

**Aboriginal Peoples and Constitutional Reform:
What Have We Learned?**

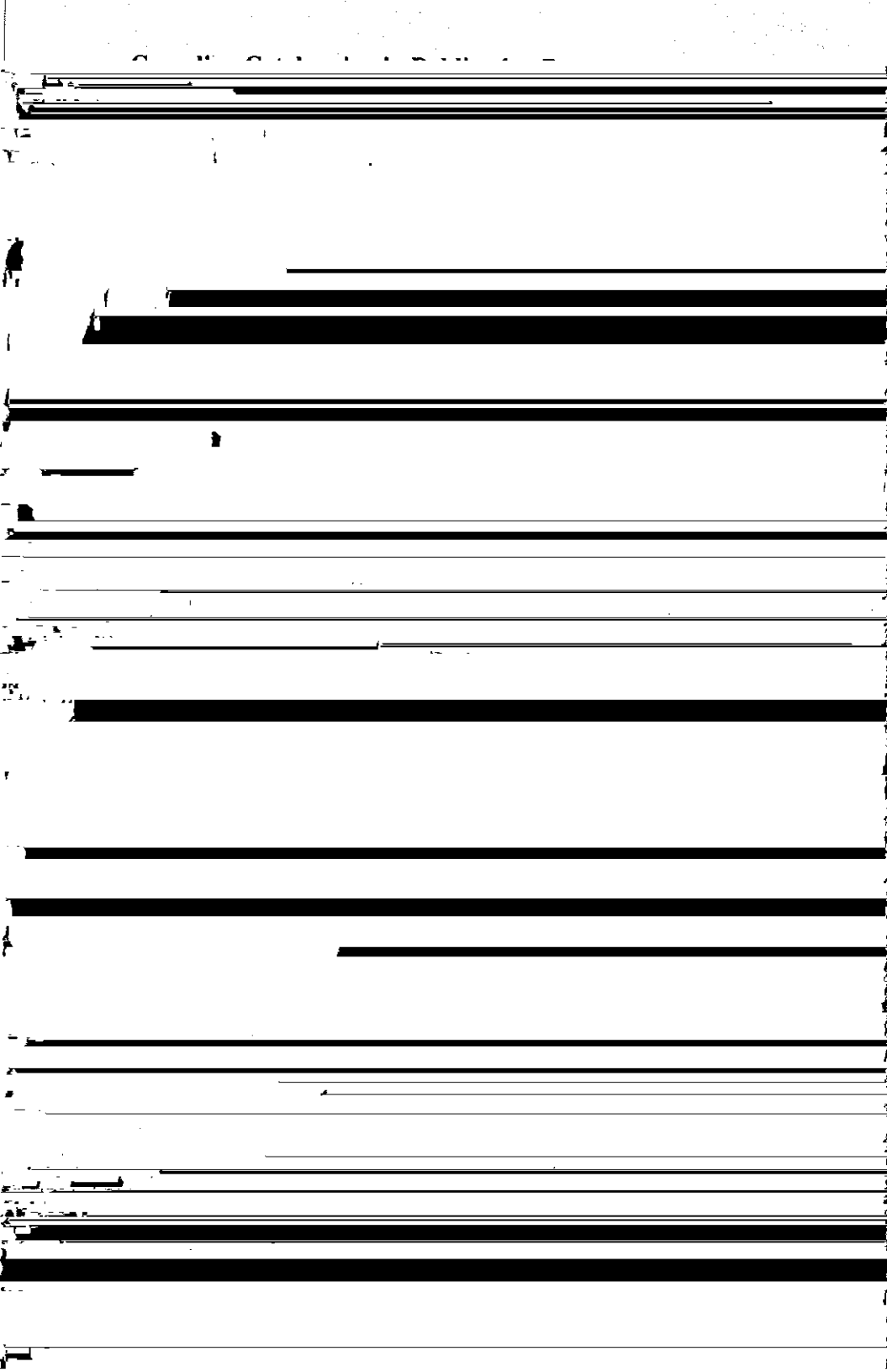
David C. Hawkes

PHASE THREE

Final Report

**Institute of
Intergovernmental Relations
Kingston, Ontario**

ISBN 0-88941-558-3



their intention to pursue the negotiation of individual self-government agree-

ACKNOWLEDGEMENTS

ABSTRACT

As a result of the Constitution Act, 1982 (as amended), a series of conf-

possible future processes, and to new opportunities for a constitutional amendment. If and when negotiations begin anew, how could the process be designed

to be more effective? What would be the most promising approach to a constitutional amendment? In Chapter Seven, the impact of the Meech Lake Accord is investigated. Chapter Eight comments on what new policy directions now appear to be on the broader policy horizon regarding relations between aboriginal peoples and Canadian governments—that is, in addition to develop-

2 BACKGROUND

The highly publicized and often acrimonious constitutional negotiations on

context. A former round of negotiations had ended at the Victoria Conference in 1971. These negotiations, frequently referred to as the "Victoria round", had addressed patriation of the constitution, a limited charter of rights, and the

proposed Charter of Rights and Freedoms. Although it would apply only to the

association was to put in place a renewed federalism to respond to the forces for change in Quebec and elsewhere. The Trudeau government thus set out to negotiate renewed federalism with the provinces almost immediately following the victory of the federalists in the May 20, 1980 referendum. However, the First Ministers' Conference on the Constitution held in September of 1980 failed to reach agreement, an outcome which appeared to be anticipated in a strategy prepared for the Prime Minister by his senior advisor Michael Kirby, and contained in a memorandum, leaked to FMC delegates at the outset of the Conference. The failure of the conference provided the rationale for unilateral federal government action.

tional reform. The proposal contained three sections which were to address the concerns of aboriginal peoples. A proposed Section 25 provided for the non-derogation of aboriginal rights with respect to the Charter of Rights and

... the Conference was held in November of 1991 in a

... ~~was~~ ~~discussed~~ ~~at~~ ~~the~~ ~~meeting~~ ~~on~~ ~~record~~. The conference, initially scheduled for

(b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement

Section 25 stated that:

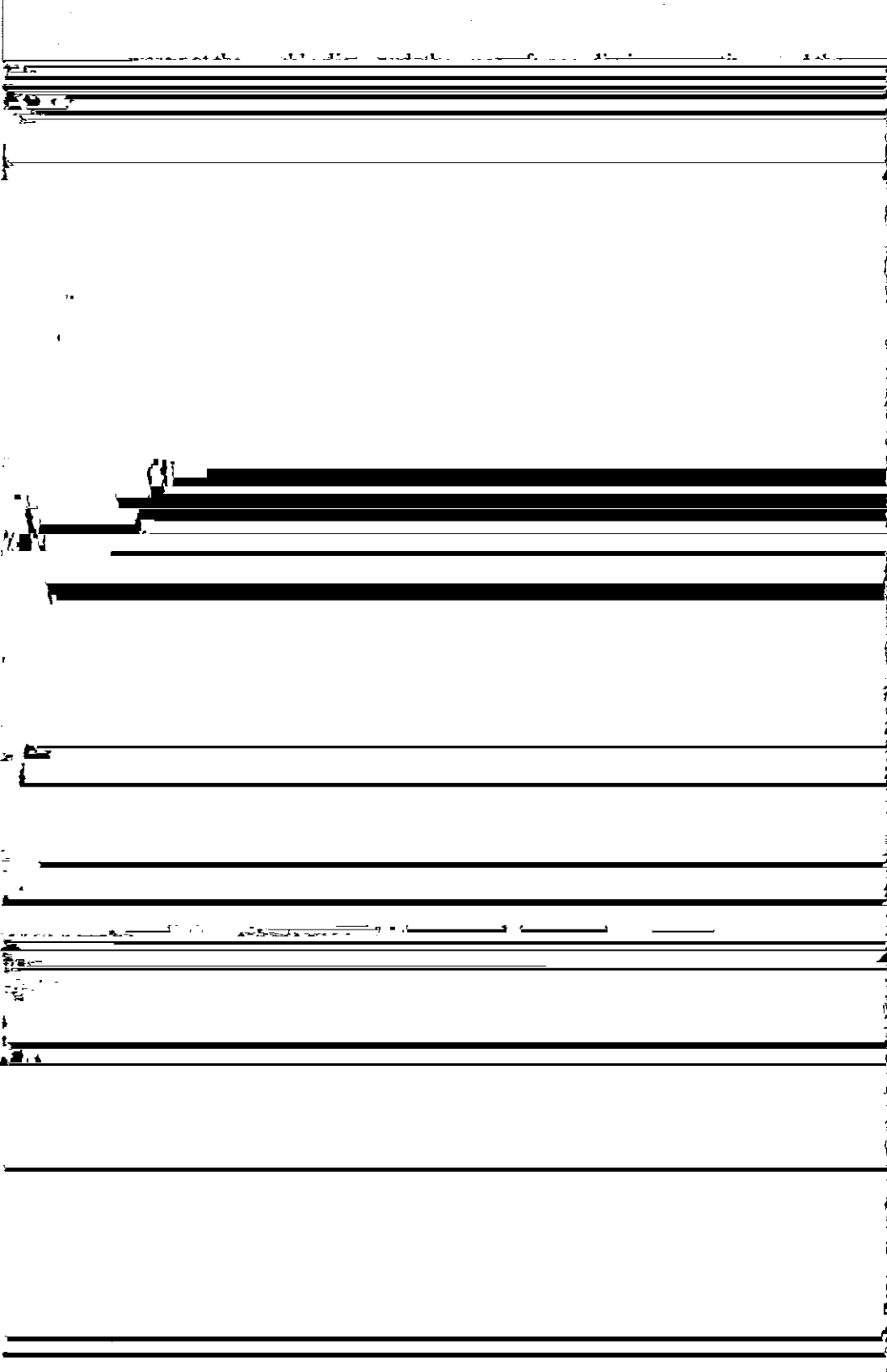
and defining aboriginal rights, in a manner acceptable to both federal and provincial governments and aboriginal peoples, would be a difficult task. This became known as the Section 37 process on constitutional reform, and is the subject of this study.

Thus during the period from 1983 to 1987 four First Ministers' Conferences

March 1983, October 1983, June 1984, October 1984, October 1985

10

Successful negotiations depend upon a range of shared goals and objectives. These, in turn, rest upon common assumptions regarding the negotiation process and upon a broad mutual framework of analysis. Symbiotic values and



group rights, including aboriginal rights. There would be widespread pressure, it was felt, to have the Charter of Rights and Freedoms apply, without exception, to aboriginal governments. Some government respondents argued that govern-

thought that the policy frameworks of some governments were assimilationist

constructive damage to the status quo". It was also an opportunity to learn. Interviewees from both government and aboriginal parties noted that the section 37 process provided aboriginal peoples with an apprenticeship in federal

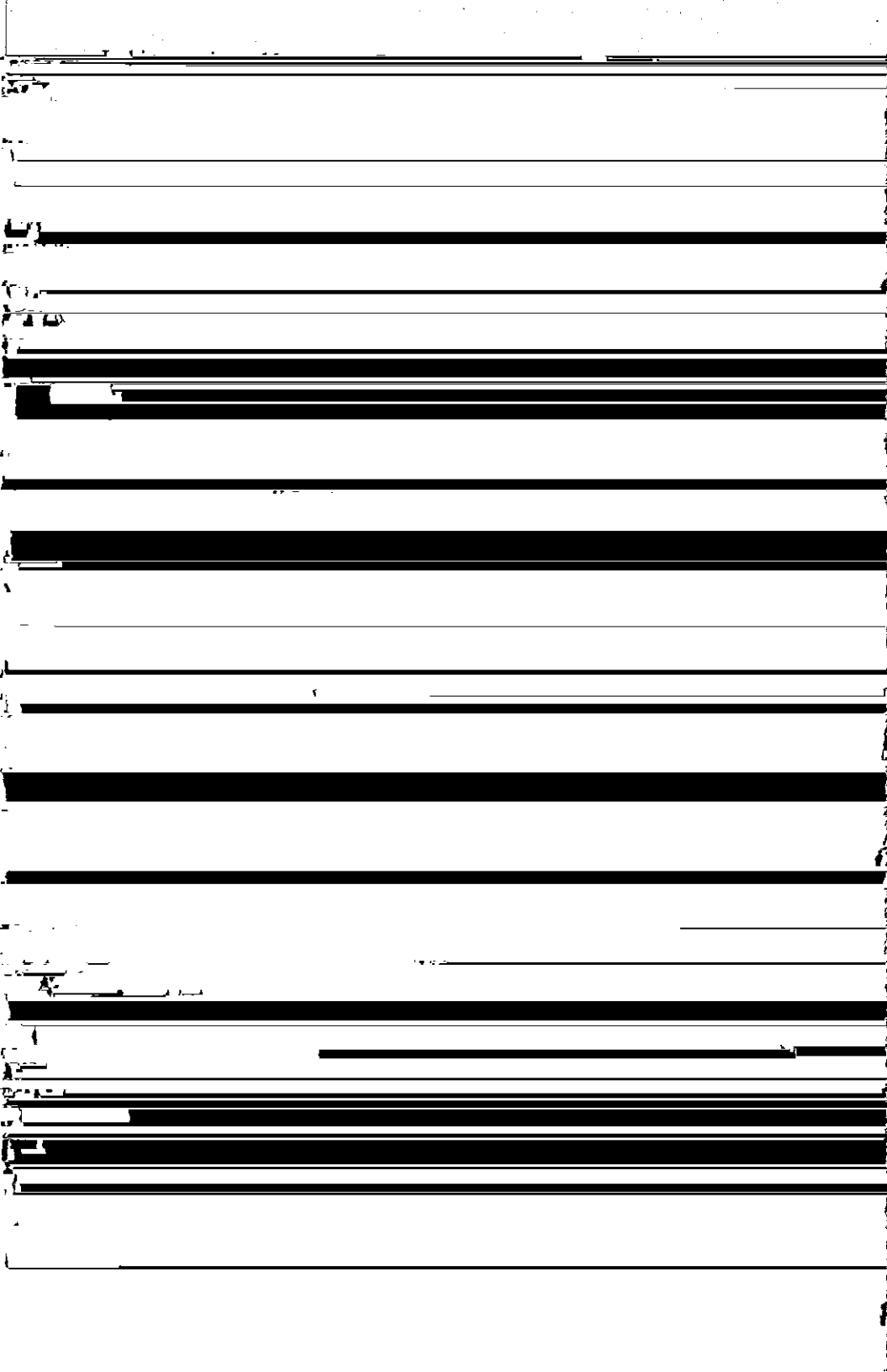
was "not serious" about reaching an agreement, although it saw other useful

purposes for the negotiations, such as teaching Canadians about aboriginal and

narrow and low, while the understanding of most was poor. Aboriginal peoples' organizations took a broad view of the commitment in section 37, and had very high expectations about the outcome. In addition, they pursued objectives such

4 MAJOR ISSUES

risk of federal government "off-loading" of programs and services, especially to provincial and territorial governments; and the assumption of greater demands for resources on the part of aboriginal peoples. There was an assumption, without much foundation on the part of many government ministers and



[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

Research. It was part of a larger series of attitudinal studies undertaken by sociologist Rick Ponting. He found that a core of 30 per cent of adult non-aboriginal Canadians supported special constitutional rights for aboriginal peoples. About 50 per cent of the sample approved of the explicit recognition of the rights of aboriginal self-government in the constitution. Ponting con-

with provincial premiers and ministers in an attempt to convince them of the

process (the section 37 constitutional negotiation process) and substance (the proposed constitutional amendments on aboriginal self-government).

5 THE PARTICIPANTS' VIEWS: RETROSPECTIVE

A. THE NEGOTIATION PROCESS

Some observers have expressed the opinion that the section 37 negotiation process itself was to blame for the failure to reach an agreement on constitutional reform, and that a different process would have produced a different (and also more desirable) result. During the interim period from 1990 to 1992,

process" would not have produced agreement. Some thought that the process "didn't help", that it was cumbersome and ineffective, but that it was not the

tions such as these simply take more time. Some described the process as "great", since it allowed the Canadian public to see what was being negotiated (as compared to the closed nature of the Moose Lake process). Finally, as

the course of the process, into mistrust among the parties, in particular between





but to the process at the level of government and organization officials, many of whom had legal training. This led to less contact between aboriginal and

not meet alone, on a bilateral basis, to discuss these matters. Formal meetings among the aboriginal peoples' organizations party to the negotiations took place

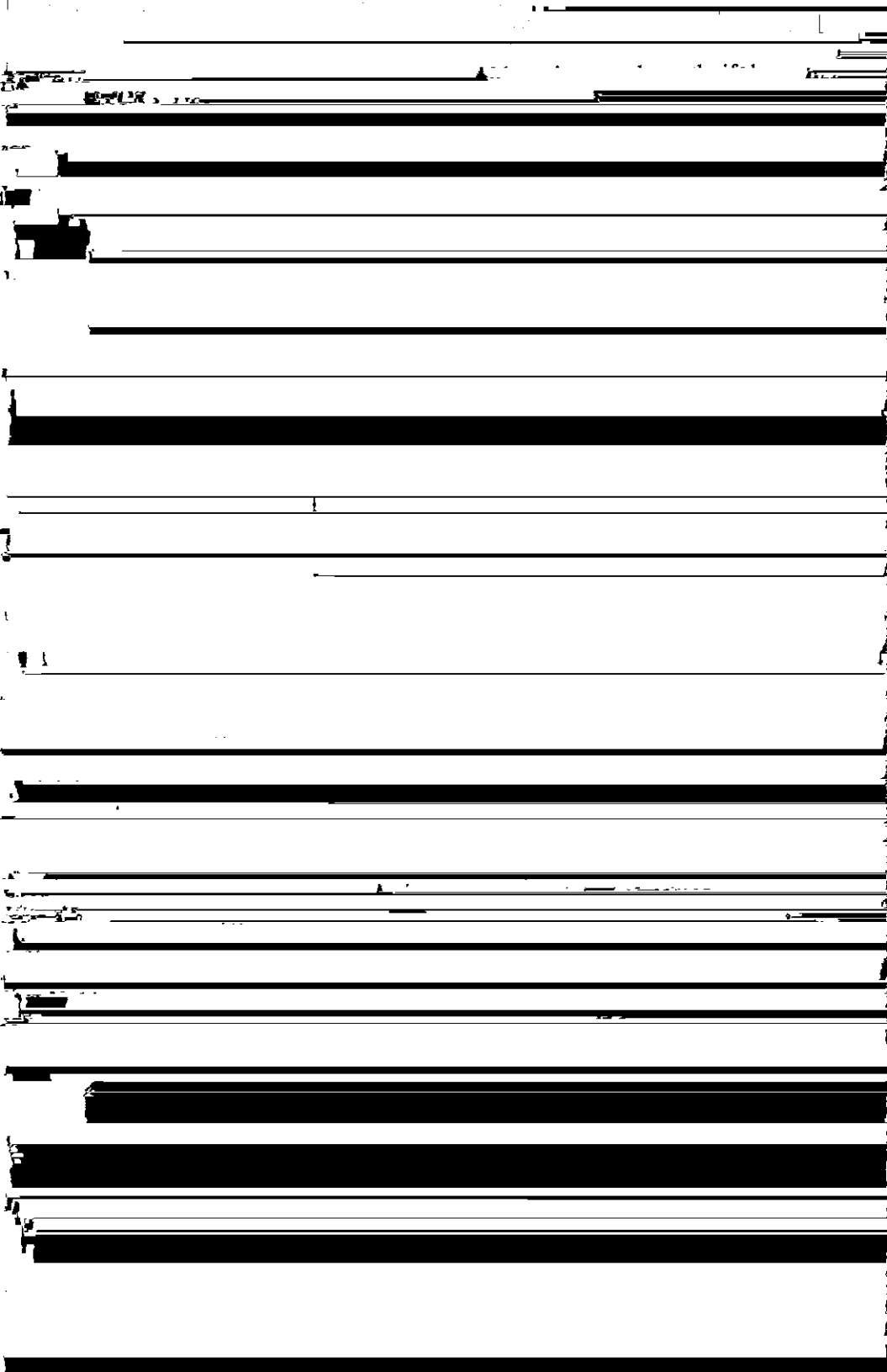
Some were of the view that the problem was in the inability to disseminate

8. Ministers...

Some of the problems with the section 37 process centred around the subject of government ministers, according to several respondents. The change of government ministers, particularly at the federal level, was one such difficulty. Given the long "learning curve" in this field, it was felt that it took some time to get ministers "up to speed". Relatively frequent changes in ministers made this learning and adjustment process all the more difficult. Other reasons

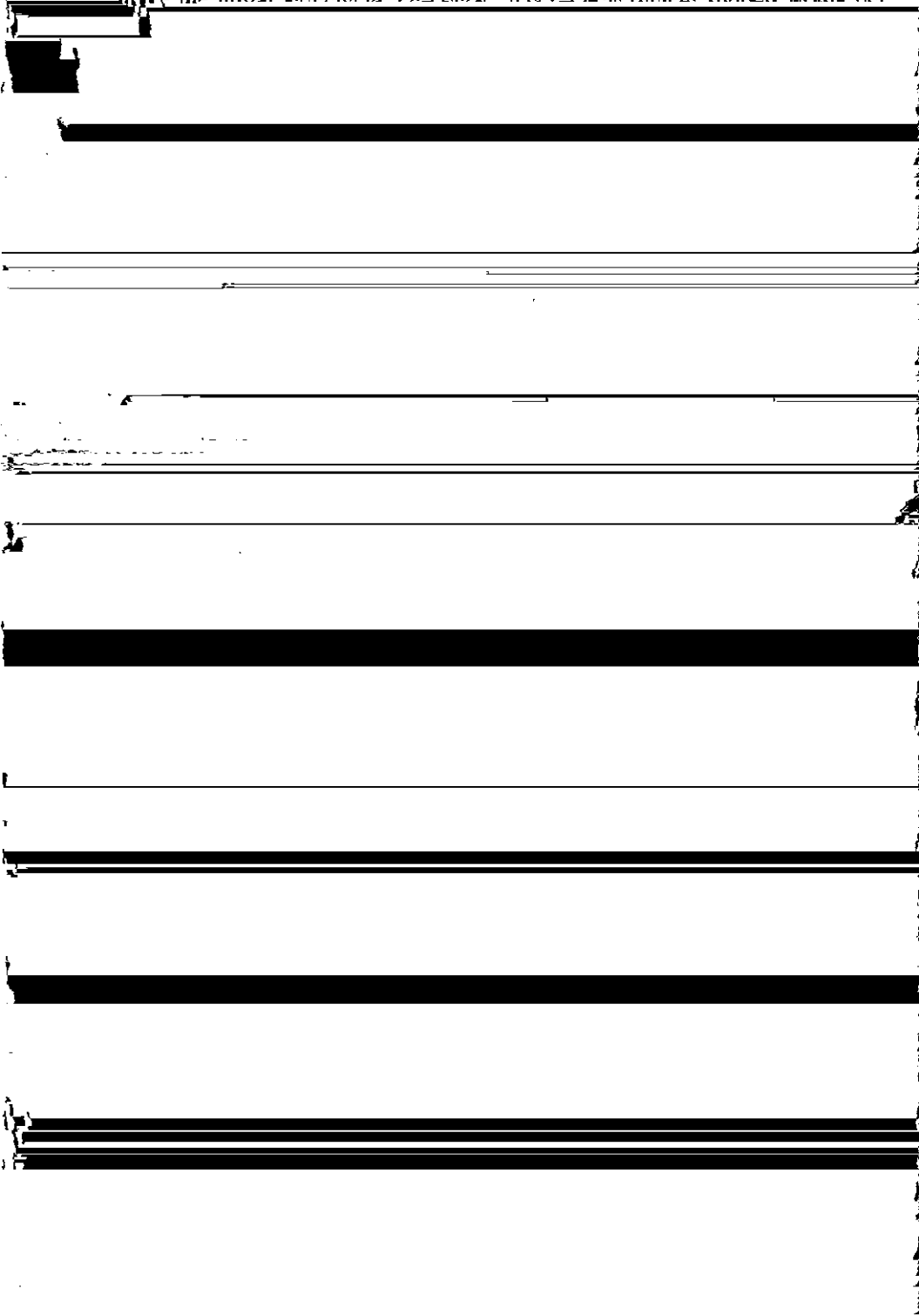


the interviewee speculated for the development of aboriginal self government



provide levels of public services to the aboriginal peoples of Canada reasonably comparable to the levels of public services provided to the non-aboriginal

(the "politicians"—First Ministers and national aboriginal leaders) in a room to make the initial agreement. Of course, federal government support would be

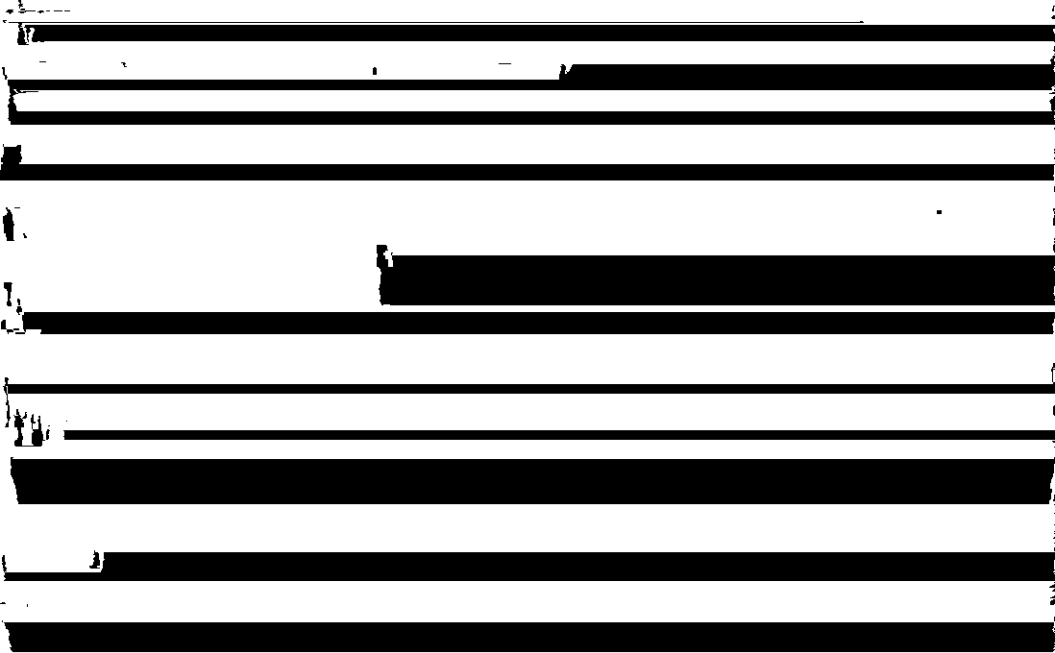


6 THE PARTICIPANTS' VIEWS: PROSPECTIVE

A. THE NEGOTIATION PROCESS

If and when constitutional negotiations begin anew, how could the process be designed to be more effective? If you were to "do it again", interviewees were asked, what changes do you think should be made to the process? The next section examines the various suggested changes in design parameters.

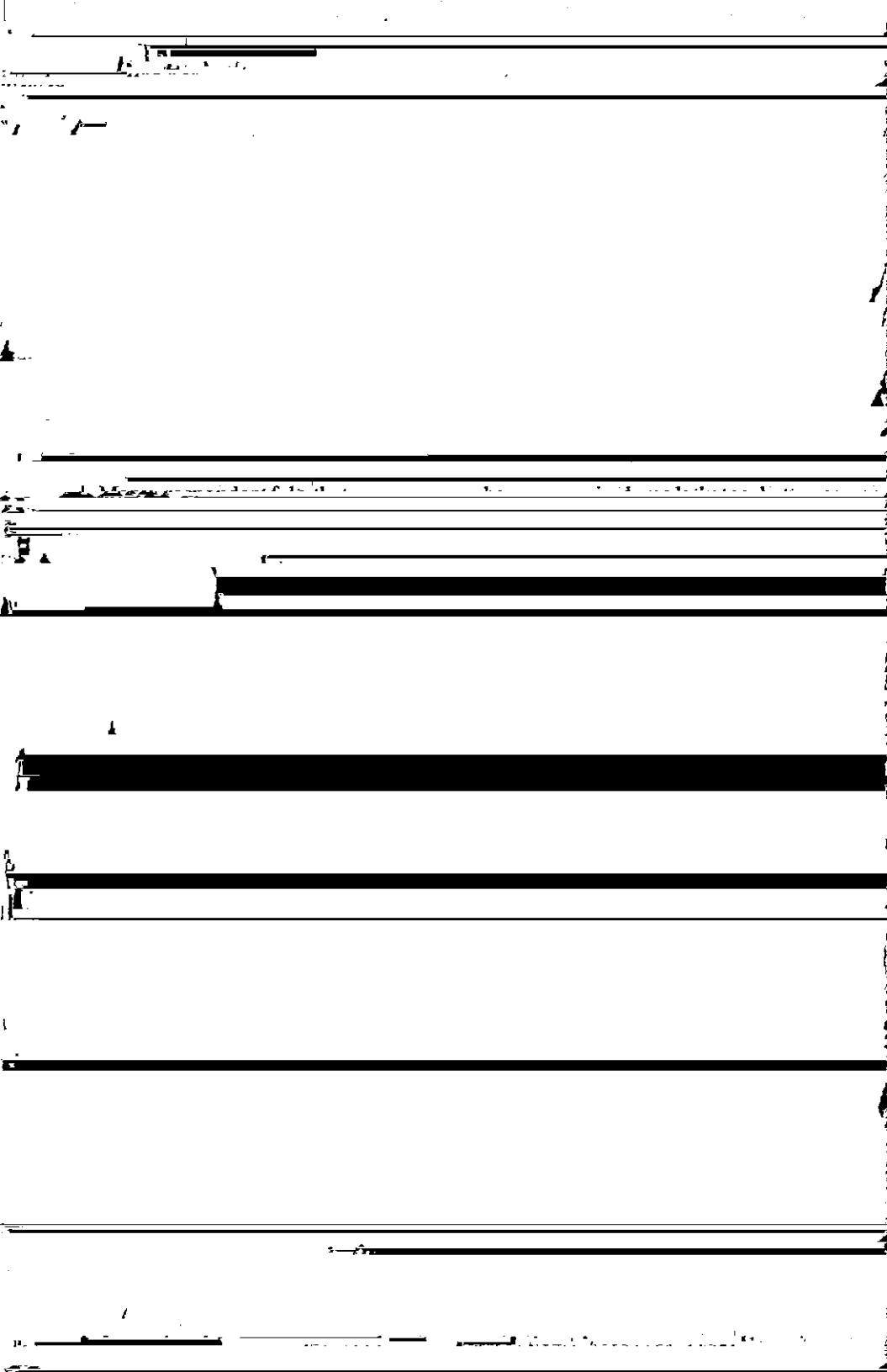
Designing a New Negotiation Process



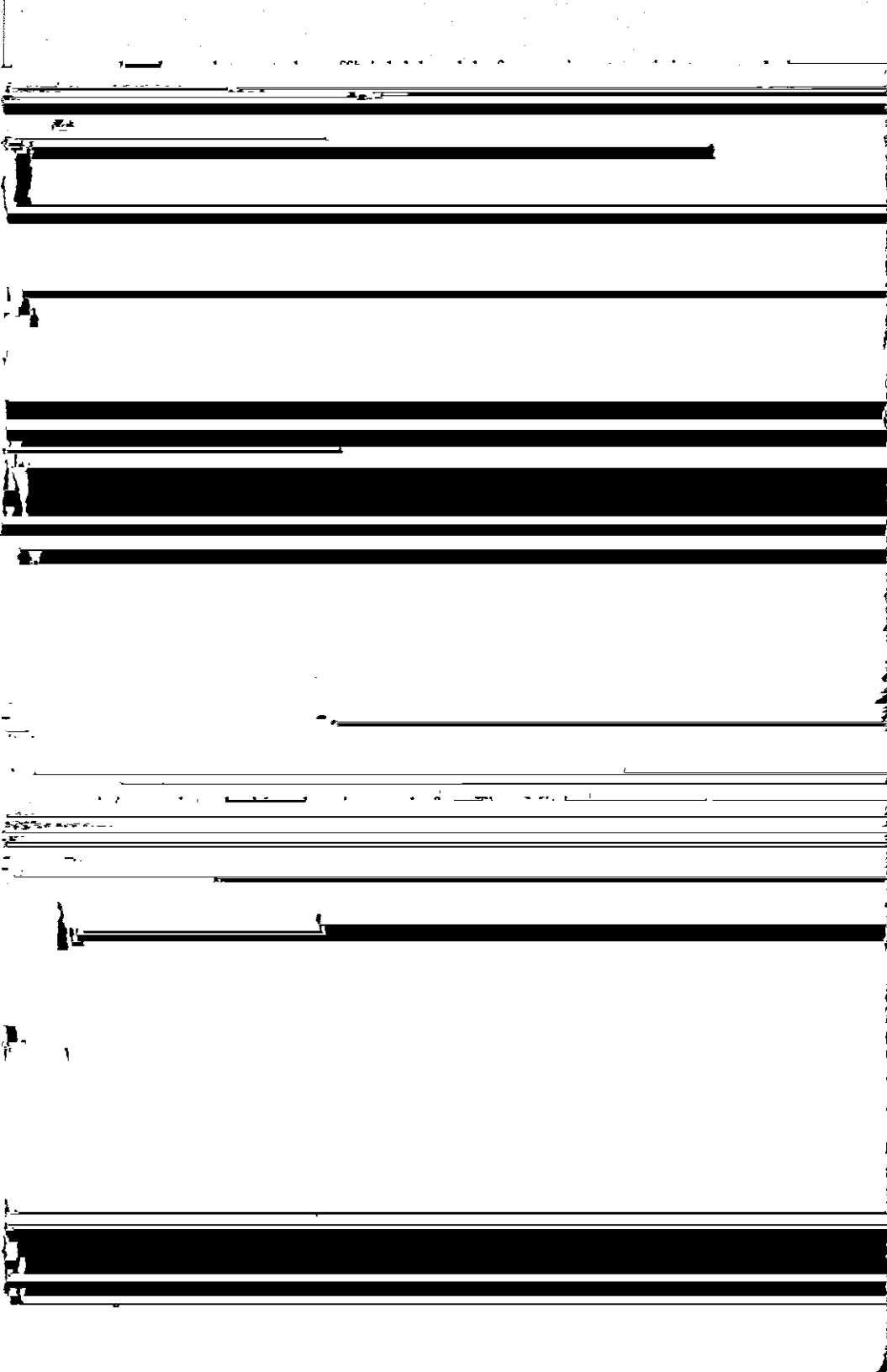
this context, several argued, aboriginal peoples would have to "move from their position on the inherent right to aboriginal self-government."

agreed objectives. There was an agreed set of principles, which the Government

Finally, it was noted that in the Meech Lake process there was political will



Yet another idea was to have the "on side" governments and the aboriginal peoples' organizations develop a draft amendment. If the process is renewed,



structured situations. This would "sensitize" the negotiators to the views of the other parties and assist in the building of trust ties among them.

Other issues...

7. Allowing the negotiators to discuss the design of a new process, several comments

Many respondents were more optimistic. One theme which emerged from their suggestions focussed on the subject of the constitutional amendment. Most thought that it would be a mistake to return to the 1983 agenda, with its 13 items. Attention should be concentrated on aboriginal self-government (as opposed to other rights such as language, land, treaties, etc.), since it is most workable. More work has been done on the subject of aboriginal self-government, and significant progress toward understanding has been achieved. Most respondents, from both government and aboriginal parties, thought that a new process should start with a self-government amendment (or

proposal was similar to that of the federal government with one very important

11

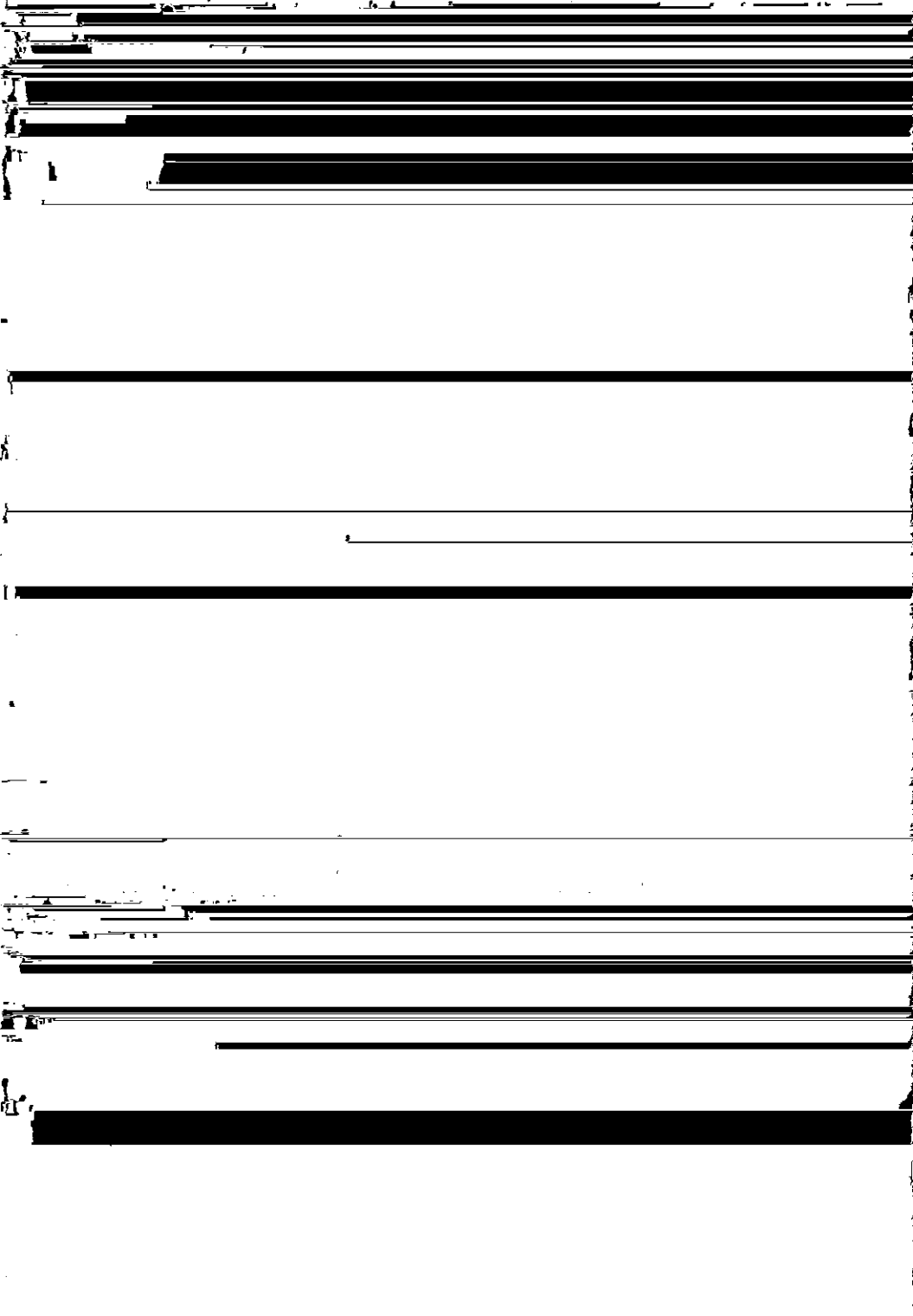
[REDACTED]

wished to proceed with self-government negotiations to do so, while enabling other provinces to maintain the status quo.

Several other approaches were suggested, although they received little support.

One was the draft amendment distributed by the four national churches.

improving the negotiation process are many, and often contradictory. It would

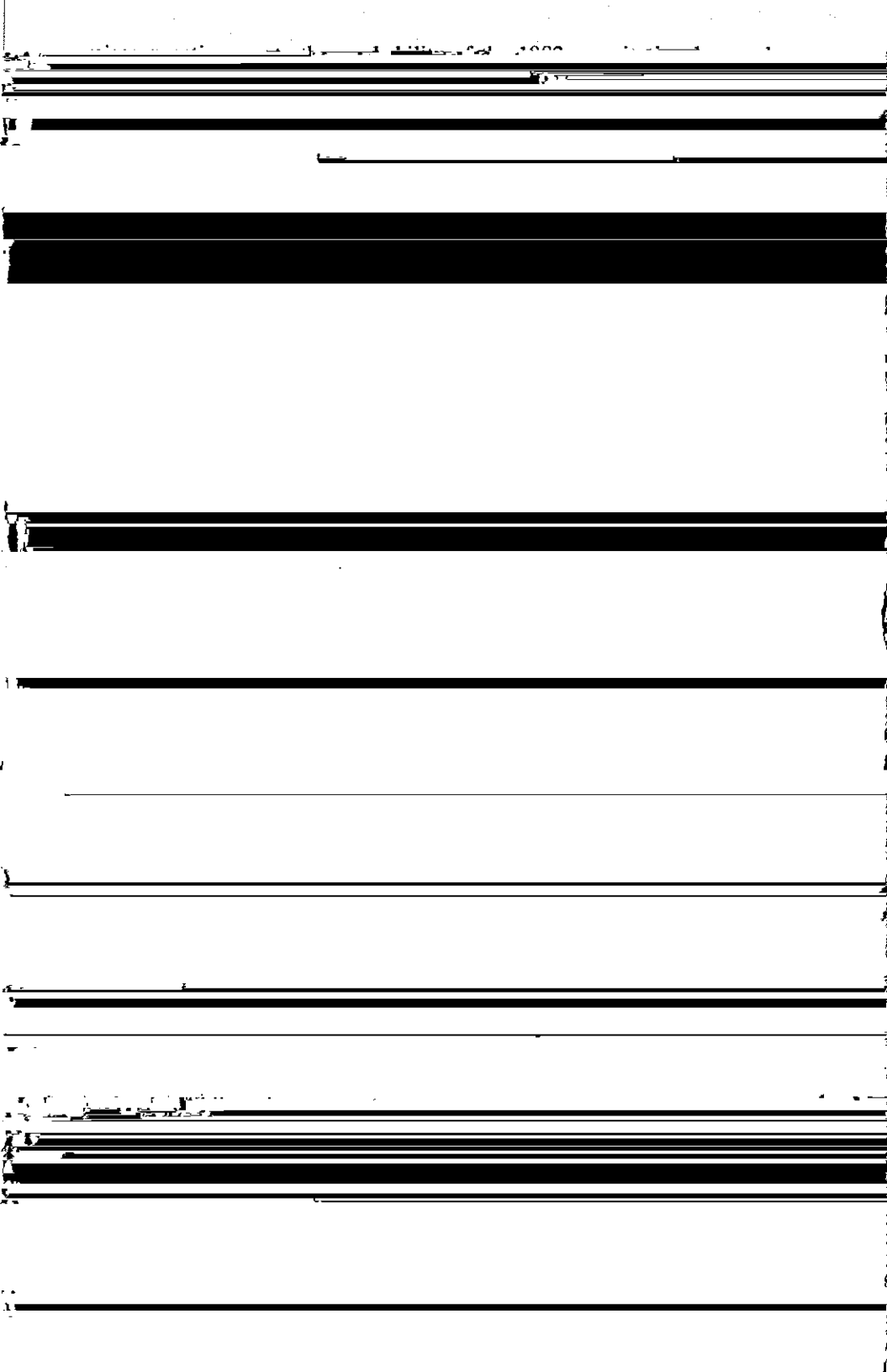


INSTRUMENTS PRECISELY MADE ACCORDING TO THE

recognized one, others may be easier..."). A "distinct society", it was suggested,

cant proportion (25 per cent) of the Yukon population, one can understand their concern.

And finally, from those interviewees less enamoured by the Meech Lake



8 NEW POLICY DIRECTIONS

Before drawing conclusions on what lessons can be learned from the constitutional negotiations on aboriginal rights, it remains for us to examine what policy

As to the matter of where current government policy is going, there was less agreement. There are, however, at least two broad exceptions to this disagreement. First, there is a common view that governments are now more interested in working from the bottom-up, rather than from the top-down (the latter characterized the constitutional process). A more incremental "grass roots" approach, at the community, regional or provincial level, is now seen by many as preferable to the constitutional approach which deals with principles and rights. Trilateral negotiations on self-government outside of the constitutional framework, involving the federal and provincial governments and aboriginal communities, are increasingly seen as the way in which government policy is developing.

Interviewees from the aboriginal organizations also see government policy

to become one of reducing dependency, the reasoning goes, which is a long-term objective best dealt with on a sector-by-sector basis. Others were of the view that, with the momentum lost on the constitutional front, the only way left to proceed was with a strategy of incremental self-government.

A third theme, much less widely held, was that there is a need to restore a

time. In this scenario, either there is agreement soon or there will be violence in the streets. On the other hand, many respondents do not think that changes will come easily and are pessimistic concerning the future. They cite the growth of "aboriginal nationalism and the rhetoric of sovereignty" moving in one direction, while "neo-conservatives in the West, who oppose entrenching self-



particularly strong in western Canada



of Ontario. It was also suggested, by persons outside Ontario, that a structure and process similar to the ICO might be a useful innovation in their provinces.

Other basic changes which were suggested were more attitudinal in character. There is a need for more respect and more knowledge of aboriginal peoples. Both aboriginal and non-aboriginal people need to know about the history, culture, and current contributions of aboriginal peoples to Canadian society. This will instill pride in aboriginal peoples, and support for them among

table only because section 37 of the *Constitution Act, 1982* (as amended) in essence forced them to be there.

It is also clear, in retrospect, that not all parties to the negotiations wanted a constitutional amendment on aboriginal self-government. Political will, for

Issues of somewhat less importance, but which also deserve to be highlighted because of the concern attached to them, include the matter of justiciability (that is, whether the right to self-government is able to be enforced in the courts in the absence of self-government agreements), and the jurisdictional issue concerning whether the Métis are now, or should be included in subsection 91.24 of the *Constitution Act, 1867*, and hence fall within the federal domain. Nor should these matters be ignored should negotiations begin anew.

More third party involvement would also be welcome. A neutral, third party

involving all parties to the negotiation; the use of an independent mediator; and the establishment of an inquiry or commission all deserve thoughtful consideration.

Incentives must be increased, both incentives to bargain and incentives to achieve resolution. Incentives to bargain can be introduced through such tech-

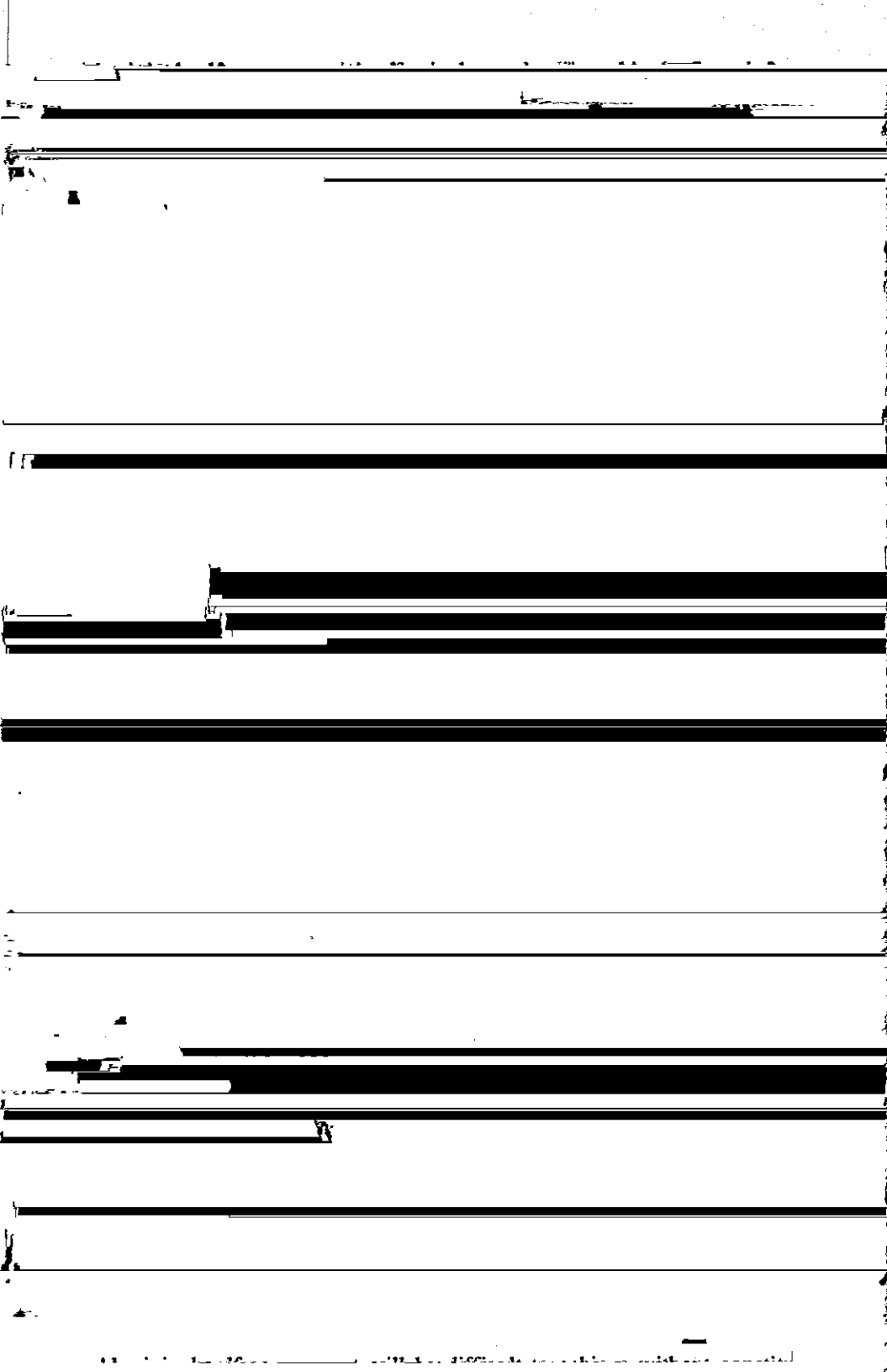
public support, fostered through greater education and understanding, is essen-

The Draft Amendments

Attention should continue to focus on a constitutional amendment on aboriginal self-government. Two other topics demand space on the agenda—the issues of financing and federal/provincial responsibility. The first issue cannot be resolved without some considerable progress on the latter two. There could be

and programing for Indian peoples, in effect "offloading" the responsibility for providing such services to provincial governments.

It is widely understood that there has to be change, but at the same time there is great resistance to change. It is also greatly feared, in this regard, that if the Meech Lake Constitutional Accord is not proclaimed (it remains, at time of



on this score. At the federal level, a Secretary of State for Aboriginal Affairs has been suggested as a more effective voice for representing the interests of all aboriginal peoples (i.e., including Métis and non-status Indians) in the decision-making processes of the federal government.⁶ The Indian Commission

APPENDIX A. INTERVIEW QUESTIONS

11. Do you think that basic assumptions and frameworks of governments, or aboriginal peoples, or both, have to change? If so, in what way?
12. What impact do you think that the Meech Lake Accord will have, if any, in this general area (of aboriginal peoples and constitutional reform)?
13. Are there any other comments that you would like to make regarding aboriginal peoples and constitutional reform?

APPENDIX B: INTERVIEWEES

Interviewee	Present or Past Affiliation
Mel Smith	Government of British Columbia
Eric Denhoff	"
Jack MacDonald	"
Vic Farley	"
Robert Plecas	"
Oryssia Lennie	Government of Alberta
John Kristiansen	"
Brian Barrington-Foote	Government of Saskatchewan
Claude Rocan	"
Jim Westasecoot	Government of Manitoba
Don Stevenson	Government of Ontario

Gary Posen
Pat Monaghan
Laura Metrick

"
"
"

Jean Rochon
René Morin

Government of Quebec
"

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]