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**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
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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.

M 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.

EXTINGUISHMENT POLICY

(iii) Policy Considerations

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.

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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. 11

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 to the 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.

OR
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 be 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 quite 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.