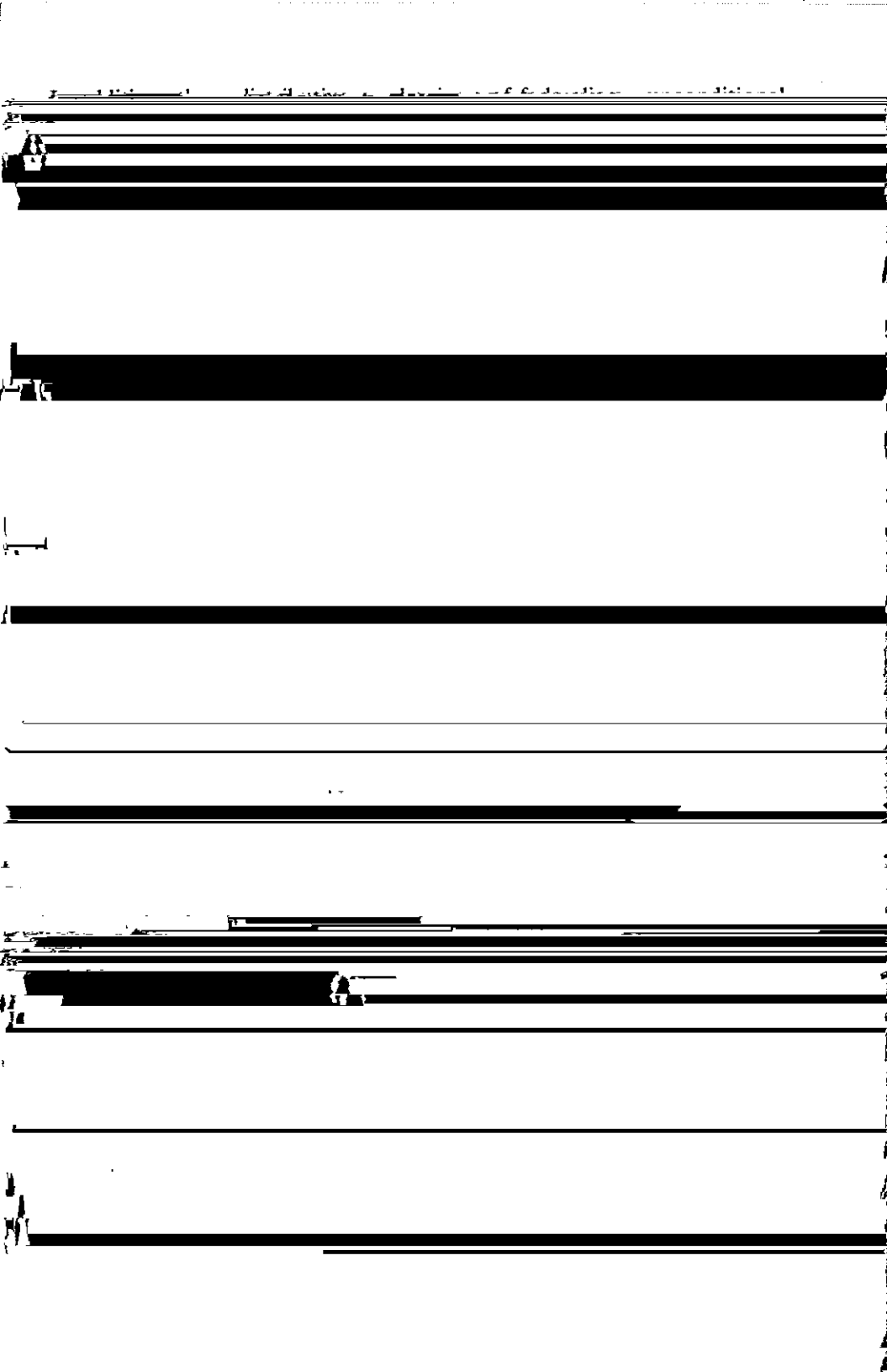


AN EVALUATION OF THE DISCUSSION AT THE WORKSHOP

Kelly Speck

The purpose of this workshop was to discuss the values underlying



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

thesis is that this would be an insufficient accomplishment in the face of an unchanged, inherently conservative court. In his estimation, the current mode of judicial thinking is incapable of reconciling the diversity

or delegated rights. Still others questioned the efficacy of the process

concerns than negotiation imperatives, requiring extensive time, energy
and resources to pursue elusive agreements on abstract levels. Perhaps

condemned as "conservative" perspectives) might provide a more useful framework through which the past five, or indeed, the 20 years might be viewed. A more critical assessment of the changes in policy and attitudes among all concerned parties with the field would be a valuable contribution.

...nificance for chemical needs. This is... ..

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Session IV

1. [REDACTED]

2. [REDACTED]

3. [REDACTED]

4. [REDACTED]

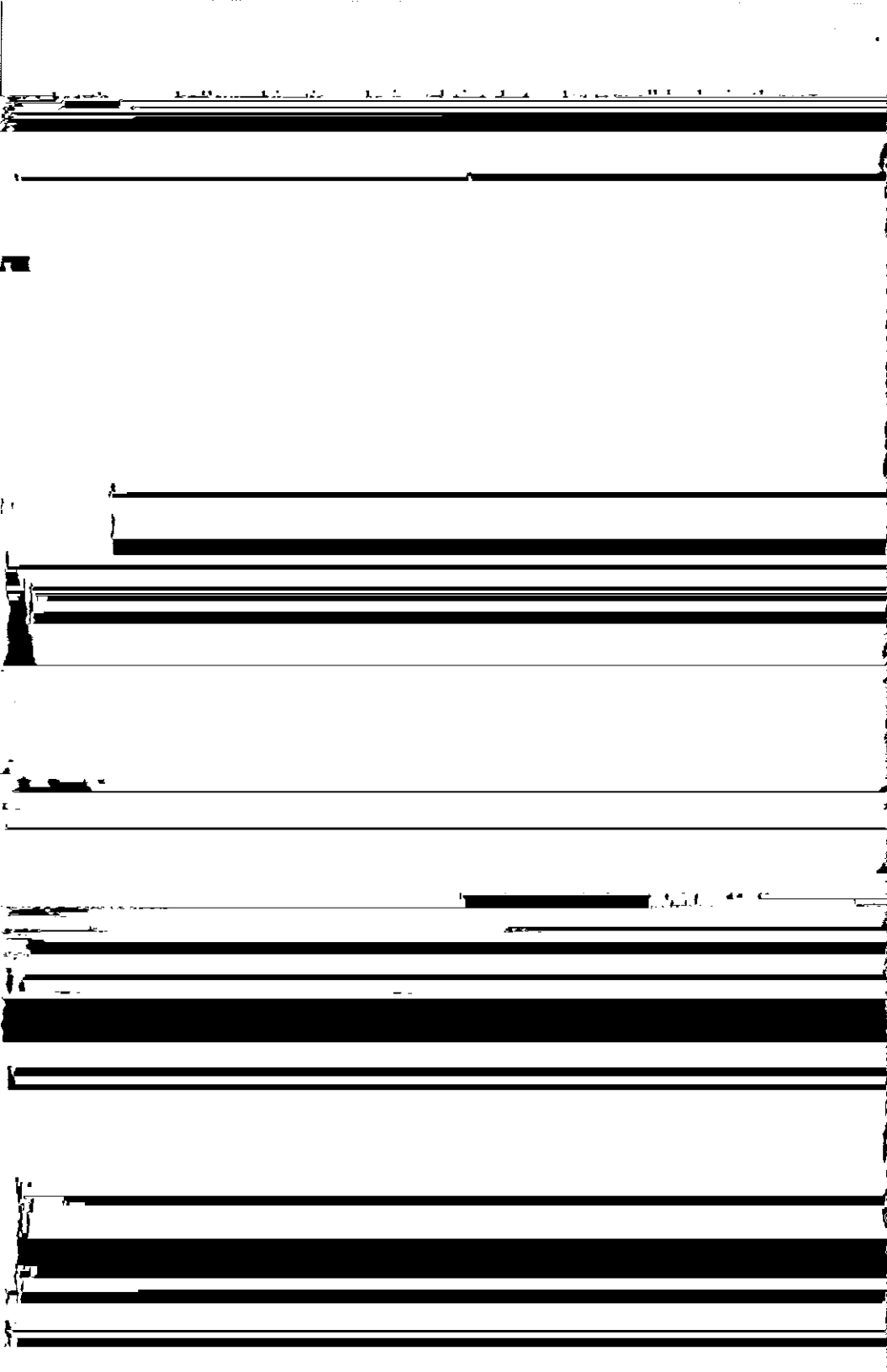
5. [REDACTED]

THE ABORIGINAL SELF-GOVERNMENT AMENDMENT:
ANALYSIS OF SOME LEGAL OBSTACLES

July 11 1987

1.

The last of the constitutional conferences, comprising the Prime Minister, the premiers of the Provinces and the political leaders of the four major aboriginal groups in Canada, that is mandated under Section 37.1(1) of the *Constitution Act, 1982*, will be held in March, 1987. The long period of negotiations relating to constitutional matters directly affecting the aboriginal peoples of Canada that has taken place between 1982 and the present day has served to focus the issues in debate. In particular, the demand for constitutional reform that has emerged



expressing liberationist claims - the story in Exodus of the escape of the Israelites from slavery in Egypt has not been drawn upon in making the

The legal problems are tentacles which keep liberation under the

control of the dominant society, and confine it to the terms that our legal system and political system are familiar with. In fact, the dominantly legal perspective on the self-government claim is the perspective of non-liberation. Having said that, however, it must be, and can be

amount to an alteration in the role of the Government.

[REDACTED]

It is beyond the scope of this paper to deal with each of these problems in detail. Instead, I will look in some detail at the first legal problem identified - the problem of whether the aboriginal self-government amendment as proposed will amount to an amendment of the amending formula.

As already described, the first problem is whether a provision which

section 38) it is necessary to determine the "matter" of an amendment. It is at this point that the distinction between statecraft and adapting the constitution to new legal claims comes into play. If we view the clause under which self-government agreements will be automatically entrenched as part of the implementing device for giving new

whether this derogation of normal governmental power fits the conditions for certain forms of constitutional amendment. But if we view the clause as expressing the autonomous status of aboriginal peoples, analysis based on the impact on existing powers will become beside the point.

It is worth noting that when section 35(3) was added to Part II of the Constitution in 1984, it was not done

But let us take the weakest case. Let us take section 35 (the basic recognition section within Part II) at its most minimal scope. This would entail saying that the word "sovereign" in section 35 means that the

original rights recognized are those found in the

21.

The legal obstacles to a self-government amendment are in some senses quite real, but in other ways they are the product of a failure of imagination on the part of lawyers and politicians.

The diversity of groups involved in these negotiations, and the dazzling array of issues which lie behind the negotiations present immense legal obstacles. The obstacles

point at issue here is whether some matters are best left out of court, to be dealt with by political rather than judicial authorities.

Of course, aboriginal peoples know only too well the dangers inherent in that solution - political failures in the past have spurred aboriginal leaders to demand legally enforceable promises. To the extent that

opportunity, it seems to me that a political compromise may be

If aboriginal rights (including the right of self-government) are to be meaningful as collective rights, they must at a minimum guarantee that the survival of the collectivity, and its essential functioning...

Session V

Financing Issues

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The James Bay and Northern Quebec Agreement provided for the

adoption of self-government legislation which was to replace the *Indian Act* for the Crees of Quebec. This has in fact been done and the *Cree-Naskapi (of Quebec) Act* now provides us with full regulatory power at the community level, control over our local governments, and the ability to assert that we have obtained self-determination and self-government. This legislation was adopted pursuant to an avowed federal recognition of its special responsibility toward the Crees (and toward other Indians) and the legislation itself recognizes this.

all efforts to have that formula approved by Treasury Board, have
misinformed Treasury Board of the nature of the agreement with the
Greens, and have caused a major financial crisis for our communities

If the necessary resources to properly become self-sufficient do not

[REDACTED]

[REDACTED]

[REDACTED]

is necessary for the effective jurisdiction of aboriginal groups to be

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1. Some statement of the right to self-government that is neutral with regard to the issue of whether it is a pre-existing or a new right.

2. A commitment to negotiate toward agreements with "identifiable"

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

is not to say that there must be a similar relationship, or non-relationship, between financing and self-government. The two issues are distinct.

The first relates to the issue of whether sections 91 and 92 are exhaustive or not, and whether self-government is a

local and regional groups can expect to address in the way of fiscal powers and financial transfers; and some clarity about the role of the provinces, where they are involved, in financing the negotiation and outcome of agreements.

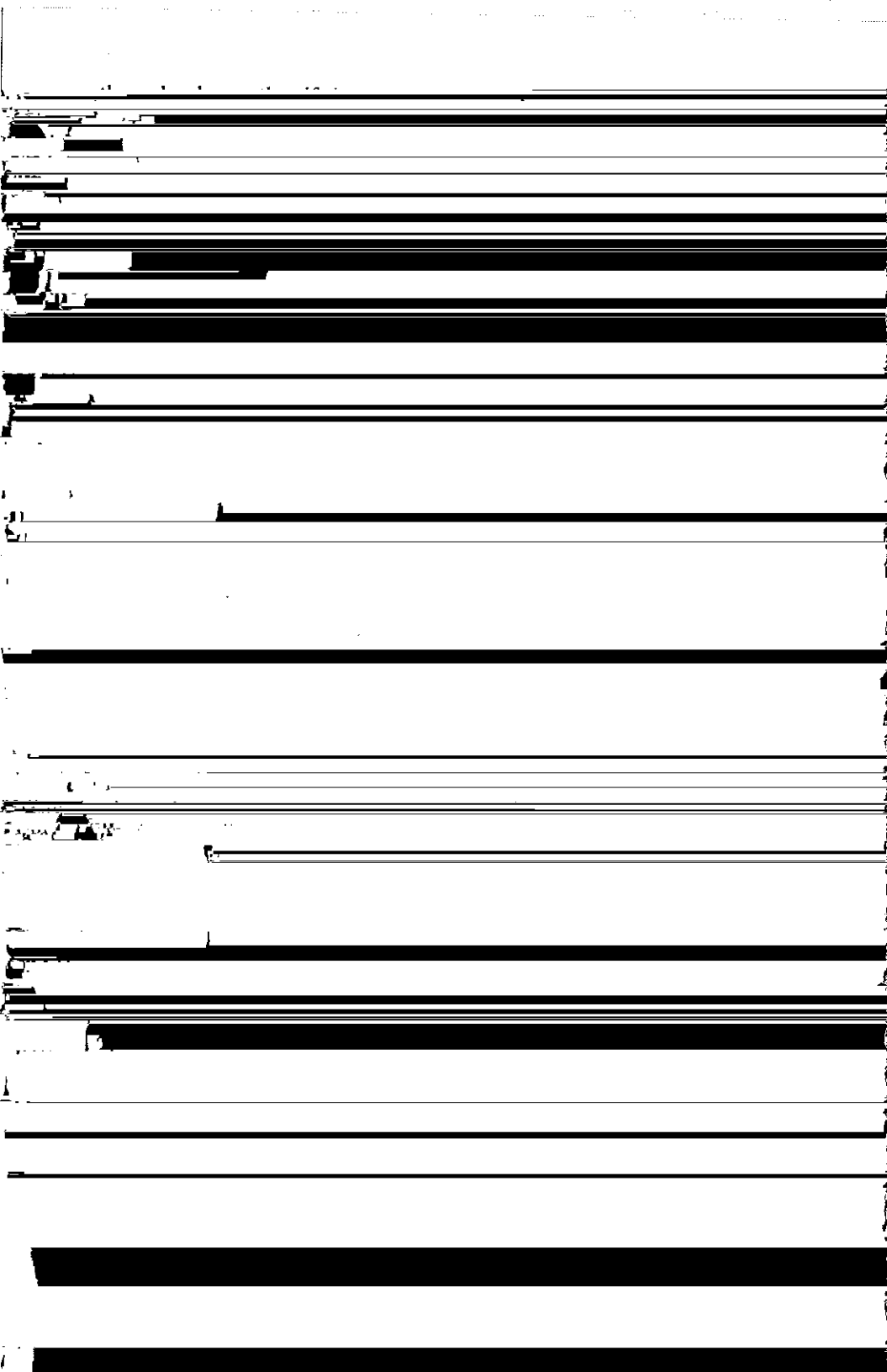
[REDACTED]

Despite the fact that most provinces see the federal government as

[REDACTED]

exclusive federal power under section 91(24) over everything coming out of self-government negotiations. Most provinces believe that some aboriginal self-governments would be exercising at least some of the legal powers that provinces exercise under section 92 (just as bands do now)

[REDACTED]



... level and regional agreements rather than simply

transferring the "who pays" battle down to the level where aboriginal groups are least able to influence the outcome.

... That ...

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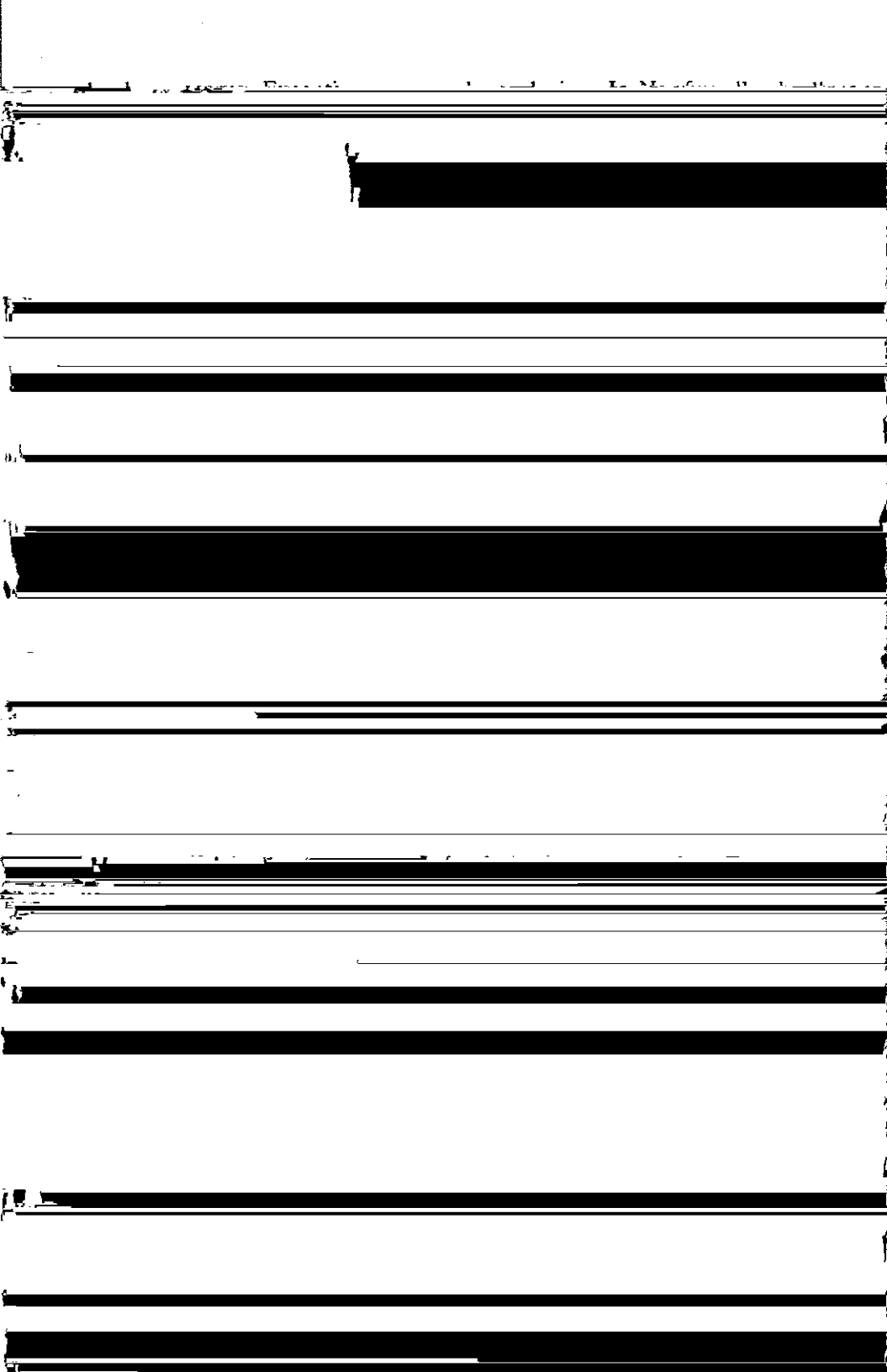
1. A general equalization provision concerning levels of services and autonomous resourcing of aboriginal governments;

3. A process provision.

government has also said that it will not provide any service level

incentives to aboriginal governments that are not provided to other groups who choose not to negotiate self-government. Since MNSI communities now get little or no service support from the federal government, does this mean they can expect none lest this indicate an "unwarranted incentive"? This is surely a peculiar way to reflect a supposed commitment of the federal government to aboriginal self-government.

So far the response of provinces to the proposed equalization approach has been less than coherent. Manitoba has given strong support for a full commitment to both comparability and autonomy. Other provinces, including the Maritimes and even Quebec, have stated support for a simple principle that the federal government has primary financial



Cost-Sharing Options

1. By Group:

a) on-reserve vs off-reserve

the merit of not importing legislative definitions. However, there are no other definitions available. One consequence of going this route would be to force the abandonment of the *Indian Act* regime. It could not survive in the face of any constitutional regime that had to untangle the current reality of Non-Status Treaty Indians, Status Métis, and so forth.

normal range of federal provincial economic development agreements

Avoidance of the issue at the First Ministers' level will only mean a worsening of the climate for negotiations at the local and regional levels. Without an arrangement for essential resourcing, the entrenchment of the right self-government may prove hollow.

My remarks will be very brief. The panelists have covered a good deal of ground and I suspect there are many who are eager to get into the discussion. I confess that after listening to Billy Diamond and Ian Cowie



David C. Hawkes, Discussant

solely dependent upon federal and provincial governments. And there is agreement with respect to public accountability for government expenditures, although some difference in terms of whether aboriginal governments should be accountable to their own members, or to Parliament and/or legislatures.

In terms of addressing the key financing issues, it might be most productive to begin by building agreement in areas where there are shared concerns.

Session VI

Jurisdictional Issues

ISSUES OF JURISDICTION BETWEEN ABORIGINAL AND NON-ABORIGINAL GOVERNMENTS

Ian B. Cowie

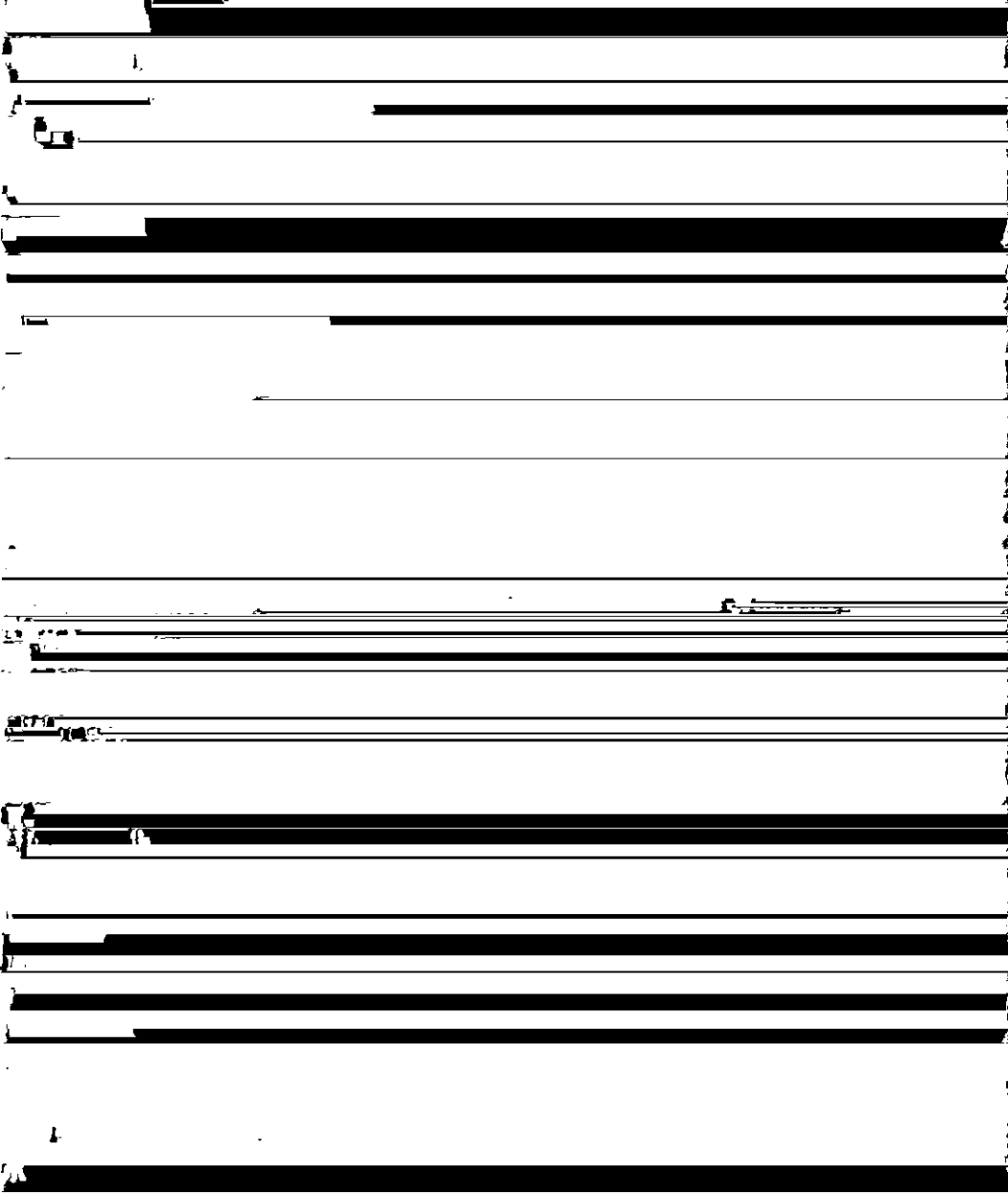
What I was asked to do today is to summarize some of the main points from my background paper for this project, on jurisdictional issues between aboriginal and non-aboriginal governments. Before I do this however, I will make some general observations on the current constitutional process and the financing of self-government. I believe that

Diamond's point of view that it's difficult to be optimistic about the

table. There are continuing attempts to make a "best effort", but the enthusiasm, the real political will to make the fundamental changes required is not there.

For any self-government amendment to be contemplated without some precision of understanding regarding future fiscal relations between federal, provincial and aboriginal governments means that the

will merely restate the kinds of disputes and lack of



Look, this is just another meeting. It's an important meeting but if failure is the result, things will continue on. Things are

My paper does not look at the legal aspects of the current constitutional discussions. It starts with the premise that irrespective of the outcome of the constitutional discussions, there are a variety of opportunities and processes now open to aboriginal peoples for moving forward with the negotiation of self-government. We have concentrated much of our energies on the constitution; now we must translate some of the concepts discussed. A lot of aboriginal communities are now focussing on questions which are constants in a number of negotiation processes - self-government negotiations under a constitutional amendment, negotiating comprehensive claims, or the so-called Indian community self-negotiation policy announced in 1986. The paper tries to identify some of the questions and issues that now confront governments and aboriginal participants in defining the strategies - the policies, the powers, the authorities and the financing requirements of self-government for the future. It says that while we are focussing all of this energy constitutionally, we must become aware that at the

community level, people are grappling with more fundamental questions. It outlines what some of those fundamental questions are, and gives an indication of how people prepare for the substantive negotiations and arrangements required.

anyone's definition. The most comprehensive option is applicable to

conservative options are processes currently underway within the Department of Indian Affairs under the headings of alternative financial arrangements, devolution programs, and the negotiation of sector-specific agreements under current arrangements, whether it be education, child-care, or policing.

related to the social interaction of the people is included here. Third, the

to economics, life-support or wealth creation. This incorporates resource
development, manufacturing activity and taxation. The physical

substantial cost in the sense that provinces pick up a third of State

11

**CONCLUSION - EXPLAINING THE FAILURE
AND LEARNING FROM IT**

Several elements emerged from the analysis...

participants hopeful regarding the outcome of the upcoming First

Ministers' Conference. In terms of their outlook for the March FMC, most participants were of the view that the parties to the negotiations

search for accommodation. However, even the most promising forms of accommodation did not attract sufficient support at the 1997 ERM

It is also the case that many of the government leaders had changed during the constitutional reform process. Compare, for example, the First Ministers' table of 1981 (the time of the patriation debate) with that of 1987 - Trudeau vs. Mulroney, Blakeney vs. Devine, Lougheed vs. Getty, and Levesque vs. Bourassa (who did not attend the March 1987 FMC). We have today a very different cast of characters and some, we would argue, do not share or feel bound by their predecessors' commitments to aboriginal peoples and constitutional reform.

Nor were the aboriginal peoples' organizations at the table without blame. They adopted a negative approach from the outset of the Conference (e.g., their response to the Ontario draft constitutional

... of accommodation and

6

8

1

printing relationship. It was not, as Zebadec Nunatak of the Inuit

of self-government by aboriginal peoples, together with broad public

If we have learned a lesson from this exercise, it is that we need a new framework or lens through which to view aboriginal - non-aboriginal relations. We must look to fundamental values rather than arcane legalism. We must seek to remove a tie that does not belong, and that should not bind. We have in the ideas and values that underlie our

federal system, a framework with the capacity to encourage many communities with different values to flourish.

If legalism is part of the problem, then perhaps federalism is part of

back from the constitutional negotiations and examine, in a comprehensive fashion, the section 37 process and the "failure" of the March 1987 FMC. We need to explore the negotiation process, how it was structured and the issues that emerged, with a view to uncovering



Appendix A
Workshop Agenda

This session will explore the values

DISCUSSANTS:

Ian Stewart, Queen's

Rick Ponting, University of Calgary

David Hawkes, Institute of

Intergovernmental Relations

This session will explore issues such as the

placement and justifiability of a commitment

Appendix B

List of Participants

PARTICIPANTS

PANELISTS & DISCUSSANTS

Ian Cowie

Ian B. Cowie and Associates
Management Consultants

Billy Diamond

Chief Negotiator

Federal Cree Negotiations on Implementation of
James Bay and Northern Quebec Agreement

Grand Council of the Crees

Grand Chief Joseph Nester

Mohawk Council of Kahnawake

Norm Prelypchin
Ministry of Attorney-General

Harvey Schachter
Editorial Department
The Whig Standard

Robert E. Simon
Tribal Director
Shuswap Nation Tribal Council

Kelly Speck
Queen's University

Sam Stevens

[REDACTED]

[REDACTED]

[REDACTED]

University of British Columbia

Inuit Committee on National Issues

Michael McGoldrick
Consultant

Gary Mitchell

[REDACTED]

[REDACTED]

Ontario

Deborah Doxtator
Ministry of Natural Resources

Linda Stevenson
Race Relations Division
Ontario Human Rights Commission

Staff

David C. Hawkes
Project Director

Pauline Hawkes
Conference Coordinator

Peter Leslie

Evelyn J. Peters
Research Associate

Aboriginal Peoples 13

PHASE ONE

Background Papers (second printing)

1. Noel Lyon, *Aboriginal Self-Government: Rights of Citizenship and*

12. C.E.S. Franks, *Public Administration Questions Relating to*

Administrative Law (1927) (1910)