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Secret

GUIDELINES FOR FEDERAL SELF-GOVERNMENT NEGOTIATORS (NUMBER 1)

Language for Recognizing the Inherent Right of Self-Government in Agreements and Treaties

Department of Justice and
Inherent Right Directorate
March 22, 1996

LANGUAGE FOR RECOGNIZING THE INHERENT RIGHT OF SELF-GOVERNMENT IN AGREEMENT AND TREATIES

I. Recognition of the inherent right: legal and policy considerations

(i) Introduction

This paper has two objectives: to help federal negotiators understand the legal and policy considerations surrounding recognition of the inherent right of self-government in a wide range of agreements and treaties with Aboriginal groups, and to provide them with approved recognition language for these agreements. There are essentially three broad types of agreements in which recognition language may be required: (1) comprehensive self-government agreements covering a range of aboriginal powers and related arrangements; (2) sectoral agreements dealing with discrete subject matters only (e.g., an education agreement); and (3) administrative arrangements involving no law-making authority, but rather, the devolution of administrative control over federal or provincial programs or services. It can be anticipated that most, if not all, Aboriginal parties to negotiations of such agreements will insist that language be included to recognize the existence of their inherent right of self-government. Whether they are responding to recognition clauses proposed by Aboriginal groups, or putting forward preferred federal language, negotiators should be aware of the legal and policy considerations surrounding the choice of recognition language, and of the type of recognition language deemed acceptable by the federal government.

In essence, the debate over how to recognize the inherent right centers around two broad approaches, which we refer to as the *specific recognition* and *general recognition* approaches. *Specific recognition* entails recognizing that a particular group of Aboriginal people have an inherent right ("Canada recognizes that First Nation "X" has an inherent right of self-government..."). *General recognition* involves recognizing that the inherent right is an existing right within the meaning of section 35 of the *Constitution Act, 1982,* without actually acknowledging that specific Aboriginal groups (i.e., the Aboriginal parties to the agreement) have an existing inherent right. In almost all cases Aboriginal groups can be expected to insist on the *specific recognition* approach and will likely argue forcefully that anything less than specific recognition is inconsistent with the federal policy on implementation of the inherent right.

What follows is a summary of the legal and policy concerns raised by the *specific* and *general* recognition approaches, accompanied by several draft clauses representing the federal government's position on acceptable recognition language for inclusion in self-government agreements.

(ii) Legal Considerations:

The inherent right implementation policy is in all respects consistent with the Department of Justice's legal theory in support of the government's position that the inherent right is an existing right within the meaning of s.35 of the *Constitution Act, 1982*. Of course, the policy goes considerably beyond what the government would be prepared to accept as a strict matter of law, if it were forced to litigate the matter before the courts. The purpose of this brief legal discussion is not to suggest that negotiators should be focused on the legal theory: on the contrary, they are to be guided by the policy, as supplemented by decisions of the Interdepartmental Steering Committee. Indeed, the policy has been designed to set legal questions aside with a view to reaching consensus on the way in which self-government will be exercised in various contexts. Nevertheless, it is important for negotiators to bear in mind that, because negotiated agreements will have legal effect and legal consequences for the federal government, the precise language used must be carefully chosen so as not to undermine the government's legal options in the event of litigation.

By way of background, there are two key elements in the legal theory underpinning the policy. The first element relates to the ability of individual Aboriginal groups to establish that they have an existing inherent right of self-government, while the second element deals with the potential scope and content of such a right in individual cases. In a nutshell, the existence, scope and content of an inherent right in specific cases will be tied to a complex set of variables (the most important of which relates to the history of a claimant group) which would have to be examined individually before the government might be in a position to recognize, first, that a particular Aboriginal group had an inherent right at law, and second, what sorts of powers were likely encompassed by that right.

With respect to the first element, establishment of an existing inherent right, some Aboriginal groups, such as First Nations situated on a land base, would likely be able to establish in a court of law that they have an existing inherent right of self-government. Other groups, most notably the Metis and urban Aboriginal groups, would likely have considerable difficulty meeting the legal tests for establishing the existence of this right. In the case of First Nations residing on a land base, even where they were able to meet the legal tests for establishing an inherent right, the specific powers that flowed from that right would differ considerably from group to group, depending, once again, on a number of factors, including the individual history of the group in question.

Negotiators will have noted that the policy contemplates negotiations with all Aboriginal people, regardless of the relative strength of their legal claims. This does not mean, though, that the same wording can be used in all agreements, any more than that the same arrangements can be considered for a group of urban Aboriginal people residing in downtown Winnipeg as might apply to a land-based First Nation. The precise wording chosen to implement the policy through negotiated agreements must be true to policy, while not compromising the government's legal interests.

(iii) <u>Policy Considerations</u>

The policy recognizes that there are differing views as to the existence, scope and content of an inherent right. Indeed, most provinces and Aboriginal groups could not be further apart in their positions on these points. At one end of the spectrum are Aboriginal groups, virtually all of whom argue for an unlimited inherent right of self-government, and reject any suggestion that this right is in any way "contingent", that is, subject to negotiations with federal or provincial governments to give it effect. On the other side of the divide are the provinces, many of which categorically reject the legal view that s.35 includes an inherent right, or have legal views on the scope of the inherent right that differ from those of the federal government, but which are nevertheless prepared to negotiate practical self-government arrangements with Aboriginal groups. **The challenge for federal negotiators is to propose recognition language that can accommodate these divergent points of view, while not scuttling the negotiations at the outset.**

(iv) Specific vs. General Recognition

The *specific recognition* approach is one that would be desirable from the point of view of all Aboriginal groups engaged in negotiations, but poses significant risks for the government. Although all groups can be expected to claim that they have an existing inherent right of self-government within the meaning of s.35, the legal claims of these groups are not equal. At a minimum, then, adoption of the *specific recognition* approach in relation to First Nations and Inuit people would require that the government differentiate among Aboriginal groups in terms of the relative force of their legal claims to an inherent right, given that Metis and urban Aboriginal groups' claims are not tenable and the *specific recognition* approach would not be feasible for them.

In the case of land-based First Nations and Inuit peoples, although many of these groups would have well-founded legal claims to an existing inherent right, *specific recognition* of that right in an agreement remains problematic for two main reasons. The first reason relates to the government's legal interests in future litigation. Although the Department of Justice has some sense of the likely legal parameters around an inherent right, it is not yet in a position to provide a definitive list of powers for each Aboriginal group in negotiations, due to the lack of case law in this area. To admit *specific recognition* of a group's inherent right in a self-government agreement, without a firm legal view on the scope and content of that right, would risk committing the government to a particular interpretation of the right with which it might not be in agreement. *Specific recognition* in this context could be used by an Aboriginal group, in subsequent litigation over the agreement, or possibly even in contexts unrelated to it, to argue for a more expansive interpretation of the inherent right than that set out in the agreement. Having recognized that particular group's inherent right, the federal government could be prevented from arguing that the scope of the inherent right was restricted to the terms of the agreement. This difficulty is exacerbated by the fact that, unlike the comprehensive claims context, we are unlikely to be able to obtain absolute certainty in self-government agreements.

The second difficulty relates to existing provincial positions on the inherent right. Acceding to Aboriginal demands for *specific recognition* that they actually have an inherent right would place the federal government in the position of having to confront the strong provincial opposition to recognition of a legally-enforceable inherent right, with the risk of, at best, entangling the parties in unfruitful legal debates at an early stage of negotiations, and at worst, losing provincial participation in self-government negotiations in many cases.

The *general recognition* model begins with a clear, and unambiguous statement recognizing that the inherent right of self-government is an existing right within the meaning of s.35 of the *Constitution Act, 1982*. Under this approach, recognition of the inherent right is explicit, but we remain agnostic as to which groups actually have such a right. This approach is entirely consistent with the inherent right policy, which is designed to avoid endless debates on intractable legal issues (such as, who has an existing inherent right) by focusing on how self-government will be exercised in practice. As demonstrated by the draft clauses below, the *general recognition* approach can be tailored to meet a wide variety of negotiating contexts, and can be used to accommodate the positions of Aboriginal groups, without compromising the federal government's interests in the event of court challenges.

II. Suggested Clauses to Deal with Recognition

(i) Introduction:

What follows are approved clauses that federal negotiators can use to deal with recognition of an inherent right of self-government, as well as certain attendant issues. While negotiators are free to choose from among the suggested clauses those that they feel are necessary and appropriate in any given context (they need not use all of the suggested clauses - that would likely be redundant), they are advised not to make substitutions or alterations to the wording provided, which has been very carefully crafted to address both Aboriginal aspirations and federal legal and policy concerns. Moreover, it will still be necessary to review the precise combination of clauses adopted to ensure that, taken together, the provisions do not have unanticipated consequences.

Certain modifications will have to be made to reflect the nature of the agreement involved. For example, wording that is appropriate for a Framework Agreement may not fit perfectly in the case of an Agreement in Principle, or a Final Agreement. In the case of Framework Agreements, the language will have to be prospective to reflect the fact that such an agreement merely established the parameters within which the substance of self-government is to be negotiated. Agreements-in-Principle, while far more detailed than Framework Agreements, need to be worded so as to retain some flexibility for drafting the Final Agreement.

Another important factor to consider will be whether the self-government arrangements are set out in a stand-alone agreement or in an agreement dealing simultaneously with land claims and self-government. Language that might be appropriate in a self-government agreement will not necessarily work in the context of comprehensive claims matters. An attempt has been made in the text that follows to indicate some of the more obvious wording adaptations to reflect the specific context, but negotiators should bear in mind that further modifications may well be necessary upon review of individual agreements.

In determining where best to place a given clause, negotiators should bear in mind the different legal effects of including wording in the preamble to an agreement as opposed to the body of the agreement itself. Preambular language serves to set the stage for the substance of the agreement which follows, and may help to establish the context in which an agreement has been reached. Preambles are given less legal weight than the substantive provisions of the agreement (where the "meat" of the agreement is reflected) and are generally only referred to by the courts to assist in interpreting ambiguous substantive provisions in the body of the agreement. For these reasons, preambles have become a very popular mechanism for reflecting some of the more controversial issues that arise in negotiations. It is where one often finds statements of parties' respective "positions", or "assertions" on matters about which there may be no consensus.

(ii) Clauses:

(A) ***Preambular Clauses:***

The clauses that follow constitute a template of options from which to choose, a sort of "menu" of clauses that might be used depending upon the particular context of a given set of negotiations. The intention is not to suggest that all of these clauses ought to be used in agreements; on the contrary, use of all of the clauses together in one agreement would be redundant, confusing and possibly contradictory. Negotiators should select from the options the ones that appear to them to be the most appropriate to the situation at hand, while bearing in mind the distinctions that have been made between those clauses that are clearly preferable from a federal government perspective, and those that are to be put forward only where absolutely necessary to the success of negotiations.

1. **WHEREAS the Government of Canada recognizes that the inherent right of self-government is an existing aboriginal right within section 35 of the *Constitution Act, 1982;***

This will likely be a "must" clause for most Aboriginal groups and would be acceptable provided the negotiations in question come within the scope of the federal inherent right/self-government implementation policy.

This clause would be suitable for Framework Agreements, AIPs, or Final Agreements.

2. (i) WHEREAS the members of the First Nation "X" are Aboriginal people within the meaning of section 35 of the *Constitution Act, 1982;*

OR

(ii) WHEREAS the members of First Nation "X" [assert] or [believe] that they are an Aboriginal people within the meaning of section 35 of the *Constitution Act, 1982;*

There may be pressure from some Aboriginal groups to make reference to their being a "distinct people" within the meaning of s.35, a reference which would be unacceptable for the federal government. They may believe that, in the absence of specific recognition by the federal government that they actually have an inherent right, references to their being "a people" within the meaning of s.35 somehow enhance their position that they do, in fact, have such a right.

There are, however, a number of serious difficulties with referring to groups as "peoples", which difficulties are exacerbated by using the adjective, "distinct". We will generally not be in a position to know if the Aboriginal parties to an agreement capture all or some of the named collectivity. The reference to "a distinct people" implies the existence of a unique group, a fact which may not be accurate in all cases. There is also a concern about whether "a people" has the authority to represent or bind all of the members of that group. And finally, there are several concerns about the implications of this language for the government's position in international fora, as well as for Canadian Unity issues. (These concerns are explained more fully in a companion document dealing specifically with requests for recognition as "distinct people(s)".) References to "a people", or "a distinct people" should therefore be resisted by federal negotiators.

Where negotiators deem it critical to obtain an agreement it would be acceptable to include either clause 2(I) or 2(ii), above. In the case of 2(I), we would simply be admitting that the parties are Aboriginal people, a statement that is likely obvious, but not harmful. In the case of 2(ii), we would be including an expression of the First Nation's views, while remaining silent as to the federal position on this point.

This clause would be suitable for Framework Agreements, AIPs, or Final Agreements.

3. WHEREAS First Nation "X" asserts that it has an inherent right of self-government and believes that this Agreement represents an expression of its inherent right;

As a general rule, there are risks in including assertions of position in any legally-binding agreement where those assertions are not countered by a different position. An absence of any opposing position (in this case, that of the federal government)

could imply that the silent party somehow agrees with the assertion. In this case, however, it is obviously not possible for the federal government to express clear opposition tot he assertion that a given First Nation actually has an inherent right. For this reason, it would not be advisable for federal negotiators to be the first to suggest this clause. Having said that, the language of clause 3 could be used if it is deemed critical to Aboriginal groups who take issue with our refusal to include specific recognition of an inherent right.

This clause would be suitable for Framework Agreements, AIPs, or Final Agreements.

4. (a) WHEREAS the parties to this Agreement acknowledge that there are different legal views as to the [existence,] scope and content of an inherent right of self-government, but nevertheless wish to set aside their legal differences for the purpose of implementing self-government arrangements [for First Nation "X"];

(b) WHEREAS the parties' adherence to the terms of this Agreement does not necessarily represent an expression of their legal views as to the [existence], scope and content of the inherent right of self-government as they may ultimately be defined at law.

Note that the word "existence" has been square-bracketed. This is intended to indicate that, while the federal government would not seek to use this word - given federal recognition of the existence generally of an inherent right, that would clearly not be appropriate - we recognize that provincial governments may expect the clause to include a reference to "existence" of the inherent right, to reflect their basic disagreement with the general proposition that it is included within s.35. If that is the price of provincial agreement, the federal government would certainly not take issue with using the word "existence", although Aboriginal groups can be expected to object to it.

This clause would be suitable for Framework Agreements, AIPs, or Final Agreements.

5. (a) WHEREAS the parties to this Agreement acknowledge that they may have different legal views as to the [existence,] scope and content of an inherent right of self-government;

(b) WHEREAS the parties nevertheless intend by this Agreement to

(i) [reflect their understanding on how self-government will be exercised by First Nation "X"]

OR

(ii) [reflect their agreement with respect to self-government arrangements for First Nation "X"]

OR

(iii) [set out the terms by which self-government will be implemented for First Nation "X"]

OR

(iv) [implement] or [develop the principles for implementation of] the inherent right of self-government for First Nation "X"

without taking any definitive positions with respect to how an inherent right of self-government may ultimately be defined at law.

The objective of clauses 4 and 5, which represent alternatives, is to characterize an agreement as reflecting practical arrangements, rather than expressing the parties' ultimate legal views on the inherent right, something about which we would never e able to achieve agreement in any event.

Clause 5(b)(iv) is problematic from the government's perspective, but may be preferred by some Aboriginal groups, since it tends to suggest that they have an inherent right of self-government, and may therefore be seen as offsetting their concern about the federal position on specific recognition. This latter clause should not be suggested by federal negotiators because of the legal risks that it poses for the government's position on specific recognition, but if it is deemed vital to reaching a deal, clause (iv) can be agreed to with the important proviso that the last part of the sentence must be included as well ("without taking any definitive positions with respect to how an inherent right of self-government may ultimately be defined at law"). This latter part of the sentence is desirable in the case of clause 5(b)(iv).

This clause would only be suitable for AIPs or Final Agreements.

6. WHEREAS the provisions in this Agreement were negotiated in accordance with a government-to-government relationship within the framework of the Constitution of Canada [and from the perspective that the inherent right of self-government is an existing aboriginal right within section 35 of the *Constitution Act, 1982*];

Once again, this language need not be suggested by federal negotiators, but would be acceptable to us if it is deemed important by the Aboriginal group in question to make reference to a "government-to-government" relationship. The square brackets

indicate language that may not be appropriate in an agreement dealing with both comprehensive claims and self-government matters.

This clause would be suitable for use in Framework Agreements, AIPs or Final Agreements, but would need to be modified, depending upon the context. In the case of a Framework Agreement, for example, negotiators would want to tailor the language to reflect the fact that the Agreement is prospective in nature. The reference in this case would therefore be to negotiations that will be conducted toward conclusion of an AIP, and eventually a Final Agreement.

(B) Purpose Clauses

7. (a) The purpose of this Agreement is to

(i) reflect the parties' understanding on how self-government will be exercised by First Nation "X"

OR

(ii) reflect the parties' agreement with respect to self-government arrangements for First Nation "X"

OR

(iii) set out the self-government arrangements that have been agreed to by the parties [and which are intended to be implemented by a Final Agreement between the parties]**

OR

(iv) set out the terms by which self-government will be implemented for First Nation "X" [which terms are intended to be implemented by a Final Agreement between the parties]**

OR

(v) [implement] or [develop the principles for implementation of] the inherent right of self-government for First Nation "X"

[based on the premise that] or [consistent with the principle that] the inherent right of self-government is an existing aboriginal right within section 35 of the *Constitution Act, 1982*.

(b) This Agreement is not intended to constitute an expression by the parties of any definitive legal views with respect to how an inherent right of self-government may ultimately be defined at law.

***Language to be inserted in an AIP*

Clauses (i)-(iv), which represent alternatives, would be equally acceptable to the federal government. For the reasons explained above, in relation to clause 5(b)(iv), clause 7(a)(v) is problematic for the government, but may be preferred by some Aboriginal groups. It should be used only if deemed vital to reaching a deal, and must then be accompanied by clause 7(b) ("This Agreement is not intended to

constitute an expression by the parties of any definitive legal views...") As in the case of clause 5(b), this last sentence is a desirable accompaniment to any of clauses 7(a)(i)-(iv), but is imperative in the case of clause 7(a)(v).

This clause would only be suitable for AIPs or Final Agreements.

(C) Without Prejudice Clauses

8. This Agreement is without prejudice to the parties' respective legal views as to the [existence,] scope or content of an inherent right of self-government.

Technically speaking, this clause would be unnecessary where an agreement already makes reference to the parties' different legal views as suggested, above. If Aboriginal groups deem it essential to include a without prejudice clause, the above wording would be acceptable to the federal government.

This clause would not be appropriate, however, in the case of a joint land claims and self-government agreement. Where an Aboriginal group wishes to include a "without prejudice" clause in a joint land claims and self-government agreement, negotiators should consider whether there might be a more general formulation that could capture the group's concerns in relation to both the land claim and the inherent right, without compromising the government's general approach to such clauses in land claims agreements.

This clause would be suitable for Framework Agreements, AIPs, or Final Agreements.

9. This Agreement is without prejudice to any treaty rights of First Nation "X" that may flow from Treaty #__.

Once again, we would not want to suggest this clause, but if it is considered important for Treaty First Nations, it would be acceptable to the federal government. Obviously, this clause would only be applicable where the agreement in question is clearly not intended to affect treaty rights. The clause would not, for example, be appropriate in the case of a combined land claims and self-government agreement, in the sense that land claims settlements may well affect treaty rights.

This clause would be suitable for Framework Agreements, AIPs, or Final Agreements.

(D) Non-derogation Clauses

10. Nothing in this Agreement shall be construed so as to abrogate or derogate from any aboriginal or treaty rights of First Nation "X" or its members/citizens, including any

inherent right of self-government, recognized and affirmed by section 35 of the *Constitution Act, 1982*.

11. Nothing in this Agreement shall affect the ability of First Nation "X" or its members/citizens to enjoy or exercise any existing or future constitutional rights of the Aboriginal peoples of Canada, or to benefit from any other arrangements or Agreements that may be applicable to them.

*As a general rule, non-derogation clauses are quire problematic and we caution negotiators not to use them **unless absolutely necessary**. The difficulty is that agreements almost inevitably do have some effect on aboriginal or treaty rights (although such effects would not necessarily be negative ones) and we may not be in a position to know, upon signing an agreement, the precise nature of those effects. Moreover, we are concerned about the potential for non-derogation clauses to undermine the binding nature of self-government agreements. The risk posed by non-derogation clauses is that they may imply that the contents of the agreement, i.e., the agreed-upon Aboriginal powers set out therein, do not take away from the inherent right, which may in turn mean that the inherent right somehow entitle the Aboriginal parties to something more than what is provided for in the agreement. And, as noted in the discussion on the "specific recognition" approach, above, this risk is exacerbated by the fact that, unlike the comprehensive claims context, we are unlikely to be able to obtain absolute certainty in self-government agreements.*

*Having said that, we recognize that many Aboriginal groups may demand some form of non-derogation, if only to ensure that the agreements do not prevent them from enjoying the benefits of future constitutional change or generous court decisions. In light of the cautions expressed above, negotiators are advised to only include either or both of clauses 10 and 11 **where absolutely essential to achieving agreement, and where they have obtained specific instructions from the government to put those clauses forward.***

Where it is deemed essential to use either or both of clauses 10 and 11 such use would only be suitable for Final Agreements, or possibly as a principle in an AIP designed to be expressed in the Final Agreement. Expressions of non-derogation are clearly not suitable for use in Framework Agreements.

In the particular case of agreements dealing with both self-government and land claims clause 10 would not be suitable, because it is clearly the intention of land claims agreements to affect aboriginal or treaty rights. Clause 11 might be acceptable in this context, but only where the word "existing" is deleted from the phrase "any existing or future constitutional rights". Once again, the reason for this modification is that land claims agreements do affect existing rights. In this case,

then, the phrase would simply read, "any future constitutional rights of the Aboriginal peoples of Canada...".

Finally, negotiators should be aware that, at the time of writing a paper is currently being prepared that will set out a more comprehensive expression of the government's position on non-derogation clauses generally. Negotiators are therefore further advised to consult this document as soon as it becomes available.

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GUIDELINES FOR FEDERAL SELF-GOVERNMENT NEGOTIATORS (Number 2)

How to Deal with Requests for Recognition as "Distinct People(s)"

Inherent Rights Directorate

and Department of Justice
March 15, 1996

Secret

How to Deal with Requests for Recognition as "Distinct People(s)"

Negotiators will be faced with requests from aboriginal groups to include language in agreements recognizing them as "a distinct peoples" or as "distinct peoples". Recognition ma also be sought as "people" or "peoples" without the accompanying adjective "distinct". All of these formulations raise similar problems/issues from the federal perspective.

Illustrative of such language is the following clause proposed for inclusion in the Fort Frances Framework Agreement over Education. Approval of the Framework Agreement by the Federal Steering Committee on Self-Government was conditional on the clause being modified. The clause is set out here as an example of language likely to be proposed by aboriginal groups.

> **The members of the First Nations are a distinct people within Canada by virtue of their Anishnaabe origin, language and culture, and as such, their history, language, culture and sacred relationship to the land integral to the education of their people.**

Note: "First Nations" is a defined term in the Fort Frances Agreement and refers to a sub-group within the larger Anishnaabe collectivity.

Such language is problematic for several reasons:

1. Use of "people(s)" by itself without further qualification has potential implications related to the international right of self-determination, a right traditionally considered akin to the right of a sovereign state. Officials have no authority to use this language in agreements, whether binding or otherwise, since it may raise implications vis-a-vis the right of self-determination at international law. It may be noted that U.N. instruments which could address the rights of indigenous peoples are currently under discussion.

   The word "peoples" found in s.35 of the *Constitution Act, 1982* ("the aboriginal peoples <u>of Canada</u>" - emphasis added) is clearly set within the context of the Canadian constitutional framework and therefore does not have implications related

to self-determination. Nonetheless, use of the expression "the aboriginal peoples of Canada" in negotiated agreements should still be approached with care.

"The aboriginal peoples of Canada" (whose aboriginal and treaty rights are recognized and affirmed) are defined in the Constitution Act, 1982 as including the Indian, Inuit and Métis people of Canada. Characterizing any sub-group as one of "the aboriginal peoples of Canada" could be problematic in that it may give credence to a claim by a specific group to an aboriginal or treaty right(s) not otherwise maintainable at law.

In other words, in the absence of persuasive evidence that the group in question historically had its own culture, language and so on - which might support an argument as separate people - to characterize such a group as one of "the aboriginal peoples of Canada" would mitigate against the Crown arguing in an appropriate case that the group does not have a valid claim to s.35 rights on its own (i.e. as opposed to a claim to s.35 rights as part of a larger aboriginal collectivity).

2. Use of the term "distinct people(s)" raises other considerations. While a good argument can be made that Indian people (and even perhaps, for example, the Anishnaabe) are a distinct group, the more larger the collectivity is sub-divided the less likely it is that distinctiveness can be demonstrated. This is underscored in the case of the Fort Frances Framework Agreement where the negotiating group (the First Nation as defined in the Framework Agreement) do not represent all of the Anishnaabe but rather only some of them. References to sub-groups as distinct entities may raise questions related to which groups are holders of aboriginal and/or treaty rights.

3. Use of the term "distinct people(s)" or "distinct status" has implications in the Canadian unity context where "distinct society" and other related terms are under debate.

For the reasons set out above, wording such as that contained in the Fort Frances Framework Agreement must be avoided. However, should this issue arise at the negotiation table, three options are available for consideration. These are set out below in descending order of acceptability:

Option 1

The first preference is to avoid such language in negotiated agreements.

Option 2

It is recognized that in some situations, despite every effort to avoid "distinct" language, the Aboriginal Group will insist on its inclusion in some form. In these circumstances, references to the distinct identity of Aboriginal people may be considered where it is clearly relevant to the content of the Agreement under negotiation. For example, while control over education and preservation of the distinct Aboriginal identity are linked, the same could not be said for a number of other matters which are negotiable under the Inherent Right and Self-Government policy, e.g. gaming, taxation, housing, public works or business regulation.

Where the context warrants therefore, a formulation along the following lines may be considered:

> **As Anishnaabe, the members of the First Nations have a distinct origin, language, culture, history and sacred relationship with the land which are integral to the education of their people.**

The specific wording will have to be adjusted to fit the specific circumstances of the group concerned and to take into account any defined terms in the operative agreement. The objective should be to attribute any distinctiveness to as broad a collectivity as possible (as in the example, it is the Anishnaabe who have distinct attributes rather than the First Nations, as defined in the agreement, who are in fact a sub-group of the Anishnaabe).

Before agreement is reached on any specific formulation language must be approved by PCO and Justice. Negotiators should, therefore, not sign off until the wording has been reviewed. The Inherent Rights Directorate will make every effort to turn around sign offs in a timely fashion.

Option 3

If the negotiating context makes resort to Option 1 or Option 2 impossible, a formulation along the lines proposed in the Fort Frances Framework Agreement (i.e. one which links "distinct" and "peoples"/"status"/"society") will be acceptable provided it is absolutely clear that the assertion is not indicative of the position of the Government of Canada. This is the

least preferred option. Again, using the Fort Frances Framework Agreement as an example, the following language would be acceptable:

> **The members of the First Nations consider that they are a distinct people within Canada by virtue of their Anishnaabe origin, language and culture, and as such, their history, language, culture and sacred relationship to the land are integral to their people.**

Significant deviation from this formulation should be reviewed by PCO and Justice in conjunction with the Inherent Right Directorate.

15 March 1996

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ANNEX A

MANAGEMENT TERMS AND CONDITIONS FOR THE NEGOTIATION OF SELF-GOVERNMENT

1. Eligible Recipients

a) Inuit and Innu communities, *Indian Act* bands and band groupings eg: tribal council, treaty, regional or provincial levels.

b) Métis groups north of the 60th parallel.

2. Objective

The objective is to assist recipients in the negotiation of comprehensive or sectoral self-government arrangements on a bi-lateral or multi-lateral basis, consistent with the policy approach approved by Cabinet on June 22, 1995. This will further the department's goal to recognize and implement an inherent right of self-government through negotiated agreements.

3. Eligibility Criteria

Initial

The selection of self-government proposals for negotiation funding, and therefore for entry into the negotiation process, will be made utilizing criteria such as:

- Demonstrated community support and commitment for self-government negotiations, at various stages of the negotiations, as indicated by
  - a commitment by Aboriginal leaders to begin substantive negotiations and assume the jurisdictions being sought;
  - a band, tribal or regional council resolution, or other similar evidence, attesting to the communities support for self-government negotiations and support for their authorized representatives;
- Readiness to start substantive self-government negotiations, as indicated by:
  - (i) the quality of self-government proposal, which should include:
    - a description of proposed governing structures and accountability mechanisms;

- a description of jurisdictions to be negotiated;
- an identification of other substantive and procedural matters;
- description of proposed ratification procedure.

(ii) the preparedness of the First Nation to begin negotiations, which includes:

- the presence of a mandated negotiating team in place;
- the degree to which Aboriginal groups have assumed responsibilities under existing authorities;
- the extent of existing political and institutional structures;
- past and present financial management practices.

- Feasibility of the self-government proposal as indicated by;

  - compatibility of the proposal to the Inherent Right Policy;
  - economies of scale.

- Affordability of the proposal considering:

  - complexity of the proposal;
  - size/aggregation of Aboriginal group;
  - jurisdictions to be assumed;
  - achievable products and milestones;
  - the federal government's fiscal framework and existing resources;
  - availability of other funds.

- Provincial/Territorial representation, as indicated by:

  - willingness of the province or territory to support and fund negotiations;
  - willingness of the Aboriginal group to involve the province or territory.

Continuing/ Eligibility Review

Departmental officers will continually review and monitor the recipient's progress and results achieved against products and milestones that have been negotiated between the parties. Unproductive negotiations will be terminated or modified - corrective will vary depending on the source and scope of any problems identified.

4. Departmental Review Procedures

In accordance with established processes and structures, self-government proposals will be reviewed by regional and headquarters departmental officers who will ensure that the eligibility criteria are met. Recommendations to proceed will be made by DIAND Directors and above, and a decision to proceed will be made by the Minister. Regular overview of negotiations will be required by senior management to provide general direction, to identify emerging problem areas and to initiate corrective action, as required. Ongoing review and assessment is conducted by a federal interdepartmental steering committee in consultation with departmental officials and federal negotiators.

5. Maximum Amount Payable

All federal funding will come from within existing resources. The maximum amount payable to any one recipient in a year will vary across a set range, outlined below. Funding will not exceed the ceilings outlined below, but may be less than that outlined. Funding will be tied to the delivery of negotiated products and milestones, and not to process related activities. All parties to negotiations are bound to deliver upon negotiated products and milestones.

Negotiation Funding Levels - ($000s/year)

AGGREGATION	SECTORAL	COMPREHENSIVE
First Nations	N/A	100-200
Tribal Council	300-400	400-700
Treaty/Regional/Provincial	500-700	700-1,500

Projected Timeframes - (years)

AGGREGATION	SECTORAL	COMPREHENSIVE
First Nations	N/A	2-3
Tribal Council	2	3-4
Treaty/Regional/Provincial	2-3	6-9

Maximum Amounts ($000s/type of agreement)

AGGREGATION	SECTORAL	COMPREHENSIVE
First Nations	N/A	600
Tribal Council	800	2,800
Treaty/Regional/Provincial	2,100	13,500

The numbers in these charts are based on an average band size of 500 persons. In limited cases, where First Nations' membership totals are closer to that of a tribal council, these figures may increase into the tribal council range. In keeping with past practice, sectoral arrangements for bands of this size are feasible.

5a. Exemptions to Maximum Amount Payable for Groups in Former Community-Based Self-Government (CBSG) Program

Under the authority currently being sought, a number of former CBSG groups have already exceeded the total maximum amount payable to any one group for achieving a self-government agreement. In order to bring closure to these files and to protect the investment already made in negotiations, a one year exemption from the total maximum amount payable is being sought for certain former CBSG files only, as identified by the department.

Under this exemption, former CBSG files continuing in negotiations will be funded in a manner consistent with the management terms and conditions until March 31, 1997. By that time, it is expected that negotiations will have resulted in an Agreement-in-Principle and an implementation plan.

6. Basis and Timing of Payments

The schedule and basis for payments will be in accordance with the Cash Management Policy described in the Treasury Board Guide on Financial Administration, Section 9.4.7, "Cash Management". Funding to any one recipient would be determined on an annual basis, if negotiated products and timeframes are respected, in relation to: the availability of existing resources; other viable proposals received; and, stringent application of the eligibility criteria.

7. Authority to Approve Contribution Agreements

The authority to approve, sign or amend contribution agreements will be contained in the departmental delegation of "Financial Signing Authorities". It is intended that this

authority will rest at the level of Director responsible for the program area, or a comparable level or higher.

8. Authority to Approve Payments

The authority to approve payments will be contained in the departmental delegation of "Financial Signing Authorities".

9. Period of Applicability/Duration

The terms and conditions will remain in effect until revised by the Department or the Treasury Board. The planned duration of the present terms and conditions shall not extend beyond March 31, 2001.

10. Audits

Each agreement will contain the provision that the Federal Government may require and conduct an audit even though an audit and accompanying financial statements will not always be requested.

11. Evaluation

The effectiveness of this contribution will be assessed by the department's Program Evaluation Directorate in accordance with its schedule of evaluations but no later than March 31, 1999. A review and evaluation of all self-government negotiations will be conducted twice a year for the Federal Steering Committee on Self-Government.