
ACCESS TO SURVIVAL

A Perspective on
Aboriginal Self-Government

For the Constituency of
The Native Council of Canada

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Kingston, Ontario

Copyright 1986
ISBN 0-88911-431-5

Canadian Cataloguing in Publication Data

Revised Edition 1988

Position paper)
ISBN 0-88911-431-5

1—Canada. Native peoples. 2 Métis — Legal status.

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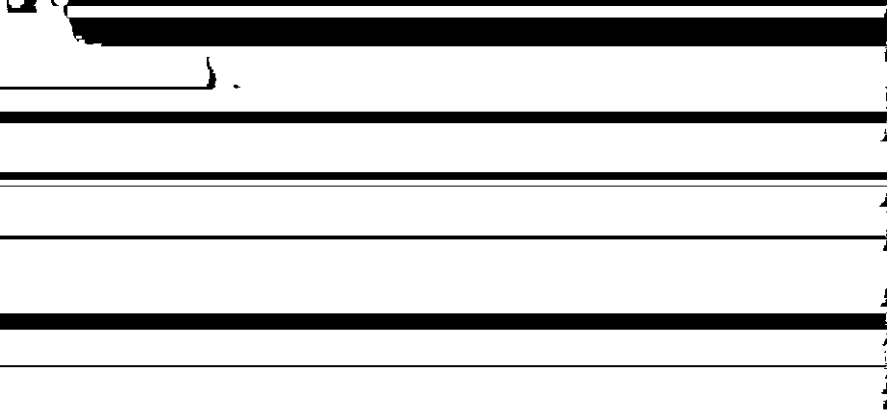
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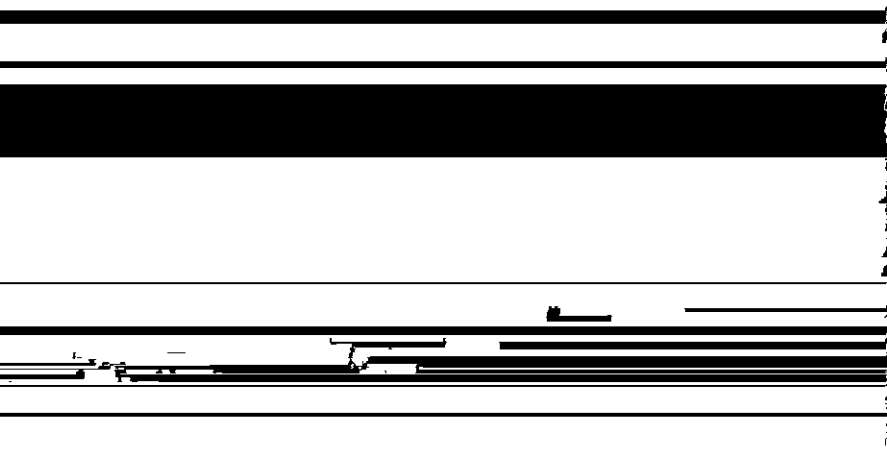
Section 37 of the *Constitution Act, 1982* (as amended) requires the holding of a series of conferences by 1987 to deal with "constitutional matters that directly affect the aboriginal peoples of Canada."

months prior to the 1985 First Ministers' Conference (FMC).

Developments in 1985, subsequent to the First Ministers' Conference, may have a dramatic impact on the constitutional negotiation process. At a meeting of government ministers and aboriginal leaders held in June, 1985, several governments indicated their intention to pursue the negotiation of individual self-government agreements, and then to consider their entrenchment in the constitution (the "bottom-up" approach). This contrasts with the proposal, which has thus far dominated discussions, to entrench the right to aboriginal

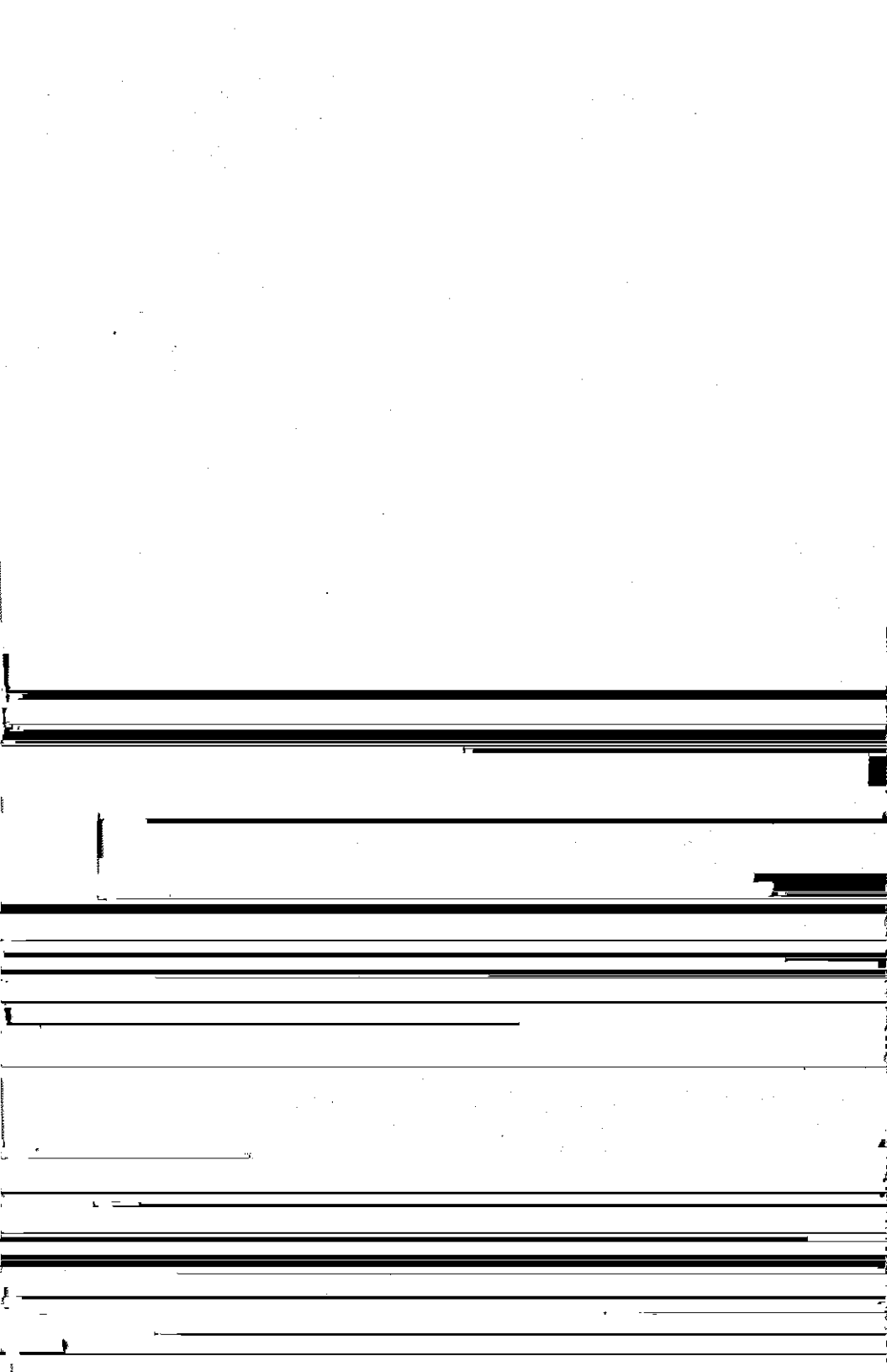


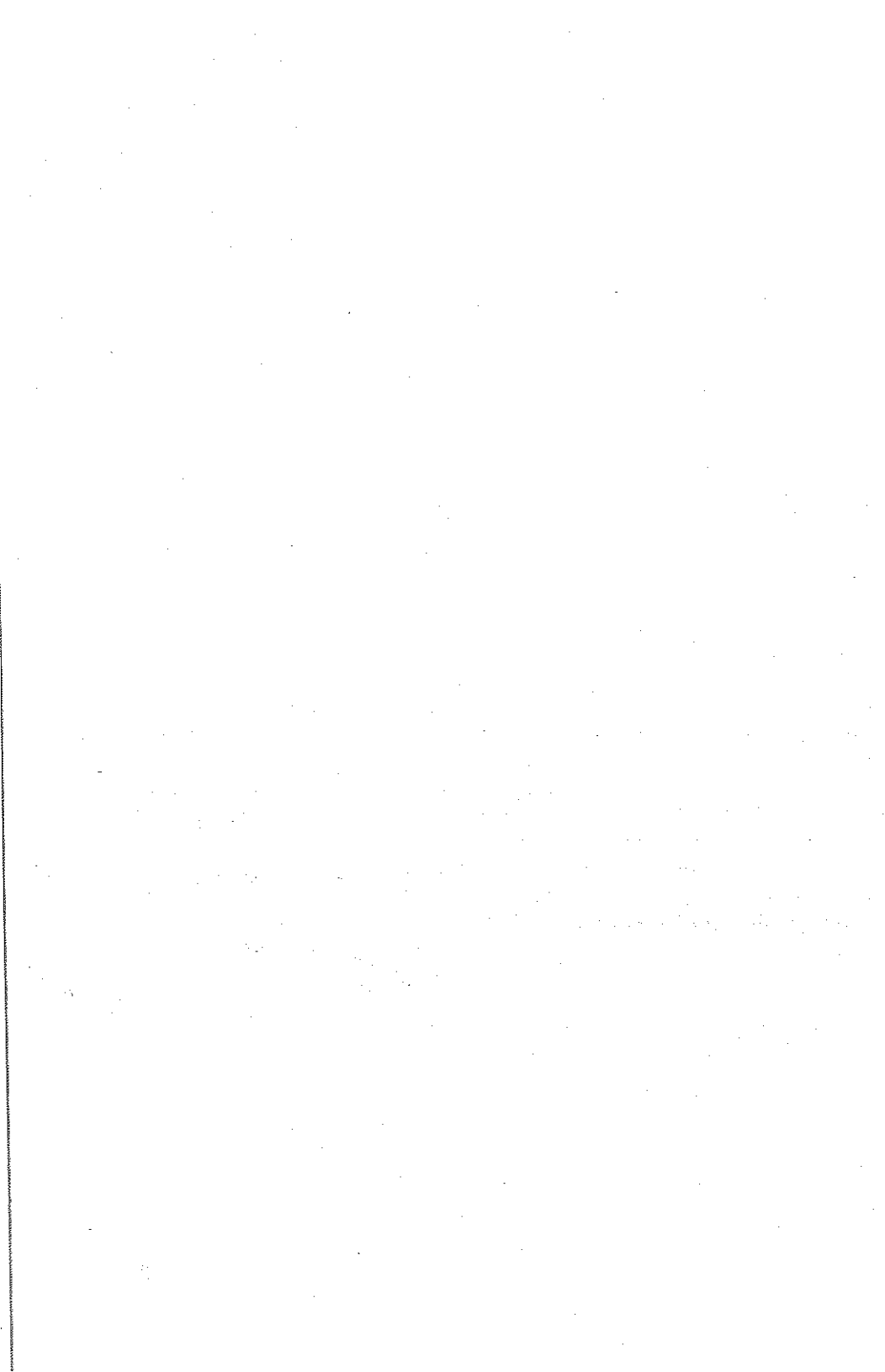
self-government in the constitution, and then to negotiate individual agreements (the "principles first" approach). The result is that, in addition to multilateral negotiations at the national level, negotiations will now proceed on a bilateral or trilateral basis, at the local, regional and ~~international~~ levels.



necessary first to inquire into, and then to resolve or assuage a number of genuine concerns about aboriginal self-government and its implications for federal, provincial and territorial governments. Research in this part of the project will explore these concerns.

The Institute wishes to acknowledge the financial support it received for Phase Two of the project from the Donner Canadian Foundation, the Canadian Studies program (Secretary of State) of the Government of Canada, the Government of Ontario, the Government of Alberta, the Government of Saskatchewan, the Government of Manitoba, the Government of New Brunswick, the Government of Nova Scotia, the Government of Prince Edward Island, the Government of Newfoundland and Labrador, the Government of Yukon, the Government of Northwest Territories, and the Government of Nunavut.





This paper is designed to describe the perspective of the Native Council of Canada (NCC) on the subject of Aboriginal self-government for NCC constituents. The



1 INTRODUCTION

2. The special or unique circumstances that must be addressed to accommodate our peoples;
3. And finally the processes and mechanisms by which

these difficulties can be resolved.

Only when these three elements are clearly understood, can we then address the subject of self-government, itself.

1. The NCC Constituency

The NCC represents the largest number of Aboriginal people recognized under Section 35 of the *Constitution Act, 1982*, including both Indian and Metis people.¹

1.A. Indian Constituents

Contrary to carefully manipulated public opinion and the wishful thinking of many Governments, most Indian ~~people in Canada are not happy and never will be~~

themselves or their children. Those who have not registered, but are entitled to register under Bill C-31 may be able to do so in law, but there is, in fact, no policy or process within the Department of Indian Affairs to carry out such first time registration.² In addition, there will continue to be an important segment of the NCC constituency and are entitled to access to Aboriginal and treaty rights whether or not they are registered

right of self-government in particular, is no different
from that of other Aboriginal peoples. This issue is not

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1/2 [redacted] Aboriginal peoples - have an obvious right to

pages 18-22)

1.A.2. New-Status Indians

[redacted] of Aboriginal ancestry who

[redacted]

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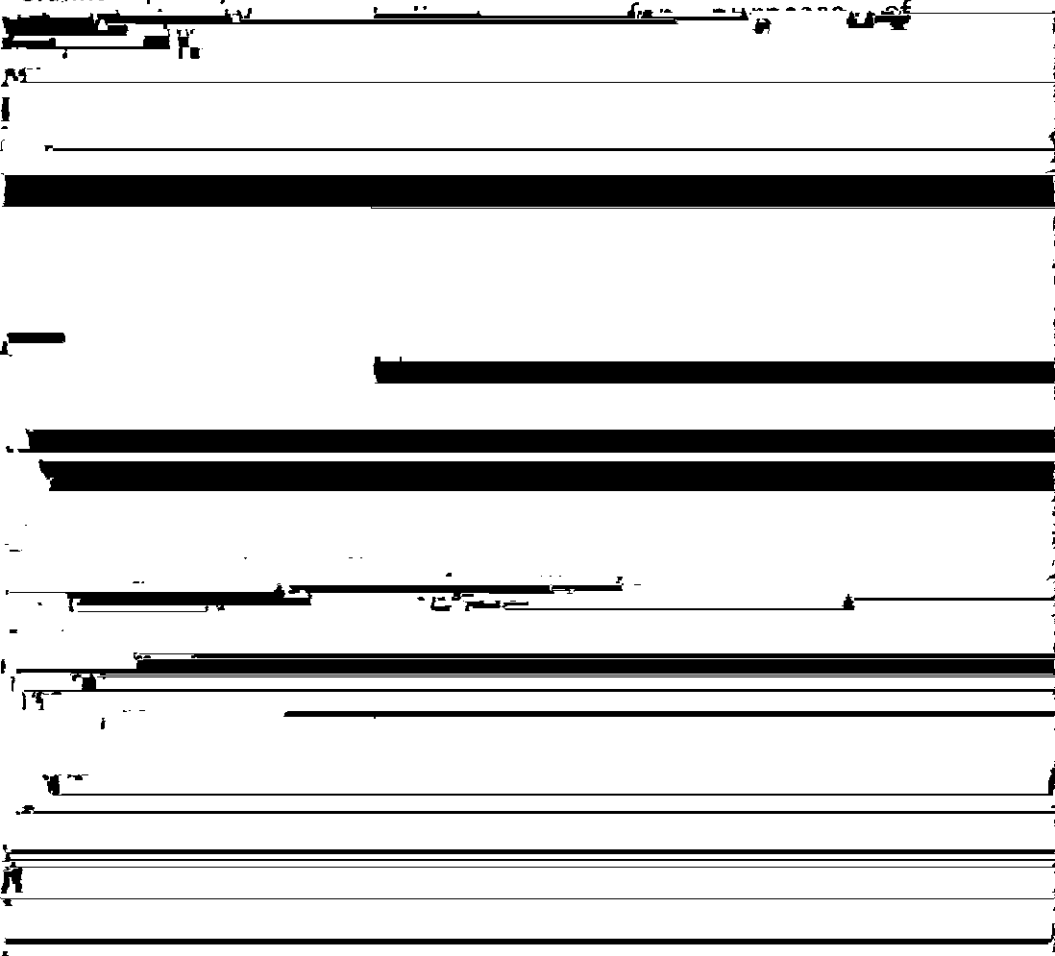
intention of including those of its constituency who identified themselves as Metis.

Although neo-colonial historians and Canadian academia in general resist the concept, others are beginning to outline Metis history in Canada from a much broader base than a Stanley or a Morton has done.² Without delving into argumentative detail, it can be reasonably demonstrated that populations of Metis, distinct from those of Red River, existed both before and after the 1800-1885 Red River/Batoche period. These include the Acadians of the Maritimes, the Halfbreed population of Sault Ste. Marie, the

established on an equitable footing with the other Aboriginal peoples. (See pages 18 and 24)

NEVER INCLUDED IN TREATY - Prior to 1830, mixed bloods associated with treaty-making groups were, as a matter of course, included in the treaty.⁸ But after 1830, the position of the Metis/Halfbreed/mixed-bloods became increasingly problematic for colonial administrators. Those who were "obviously Indian" were reluctantly included, but by 1850 when the Robinson treaties were signed, the exclusion of halfbreeds was officially sanctioned.

With the interesting exception of the Halfbreed (Metis in the French version) Adhesion to Treaty Three, which was promoted as a way of lessening Riel's influence in the Northwest, the policy continues to expand the NCC constituency even today. The fact that current land claims policy insists, in practise, on Metis being



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accommodation. These circumstances include those who are:

BAND RELATED - This group is made up of those who have ~~existing~~ family and social ties with existing Indian

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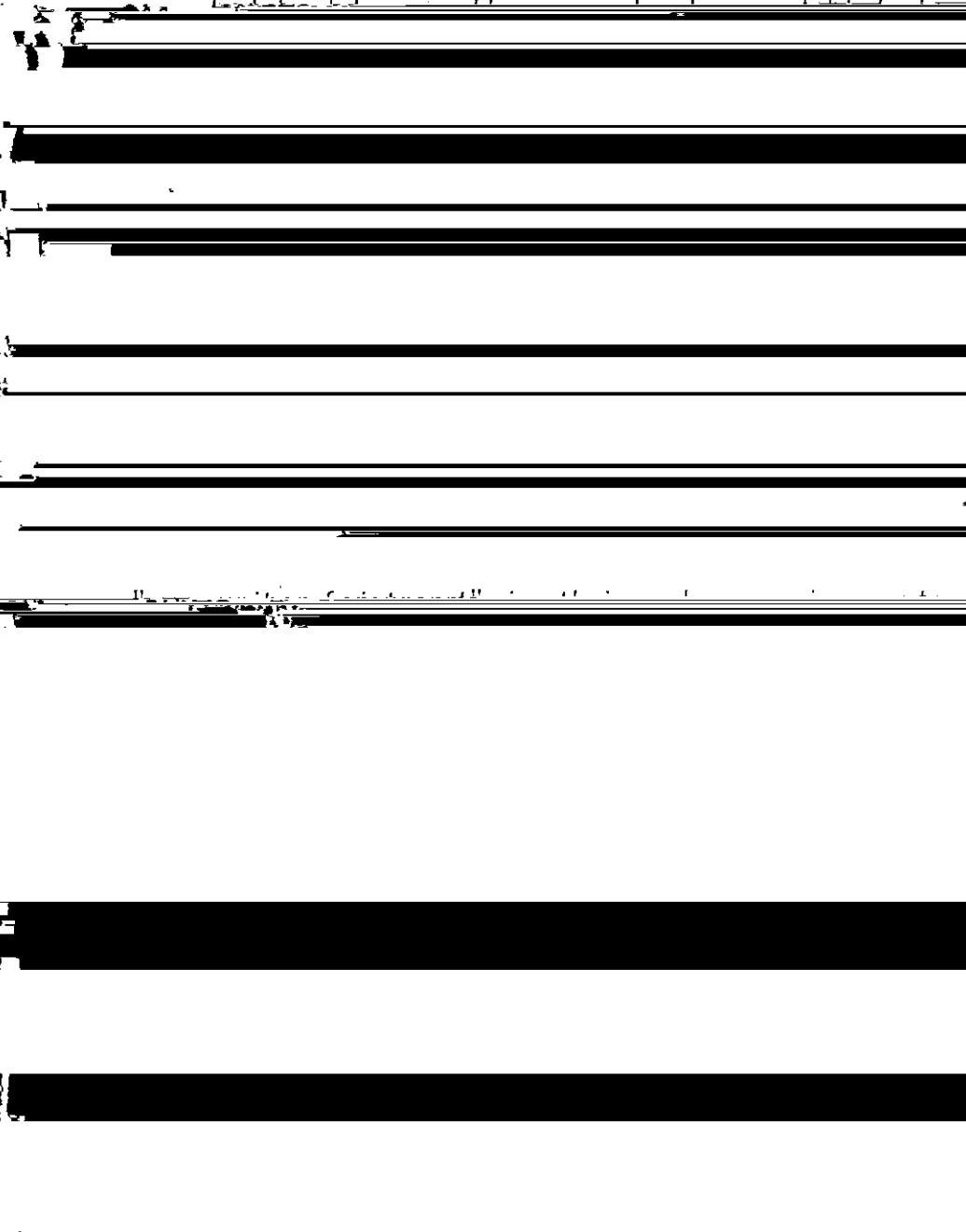
community. This includes individuals and communities who are:

BAND RELATED - This would include those Metis who were omitted or expelled from Treaty or bands because they were identified as Metis or Halfbreeds. Some of these Metis will be able to repatriate under Bill C 31.

population. This type of community is more common in central and eastern Canada, but can appear anywhere

enfranchisement or "marrying-out". The further back

person has been recognized as significant. The reality of permanent populations of Indian and Metis peoples is a fact in every Canadian city. Almost by definition, these populations are a demographic minority who are separated (in most, but not in all cases) from their



Court of Canada, are "Indians" within the meaning of that section. But this is where any semblance of clarity ends in a foggy morass of self-serving legal interpretation.

Historically, the Federal government has chosen to

who are registered under the *Indian Act*, and for some Inuit peoples. By default, if not explicitly, those same Federal governments have ignored and, in effect, discriminated against the majority of Indian people in Canada

CLAIMS PROCESSES - The inequity experienced by the NCC constituency is evident in the current Federal Land Claims policy. The recent report of the Task Force for Claims Policy Review has an immediate effect on their

amendment to the Constitution entrenches the Land

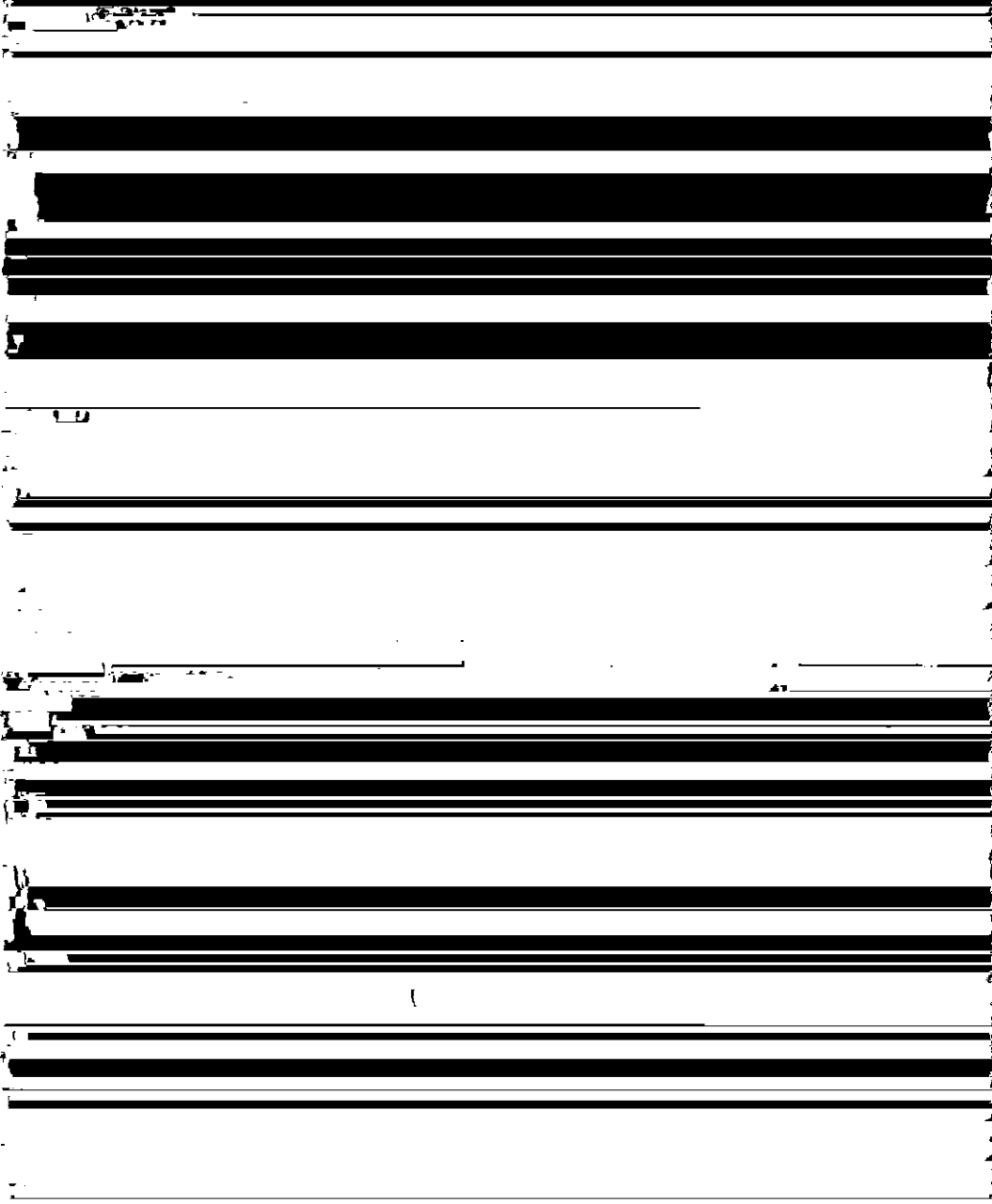
are available to other Aboriginal peoples under Section 35(3).

CLAIMS REVIEW REPORT - Even a cursory scan of the recent report of the Federal Task Force on Comprehensive Claims is sufficient to justify NCC concerns. The fact that these concerns are dealt with so briefly in the report supports the necessity for NCC's insistence on a higher profile for its constituency in the

address Metis and Non-Status Indians is worth quoting

The history and current situation of most Metis and

TREATY NEGOTIATIONS - Traditionally, the relationship between Aboriginal peoples and governments was established by treaty. The fact that these treaties varied in form and content over the last 500 years has generated a range of issues and problems with every Aboriginal group at the table. In terms of the NCC



virtue of various forms of enfranchisement. Given the

unique set of circumstances vis-à-vis other Aboriginal peoples; and that they exist in an inequitable relationship in terms of access to their Aboriginal birthright- we can
~~not turn to ourselves for resolution of this situation~~

Clearly, accommodation for the constituency of the NCC is not just a matter of preference, or even a matter of principle in the context of justice. It is a matter of basic survival as Aboriginal peoples in Canada.

The fundamental element upon which that survival depends is recognition - both as Aboriginal peoples, and
~~in terms of establishing a specific political identity~~

be eligible for Aboriginal government is certainly unprecedented, but, with political will, seems at least possible.

VIA NEGOTIATED RECOGNITION - Another class of mechanism that could be considered is that of negotiated recognition of Aboriginal community. This process could readily be part of a claims agreement, or included in the range of trilateral community-level negotiations that governments are currently promoting. This would require considerable revision of the current Federal Claims policy to include NCC constituents, or to create an entirely new process from whole cloth. In either case two distinct categories of community would have to be accommodated. These are:

ABORIGINAL GEOGRAPHIC COMMUNITY - The more straightforward case is that of an identifiable collectivity of Aboriginal people who occupy a specific geographic

area. In a context where this population was a clear majority, the resolution would be uncomplicated, if not simple.¹⁹ Where the population was a minority, the resolution might be more problematic, and would have to be approached on a case-by-case basis.²⁰ In any case,

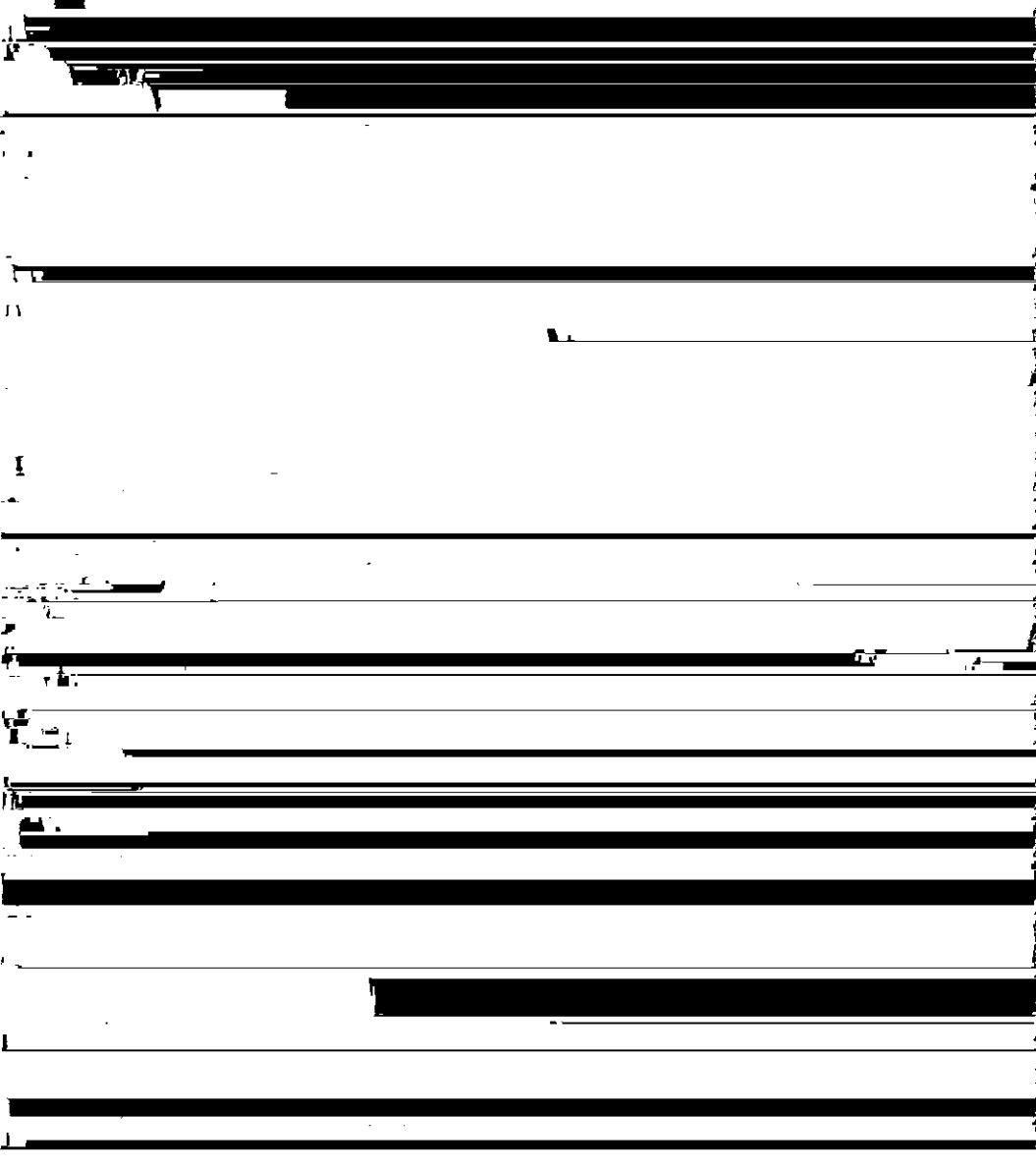
population into decision-making processes which affect

communities, it has a ring of functional reality for those who no longer have an association with a specific land base, but who have a claim based on deprivation of Aboriginal rights.

By virtue of Land Claims or Trilateral agreement it would be possible to identify a specific tract of Crown land, the resources of which could be developed for the benefit of a specific Aboriginal community. A specified percentage of resource taxation in a particular area could be earmarked for the use of a specific community. The

by NCC constituents other than the FMC process which presumably ends next year. At the same time, most registered Indians and Inuit can look to formal legislative, treaty and lands claims process to accomplish their self-government objectives.

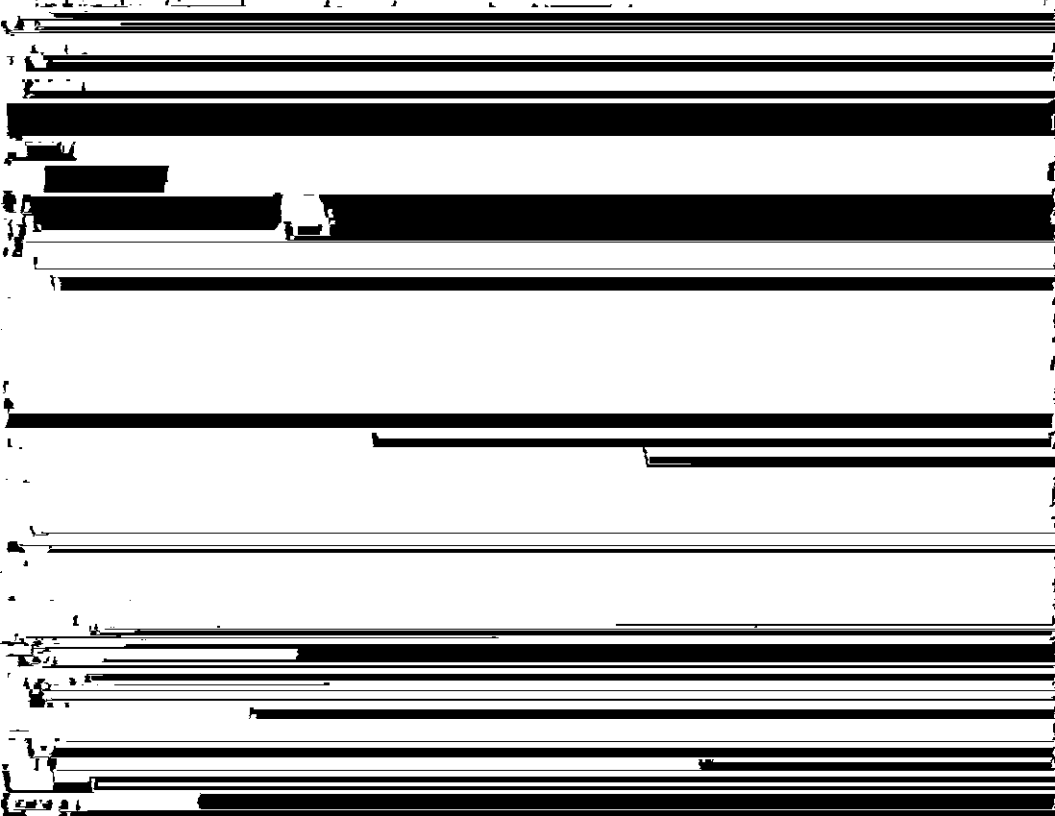
THE RIGHT OF SELF-GOVERNMENT - For NCC's constituency the right of self-government is, by definition, a Constitutional issue.



2 KEY ELEMENTS OF SELF-GOVERNMENT

1. Constituency base

The artificial division of self-government constituency bases into "public" and "ethnic" modes may be academically convenient, but such a division could well lose many NCC constituents in the process. The



being that the people involved are the majority in the communities or areas concerned, but are surrounded by

complex in off-reserve or Non-status Indian communities, and more difficult still where Metis were included in a specific Aboriginal community. There are constituents of the NCC currently living in all of these situations.

1.B. Ethnic Government

To distinguish between "ethnic forms" and "public forms" of government is to assume that "ethnic" and "public" governments are somehow different. To the extent that

COMMUNITY-BASED - There are other concentrations of NCC constituents who are a majority in a particular location -such as a neighborhood or, perhaps, an unorganized territory- but are surrounded by a larger, non-Aboriginal, population. In order to accommodate these populations, they could be treated as a "majority" for the purposes of a self-government agreement, in the same context as a band without a reserve. In cases where the Aboriginal community is geographically integrated with (but culturally and politically distinct from) the surrounding population, the agreement could be based on a ~~community-specific~~ format which is co-ordinated

with the government of the surrounding population.

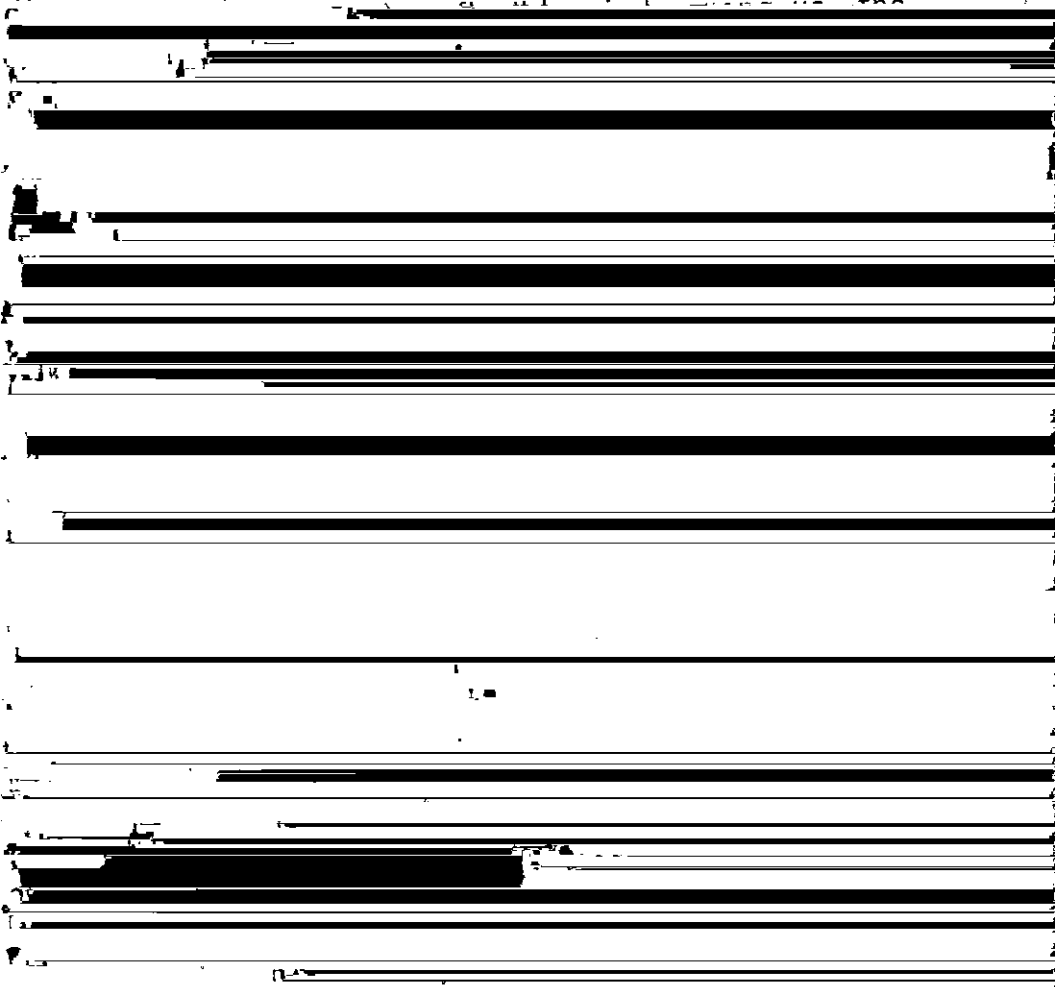
COMMUNITY OF INTEREST - In situations where the

validate or recognize that relationship in the context of developing self-governing agreements.

Of course many other NCC constituents have been deprived of even a "use and occupancy" relationship to specific lands. By exclusion or expulsion from treaty, they have been deprived of the use of treaty lands; by enfranchisement they have been deprived of residency on reserves; and via a multitude of Provincial and Federal game laws they are deprived of their traditional harvesting pursuits. In short, thousands of NCC constituents have been unilaterally deprived of the very relationship to land that is seen as being such a "key" element to the development of self-government.

2.A. Land Based

If the concepts of "government" and "territory" are



context, the establishment of a land base and the negotiation of self-government could be simultaneous, or at least parallel.

TRILATERAL NEGOTIATION - If the trilateral negotiation processes that are now being promoted by some governments are open to NCC constituents, then a third mechanism for identifying a specific land base would seem to be available. Those NCC constituent communities who met whatever criteria might be established, could have a land base identified with Federal and Provincial participation. This process could be staged in lieu of a specific or comprehensive land claim, or be a mechanism to deal with a formal claim.

2.B. Non-Land Based

No matter how many new-status reserves might be created, or how many land claims settled, or trilateral agreements signed, there will be large numbers of NCC

protection is.²⁹ But there are mechanisms by which this protection can be readily established. They are:

VIA TREATY RENOVATION - Since Treaty rights are established and affirmed in the Constitution

and are likely to be guaranteed before the Section 37 process is complete, any process that becomes or alters

Many of these groups may find it necessary to develop forms of self-government as a result of agreement between themselves and more likely that local Aboriginal governments themselves may form alliances or specific structural associations on a provincial, trans-provincial, or provincial-territorial basis. Again, it is more likely that these provincial governing structures would be subordinate to the local forms, with specific and delimited jurisdictions to exercise in terms of co-ordination, particularly between Aboriginal governments and non-Aboriginal provincial governments.

NATIONAL - It is reasonably certain that there will never be a direct Aboriginal equivalent of the national Canadian

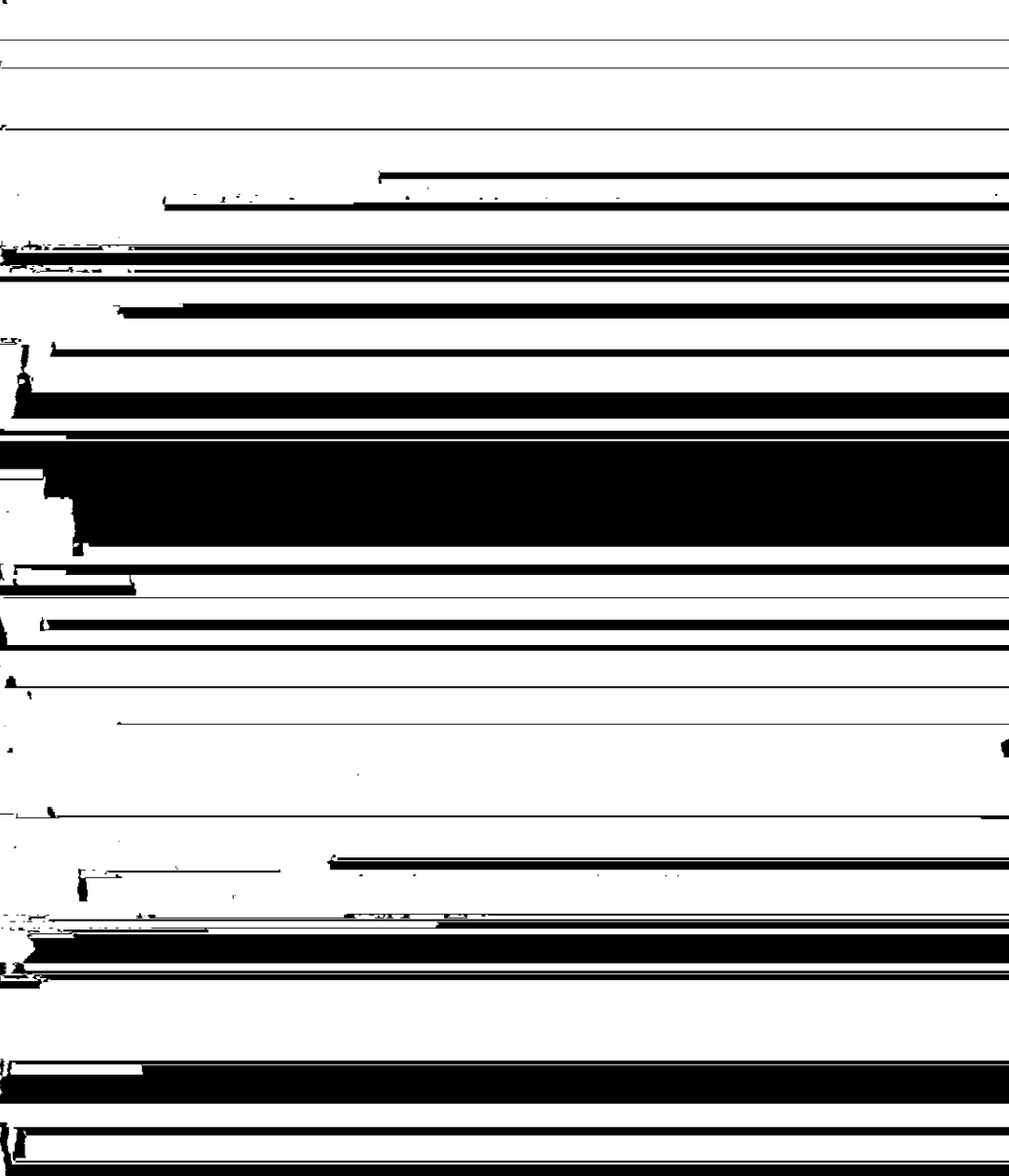
Parliament. Even in the unlikely circumstance that such a structure were formed, it is certain that its function, and jurisdiction, would be totally different from the non-Aboriginal structure. It may well be necessary to develop one or more national bodies to lobby for, co-ordinate, and even design national policy for one or more Aboriginal perspectives, but a national government which dictates policy to subordinate levels of government would contradict the very basis of Aboriginal political activity.

It is much more likely that a relatively informal national council would evolve. In terms of lobbying and co-ordination, this group would be more functional than structural. In terms of policy development and

delegations would accept the concept for Aboriginal

this is the approach taken by all of the Aboriginal delegations and most of the government delegations at the FMC table.

EXISTING TREATY RIGHT _ Parallel to, or in conjunction with the entrenchment of the right to self-government, many treaties offer another existing mechanism to validate the authority and jurisdiction of Aboriginal governments. This is particularly true of many pre-Confederation



community, and a specific Provincial government - or governments in the case of trans-provincial regional agreement.

2. Evolution of Jurisdiction

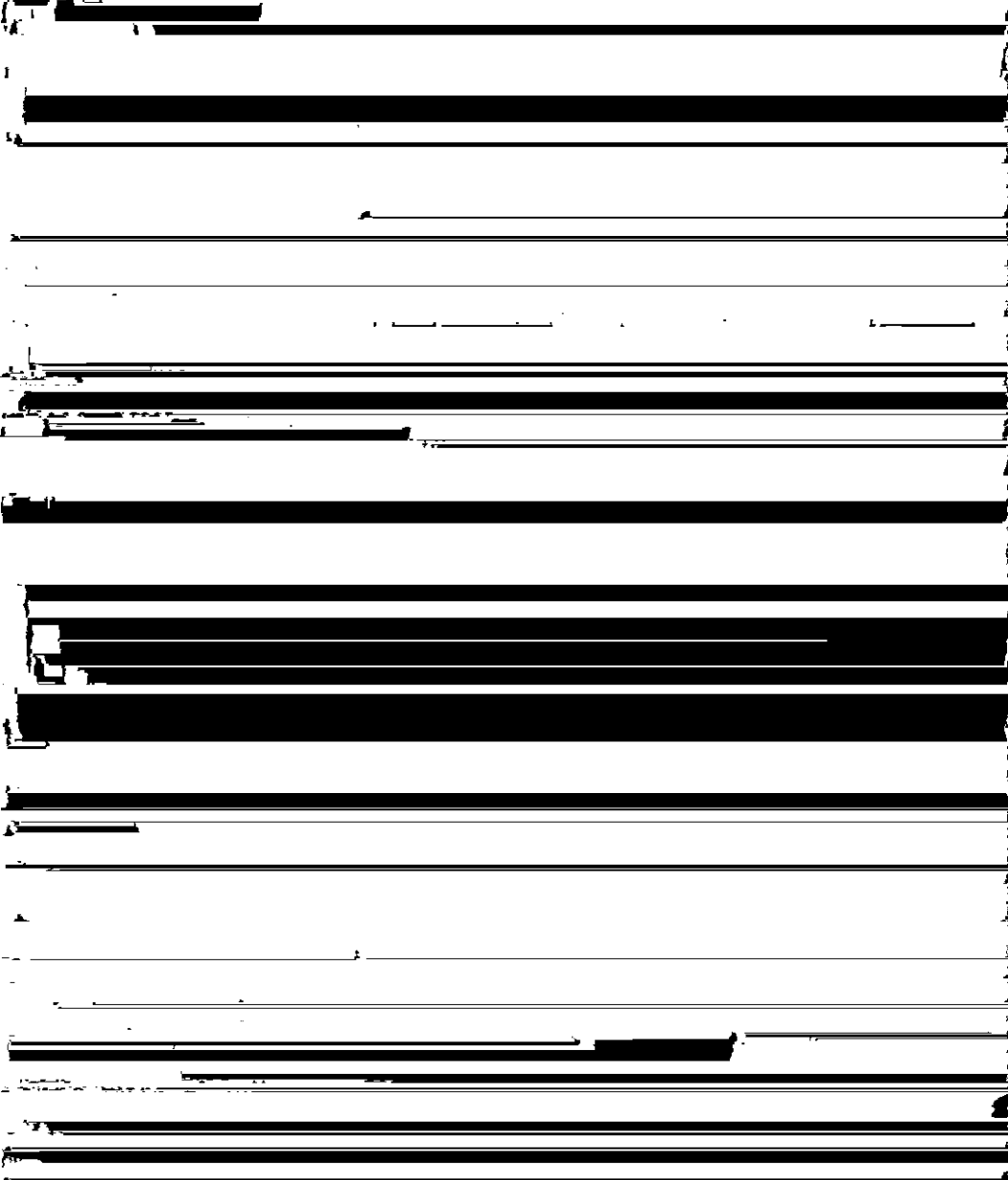
In responding to the applications of specific communities for the development of Aboriginal self-government, it may be advisable to evolve or schedule - at the request of applicants - the implementation of specific powers

jurisdictions, and authorities over a period of time. To ensure the phasing-in of successively complex and increasingly exclusive areas of jurisdiction, the timetable itself would have to be judicially enforceable.

The same techniques discussed previously would be

adopted for this process including constitutionally

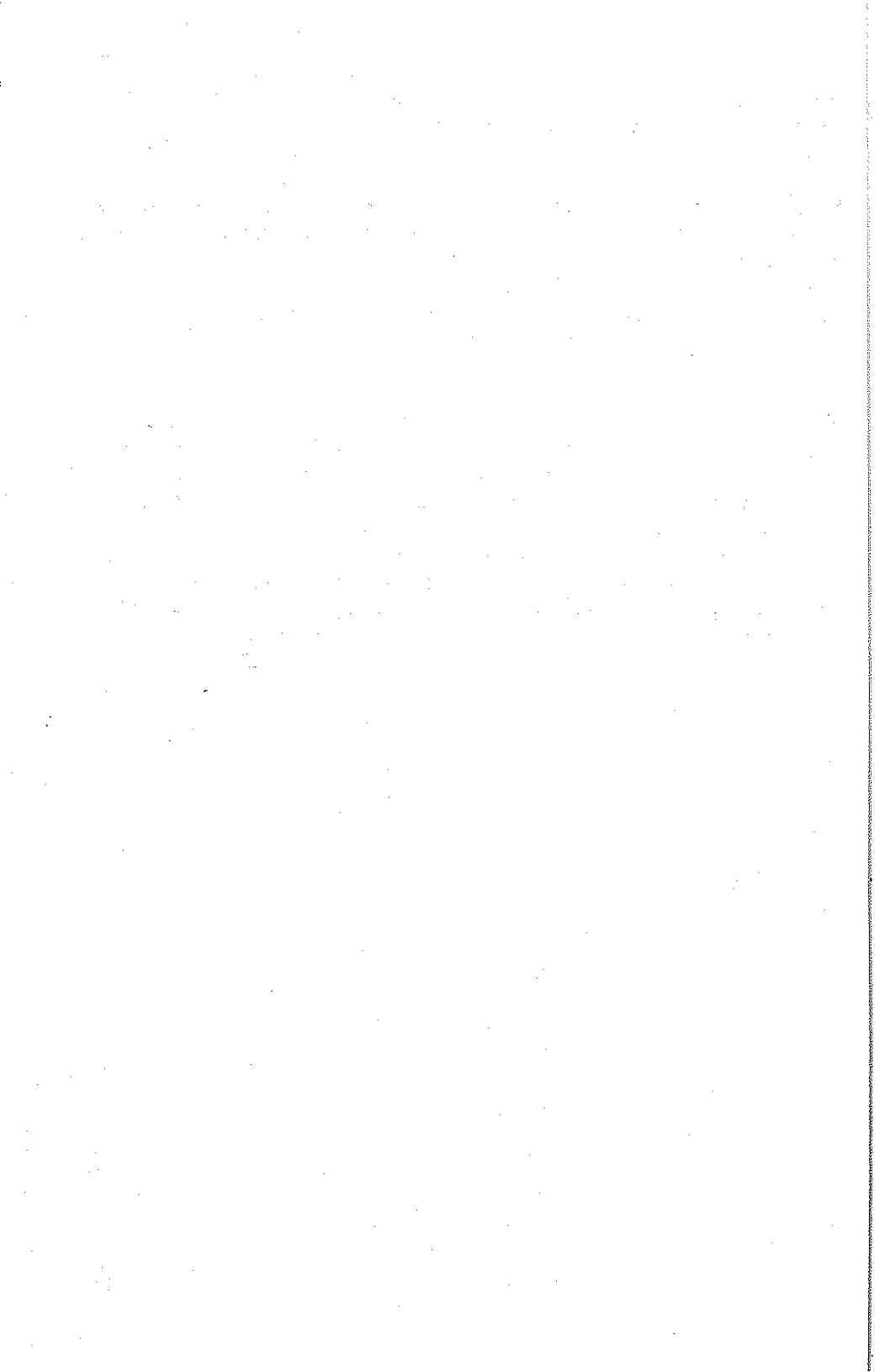
Given a mechanism by which agreements can be entrenched, those who are prepared to move immediately can establish full-blown self-governing bodies. Others, by mutual agreement, can develop bilateral or trilateral agreements which will eventually result in entrenched self-governments. At the other end of the scale there are Aboriginal peoples who prefer to establish their governments in the context of devolved jurisdiction from Federal and Provincial governments ⁴⁰ Presumably



context that treaty renovation, and land claims agreements can play a determining role.

It is also in this context that NCC constituents must be equitably accommodated, in direct ratio to the degree they have been excluded from these processes in the past. In those situations in which the exclusion was so successful (from a settler point of view) as to make re-patriation of a given Aboriginal population to a specific land base impossible, governing control of the resource development of a different area might be considered in the compensation section of a lands claims agreement. In effect, the Aboriginal population involved would (in absentia) have a controlling interest in that specific area, or be specifically assigned equivalent Crown royalties. A similar mechanism could be activated

HEALTH - The necessity for specific jurisdiction in the area of health springs from two sources. The first is cultural, in the sense that traditional healing practices would be more readily available to those who require



constituents of the NCC have an obvious concern that some membership codes will arbitrarily exclude them from their home communities, in exactly the same way the Indian Act did, thus reinforcing the sexual discrimination

C-31 was supposed to eliminate. It is too early to make final conclusions on this concern, but recent developments are not promising.⁴¹

To the extent that models for band government will influence the development of other forms of Aboriginal

mechanisms must be provided whereby an individual can identify him- or herself as an Aboriginal person.

Whether or not that individual can be associated with a specific land-based Aboriginal community, he or she has a basic right to self-identification, and a recognized association with his or her Aboriginal heritage and birthright. The very existence of the NCC constituency provides a mammoth inventory of case histories demonstrating the necessity for this form of accommodation. Without that accommodation, the present

mechanisms will certainly be necessary, for at least an

6 FINANCING ABORIGINAL GOVERNMENT

The discussion of how Aboriginal governments might be financed might well seem ephemeral to NCC constituents,

is that they do not currently have access to claims processes. Accommodation must be developed to establish claims as a revenue source for NCC constituent governments.

3. Fiscal Arrangements

Special fiscal arrangements will be required for Aboriginal governments in exactly the same way they are

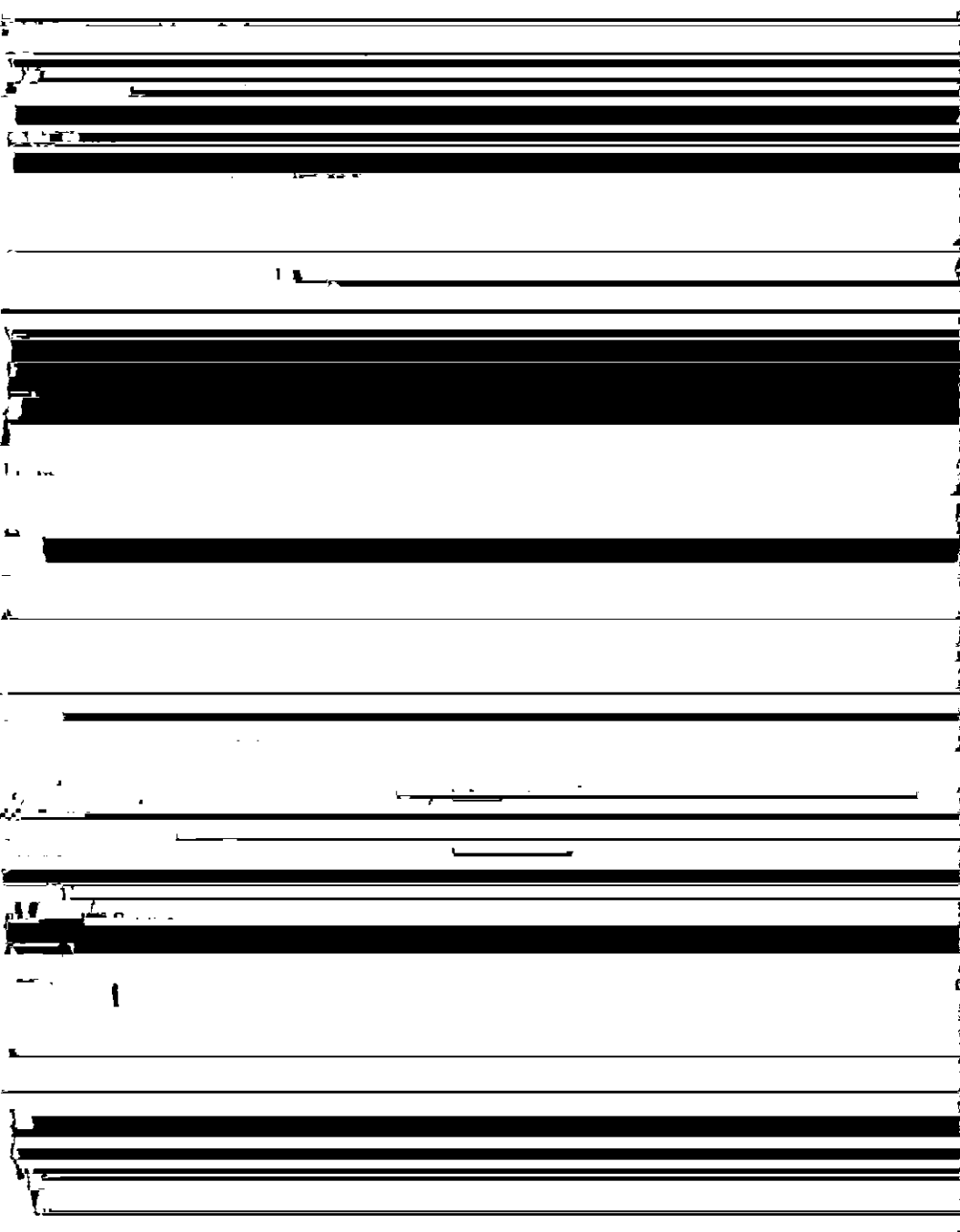
state of NCC constituents in Canada today. It is

... immediately obvious that both levels of

1. With Other Governments

Quite apart from fiscal arrangements via federal-provincial cost-sharing, Aboriginal governments are going to establish a range of intergovernmental

GUARANTEED REPRESENTATION - A distinct form of relationship is being proposed for some NCC constituents, in terms of guaranteed representation for



in Canada. Certainly, Aboriginal governments will have more in common and more to gain from association with each other than from non-Aboriginal governments.

On this basis, it is not difficult to imagine the development of liaison councils, or the establishment of Aboriginal relations offices to carry out many interactive functions. It is entirely likely some Aboriginal governments could contract services from other Aboriginal governments, again diminishing the overlap or duplication of services.



8 CONCLUSION

of the Canadian Constitution. The constituency of the NCC is prepared to take its rightful place in that process.

What is required is the creation of a specific, formal, and ongoing forum in which these issues can be

APPENDICIES

APPENDIX #1

NCC SELF-GOVERNMENT AMENDMENT PROPOSAL (from FMC Doc. 830-173/014 March 11-12, 1985)

"S.35(5) The rights of the Aboriginal Peoples of Canada include the right to self-government within Canada.

S.35(6) Parliament and the Government of Canada are committed, together with the legislatures and governments of the provinces to the extent that they have jurisdiction, to negotiate and conclude agreements with the Aboriginal Peoples to self-government, including such related matters as:

(a) the jurisdiction, responsibilities and powers of Aboriginal self-governments and the geographic area under their authority;

(b) the appropriate fiscal arrangements between the Government of Canada, the provincial governments where applicable, and Aboriginal self-governments;

(d) ownership and management of land and resources;

(e) any other matters agreed upon by the parties

sub-section (6) shall be deemed to be treaties and treaty rights respectively within the meaning of section 35(1).

S.35(8) Nothing in Sub-sections (6) and (7) shall be construed so as to abrogate or derogate from any ~~original and treaty rights guaranteed in sub-section~~

S.35(9) Nothing in this part extends the legislative powers of Parliament or the legislatures of any province."

APPENDIX #2

IN UNDERTAKING A JOINT PROCESS TO ADDRESS
BILATERAL INITIATIVES AND THOSE REQUIRING THE
INVOLVEMENT OF PROVINCIAL GOVERNMENTS, THE
GOVERNMENT OF CANADA AND THE NATIVE COUNCIL
OF CANADA SHALL ESTABLISH AS A MATTER OF
PRIORITY THE FOLLOWING

AGENCIES AND PROVINCIAL GOVERNMENTS;

* SUB-COMMITTEES OR A TASK FORCE COMPRISED OF
GOVERNMENT AND ABORIGINAL REPRESENTATIVES
TASKED WITH PURSUING SPECIFIC INITIATIVES;

* THE REQUIREMENT FOR COMPLEMENTARITY OF

NOTES

1. There is a dim hope that the census to be undertaken in the next few months will provide more accurate statistics on Metis and Non-Status Indians. It would certainly not be difficult to improve on the pitifully inaccurate 1981 figures. Until then a very rough (and very conservative) rule of thumb is that there are three MNSI for every registered Indian. This would give the NCC a constituency of at least 800,000 persons. On Secretary of State's report 4/1

2. The current policy is prepared to deal with those who were registered and lost their status and the first generation children of those persons. But there is no specific procedure or policy regarding the registration of those who may technically be entitled to register, but who have never been registered. For example, there are 1400 Indians in the interior of Newfoundland who, since 1949, have been unable to convince a reluctant INAC to register them and to recognize their communities as bands. Similarly

... of north central Alberta who were

missed in the 1899-1900 Treaty 8 process and who,

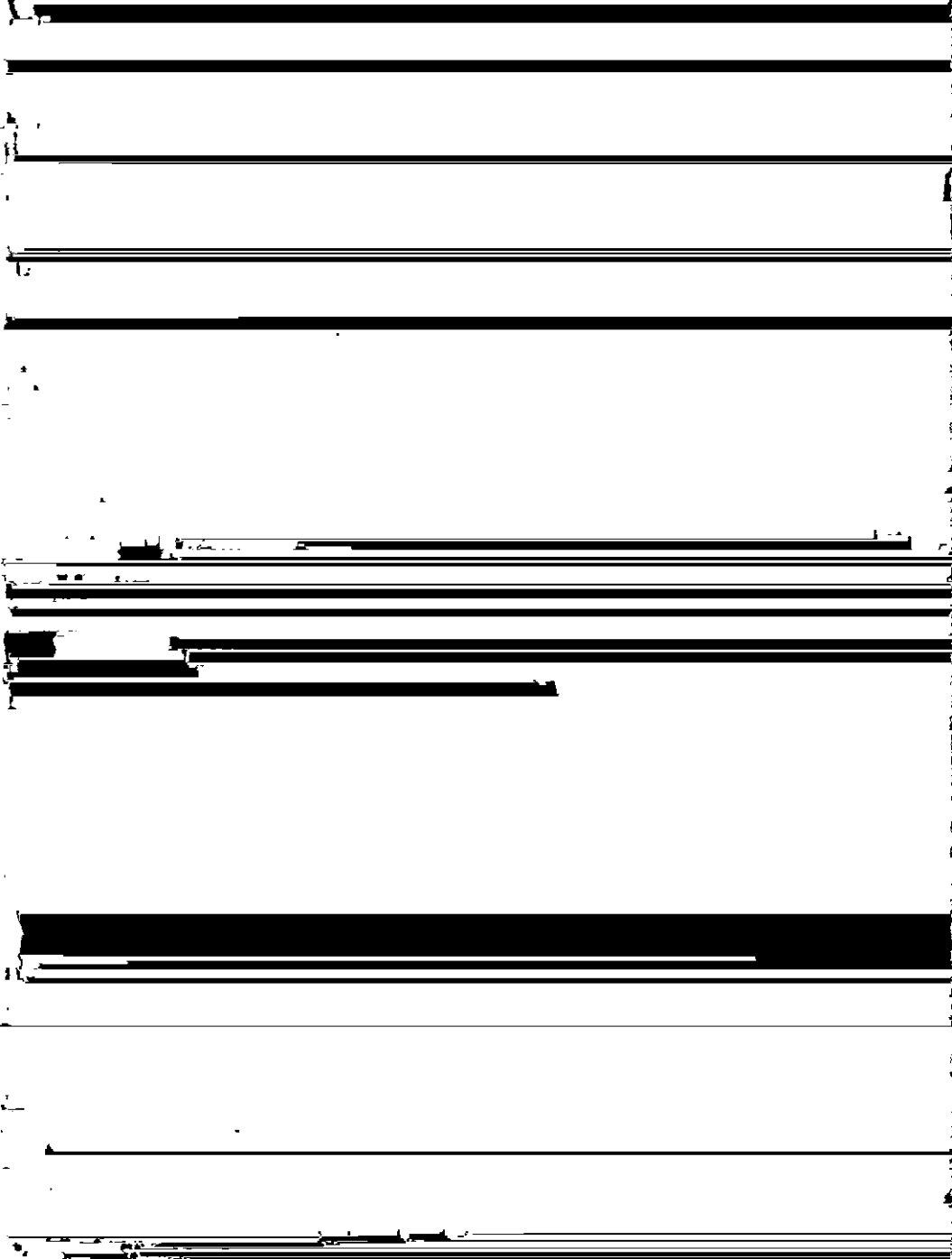
8. "...if any man or woman, being a half-Indian wished to become part of, or attached to any tribe, he or she shall be claimed, and in every respect considered as belonging to that tribe..."
See:- "Resolutions of the Council of Principal Chiefs", Jan. 28, 1836, United Kingdom, 1847, Section III, p. 197.
9. See:- CP, Statutes of Canada (42 Vict. cap. 34), 1879: and (47 Vict. cap. 27) 1884.
10. See:- Macrae Report on Robinson Treaty Annuities, 1898-99. A policy of "Non-transmissible Title" was

remain registered but provided that their children should be struck from annuity payment lists at age 21.

11. "The new bill will end only some of the more obvious forms of sexual discrimination."

no Indian Department." D.C. Scott, Department of
Indian Affairs, 1920 PAC RG10, VOL. 6810, file
470-2-3, vol. 7.

14 C. 10-25(2) For further certainty in subsection



claims themselves were not received by the Office of Native Claims but were rejected two years later on

See:- FMC Doc. 830-143/001, Toronto Feb. 13-14, 1984.

830-143/001 FMC Doc. 830-143/001 FMC Doc. 830-143/001 FMC Doc. 830-143/001

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LIST OF TITLES IN PRINT

Aboriginal Peoples and Constitutional Reform

PHASE ONE

Background Papers

1. Noel Lyon, *Aboriginal Self-Government: Rights of Citizenship and Access to Governmental Services*, 1984. (\$10)
 2. David A. Boisvert, *Forms of Aboriginal Self-Government*, 1985. (\$10)
 3. NOT AVAILABLE
 4. Bradford Morse, *Aboriginal Self-Government in Aus-*
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- tralia and Canada, 1985. (\$10)
5. Douglas E. Sanders, *Aboriginal Self-Government in the United States*, 1985. (\$10)
6. Bryan P. Schwartz, *First Principles: Constitutional Reform with Respect to the Aboriginal Peoples of*

