite the ideological and consultative change that occurred during this period, the federal government maintained a policy approach to implementing self-government based on the notion

of delegated authority. However, this period has also demonstrated the inability of such an approach to implement self-government. Slowly, as Doern points out, the federal government has come to realize that it needs to develop an alternative approach to implementing self-government for Aboriginal people

The following chapter of this thesis will examine the factors which affected the development of the IR policy. While this chapter has focused on the historical basis of the self-government debate, Chapter Three will outline those factors which influenced the Liberal government in the development of its new policy approach. Through an examination of the government's policy agenda and the roles and objectives of the various different actors, Chapter Three will assess the environment in which the IR policy was developed.

CHAPTER THREE: THE FRAMEWORK OF POLICY DEVELOPMENT

The historical assessment conducted in the preceding chapter has demonstrated the unsuccessful constitutional, legislative and administrative attempts of the federal government to implement self-government for Aboriginal people. In addition, this assessment has demonstrated that the past fifteen years of self-government debate have produced a vast knowledge base about self-government, as well as an ideological shift in the self-government paradigm.

The focus of this chapter is to outline and assess the policy development process. As outlined in Chapter One, the development of public policy is a matter of conflict (Simeon, 1976). Several different factors come into play during the policy-making process. The ideologies and objectives of the various different actors must be weighed against each other and considered within the context of the government's overall agenda. In addition, the government's policy objectives must be considered within the context of its financial resources. This chapter will proceed to outline the environment in which the IR policy was created. This assessment will begin with an examination of the government's overall Aboriginal policy objectives and follow with an examination of the ideas and objectives of the various different actors in the policy-making process. Finally, the actual process in which the policy was developed will be examined.

Response to the Need to Re-Construct the Paradigm

How has the current Liberal government responded to the call to re-construct the overall Aboriginal policy paradigm, in particular, the self-government policy paradigm? The federal Liberals were elected on a promise that they "[would] act on the premise that the inherent right of self-government is an existing Aboriginal and treaty right" (Liberal Party, 1993:98). The Aboriginal policy platform of the current government, as outlined in their 'Red Book', is based on the principle of building new partnerships with Aboriginal people: "the Government's commitment is to build a new partnership with Aboriginal peoples based on mutual respect, trust and participation in the decision-making process" (DIAND, 1995a). The focus then of the current government's Aboriginal policy platform is to change the structure of the relationship between Aboriginal people and the federal government

Traditionally the relationship has been constructed around a power dynamic in which the federal government held all the power. The shift now, according to the Liberal policy platform, is to include Aboriginal people in the decision making process. The framework of this policy approach is based on a recognition of Aboriginal rights with the intention to alter the relationship between Aboriginal people and the federal government. According to the Minister of Indian Affairs and Northern Development (MIAND), Ron Irwin, the Aboriginal policy framework outlined in the 'Red Book' marks the first time in history First Nations issues have had a significant section devoted to them in a policy platform (Irwin, Speech at AFN

conference (Oct. 27, 1995). The focus of this government on Aboriginal policy issues and a plan to create change seems to respond to the notion that the 'status quo' is no longer acceptable.

The primary focus of the Liberal government's Aboriginal policy approach is to assist Aboriginal people to be able to become self-sufficient and self-governing. This policy approach recognizes that previous Aboriginal policy approaches have inhibited the social and economic growth of Aboriginal people and Aboriginal communities (Liberal Party, 1993). Thus, the approach is based on the premise of "[undertaking] together creative initiatives designed to achieve fairness, mutual respect and recognition of rights" (Liberal Party, 1993:97). The key element of the Liberal government's new Aboriginal policy paradigm is the implementation of self-government which is to be based on the premise that the inherent right of self-government for Aboriginal people is already recognized within the Constitution. Recognition of the inherent right of self-government is in keeping with the ideological shift that occurred with the Charlottetown Accord. In addition, this approach also marks a break with previous federal policy approaches which maintained that self-government was a delegated right.

A cursory assessment of the main premise of the Liberal government's Aboriginal policy platform and its goal to act on the implementation of the inherent right of self-government would seem to demonstrate that this government acknowledges the need to re-construct the Aboriginal policy paradigm. The following

are some of the Aboriginal policy goals outlined in the 'Red Book'. community development, economic development, improved housing and community infrastructure, increased funding for education and training and a renewed focus on health and healing (Liberal Party, 1993). These policy goals combined with the notion that the federal government's relationship with Aboriginal people is a "litmus test of our beliefs in fairness, justice, and equality of opportunity" (Liberal Party, 1993:97), suggest a recognition that the 'status quo' is no longer acceptable. The true 'litmus test' of course will be the policies developed in order to achieve these goals.

The Context of Policy Development

As Chapter One outlined, in developing public policies the federal government is required to weight the goals and objectives of the various different policy actors against each other. By doing so the government is able to get a sense of what type of policy framework would be able to achieve the overall desired goals and objectives. This chapter shall proceed to outline the ideas and objectives regarding self-government of the following policy actors: non-Aboriginal Canadians, opposition parties, the provincial governments and policy communities.

Non-Aboriginal Views

In developing the IR policy, the task was to create a policy framework that

not only corresponded to the desires of Aboriginal people, but would also be viewed as an 'acceptable' policy framework by non-Aboriginal Canadians. The importance of the role of public opinion in policy making cannot be discounted when assessing the context in which the IR policy was developed. The perspectives of non-Aboriginal Canadians are a key factor in explaining the overall environment in which this policy was developed. The importance of the role that public opinion played in the development of this policy is demonstrated by a quotation from a May 1994 speech by Minister Irwin. In his speech Minister Irwin stated that: "I believe that it will be almost impossible to maintain public support for Aboriginal self-government unless we can ensure that the individual rights of all Canadians, Aboriginal and non-Aboriginal, are respected and protected" (Irwin, 1994:9). This quotation serves to reinforce the notion that a primary focus in the development of the IR policy was to achieve an approach that could be 'sold' to non-Aboriginal Canadians.

The following chart outlining the results of recent opinion poll surveys assists in painting a picture of the overall environment in which the IR policy was developed.

...

NON-ABORIGINAL PUBLIC OPINION ON SELF-GOVERNMENT

QUESTIONS	RESULTS			
"Do you think that First Nations are ready to assume self-government?" (Insight Canada, Fall/Winter 1995)	Yes - 38%	No - 53%	Undecided - 9%	
"With which Aboriginal groups should the federal government negotiate self-government?" (Insight Canada, Fall/Winter 1995)	National Organizations - 48%	Regional Aboriginal Groups - 32%	Undecided - 20%	
"What is the best approach for negotiating self-government?" (Insight Canada, Fall/Winter 1995)	Should continue to transfer specific powers - 34%	Should develop definition of self-government before negotiating - 29%	Should proceed with those willing to negotiate - 25%	Undecided - 12%
"What level of priority do you perceive Aboriginal issues in Canada to have?" (Insight Canada, Summer 1995)	High - 17%	Medium - 37%	Low - 32%	Very Low - 9%
"It is important to the future well-being of Canadian society that the aspirations of Aboriginal people for greater control over their lives be accomplished with negotiated self-government agreements?" (Insight Canada, Summer 1995)	Agree - 61%	Disagree - 19%	Neutral - 18%	
"If Parliament and the elected leaders of the Aboriginal people agreed that some Aboriginal laws instead of federal or provincial laws would apply in Aboriginal communities, it would be alright with me." (Insight Canada, Summer 1995)	Agree - 53%	Disagree - 19%	Neutral - 16%	

NON-ABORIGINAL PUBLIC OPINION ON SELF-GOVERNMENT

QUESTIONS	RESULTS			
"Who else should be involved when the federal government negotiates self-government with Aboriginal peoples?" (Insight Canada, Spring 1995)	Only the federal government - 26%	Include provincial governments - 27%	Other groups, such as municipalities, should be included along with federal and provincial governments - 30%	Undecided - 17%
"Should reparations for past injustices to Native peoples be limited to what is considered affordable?" (Insight Canada, Spring 1995)	Agree - 80%	Disagree - 7%	Undecided - 13%	
"If Aboriginal self-government becomes a reality, there should be guarantees that Aboriginal governments follow the same basic principles that other Canadian governments do." (Angus Reid, 1993:33)	Agree - 89%			
"What would be the most appropriate political organization for Aboriginal lands under self-government?" (Angus Reid, 1993:30)	Delegated powers like Canadian municipalities - 60%	Significant powers like provincial governments - 27%	Complete sovereignty - 7%	Undecided - 2% Status quo - 4%
Overall perspectives on the concept of Aboriginal self-government (Angus Reid, 1993:26).	Aboriginal people have an existing inherent right to self-government - 36%	Federal and provincial governments should allow Aboriginal people to govern themselves - 27%	Aboriginal people have no more right to self-government than other ethnic groups in Canada - 34%	Undecided - 4%

As demonstrated by the results of these opinion polls, Canadians hold a very conservative view of self-government and how it should be negotiated. A strong majority of Canadians polled accept the concept of Aboriginal self-government, however, only a mere 36 percent support the notion that the right of self-government is inherent. In addition, these poll results demonstrate that there is no clear consensus as to how the federal government should go about negotiating self-government; however, a strong majority, 57 percent, feel that the provincial governments should be involved in self-government negotiations. Despite the fact that Canadians have a conservative vision of Aboriginal self-government these poll results demonstrate that there is strong support for the federal government to address Aboriginal issues, in particular self-government.

Federal officials were well aware of these poll results and this conservative environment appears to have been a strong impetus for the federal government in the development of the IR policy approach to implementing self-government. As Chapter Four will demonstrate, the federal government's IR policy is consistent with the 'conservative' views that non-Aboriginal Canadians have of self-government. The IR policy with its quasi-municipal scope and limited areas of jurisdiction is representative of the conservative vision of self-government that non-Aboriginal Canadians feel is acceptable.

The Political Right

The position of opposition parties like the Reform Party has also played an important role in the development of the federal government's policy approach to implementing self-government. In recent years, there has been an increasing shift towards the 'right' on the Canadian political spectrum. Thus, it is important to assess the right-wing perspective and the Aboriginal policy platform of the Reform Party.

The policy perspective of the right-wing in Canadian politics is premised on the principles of fiscal restraint and equality¹⁸ for all Canadians (Watkins, 1992; Smith, 1995). Consequently, the social policy guidelines developed by right-wing political groups focus on these two principles. The right-wing in Canada views issues of Aboriginal policy and Aboriginal rights as being based on race. It is their belief that Aboriginal policies based on a recognition of special rights promote racism and are therefore an injustice to both Aboriginal and non-Aboriginal people (Reform Party 1995; Smith, 1995). Thus, their Aboriginal policy platform calls for an end to a special status for Aboriginal people and a termination of the federal government's fiduciary relationship with Aboriginal people and the fiduciary obligations resulting from it. As outlined in their policy guidelines, the Reform Party believes that Aboriginal people and Aboriginal governments should be treated the same as non-Aboriginal Canadians: "We believe in the equality of all citizens of

¹⁸ In this context, the term equality refers to formal equality, not substantive equality

Canada and say that policies relating to Aboriginal persons should respect that principle" (Reform, 1995.i). This position is based on the notion that Canadians should not be divided on the basis of race. The Reform Party views the recognition of Aboriginal rights as an issue of racial discrimination and they do not believe that the recognition of these rights should place Aboriginal people in a privileged position (Reform Party, 1995). It is this historic recognition of special rights that the right wing attributes to the development of a dependency cycle which has eroded the self-reliance of Aboriginal people.

On the issue of self-government, right wing groups such as the Reform Party do not recognize the inherent right of Aboriginal people to govern themselves. This position is premised on the theory of 'exhaustive jurisdiction', meaning that under sections 91 and 92 of the *Constitution Act, 1867* all areas of jurisdiction have been divided between the federal and provincial and territorial governments. Consequently, those who ascribe to this ideological position believe that Aboriginal self-government could only be a delegated form of government, subject to all Canadian laws (and the provinces and territories), including the Charter of Rights and Freedoms. All laws enacted by a delegated Aboriginal government would be subordinate to federal and provincial and territorial laws (Reform Party 1995, Smith, 1995). In his book Our Home or Native Land?, Melvin Smith argues against the position of the Liberal government that the inherent right of Aboriginal people to self-government is an existing right under section 35 of the Constitution. According

to Smith, the previous attempts of the federal government to constitutionally recognize self-government demonstrate that such a right does not exist within the current Constitution. In addition, he argues that previous decisions of the Canadian courts have rejected the notion of a third order of government (Smith, 1995). In the opinion of the right-wing, the recognition of the inherent right of self-government would result in a third level of government which would be able to legislate without regard for other levels of government. The consequence of such a third order of government would be inequality amongst Canadians: a notion that they find unacceptable.

In their Aboriginal self-government policy recommendations, the right-wing supports the implementation of Aboriginal governments as a delegated authority with powers equivalent to a municipal government. The authority of an Aboriginal government under this model would be restricted to reserve land and subject to all federal and provincial and territorial laws. In addition, Aboriginal governments must be both economically and socially viable, developed with the intent of reducing federal expenditures for Aboriginal people over the long-term. It is their position that self-government should enhance Aboriginal self-reliance, ensure accountability and promote equality for all Canadians (Reform Party, 1995, Smith 1995). In keeping with the Reform Party's overall policy platform principle of accountability, the Chief Electoral Officer of Elections Canada would have the authority to examine the electoral procedures of Aboriginal governments. Similarly, the Auditor General would

have the authority to review an Aboriginal government's management of federal funds (Reform Party, 1995). Reminiscent of the federal government's 1969 White Paper, the goal of the Aboriginal self-government policy agenda of the right-wing is not to implement self-government for Aboriginal people, but to institutionally assimilate them to ensure equality amongst Canadians.

Provincial Perspectives

Historically, the provincial governments have been reluctant to implement Aboriginal self-government either through negotiations or a constitutional amendment. This position is predicated on the view that Aboriginal people are a federal responsibility. Consequently, provincial governments have ascribed to the position that self-government should be negotiated and funded by the federal government.

The concerns of the provinces centre around three specific issues: funding, land and jurisdictional authority. With respect to the first issue, the concern is that through self-government, the federal government is attempting to off-load its financial responsibilities to the provinces (Smith, 1993). Second, the provincial governments have concerns about the potential scope of Aboriginal governments and what the consequences will be for their land base and jurisdictional authorities. While there are concerns at the provincial level regarding self-government, this is not to say that all provincial governments are unwilling to negotiate self-

government agreements. Over the years, some provincial governments have demonstrated a commitment to self-government and a recognition of Aboriginal rights. For example, the Ontario government under David Peterson was the first province to approve provincial guidelines for negotiating self-government and the province's subsequent government under Bob Rae formally recognized the inherent right of self-government in October 1990. The B.C. government under Mike Harcourt also formally committed itself to negotiating self-government agreements. As well, the governments of Saskatchewan and Manitoba have successfully implemented co-management arrangements with Aboriginal people (Smith, 1993). While none of these commitments resulted in the development of self-government agreements, they demonstrate the potential for provincial support of self-government.

Despite their reluctance, the provincial governments play a very important role in the self-government debate. The importance of this role is emphasized by the lessons learned from previous constitutional and legislative attempts to implement self-government. Those areas that are of primary concern to an Aboriginal community and form a necessary part of any self-governing structure such as: education, policing, justice, health, land and resources are all areas of provincial jurisdiction. Consequently, no meaningful self-government arrangement can be negotiated without the involvement of the provinces. Thus, it was extremely important for the federal government in the development of the IR policy to ensure that the provinces were on side with their policy approach. As the analysis of the

consultation process conducted later in this chapter will demonstrate, the provincial governments were actively consulted throughout the policy development stage. While federal officials argue that the provincial governments had the same role as other groups in the development of the IR policy, the analysis demonstrates that more meetings were held by the DIAND officials with provincial and territorial governments than with Aboriginal organizations; thus reinforcing the importance of the role played by provincial governments in the development of this policy approach.

Policy Communities

Policy communities including Aboriginal groups, various government agencies, government appointed advisory groups, the media and academics play a very important role in policy development. It is these groups which generate the ideas around which policies are developed. Of course, the government is not mandated to adhere to the advice of policy communities and in many instances it has ignored it. However, when certain ideas keep recurring in policy advice they can lead to a shift in the policy paradigm.

Fifteen years of self government debate has generated a vast amount of research on the issue. In particular, the period of debate around the Charlottetown Accord clearly brought to the fore the perspectives on self government of the various different actors. In the aftermath of the Accord, policy communities began to refocus their analysis of self government. Motivated by the fact that two

previous attempts to amend the Constitution had failed and it would be quite some time before another constitutional amendment was attempted, policy communities began to explore alternative options to accommodate Aboriginal self-government. Taking lessons from the successes and failures of previous constitutional, legislative and administrative attempts to implement self-government, policy communities began to develop a new policy framework.

Often arguing that the 'status quo' was no longer appropriate for addressing the concerns of Aboriginal people, policy communities made recommendations for implementing self government. These recommendations covered a wide array of self government options including the creation of an eleventh province encompassing all local Aboriginal governments, sovereign Aboriginal governments and Aboriginal governments exercising municipal authorities. Throughout this re-examination period, there was an emerging notion that the inherent right of self-government for Aboriginal people already existed in the Constitution. Therefore, self government could be successfully implemented and the interests of Aboriginal people accommodated without a constitutional amendment¹⁹. This notion was supported by some policy communities and rejected by others, however it served to broaden the parameters of potential self-government policy. The Liberal Party of Canada picked up on the idea and implemented it into its Aboriginal policy platform thus confirming that this idea could form the basis of a new self-government policy

¹⁹ This notion has been explored by the RCAP, 1993; McNeil, 1994; Hogg and Turpel, 1995; Smith 1995; B.C. Ministry of Aboriginal Affairs, 1996, and Ontario Native Affairs Secretariat, 1996.

approach.

The Aboriginal Policy Paradigm

Aboriginal issues affect a variety of different federal departments in particular in the areas of health, natural resources, the environment, fisheries, justice, employment and training, and taxation. Consequently, a number of federal departments have Aboriginal affairs directorates which influence the development of Aboriginal policy. However, the DIAND is the guiding force in the development of public policy concerning Aboriginal people. The document entitled Framework for Action: A Work in Progress, outlines the current Aboriginal policy paradigm of the DIAND and consequently the federal government. Premised on the promises outlined in the 'Red Book', the current Aboriginal policy paradigm focuses on achieving a fundamental change between Aboriginal people and the federal government over the long-term (DIAND, 1996). In order to achieve this long term objective, the federal government's Aboriginal policy paradigm is structured around the notion of changing the way that it conducts 'Aboriginal business' in order to increase the self reliance and accountability of Aboriginal people. Consistent with previous attempts to devolve the administration and funding of programs and services to Aboriginal people, the federal government is attempting to change its role from one of administrator and advocate of Aboriginal people to that of a negotiator and mediator. The focus of Aboriginal policy is to change the federal government's role

from delivering programs and services to Aboriginal people to negotiating agreements through which Aboriginal communities would take on these responsibilities themselves. Consequently, the implementation of self-government for Aboriginal people is one of the principal policy objectives of this paradigm. The success of this policy approach is predicated on co-operation between the provincial governments and all federal departments involved in Aboriginal policy and limited by an availability of financial resources. The possibility of success is supported; however, by the desire of Aboriginal people to increase their control and decision-making ability in their communities (DIAND, 1996).

A strong impetus for the development of a new policy approach to self-government is the fact that many Aboriginal communities already have administrative control over their programs and services. As a result of devolution, over 80 percent of the DIAND programs are currently administered at the community level (DIAND, 1996). Through devolution, Aboriginal communities have been able to achieve an administrative role over program design and delivery and block funding arrangements through which to finance these programs (Lenihan et al, 1994). This in turn has resulted in the achievement of a limited authority over programs and services. However, the reality is that while devolution has somewhat increased the authority of Aboriginal communities, they are merely administering federal and provincial government programs and services. Devolution is simply a transfer or off-loading of an administrative role, but it does not allow a community to develop

its own programs and services. Consequently, it is not self government. However, devolution has begun to restructure the relationship between the federal government and Aboriginal people, providing a foundation on which to build self government arrangements

Regulatory Instruments

The role of the federal government in the creation of Aboriginal policy is derived from Section 91 (24) of the *British North America Act (BNA Act), 1867*. Section 91 (24) granted to parliament jurisdiction over "Indians and lands reserved for Indians". This section of the *BNA Act, 1867* has provided for the basis of the relationship between the federal government and Aboriginal people. Historically, the policy approach of the federal government has been based on the principles of 'protection, civilization and assimilation'²⁰. The regulatory means chosen to achieve these goals was the passage of the *Indian Act* in 1876.²¹ The *Indian Act* and subsequent amendments to it "provided Canada with the means to 'manage' Indian affairs, to recognize and assimilate Indian peoples and their governments" (Cassidy &

²⁰ For a historical account of this policy approach refer to John Tobias, "Protection, Civilization, Assimilation: An Outline of the History of Canada's Indian Policy", Sweet Promises Toronto: University of Toronto Press, 1991.

²¹ Passed in 1876, the *Indian Act* was to amend and consolidate the laws with respect to Indians. The Act clarified and described the responsibilities of the federal government towards Indians that had been established in the *BNA Act* and it is the foundation on which all succeeding legislation has been based. The *Indian Act* clearly defined those whom the federal government viewed as 'Indian', as well as outlined those rights and privileges that were to be afforded them. "The *Indian Act* is something of a 'total institution', with the treaties, it touches on almost all aspects of the lives of status Indians, placing them in a separate category from other Canadians" (Dickason, 1992:286).

Bish, 1989:5). It is from this ideological and jurisdictional premise that Aboriginal policy has historically been developed. While the *Indian Act* defines the federal government's responsibility as being only to those Aboriginal people who are classified as status Indians, the Act affects all Aboriginal people. For those who fall under the *Indian Act* this has been the means through which the federal government has regulated their social and economic status. For those who do not fall under it, the *Indian Act* has regulated that the federal government is not responsible for the provision of programs and services to these communities. Thus, the *Indian Act* has regulated the involvement, or lack of involvement, that the federal government has in matters affecting Aboriginal people. Consequently, in order for a new partnership to be created between the federal government and Aboriginal people the regulatory force of the *Indian Act* must be changed.

Self-Government Objectives

What are the overall objectives of Aboriginal people and the federal government with respect to implementing self-government? There are many different Aboriginal groups in Canada. Consequently, there are a variety of different views about what the objectives of self-government should be. The RCAP encapsulates these varying views in the following manner:

Self-government means different things to different Aboriginal groups. For some, it may mean reviving traditional governmental structures or adapting them for modern purposes. For others, it may mean creating entirely new structures or participating more actively in new or existing institutions of

public government that would include all the residents of a particular region or territory. For still other groups, it may mean greater control over the provision of governmental services such as education and health care... (RCAP, 1993:41).

No matter how the objectives are described, self government implies a restructuring of the present relationship between Aboriginal people and the federal government. The framework for this restructuring, however, needs to be flexible enough to enable the achievement of a variety of different self-government objectives.

For the federal government, the long-term objective of self-government is to get out of the business of Aboriginal affairs. Since 1969, the notion has been that the DIAND would eventually be dismantled. Through such initiatives as: devolution, amendments to the *Indian Act* Manitoba Dismantling and the creation of Nunavut, the federal government has been slowly attempting to devolve its responsibility for Aboriginal people. The implementation of self-government for Aboriginal people represents the ultimate devolution of this historic responsibility. It is unclear whether or not the intention of the federal government is to terminate its fiduciary responsibilities and obligations to Aboriginal people via self-government. However, the implication is that self-government would enable a reduction in the level of responsibility and financial obligations of the federal government for Aboriginal people.

The Policy Development Process

Federal Role

The IR policy was not developed by the federal government overnight. Rather, this policy emanates from the lessons that have been learned from its previous policy approaches and the limited progress that has been made towards self-government over the past fifteen years. For the past fifteen years, self-government has been a policy consideration for the federal government; however, the impetus for the development of this current policy approach was the Liberal government's 'Red Book' promise to implement self-government. Acting on this promise, federal officials began to develop a policy approach which would enable the implementation of self-government based on the principles outlined in the Liberal policy platform. Consequently, the IR policy represents a macro-policy approach and all affected departments were involved in its development. The sponsoring Ministers for the policy were the MIAND and the Federal Interlocutor. Their respective departments the DIAND and the PCO with support from officials from the DOT and the DOJ had an integral role in developing both the legal and policy framework for the policy. In developing this policy approach, however, the federal government faced many challenges.

What issues are regarded as priorities for the federal government and how does Aboriginal self-government fit into this agenda? In 1993, Menno Boldt wrote that: "all Canadian governments, of whatever party stripe, have consistently

subordinated Indian interests to the Canadian 'national interest' in their development of policy" (Boldt, 1993:79). Boldt's analysis reinforces the fact that an assessment of the objectives of Aboriginal policy must be regarded in relationship to the overall objectives of the government.

The 1994 Speech from the Throne articulates the top priorities of the government as: job creation and economic growth, reform of the social security system, fiscal restraint and taxation (Canada, 1994). In 1996, the top priorities of the government are listed as: national unity, economic growth and job creation and fiscal restraint and deficit reduction (Canada, 1996). For the purposes of this research I have chosen to focus on what I feel are currently the two principal priorities of the federal government and their relationship to Aboriginal self government. I feel that national unity and fiscal restraint are these two principal priorities. How have these two priorities affected or restricted the development of the IR policy?

The national unity issue, in particular the concerns surrounding Quebec's exclusion from the *Constitution Act, 1982* and its attempts to claim sovereignty as a 'nation', has played a very important role in the development of the IR policy. Firstly, the lack of political will to re-open the Constitution to address issues of concern to Quebec has thus limited the federal approach regarding self government. A desire on the part of the federal government to leave the 'Constitutional debate' in the past has limited its ability to implement Aboriginal self government through

a constitutional amendment. Second, despite the fact that Aboriginal people have argued that self-government should result in sovereign Aboriginal governments the federal government was limited in its ability to respond to this position. To create sovereign Aboriginal governments would be precedent-setting for the province of Quebec, which has also argued for sovereignty. Consequently, the federal government had no other choice but to adopt a policy approach that worked within the existing Constitution and would not result in sovereign Aboriginal governments. In addition, it has been argued that in adopting such an approach to Aboriginal self-government, the federal government was signalling to Quebec its position that it is unwilling to negotiate a constitutional amendment to recognize the rights of both Quebec and Aboriginal people (Delacourt, 1995).

The federal government's preoccupation with the notion of fiscal restraint has also placed serious limitations on the self-government policy development process. In an era when the federal government is making cuts to government programs in an attempt to reduce the deficit, it is imperative that any new self-government policy be developed in a fiscally conservative manner. A policy approach like the CBSC policy that cost millions of dollars and achieved no results would not be acceptable. If the federal government was going to obtain support for its policy approach it was going to have to assure non-Aboriginal Canadians that self-government was not going to be a drain on the federal purse.

Other challenges that the federal government faced in developing a new self-

government policy concern the current status of Aboriginal people. Principal amongst these is the fact that "the population on reserves is increasing at almost double the rate of that for the population of Canada" (DIAND, 1996). This population growth in turn will result over the long-term in increased government spending for the delivery of programs and services. In addition, Aboriginal people traditionally have poorer living conditions, lower levels of education and higher rates of unemployment. This, coupled with the fact that Aboriginal people have increasing expectations for the federal government to address Aboriginal issues, has placed the federal government in a position in which it must initiate policy change.

The Consultation Process

As Chapter Four will demonstrate, Aboriginal groups have objected to the IR policy on the basis that they were not consulted throughout its development. However, the federal government maintains the position that this policy was developed in consultation with Aboriginal people. In January 1994, the MIAND (Ron Irwin) and the Federal Interlocutor for the Metis and Non-Status Indians (Anne McLellan) embarked upon a six-month consultation process in which the framework for this policy was developed. The federal position is that this consultation process was undertaken to enable national and regional Aboriginal leaders, provincial and territorial governments and other interested parties to express their views on self-government and suggest possible mechanisms for its implementation (Canada,

1994a 1)

This consultation period has been referred to, by federal officials, as more of a discussion period. The various different ideological views on self-government and the inherent right concept were very well known in the post-Charlottetown Accord period. Thus, the intent of this discussion period was not to debate the notion of the inherent right. Rather the focus of these discussions was to develop a new policy approach to act on the Liberal promise to implement the inherent right of self government. It was a well accepted fact that consensus on an implementation framework would never be achieved. Thus, the objective of this discussion/consultation period was to be able to develop the most acceptable implementation framework possible.

In May 1994, Ministers Irwin and McLellan gave a speech to a meeting of federal-provincial-territorial Ministers and Aboriginal leaders. The objective of this speech was to provide a status report of the consultation process to date and outline potential ideas that could be represented in the policy framework for implementing the inherent right of self-government. Minister Irwin indicated that since the consultation process had begun, he had met with hundreds of Chiefs and Elders across the country and regularly with National Aboriginal leaders (Irwin, Speech: May 17, 1994). The implication made in the speech is that the purpose of these meetings was to discuss their views on the implementation of the inherent right of self-government. While I believe that the issue of self-government was

discussed at a majority of these meetings, it would be overly optimistic to assume that Minister Irwin had substantive discussions with hundreds of Chiefs and Elders in this five month period. It was clearly indicated that the views presented in the speech were preliminary and not to be considered the policy framework that would necessarily be adopted by the federal government:

I want to emphasize very clearly at the outset that none of our remarks represent firm and final positions on the part of the federal government. They are only our initial views and ideas. Minister McLellan and I invite, and would welcome, your comments on these ideas (Irwin, Speech May 17, 1994.2)

The intent of this presentation was to be an impetus for discussion. The Ministers outlined the general principles which they felt, in light of their consultations, should guide the policy framework for the implementation of the inherent right of self government.

A review of the content of this speech demonstrates that the overall broad goals and principles of the policy approach that was adopted were outlined by the Ministers at this time. Issues of financing, accountability, process and organizational funding are not very clearly defined in the speech. In each of these areas, the Ministers outlined the need for consultations in order to achieve clarity as to how the policy framework should address these issues. It would appear as though the Ministers used this speaking engagement as an opportunity to 'test the waters'. Initially, the consultation period was to terminate in June 1994. However, consultations continued for an additional year. The extension of the consultation period from six months to eighteen months would suggest that the Ministers had

difficulty either finalizing or 'selling' their policy approach at either the Aboriginal, provincial or Cabinet level.

In total, throughout this consultation period the federal government contributed \$4.5 million to 61 national and regional Aboriginal groups in order to facilitate their participation in the development of the policy (Canada, 1995a). Of the total \$4.5 million, approximately \$3.1 million in funding was distributed by the DIAND to 47 national or regional organizations representing status, on-reserve Aboriginal groups. The remaining \$1.4 million was funded by the Federal Interlocutor to 21 Métis and off-reserve Aboriginal groups. Funding was distributed to Aboriginal groups in each of the 10 provinces and 2 territories. In addition, the following nine national Aboriginal groups received funding: AFN, CAP, ITC, MNC, NAFC, NAHA, NFN, NWAC and Pauktuutit. Funding was provided to Aboriginal groups in order to facilitate their ability to consult with their membership on the inherent right of self-government and enable them to provide the federal government with their official position.

Six national and 21 regional organizations provided written submissions to the DIAND on the inherent right of self-government²² (DIAND, 1995:List #4). The only national Aboriginal organization (of the seven who received funding from the DIAND)

²² The author was unable to obtain access to the detailed information outlining the meetings held with Métis and off-reserve Aboriginal groups, or which of these groups provided the federal government with written submissions.

to not provide a written submission was the AFN²³. Over the course of the consultation period, the MIAND and the Federal Interlocutor and officials from their respective departments met with representatives from various national and regional Aboriginal organizations. In short, official meetings were held with any group which requested an opportunity to discuss the inherent right of self government with the federal government.

A review of the list of those groups with which official 'IR' meetings were held by the MIAND or officials from his department reveal that between January 1994 and May 1995 approximately fifty two meetings were held. Four of these meetings were held with three national Aboriginal organizations (ITC, NAFC and NFN). At the regional level, twenty three meetings were held with Aboriginal groups in two territories and six of the ten provinces. Throughout this period Minister Irwin also held ten meetings with Ministers from eight of the ten provinces and two territories. In addition, the Minister and/or DIAND officials held fifteen meetings with provincial and territorial government representatives and four meetings with third party groups (DIAND, 1995 List #1 & 2). Thus, a total of twenty seven meetings were held by the DIAND with Aboriginal organizations while twenty nine meetings were held with the provinces, territories and third parties.

The overall analysis of this consultation process is somewhat skewed by the fact that I was unable to obtain detailed information regarding the number of

²³ The total funding to the AFN during this consultation process was \$280 500 (DIAND 1995 List #4)

meetings held with Métis and off reserve groups. However, I would argue that the consultation process for developing this policy was very open and adequate funding was granted to Aboriginal groups. Yet the openness of the consultation process and the funding provided for it may just have been smoke and mirrors. In actuality more 'official' meetings were held by the Minister and the DIAND with provincial and territorial governments than with Aboriginal organizations. Keeping in mind of course that the inherent right of self-government was more than likely discussed at various other meetings with Aboriginal groups, the fact remains that twenty-seven meetings over a one and a half year period does not seem to represent broad consultation. However, in all fairness the federal government made its position fairly well known and publicly invited comments on its position. Aboriginal groups were also afforded the opportunity to submit written proposals, which groups such as the AFN chose not to do.

Conclusion

The focus of this chapter has been to outline the environment in which the IR policy was developed. Through an assessment of the various ideas and roles of the actors involved in the policy development process (Aboriginal and non-Aboriginal people, provincial governments and the federal government) this chapter has attempted to demonstrate some of the limitations and challenges that the federal government faced in developing the IR policy.

As this assessment has shown, there are many different competing agendas that must be taken into account during the policy development process. Careful consideration must be given to each of the various perspectives for the miscalculation of the perspectives and positions of the various actors can have a devastating effect on the future of a policy. An examination of the perspectives of the various different actors in the development of the IR policy demonstrates that there is no cohesive or unified vision of self-government. Thus, the federal government was faced with the challenge of weighting the objectives and liabilities of each of the policy actors against each other. While there is not one unified vision of self-government that emerged through this assessment several guiding principles become very apparent. The first of these is that self-government should be implemented in a financially responsible manner. Second, self-government should not result in the creation of sovereign Aboriginal governments. Finally, the implementation of self-government for Aboriginal people requires the involvement of the provincial governments. On this issue of the inherency of self-government no clear consensus emerges. However, a majority of the political actors agree that Aboriginal people have an inherent right of self-government, the question remains though does this right already exist within the Constitution?

The next chapter of this thesis will examine the new policy approach that has been undertaken by the federal government to implement self-government. The focus of this chapter will be to examine the dominant ideas, structures and

processes of this new policy approach. In analysing the IR policy, the focus will be to demonstrate that the Aboriginal self-government policy paradigm has shifted, but the resolution stage has not been successfully completed. Consequently, a new policy paradigm has not yet been realized. In addition, this analysis will assess whether or not this new policy approach responds to the desires of Aboriginal people and if it responds to the Aboriginal policy goals outlined by this government.

CHAPTER FOUR: POLICY ANALYSIS

From an ideological perspective significant change has occurred within the self-government policy paradigm since 1982. As Chapter Two demonstrated, the watershed of ideological change occurred in 1992 with the Charlottetown Accord. The Accord explicitly recognized an 'inherent' right of self-government for Aboriginal people. This right was understood by all participants in the negotiations (federal government, provincial governments and Aboriginal organizations) "to be a pre-existing right that is rooted in Aboriginal peoples' long occupation and government of this land before European settlement" (Hogg & Turpel, 1995:379). While the concept of inherency is not new, the Charlottetown Accord was very important politically. It represented the first time that the federal and provincial governments acknowledged the inherent right of Aboriginal people to self-government. The past failures to implement self-government for Aboriginal people suggest that the federal government needs to re-construct the Aboriginal policy paradigm. Now that the inherent right of self-government has been ideologically accepted, the task is to develop a policy framework in which to implement this right. Successful completion of both of these stages would result in the emergence of a new self-government policy paradigm.

Thus, it is from this perspective that I begin my assessment of the IR policy. At this time, I feel that it is important to highlight the ideological tenets on which

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both Aboriginal and non-Aboriginal communities, the jurisdiction and authority of an Aboriginal government would be subordinate to that of the federal or provincial government which has primary law-making authority in that area (Canada, 1995d).

Finally, the third category outlines those areas in which the federal government is not willing to transfer power and authority to Aboriginal governments. Those authorities not to be negotiated pertain to: "(i) powers related to Canadian sovereignty, defence and external relations; and (ii) other national interest powers including such things as: monetary policy, trade policy, broadcasting and telecommunications, navigation and shipping and maintenance of national transportation systems" (Canada, 1995d:7). The federal government is of the view that the powers and authorities within these areas are not "characterized as either integral to Aboriginal cultures, or internal to Aboriginal groups" (Canada, 1995d:7). Since these are areas of national concern, it is the position of the federal government that it should maintain responsibility for these areas.

The jurisdictional position that has been taken in this policy is in contrast to the position of RCAP on self-government. In their 1992 position paper on self-government, RCAP argued that Aboriginal governments should be a third order of government. This third order of government would have areas of exclusive jurisdiction similar to those of the federal and provincial governments. RCAP does not advocate unlimited jurisdiction for Aboriginal governments. However, it does recommend that Aboriginal governments be accorded sovereignty in certain areas

The Inherent Right Policy

Building on the principles and ideological change that took place during the Charlottetown Accord and the need to alter the 'status quo', this policy marks a new approach to Aboriginal self-government policy. The IR policy marks the first time that the federal government has adopted a policy which acknowledges the inherent right of self government and provides a framework in which to implement it.²⁵ But the question to be answered in analysing this policy framework is. Does it represent a new policy paradigm?

The crux of this policy is the recognition of the inherent right of self-government as an existing right within section 35 of the Constitution Act, 1982 (Canada, 1995c:3). In taking this approach, the federal government has based this policy on the view that:

Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources (Canada, 1995d:3).

Recognizing that, at this time, it would be difficult to amend the Constitution to explicitly recognize the inherent right of self-government for Aboriginal people, the federal government has adopted the position that this right already exists within the

²⁵ "The [Charlottetown] Accord would have established for the first time a firm legal and policy framework to govern negotiations, to resolve preliminary issues such as identification of parties, to clarify the scope of Aboriginal jurisdiction, to ensure adequate funding for the process and for the resulting governments, and to provide for the constitutionalization of the self-government agreements and for their implementation" (Hogg and Turpel, 1995). Since the Canadian people voted against the Charlottetown Accord in a national referendum, it was never legally implemented. Thus, this new policy framework represents the first time that the federal government has adopted such a framework.

Constitution. While the existence of such a right has never been formally recognized by the Canadian courts, there is both a political and legal framework on which to base this assumption

The political framework on which to base this assumption is rooted in the ideological shift that occurred during the Charlottetown Accord (Hogg & Turpel, 1994; RCAP, 1993). While the legal framework for this policy approach is based on the premise of recent Supreme court decisions in the cases of *Guerin* and *Sparrow* which have acknowledged the existence of Aboriginal rights. In accepting that the inherent right of self-government exists within the Constitution the federal government has acknowledged that:

Aboriginal rights are rights that are held by Aboriginal people, not by the virtue of Crown grant, legislation or treaty, but by reason of the fact that Aboriginal peoples were once independent, self governing entities in possession of most of the lands now making up Canada (Slattery, 1987:314; Hogg and Turpel, 1995:380).

This principle is not exclusive to the adoption of this policy. Policy communities have previously examined such a theory. For example, RCAP acknowledged that:

there are persuasive reasons for concluding that the right of self-government is one of the rights enjoyed by Aboriginal peoples under the common law doctrine of Aboriginal rights. So, the right of self-government qualifies as an Aboriginal right within the meaning of section 35(1) (RCAP, 1993:31).

Aboriginal organizations and academics writing about self-government have also previously suggested the undertaking of such an approach (RCAP, 1993; Hogg and Turpel, 1995; McNeil, 1994). Thus, there is a basis of support amongst Aboriginal

people and academic theorists for such an approach. This policy, however, marks the first time that the federal government has acknowledged the existence of the inherent right of self-government. Acknowledgment of such a right, which is consistent with the ideological shift that has occurred regarding self-government, is only the first step to developing a new self-government policy paradigm. The second step is a shift in the policy framework in which this right is to be implemented.

The federal policy framework for implementing the inherent right of self-government is premised on the undertaking of negotiations between federal and provincial governments and Aboriginal groups to determine how this right would be exercised. Negotiations are seen by the federal government to be the only practical means available at this time to implement the inherent right of self-government (Canada, 1995d). The IR policy framework is designed to negotiate self-government agreements with all Aboriginal people including: Indian, Métis, and Inuit people. The intent is that agreements will be developed with Aboriginal people on and off a land base, in the North, in urban centres and in remote locations (Canada, 1995c). The federal government is said to recognize within this policy the unique political, economic, legal, historical, cultural and social circumstances of Aboriginal people (Canada, 1995d). Thus, the IR policy acknowledges the necessity to negotiate self-government agreements with Aboriginal people that are designed to respond to their unique circumstances. Under this policy, the federal government is willing to

negotiate agreements with Aboriginal groups at the local, provincial, treaty or regional level. In addition, the policy framework implies that the preference is for provincial governments to be actively involved in the negotiation process.

The intent of this policy is not to create a model of self-government that could be applied across the country. Rather it is designed to be a flexible approach to creating self-government agreements that will meet the needs of the specific Aboriginal group or community. The relationships between the federal government and First Nations, Inuit Communities, Métis and Indian groups off a land base, Métis with a land base, and Aboriginal groups in the Western Northwest Territories and the Yukon vary widely. Consequently, the negotiation of self-government agreements with each of these groups will vary.

Under the IR policy, Aboriginal governments would exercise their inherent right of self-government within the framework of the Canadian Constitution (Canada, 1995d), and would be required to work in cooperation with those authorities and jurisdictions of other levels of government. Therefore, the negotiation of self-government would involve the participation of provincial and territorial governments in order to negotiate agreements in those areas that presently fall under their jurisdictions. In a practical sense, self-government would not grant sovereignty to Aboriginal governments and would not create independent Aboriginal nation states. Rather, this policy framework is intended to "enhance the participation of Aboriginal peoples in the Canadian federation, and ensure that Aboriginal peoples and their

governments do not exist in isolation, separate and apart from the rest of Canadian society" (Canada, 1995d:4).

The federal policy guide outlines that under this implementation approach, the Canadian Charter of Rights and Freedoms "should bind all governments in Canada so that Aboriginal peoples and non-Aboriginal Canadians alike may continue to enjoy equally the rights and freedoms guaranteed by the Charter" (Canada, 1995d:4). Section 25 of the Charter, which guarantees that those "rights and freedoms granted by the Charter shall not be interpreted in a manner that would abrogate or derogate from any existing or future Aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada" (Constitution Act, 1982), would continue to apply.

Application of the Charter to Aboriginal people has historically been a contentious issue²⁶. There are essentially two principles on which Aboriginal organizations have based their objection to the Charter.

1. "Aboriginal people were not directly involved in the patriation of the Constitution and inclusion of the Charter in 1981-82" (McNeil, 1994:12) and they lobbied against it in an attempt to block patriation; and
2. the Charter is premised on the notion of protecting individual rights and freedoms.

The protection of individual rights and freedoms as guaranteed by the Charter is seen to be in opposition to the protection of the collective rights of Aboriginal people. However, in spite of historical opposition to the Charter, the federal

²⁶ It should be noted that Aboriginal women's organizations (e.g. NWAC) have insisted on the application of the Charter to Aboriginal governments (AFN, 1992)

government is of the view that with the inclusion of Section 25 "The Charter is thus designed to ensure a sensitive balance between individual rights and freedoms, and the unique values and traditions of Aboriginal peoples of Canada" (Canada, 1995d:4). Thus, the federal government does not feel that the application of the Charter will alter the flexibility of their policy approach to accommodate Aboriginal people in obtaining self-government agreements (Canada, 1995c)

It is important to note the wording used in the IR policy. It states that the Charter "should" bind all self-government agreements thus, articulating the federal government's preference that the Charter apply. However, there are varying legal opinions on whether or not the Charter 'would' actually apply to Aboriginal governments (RCAP, 1993, McNeil, 1994; Hogg and Turpel, 1995)

The text of the Charlottetown Accord and those who negotiated it, accepted that the Charter "should apply immediately to governments of Aboriginal peoples" (Consensus Report, 1992:15). This clause was followed by an additional one outlining that Aboriginal peoples should also have access to Section 33 (the notwithstanding clause) of the Constitution Act, 1982. Application of the Charter to Aboriginal governments in the Charlottetown Accord is said to have been reluctantly accepted by the AFN. There is also evidence to suggest that Chief Mercredi has reverted back to a position of opposition to the Charter.²⁷ It has also been argued that the

²⁷ In his book In the Rapids, Chief Ovide Mercredi articulated his opposition to the application of the Charter to Aboriginal governments, despite its inclusion in the Charlottetown Accord (Mercredi and Turpel, 1993).

decision in the Charlottetown Accord to apply the Charter was made in haste without proper consideration of the legal implications (McNeil 1994).

The legal position of those who oppose the application of the Charter to Aboriginal governments can be summarized as follows:

Section 32(1), which specifies that the Charter applies to the federal, provincial and territorial governments, does not encompass Aboriginal governments. Moreover, section 25 shields the rights and freedoms of Aboriginal peoples, including their right of self-government, from abrogation or derogation by the Charter (McNeil, 1994:26).

Thus it is argued that since section 32 of the Charter did not contemplate the existence of Aboriginal governments they should not at this time be forced to abide by it. In addition, it is argued that the application of the Charter would place limitations on the exercise of the right of self-government which would thus constitute a derogation of that right.

In contrast, the position of those who feel that there is a legal basis for the application of the Charter to Aboriginal government rests on a different interpretation of both section 32 and section 25. It has been argued that if faced with a court challenge the Canadian courts would rule that Aboriginal governments are bound by the Charter (Hogg and Turpel, 1995). This position is based on the premise that even though the right of self-government is not created by the federal government, the implementation of such a right would require a negotiated agreement enforced by a statute or legislation (in the case of protecting treaty rights), in order for it to be legally binding. The statute or legislation is believed to

constitute involvement by the Parliament of Canada thus enforcing the application of the Charter to Aboriginal governments. It is the view of RCAP that "Insofar as the right of self-government is an Aboriginal right, section 25 protects it from suppression or amputation at the hands of the Charter" (RCAP, 1993:39). Thus, the Charter would serve to regulate how Aboriginal governments exercised their power but it would not abrogate their right of self-government.

The point to be made here is that the federal government has articulated its position that under the IR policy, the Charter should apply to Aboriginal governments. However, the legal basis of its application has never been formally tested. This issue has historically been a very contentious one and I believe that it will remain so under the IR policy.

In terms of the potential jurisdictional authority for Aboriginal governments under the IR policy, there are three categories. These categories range from the potential for broad to very restrictive levels of authority.

As outlined in its policy guide, the objective of the federal government is to negotiate self-government agreements in those areas which are "internal to the group, integral to its distinct Aboriginal culture, and essential to its operation as a government or institution" (Canada, 1995d:5). The following is an abbreviated list of those items the federal government feels are 'integral' or 'internal' to Aboriginal governments:

- establishment and administration of governing structures and membership

- health and social services, including child welfare
- education, language and culture
- policing and justice issues
- land and resource management
- housing and municipal services
- taxation and financial management
- economic development

(Canada, 1995d:5-6).

Essentially, what this means then is that in these 'core' areas Aboriginal governments would be able to negotiate jurisdictional authority. However, this authority would not be exclusive and would consequently be required to be exercised concurrently with those authorities of the federal and provincial governments.

The legal theory on which the federal government has based its position has been derived from the *Sparrow*²⁸ decision. The negotiation of Aboriginal jurisdiction in one of these 'core' areas does not automatically exclude federal or provincial jurisdiction in that area. Federal and provincial laws and jurisdictions would apply concurrently with those of Aboriginal governments. However, like other Aboriginal rights, self-government would be protected under section 35 against infringement by the federal and provincial governments. Consequently, the 'Sparrow test' would regulate jurisdictional disputes. In such cases, if it could be demonstrated that federal or provincial laws and jurisdictions infringed upon the Aboriginal right of

²⁸ In the *Sparrow* case, the Supreme Court ruled that the Aboriginal fishing rights of members of the Musqueam Nation are protected against limiting federal legislation which fails to meet the test for justification which the court set out.

The 'Sparrow Test' "requires the federal government to justify any legislative infringement of Aboriginal rights by proving first that it had a valid legislative objective, and second that the legislation fulfils that objective with as little infringement of Aboriginal rights as possible in the circumstances" (McNeil, 1994:5).

self-government then the onus would be on the federal or provincial governments to justify their jurisdiction in that area. In short, the laws and jurisdictions of Aboriginal governments (in these specific areas) would be exercised concurrently with those of the federal and provincial governments, unless it could be shown that this right had been infringed. In theory, this framework offers Aboriginal governments the potential for jurisdictional authority in these core areas; however, in a practical sense there exists the potential for overlapping jurisdictions which could result in the application of multiple laws.

In the second category of areas of jurisdiction, the IR policy guide denotes that there are some areas that cannot be classified 'as integral to Aboriginal culture or internal to an Aboriginal group', but which could be negotiated in self-government agreements. Examples of those additional areas which could be negotiated in a self-government agreement include:

- divorce
 - labour training
 - administration of justice issues
 - penitentiaries and parole
 - environmental protection and co-management
 - gaming
- (Canada, 1995d:6).

The negotiation of jurisdiction and authority in these areas is subject to several limitations. The policy guide states that: "to the extent that the federal government has jurisdiction in these areas, it is prepared to negotiate some measure of Aboriginal jurisdiction or authority" (Canada, 1995d:6). Since these areas affect

both Aboriginal and non-Aboriginal communities, the jurisdiction and authority of an Aboriginal government would be subordinate to that of the federal or provincial government which has primary law making authority in that area (Canada, 1995d).

Finally, the third category outlines those areas in which the federal government is not willing to transfer power and authority to Aboriginal governments. Those authorities not to be negotiated pertain to: "(i) powers related to Canadian sovereignty, defence and external relations; and (ii) other national interest powers including such things as: monetary policy, trade policy, broadcasting and telecommunications, navigation and shipping and maintenance of national transportation systems" (Canada, 1995d:7). The federal government is of the view that the powers and authorities within these areas are not "characterized as either integral to Aboriginal cultures, or internal to Aboriginal groups" (Canada, 1995d:7). Since these are areas of national concern, it is the position of the federal government that it should maintain responsibility for these areas.

The jurisdictional position that has been taken in this policy is in contrast to the position of RCAP on self-government. In their 1992 position paper on self-government, RCAP argued that Aboriginal governments should be a third order of government. This third order of government would have areas of exclusive jurisdiction similar to those of the federal and provincial governments. RCAP does not advocate unlimited jurisdiction for Aboriginal governments. However, it does recommend that Aboriginal governments be accorded sovereignty in certain areas

and required to work concurrently with federal and provincial governments in other areas. Under this framework in the case of conflict over jurisdiction the same principles would apply as between the federal and provincial governments, when there is a conflict in an area where a provincial government has jurisdiction the federal jurisdiction and authority will automatically be excluded (RCAP, 1992). In addition, the position that the federal government has taken within this policy is in opposition to that of Aboriginal people who have historically argued that the level of power and jurisdiction accorded to Aboriginal governments should not be restricted without their consent.

Under the IR policy framework, Aboriginal groups with a self government agreement would continue to be eligible for federal programs. However, eligibility for federal programs would no longer apply if within a self-government agreement the Aboriginal group assumed control for a comparable jurisdiction, authority or program. For those programs in which legal status or residency on reserve is a condition of eligibility the requirements would remain unchanged (Canada, 1995d). Entitlement to federal programs would not be extended to those groups whom the federal government does not currently fund. The funding of programs for off-reserve Status Indians, non-Status Indians or Métis groups would continue to remain the responsibility of provincial governments. This point requires further clarification, for while the overall IR policy framework applies equally to Aboriginal people the funding of programs and services by the federal government continues to

revenue for the implementation of Aboriginal governments. With self-government would come the removal of existing federal policy and legal impediments (e.g. *Indian Act*/regulations) to economic development. Increasing economic development opportunities for Aboriginal people would then enable them to generate financial resources to put towards the implementation of self-government.

Aboriginal governments and institutions established under this framework are to be politically and financially accountable to their members. It is required that mechanisms to ensure accountability be developed, ratified by the membership and detailed in an internal constitution. The required accountability measures will be determined by the scope of the functions and authorities that have been negotiated. The Aboriginal government or institution would be required to maintain financial records which comply with standard accounting principles and prepare an annual financial report for their members. For those funds that have been contributed by the federal government, an Aboriginal government or institution would be accountable to Parliament as well (Canada, 1995d).

Land has traditionally been viewed by Aboriginal groups as a principal factor in determining the viability of self-government. However, the IR policy does not provide a framework in which to address this issue. On this issue of land, the policy guide indicates the federal government will negotiate self-government agreements with those Aboriginal groups that have settled land claims, but it "does not propose to re-open the provisions of existing land claim agreements as part of any process

maintaining its fiduciary relationship with Aboriginal people; however, in an area where an Aboriginal government assumes control it will no longer maintain its fiduciary obligations. The historic fiduciary relationship between the federal government and Aboriginal people is essentially a 'trust' relationship. This 'trust' relationship obligates the Crown to act honourably in its dealings with Aboriginal people and uphold their constitutional rights (Imai et al, 1993). This fiduciary relationship and the obligations on the federal government that it implies have been upheld and further clarified in Supreme Court decisions in the cases of *Guerin* and *Sparrow*. It has also imposed certain financial obligations on the federal government for the funding and responsibility for the provision of programs and services. What can be implied then from the wording of the IR policy is that as control and responsibility in an area is assumed by Aboriginal governments, the responsibilities of the federal government will be reduced. The assumption then is that this will result in an eventual end to the fiduciary relationship in the form that it currently exists.

It is the position of the federal government that the costs associated with self-government agreements should be shared between the federal government, provincial and territorial governments and Aboriginal governments. A key principle of the policy is that self-government agreements are to be negotiated within existing financial resources and consistent with the social and economic policies and priorities of governments (Canada, 1995d). The fiscal and budgetary capacity of the

various parties involved will be a primary determinant in the financing of self-government. The policy outlines that where possible "Aboriginal governments and institutions should develop their own sources of revenue in order to reduce reliance, over time, on transfers from other governments" (Canada, 1995d:15).

The financing of actual Aboriginal governments as outlined in the policy is rather vague and would be a principal issue at the negotiating table. The federal position as put forth in this policy framework is that all existing federal and provincial financial resources for Aboriginal programs and services would be transferred to Aboriginal governments. Presumably, the implementation of Aboriginal governments would result in additional expenditures to develop organizational structures and administrative bodies to manage programs and services that are currently provided by federal and provincial governments.²⁹ Federal officials acknowledge that additional costs will be incurred through the implementation of Aboriginal governments. The intended means for addressing this issue is through the reallocation of financial resources in areas where the federal government is able to reduce its current spending. In addition, it is assumed that other financial arrangements would be negotiated with Aboriginal groups in areas such as taxation, co-management or economic development which would generate other resources to be put towards the financing of Aboriginal governments. Economic development for Aboriginal groups is seen to be a potential source of

²⁹ The implementation of Aboriginal justice systems is an example of an area where there would be substantial additional costs incurred for an Aboriginal government to implement its own justice system.

revenue for the implementation of Aboriginal governments. With self-government would come the removal of existing federal policy and legal impediments (e.g. *Indian Act* regulations) to economic development. Increasing economic development opportunities for Aboriginal people would then enable them to generate financial resources to put towards the implementation of self-government.

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to implement the inherent right of self-government" (Canada, 1995d:10). The policy does, however, indicate that: "The Government of Canada is prepared to discuss the provision of land, but only if it is deemed necessary and complementary³⁰ to the management of a federal program or service that is transferred to a Métis or non-land based Indian group" (Canada, 1995d:19). Thus, the implication is that it is not the desire of the federal government to place 'new' land issues on the negotiating table. In expressing their intent not to address the issue of land in cooperation with this policy framework, the federal policy approach places limitations on the ability of Aboriginal groups to implement self-government. A clearly defined land base is not only necessary for the implementation of self-government and the definition of jurisdictional areas, it is also a key factor in creating economic development opportunities to assist Aboriginal groups in the financing of their government structures. By failing to address the issue of land within the policy framework, the federal government has placed serious impediments on the negotiation and implementation of Aboriginal governments, in particular for Métis and off-reserve Aboriginal groups.

In addition to recognizing the inherent right of self-government as an existing Aboriginal right under section 35, the policy guide also indicates that: "The Government of Canada is prepared, where the other parties agree, to constitutionally protect rights set out in negotiated self-government agreements as treaty rights

³⁰ Emphasis added by author.

within the meaning of section 35 of the Constitution Act, 1982 (Canada, 1995d:8). Such recognition of an agreement would provide Aboriginal governments with constitutional protection of their rights without a constitutional amendment.

Under the policy framework, the MIAND is mandated to begin negotiations with First Nations, the Inuit and Métis groups north of the sixtieth parallel. The Federal Interlocutor has a mandate to begin negotiations with Métis groups south of the sixtieth parallel and Indian people living off-reserve. In addition, other federal Ministers have the mandate to begin negotiating sectoral agreements in those areas for which they are responsible (eg. policing, health or justice).

Summary of Main Elements of the Policy

The 1992 RCAP report on self-government provides a useful framework for analysing the IR policy. In their recommendations, RCAP outlines three issues that must be examined when evaluating a proposal for implementing self-government. These three issues are: the source of the right of self-government, the scope or extent of the right and the status of the right (RCAP, 1992). Under the IR policy, the right of self-government is inherent. The constitutional provision under which the right is recognized, in this case section 35, simply guarantees and protects the right of self-government; it does not create it. Section 35 then recognizes and guarantees the inherent right of self-government, but does not specify manner in which it is to be exercised (McNeil, 1994). The focus of the policy framework is to

outline how the federal government proposes that the right of self-government would be exercised.

The provisions of the IR policy framework outline that the scope of Aboriginal governments under the proposed policy approach is **circumscribed**. If the scope of Aboriginal governments were uncircumscribed they would have the ability to legislate in any subject matter. However, this is not the case under the IR policy. It is proposed that Aboriginal governments work within the existing Constitution, using negotiations to determine the level of power and jurisdiction that they will exercise.

In the final area regarding the status of an Aboriginal governing structure, RCAP recommends that they be sovereign. The sovereign status of Aboriginal governments would enable them "to legislate in a certain sphere without the possibility of being overruled by any other level of government, whether Federal or Provincial" (RCAP, 1992:11). In contrast, however, the IR policy framework does not grant sovereignty to Aboriginal governments comparable to that enjoyed by the federal and provincial governments. Rather, Aboriginal governments would exist **concurrently** with federal and provincial governments in certain 'core' areas while remaining subordinate in other areas. In the 'core' areas outlined within the policy framework Aboriginal laws have the potential to take precedence over federal and provincial laws; however, they are not guaranteed exclusive control in these areas.

The Shifting Paradigm

The framework of the IR policy focuses on the implementation of self government at the community or regional level. This approach is similar to the previous CBSG policy approach. Consequently, the IR policy has been criticized as not representing a new policy, but a re-packaged form of the CBSG policy. These criticisms are not totally without justification for like its predecessor the IR policy proposes the implementation of self-government through negotiations at the community level rather than addressing self-government through a constitutional amendment at the national level. However, there are a substantial number of differences between the two policies.

The primary difference between the two policy approaches is that under the new policy, the inherent right of self-government is recognized as an existing right of Aboriginal people. Under the former policy approach the status of the right of Aboriginal people to self-government was to be delegated by an Act of Parliament. Thus, under CBSG, the right of self-government did not emanate from the fact that Aboriginal people had historically been self-governing. Rather, it was the view of the federal government that self-government was a right bestowed upon Aboriginal people by Parliament. In addition to recognizing the inherent right of Aboriginal people as an existing right, the new policy approach also allows for the consideration, if all parties agree, of constitutionally protecting certain elements of a self-government agreement as treaty rights under section 35. Such recognition

would result in not only the constitutional recognition of the right of self-government, but also of those rights that were negotiated within the self-government agreement

The second area in which the two policies are significantly different is with respect to the status of an Aboriginal government. Under both policy approaches, the federal government expresses a willingness to negotiate self-government agreements in the same 'core' areas. However, under the CBSG policy approach the jurisdictional authority of an Aboriginal government remained restricted:

Community self-government negotiations and/or arrangements will not alter the division of powers between the federal and provincial governments and will, through practical measures, attempt to accommodate Indian governments within the existing constitutional framework (Canada, 1988a:1).

The status of Aboriginal governments under the CBSG policy was subordinate to the federal and provincial governments. In contrast, the IR policy has increased the potential for Aboriginal paramountcy, in that Aboriginal governments may exercise jurisdictional authority in certain areas. The focus of this new policy approach is on the harmonization of jurisdictions so that in those 'core' areas the laws of an Aboriginal government would exist concurrently with federal and provincial laws.

Whereas the CBSG policy was designed only to negotiate self-government agreements with status, on-reserve Indians and Inuit people, the IR policy applies to Métis and off-reserve Aboriginal people as well. Traditionally, these groups have been the responsibility of the provincial governments and the federal government has been reluctant to discuss governance issues with them. Under this new policy,

the federal government proposes a framework for negotiating self government agreements with the provinces and these groups. However, the policy also indicates that: "the federal government maintains the position that it has primary but not exclusive responsibility for on-reserve Indians and the Inuit, while the provinces have primary but not exclusive responsibility for other Aboriginal peoples" (Canada, 1995d:14). What this translates into then is a commitment on the part of the federal government to facilitate the negotiating of self government agreements with Aboriginal people, but it is not willing to assume the financial responsibility for all of these groups.

Finally, the CBSC policy emerged as a micro policy approach strictly focused on the DIAND, thus limiting those areas in which negotiations could take place. In contrast, the IR policy is a macro policy approach. All affected federal departments were involved in the policy's development and are mandated to negotiate self government agreements in their respective areas.

Responses to the Inherent Right Policy

Aboriginal People

The following analysis of the Aboriginal perspective has been based on press releases, media accounts and the limited available policy analysis that has been conducted. The Aboriginal perspective has been outlined in a global fashion, however, specific reference has been made to those areas in which the positions of

the various groups differed. This global presentation of the Aboriginal perspective is not intended to imply a 'pan Aboriginal' representation. I acknowledge that the IR policy framework and the implementation of self-government has different implications for Aboriginal groups. However, since many of the basic positions are the same, I feel that in order to avoid repetition it is necessary to present these views in a more global fashion

In general, there has been a very mixed reaction to the IR policy by Aboriginal groups. This mixed reaction ranges from an outright rejection of the policy by the AFN as a "demeaning and paternalistic approach" (AFN, 1995:1) to a more cautious approach such as that taken by the CAP which calls for local communities to request immediate negotiations with the federal government to put the policy to the test (CAP, 1995:2). National Aboriginal organizations have generally expressed a stronger opposition to the policy approach than regional groups. Except for the CAP which has taken a more cautious approach to the policy, the AFN, the MNC and the ITC have each called for a rejection of the IR policy. However, at the regional level Aboriginal groups such as: the Union of Ontario Indians, the First Nations Summit of B.C., the Mohawks of Quebec, the Manitoba Métis Federation and the Makivik Corporation have responded to the policy approach with more optimism than the national organizations. This is not to say that all regional groups have accepted the policy, nor that those who have accepted it, have done so without reservations. The point to be made here is that each of these regional groups has

each expressed a willingness to attempt to work with the policy. The Union of Ontario Indians has taken the position that: "If parts of the package are helpful to us in our way of defining self government, we will take what is good and leave the rest" (Laronde, 1995:1). The position of these regional groups, much like that of the CAP, has been cautious. More so than the national organizations, regional Aboriginal groups appear willing to examine the policy framework with the view to seeing how it can assist Aboriginal people in achieving self government.

The varying reactions to the policy between national and regional groups has much to do with how the IR policy was developed. Both the AFN and the MNC have opposed the policy approach on the grounds that they were not consulted in the policy development stage (AFN, 1995; MNC, 1995). The opposition of these national organizations corresponds directly to the approach that has been taken by the federal government: to implement the inherent right of self government through negotiations at the local, regional, provincial or territorial level.

Overall, there is general agreement amongst Aboriginal groups with the ideological premise of the policy; that the inherent right of self-government is an existing Aboriginal right under section 35. However, Aboriginal groups are concerned about the how the federal policy approach calls for the inherent right of self-government to be implemented. Some national Aboriginal organizations agree with the federal position of the policy that progress towards implementing self government can be made without a constitutional amendment (CAP, 1995:2). Other

organizations have expressed the position that while progress can be made, at this time, outside the Constitution "the policy should not close the door on Aboriginal groups participating in future constitutional talks" (Aubry, 1995:A3)

In terms of the status of self government as outlined in the federal policy, Aboriginal groups have argued that under this policy approach self-government remains a contingent right rather than an inherent right. According to Rosemarie Kuptana, President of the ITC, "the 'inherent right' spelled out in Irwin's new policy isn't a true inherent right" (Bell, 1995:10). This position has also been taken and further clarified by the Chiefs of Ontario who argue that for the inherent right of self government to be truly 'inherent' it must be defined by Aboriginal people themselves and not by the federal government (Chiefs of Ontario, 1995). The federal policy approach that has been outlined limits the inherent right of self-government to those areas which are internal to an Aboriginal group or integral to an Aboriginal community. The policy therefore defines what rights are available to Aboriginal governments as opposed to allowing Aboriginal people to define their rights. According to Grand Chief Mercredi: "Irwin's policy paper has nothing to do with the inherent right of self government. It is really the entrenchment of the federal system of government. And to me, when you really translate it into its bare roots, that means white supremacy" (Wood, 1995:30). In addition, the Chiefs of Ontario argue that "the requirement to negotiate the inherent right makes it a contingent right dependent on reaching agreements with both federal and provincial

governments" (Chiefs of Ontario, 1995:1). The Chiefs of Ontario agree that it is necessary to negotiate with federal and provincial governments the inter-relationship between jurisdictions, however they object to negotiating the parameter of their rights. Thus, the general consensus appears to be that while the IR policy is written in a language which recognizes the rights of Aboriginal people, the policy framework restricts those so called rights.

The scope of Aboriginal governments as outlined in this policy approach is the most contentious issue for Aboriginal people. There is an overall general consensus that the IR policy is too restrictive in its approach towards implementing self-government (CAP, 1995; AFN, 1995; Chiefs of Ontario, 1995). According to Aboriginal leaders, this policy framework falls short of the third order of government offered in the Charlottetown Accord (Parker, 1995). Instead, the IR policy offers Aboriginal governments an enhanced municipal status. The policy guide goes so far as to include a list of those areas in which the federal government is willing to negotiate jurisdiction and authority for Aboriginal governments. The inclusion of such a list is deemed by the Chiefs of Ontario to be "highly offensive and paternalistic" (Ontario Chiefs, 1995:4). Aboriginal leaders such as the vice chiefs for Alberta, Ontario and Quebec and Labrador argue that all areas should be open for negotiation in self-government discussions. Restricting the potential jurisdictional authority of Aboriginal governments to a limited number of areas inhibits the ability for truly meaningful Aboriginal self-government to be implemented. Despite the

rhetoric that this policy represents a fundamental change in the federal government's approach to self-government. "the policy seems to envision only First Nation control over existing programs and services" (Laronde, 1995:1). In limiting the potential jurisdictional authority available to Aboriginal governments, it is felt that the IR policy offers little more than what was available under the CBSC policy or *Indian Act* authorities.

In terms of provincial involvement, the IR policy has been criticized as being a strategy through which the federal government is attempting to off-load its responsibilities for Aboriginal people to the provinces (AFN, 1995; CAP, 1995; Ontario Chiefs, 1995). Aboriginal people have long argued that they have a special relationship with the federal government and believe that they should have a direct relationship with the federal government. Consequently, Aboriginal organizations are generally of the view that self-government negotiations should be bilateral not trilateral. Based on this premise, a policy framework that is largely dependent on provincial involvement to negotiate agreements in areas such as education, health and social services and assume financial responsibility for off-reserve self-government is seen as an attempt by the federal government to limit its responsibility towards Aboriginal people. This issue of off-loading to the provinces is of particular concern for off-reserve Aboriginal people who see their rights and a federal responsibility for them as being sacrificed via this policy approach (CAP, 1995). Some Aboriginal leaders; however, are in favour of a strong provincial role in

the negotiation and implementation of self-government. Bill De La Ronde, MMF President, sees an active provincial role in self-government negotiations as leading to a more encompassing self-government agreement (Nepinak, 1995).

The policy stipulates that self-government agreements are to be financed within existing federal and provincial resources which raises a concern for Aboriginal leaders. How are Aboriginal people supposed to exercise their right of self-government if there are no resources available to exercise that right? This limitation of financial resources places serious constraints on Aboriginal governments: "Without additional resources, First Nations cannot hope to obtain self-sufficiency. Taking on increased powers without the necessary resources means that the First Nations' governments would have to carry the burden of ever increasing costs" (Ontario Chiefs, 1995:5). The limiting of funding for Aboriginal governments to a reallocation of already scarce existing resources is seen as an indication that the IR policy is a sham (Laronde, 1995). In addition, the ability of Aboriginal people to contribute to the financing of self-government is limited by the fact that the new policy does not allow for the negotiation of new land claim settlements. As expressed by Jim Sinclair, President of the CAP, Aboriginal people are willing to contribute to the financing of self-government, however, in order to do so, barriers to economic development must be removed, in particular Aboriginal people must have access to land and resources. The IR policy continues though to constrain the ability of Aboriginal people to become financially independent: "Under

the new policy the federal government will not take responsibility for placing new lands on the bargaining table" (CAP, 1995:1). Thus, the IR policy does not offer Aboriginal people the necessary tools to enhance their financial resources nor an adequate financial arrangement through which to implement self-government.

At the press conference announcing the release of the IR policy, Minister Irwin spoke of the policy as: "turning a page in a relationship between Canada and First Nations that for too long has been paternalistic and neglectful" (Evening Telegram, 1995:7). The position of the federal government is generally in opposition to that of Aboriginal organizations who view the policy as a continuation of past approaches (AFN, 1995; CAP, 1995; MNC, 1995; Ontario Chiefs, 1995). While Aboriginal leaders have expressed a willingness to explore the ability of implementing self-government via this policy approach, they have also expressed reservations about whether or not this policy offers the tools necessary for Aboriginal governments to function and improve the lives of Aboriginal people.

Media Reaction

An analysis of the media reaction to the IR policy demonstrates that the federal government's approach has been deemed generally 'acceptable' by non-Aboriginal Canadians. An environmental scanning report of media reaction for the weeks of August 5 - 16, 1995 concluded that: "Editorial reaction was swift and overwhelmingly supportive of the federal policy on self-government" (DIAND, 1995).

Headlines such as: "Sensible Native Plan (Toronto Star, August 12, 1995); "Pragmatic moves on self-government" (Montreal Gazette, August 16, 1995); "A promising project" (Ottawa Citizen, August 12, 1995); and "Self-government that makes sense" (Toronto Sun, August 18, 1995) demonstrate that the IR policy is viewed by non-Aboriginals as an 'acceptable' policy framework in which to negotiate self-government. Of course, this positive reception corresponds directly to the fact that the policy is in keeping with the 'conservative' views of non-Aboriginal Canadians. An editorial in the Globe and Mail on August 12, 1995, described the policy as: "a pragmatic plan that does not offer the impossible" (D6). This position serves to reinforce the importance of the role that non-Aboriginals have played in the development of this policy approach.

It has been demonstrated that there are several areas in which the IR policy does not correspond to the desires of Aboriginal people. While the policy may offer a framework in which to implement Aboriginal governments, it is not the framework that was desired by Aboriginal people. The policy framework, however does correspond to the view that non-Aboriginal people have of self-government:

The policy is more in line with what we expect as non-Aboriginals. It doesn't make provisions for sovereignty and it places self-government within the context of the Constitution and the Charter of Rights and Freedoms, which is important... (Dick McMaster, B.C. Fishing Resorts and Outfitters, August 29, 1995).

The fact that the IR policy seems to be more representative of a non-Aboriginal vision of self-government leads one to conclude that the non-Aboriginal agenda was

a key factor in the development of this policy approach.

Questionable Commitment

The Overall Agenda

A government's overall agenda and priorities are traditionally articulated in the Throne and Budget speeches. Thus far, the current Liberal government has made two Throne speeches and brought down three budgets. An examination of the two Throne speeches under the current government demonstrates that Aboriginal issues rank very low on the government's list of priorities. In both the 1994 and 1996 Throne speeches, Aboriginal issues were articulated as a matter of concern; however, in each case Aboriginal issues were regarded as secondary issues. In both Throne Speeches, Aboriginal issues were listed at the tail-end of the government's agenda. In 1994, Aboriginal issues were the second last priority mentioned coming before the issue of Foreign Policy and in 1996 they were the last issue addressed in the speech.

In the 1994 Speech from the Throne, Aboriginal issues were regarded as a concern of the Government of Canada: "The Government will forge a new partnership with Aboriginal peoples, particularly in respect of the implementation of the inherent right of self-government" (Canada: 1994:4). In keeping with its commitment outlined in the 'Red Book', the Liberal government acknowledged its priority to act on the implementation of the inherent right of self-government.

Keeping in mind that this issue was regarded as a low priority on the overall agenda, this assertion in the Throne speech acknowledges a firm commitment on the part of the Government. However, this commitment appears to have waned in the two years that lapsed until the second Speech from the Throne. In the 1996 speech, the issue of self-government, which had previously been regarded as the cornerstone of this government's Aboriginal policy platform (Liberal Party, 1993), is not even mentioned as a priority. Rather, this second Throne speech cited the success that had been achieved in reaching an agreement in principle with the Nisga'a and maintained that: "The MIAND will continue to pursue other initiatives in partnership with Aboriginal people and other governments" (Canada, 1996:12).

There are two very important changes to note in the Government of Canada's position on Aboriginal self-government. Firstly, in both 1993 and 1994 the commitment to implement self-government for Aboriginal people was articulated as a concern of the government, whereas by 1996, the commitment had reverted back to only a commitment (or responsibility) to address Aboriginal issues by the DIAND. This would seem to demonstrate that by 1996 the political will to implement self-government had waned, in turn stressing the fact that its implementation remains a very low priority of the federal government. In addition, by the time the 1996 Speech from the Throne occurred, the federal government had released its new and 'pragmatic' policy approach for implementing the inherent right of self-government. However, this policy is not cited as a major achievement of the government at a

time when they were focusing on 'keeping commitments'. Instead, the government chose to focus on the success of the Nisga'a land claim, which is indeed a 'good news' story. However, it cannot go unnoticed that the federal government had not articulated that their new IR policy was a success story. The fact that this policy approach was not mentioned in the 1996 Throne Speech would seem to demonstrate that it may not have been as successful an achievement as had originally been intended.

Expenditure

Like Speeches from the Throne, a government's annual budget is a key indicator of its commitment to a particular policy approach. An examination of the three budgets that have been implemented by the Liberal government enables an assessment of how fiscal pressures have influenced the government's position on Aboriginal self-government policy. While the first Liberal budget in 1994 concentrated primarily on economic renewal and restructuring of social programs, the two subsequent budgets have substantially reduced government spending with a focus on reaching deficit reduction targets. This increased focus on reduced government spending impacts significantly on the government's ability to implement the IR policy. As previously outlined, the policy framework calls for self-government to be implemented within existing financial resources. Fiscal restraint has been an impetus for the Liberal government in developing a self-government

implementation framework which is premised on the involvement of both the provincial and territorial governments and Aboriginal people for its financing. Will the Liberal government's focus on reducing government spending impede the implementation of self-government? Is there enough money within the government's existing financial resources for Aboriginal people to be able to successfully implement self-government? A closer examination of the federal government's spending on Aboriginal policy and programs will assist in clarifying its financial commitment to building a new partnership with Aboriginal people.

Despite the fact that overall government spending has been reduced since 1994, the DIAND's budget is the only departmental budget that has been marginally increased. "Budgetary spending by DIAND for the provision of programs and services, excluding major transfer payments to the territorial governments, will grow from \$3,760 million in 1994-1995 to \$4,208 million in 1997-1998. This is an average annual growth rate of 3.8 percent and a reduction from the average growth of 8 percent a year over the last decade" (DIAND, 1995b:2). At a first glance, this marginal increase could be viewed as a commitment on the part of the federal government to address Aboriginal issues. However, I would argue that this increase does not demonstrate a political commitment. Instead, this marginal increase is merely a response to the reality that the Aboriginal population is growing at a significantly higher rate than the non-Aboriginal population. When you take into account this population growth it then becomes evident that the federal

government's expenditures for Aboriginal people have not really increased. It should also be noted that while the IR policy is a framework to negotiate self-government with all Aboriginal people, new financial resources have not been allocated for off-reserve Status Indians or Métis people. The federal government does not intend through this policy approach to incur additional financial expenditures for these groups. Rather, the federal view is that these groups shall remain the financial responsibility of the provinces.

Potential Obstacles

Provincial Role

Under this policy approach, the provincial governments have the ability to be able to stifle any meaningful self-government negotiations. Due to the fact that many of the areas in which the federal government has indicated a willingness to negotiate self-government agreements fall under provincial jurisdiction, the success of this policy approach depends on the willingness of the provincial governments to enter into negotiations. According to federal officials, approximately 50 percent of the provinces are opposed to the theoretical basis of this policy and do not recognize the inherent right of self-government as an existing constitutional right. This does not appear to be a concern for federal officials who indicated that while they may not agree with the theoretical framework, at this time, the provincial governments appear to be willing to negotiate to make practical progress on

Aboriginal issues. Despite this optimism, history has demonstrated that the level of commitment of the provincial governments can make or break a self-government agreement. Since so much of this policy is based on a willingness of the provincial governments to enter into negotiations on jurisdictional issues, the federal government should be greatly concerned over the fact that half of the provinces do not agree with the ideological premise of this policy approach.

Both the Governments of Ontario and B.C. have recently released policy statements on Aboriginal issues. An examination of each of these policy platforms demonstrates two provincial positions on self-government. The province of Ontario has not taken the position that it recognizes the inherent right of self-government as an existing Aboriginal right. Instead, Ontario's position paper indicates that throughout 1996 it will conduct a review of decisions of the Supreme Court regarding the inherent right issue and proceed to develop a self-government policy framework (Ontario, March 1996). The province's position paper on Aboriginal issues focuses on economic development and has taken a business/non-committal approach to addressing Aboriginal issues. However, the province has indicated that they will continue to be at the self-government negotiating table (Charles Harnick, Speech, March 25, 1996). However, this government has also indicated its position that the federal government is primarily responsible for Aboriginal self-government matters (Ontario, March 1996). The province of Ontario has taken a very cautious position on the issue of implementing self-government for Aboriginal people. While this

government has indicated a willingness to enter into negotiations, it has also clearly stated that it "will continue to assess and protect provincial interests in this process" (Ontario, March 1996). Thus indicating that the province of Ontario will be extremely cautious when negotiating the funding and jurisdictional arrangements of any self-government agreement.

In contrast to Ontario, the B.C. government's position paper outlining its approach to treaty settlements and self-government is written in a more conciliatory fashion. The Government of B.C. recognizes the inherent right of self-government and intends to define this right through its current treaty negotiation process (B.C., March, 1996). While the B.C. approach appears more promising it clearly defines the parameters in which the province is willing to negotiate self-government agreements. Similar to that of the federal government, B.C. has taken a policy approach which it deems as 'practical'. Under this approach, self-government authorities are to be negotiated, limited to a designated land base and circumscribed by provincial standards. B.C.'s position is that self-government will not result in overlapping jurisdictional areas, nor will it create sovereign Aboriginal governments (B.C., March 1996). This policy approach also clearly limits the province's responsibility to fund First Nation's programs and articulates that it views the funding and delivery of programs and services for Aboriginal people as a federal responsibility. The success of the recently negotiated Nishga'a land claim agreement demonstrates a willingness on the part of the B.C. government to address Aboriginal

issues. However, its policy approach to self-government indicates that like the Ontario government they too will take a cautious approach to negotiating funding and jurisdictional issues.

The Negotiation Process

The second possible obstacle facing the successful implementation of self-government under the IR policy is the proposed negotiation process. In the interest of maximizing federal resources and minimizing its expenditures, the self-government is to be negotiated and implemented through existing tri-partite processes where possible (e.g. British Columbia Treaty Commission, Manitoba Dismantling initiative and continuation of on-going CBSC negotiations). While such an approach could prove more beneficial in that it would require an Aboriginal group to participate at fewer negotiating tables it also has the ability to impede the process by hinging the achievement of self-government agreements on the resolution of other issues

A significant change in this policy approach is that it represents a federal government commitment to implementing self-government. While on the one hand this responds to a criticism of the former CBSC policy and commits all federal departments with Aboriginal programs to negotiating self-government. On the other hand, this could further complicate the negotiation process. The success of this policy approach will depend largely on the federal government's ability to manage

and coordinate all affected federal departments to ensure a unified negotiation process. The implication to be made here is that self-government agreements will not be easily achieved. A negotiation process which involves the provincial governments and all affected federal government departments is almost guaranteed to be an extremely lengthy process.

Funding Issues

Finally, a third possible obstacle is that at present the federal government has not approved a funding formula for this policy approach. At the time of writing, it has not yet been determined what federal resources would be required to implement the IR policy, nor the source of these funds. While the 1996 - 1997 Estimates allocates 66 percent or \$20.4 million of the DIAND's budget to self-government expenditures it can be expected that the actual costs could be significantly higher. In addition, it has not yet been determined how much of these allocated resources would be designated for negotiating or implementing self-government agreements. While discussions on funding issues are ongoing, no formal funding arrangement has been approved, nor has a cost sharing formula been developed that would indicate the required financial commitment of Aboriginal groups and the provincial governments. The fact that this policy approach does not include a financial framework for negotiating and implementing self-government is likely to be a serious impediment to the achievement of self-government.

agreements. One of the key weaknesses of the CBSG policy was found to be the lack of clarity surrounding funding issues (DIAND, 1993.m) and it can be expected that this will be a major weakness of this policy approach as well

Demonstrated Commitment

In the 1996-97 Business Plan, Minister Irwin affirmed the DIAND's commitment to the IR policy listing the achievement of negotiated self government agreements as the first of its four overall strategic objectives (Canada, June 25, 1996). An examination of the plan demonstrates that many of the departmental initiatives are tied to the IR policy (e.g. re structuring of FTAs, *Indian Act* amendments and co management initiatives). The department's objective as outlined by the plan is to achieve twelve self government agreements by the end of the current government's mandate.

Within the DIAND, an Inherent Right Directorate has been established to manage and coordinate this policy approach. This unit, comprised of approximately twenty-two people, is responsible for policy support, interdepartmental coordination, management of negotiation funding and monitoring and evaluating negotiations. Learning from the lessons of the past, the federal government has adhered to some of the recommendations made in the Departmental Audit of the previous CBSG policy. The audit recommended organizational changes to the structure of the department in order to properly manage its self-government policy (DIAND, 1993)

In creating a directorate dedicated to policy development, coordination and implementation of the IR policy, the federal government has demonstrated a commitment to this policy approach. The DIAND is also responsible for providing and coordinating a pool of federal negotiators and negotiating teams. A key criticism of the CBSC policy approach was that it did not constitute a cohesive federal approach to implementing self-government. Consequently, under this new policy approach the DIAND, in particular the Inherent Right Directorate, has been given the responsibility of coordinating and managing a federal wide implementation process for this policy.

In order to assist the DIAND in coordinating and managing this federal wide implementation process, a Federal Steering Committee on Self-Government (FSCSG) has also been established. This committee is chaired by the DIAND's ADM, Policy and Strategic Direction, and comprised of ADMs from each of the central agencies and all federal departments with Aboriginal programs. The primary function of this committee is to approve mandates for negotiation, provide policy guidance, ensure the participation of all affected federal departments and monitor progress (Canada, 1995d). The existence of such a committee of fairly high ranking federal officials demonstrates the government's commitment implementing self-government through a unified and cohesive federal approach. Whereas, the previous self-government policy approach focused primarily on the DIAND and involved other federal departments on an ad-hoc basis, organizational mechanisms have been established to ensure that this policy approach represents a commitment on the part of the

entire federal government to implement self-government.

These examples demonstrate an administrative and organizational commitment on the part of the federal government to implement self-government. However, as has been previously demonstrated in the key areas such as the financing of self-government there is still not a strong federal commitment.

Conclusion

In order to evaluate the extent to which a new paradigm has emerged, or not emerged, it is necessary to evaluate the IR policy against the Aboriginal policy objectives of the Chretien government. As Chapter Three outlined the key Aboriginal policy objectives of this government were: 1) to include Aboriginal people in the decision-making process; 2) to assist Aboriginal people in becoming self-sufficient and self-governing; and 3) to develop creative initiatives to achieve fairness, mutual respect and recognition of rights. I would argue that the IR policy falls short of meeting each of these key objectives. Consequently, it does not represent a new self-government policy paradigm.

This assessment has shown that while the federal government made an attempt to include Aboriginal people in the policy development process they were not key decision makers in the development of this policy approach. Instead, I would argue that this policy approach has been influenced more by a variety of other factors including: provincial perspectives, non-Aboriginal perspectives and the

federal government's overall agenda than it has been by Aboriginal people themselves. With respect to the notion of assisting Aboriginal people in becoming self-sustaining and self-governing, a policy approach which does not include the negotiating of new land bases nor an approved funding formula offers little hope in achieving this objective. Finally, while the federal government has adopted a self-government policy approach which is based on the recognition of the inherent right of self-government as an existing constitutional right, this policy does not represent a creative initiative. Instead, this policy tinkers with the approaches of the past and while progress has been made in some areas, it falls short of representing a new policy paradigm.

A year after its inception, the IR policy has made few in-roads towards implementing self-government for Aboriginal people. The level of commitment to this policy approach on the part of the federal government is questionable and there are some significant obstacles to be addressed before self-government can be implemented. Perhaps the most significant obstacle to be addressed is that in order for self-government to be implemented, the chosen policy approach must be viewed as legitimate to all parties involved (Chartrand, 1994). As this chapter has shown, thus far this has not been the case. Federal officials maintain that some Aboriginal groups have expressed an interest in the policy and that discussions with them are proceeding. However, at present no formal-self-government negotiations have commenced. Both Aboriginal people and the provincial governments are extremely

apprehensive about this policy approach. Consequently, the negotiation process may well prove to be a very long and difficult one.

CONCLUSION

In the introduction to this thesis I posed three questions: Does this particular policy really offer a new approach to self-government? Does the IR policy alter the status quo or merely linker with it? Is this policy approach representative of a new self-government policy paradigm? I shall proceed to summarize the findings of the research presented in this thesis by answering each of these questions.

In response to the first of these questions, I would argue that this policy does represent a new approach to self-government. The assessment conducted in Chapter Four has demonstrated that the IR policy is based on several significant changes in the way Aboriginal self-government policy has previously been developed. The first of these changes is the fact that unlike previous approaches, this policy recognizes the 'inherent' right of self-government for Aboriginal people. Premised on the ideological shift that has occurred, this policy has taken the notion of inherency to a new level by recognizing the inherent right of self-government as an existing constitutional right. Second, this approach is a macro-policy approach designed to implement self-government for all Aboriginal people, whereas previous policy approaches were micro-policy approaches focusing primarily on implementing self-government for First Nations people. The third significant change in the federal government's policy approach lies in the potential scope of jurisdictional authority for Aboriginal governments offered in this policy. Admittedly, this policy does not

goes as far as Aboriginal people would like in terms of the jurisdictional authority for Aboriginal governments. However, it marks the first the time that a federal government policy has offered the potential for the authority of Aboriginal governments to operate concurrently with that of federal and provincial governments in certain 'core' areas. Previously, policy approaches have always maintained that Aboriginal governments would remain subordinate to the authority of federal and provincial governments.

While this analysis has demonstrated some significant changes from previous policy approaches I would argue that in developing the IR policy, the federal government merely tinkered with the status quo. Like previous approaches, it offers only a municipal level of government to Aboriginal people as opposed to a third order of government. In addition, this policy continues to limit the parameters in which self-government agreements are to be negotiated by clearly defining which jurisdictional areas the federal government is willing to negotiate. Just as with previous approaches, Aboriginal self-government under the IR policy continues to be defined by the federal government.

Consequently, the IR policy does not represent a new self-government policy paradigm. Referring back to Chapter One, there are two stages of a paradigm shift that must occur in order for a new paradigm to be established. The first of these stages, the ideological shift has been furthered with this policy approach. As it has been demonstrated, the IR policy marks an ideological break from past policy

approaches. However, the second stage in which a shift in the policy framework occurs has yet to be achieved. Too many of the weaknesses of past policy approaches are present in the IR policy to be able to say that the federal government has developed a radically different self-government policy framework. It is on this basis then that I have concluded that the IR policy represents a convergence of old and new paradigm thinking. Thus, I would argue that until changes are made to the IR policy framework the self-government policy paradigm will remain in a state of flux.

Recommendations to Policy Makers

It is my belief that if the federal government is serious about its commitment to building a new partnership with Aboriginal people consideration must be given to the following recommendations. First, Aboriginal people need to be actively involved in the policy-making process. They need to have a decision-making role in self-government policy development not just consulted for their opinion on the federal position. Second, a self-government policy needs to provide Aboriginal people with the necessary tools in order to become financially self-sufficient. This means that the policy framework must allow for the negotiation of land and resources. Third, if self-government is truly an inherent right of Aboriginal people then the jurisdictional parameters of self-government agreements cannot be determined solely by the federal government. Fourth, a self-government

policy framework must include a clearly developed funding arrangement with adequate financial resources allocated in order for Aboriginal governments to assume responsibility for their communities. Finally, in implementing self-government, the federal government needs to focus on the aspirations of 'grass-roots' Aboriginal people.

It has been argued that three criteria must be met for a new policy approach to be successful: 1) the policy must correspond to the contemporary ideology; 2) people must buy into the policy approach; and 3) the bureaucracy must be able to successfully implement the approach (Phillips, 1994). An assessment of the IR policy against those criteria demonstrates that the future does not bode well for its success. While the ideological framework of the policy corresponds to the generally accepted view that Aboriginal people have an inherent right of self-government, there are still those who do not accept this notion. In addition, Chapter Four has demonstrated that neither Aboriginal people nor the provincial governments have enthusiastically bought into this approach. Finally, the lack of a clearly developed funding arrangement for this policy approach is a significant obstacle to the bureaucracy's ability to implement this policy. It has yet to be demonstrated whether or not the IR policy framework has the ability to be able to successfully implement self-government for Aboriginal people. In the meantime, this policy remains a "hypothesis waiting to be tested" (Doern and Phidd, 1992:xx).

DEFINITIONS

Aboriginal. People who trace their ancestors in these lands to time immemorial. This means that the term subsumes all Indians, whether registered under the Indian Act or not, the Métis and all Inuit (Morse, 1985:1).

Indian: A status Indian is a person registered or entitled to be registered as an Indian according to section 6 of the *Indian Act* which states that:

- 6 (1) Subject to section 7, a person is entitled to be registered if
- (a) that person was registered or entitled to be registered immediately prior to April 17, 1985;
 - (b) that person is a member of a body of persons that has been declared by the Governor in Council on or after April 17, 1985 to be a band for the purposes of this Act;
 - (c) the name of that person was omitted or deleted for the Indian Register, or from a Band List prior to September 4, 1951, under subparagraph 12(1)(a)(iv), paragraph 12(1)(b) or subsection 12(2) or under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of the Act relating to the same subject-matter as any of those provisions;
 - (d) the name of that person was omitted or deleted from the Indian Register, or from a Band List prior to September 4, 1951, under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(1), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;
 - (e) the name of that person was omitted or deleted from the Indian Register, or from a Band List prior to September 4, 1951,
 - (i) under section 13, as it read immediately prior to September 4, 1951, or under any former provision of the Act relating to the same subject-matter as that section, or
 - (ii) under section 111, as it read immediately prior to July 1, 1920, or under any former provision of this Act relating to the same subject-matter as that section; or

- (f) that person is a person both of whose parents are or, if non longer living, were at the time of death entitled to be registered under this section.
- (2) Subject to section 7, a person is entitled to be registered if that person is a person one of whose parents is or if no longer living, was at the time of death entitled to be registered under subsection (1).
- (3) For the purposes of paragraph (1)(f) and subsection (2),
 - (a) a person who was no longer living immediately prior to April 17, 1985 but who was at the time of death entitled to be registered shall be deemed to be entitled to be registered under paragraph (1)(a), and
 - (b) a person described in paragraph (1)(c), (d), (e), or (f) or subsection (2) who was no longer living on April 17, 1985 shall be deemed to be entitled to be registered under that provision (Imai and Hawley, 1996:15-16).

Non-status Indian Indians who for one reason or another, are not registered under the Indian Act. Prior to 1985, the largest group of non-status Indians were Indians women who were "de-registered" because they married men without Indian status (Imai et al, 1993:5)

Reserve: Means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band (Imai and Hawley, 1996:5).

Status Indian on-reserve A status Indian who resides on a land base designated as a reserve.

Status Indian off-reserve - A status Indian who does not reside on a land base designated as a reserve.

Inuit: Are descendants of the Aboriginal inhabitants of northern Canada who historically resided north of the 60th parallel; and in northern Quebec and Labrador, somewhat south of the 60th parallel. They do fall within the federal jurisdiction, since the Supreme Court of Canada ruled in 1939 that the Inuit are included within the meaning of the word "Indians", in s. 91(24) of the *Constitution Act, 1867* (Morse, 1985:5).

Métis: There are two different views about the meaning of the term "Métis". The first refers to those of Aboriginal ancestry who are descended from the historic

Métis community of Western Canada and represent a uniquely Canadian culture developed in the Prairies through blending the French *coureur des bois* and the Indian, creating a strongly Catholic community with many Indian values (Morse, 1985:4).

The second refers to persons of Aboriginal descent who have a "mixed" ancestry. Initially, the title meant a half 'mixture' of French and Indian, although it has been broadened to include almost all people with at least some Indian ancestry (Morse, 1985:4).

Self-Government: This term has different meaning for different Aboriginal people. For many it means the ability to make laws, while for others it means the ability to provide services to their members. Still for others, it means the ability to live according to their heritage (Imai et al, 1993:63).

SECTIONS OF THE CONSTITUTION ACT, 1982
PERTAINING TO ABORIGINAL PEOPLES

25. The guarantee in the Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any Aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada including:

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- (b) any rights or freedoms that now exist by way of land claim agreements or may be so acquired.

35. (1) The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "Aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3)* For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4)* Notwithstanding any other provision of this Act, the Aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

35.1* The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to class 24 of section 91 of the "Constitution Act, 1867", to section 25 of this Act or to this Part,

- (a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first minister of the provinces, will be convened by the Prime Minister of Canada; and
- (b) the Prime Minister of Canada will invite representatives of the Aboriginal peoples of Canada to participate in the discussions on that item.

37.* (1) A constitutional conference composed of the Prime Minister of Canada and the first Ministers of the provinces shall be convened by the Prime Minister of Canada within one year after this part comes into force. (2) The conference convened under subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the Aboriginal peoples of Canada, including

the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions of that item.

37.1* (1) In addition to the conference convened in March 1983, at least two constitutional conferences composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister, the first within three years after April 17, 1982 and the second within five years after that date. (2) Each conference convened under subsection (1) shall include in its agenda constitutional matter that directly affect the Aboriginal peoples of Canada, and the Prime Minister shall invite representatives of those peoples to participate in the discussion of those matters.

* Subsections 35(3), 35(4) and 35.1 were added by the Constitution Amendment Proclamation, 1983. As well, subsections 37 and 37.1 were revised in 1983 and then repealed on April 18, 1987

INTERVIEW QUESTIONS

1. Do you feel that the IR policy represents a change in the traditional approach of the federal government towards self government?
2. How did the development of this policy begin?
3. What process was used to develop this policy?
4. What were the overall goals and objectives for the creation of this policy?
5. How does the final policy that was created correspond to these goals and objectives?
6. How have the following factors affected the development of this policy: recognition of the inherent right of self-government, the mandate of the Liberal government, the attempt to downsize the federal government and increased fiscal restraint?
7. Who do you feel were the key political actors in the development of this policy? How would you define their role?
8. What was the role of the DIAND in the creation of this policy?
9. How does the development of this policy relate to the mandate of the DIAND?
10. What other federal government department's were involved in the development of this policy? How would you define their role?
11. What was the level of involvement of Aboriginal people and organizations in the development of this policy?
12. What is the perspective of the national Aboriginal organizations with respect to the development of this policy?
13. How has this policy been received by Aboriginal people?

APPENDIX D

CHAPTER 7: ABORIGINAL PEOPLE CREATING OPPORTUNITY THE LIBERAL PLAN FOR
CANADA

CREATING OPPORTUNITY

The Liberal Plan for Canada

Aboriginal Peoples

THE PLACE OF ABORIGINAL PEOPLES IN THE GROWTH AND DEVELOPMENT OF Canada is a litmus test of our beliefs in fairness, justice, and equality of opportunity.

For generations, Canadian society has failed this test. Many Aboriginal people face enormous problems, both in their communities and in the cities across Canada where they live: absence of meaningful employment and economic opportunities, unequal educational opportunity and results, poor housing, unsafe drinking water, and lack of health services. They suffer also from the destruction and lack of respect for Aboriginal languages, values, and culture.

Past and current ways of dealing with these conditions are not working. It is time for a change. We must define and undertake together creative initiatives designed to achieve fairness, mutual respect, and recognition of rights.

The role of a Liberal government will be to provide Aboriginal people with the necessary tools to become self-sufficient and self-governing. Our priority will be to assist Aboriginal communities in their efforts to address the obstacles to their development and to help them marshal the human and physical resources necessary to build and sustain vibrant communities.

The Aboriginal population is an overwhelmingly young population. If we do not focus on the potential of these young people, we will face increasing costs to our social security, health, and justice systems, and we will have lost a generation able and willing to make a contribution. Canada needs their talent and energy.

Our goal for Canada must be a future where:

- Aboriginal people enjoy a standard of living and quality of life and opportunity equal to those of other Canadians;
- First Nations, Inuit, and Métis peoples live self-reliantly, secure in the knowledge of who they are as unique peoples;
- all Canadians are enriched by Aboriginal cultures and are committed to the fair sharing of the potential of our nation;
- Aboriginal people have the positive option to live and work wherever they choose; and
- perhaps most importantly, Aboriginal children grow up in secure families and healthy communities, with the opportunity to take their full place in Canada.

RENEWING THE PARTNERSHIP

A Liberal government will act on the premise that the inherent right of self-government is an existing Aboriginal and treaty right.

A Liberal government will be committed to building a new partnership with Aboriginal peoples that is based on trust, mutual respect, and participation in the decision-making process. It does not make sense for the federal government to be unilaterally making policy or budgetary decisions that affect the lives of Aboriginal people, without their involvement. A Liberal government will develop a more comprehensive process for consultation between federal ministers and Aboriginal representatives with respect to decision-making that directly affects First Nations, Inuit, and Métis peoples.

A Liberal government will be committed to gradually winding down the Department of Indian Affairs at a pace agreed upon by First Nations, while maintaining the federal fiduciary responsibility. We will work with Aboriginal peoples to identify where existing federal expenditures for Aboriginal peoples, currently in excess of \$5 billion a year, can be redirected into more productive uses. A Liberal government will also explore new fiscal arrangements with Aboriginal peoples.

A Liberal government will seek the advice of treaty First Nations on how to achieve a mutually acceptable process to interpret the treaties in contemporary terms, while giving full recognition to their original spirit and intent.

The Inuit are seeking a process for the negotiation of regional self-government agreements for Inuit living outside the future territory of Nunavut. A Liberal government will support this objective.

A Liberal government will take the lead in trilateral negotiations involving the provinces to define the nature and scope of federal and provincial responsibility for Métis and off-reserve Indians. A Liberal government will also provide assistance to enumerate the Métis.

A Liberal government will be committed to building a new partnership with Aboriginal peoples that is based on trust, mutual respect, and participation in the decision-making process.

POPULATION

Age distributions reveal other differences between the total Canadian population and the population who identified with an Aboriginal group. The Aboriginal Peoples Survey reveals that the population identifying with an Aboriginal group tended to be much younger than Canada's total population: 37 percent were under the age of 15, compared with 21 percent for Canada's total population. Seven percent of the population identifying with an Aboriginal group were aged 55 and over, compared with 20 percent for Canada's total population.

Canadian Population by Age, 1991

Age group (years)	Total population (%)	Population identifying as Aboriginal (%)
0-4	7.1	14.0
5-14	14.0	23.4
15-24	14.2	19.4
25-34	17.9	17.6
35-54	27.1	18.4
55+	19.7	7.2

Source: Statistics Canada, 1993

Income of Aboriginal People Compared with the National Average, 1985

Source: Statistics Canada, 1990

Education of Aboriginal People Compared with the National Average, 1986

Source: Statistics Canada, March 1989

COMMUNITY DEVELOPMENT

**The untapped potential of
Aboriginal peoples is untapped
potential for Canada**

The socio-economic conditions of Aboriginal peoples are the poorest in the country. A Liberal government, in partnership with Aboriginal peoples, will work towards improving their economic and social conditions. The untapped potential of Aboriginal peoples is untapped potential for Canada. Government studies show that a reduction of the Aboriginal unemployment rate to the national average by the year 2000 would increase the gross national product of Canada by 2.3 percent.

Aboriginal-controlled community enterprises and effective community development institutions will be supported as the main engines of economic growth for Aboriginal peoples. A Liberal government will also explore new approaches to obtaining capital for Aboriginal development projects, such as through a National Aboriginal Development Bank, whose initial capital will come from banks, corporations, and prosperous Aboriginal communities. Its mandate could include the issuance of Aboriginal Development Bonds, which Canadians could purchase to finance Aboriginal community development.

A Liberal government will adopt federal procurement policies designed to stimulate the growth of Aboriginal business and will set up an Aboriginal Trade Commission to cultivate national and international markets for Aboriginal goods and services, including tourism, arts, crafts, and the products of traditional economies.

HOUSING AND INFRASTRUCTURE

Adequate shelter is a fundamental need of any society and a basic prerequisite for community prosperity. Properly designed projects for the construction of housing and infrastructure should also create jobs and training for members of that community.

Aboriginal peoples are suffering an extreme housing crisis, brought on in part by the growth in the Aboriginal population, coupled with the Conservative regime's refusal, over nine years, to provide adequate resources to remedy the housing-need backlog. The 1992 report of the all-party Standing Committee on Aboriginal Affairs recommends a number of ways that existing resources could be reallocated to better address the housing crisis.

A Liberal government will work with Aboriginal peoples to develop an approach to housing that emphasizes community control, local resources, and flexibility in design and labour requirements. A Liberal government will bring together Aboriginal leaders, business and investment leaders, and other levels of government to define the appropriate legal instruments that will provide the security of repayment necessary to encourage private-sector financing to meet the need for housing.

**A Liberal government will
work with Aboriginal peoples to
develop an approach to housing
that emphasizes community
control, local resources, and
flexibility in design and labour
requirements.**

EDUCATION AND TRAINING

Too many Aboriginal children are dropping out of school. Less than half the Indian school-age population reaches Grade 12, and in the Northwest Territories the success rate for Aboriginal children is approximately 3 percent. Many causes for the dropout rate are poverty-related or reflect an educational system that is not relevant to the lives of Aboriginal young people. The education system is not preparing these young people to meet the minimum educational requirements of the Canadian labour force.

The needs of off-reserve, urban Aboriginal people are not currently being met. A Liberal government will initiate an Aboriginal Head Start program for preschool children and their parents, to be designed and run by Aboriginal peoples (see chapter 5).

A Liberal government will establish, with the participation of Aboriginal peoples, an Aboriginal Educational Institute that would specialize in curriculum development for Aboriginal and non-Aboriginal schools, teacher orientation, distance education, standards development, Aboriginal languages, literacy, and the development of cultural survival programs for youth.

Postsecondary education assistance for Aboriginal students was first introduced by a Liberal government in the late 1960s as a deliberate strategy to close the gap between Native and non-Native education in Canada. The Postsecondary Education Program continued to meet the growing demand from the Aboriginal community for higher education until 1987, when the Conservative government restricted the criteria and capped the budget for the program. Eligible Aboriginal students are now being turned away from postsecondary institutions for lack of funding, while at the same time the government is more than willing to support many of these young people with welfare payments.

A Liberal government will remove the cap on postsecondary education specifically to provide adequate funding for Aboriginal students accepted at colleges, universities, and vocational institutes, and in adult education programs and professional degree programs. An additional \$20 million per year will be budgeted initially to address the backlog of eligible students who have been deterred as a result of the cap on funding. A review of the Postsecondary Education Program will also be undertaken with Aboriginal peoples to determine fair criteria for eligibility and special needs, including adequate child care for students in need of such a service.

HEALTH AND HEALING

The need for a new approach to health issues in Aboriginal communities is starkly obvious. Aboriginal young people are committing suicide at a rate six

The education system is not preparing Aboriginal young people to meet the minimum educational requirements of the Canadian labour force.

A Liberal government will initiate a comprehensive health policy, designed by and for Aboriginal peoples, which supports an integrated approach to dealing with physical and mental health issues and incorporates traditional healing methods.

times the national average, and many are falling into a life of hopelessness characterized by a lack of education, alcohol and drug abuse, and, for too many, incarceration in our prisons.

A Liberal government will work in partnership with Aboriginal peoples to provide their communities with the tools and resources necessary to tackle these problems. Some communities have identified an urgent need for crisis intervention counsellors, drop-in centres for youth, cultural survival programs, healing centres, or other resources. Successful models for these initiatives already exist. A Liberal government will initiate a comprehensive health policy, designed by and for Aboriginal peoples, which supports an integrated approach to dealing with physical and mental health issues and incorporates traditional healing methods.

Many Aboriginal communities, particularly in remote areas and the North, lack qualified mental health counsellors and facilities. A Liberal government will commit the necessary resources to train professional counsellors in traditional and contemporary methods and to assist communities to develop traditional healing centres or other culturally appropriate initiatives. A Liberal government will triple the current number of bursaries and scholarships available through Health and Welfare Canada for training Aboriginal health professionals and will make the bursaries and scholarships accessible to all Aboriginal peoples.

ABORIGINAL JUSTICE ISSUES

There is ample evidence to demonstrate that the conventional justice system is not working for Aboriginal peoples. They continue to be imprisoned at a rate greater than that of the overall population. Several years ago, the Canadian Human Rights Commission made the observation that Native youth today are more likely to go to prison than to college or university.

Numerous studies and inquiries have examined the Canadian justice system and Aboriginal peoples, including the Marshall Inquiry and the Manitoba Justice Inquiry. The Royal Commission on Aboriginal Peoples has held a National Round Table on justice issues. There is clear agreement that change is needed and now is the time for action. Studies to date have been moving in the direction of either a separate Aboriginal justice system or, at the very least, major reforms to the present justice system to accommodate the unique cultures of Aboriginal peoples.

A Liberal government will act on Aboriginal justice issues as a priority and will consider alternative justice systems for Aboriginal peoples. We will also continue to support innovative alternative justice projects.

A Liberal government will act on Aboriginal justice issues as a priority and will consider alternative justice systems for Aboriginal peoples.

A SECURE LAND AND RESOURCE BASE

The resolution of outstanding Aboriginal claims must be a priority for all Canadians. Aboriginal peoples require certainty with respect to land rights if their communities are to have a productive future. Until claims and grievances are resolved, uncertainty over land rights will limit the possibilities of economic development in many parts of Canada.

The objective of a Liberal government will be to uphold the honour of the Crown by settling claims through a fair and equitable process. The resolution of land rights will allow the federal government to meet its obligations and guarantee a secure land and resource base for self-government.

The current process of resolving comprehensive and specific claims is simply not working. A Liberal government will implement major changes to the current approach. A Liberal government will be prepared to create, in cooperation with Aboriginal peoples, an independent claims commission to speed up and facilitate the resolution of all claims. This commission would not preclude direct negotiations.

Most Crown land in Canada south of the 60th parallel is held by the provinces. A Liberal government will engage the provinces in redressing the grievances of the Aboriginal peoples over land and resource rights, including negotiating agreements for resource revenue-sharing. We will also promote co-management agreements between Aboriginal peoples and federal, provincial, and territorial governments.

A Liberal government will be prepared to create, in cooperation with Aboriginal peoples, an independent claims commission to speed up and facilitate the resolution of all claims.

APPENDIX E

A SUMMARY OF THE GOVERNMENT OF CANADA'S APPROACH TO IMPLEMENTATION OF THE
INHERENT RIGHT AND THE NEGOTIATION OF ABORIGINAL SELF GOVERNMENT

ABORIGINAL SELF-GOVERNMENT

***A Summary of the Government of Canada's
Approach to Implementation of the Inherent Right
and the Negotiation of Aboriginal Self-Government***

The Government of Canada recognizes the inherent right of self-government as an existing right within section 35 of the *Constitution Act, 1982*. Now the federal government has developed an approach that will enable Aboriginal peoples in Canada to make self-government a reality. The federal government proposes setting aside legal and constitutional debates that have stymied progress toward Aboriginal self-government and instead working out practical arrangements through negotiated agreements.

Canada

The federal approach is designed to be flexible enough to accommodate the diverse needs and interests of Indian, Métis and Inuit peoples including those living on and off a land base, in the North, in urban centres as well as in remote locations. It will enable the federal government, Aboriginal groups and the relevant province or territory to sit down together and negotiate agreements tailored to best meet the needs of various Aboriginal groups. The federal government believes this is the only way to make real progress, that this is an approach that all parties can work with and one that Canadians will support.

The Crown has a unique, historic, fiduciary relationship with Aboriginal peoples in Canada. The fact that the federal government recognizes an inherent right of self-government does not imply the end of this historic relationship. But it is important to understand the ways in which the exercise of Aboriginal self-government may change the nature of this relationship. As Aboriginal governments assume greater control over decision-making that affects their communities, they will also assume greater responsibilities for those decisions. This will mean that the role and responsibilities of the Crown will lessen. In this sense, the historic relationship between Aboriginal peoples and the Crown will not disappear, but will evolve as a natural consequence of Aboriginal peoples' changing role in shaping their own lives and communities.

Building a new relationship with Aboriginal peoples in Canada means providing them with the tools to become self-governing. It means restoring the dignity of Aboriginal peoples and renewing hope in their communities. It does not mean the end of the special relationship between Aboriginal peoples and the Crown.

Key Elements of the Federal Approach

The Government of Canada's recognition of the inherent right is based on the view that the Aboriginal peoples of Canada have a right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and resources.

At the same time, the federal government believes that Aboriginal self-government must operate within the Canadian federal system, in harmony with other governments, and in a way that enhances the participation of Aboriginal peoples in Canadian society.

The federal approach focuses on developing practical arrangements that respond to the self-government aspirations of Aboriginal peoples. It allows for the negotiation of self-government authorities that fit the widely different needs and

circumstances of Indian (Status and Non-Status), Métis and Inuit peoples, and ensures that these authorities are exercised by accountable Aboriginal governments and institutions.

One important area not open to negotiation relates to the application of the Canadian Charter of Rights and Freedoms. Self-government agreements must contain a provision ensuring that the Charter applies to Aboriginal governments and institutions as it applies to other governments in Canada. The Charter itself contains the necessary flexibility to accommodate distinct Aboriginal approaches to self-government.

Getting Started

Self-government arrangements won't be put in place right away. They will be the subject of negotiations in the coming years among Aboriginal peoples, and federal, provincial and territorial governments.

Within the federal government, the Minister of Indian Affairs and Northern Development is mandated to enter into negotiations with First Nations and all Aboriginal peoples in the territories. The Federal Interlocutor for Métis and Non-Status Indians is mandated to enter into negotiations with Métis south of the sixtieth parallel and Indians living off a land base.

As a first step, the federal government will meet with duly-mandated representatives of Aboriginal groups and provincial and territorial governments to establish mutually acceptable processes for negotiations. A variety of approaches at provincial, territorial, treaty, regional or local levels will be considered. Wherever practical and if all parties agree, existing processes or structures will be used for the purpose of self-government negotiations.

The federal government will work with provinces, territories and Aboriginal groups to develop appropriate consultation mechanisms for municipalities and third parties that may be directly affected by self-government negotiations and agreements.

Negotiating Self-Government Arrangements

Under the federal approach, the scope of negotiable self-government powers covers a range of matters designed to meet the needs of Aboriginal groups across the country. These powers are both legislative and/or administrative in nature, and deal with such matters as: the establishment of governing structures, leadership selection and group membership; language, culture, religion; education; land, resource and environmental management on Aboriginal lands; and a range of authorities in areas such as health and social

services, law enforcement and administration, housing, taxation, policing, local transportation, licensing, regulation and operation of Aboriginal businesses, among others.

Where provincial or territorial jurisdiction or interests are affected, the federal government would only proceed with negotiations and agreements with the involvement of the province or territory concerned.

Aboriginal governments would not have authority to pass laws in relation to certain matters, such as defence and external relations, the management and regulation of the national economy, federal undertakings, or those parts of the national legal framework that apply to all Canadians.

In addition, self-government will not mean the automatic exclusion of federal and provincial laws. Because of the need for harmony among jurisdictions, agreements will need to be clear about how Aboriginal laws relate to other laws.

Various Approaches to Self-Government

Indian, Inuit and Métis peoples live in widely diverse circumstances and have different needs and aspirations. The federal approach will enable them to exercise self-government in different ways: through their own government on their

land base; within wider public government structures; or through institutional arrangements. The federal government is willing to support various approaches that will meet the needs of different Aboriginal groups.

First Nations

Negotiated self-government arrangements would enable First Nations to exercise control over their own affairs and deliver programs and services better tailored to their own values and cultures.

These arrangements would recognize the jurisdiction and authority of First Nations' governments and replace the *Indian Act* with a modern partnership. Self-government arrangements with Treaty First Nations would build on the treaties and on the relationship already established by the treaties. Where all parties to negotiations agree, rights contained in self-government agreements could be constitutionally protected under section 35 of the *Constitution Act, 1982*.

Of course, not all members of a First Nation live on its land base. With the agreement of the provinces and at the option of non-resident members, First Nation laws and services delivered by First Nations could apply to members residing off the land base, where feasible and affordable.

Inuit Communities

Inuit groups in various parts of Canada have said they want to realize their self-government aspirations within the context of public government, even though they have, or will receive their own separate land base as part of a comprehensive land claim settlement. The public government of the new territory of Nunavut is one example of such an arrangement on a large scale.

The federal approach contemplates self-government arrangements in a public government context, although it does not preclude other arrangements at some future date.

Where the parties to the negotiations agree, the government is also prepared to protect rights negotiated in public government arrangements as constitutionally protected rights under section 35.

Métis and Indian Groups Residing off a Land Base

The government is prepared to enter into negotiations with provinces and Métis and Indian groups residing off a land base. With provincial agreement, the Government is also prepared to protect rights in agreements as constitutionally protected section 35 treaty rights.

The type of self-government arrangements off a land base will naturally be different from those which can be implemented on a land base. The federal government is willing to look at various approaches to self-government off a land base including: forms of public government; devolution of programs and services and the development of institutions providing services; and other arrangements where feasible.

Many Métis groups have expressed the view that enumeration is an essential building block for self-government. The Government agrees and is prepared to cost share with the provinces concerned the enumeration of Métis and the identification of Indian people living off a land base who may be covered by self-government arrangements.

Métis with a Land Base

The Alberta Métis Settlements have also expressed interest in pursuing self-government, as it applies to their specific circumstances. Consequently, the federal government, with the participation of the Government of Alberta, is also prepared to negotiate self-government arrangements with Métis people residing on Alberta Métis Settlements that reflect their unique circumstances. Should lands be provided by other provinces to Métis people under

similar regimes, the federal government would be prepared to negotiate similar arrangements, with the participation of the province in question.

The application of Métis laws and delivery of Métis services to members who reside off the land base may be addressed in negotiations with the provinces concerned and would be at the option of non-resident members.

Self-Government in the Western Northwest Territories (NWT)

Aboriginal groups in the western NWT have an opportunity to develop unique self-government arrangements within public government structures, which are not feasible south of the sixtieth parallel.

The federal government also believes that this approach is the best way to address the distinctive features of this region including the fact that many communities are mixed. Given these circumstances, and considering inefficiencies that may arise due to duplication of programs and services in mixed communities, the creation of completely separate Aboriginal governments in the western NWT may not be practical or efficient.

The federal government believes that the self-government aspirations of Aboriginal

peoples in the western NWT can be addressed by providing specific guarantees within public government institutions. The creation of Aboriginal institutions to exercise certain authorities may also be a useful approach.

Self-Government in the Yukon

There are four First Nation self-government agreements which were brought into force by legislation in 1995 and processes are in place to continue negotiating with the remaining First Nations in the Yukon. The federal government's participation in these negotiations will be guided by the inherent right policy and existing commitments.

Tools for Making Self-Government a Reality

There are a variety of mechanisms that might be suitable for implementation of self-government agreements including treaties, legislation, contracts and memoranda of understanding. Where all parties agree, the federal government is prepared to protect certain rights in negotiated self-government agreements as treaty rights within the Canadian Constitution.

Treaties create binding obligations of an enduring nature. They constitutionally protect the rights they contain. The main criterion used to decide if a matter should be included in a treaty is whether the matter is a fundamental element of self-government which should bind future generations.

Many Aboriginal groups already have treaties with the Crown which have established a special relationship. The federal government does not intend to reopen, change or displace these treaties through the implementation of the inherent right or self-government agreements. Instead, it is prepared to build on the existing treaty relationship.

Financial Obligations, Responsibility and Political Accountability

Financing self-government is a shared responsibility of federal, provincial, territorial and Aboriginal governments. Implementation of self-government must take into account the difficult financial situation facing all governments and the need for greater efficiency and effectiveness in the use of government resources.

Negotiations on implementation funding will consider:

- existing levels of support;
- programs and services being assumed by the Aboriginal governments;
- the ability of the Aboriginal government to raise its own revenue;
- the cost-effectiveness of the proposed arrangements;
- the objective of ensuring basic public services for Aboriginal peoples comparable to those available to others in the vicinity; and
- the need for stable and flexible funding arrangements.

Governments will need to work together to eliminate duplication of funding, programs and services and to ensure the most efficient and effective use of resources.

All governments have to be politically and financially accountable for the authorities they exercise. This responsibility applies equally to Aboriginal governments and institutions. Provisions to ensure accountability will have to be set out in self-government agreements.

Transition

It will be important to ensure a smooth transition from current arrangements to implementation of the inherent right through negotiated agreements. All agreements should therefore include appropriate transition measures to ensure that implementation of self-government does not create legal uncertainty.

Finalizing Agreements

Parliament, provincial legislatures and Aboriginal groups will need to ratify self-government arrangements.

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