

# NEGOTIATING ABORIGINAL SELF-GOVERNMENT

Development of the ... 1997

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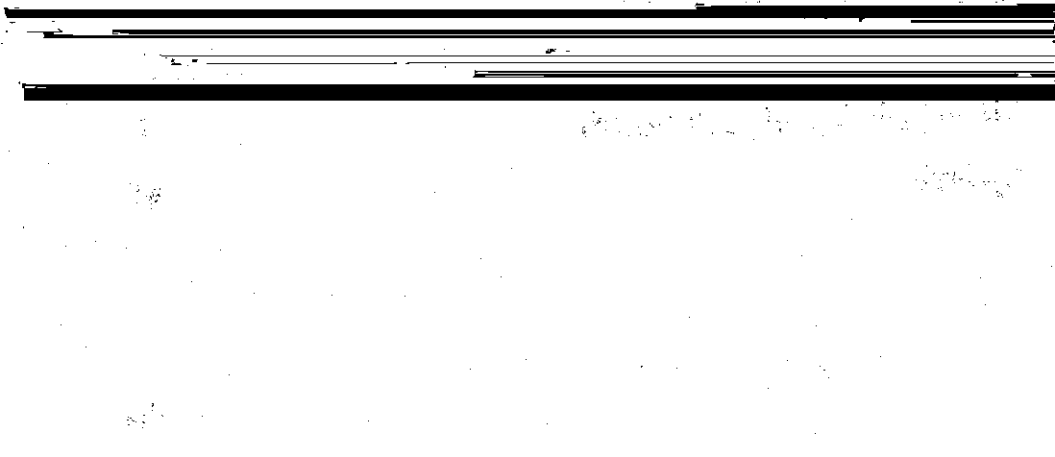
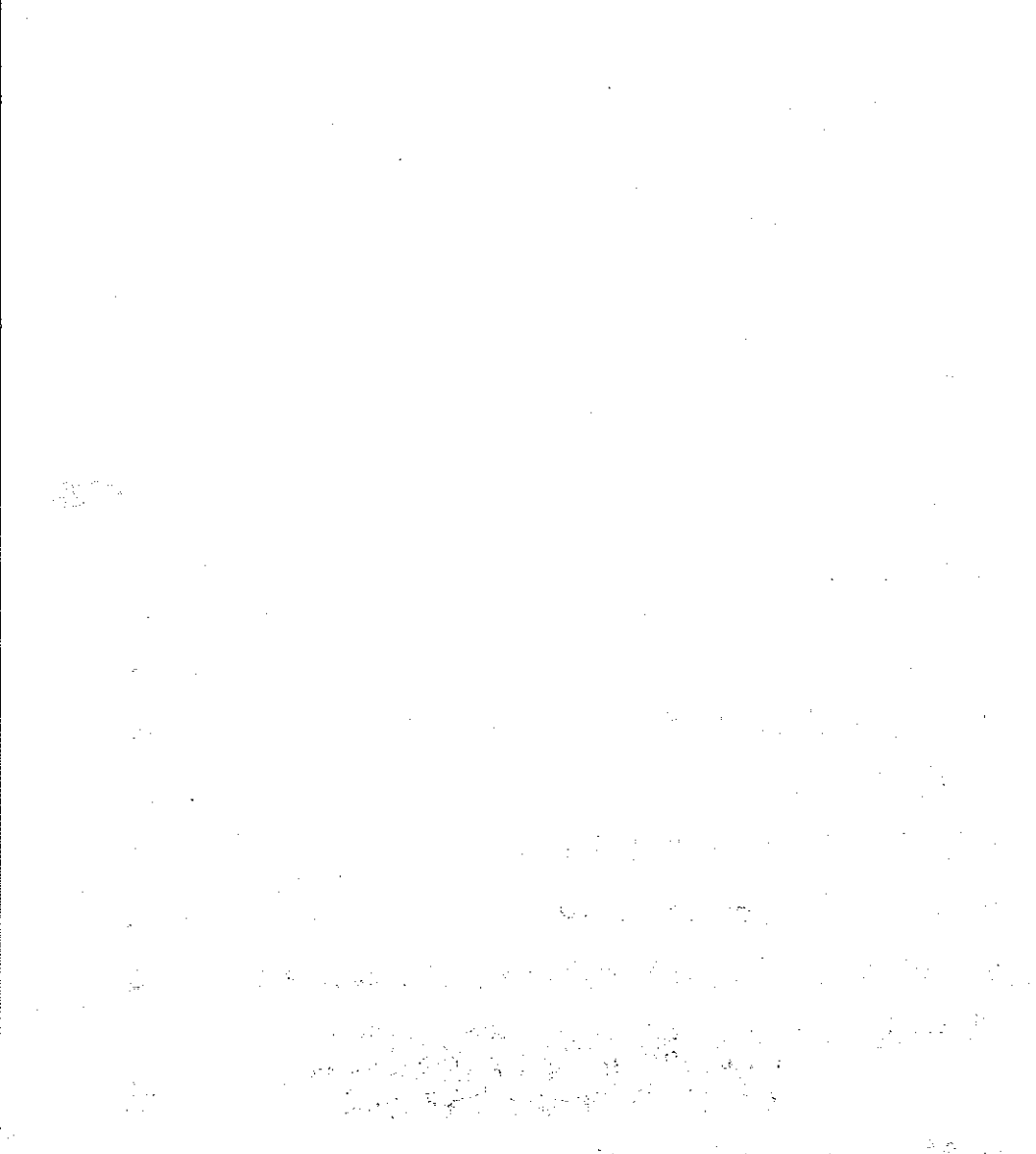
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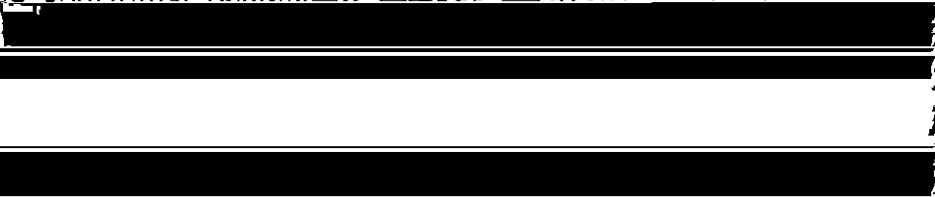
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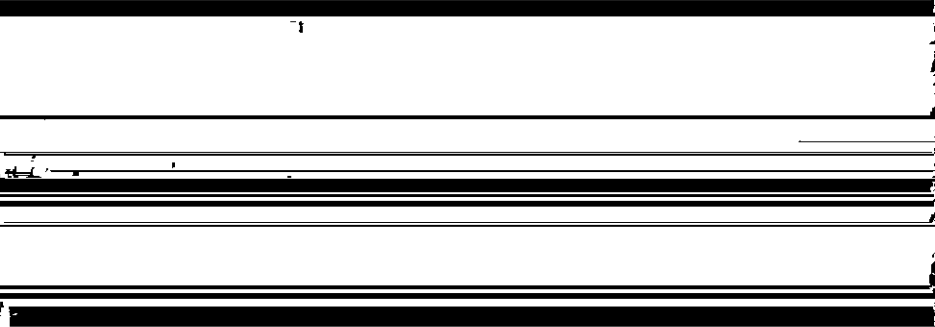
## PREFACE

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Section 37 of the *Constitution Act, 1982* (as amended) requires the holding of a series of conferences by 1987 to deal with "constitutional matters that directly affect the aboriginal peoples of Canada." Dismissed

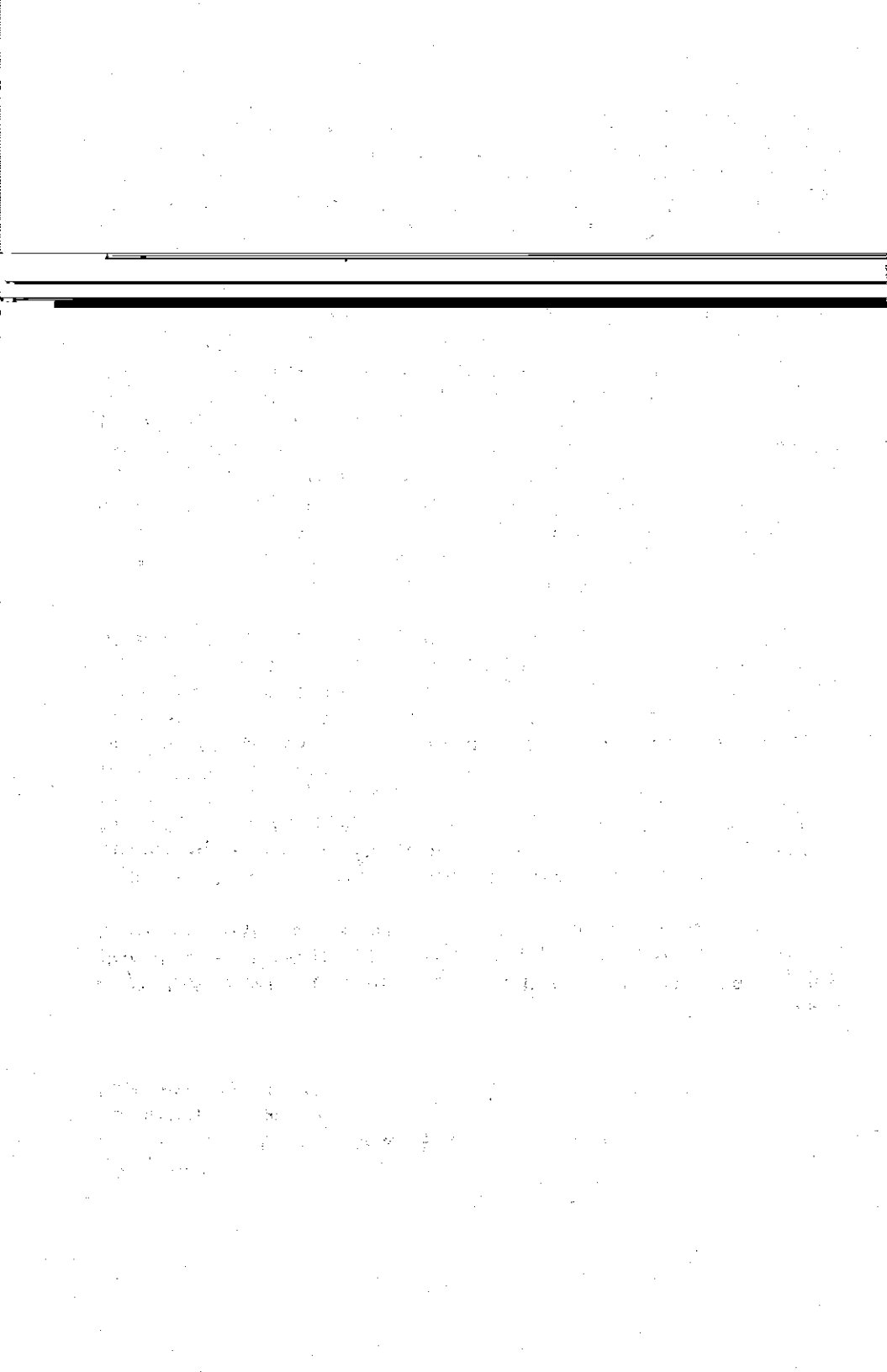


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As the 1987 FMC approaches, attention will gradually shift from negotiations on a bilateral or trilateral basis to the multilateral constitutional forum (the FMC). The 1987 FMC may consider the constitutional entrenchment



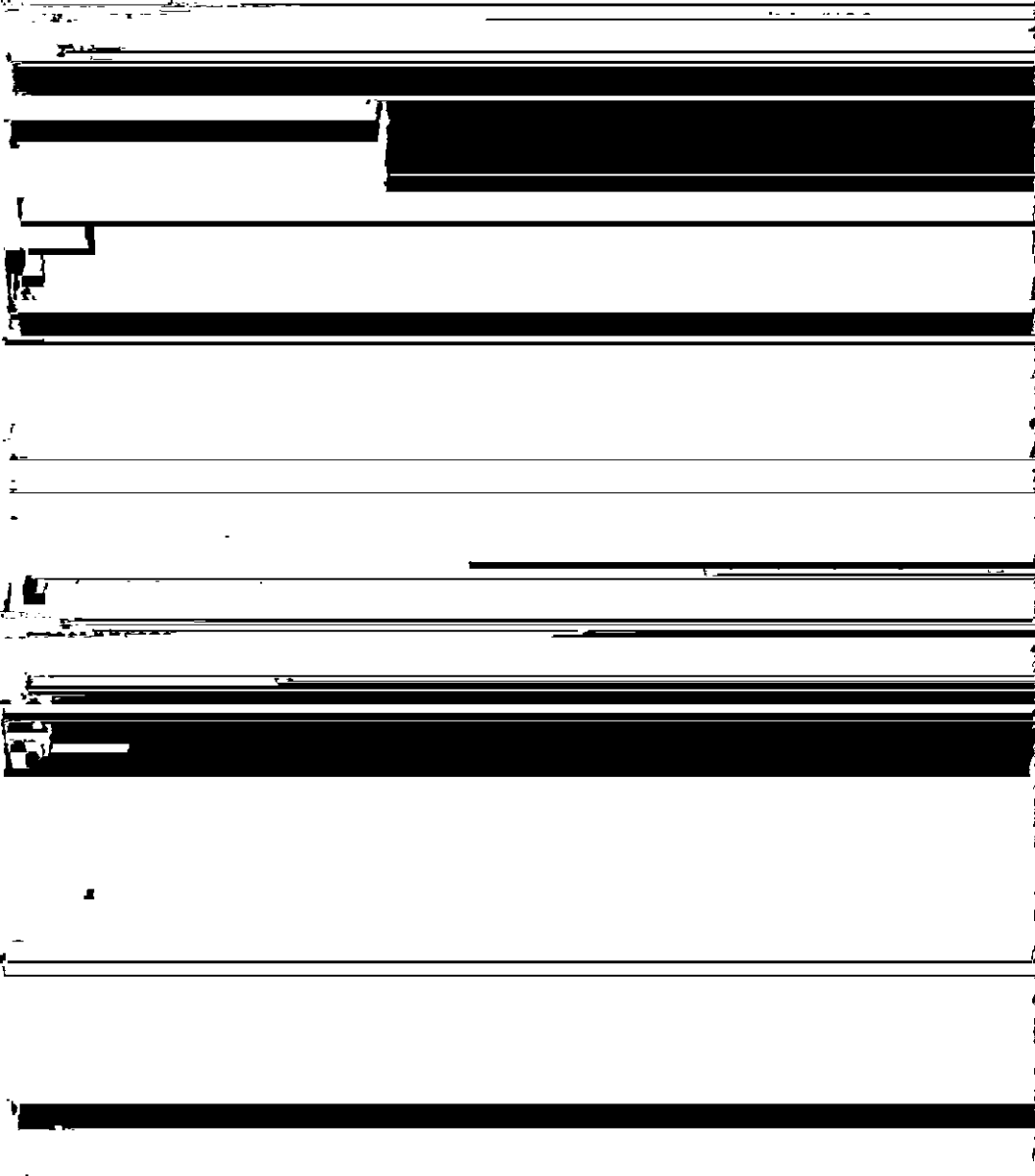


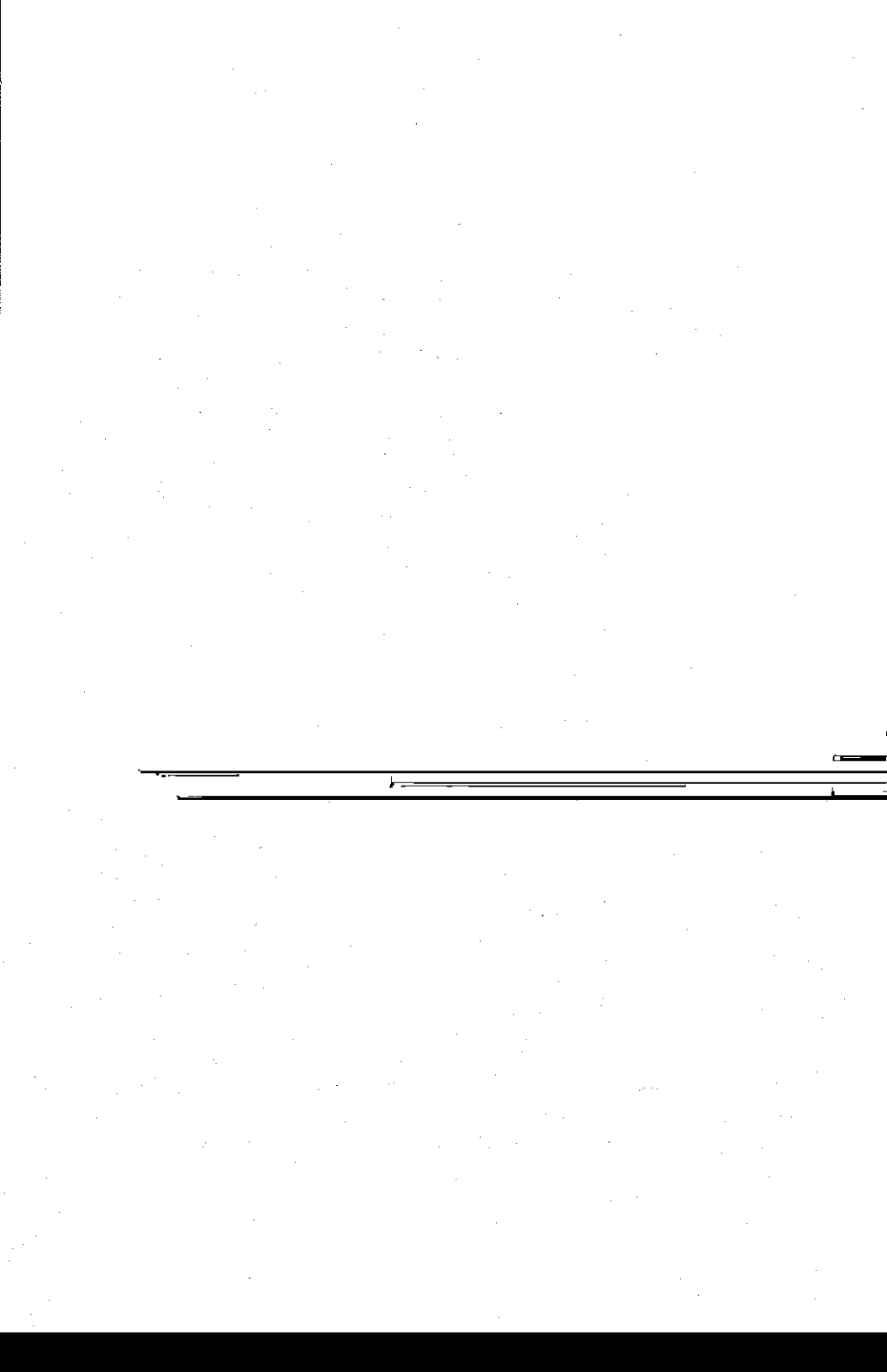




ABSTRACT

The period of September 1984 to June 1985 represented



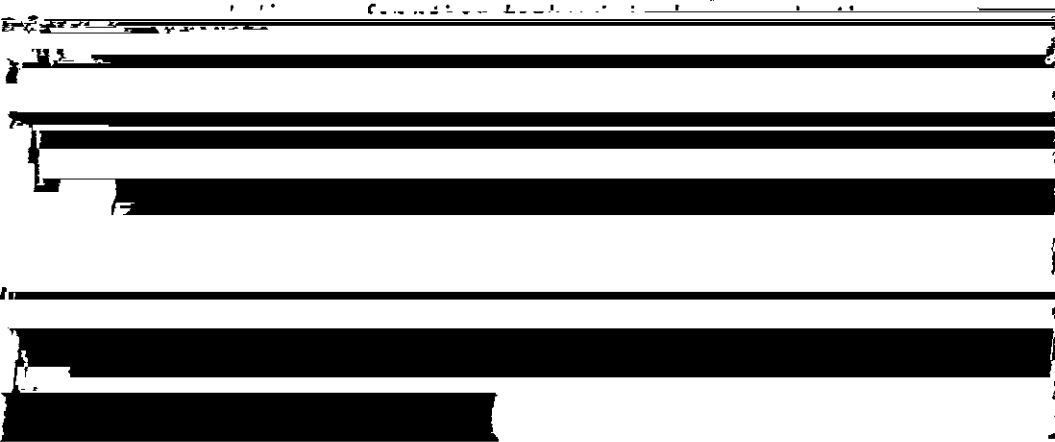


## 1 INTRODUCTION

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Each spring for the past three years, the Canadian public has witnessed two full days of televised discussion and debate as the Prime Minister, the provincial Premiers, leaders of the territorial governments, and

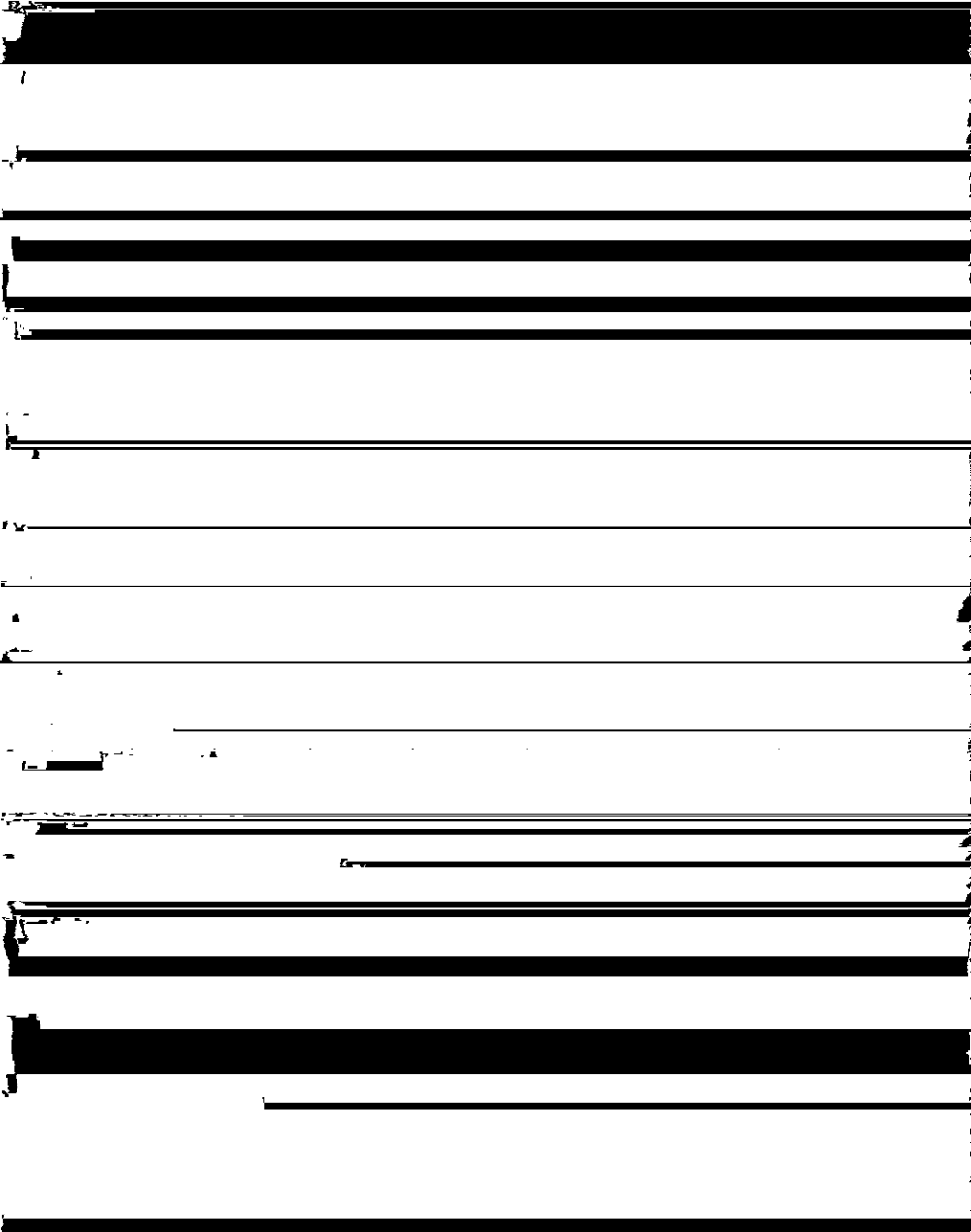
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in Ottawa to discuss constitutional reform. These discussions were mandated by the proclamation of the *Constitution Act, 1982*, and its subsequent amendment in 1983. Although initial discussions addressed a wide range of issues, such as aboriginal rights in the areas

This paper examines recent negotiations on aboriginal self-government, concentrating analysis on developments which have occurred since the election of the Progressive Conservative federal government in October 1984.



people can effectively design and administer public

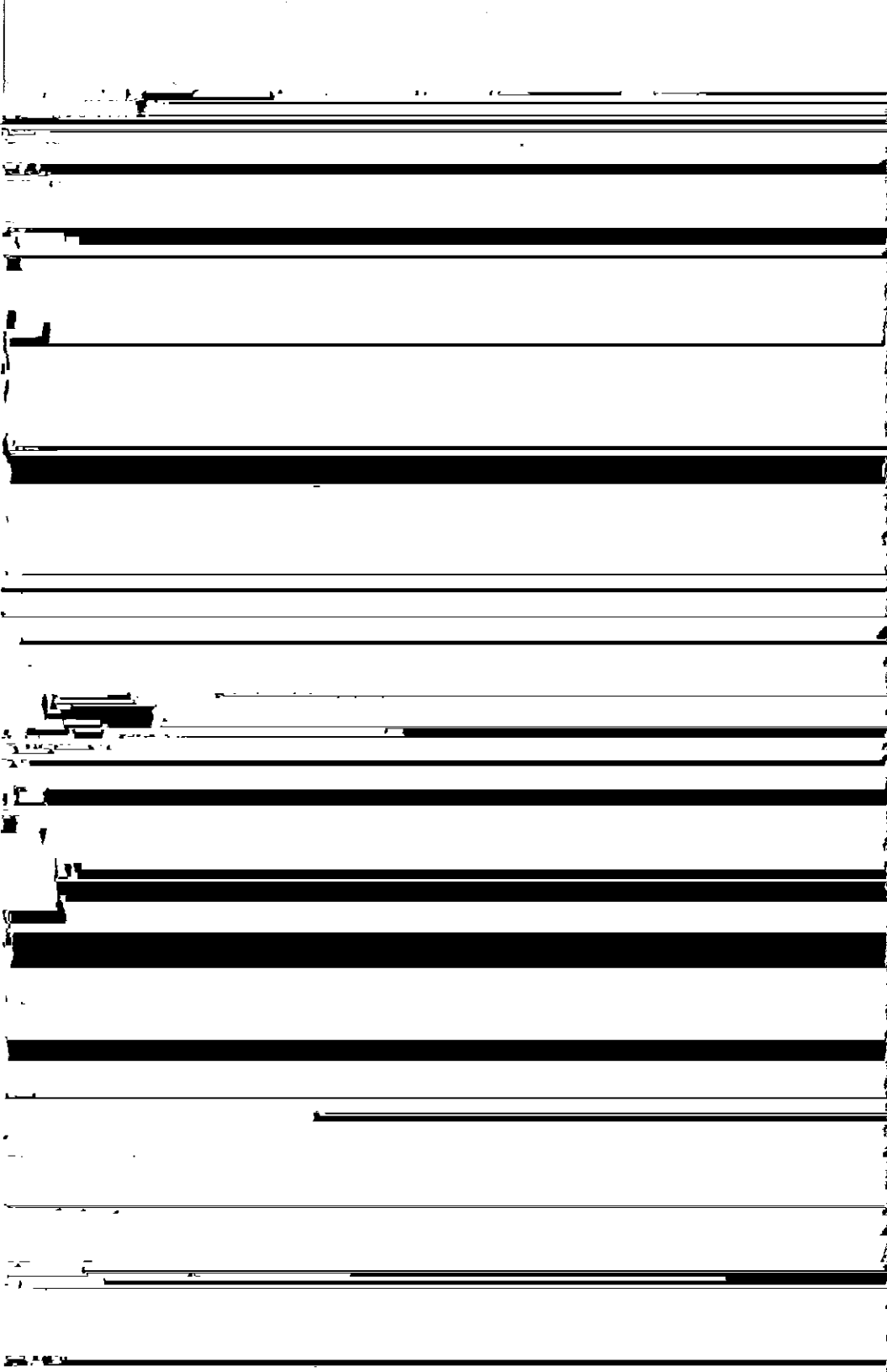
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paper concludes with some observations on the outcomes of the negotiations and on what lies ahead.



## 2 BACKGROUND

2. whether the government is regional or local/  
community in scope; and
3. the amount of power exercised by the government,



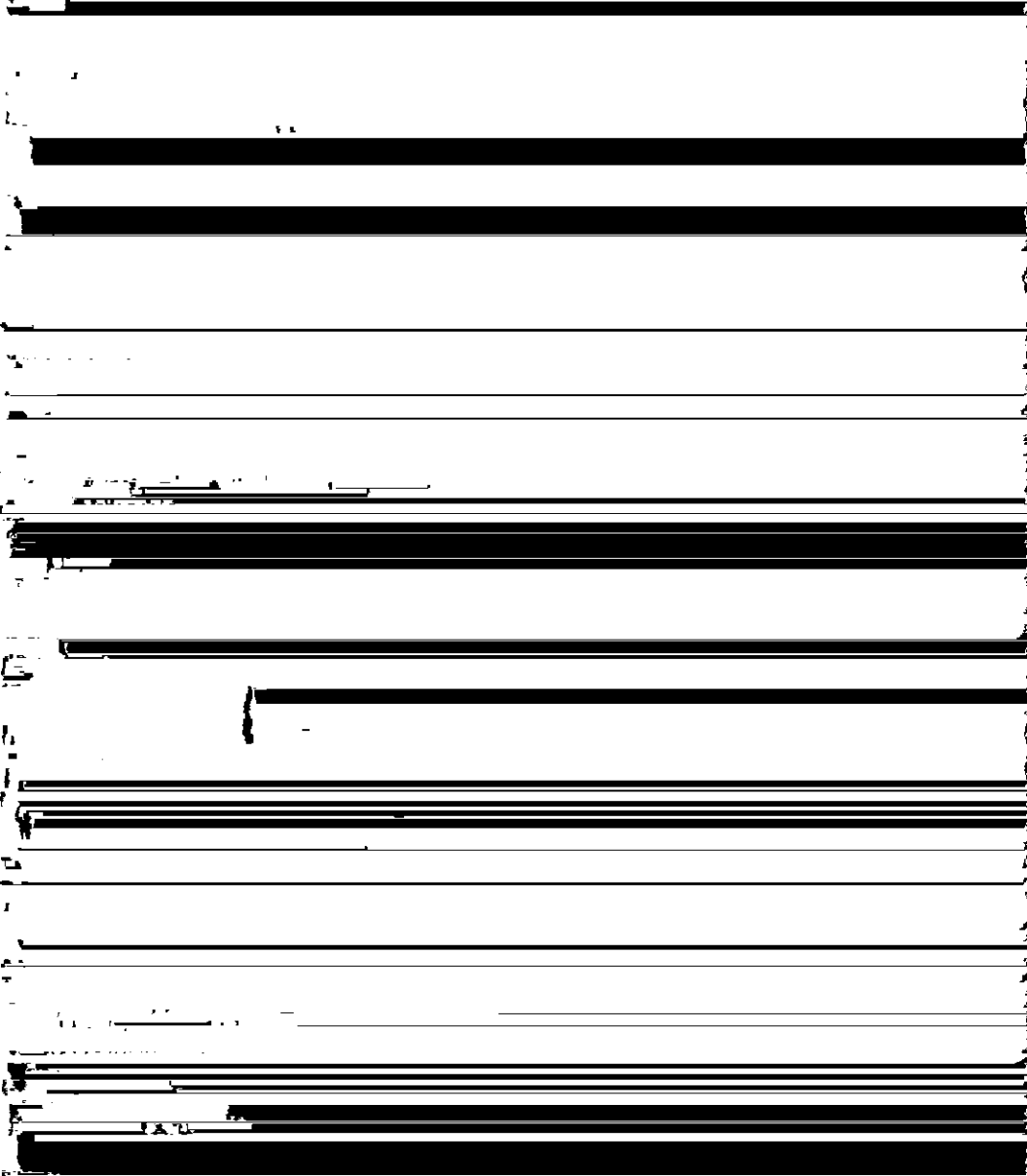
to their restoration one month later, but with one important addition. The word "existing" was placed before "aboriginal and treaty rights", leaving open the question of what rights they existed

Patriation was completed with the proclamation of the *Constitution Act, 1982* on the 17th of April. Three sections of the Act relate directly to aboriginal peoples. Section 25 guarantees that The Canadian Charter of Rights and Freedoms will not "abrogate or derogate from any aboriginal treaty or other rights or freedoms that

new constitution. Section 25(b) was amended to read "(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired". Two new sub-sections were added to section 35: the first included existing and future land claims agreements in the definition of "treaty rights"; the second guaranteed aboriginal and treaty rights equally to male and female

taxation and education. Block funding would be provided by the federal government.<sup>1</sup>

The federal government's response to the Penner Report was made public on March 5th, 1984, a mere three days before the 1984 First Ministers' Conference on Aboriginal Constitutional Matters. The federal response



process of constitutional reform as it relates to aboriginal peoples was in serious trouble.







- (a) entrench in the constitution; or
- (b) sign a political accord

for a process of recognizing the right(s) of aboriginal peoples (to self-government) the identification and

negotiating process outlined below. A negotiating process would be instituted at the regional or community level, of a trilateral (federal-provincial-aboriginal) or bilateral (federal-aboriginal) nature, to reach agreements on



right to aboriginal self-government within the framework of the Canadian federation in 1985, agreed in principle to the proposed federal constitutional amendment, but also argued that the amendment should be accompanied by a political accord, which would provide the framework necessary for specific negotiations. Ontario also took the opportunity to admonish its sister provinces for their fears about what the wording of any constitutional

governments should not use this as a reason for inaction.

Order of the day proposed a "Statement of Commitments"

introduced in December 1984, would commit the Government of Quebec to a wide range of measures vis-à-vis aboriginal peoples. The Motion recognized the existence

Quebec's entry into the partial accord, a very much larger constitutional issue for the Quebec government.

The Governments of Saskatchewan and Nova Scotia had altered their positions on aboriginal self-government somewhat at the March meeting. Although they preferred



implored parties to the negotiations to search for

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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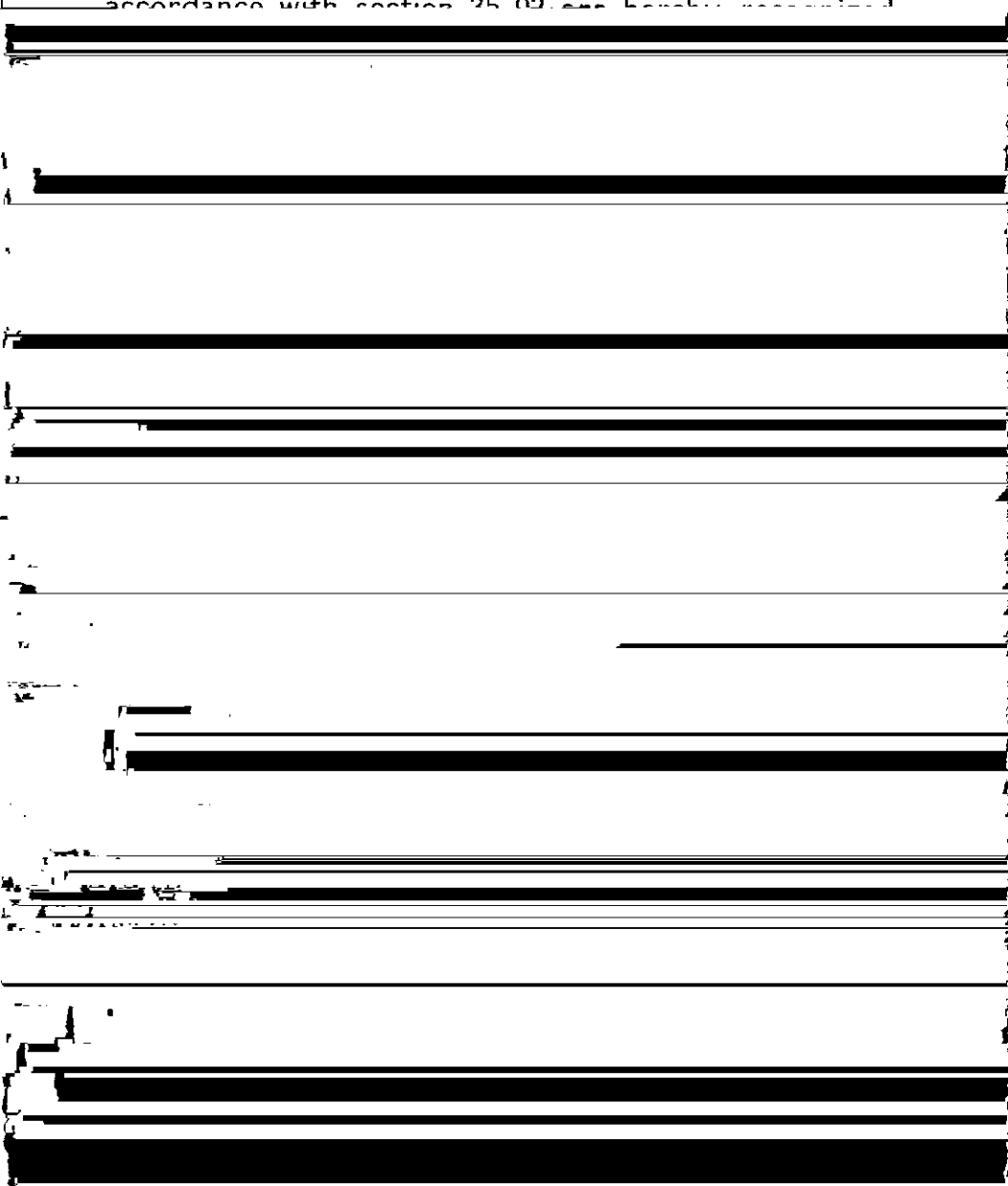
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35(2) of the *Constitution Act, 1982*, as do treaties and land claims agreements. The relevant portions of the proposed amendment were:

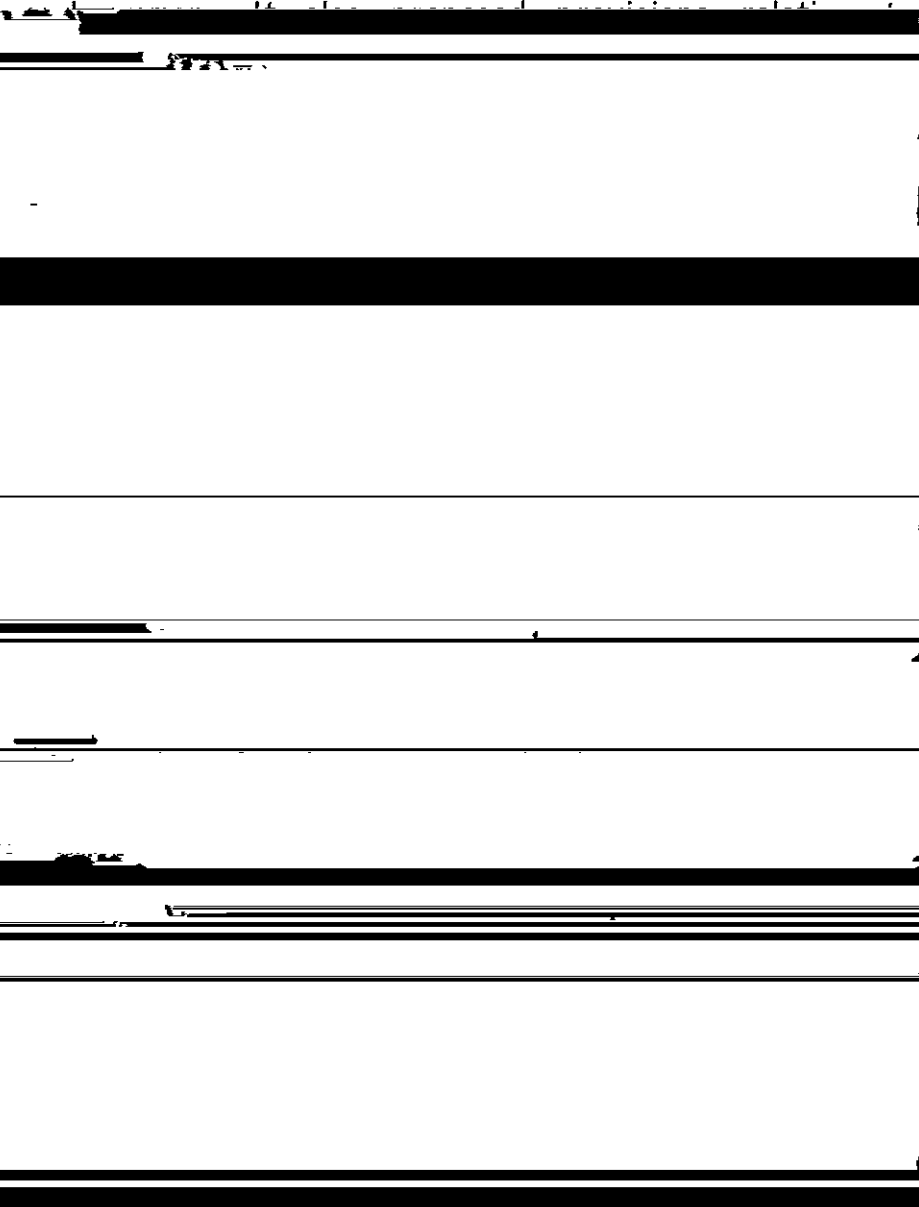
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(1) The rights of the aboriginal peoples of Canada to self-government, within the context of the Canadian federation, that are set out in agreements in accordance with section 25.02, are hereby recognized



The negotiations referred to would include consideration of the type of government (e.g., ethnic, public), the issue of a land base, determination of membership, the nature and powers of the institutions of self-government, fiscal arrangements, and so forth.

The "Proposed 1985 Accord" tabled by the Prime Minister also addressed other matters. It proposed that the constitution be further amended to clarify the provisions relating to equality rights for aboriginal men



right to self-government for aboriginal



constitutional recognition to the right to self-government.  
Negotiations regarding implementation could then begin.  
New Brunswick supported the federal proposal Premier

[REDACTED]

Nor did the Government of Yukon support the federal proposal. It was of the view that the definition of aboriginal self-government must precede its entrenchment. Moreover, the Yukon was concerned that constitutional negotiations would adversely affect a land claims settlement in the Territory.<sup>17</sup>

Perhaps the most lucid opening statement was that of Richard Nerysoo, Government Leader of the Northwest Territories. The Conference, he remarked, was about constitutional change, about nation building. He spoke of the constitution as a living tree, which must grow and adapt to keep pace. A branch of that tree was cut off by former constitutional architects who decided that aboriginal peoples would be excluded from the Canadian federation. This Conference presented an opportunity to graft that branch back on the tree.<sup>18</sup> The N.W.T. supported the federal proposal to do so.

When the Conference adjourned for lunch on the first day, all parties to the negotiations had publicly stated their positions. In support of the federal proposal were the Governments of Ontario, New Brunswick, Manitoba, Prince Edward Island, Newfoundland and the Northwest Territories. Quebec chose to abstain. Nova Scotia and Saskatchewan were mild in their opposition and indicated that, with some revisions, they might be convinced to support the proposal. Opposition from Alberta, British Columbia and the Yukon was stronger.

Of the national aboriginal organizations, the Inuit Committee on National Issues (ICNI) and the Metis National Council (MNC) were generally supportive. The Assembly of First Nations (AFN) and Native Council of Canada (NCC) were opposed, but willing to negotiate.

It was clear that the federal government did not enjoy the support of seven provinces with 50 per cent of the population. Only five provinces had indicated their support. More cajoling and convincing remained to be done. When the Conference reconvened in the afternoon of the first day, the Prime Minister set out to do just

that. He pressed hard for the federal proposal, calling for "simple dignity" for aboriginal peoples.

also pressed hard, calling for equality for aboriginal peoples, and for governments to exercise leadership.

asked his Minister of Indian Affairs and Northern Development, David Crombie, who had been somewhat removed from the heat of the debate, to make yet another effort to draft a compromise accord on self-government

taking into consideration the views expressed during the



ongoing process depends upon reaching agreement on  
aboriginal self government. The

said Premier Devine, 'was to move the commitment to participate in negotiations out of the constitutional amendment and place it into the attached political accord  
Governments will participate in negotiations directly

toward concluding agreements that could result in the

view that self-government is a treaty right. The Premier wanted to talk to the PTNA before giving his response. He also wanted to obtain legal advice, and restated his view that there are only two sovereign orders of government in Canada.

Neither could the Northwest Territories support the draft accord, but for quite different reasons. The proposal did not go far enough.

It was time to hear the reaction of the aboriginal peoples' organizations. The Assembly of First Nations stated that it could not accept the proposal. What was required was the immediate constitutional recognition of

In private discussion, the Prime Minister had given Metis National Council leader Jim Sinclair an undertaking that he would meet with Metis and non-status Indian people to discuss their particular concerns. In a separate meeting with leaders from the Native Council of Canada, the Prime Minister agreed that these discussions would include the issue of a land base. Based on these

assurances, the MNC and the NCC supported the proposed federal accord.

The Inuit Committee on National Issues equivocated, stating that it could not "say yes" without consulting Inuit people. The political commitment to negotiate it

suggested, should be in the constitution. There were also concerns that the accord might alter section 91(24), and affect federal responsibility for the Inuit.

As the afternoon drew to a close, it became apparent that consensus had not been achieved. Although the new accord enjoyed the support of seven provinces, this support rested upon the unwritten proviso that the

Minister then abruptly adjourned the Conference, shocking most participants.

At the reception held immediately following the

Saskatchewan had supported the final "Saskatchewan draft" (which did not "constitutionalize" the negotiation process). It would be difficult for these governments to "back down" from their publicly-stated positions.



same two proposed accords - the initial federal draft, and the "Saskatchewan draft" (the one under discussion at the close of the FMC) - were on the table. The latter had a new non-derogation clause.

Mr. Crosbie began by asking parties whether they had altered their respective positions on aboriginal self-government during the interregnum. The Inuit Committee on National Issues responded first. The ICNI had used the two-month interval to consult its constituents on the "Saskatchewan draft". ICNI Co-Chairperson Zebedee Nungak announced that the ICNI could not support it, and that a political accord was not enough. The commitment to negotiate self-government agreements must



aboriginal constitutional issues before the Court.

part, outside the constitutional framework. It was left  
unsaid how non-Settlement Metis would be affected. It

became evident as the meeting progressed that this was  
the "shape of things to come" in other jurisdictions as  
well - bilateral or trilateral negotiations outside the  
constitutional framework.

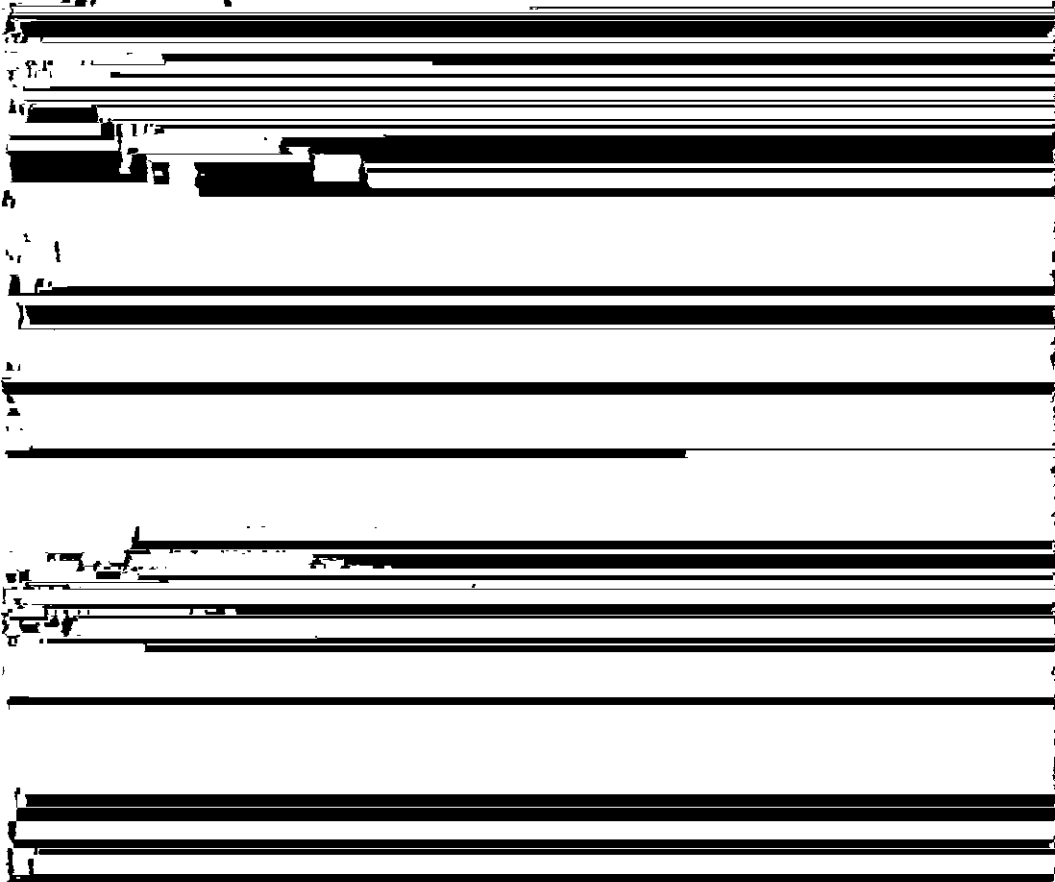
During the afternoon discussion on self-government,

should be commencing discussions with Metis and Indians

respectively, on matters within the provincial sphere of

agenda item - the next steps in the section 37 process between 1985 and 1987 or, as he put it, "Where do we go from here?"

Reference was made to the federal proposal on this matter tabled at the FMC, on which there was no disagreement. Two annual Ministerial meetings would be held before the 1987 First Ministers' Conference. The first of these, the Chairman speculated, might take place early in 1986, and would have as one of its agenda items the Assembly of First Nations' Draft Composite Amendments to the constitution.<sup>24</sup> The AFN had tabled the draft amendments at the Ministerial meeting in December 1984, and was annoyed that they had not yet been discussed. If enough progress were made, a further FMC could be called in 1986, although it was generally



the National Conference Centre in Ottawa. Negotiations on aboriginal self-government would be taking place at the local, regional, territorial and provincial levels. The "bottom-up" approach - that of implementing self-government prior to entrenching it in the constitution - would now be given its acid test.

## 6 CONCLUSION

The outcomes of negotiations to date on aboriginal self-government pursuant to the section 27 process are

being interpreted in widely different ways. While they have been less than a smashing success, few would consider them a failure. The new "window of opportunity", as it is called, in intergovernmental relations, imbued with a fresh spirit of federal-provincial coop-



birthright. In terms of reaching an accommodation, how far can they go before they are repudiated by their own people? Moreover, for many aboriginal peoples, self-government is a new and untried experiment. Fear of the unknown and fear of failure are also present. At the same time, the social costs of not acting, of the status-quo, are all too well known.

Another outcome of negotiations to date has been the shift in approach noted earlier, from top-down to bottom-up. Bilateral and trilateral negotiations on aboriginal self-government will be taking place outside of the constitutional framework. A number of provincial

constitutional amendments, with the Prairie Treaty Nations Alliance on self-government through the treaty

process, and with a large number of aboriginal people on self-government at the community or local level.

The significance of this agenda to the next (and perhaps final) First Ministers' Conference on Aboriginal Constitutional Matters in 1987 is not clear. Should self-government agreements be successfully negotiated these could be given constitutional protection in 1987. Should the bottom-up approach fail, however, discussion



## NOTES

1. *Does It Mean?* (Kingston: Institute of Intergovernmental Relations, 1985), pp. 54-55.
2. *Ibid.*
3. Nova Scotia, *1985 Accord Respecting Matters Affecting the Aboriginal Peoples of Canada*, Toronto, 11-12 March 1985, CICS Document 830-173/010.
4. Government Motion 49, Quebec National Assembly, Fifth Session, Thirty-Second Legislature, 18 December 1984.
5. *Notes for an Opening Statement by the Right Honourable Brian Mulroney, Prime Minister of Canada*

- CICS Document 800-20/019.
9. Native Council of Canada, *Opening Remarks*, First Ministers' Conference on Aboriginal Constitutional Matters, Ottawa, 2-3 April 1985, CICS Document 800-20/018.
  10. *Opening Statement by The Honourable Frank S. Miller, Premier of Ontario*, The First Ministers' Conference on Aboriginal Constitutional Matters, Ottawa, 2 April 1985, CICS Document 800-20/006 [emphasis added].
  11. *Opening Statement by Premier René Lévesque*, First Ministers' Conference on Aboriginal Constitutional



