SUBJUGATION, SELF-MANAGEMENT AND SELF-GOVERNMENT OF ABORIGINAL LANDS AND RESOURCES IN CANADA

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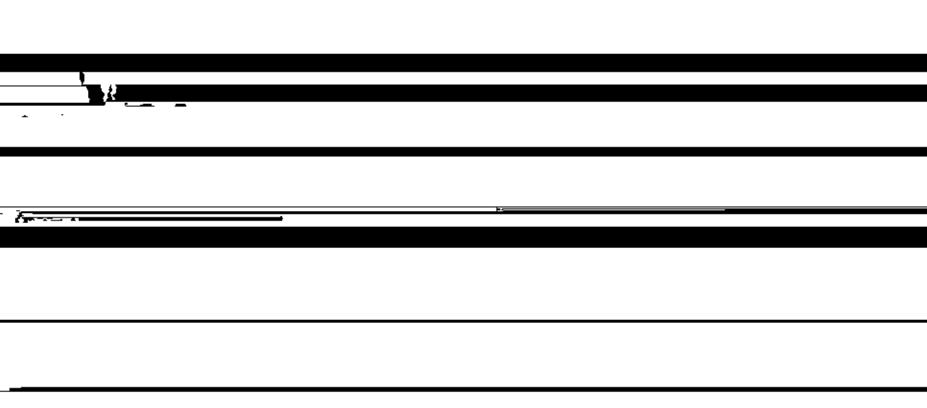

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PREFACE

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." Discussion leading up to and during the First Ministers' Conferences on Aboriginal Constitutional Matters quickly focused on the task of making constitutional

Developments in 1985, subsequent to the First Ministers' Conference, may have a dramatic impact on the

government ministers and aboriginal leaders held in June, 1985, several governments indicated their intention to

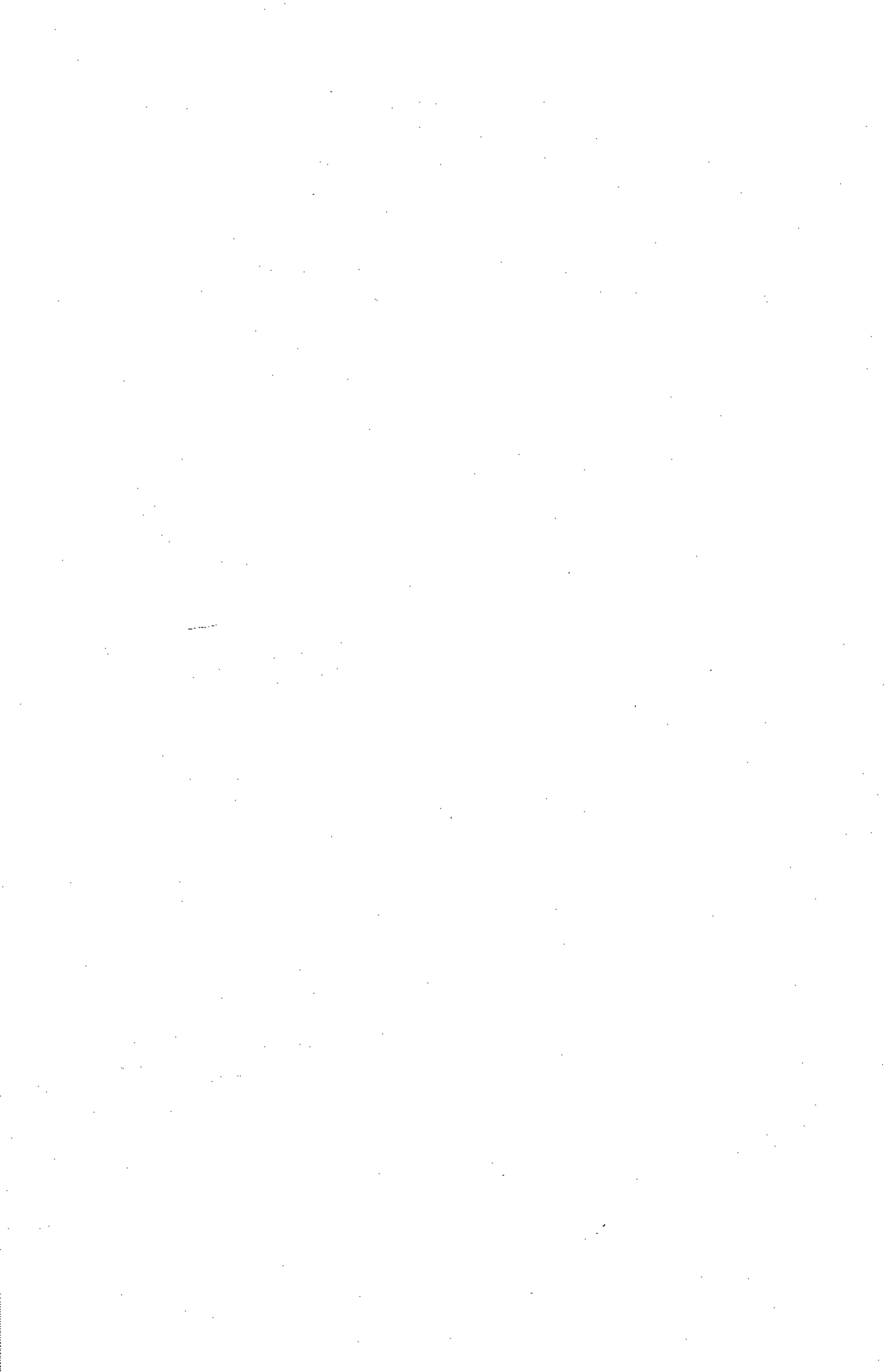
pursue the negotiation of individual self-government agreements, and then to consider their entrenchment in the constitution (the "bottom-up" approach). This contrasts with the proposal which has thus far

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 Quebec, the Government of Alberta, the Government of Manitoba, the Government of New Brunswick, the Government of Yukon, the Assembly of First Nations, the

Council and the Native Council of Canada.

The extent of aboriginal control in various policy sectors is not well documented. Richard Bartlett's paper on *Subjugation, Self-Management and Self-Government of Aboriginal Lands and Resources in Canada* provides a comprehensive review of the existing control (or lack



ABSTRACT

The paper provides a survey of the law respecting self-government of aboriginal lands and resources. An aboriginal community is considered to be self-governing

actuels fédéraux et provinciaux ont subjugué terres et ressources autochtones. Aujourd'hui des accords incluant le James Bay Agreement et le Cree-Naskapi (of Quebec) Act, le Sechelt Indian Band Self-Government Act et le Inuvialuit Final Agreement (Western Arctic) fournissent une méthode d'"auto-gestion" et de gouvernement municipal et non pas d'autonomie politique.

1. SUBJUGATION, SELF-MANAGEMENT AND SELF-GOVERNMENT

It is we who must protect

(2) the nature of the rights possessed with respect to lands and resources.

It is also necessary to offer some preliminary indication of the meaning to be accorded to terms, in particular "self-government". The following meaning, and pattern of evolution, is suggested:

a. Subjugation

- no or little protection from "interference and intimidation" under other governmental authority, and the invasion of aboriginal lands
- no or few powers to administer land and resources

b. Self-management and municipal government

- little protection from "interference and intimidation"
- the power to administer aboriginal land and resources as any other owner but subject to "general laws of application"; citizens, but not "citizens plus".
- "self-management" is a term chosen by the Liberal-Country Federal Government of Australia to describe its policy in 1978:

> In essence, the policy of self-management

> and communities, be in a position to make

The term "aboriginal self-government" will accordingly be considered appropriate with respect to an aboriginal community that is not subject to the requirements or demands imposed under the constitutional authority of other governments, and which is fully empowered to act with respect to the administration of aboriginal lands and resources. Such powers should include:

by the Federal Government on Federal lands, the Inuvialuit, are considered seperately.

2 THE DENIAL OF SELF-GOVERNMENT BY THE FEDERAL GOVERNMENT: SUBJUGATION UNDER THE INDIAN ACT

exclusive jurisdiction upon the Federal Government in relation to "Indians and lands reserved for Indians". The

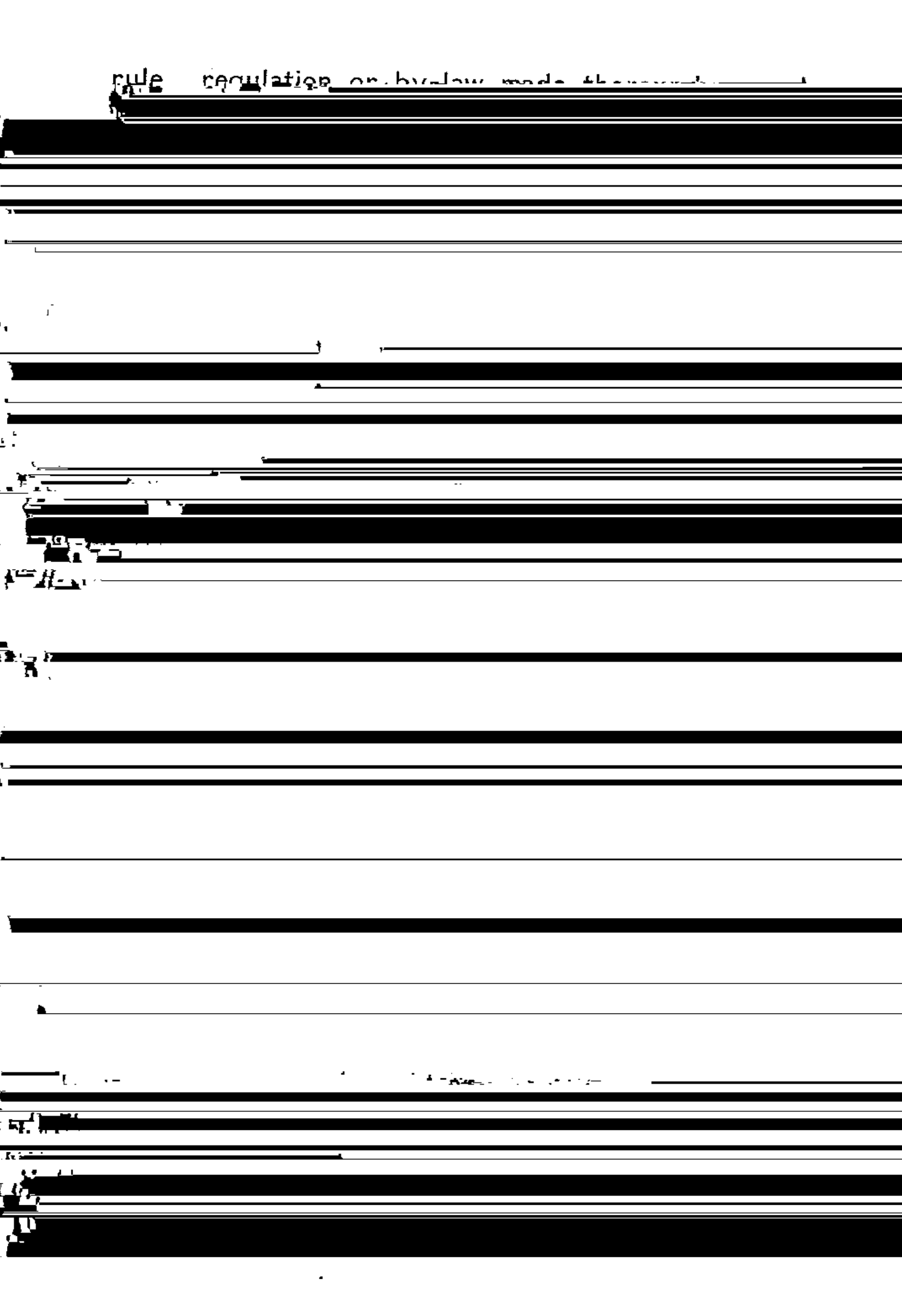
for Indians: *Cardinal v. Attorney General Alberta.*[4]

The Federal Government is generally fettered only by section 25 of the *Constitution Act, 1982* in its ability to

legislate with respect to "Indians and lands reserved for Indians". Indians and Indian lands are subject to the entrenched jurisdiction of the Federal Government. The *Constitution Act, 1867* made no provision for Indian self-government.

In the absence of special provision, federal laws of general application apply to "Indians and lands reserved for Indians". Thus the federal *Income Tax Act* is

applicable on Indian reserves. The operations of a non-Indian or any corporation on a reserve are fully subject to such tax. The reach of such federal laws of general application is a dominant factor in the denial of aboriginal self-government of reserve lands and resources.



In *R. v. Dick* the Supreme Court of Canada thereby recognized that section 88 was not a mere statement of provincial jurisdiction that would in any event exist, it was a deliberate grant of jurisdiction to Provinces over Indians and their lands.

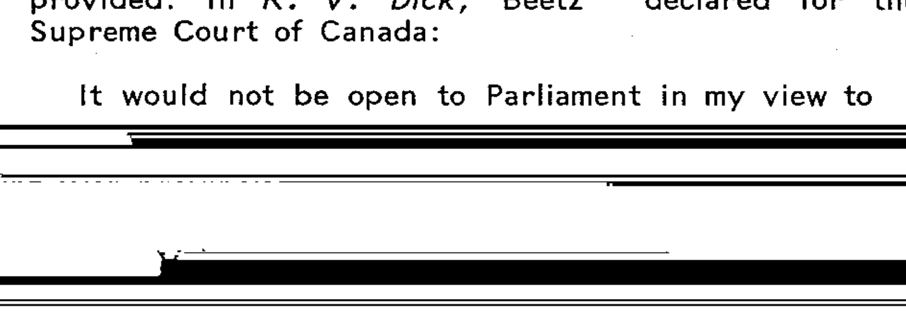
Section 88 applies provincial laws of general application "to Indians". It does not refer to "lands reserved for Indians", but it must be recognized that the application of provincial laws to "Indians" must to some degree regulate the use of reserve lands. The most obvious instance is with respect to access. The application of provincial child welfare legislation on reserves necessarily confers rights of access on provincial child welfare offices.

It is unsettled to what extent section 88 applies provincial laws to Indian lands and resources.[8] It may be that provincial laws are inapplicable despite section

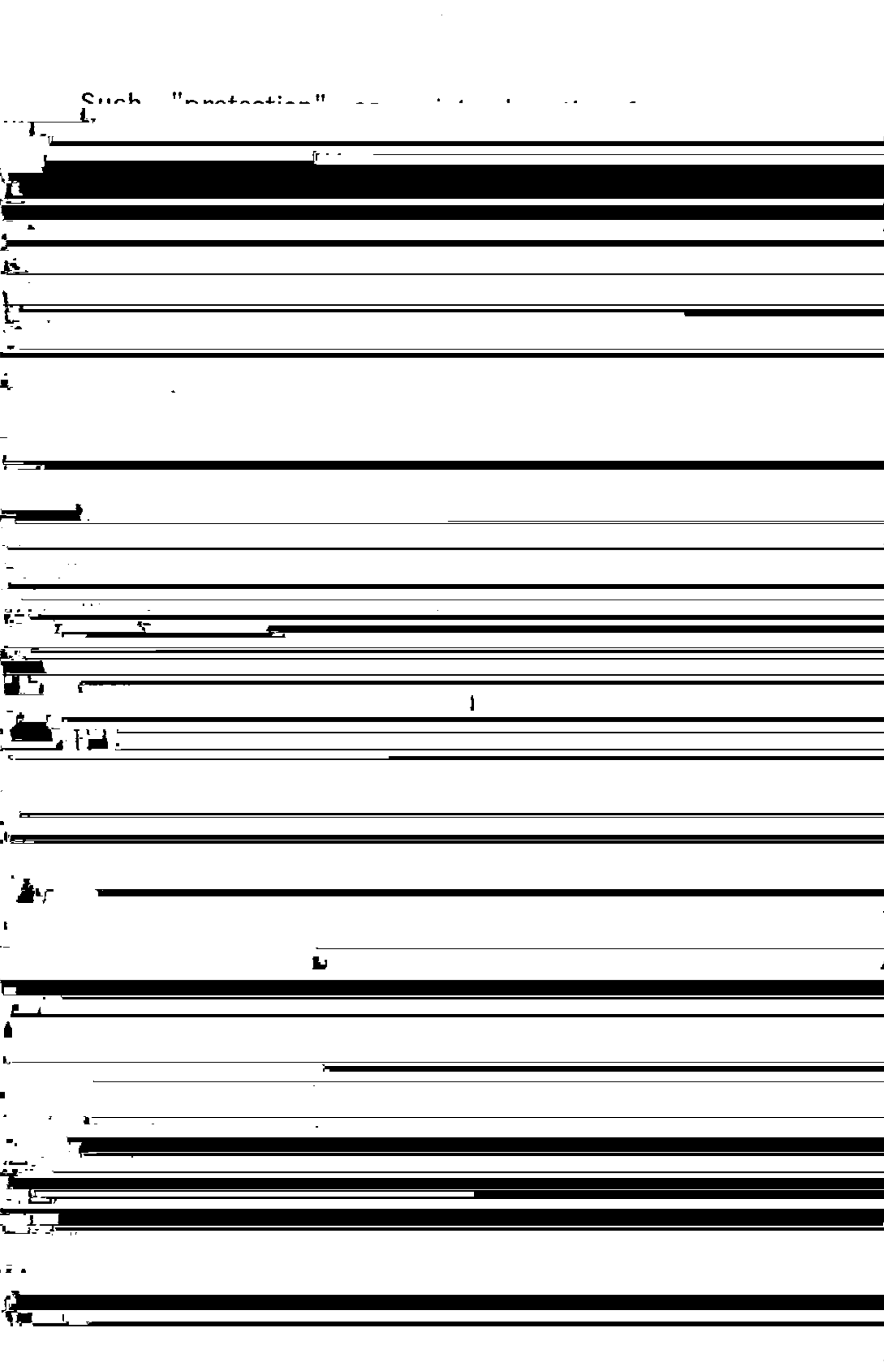
Local, property taxes are construed as a tax upon the occupier's interest and not upon the land itself, despite the reduction in "the power of the Federal Government and the band council to control and direct economic development activity on Indian reserve land". Macdonald J.A., for the British Columbia Court of [illegible]

provided. In *R. v. Dick,* Beetz[13] declared for the Supreme Court of Canada:

It would not be open to Parliament in my view to



simply because the Indian Act occupied the field. Operational conflict would be required to this end. But Parliament could validly provide for any type



Such "protection"

construction of roads, bridges, ditches and fences. No reserve or portion thereof including minerals, might be disposed of without a surrender. Upon such surrender the Act provided that the lands should be "managed, leased and sold as the Governor-in-Council may direct, subject to the conditions of surrender". The Superintendent General was empowered to issue licenses to cut timber in accordance with the regulations established by the Governor-in-Council, and to remove timber, hay, stone and gravel with the consent of the band, without a surrender. "Proceeds arising from the sale or lease of any Indian lands, or from the timber, hay, stone, minerals or other valuables thereon, on a reserve" were directed to be "paid to the Receiver General to the credit of the Indian fund." The band council was empowered to make rules and regulations, but subject to confirmation by the Governor-in-Council, and only with respect to cattle trespass, maintenance of roads, bridges, ditches and fences, and the allocation of lands on the reserves.

The above-described provisions remain almost entirely unchanged to the present. The band council still has little power to control or administer reserve lands. Such power continues to be vested in the Minister of Indian Affairs. In some instances, the powers vested in the Minister of Indian Affairs have become more extensive or have become more detailed.

i. Land use

The Minister may direct the use of reserve lands for schools, administration, burial grounds, health projects, and with the consent of the band council, for any other purpose for the general welfare of the band. He may survey and subdivide the land, and direct the construction of roads that the band must maintain in accordance with his instruction. If land is uncultivated

Recognition of the management prerogative of the

by individual band members under Certificates of Possession without band council consent or surrender. The Minister has issued successive one year permits. Band council consent is only required for longer term permits, or where the leased lands are held by the band in common.

iii. Land allotment to members

The only significant power of the band council under the

possession of that land to band members. Such allotments are, however, subject to the approval of the Minister. The Minister issues a Certificate of Possession when

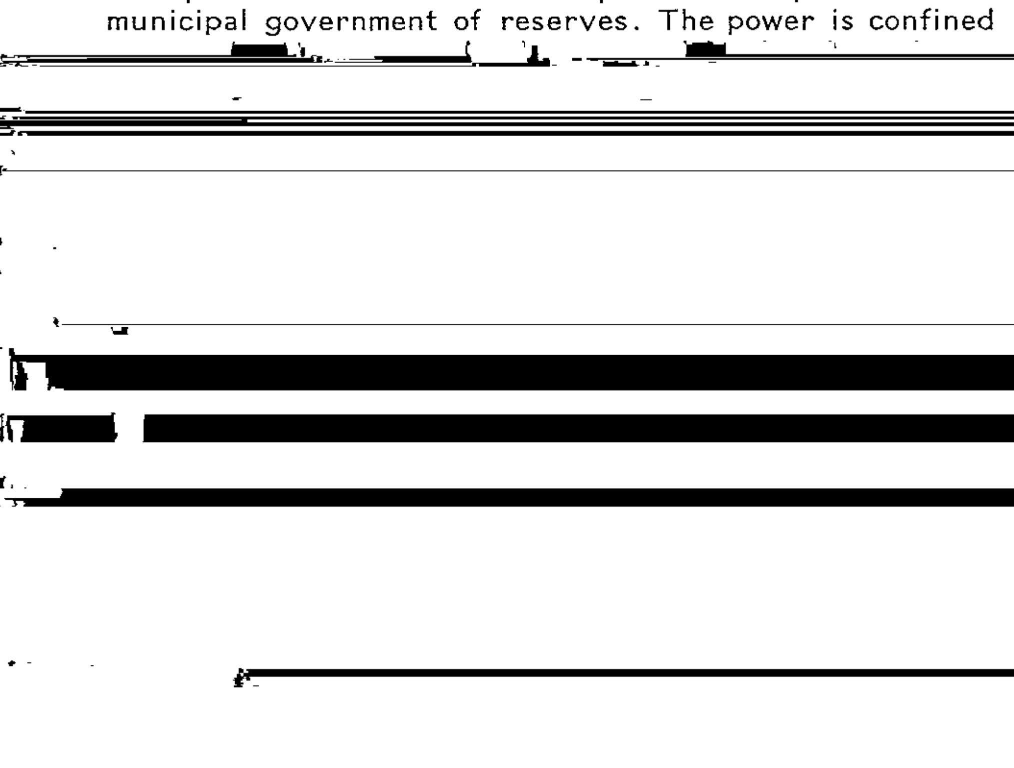
iv. Residence

The amendments to the *Indian Act* of 1985 authorized the Band Council to make by-laws with respect to "the

(1) (a) the raising of money by

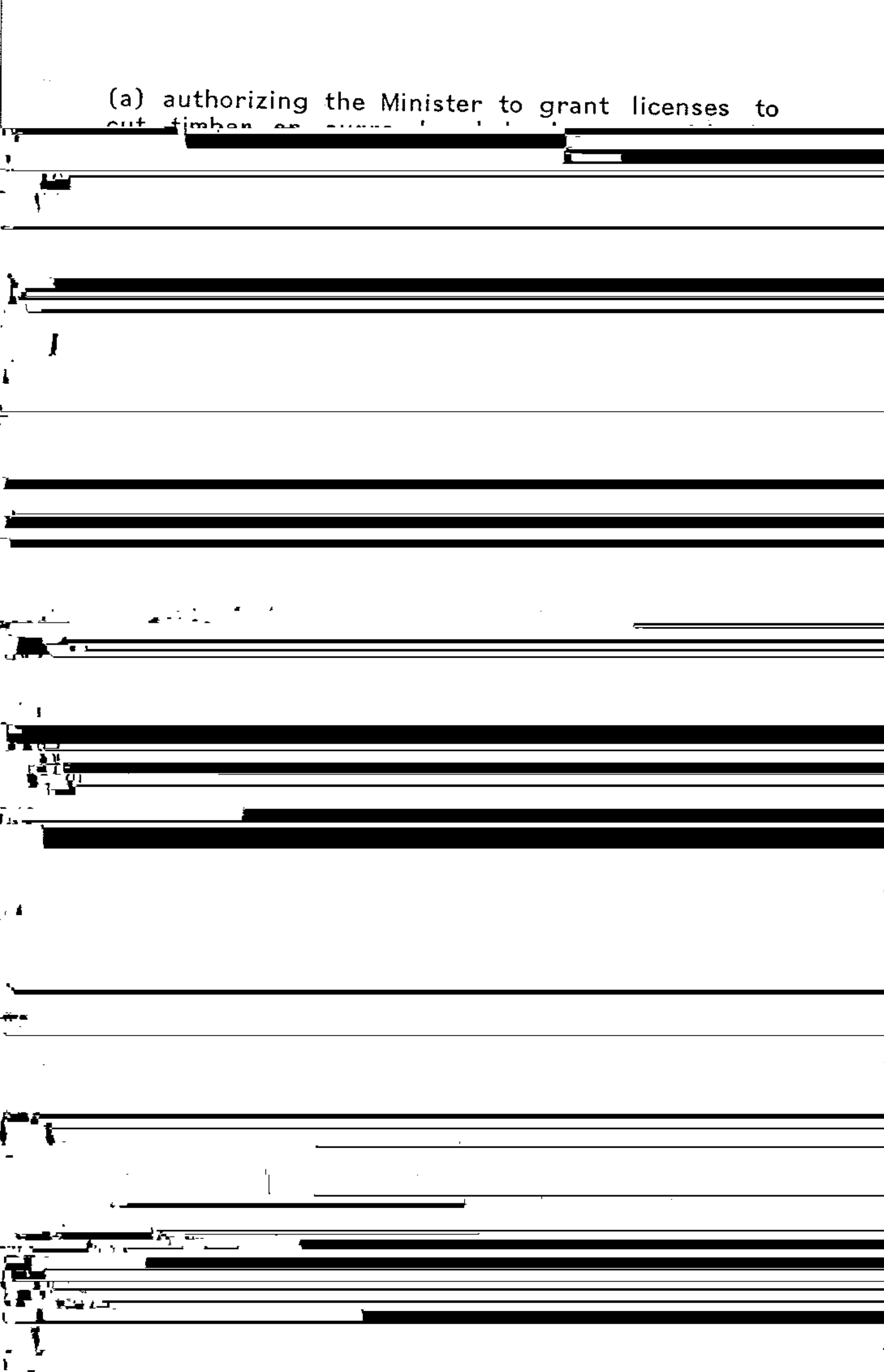
(i) the assessment and taxation of interests in land in the reserve of persons lawfully in possession thereof...

The power was introduced as part of the provision for municipal government of reserves. The power is confined



and accordingly does not enable Band control of

(a) authorizing the Minister to grant licenses to

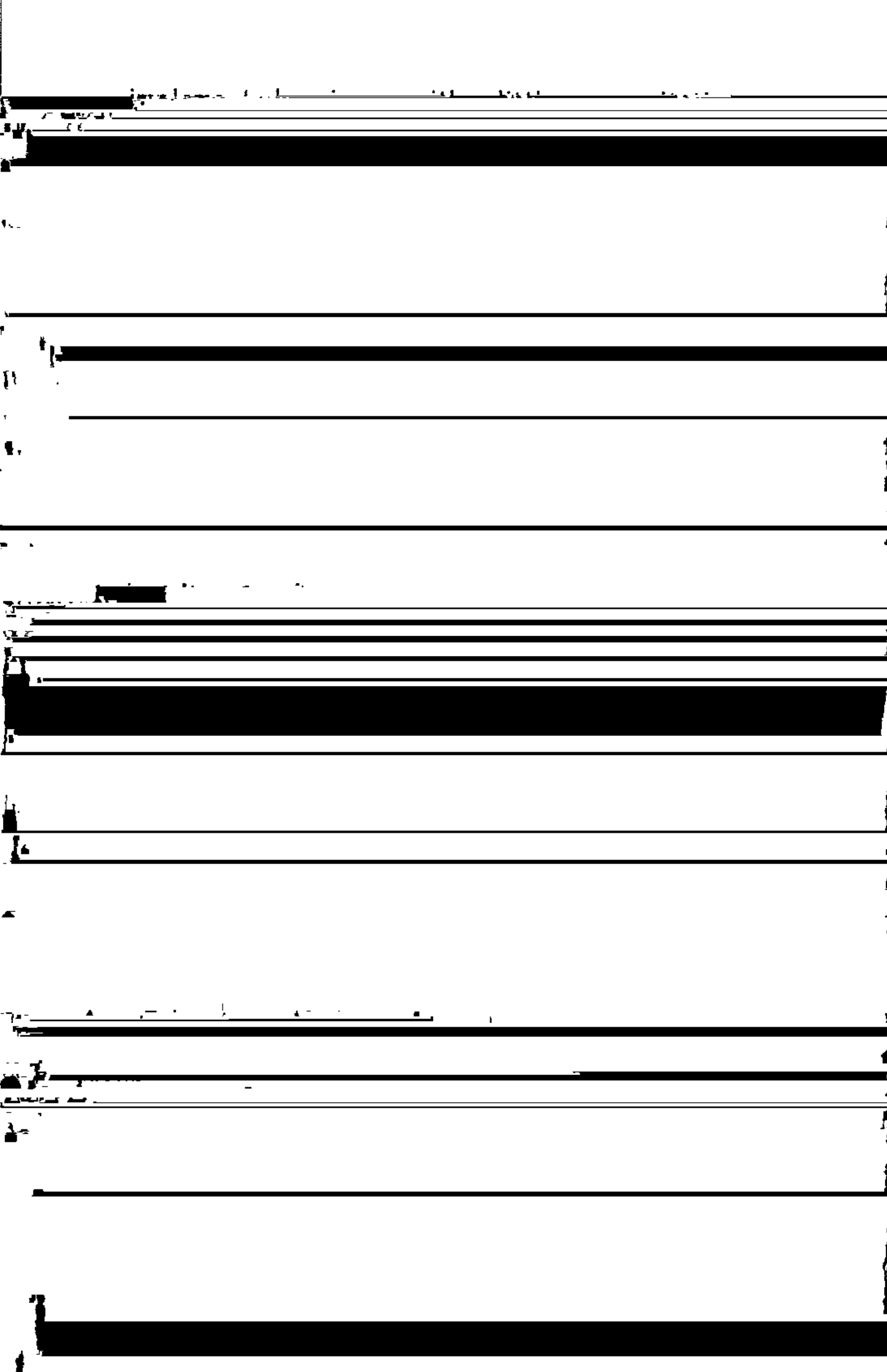


repeatedly over a long period without any change

in price.

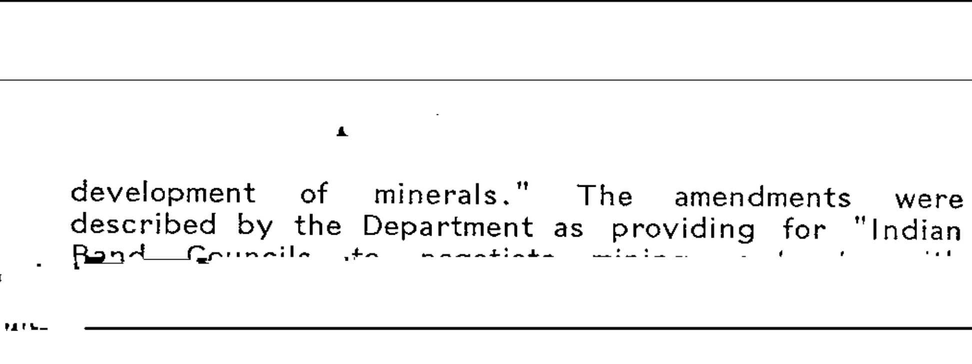
The management of forest lands on reserves, in addition to the issuance of rights to cut timber, is vested in the

which trees are to be left standing, may consent to removal before payment of dues, may require compliance with provincial laws, and generally administers the terms and conditions of licences. The Minister may forfeit the



but it gives the holder no prior right to a permit or lease. The main reason for the change is to secure revenue for the Indians in the disposal of mining rights, something that did not occur under the former Quartz Mining Regulations.[27]

In 1968 the regulations were amended to provide a more flexible regime for the disposition of minerals, and to



development of minerals." The amendments were described by the Department as providing for "Indian

treatment and marketing of minerals and do not conflict with these Regulations.

Regulation 4 would require compliance, inter alia, with provincial laws regarding the environment, health and safety, and marketing. The Department has apparently

Nigel Bankes has oberved that "Indian Minerals generally advises bands not to negotiate".

a) Indian minerals takes the view that it would be difficult to improve financial returns to the bands from the royalties and cash bonuses provided for by the regulations. Negotiation would likely compromise a strong bargaining position based on royalties established by statute.

b) The tender method does permit a certain amount of flexibility by attaching terms and conditions to the lease.

(d) unless otherwise directed by the Minister in writing, the applicable laws of the province in which a contract area is situated and with any orders or regulations made from time to time thereunder relating to the environment and the exploration for, devlopment, treatment, conservation and equitable production of oil and gas.

The provision thereby imposes provincial standards relating to the environment, health and safety, methods of exploration, ...

"conservation and equitable production". The latter requirement subjects Indian oil production to the "allowable level of production" set by the Energy Resources Conservation Board of Alberta and the Department of Energy and Mines of Saskatchewan.

The *Indian Oil and Gas Act* does not contemplate the administration and disposition of the oil and gas by the bands, but by the Department. Section 7 declares that the Minister of Indian Affairs "in administering this Act, shall consult, on a continuing basis, persons representative of the Indian bands ...

e. Wildlife

The *Indian Act* affords some potential for the management

the Minister and the Governor-in-Council on Indian reserves outside the Prairie Provinces.

Paragraph 73(1)(a) of the *Indian Act* provides that

In *R. v. Baker*,[38] in the British Columbia County

D. Summation

The subjugation of Indian lands and resources under the Indian Act has three elements. Firstly, the denial of protection from governmental intrusion. The Federal Government has jurisdiction to legislate with respect to

3 THE DENIAL OF SELF-GOVERNMENT BY THE PROVINCES: SUBJUGATION UNDER EXISTING CONSTITUTIONAL AGREEMENTS

The exclusive federal jurisdiction over "Indians and lands reserved for Indians" has not discouraged the Provinces

controversies; ... we therefore advise, that, as far as possible, the Aborigines be withdrawn from its control.

This recommendation was accepted in Canada. The

grant of federal jurisdiction with respect to "Indians"

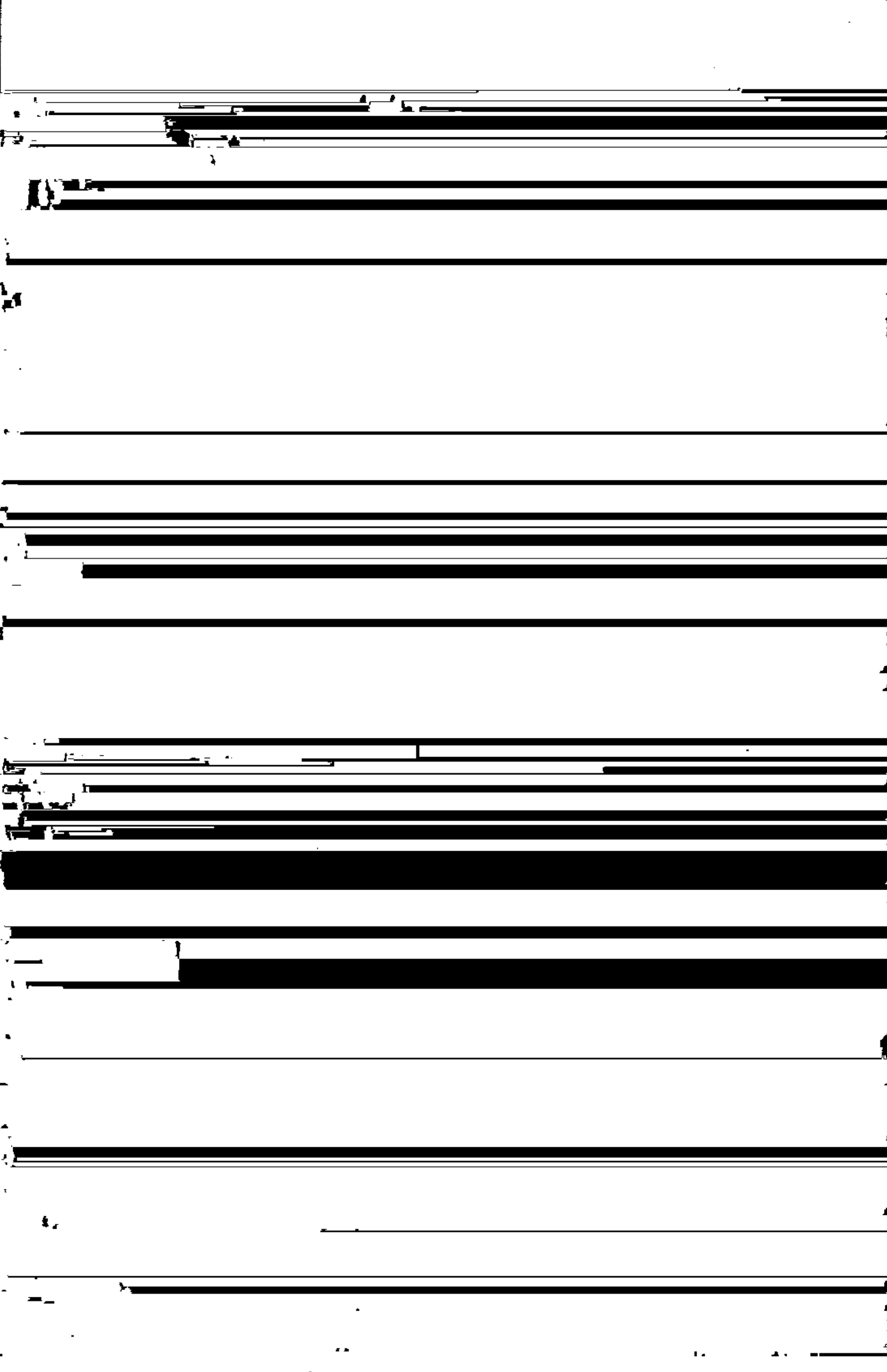
and in the Prairie Provinces the need to treat with respect to aboriginal title was recognized, albeit the Provinces still asserted the limits of the Indian interest. In the Maritimes reserves were established at Confederation and the need to secure Provincial agreement to set apart reserve lands was absent.

The effect of the Federal-Provincial agreements upon Indian self-government of lands and resources may generally be described as establishing provincial

including a right to sell the said lands and fund or use the proceeds for the benefit of the Indians."[43]

The conveyances, however, reserved certain powers to the Province:

- the right to resume one twentieth of the land for

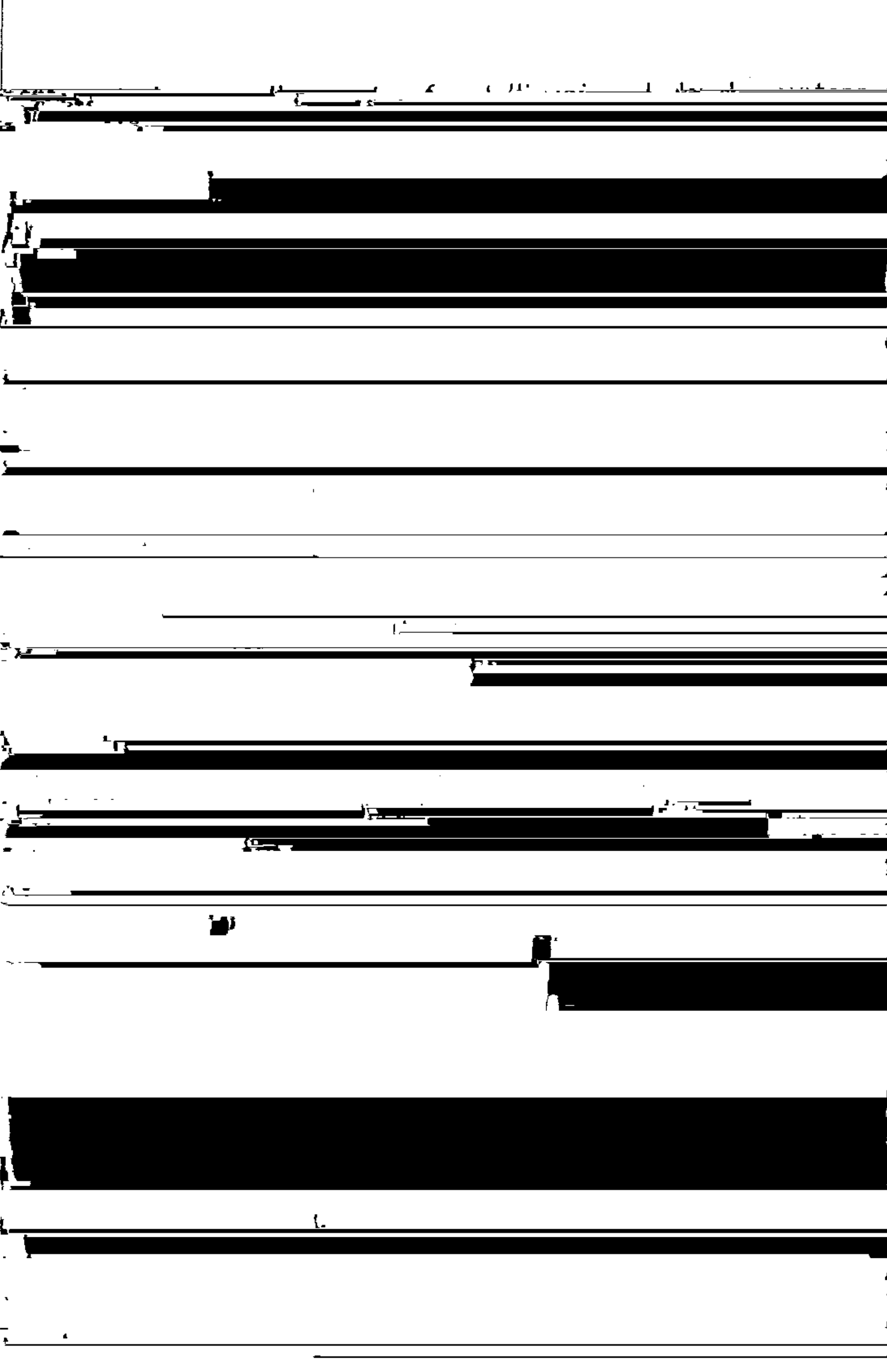


The Federal Government is entitled to only one-half of such revenues for the benefit of the band.

> 6. The scale of fees, charges, royalties and other sources of revenue relating to the prospecting, staking, recording, leasing, selling or otherwise disposing of or dealing with minerals and mineral claims on Indian reserves in the said Province, in force at the date of this Agreement shall not be reduced without the consent of the Governor-General-in-Council.

The Manager, Lands Division, Indian Minerals (West) has explained:[45]

> Since B.C. depends largely on a mineral tax for revenues, and these taxes are not considered to be subject to the fifty per cent split, bands could



but if any time an Indian Agent is not appointed for the reserve, the powers and duties exercisable

underlying the Reserve and all claims and rights thereto shall be shared equally between Canada for the use and benefit of the Band, and the Province.

The Agreement endeavours to ensure the access of oil and gas developers to the reserve. Neither the Federal

apart in the "public lands" of the Province and the

on a reserve may only be disposed of upon agreement with the Province. In the event of the extinction of a

disposition, and the entitlement of the Indians to all proceeds thereof.

And:

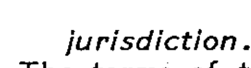
There is no agreement with the Province of Quebec, which claims complete jurisdiction over mineral development once a band surrenders its interest in on-reserve minerals. We are presently establishing the departmental position so that an

a substantial diminution of provincial powers over public lands and suggest the need for a treaty or agreement between the province, the Federal Government and the Indians to provide for the management and development of reserve and other lands.

Future agreements, demanded by the need to provide for aboriginal title, will undoubtedly seek to eliminate Provincial powers and interests over reserve lands and resources, and to that extent promote self-management and self-government.

4 SELF-MANAGEMENT AND MUNICIPAL GOVERNMENT

issuance of an injunction restraining development by the Province in Northern Quebec. The Agreements provide for the surrender of aboriginal title by the Cree-Naskapi and Inuit of the region. The Inuit, the Cree, the Government of Quebec, the Government of Canada, and the provincial crown corporations engaged in the development were parties to the James Bay Agreement. The Naskapi, the Government of Quebec and the Government of Canada were parties to the Northeastern



jurisdiction.

The terms of the Agreements are entrenched and given legislative and constitutional authority by parallel federal and provincial legislation and section 35 of the Constitution. If the Agreements declared the abrogation of federal and provincial authority over aboriginal lands

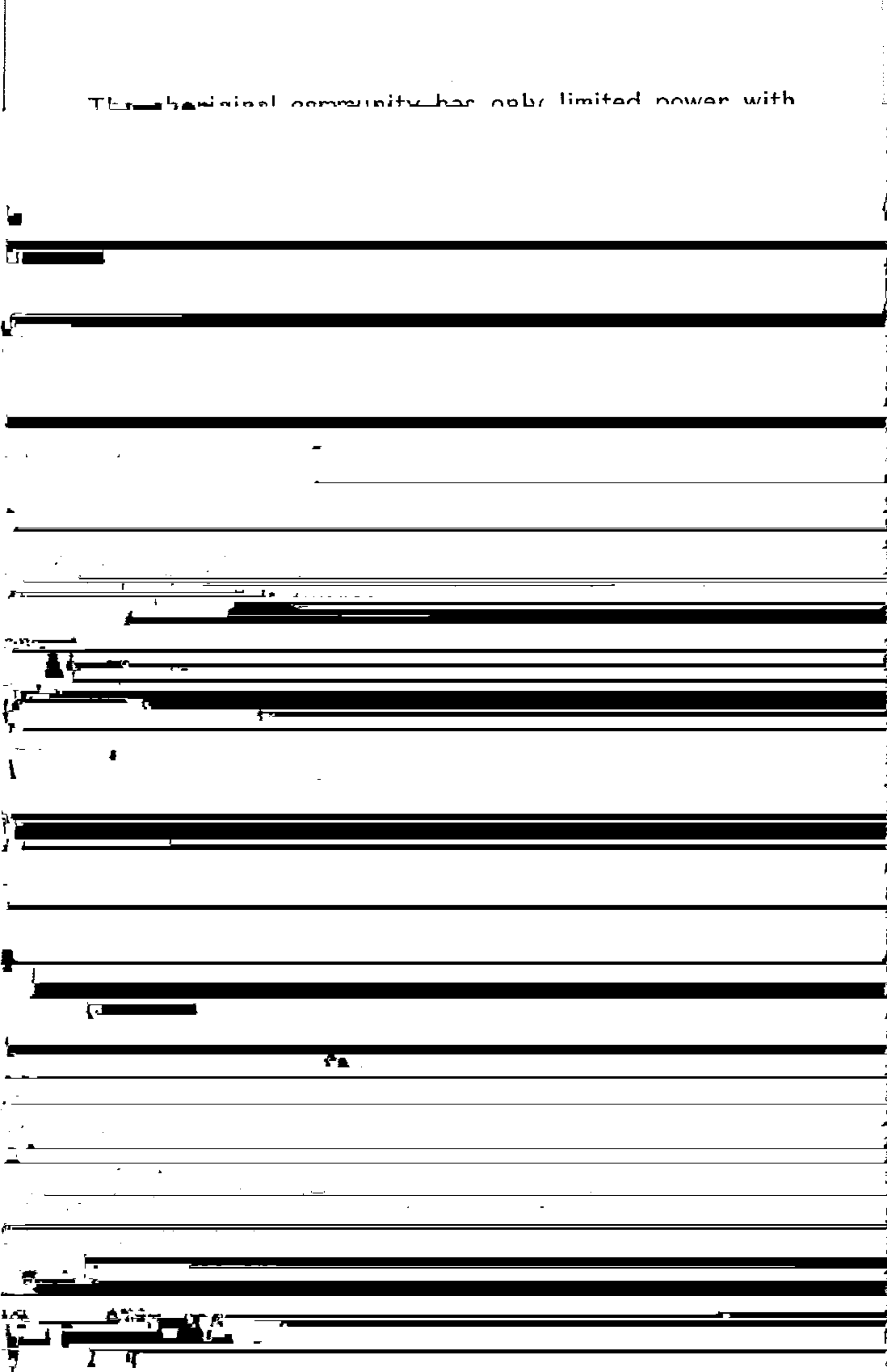
such would be entrenched. The Agreements do not deny

ii. The denial of land and resources and the limited security of tenure

The *James Bay Agreement* provided a per capita allocation of approximately 210 acres to the Cree, and one square mile to the Inuit. Such allocations amount to

Lands subject to existing mining interests are Category III lands, and subject to provincial administration exclusively.

A permit must be obtained from Quebec to use "gravel



The aboriginal community has only limited power with

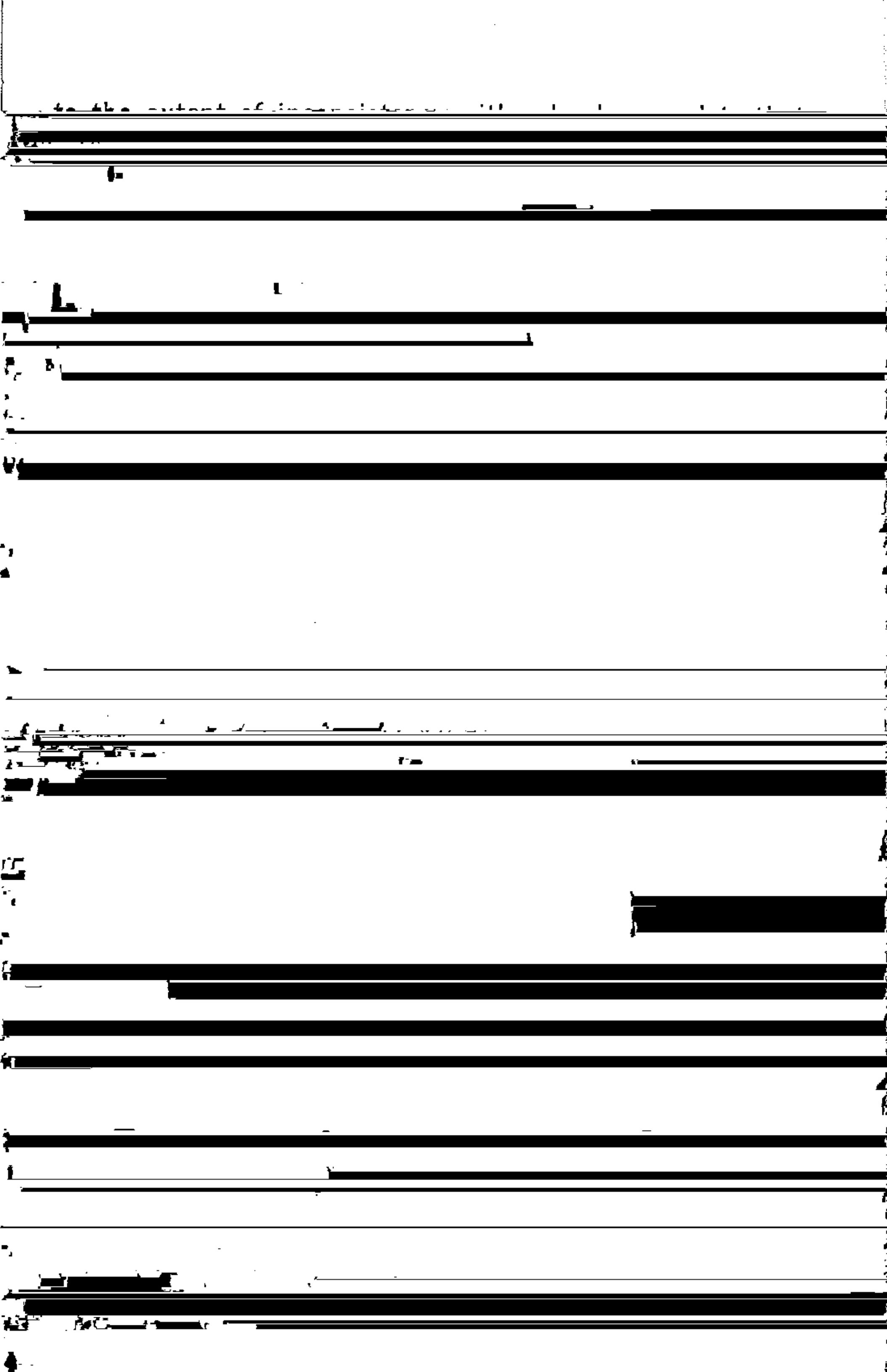
"corporations of a municipal character", and the Act provides for the application of the provincial *Cities and Towns Act*. In accordance with the Agreement, the Act does provide for the power to make by-laws respecting the protection of the environment and the "protection and use of natural resources, but such by-laws are subject to the approval of the Province, must not restrict existing development or developments outside the municipality, and must be more stringent than the laws otherwise applicable."

Further, such special powers to make by-laws are subject to the ownership by the Province of sub-surface resources and provincial legislation respecting resource

are, of course, excluded from Category I lands.

The Cree Regional Authority, created by provincial

The powers are clearly more extensive than that contemplated by the *Indian Act*. But they remain "local" and "municipal" in character. Moreover, the Agreement contemplated "general powers of the Minister of Indian Affairs ... to supervise the administration of Category



limited by the power of the Province to control resource development, and by the responsibility of the Federal and Provincial Governments for the protection of wildlife.

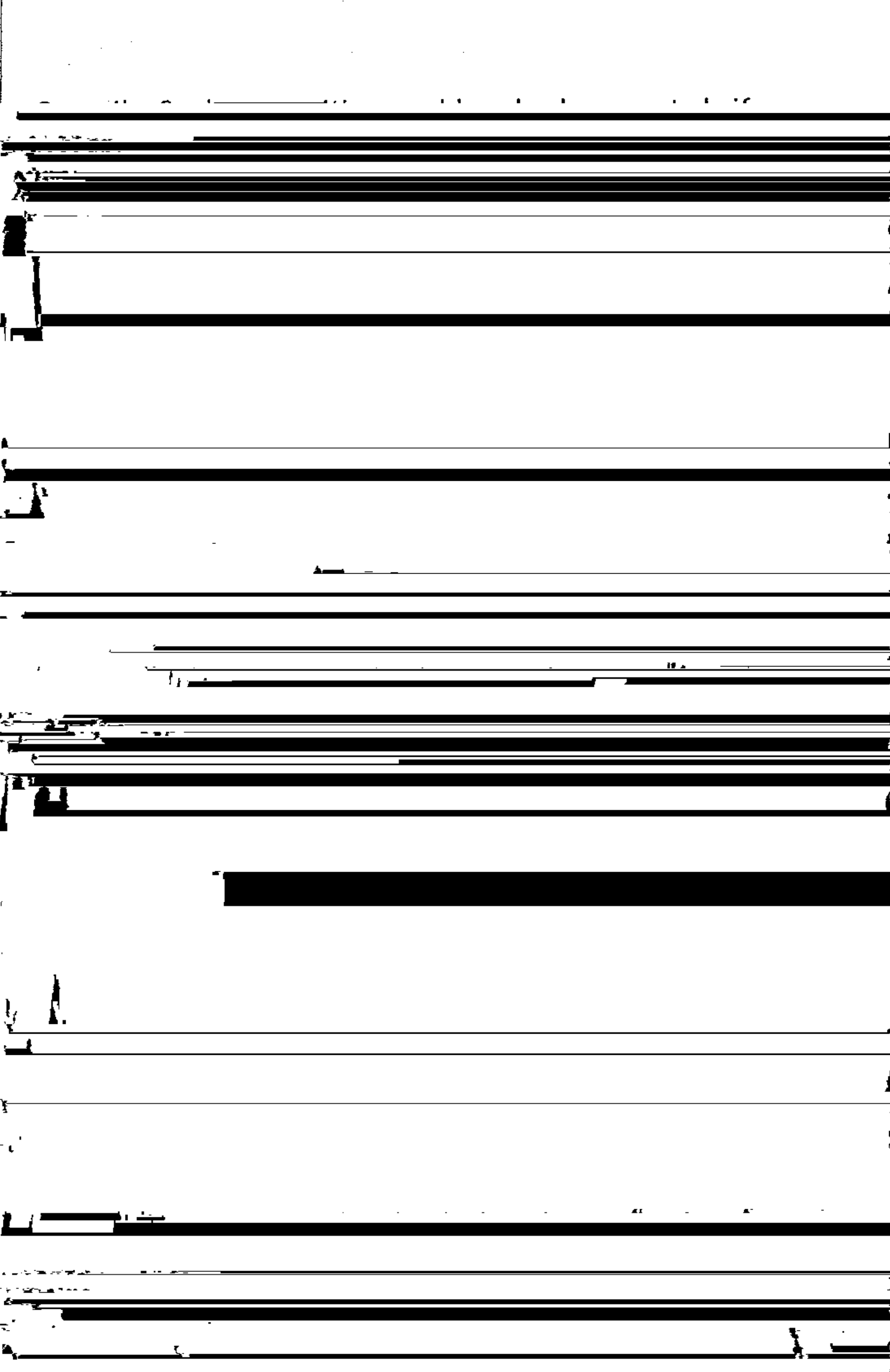
The band may also make by-laws respecting access and residence, but subject, of course, to the rights

The Act provides for the establishment of Inuit communities as "northern village municipalities". The municipalities are empowered to make by-laws respecting

governing the conservation of wildlife, including the setting of quotas, after consideration of the recommendations of a Co-ordinating Committee (six of whom are appointed by the aboriginal peoples and six

recognized Indian First Nations as to the jurisdiction that each government wishes to occupy."

The Committee recommended that the powers would include "full control over the territory and resources within the boundaries of Indian lands", including land and resource use, revenue raising, and economic and commercial development. It urged the "provision of an

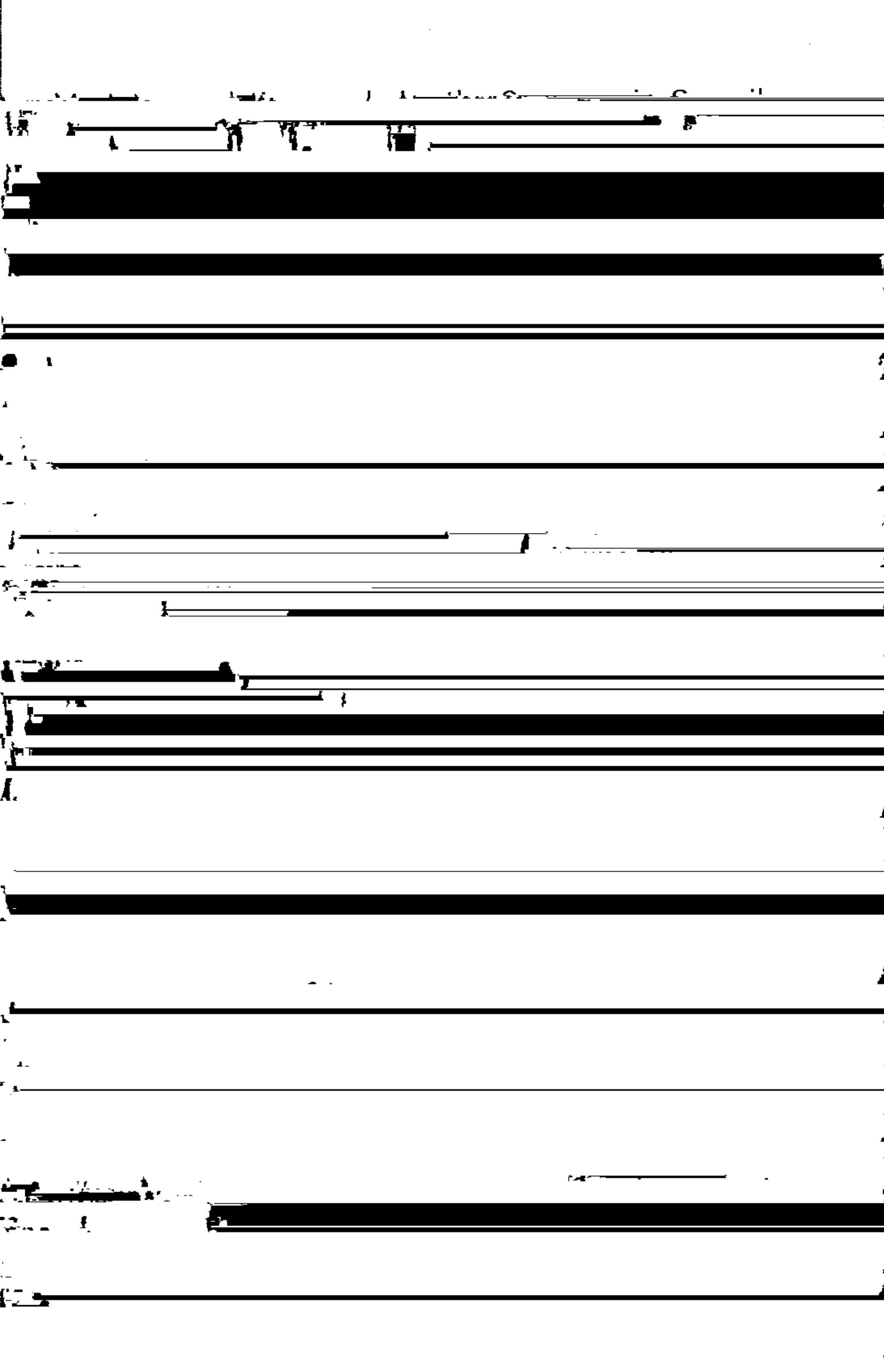


as bands under the Indian Act, unless substantial powers were conferred by the Bill.

iv. The powers conferred upon Indian Nations upon recognition under the Bill

Upon recognition, an Indian Nation would have "executive powers" with respect to:

> (a) the management and administration of the lands; ...
>
> (e) the economic development of the Indian nation...



respects. For example, potentially the band could levy an income tax on a non-Indian developer on reserve lands, who would be required to comply with Indian Nation environmental standards. The ambit of such

self-government. But such powers are subject to:

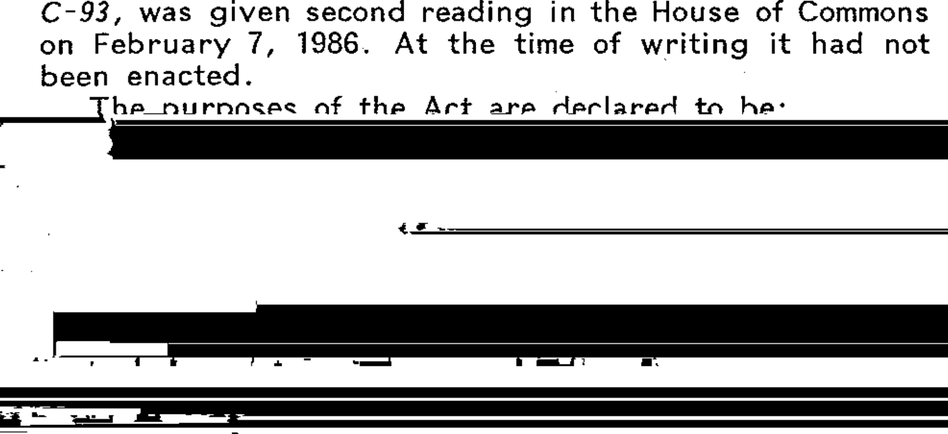
- the obtaining of an agreement;
- termination under the agreement;
- the limitations set out in the agreement;
- the approval of the Governor-in-Council of the agreement,
- the power of disallowance of the Governor-in-Council of any law made pursuant to the agreement; and
- the recognition and protection of pre-existing interests.

Such limits indicate an absence of substance to the powers described in the Bill. It was not contemplated that

C. The Sechelt Indian Band Self-Government Act 1986, Bill C-93

The *Sechelt Indian Band Self-Government Act 1986, Bill C-93*, was given second reading in the House of Commons on February 7, 1986. At the time of writing it had not been enacted.

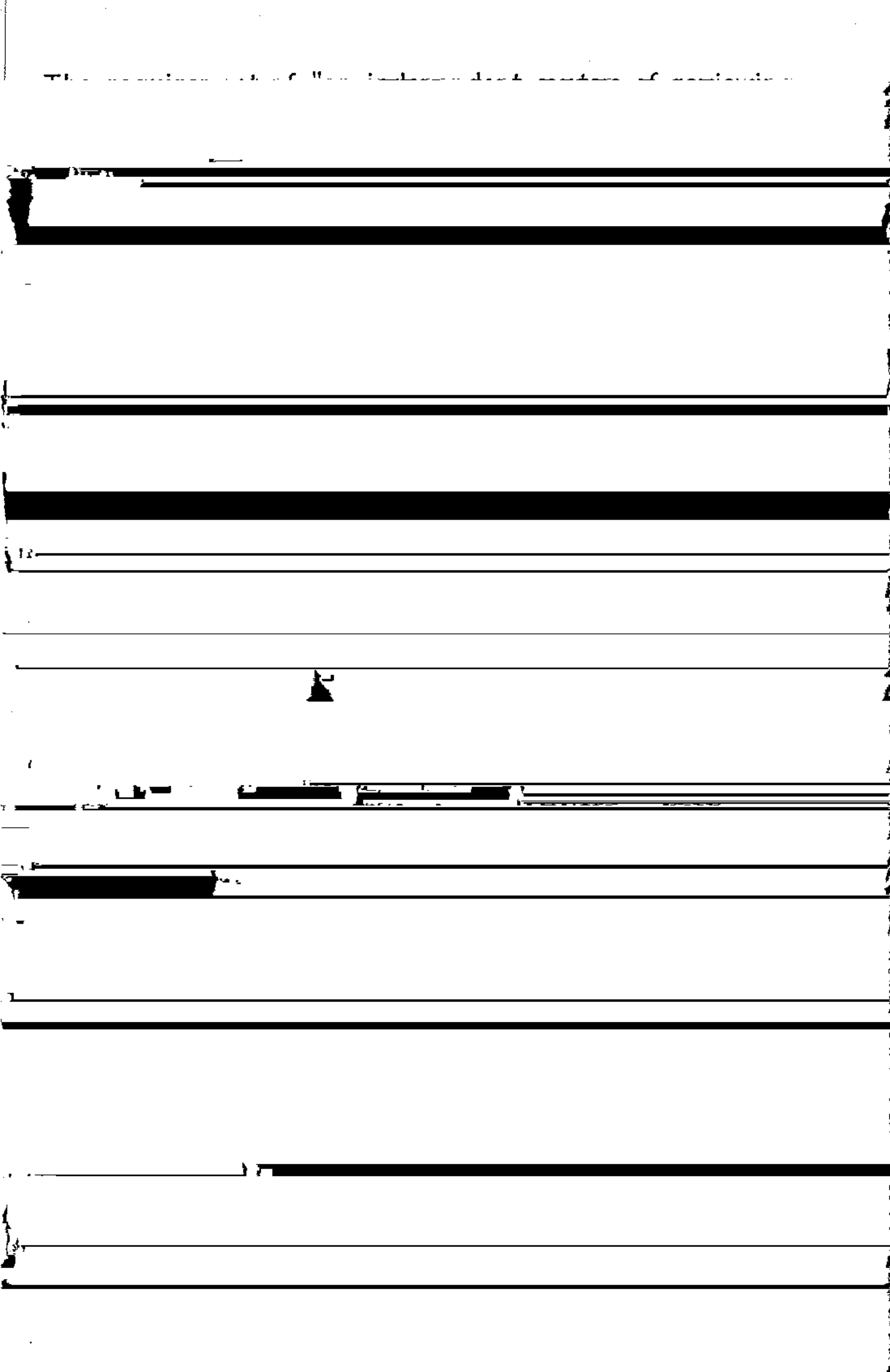
The purposes of the Act are declared to be:



depends upon the substance of the powers conferred by Bill C-93.

The Bill affirms provincial interests and powers with respect to the lands and resources of the Sechelt Band. The title and powers of the Band to the lands and

the Province in the minerals of the reserve, and the powers of management thereof of the Province recognized in the *British Columbia Indian Reserves Mineral Resources Act*. Further, the conditions attached to the



non-Indians lease land from the Sechelt Band. The grant

5 THE METIS SETTLEMENTS: ABORIGINAL COMMUNITIES ESTABLISHED UNDER PROVINCIAL JURISDICTION ON PROVINCIAL LANDS

The unique aspect of the Metis settlements in Canada is that they were established under provincial jurisdiction on provincial lands at a time when jurisdiction over "Indians and lands reserved for Indians" resided in the Federal Government. The Federal Government denied that it had jurisdiction with respect to the Metis. It is appropriate to consider what rights and powers the government that is representative of local interests is prepared to accord descendants of the local aboriginal inhabitants, in the absence of any countervailing governmental power with acknowledged reponsibility to act for the aboriginal people. The *Metis Population Betterment Act* of Alberta suggests subjugation

In 1982, the *Constitution Act* afforded constitutional protection to the "existing aboriginal and treaty rights"

to do prior to that time. The proposals of the MacEwan Report of 1984 must be considered in the context of such constitutional protection. It should be observed that they could have been grouped under the prior heading: "Self-management and municipal government under contemporary ad hoc agreements".

A. 1938 Metis Population Betterment Act of Alberta: Subjugation under Provincial Jurisdiction

In 1936 the Ewing Commission,[65] appointed by the Legislative Assembly of Alberta, recommended the establishment of "some form of farm colonies" for the Metis to enable them to become "self-supporting citizens". The Commission rejected the notion that the Metis should be "wards of the Government", but declared that:[66]

> The final control of these colonies must continue to rest with the Department concerned. The management will be carried out under such superintendents or instructors as may be necessary.

Each instructor was to be appointed by the Government and "in a general way he should have control of the operations of the colony and should in addition have the

to the approval of the Lieutenant-Governor-in-Council.
In 1940 a new

exercise any such jurisdiction. And the Provincial Government did not hesitate to eliminate the

disposition of timber, and rights of members to hunt,

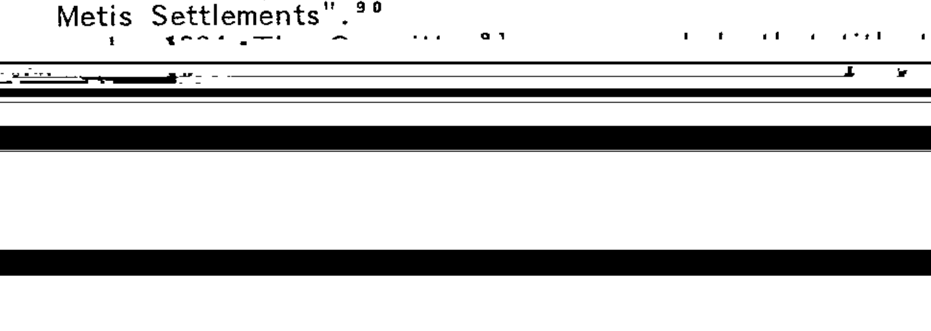
all-embracing.

The Minister is responsible for the administration of monies arising from settlement lands. A Metis Population Betterment Trust Account was established in 1943[83] as the depository of fees and dues arising from timber permits, grazing and other leases. In 1951 the order was amended to provide for "all moneys received from the sale or lease of any other of the natural resources of the said areas."[84] The Minister is directed "to provide for the general management and administration of such trust funds."

Any analysis of the powers of management of settlement lands must conclude that they are vested in the Provincial Minister. The powers of the Board of the settlement association are confined to

recommending the grant of timber permits and commercial fishing licenses to members.

Settlements."[89] The Minister of Municipal Affairs established terms of reference which included "the development of models in terms of local government, land holding, social organization and economic opportunity on Metis Settlements".[90]



settlement lands should be vested in the Metis settlements by legislation; self-management of settlement lands; and a municipal form of "local self-government." It suggested that the following principles should be applied in drafting legislation:[92]

(1) the Metis represent a unique cultural group in

sand, gravel and timber to the settlements.[93] The ownership of mines and minerals was to be "resolved" by the courts. Ownership would include highways and roads subject to public rights of way. The vesting of title by provincial legislation would seem to afford certainty to the constitutional entrenchment of the Metis rights to the settlement lands provided by section 35 of the *Constitution Act, 1982*. It is in the context of such constitutional entrenchment under section 35 that the

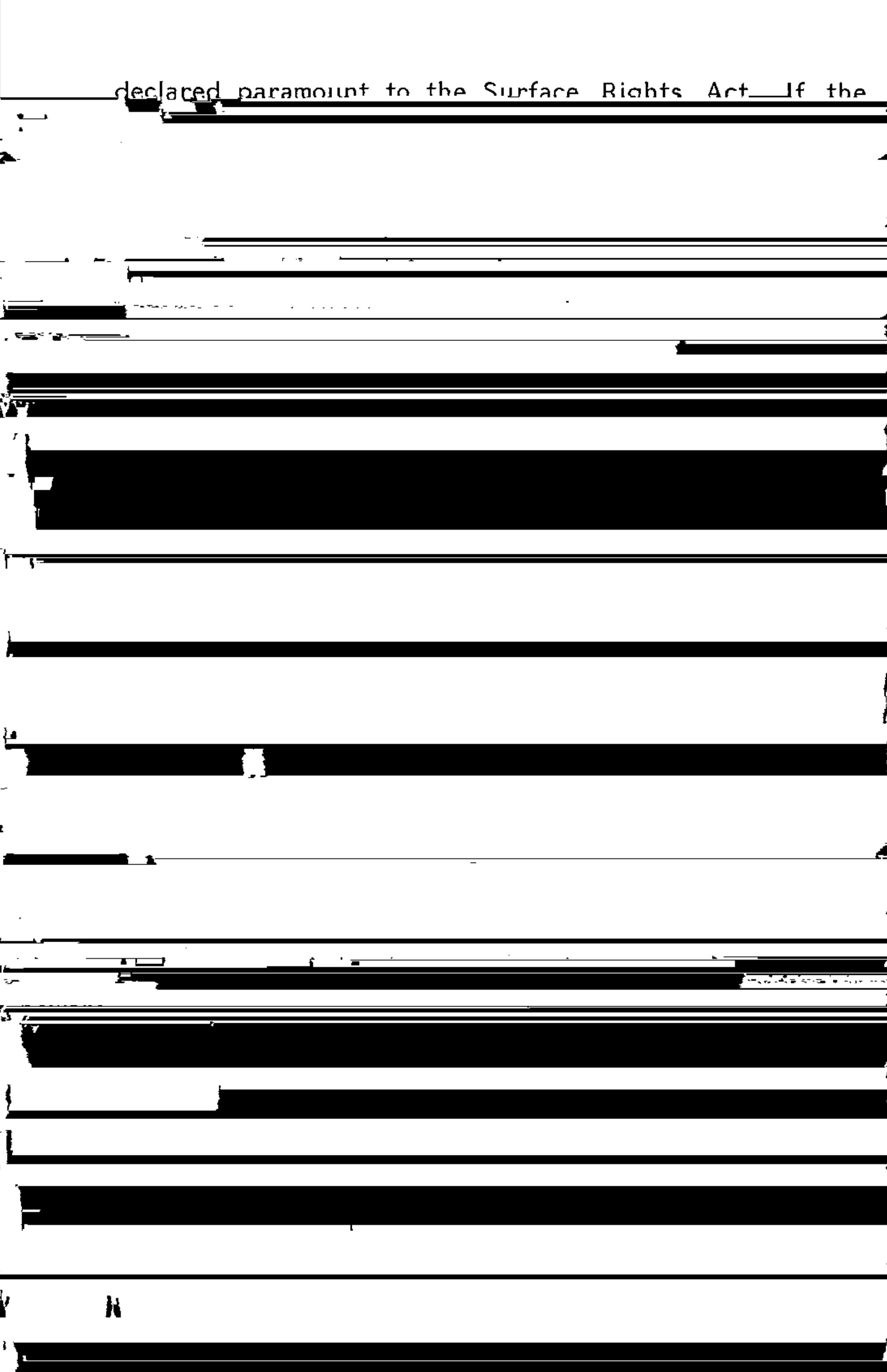
5. Endorse the commitment of the Government of Alberta to introduce, once a revised Metis Betterment Act has been enacted, a resolution to amend the *Alberta Act* by proclamation issued by Her Excellency the Governor General under the Great Seal of Canada to grant an estate in fee simple in existing Metis Settlement lands to the Metis Settlement Associations or to such appropriate Metis corporate entities as may be determined on behalf of the Metis people of Alberta, in accordance with this resolution."[94]

The amendment of the *Alberta Act* to provide for the grant of the Metis Settlement lands would afford certainty to the constitutional entrenchment of the Metis rights to such lands. The reservation of mines and minerals, however, strikes at the economic foundations of any potential for self-government. A major gas field underlies Metis settlement lands. Further, the reservation of "certain specified interests of the Province" suggests the possibility of the vesting of substantial powers over the lands in the Province. Moreover, the "continuing legislative authority of the Province" may allow for expropriation of the lands.

ii. The continued jurisdiction of the Province

The MacEwan Report did not recommend the entrenchment of the power and jurisdiction of Metis Settlements. It contemplated the continued jurisdiction of the Province over the powers of the Metis Settlements. Section 20 of the draft Bill [illegible]

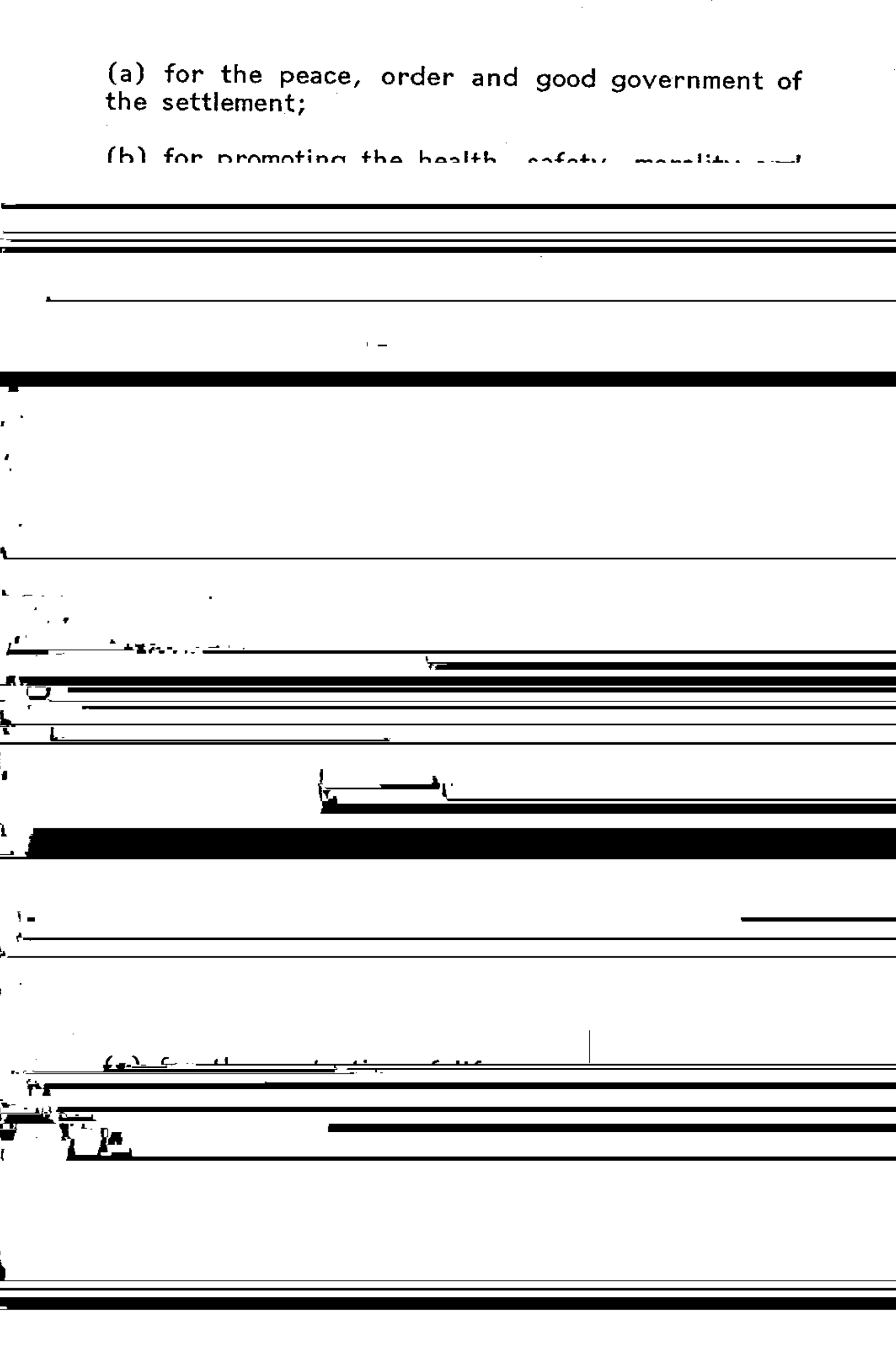
substantial impediment both to the grant of any form of self-government and its development. Only if the



declared paramount to the Surface Rights Act. If the

(a) for the peace, order and good government of the settlement;

(b) for promoting the health, safety, morality and



may be granted exclusive legislative authority". The Report observes that "this is a matter for further

Only if such "further discussion" was fruitful might a form of aboriginal self-government appear.

The Government of Alberta has not committed itself to any form of local self-government of Metis Settlement areas. The resolution of June 4, 1985 recites the Metis desire for enlarged jurisdiction, but thereafter referred to the matter as follows:

> 4. Endorse the commitment of the Government of

6 THE INUVIALUIT FINAL AGREEMENT (WESTERN ARCTIC):[105] SELF-MANAGEMENT OF ABORIGINAL LANDS IN THE NORTH

The *Inuvialuit Final Agreement* of 1984 demands separate consideration because it is the only contemporary settlement arrived at with respect to federal lands and exclusively under federal jurisdiction. The influence and control allowed to the Territorial Government in arriving at the Settlement was at the discretion of the Federal Government. In such respect there is a similarity to the settlements reached on the Prairies prior to 1930. What is unique to the

Agreement expressly declares the application of Federal and Territorial laws and ordinances:[106]

> (97) Except as otherwise provided in this Agreement, Inuvialuit lands shall be subject to the laws of general application applicable to private lands from time to time in force, including, without restricting the generality of the foregoing, territorial laws and ordinances that apply or are made to apply generally to private lands.

The Agreement makes provision for the application of

jurisdiction. That Government will determine the extent and ambit of forms of government allowed to Inuvialuit communities, just as the Government of Alberta did with respect to the Metis Settlements.

The Agreement specifically declares that "royalties, rents, profits and other revenues or gain derived from

tax is payable on Inuvialuit lands, and accordingly they are not subject to forfeiture upon non-payment of taxes, as is the case under the Alaska land claims settlement.

Title may be granted in fee simple absolute, but the security of tenure is not absolute. The Inuvialuit lands are subject to an unfettered power of expropriation by the Governor-in-Council. Further, a government or municipality may seek to expropriate Inuvialuit land for the provision of government services where it "demonstrates a need .. to meet public convenience and necessity, and such lands cannot be reasonably obtained from other sources." Such expropriation is subject to good faith, negotiation and arbitration. Lands may also be appropriated for public road rights of way upon consultation, negotiation and arbitration.

C. Self-Management

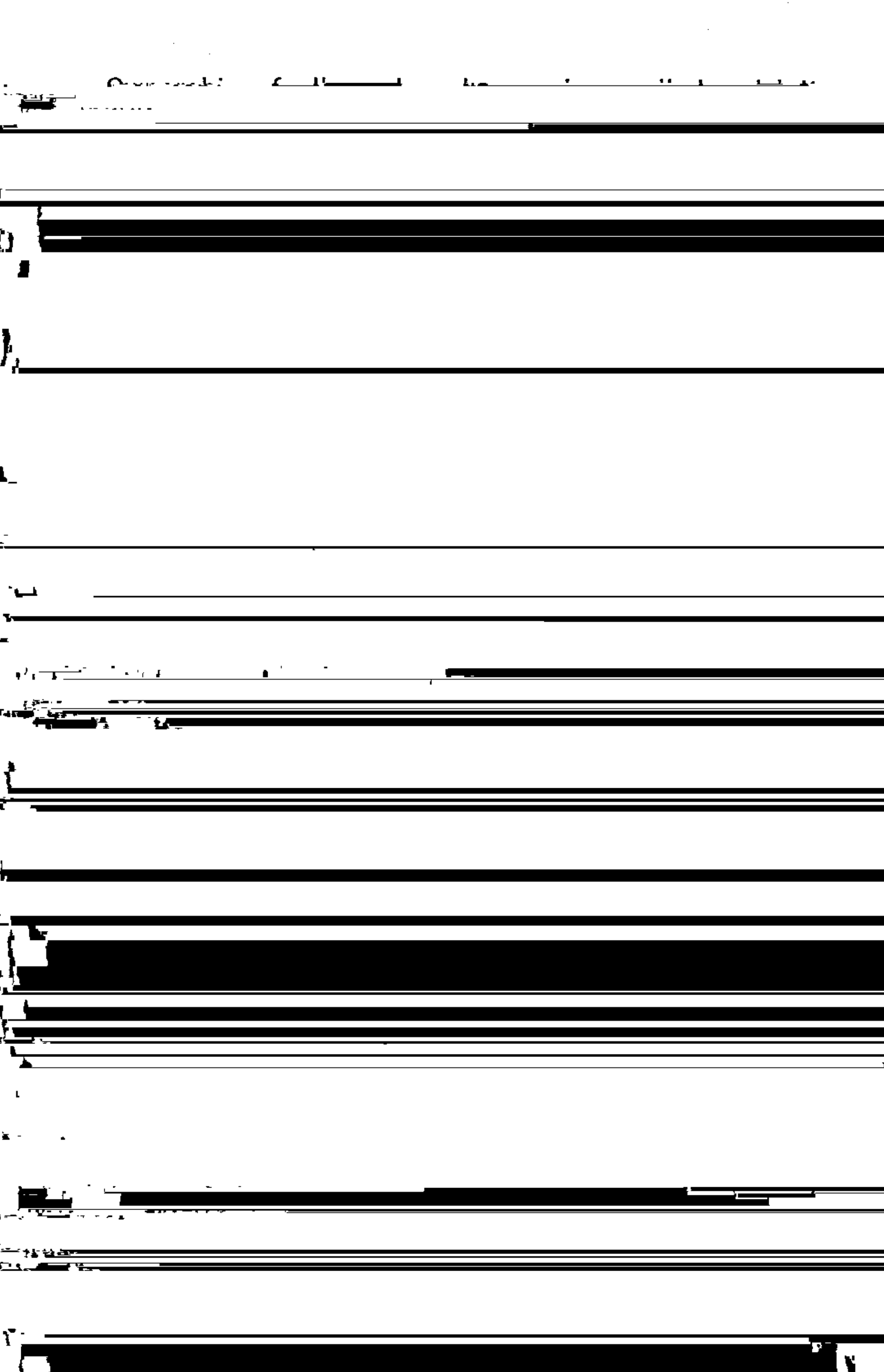
The Agreement provides for the Inuvialuit self-management of the Inuvialuit lands and resources. The rights conferred are subject, however, to "laws of general application", rights of expropriation just mentioned, the rights of existing interests, the

management of water-bodies by the Crown, controls upon the disposition of sand and gravel, and surface and access rights of non-Inuvialuit. The rights of the

and other rights to use and occupy Inuvialuit lands for any purpose and dispositions of rights to explore, develop and produce resources owned by the Inuvialuit may be made by the Inuvialuit to persons or corporations in accordance with this Agreement and laws of general application.

The Agreement thereby recognizes the right of the

(94) Canada shall, on behalf of the Inuvialuit,



migratory bird management, "navigation, transportation

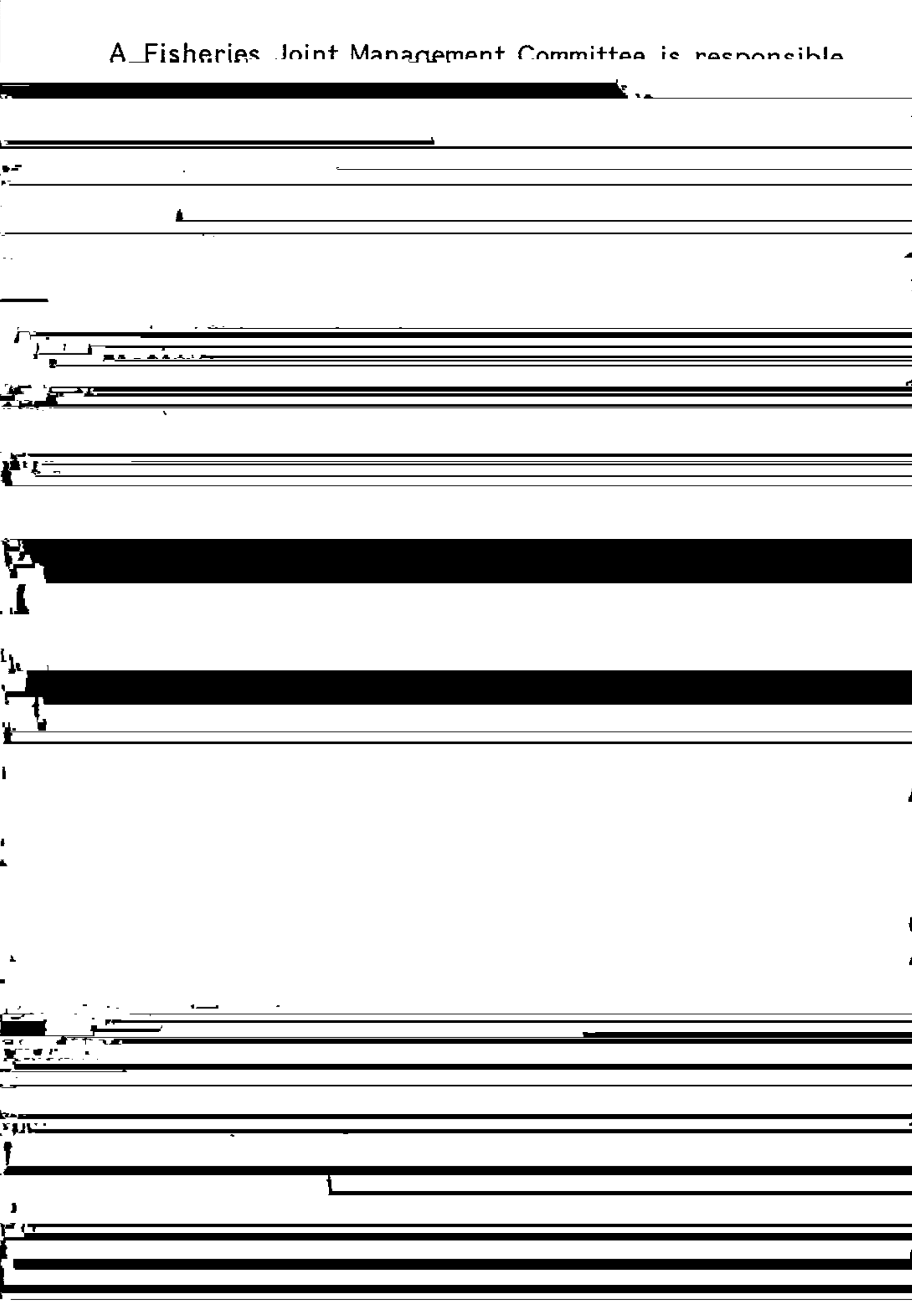
flood control and similar matters", and protection of community water supplies. Such powers do not extend to authorizing hydro-electric development. Such a project could be authorized by expropriation.

The Inuvialuit have a preferential right to harvest all species of wildlife, except migratory non-game birds, for subsistence usage, and exclusive rights to harvest

fur-bearers throughout the Inuvialuit Settlement Region. They also have exclusive rights to harvest game on Inuvialuit lands and in the National Park and Territorial

Park to be established on the Yukon North Slope. The Inuvialuit rights do not include management of wildlife. The rights of the Inuvialuit are subject to the laws of general application respecting public safety and

A Fisheries Joint Management Committee is responsible



which it has representation, the advisory powers of the Wildlife Management Advisory Councils and the Fisheries Joint Management Committee. The determinations of such agencies are advisory and can be rejected by the appropriate Minister. The Inuvialuit do not have control or a veto on off-shore development.

On April 11, 1986 the Federal Government tabled the *Canadian Laws Off-Shore Application Bill*. The Bill proposes to declare the sovereignty of Canada [illegible]

7 CONCLUSION

A. Past and Present

It is the conclusion of this survey that Canadian law has not and does not provide for self-government of aboriginal lands and resources. More significantly, it is suggested that a pattern of contemporary arrangements has been established, and it is that of self-management and municipal government.

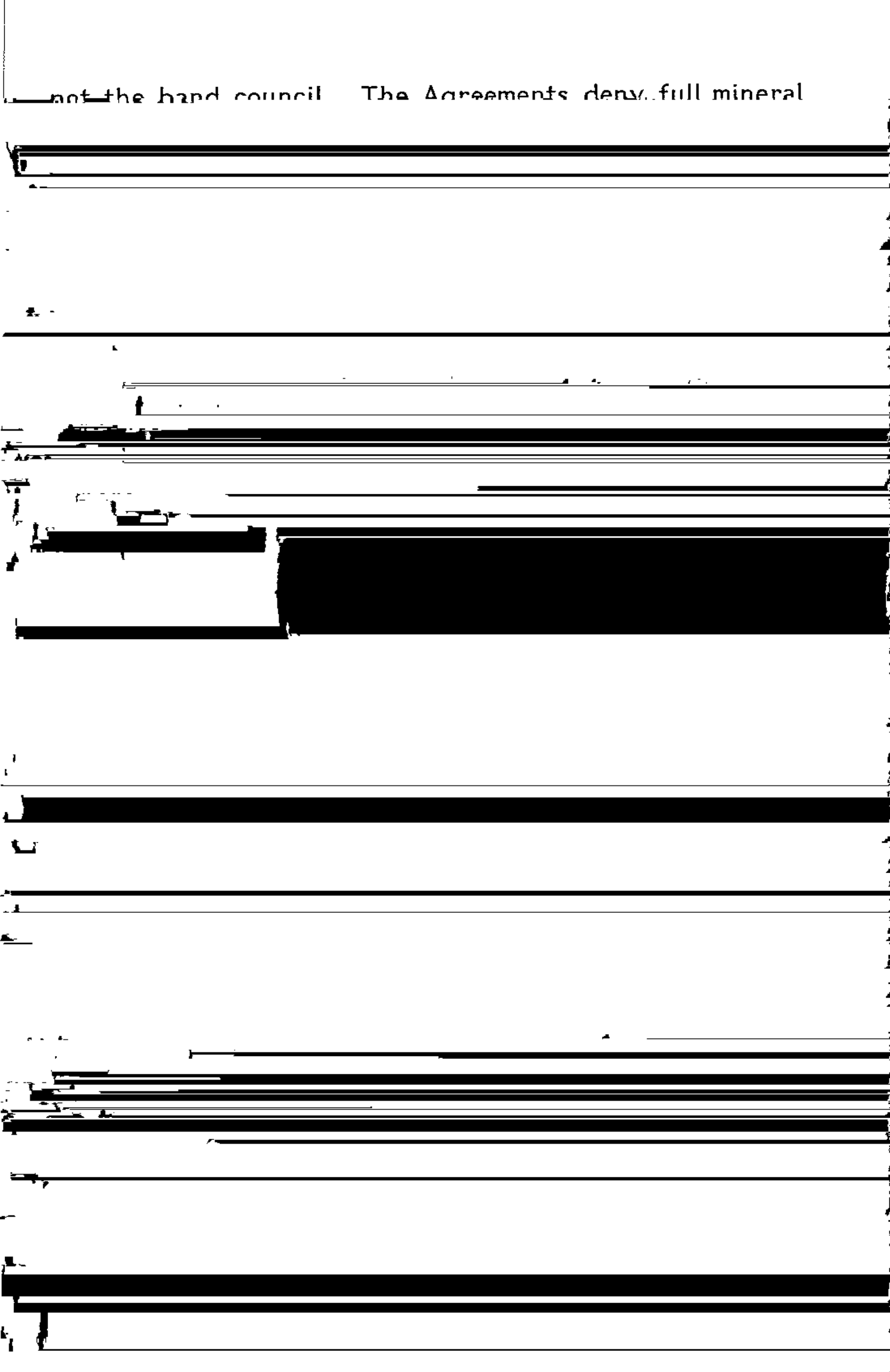
i. The sovereign jurisdiction of the Federal and Provincial Governments

The *Constitution Act, 1867* invested the Federal and Provincial Governments with sovereign powers in their respective areas of jurisdiction. It does not provide for sovereign or exclusive jurisdiction of aboriginal governments.

Section 35 of the *Constitution Act, 1982*, provides a

ii. The Federal Government has accepted and extended the exercise of jurisdiction by the Provinces

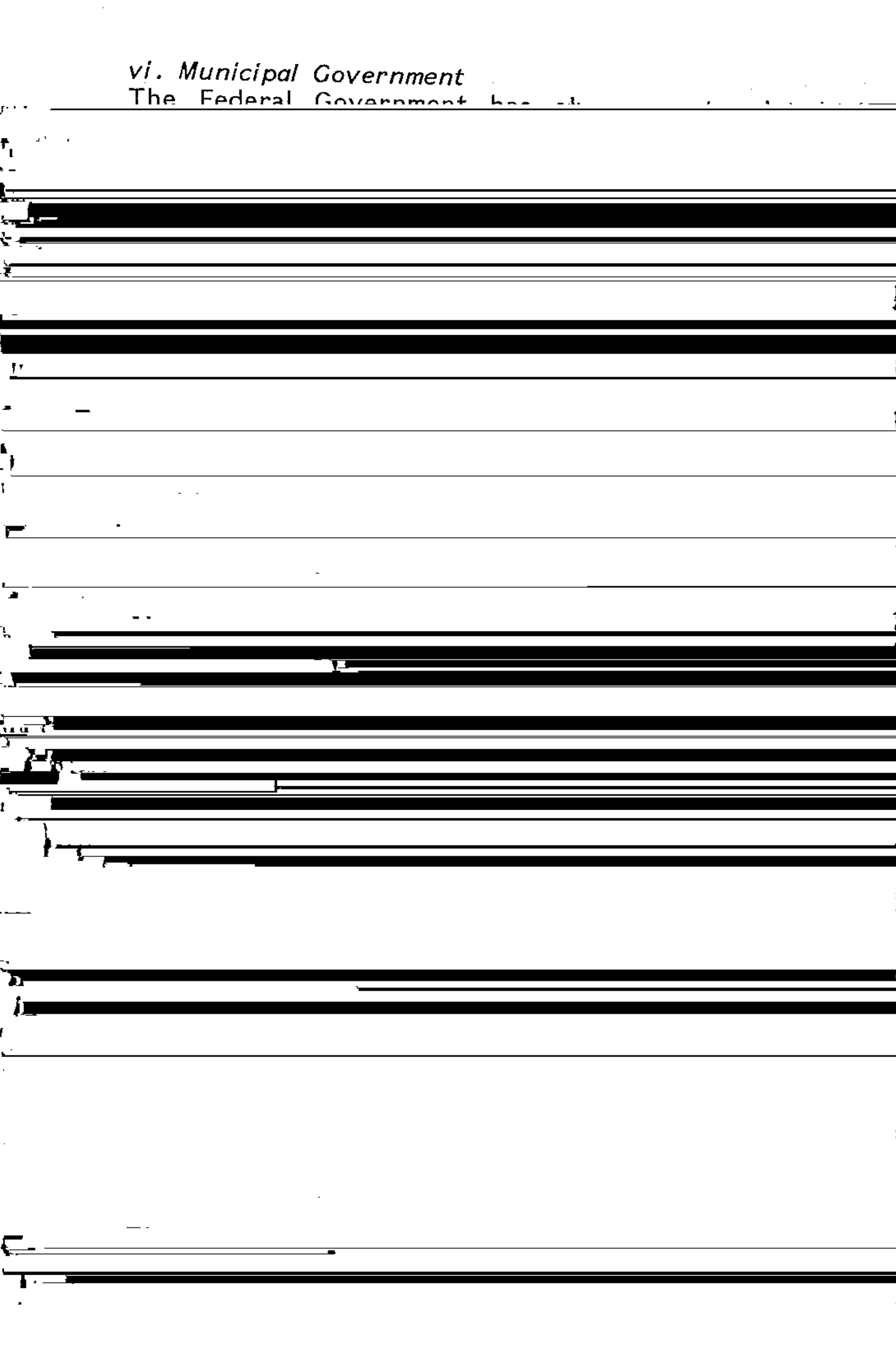
The Federal Government has historically accepted and



not the band council. The Agreements deny full mineral

vi. Municipal Government

The Federal Government has ...

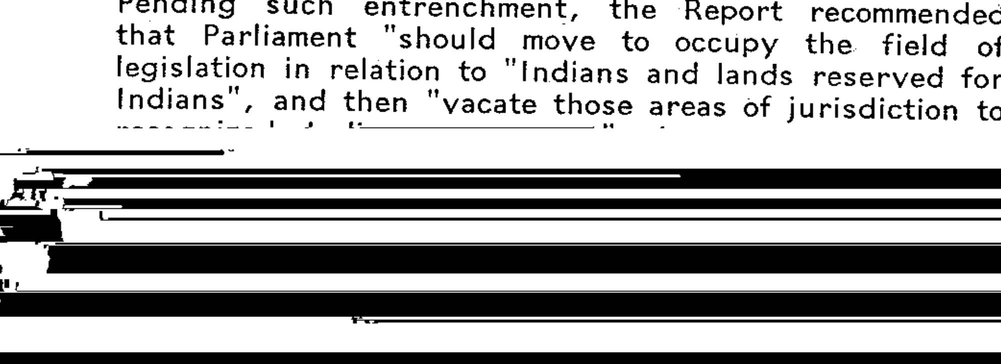


viii. *Precedents: the James Bay Agreement and the Cree-Naskapi (of Quebec) Act*

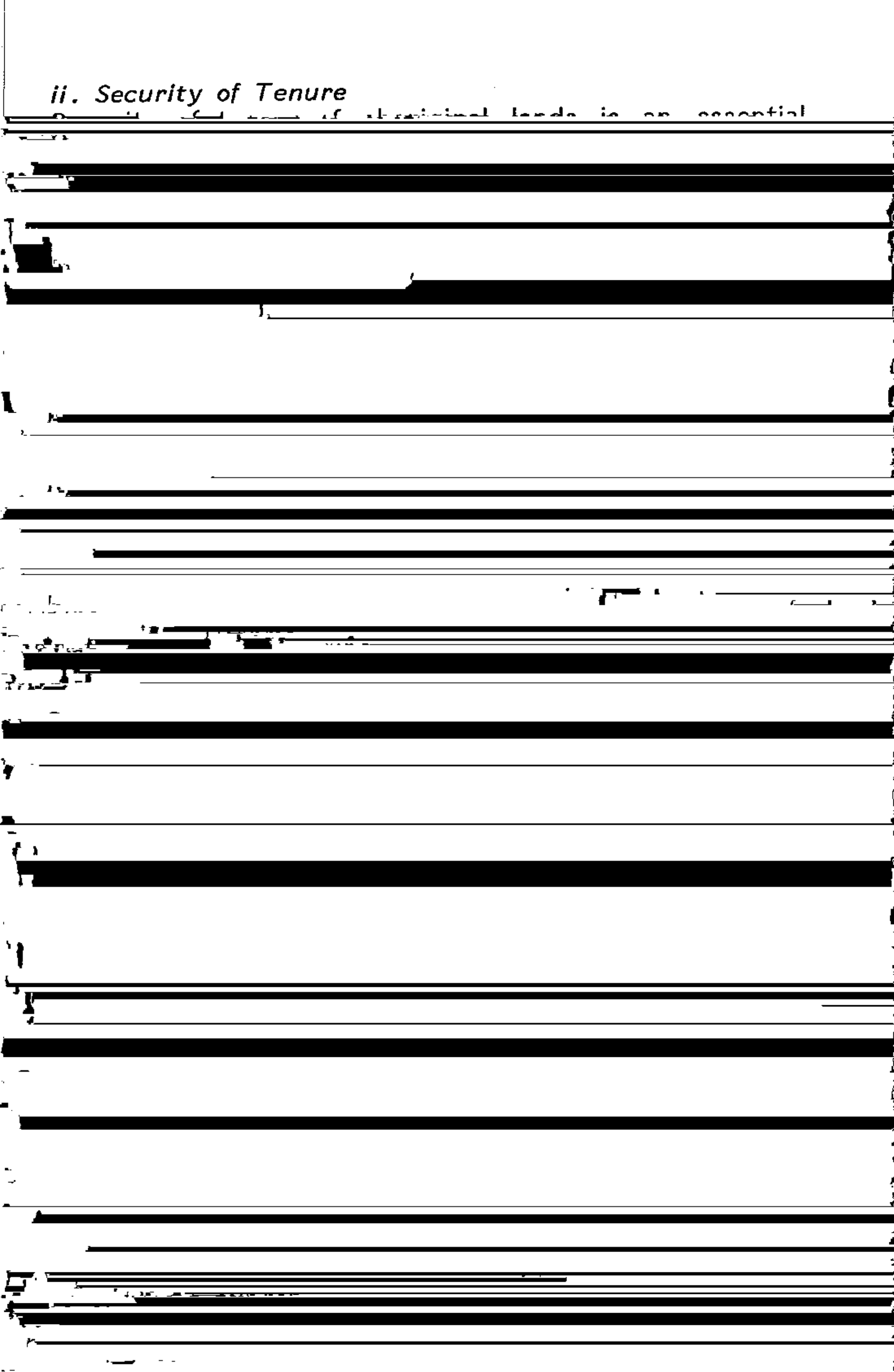
The establishment of managerial and government regimes for aboriginal lands and resources has created

provincial rights contained in the *Canada-British Columbia* agreements.

One can only agree with the recommendation of the Penner Report-that self-government can be most effectively brought about by the entrenchment of the right of aboriginal self-government in the Constitution. Pending such entrenchment, the Report recommended that Parliament "should move to occupy the field of legislation in relation to "Indians and lands reserved for Indians", and then "vacate those areas of jurisdiction to



ii. Security of Tenure



although "aboriginal groups should be given the chance to participate". Taxation was referred to only in the context of resource revenue-sharing. Access and expropriation were not referred to at all. The "scope of negotiations" proposed does not appear significantly different, except for resource revenue-sharing, from the existing policy.

iv. Powers outside the boundaries of aboriginal lands
Contemporary arrangements have made provision for the exercise of advisory

The Provinces should, of course, honour the terms of the treaties, and provide the full beneficial ownership in mineral resources which has been denied in Federal-Provincial agreements in Ontario and Western Canada.

A macabre footnote is afforded by the Study Team Report to the Neilsen Task Force on Program Review.[118] Notably absent from the Report is any recognition of the origin of aboriginal rights or special status, or any recommendation for an enhanced land and resource base. The Report acknowledges that "while great hope has been voiced for a native economic renaissance, the "found" natural resource base for such renewal is strikingly inadequate on most reserves."[119] The Report *inter alia* recommends "encouraging entrepreneural expertise", "private sector involvement, "integrating" federal with provincial programs, and "capping expenditures and turning the responsibility back on native communities to resolve their problems for themselves."[120]

vi. Contrasting Provincial Approaches

a. Ontario

On December 20, 1985 Canada, Ontario and the Indian First Nations of Ontario signed a Declaration of Political Intent:

> [illegible] tripartite discussions to resolve issues
>
> relating to Indian First Nations self-government and matters and arrangements with respect to the exercise of jurisdiction and powers by First Nations' governments in Ontario

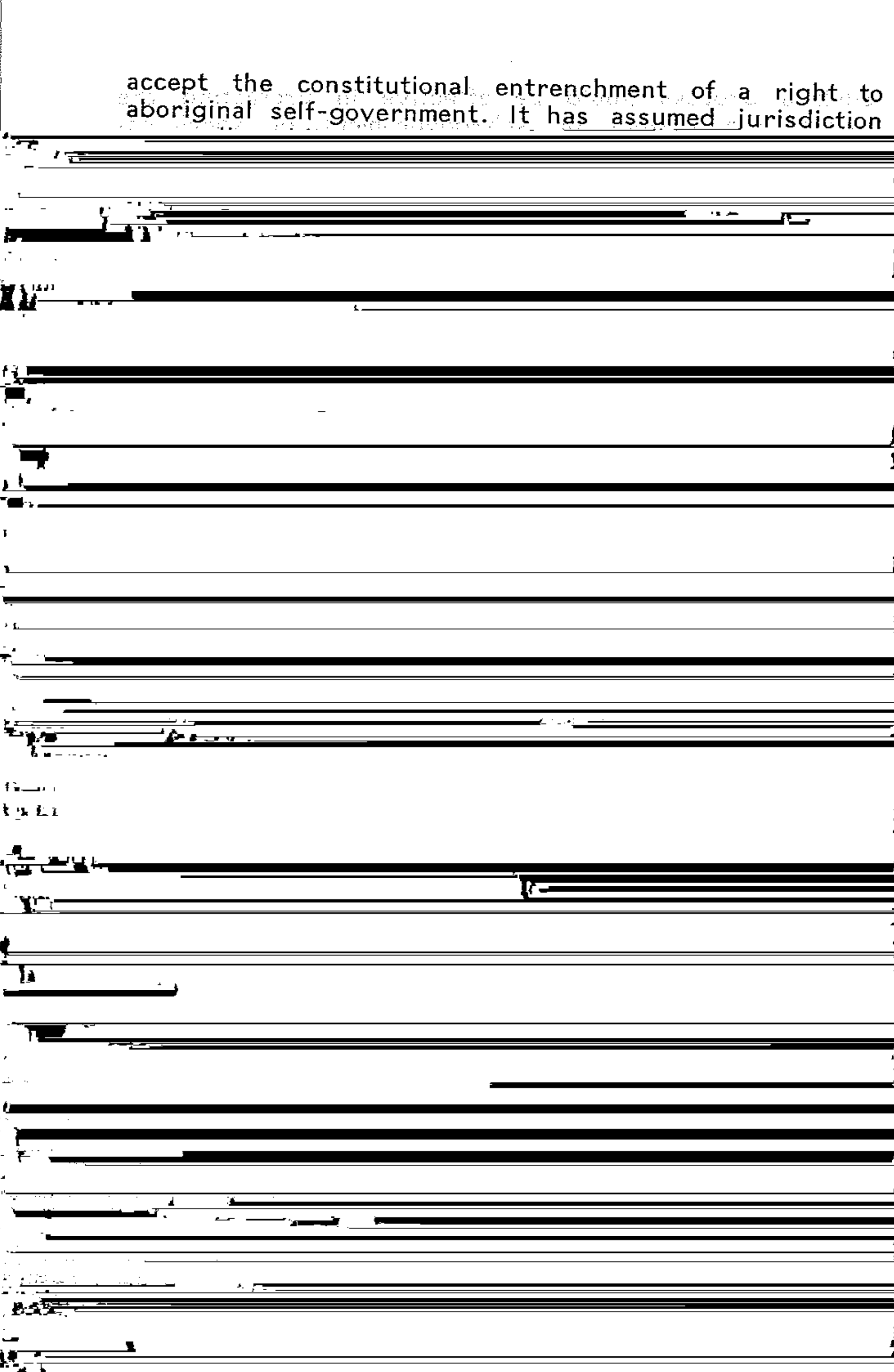
(b) the clarification of areas of jurisdictional overlap and arrangements with respect to the exercise of jurisdiction by governments in Ontario.

On February 24, 1986 Canada, Ontario and the

Such a process would be effective in protecting the rights and powers of self-government of aboriginal communities.

The Ontario initiative is merely an agreement to negotiate. It creates no rights or powers. The success of the approach will depend upon the substance of rights and powers, and the manner of their protection which

accept the constitutional entrenchment of a right to aboriginal self-government. It has assumed jurisdiction



NOTES

1. Fred Plain, in *Pathways to Self-Determination*, Ed. L. Little Bear, M. Boldt, J.A. Long, Univ. of Toronto Press, 1981, p. 39.
2. per Min. for Aboriginal Affairs, 24 Nov. 1978, House of Reps., Background Notes No. 7, Nov. 1980, Dept. of Aboriginal Affairs, Canberra, Australia.
3. [1982] 1 W.W.R. 302, [1982] 1 C.N.L.R. 133, 151 (Alta. C.A.).
4. [1974] S.C.R. 695, [1973] 6 W.W.R. 205

Australia, or Cold Lake and Wolf Lake Metis Settlements in Alberta.

15. "Discussion Notes on the *Indian Act*," Department

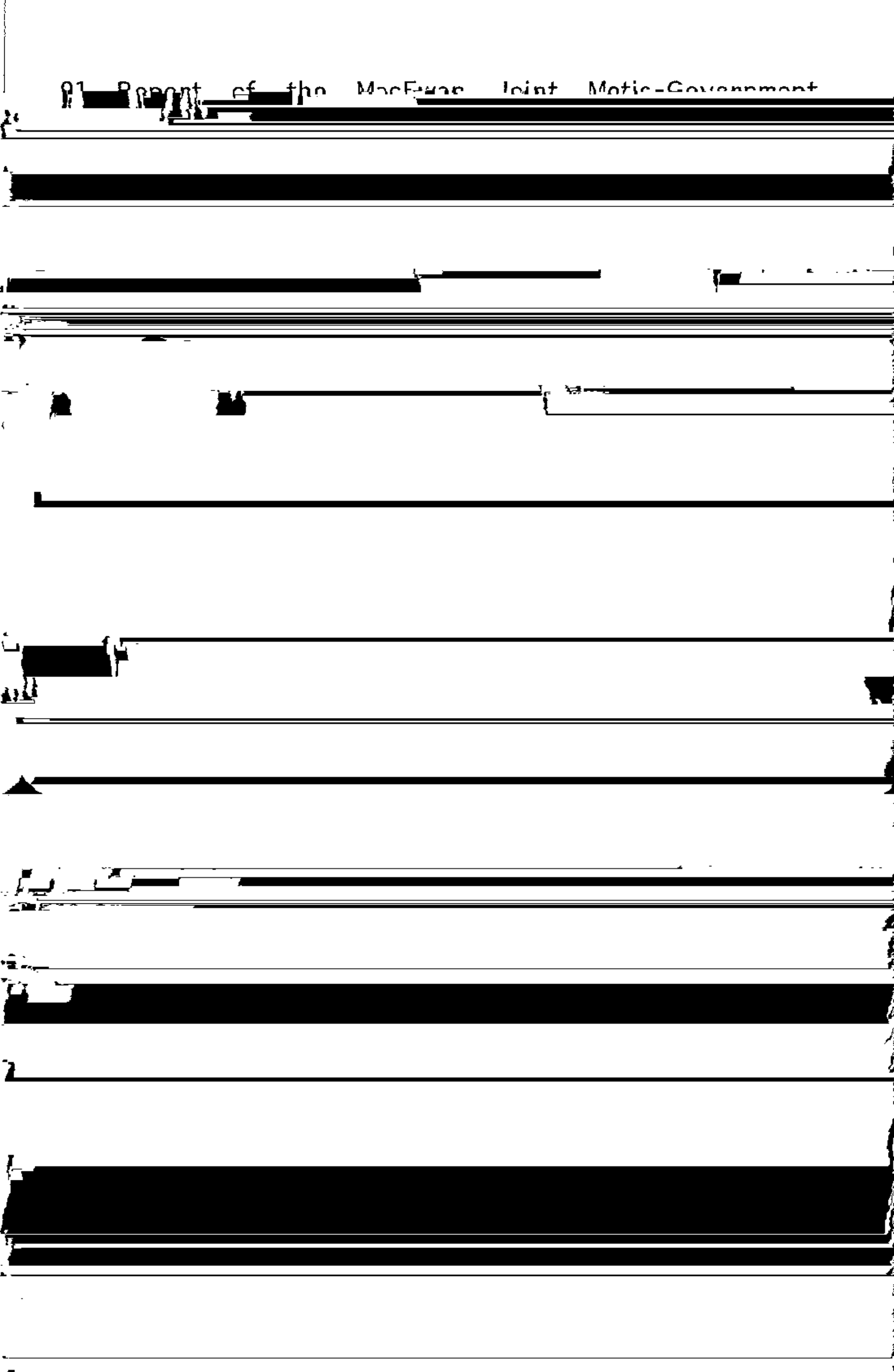
18. Report of Department of Interior, 1876, Sessional

43. *Ibid.*, 82-83.
44. *Ibid.*, 82.
45. O.C. 1036 B.C. 29th July 1938.
46. S.C. 1943-44 c. 19.
47. "Native Self-Reliance," supa n.25 p. 169, W. Dombroski.
48. *Ibid.*
49. S.C. 1980-81-82-83 c.38.
50. S.C. 1924 c. 48.
51. S.C. 1959 c. 47, S.N.B. 1958 c. 4.
52. S.C. 1959 c. 50, S.N.S. 1959 c. 4

Dombroski, p. 59 per Jean-Luc Blais.

54. *James Bay and Northern Quebec Agreement*, Editeur Officiel du Quebec, 1976 and S.C. 1976-77 c. 32, S.Q. 1976 c. 46.
55. *Northeastern Quebec Agreement*, Editeur Officiel du Quebec, 1978, S.C. 1976-77 c. 32 n.5, S.Q. 1978 c. 98.
56. *Negotiating a Way of Life*, La Rusic et al, Dept. of Indian Affairs, Oct. 1979 p. 41

64. *Indian Self-Government* Second Report of Special Committee of House of Commons, 1st Session, 32nd Parl., 1980-81-82-83, Oct. 1983.
65. Report of Commissioners appointed to inquire into the problems of health, education and general welfare of the Half-breed population, Govt. of Alberta, Edmonton (Ewing Report), Feb. 15, 1936.
66. *Ibid.*, p. 12.
67. *Ibid.*, p. 12.
68. S.A. 1938 c. 6.
69. S.A. 1940 c. 6.
70. E.g. Goodfish Lake, O.C.-379-39, March 29, 1939.
71. O.C. 192/60, 193/60, Feb. 10, 1960.



91 Report of the MacEwan Joint Metis-Government

and "as a second priority" supplies are reserved "for the direct private and corporate needs of the Inuvialuit and not for sale", both based on 20 year forecasts. "As a third priority the Inuvialuit shall make available sand and gravel for any project approved by an appropriate governmental agency." The Inuvialuit are also required to

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-*

PHASE TWO

Background Paper

7. David C. Hawkes, *Negotiating Aboriginal Self*