





**PREFACE**

Section 37 of the *Constitution Act, 1982* (as amended) requires the

identifies sectors where self-government arrangements might be concluded, and outlines the current occupation of those sectors by federal and provincial governments. In conclusion, Mr. Cowie offers some suggestions for managing difficulties which may arise in the process of negotiating and implementing aboriginal self-government agreements.

Mr. Cowie heads his own firm of management consultants in

## ABSTRACT

... on issues relating to jurisdictional interface and

## INTRODUCTION

---







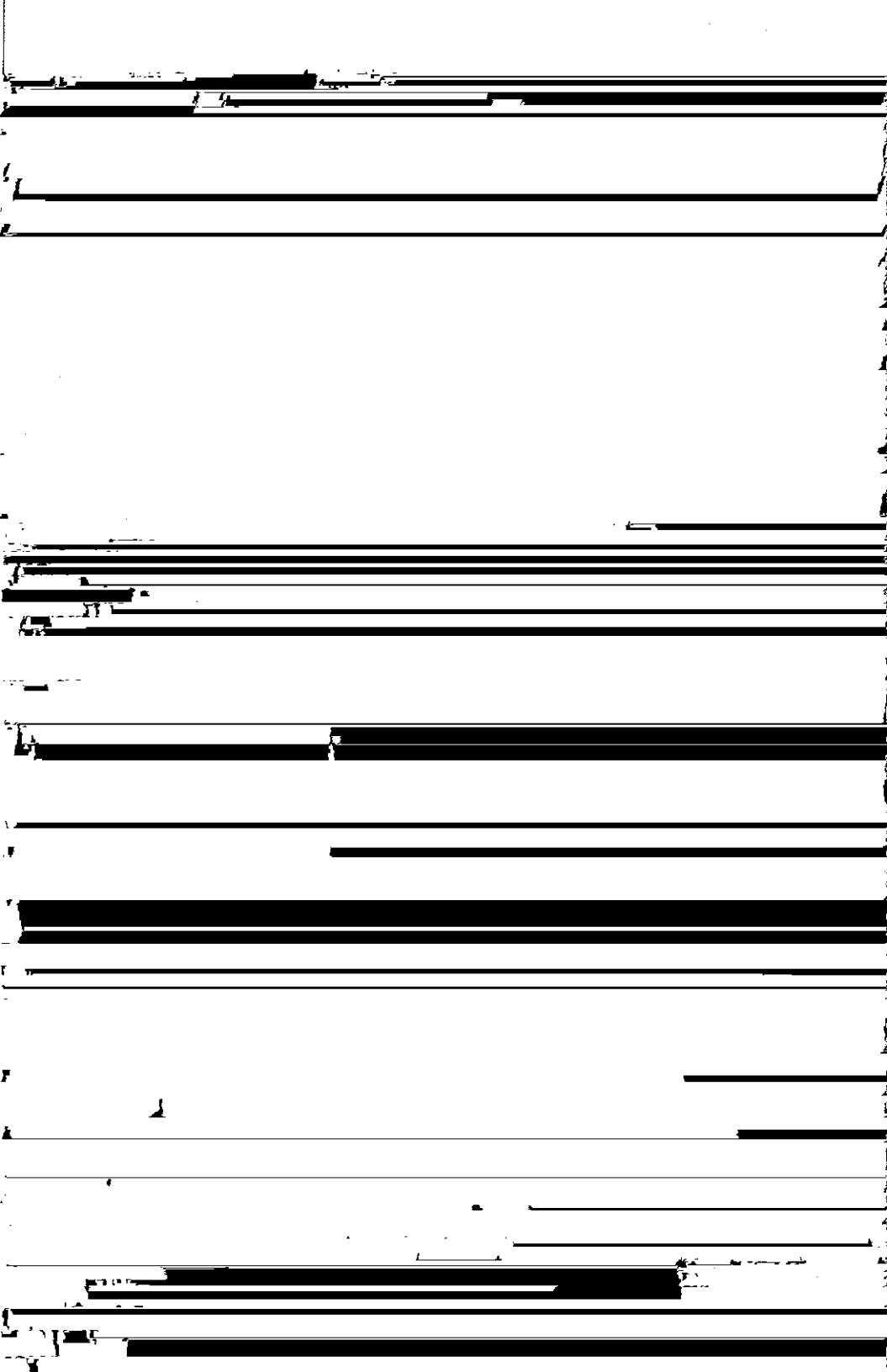
"The government of Canada and the provincial governments are committed, to the extent that each has authority, to

(a) participating in negotiations directed toward concluding, with representatives of aboriginal people living in particular communities or regions, agreements relating to self-government that are appropriate to the particular circumstances of those people; and

(b) discussing with representatives of aboriginal people from each [redacted] the timing, nature and scope of the negotiations referred

[redacted]

The essential difference between the two accords was whether governments would constitutionally assure the commitment to negotiate

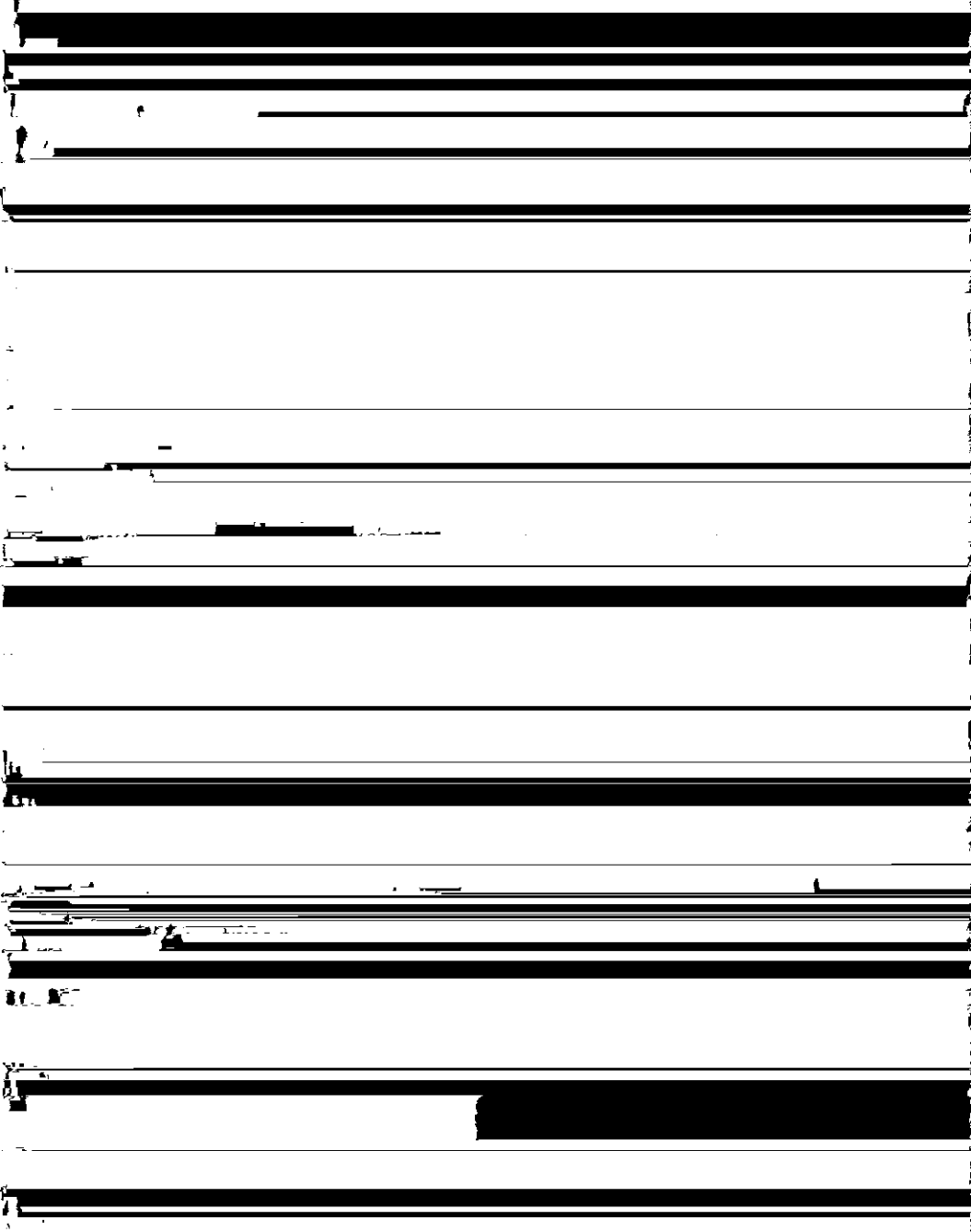


### 3. Suspicion of Government Initiatives/Policies

Reaction to new government approaches and policies is often driven

[REDACTED]

groups enter into constitutionally derived "regional or community-based self-government negotiations", associations are focussing on the need to develop frameworks and approaches which will allow for the identification and phasing in of self-governing capacities in accordance with the particular needs, aspirations and circumstances of the groups



- accommodation of collective and individual rights.

In short, when it comes down to specific negotiations it is clear that no matter what the agreed upon political departure points may ultimately be, there will be significant variation in their translation from province to province, region to region, community to community, and among the different Aboriginal peoples. In the same way as diversity dictates high levels of difference, there will also be identifiable points of commonality, as the results of specific sets of negotiations become available and are used, to the extent relevant, as guidance points for subsequent negotiations with other communities.

### (5) The Self-Government Choices

requirement for flexibility of choice. This in turn dictates the need for a broad range of "negotiable" self-government options open to individual communities or groups, ranging from measures which can be termed transitional in their nature to more fundamental and all encompassing options.

This requirement for flexibility exists between the different Aboriginal peoples, as well as within a given Aboriginal group.

This requirement of choice among a broad range of options appears

b) Negotiation of self-government arrangements within selected jurisdictional sectors:

Application: - Indian, Inuit, Métis.

Application: - Indian specific.

d) New financial arrangements (either comprehensive or within selected jurisdictional sectors).

Application: Indian specific

**(A) Indication of Interest**

.Indicates interest in commencing discussions.  
May or may not be accompanied by specific proposal.

- ( .Community Profile
- ( .Band Information Package describing options under federal policy
- ( .Jurisdictional Framework

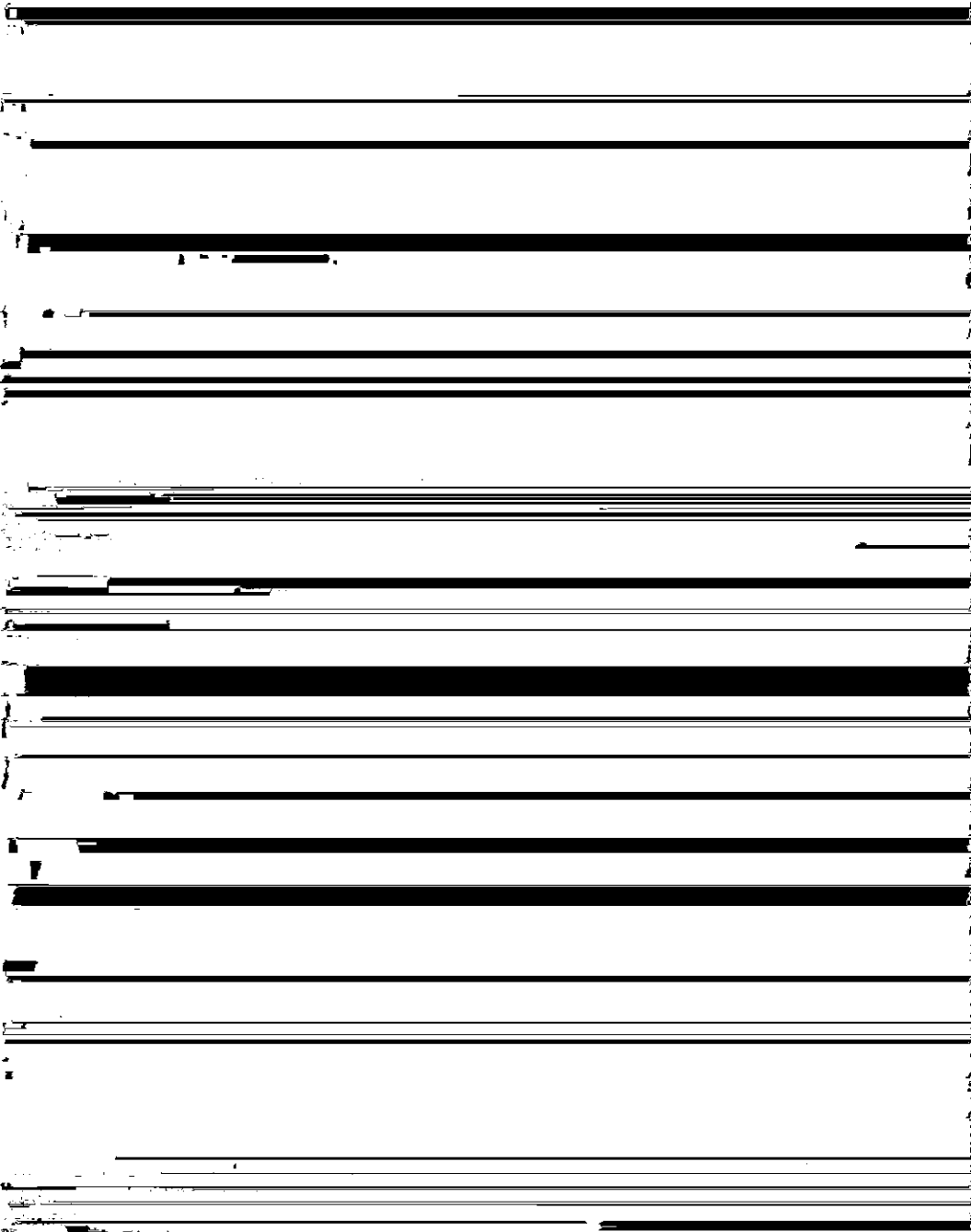
**(B) Preparatory Phase**

.Material on federal policy/ response provided to Band  
 .Information sessions/workshops to explain, and exchange views.  
 .Examination of options for structuring process.

↳ Band confirms interest in proceeding.  
 Discussions regarding:  
 .Preferred approach.  
 .Identification of priority jurisdictional sectors.  
 .Options regarding process

Examples of some of the broader preparatory requirements and issues that would have to be addressed include:

1. Despite recording accuracy, ...



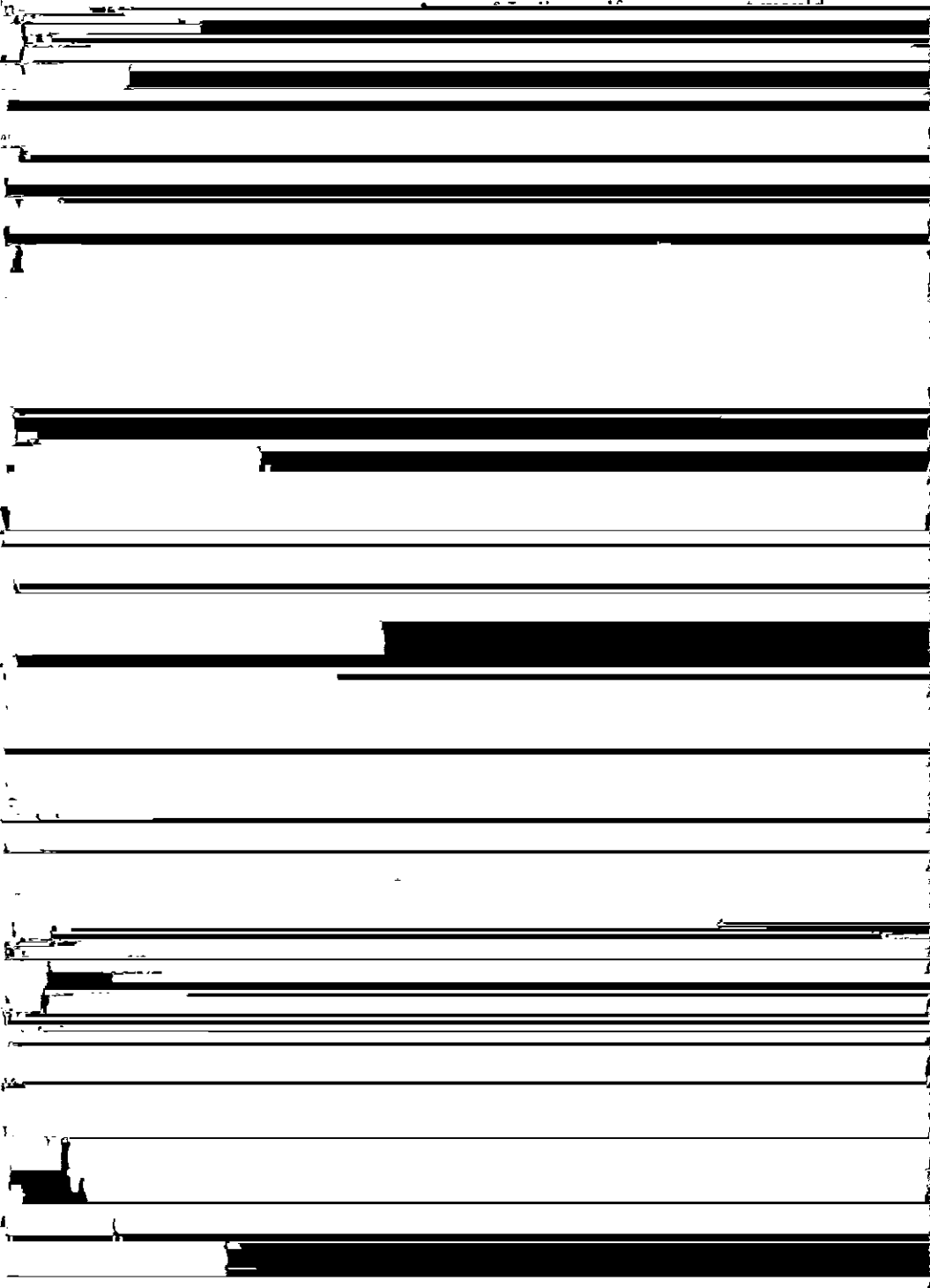


6. parental involvement will require careful discussion with



definition, prioritization and the grouping that the framework will take

As with the present paper, the work did not assume the adoption of any one self-government concept at the constitutional or legislative level.



Flowing from these broad environments, primary jurisdictional sectors were identified as follows:

ENVIRONMENT

PRIMARY SECTORS

(1) Natural Environment

- (1) Property
- (2) Natural Resources
- (3) Environment
- (4) Citizenship
- (5) Communications
- (6) Transportation

(2) Socio-Cultural Environment

(3) Economic Environment

- (8) Cultural Development
- (9) Health
- (10) Social Development
- (11) Domestic Relations
- (12) Justice
- (13) Economic Development
- (14) Energy
- (15) Labour
- (16) Trade
- (17) Companies
- (18) Taxation
- (19) Private Works
- (20) Public Works
- (21) Public Administration
- (22) Finance
- (23) Intergovernmental Relations

(4) Physical Environment

(5) Government Environment



**(2) Proposals/Working Experience in Defining  
Jurisdictional Sectors for Negotiation**

It is useful to make brief reference to the proposals and limited working experience to date in defining self-government jurisdictional sectors.

Both the federal government and Saskatchewan departments

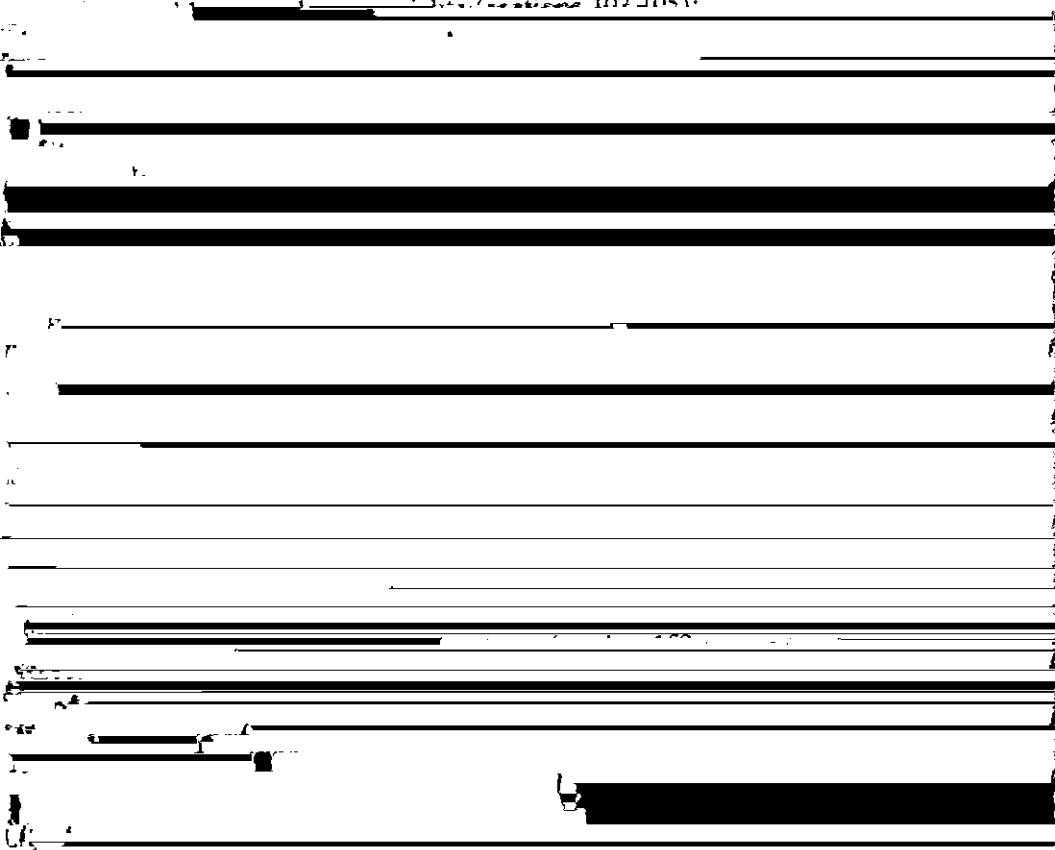
made highly generalized references to the matters that would be

- local services;
- road traffic and transportation; and
- operation of businesses and trade.

Other powers provided for are as follows:

- land and resource use and planning (sections 46-47);
- hunting, fishing, trapping and wildlife protection (may be disallowed) (section 48);
- band elections, meetings and council procedures (sections 82-86);
- awarding of contracts (section 99);

Sections 102-105.





- preservation and management of wildlife and natural resources;
- public order and safety;
- roads and traffic;
- business, professions and trade;
- intoxicants;
- fines or imprisonment for contravention;
- devolution of real property;
- financial administration;
- administrative bodies; and
- good government of the band, its members or Sechelt lands.

**(d) The Kativik Act:**

The James Bay and Northern Quebec Agreement provided for the enactment by the province of legislation establishing municipal community government and municipal regional government. *The Act Concerning Northern Villages and the Kativik Regional Government* was assented to on 23 June, 1978. The Act applies to the territory of Quebec situated north of the fifty-fifth parallel. The Kativik Act and the institutions created by it are not ethnically based. The local government represents municipalities in which all residents, native or not, may vote, be elected and otherwise participate. The regional government is likewise non-ethnic.

Under Part I of the Act, Inuit settlements became, after

- public health and hygiene;
- parks, recreation and culture;

... and transportation; and

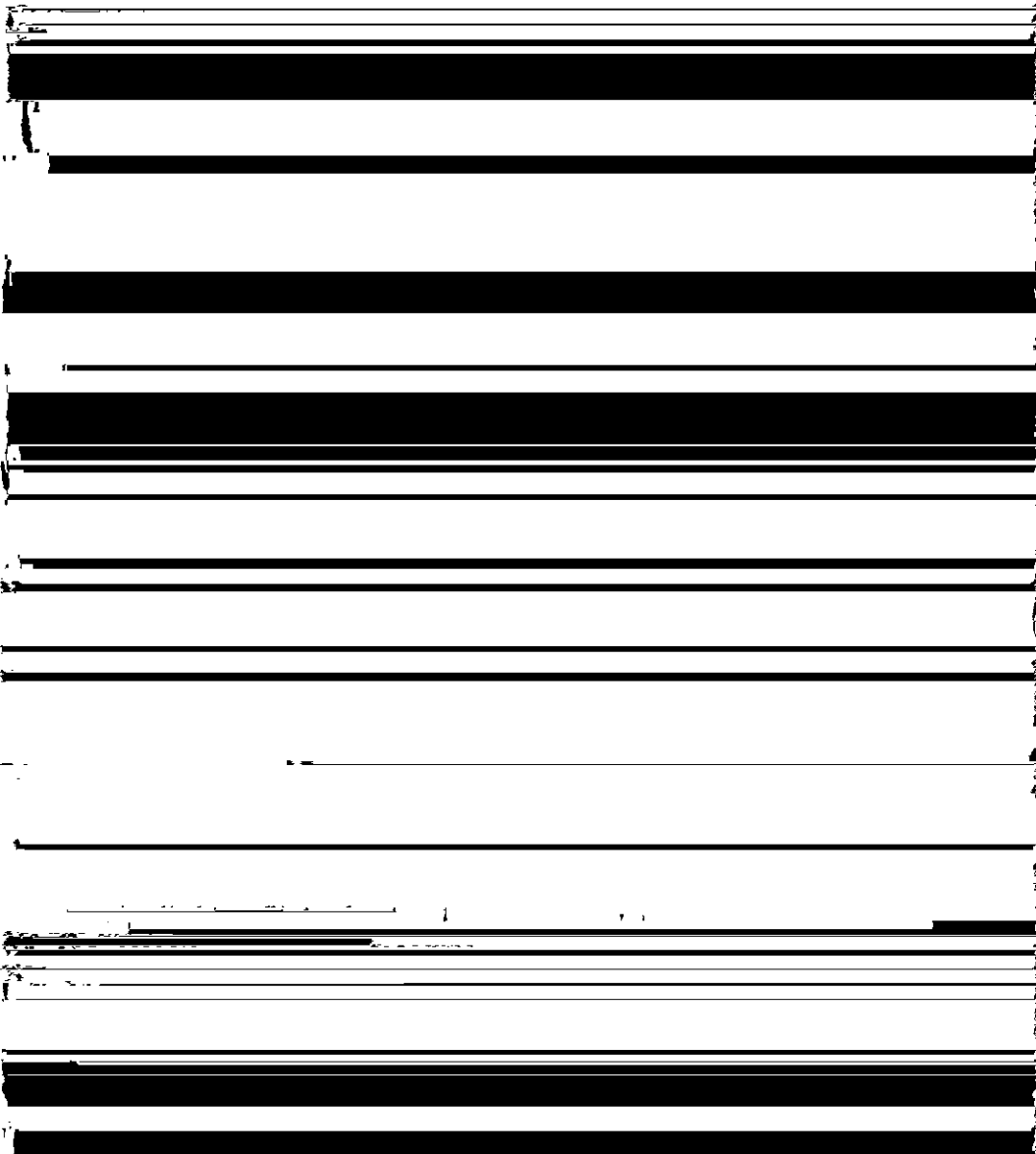
Part II of the *Kativik Act* creates the Kativik Regional  
Government which has the powers of a northern village

models to be emulated in future negotiations. Rather, they reflect the "products" of what were in each instance, essentially community-regional based negotiation processes, carried out during the last 10 years.



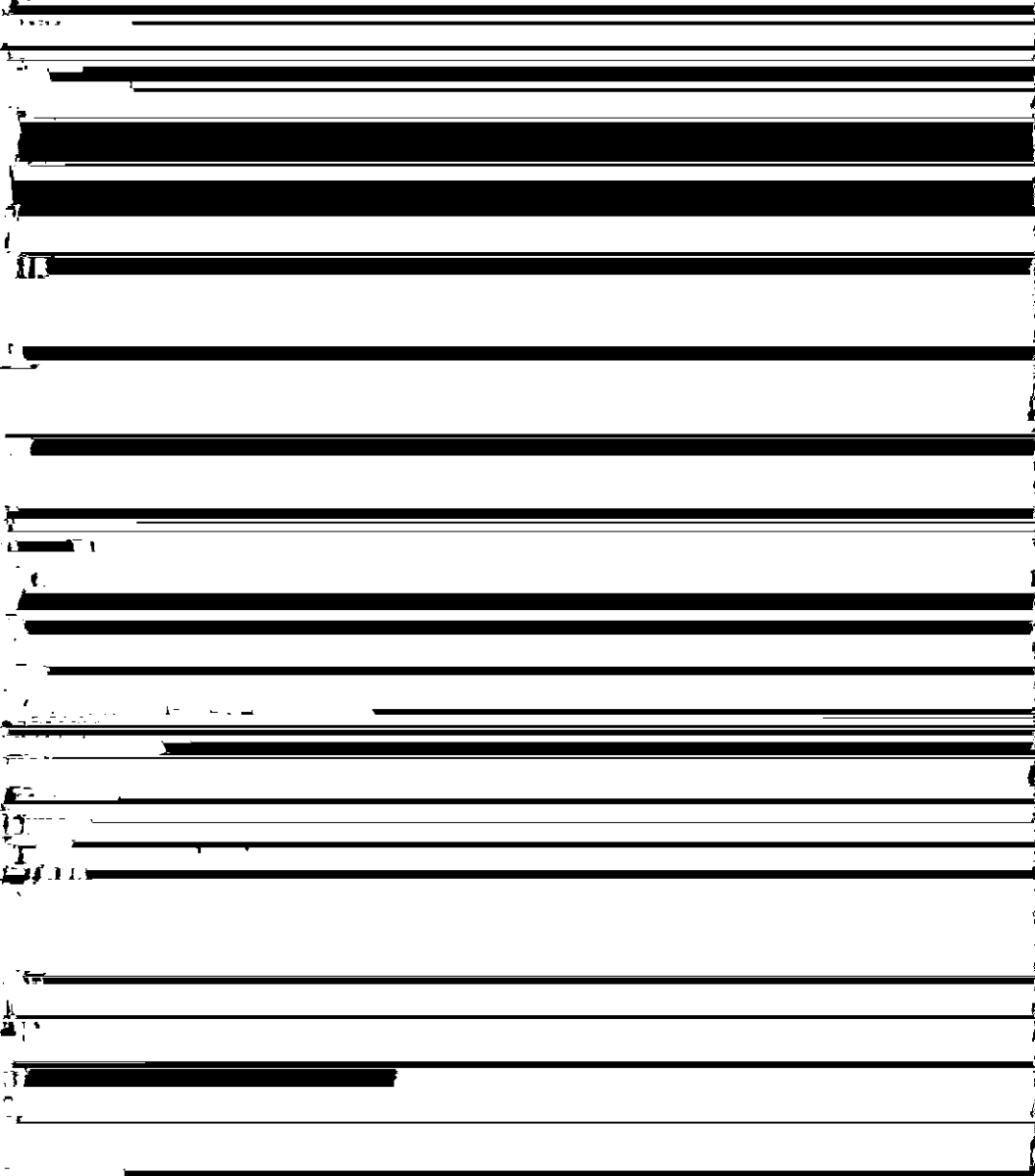
iii) Determining the interface implications of Aboriginal government jurisdictions with continuing federal and/or provincial jurisdictions in the sectors under discussion.

This chapter provides general observations relating to current occupation of key jurisdictional sectors by the federal and/or provincial governments. In the context of individual cases of jurisdictional



Finally, in trying to anticipate some of the jurisdictional and fiscal

designed to meet their special, let alone basic, needs. While programs developed through the 70s were in some sectors made of application to all Aboriginal peoples (e.g., Justice, Secretary of State programs and some employment and training programs), essentially the Métis were viewed as any other residents of the province and had access to provincial programs in a similar manner. Federal funds, if any, flowed through programs of general application as for other provincial residents (e.g., CAP - Established Program Element).



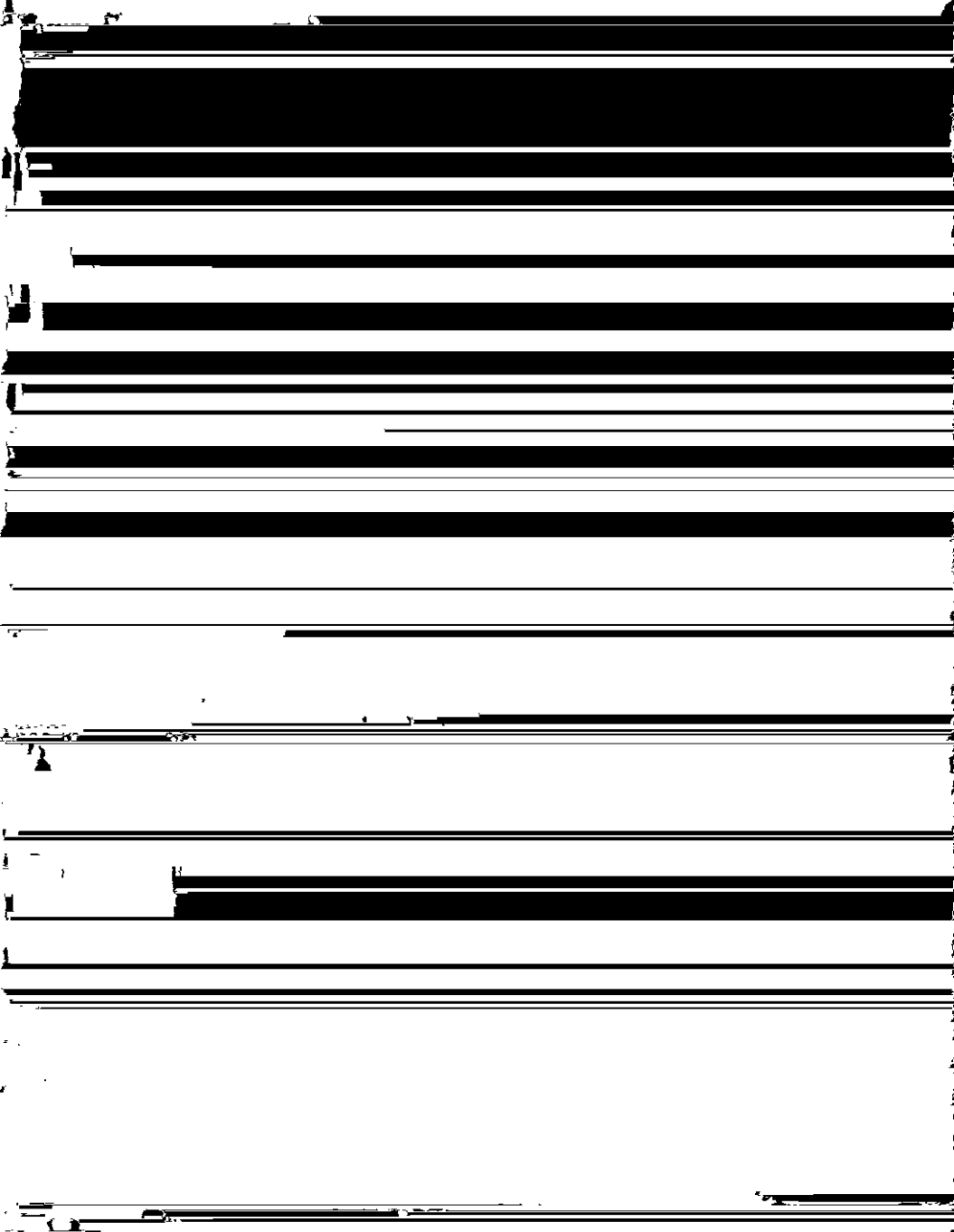
have both taken the position that the Métis are or at least should be included under section 91(24).

3. Does section 91(24) confer "mandatory" or "permissive" legislative jurisdiction/responsibility on the federal government?



The answer to the first question should encompass which government or governments have the legislative competence to enact legislation (self-government or otherwise) relating to Canada's Aboriginal peoples. The answer to the second question should include how the field is

divided into 1/2 of the field of jurisdiction and legislative



"No statute of the provincial legislature dealing with Indians or their lands as such would be valid and effective, but there is no reason why general legislation may not affect them."

*—The Attorney General of Alberta* [1974] 2 S.C.R. 695 @ 706.

(B) POSITIONS OF GOVERNMENTS

1/1/52

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

need to address the more general issue of federal-provincial responsibilities at the national level.

... the M&C, virtually all provinces, with the notable

Off-Reserve:

In most instances, Status Indians residing Off-Reserve must look to provincial governments for required services, given that most federal programs are restricted to Indian people residing On-Reserve. Selected federal programs in ...

reimbursement by the federal government of the actual costs incurred, especially in the health care and administration of justice sectors.

Added difficulties flow from the issue of the range and quality of services provided to On-Reserve residents under federal programming. Past studies have clearly demonstrated that the range and quality of services

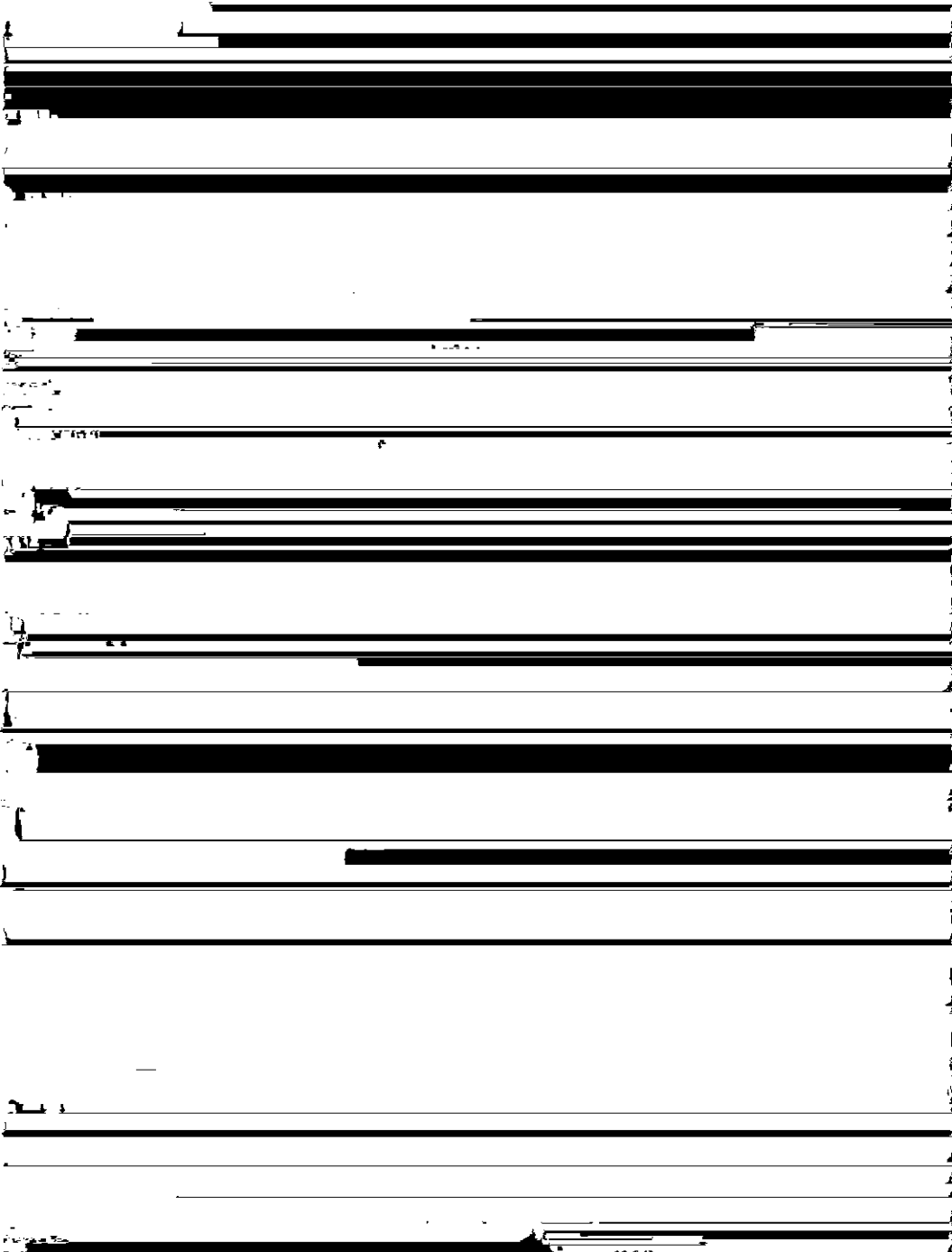
discussions start with Aboriginal groups, especially Indian Bands in the negotiation of self-government arrangements in a broad range of areas.

### **(3) Jurisdictional Sectors**

#### **(A) General**

The analysis in the preceding part of this paper clearly demonstrates that identification of jurisdictional interface from a constitutional and legal point of view, will be of limited assistance in determining the current

question to answer at a generalized level. Reference should be made to pages 56-111 of the work by David Nahwegabow for its more extensive examination of the jurisdictional questions relating to the various sectors identified. The brief comments made here will follow the same order as





- *Public Property.* The *Constitution Act 1867* confers on Parliament and the Legislatures of the provinces the authority to make laws in relation to their respective property.

(E) Citizenship

It is the federal and provincial governments are

[REDACTED]

(J) Health

- Similarly this head is not specifically mentioned in the *Constitution Act 1867*. The sector falls primarily under provincial jurisdiction. Once again other federal heads have allowed for both general (e.g., spending power based) or Indian specific (section 92(24)) items.

(K) Social Development

- Specific subsectors that are incorporated under this general sector

... which is referred to the federal government under section

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



However, as is apparent from the brief sector-by-sector comments

- c. Financing – Federal Direct
  - Federal Transfer
  - Provincial Direct (net of Transfers)
  - Aboriginal

- By jurisdictional sector
- Program implications

– Financial requirements.

**(4) Specific Interface Issues for the Future**

through. The issue of federal transfers under the Established Programs Financing arrangements arises when examining financial issues in this sector.

### 3. Cultural Development

This is one of the sectors that would appear to lend itself to early ~~development~~ with relatively few jurisdictional interface problems

### 4. Health

This sector is particularly complex. Current Department of National Health and Welfare transfer policies already create a level of working precedent for some of the possibilities in this area. The complexity ~~of a federal program~~ ~~associated with primary health~~



adoption, child welfare, maintenance, custody, and juvenile delinquency. Reciprocal enforcement questions will arise in a

This sector is complex in the interfaces it presents in such areas as policing, court structures and jurisdiction, correctional and

## **4 ISSUES FOR THE FUTURE: EXPERIENCE TO DATE AND SOME TENTATIVE CONCLUSIONS**

### **(1) Introduction**

This paper has focussed on some of the issues that will emerge in the future. It is intended to provide a starting point for discussion and to highlight some of the key issues that need to be addressed.

(b) The future relationship between Aboriginal government, *democratic self-determination*

[REDACTED]

"delegation" in the context of future recognition of the rights to

The technical capacity of the federal government to unilaterally enact new Indian self-government regimes will likely be replaced as a matter of practicality by a requirement at least in some areas, for concurrent and complementary federal and provincial legislation. (This is demonstrated to some extent in the legislative requirements agreed to in both the

- The Governor-in-Council may declare that the *Indian Act* or some provisions of it do not apply. (Section 36).
- The *Indian Oil and Gas Act* applies. (Section 39).

It should be noted in relation to the Northern Village Municipalities and Regional Government (*Kativik*) created under the *Kativik Act* that bylaws

is in conflict with federal legislation, derivative Indian constitutions, laws

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

LP

[REDACTED]

[REDACTED]

empowered to disallow any by-law passed by the Kativik Regional Government or the Northern Village Municipalities.

In summary, in terms of legal paramountcy, legislation enacted pursuant to current federal legislative authority gives primacy to enabling legislation and directly or indirectly to the constitution of the Band or ~~of the Band in question~~. It is clear that provincial laws of general



should federal legislation specifically extend in its application to a defined Off-Reserve population.

If there is an apparent conflict the determination of paramountcy will

where the potential for conflict exists and which might usefully be considered in such a forum include:

- Land use and planning issues;
- Environmental control issues;
- Natural resource development and management issues, and in particular, wild life management;
- Issues pertaining to access to Indian lands; and
- Taxation issues, especially where the Indian community in question is in close proximity to Non-Indian municipalities (e.g., municipal services and the general taxation and treatment of Non-Indian residents).

Once again, the potential difficulties in such areas flow not from overlapping jurisdictions, but from the exercise of separate powers and jurisdictions. The primary consideration which argues for some form of joint planning and review mechanism are the dictates that flow from physical proximity, and the object of achieving cooperation which will result in adjustments to initiatives on the part of participant governments for the sake of promoting and maintaining good relations.

At a more general level, the same planning/review mechanism would have potential planning for and implementation of program integration, definition of standards and broader policy coordination in such key areas as:

- education;
- social services;
- administration of justice;
- economic development; and
- taxation.

Once again, forums such as those presented by some parts of the current Ontario Tripartite Process have potential to act as clearing houses and ~~to provide a forum for cooperative study and action on issues that cut across~~

---

---

Clearly a number of issues arise in relation to the structure and operation of such a vehicle, although these will not be addressed in detail at this time. Such questions include:

- Composition;

(E) IS THERE A NEED TO PROVIDE FOR SOME FORM OF  
FEDERAL OVERRIDE OR DISALLOWANCE POWER IN  
RESPONSE TO A BODILY GOVERNMENTAL LAWMAKING

*Cree-Naskapi:*

Approval of Minister required with respect to:

- by-laws dealing with wildlife harvesting and protection (Section 48); and
- election by-laws (Section 66).



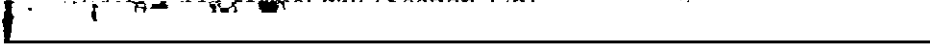
Minister may also:

appoint financial records (Section 91);



- appoint an auditor where a council fails to do so (Section 93);
- acquire a copy of an auditor's report (Section 94);
- appoint a financial administrator (Section 100); and

appoint a financial will (Section 176)



Governor-in-Council may make regulations:

- prescribing anything that is to be prescribed under the Act (Section 10);
- applying provincial law to certain lands (Section 11);

# List of Titles in Print

---

## Aboriginal Peoples and Constitutional Reform

### PHASE ONE

#### *Background Papers (second printing)*

1. Noel Lyon, *Aboriginal Self-Government: Rights of Citizenship and Access to Governmental Services*, 1984. (\$12)
2. David A. Boisvert, *Forms of Aboriginal Self-Government*, 1985. (\$12)
3. NOT AVAILABLE
4. Bradford Morse, *Aboriginal Self-Government in Australia and Canada*, 1985. (\$12)
5. Douglas E. Sanders, *Aboriginal Self-Government in the United States*, 1985. (\$12)
6. ~~Devin D. Schwartz~~ *First Principles: Constitutional Reform with*

---

*Respect to the Aboriginal Peoples of Canada 1982-1984*, 1985. (\$20)

*Discussion Paper*

---

---

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

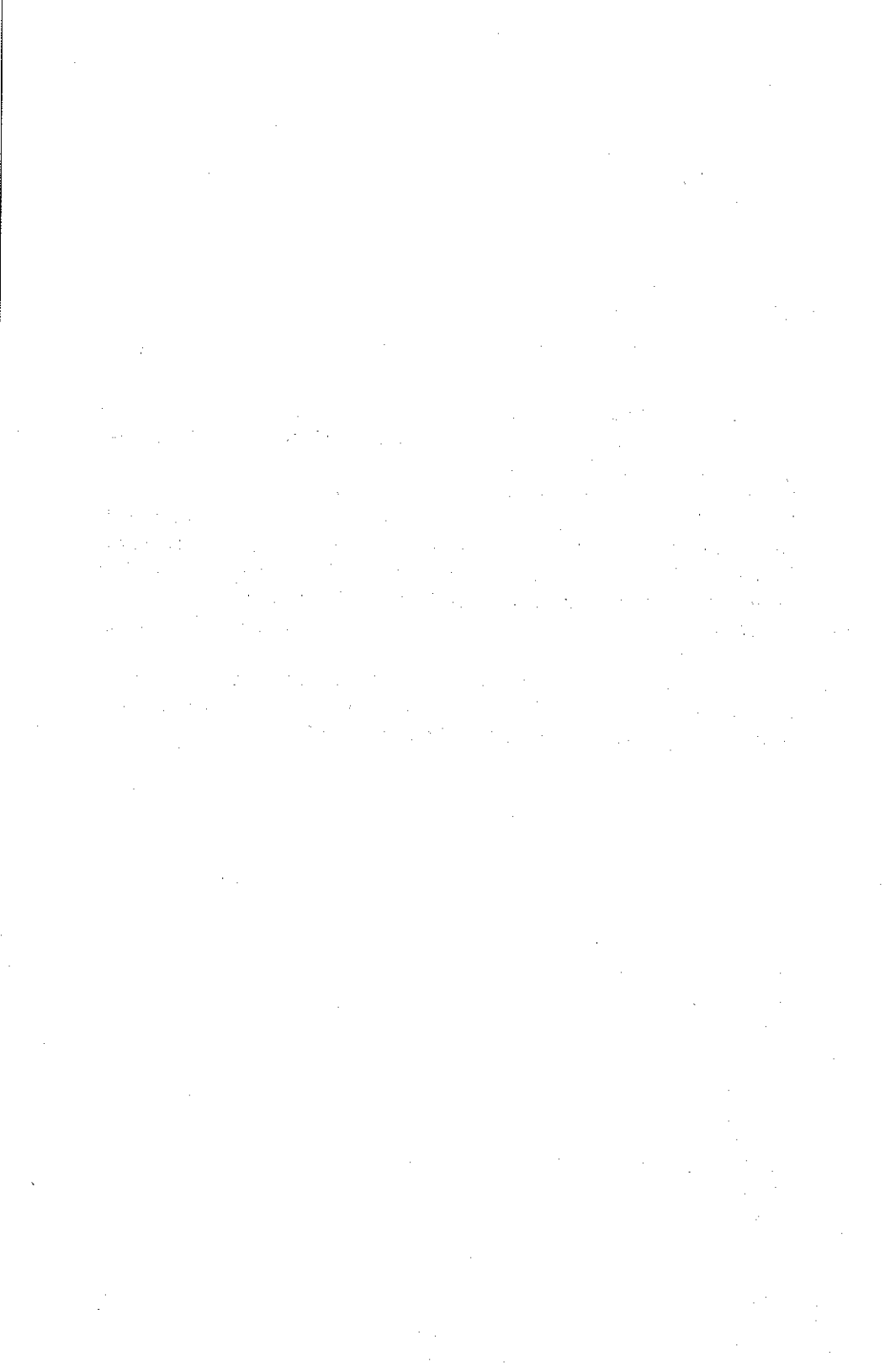


## NOTES

---

1. "Federal" and "Saskatchewan" draft accords tabled at the 1985 First Ministers' Conference. See e.g. - Federal (Document 800-20/041 Part I, Clause 2.)
2. Federal draft - Document 800-20/041 - Clause 6.
3. "Federal-Provincial implications of various concepts of Indian Self Government" - by David Nahwegabow for Ian B. Cowie, Director General, Corporate Policy - DIAND - 1982. Public document





the name of a head (Section 16) and



A number of issues, while technically within the scope of the paper, are not addressed, including consideration of the future situation in

## The Broad Process of Negotiation

Whatever the scope of negotiations agreed to by participants, it is clear that the broad process will involve:

• Identification of those institutions of state to be involved

1.

• Identification of the type of powers and authorities required within

sectors. Such analysis proves to be of limited value in isolating the questions and considerations that will have to be dealt with in examining future Aboriginal self-government capacities and jurisdictional coordination requirements in those areas. Of equal, if not more importance, will be achieving detailed understanding in relation to current occupation, programmatically and financially of identified jurisdictions, and achieving agreement on how these will have to be

