

CANADA'S APPROACH  
FOR DEALING  
WITH SECTION 35 RIGHTS

## **APPROACH FOR DEALING WITH SECTION 35 RIGHTS**

### **MINISTERIAL RECOMMENDATIONS TO CABINET- NOVEMBER 24, 2000**

#### **ISSUES**

Whether to approve a new technique for achieving certainty and finality for section 35 rights related to land and other natural resources in the Dogrib Comprehensive Land Claim and self-government Agreement ("Dogrib Agreement") and to approve principles for achieving predictability for the exercise of other section 35 rights in the Dogrib Agreement and in other treaties addressing self-government.

#### **RECOMMENDATIONS**

It is recommended that:

1. The Minister of, Indian Affairs and Northern Development (IAND) be authorized:
  - (a) in consultation with the Department of Justice (DOJ), to use in the Dogrib Agreement, the new technique set out in Part 1 of Annex A for achieving certainty and finality with respect to section 35 rights related to land and other natural resources ("land-based rights")
  - (b) in consultation with DOJ, to use that technique for land-based rights in other comprehensive land claim agreements as an alternative to the surrender technique or the modification/release technique of the Nisga'a Agreement; and
  - (c) To continue consultation with Aboriginal groups on other alternatives to the surrender technique for achieving substantially the same certainty and finality for land-based rights;
2. The principles set out in Annex B be approved as basic requirements for achieving certainty and finality for land based rights and predictability for other section 35 rights in treaties through which self-government rights are to be constitutionally, protected and specific techniques for applying those principles be developed in consultation with DOJ; and
3. The Minister of IAND be authorized to use in the Dogrib Agreement the technique set out in Part 2 of Annex A, which is based on the principles set out in Annex B, for achieving predictability for section 35 rights that are not land-based rights.
4. The Communications Plan set out in Annex C is approved.

This proposal will not require additional resources from government reserves nor any reallocation from within the A-bases of affected departments.

## **RATIONALE**

5. In December 1999, Cabinet approved the Dogrib Agreement-in-Principle (AIP) and a mandate to conclude the Dogrib Agreement (RD 4-0283-99RD (01)). At that time Cabinet also instructed me to make recommendations on techniques for achieving certainty and finality with respect to any Aboriginal rights of the Dogrib and other Aboriginal groups other than by way of the surrender technique which is the approach currently authorized under the Comprehensive Claims policy.
6. The Dogrib Agreement is both a land claim agreement and a self-government agreement. In addressing the issue of certainty for that Agreement, I have found it necessary to distinguish between land-based rights and rights that is not land-based.
7. With respect to land-based rights, I am asking Ministers to approve a new certainty and finality technique for use in the Dogrib Agreement and for use in other comprehensive land claim Agreements. The new technique would require the Aboriginal group to commit to not exercising or asserting any land-based rights, other than those set out in the Agreement. This contrasts with the surrender technique, which requires the Aboriginal group to release, up-front, any land-based rights that are not set out in the Agreement. If the non-assertion commitment is not enforceable or its purpose is not achieved for a particular right, the Aboriginal group would provide, as a fallback, a release of that land-based right. In addition, the technique would require a release for any past infringements of land-based rights.
8. With respect to land-based rights, DOJ has advised that this new technique represents a responsible alternative approach to achieving substantially the same certainty and finality as either the modification/release technique approved for the Nisga'a Agreement or the up-front surrender provided by other land claim agreements. The new technique is acceptable to the Dogrib and the Government of the Northwest Territories. I also believe that it may be an acceptable technique for other Aboriginal groups.
9. I am recommending that, on the basis of the authority obtained in 1998, I continue consultation with Aboriginal groups across the country about this and other alternatives to the surrender technique since I am not satisfied the techniques we have identified so far are the only acceptable alternatives. In conducting these consultations it will be important to affirm that we are seeking substantially the same certainty and finality for land-based rights as we achieve through surrender.
10. With respect to rights, which are not land-based, the inherent right policy is silent on whether or not land claim techniques for achieving certainty and finality would be required as a condition for entering self-government treaties.

**11.** In recognizing the inherent right of self-government as an existing Aboriginal right within section 35 of the Constitution Act, 1982, Canada sought to establish a process to manage the jurisdictional "uncertainty" that could arise from unilateral exercise of the inherent right and to avoid confrontation in the courts over the nature, scope and content of the right. The inherent right policy was designed to create a process that was attractive to Aboriginal groups and provinces for negotiation of practical and workable arrangements for implementation of the inherent right and exercise of self-government within the Canadian constitutional framework. A central focus of the policy approach is the establishment of clarity, harmony and predictability regarding the relationship among Aboriginal, federal and provincial/territorial laws.

**12.** Unlike the comprehensive claims policy, which contemplates a one-time full and final settlement for land-based rights, the inherent right policy was designed to be flexible to accommodate the growth and evolution of self-government arrangements and intergovernmental relations. Self-government agreements can deal with a single jurisdiction or a broad range of jurisdictions. Many agreements currently under negotiation will be implemented through legislated arrangements that are not intended to be treaties. However, a major feature of the inherent right policy is the option to include self-government arrangements in treaties, thereby assuring the Aboriginal party that the rights agreed to will be protected under section 35 of the *Constitution Act, 1982* from unjustified infringement by government.

**13.** The inclusion of self-government arrangements in treaties raises concerns regarding the appropriate relationship between the section 35 rights set out in the treaty and any section 35 rights, which remain outside the treaty. In particular, because some self-government rights not set out in the treaty could be land-based rights, there is a concern that assertion of those rights by the Aboriginal party could prejudice the certainty and finality we seek to achieve for land and other natural resources. In addition, there is a concern that the Aboriginal party could exercise an Aboriginal right outside the treaty in a manner conflicting with the treaty arrangements. There are fundamentally two options for addressing these concerns. One is to deal with all section 35 rights in a uniform way; the other is to distinguish between section 35 land-based rights and other section 35 rights.

**14.** The "uniform approach" would require that self-government treaties secure certainty and finality for section 35 rights, which are not land-based, using the same legal techniques, which are used to achieve certainty and finality for land-based rights. This "uniform" approach was adopted in the Nisga'a land claim and self-government treaty. In that instance, British Columbia insisted on a full and final settlement of all Aboriginal rights and the Nisga'a did not wish to distinguish between land-based rights and other Aboriginal rights. Such an approach minimizes legal risks for the Crown by securing finality for all self-government rights not included in the treaty and a release of any claims for past infringement of such rights. Such an approach is clearly an acceptable approach for Canada where all parties agree.

15. However, the uniform approach is not a viable approach with most Aboriginal groups across the country, particularly in areas of Canada where there are existing land claim agreements or historic land cession treaties, and any federal policy decision to now require adoption of a uniform approach in all self-government treaties would be condemned by most Aboriginal groups as a fundamental reversal of the inherent right policy and a betrayal of the undertaking to provide treaty status to self-government arrangements. While non-treaty arrangements would remain possible without a release of the inherent right, the whole policy approach would fall suspect as a process aimed at “extinguishment” rather than “implementing” the inherent right. In response many groups would renounce negotiations in favor of unilateral exercise of the inherent right. This would result in the jurisdictional uncertainty and confrontation, including by litigation, that the inherent right policy was designed to avoid. Finality can be justified as a requirement for the development of land and other natural resources. However, development of natural resources will not be affected by failure to achieve finality for other rights.

16. The uniform approach is also problematic because it would require the Aboriginal party to provide a release for any claim for past infringement of the inherent right (an example of such a claim might be that the prohibition on the use of Aboriginal language in residential schools infringed Aboriginal rights to educate children, resulting in cultural loss and damages). However, the courts have not yet ruled on such claims and no criteria exist for acceptance or compensation. In *Gathering Strength*, Canada provided an apology to Aboriginal people for the impact of past social policies, but chose not to establish a policy or process to compensate for such claims. Unlike comprehensive claim settlements, which include significant cash compensation, self-government negotiation mandates and stand-alone self-government treaties include no such benefits for the Aboriginal party. Seeking a release of past infringement claims would turn self-government negotiations into a grievance resolution process, requiring a new policy, financial resources and process for the acceptance and negotiated resolution of such claims. The chance of success for such negotiations is questionable.

17. An alternative to the uniform approach is one which distinguishes between the treatment of land-based rights and rights that are not land-based. The principles of this approach are set out in Annex B and are designed to ensure that certainty and finality are achieved for all land-based rights in accordance with the comprehensive land claims policy. With respect to other rights, the principles are designed to ensure stability for jurisdictional arrangements in the treaty and to reduce the frequency of litigation over rights outside the treaty, consistent with the intent of the inherent policy. The specific Techniques for applying these principles will need to be developed, with assistance from DOJ, taking into account the different types of self-government treaties being negotiated and their link to existing treaties and land claim agreements. Annex A illustrates how the principles would be applied in the Dogrib Agreement.

**18.** Without requiring the Aboriginal party to release to Canada their inherent right of self-government, the approach set out in Annex B provides mutual security for on-going government relationships with Aboriginal groups. The Aboriginal party receives the security of section 35 protection for the self-government rights set out in the treaty. In return, government receives the security that the Aboriginal party can no longer assert or exercise any Aboriginal right without first going through an orderly process to amend the treaty or to prove the scope and content of the right in court. This process would use the court in a relatively non-confrontational manner, to achieve the common objective of clarity for these rights before they are exercised, rather than as a forum to resolve allegations of wrongdoing. No Aboriginal right could be exercised in a manner that conflicts with the treaty. Government will know in advance what section 35 rights it must respect and so will be able to avoid infringing them.

**19.** With the approach taken in Annex B, there are some residual legal risks. There is a risk that the courts will affirm the existence of Aboriginal rights other, than those rights and jurisdictions that Canada is currently prepared to negotiate and include in a self-government treaty. There is some risk that the future exercise of some rights which are outside the treaty and which are not land-based could adversely impact on the certainty obtained for land-based rights, but DOJ advises that this risk may be minimized with suitable language. In any event, this latter risk is one Canada faces in all historic numbered treaties and all land claim agreements (except Nisga'a) since those treaties and agreements only achieved certainty and finality for land-based rights.

**20.** Distinguishing between the certainty and finality requirements for land-based rights and jurisdictional predictability required for other rights provides a sound, interest-based approach for future treaty negotiations which achieves the different objectives of the inherent right policy and the comprehensive land claims policy. I am therefore recommending that the principles set out in Annex B be approved as basic requirements to be met when negotiating treaties, which include section 35 rights to self-government. With respect to the Dogrib claim, I am recommending that the techniques in Annex A be affirmed to enable Canada to conclude an agreement providing necessary certainty for resource development, including diamond mining and hydro electric projects in that portion of the Northwest Territories.

**21.** Failure to accept these recommendations will likely result in a collapse of the Dogrib negotiations. In addition, any federal proposal to apply the "uniform" approach for self-government rights that are not land-based would likely touch off a nation-wide confrontation with Aboriginal groups over the goals of the inherent right policy. It would be perceived by Aboriginal parties as an attempt to retrofit the inherent right policy with extinguishment approaches which have been repeatedly condemned in land claims negotiation. The inherent right policy sought to de-emphasize the focus on rights in favor of developing, practical governance arrangements that would improve conditions in Aboriginal communities and provide a framework for new intergovernmental relationships.

Requiring a release of the inherent right and claims for past infringements would shift the balance of the policy from a forward-looking focus on workable self-governance arrangements to a regressive rights-based approach focused on full and final settlement of rights and compensation for alleged past infringements.

### **CONSULTATIONS AND PERSPECTIVES**

22. There has been no consultation with the public or aboriginal groups on the recommended principles for negotiating self-government treaties. As the principles are consistent with existing policy statements, it is preferable to address their application at specific tables. The Dogrib Council has been consulted regarding the principal components of the techniques in Annex A and is prepared to finalize the Dogrib Agreement on that basis.

### **FEDERAL/TERRITORIAL/PROVINCIAL CONSIDERATIONS**

23. The GNWT will be a party to the Dogrib Agreement and is supportive of the principal components of the new technique set out in Annex A for the Dogrib claim.

24. Other provincial and territorial governments have not been canvassed for their views on the new certainty technique for land-based rights or the basic requirements for self-government treaties. It is anticipated that British Columbia and Newfoundland may prefer the uniform approach. Other provinces and Yukon wish to preserve the certainty achieved in existing land claim agreements but have not advocated release or surrender of self-government rights. Any potential criticisms in B.C. of these alternative approaches can be managed in the context of the on-going initiatives in B.C. on alternatives to surrender.

### **DEPARTMENTAL POSITIONS**

25. The FSC approved the new technique on December \_\_\_\_, 2000

### **PROBLEMS AND STRATEGIES**

26. Problem: The lack of consistency in techniques for land claim Agreements may cause confusion and raise concerns about the effectiveness of the techniques.

27. Strategy: It would be noted that "one size doesn't fit all" and that as long as each treaty meets the interests of Canada, Aboriginal groups, the province or territory, third parties and other members of the public, various techniques should be considered.

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Minister of Indian Affairs  
and Northern Development

## COMMUNICATIONS OVERVIEW

(Plan, see page 29)

### 1. COMMUNICATIONS GOALS

**Note:** There would not be an announcement of the Cabinet decision. The information on the "Dogrib technique" would become public as part of the news release and backgrounder to be issued when the Dogrib Agreement is finalized.

- To demonstrate the federal government's commitment to the resolution of land claims and the negotiation of self-government agreements.

### 2. LINKS TO FEDERAL GOVERNMENT MESSAGES AND CAMPAIGNS

- Demonstrates Canada's dedication to continue negotiating settlements with Aboriginal people on the basis of its inherent right and comprehensive land claim policies. It builds on the federal government's initiative, "Gathering Strength: Canada's Aboriginal Action Plan".

### 3. KEY MESSAGES

- In approving the "Dogrib technique" Canada is achieving the objectives of its inherent right and comprehensive land claim policies.
- The Dogrib Agreement will provide
  - certainty and finality about the use and ownership of land or other resources, consistent with the intent of the comprehensive claims policy; and
  - A high level of jurisdictional predictability regarding the self-government rights of the Dogrib, consistent with the intent of the inherent right policy.

### 4. TARGET AUDIENCES AND REACTIONS

**Media--daily, business, weekly and Aboriginal:** NWT residents are generally supportive of land claims. It is likely that they will welcome the new certainty technique for land-based rights and predictability for other rights. It is unlikely the NWT media will have enough background to do their own analysis of the certainty and predictability provisions. It is more likely that they will depend on the reactions of stakeholders including the Dogrib, other Aboriginal groups and the business and resource sectors.

**Business and Resource Sectors:** Business and resource sectors have repeatedly indicated the need for a stable resource environment for exploration and development and thus will support the new technique for land-based rights.

**First Nations in the Northwest Territories:** First Nations continue to state that the conclusion of land claims in the NWT is their number one priority. They will likely welcome the new certainty technique because it is an alternative to the much-criticized surrender technique.

## **5. KEY COMMUNICATIONS ELEMENTS**

- The progress of Dogrib negotiations has a high regional, but modest national profile. Since the certainty and predictability provisions will be part of the Dogrib Agreement, those issues will be addressed as part of overall communications activities when the Dogrib Agreement is made public.
- Key messages and Questions and Answers would be developed in case inquiries are made in the interim.

## **6. REGIONAL/TERRITORIAL/PROVINCIAL ISSUES**

- Cooperative efforts by the Dogrib and the GNWT will lead to greater harmonization and be an example for other Aboriginal groups.
- A Dogrib Agreement would establish a template for other NWT outstanding land claims.
- Any criticism in B.C. of alternative approaches can be managed in the context of on-going initiatives in B.C. on alternatives to surrender.

## **7. BUDGET**

- No communications funds required at this time.

**ANALYSIS**  
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## **ANALYSIS**

1. Decisions are required concerning the approval of the following: the use in the Dogrib Agreement and in other treaties of provisions based on a non-assertion/fall-back release technique ("new technique") for achieving certainty and finality with respect to section 35 rights related to land and other natural resources ("land-based rights"); continuation of consultation with Aboriginal groups on other alternatives to the surrender technique for land-based rights; basic requirements for achieving predictability for section 35 rights that are not land-based in treaties through which self-government rights are to be constitutionally protected; and the Communications Plan.

### **BACKGROUND**

2. In this analysis, "land-based" means, in relation to a section 35 right, related to or affecting land or another natural resource; and "section 35 right" means an Aboriginal or treaty right of an Aboriginal group protected by section 35 of the Constitution Act, 1982.

3. In April 1997, the negotiation of a comprehensive land claim and self-government agreement-in-principle (AIP) among the Dogrib First Nation, as represented by the Dogrib Treaty 11 Council ("Dogrib Council"), the Government of the Northwest Territories ("GNVVT") and the Government of Canada ("Canada") was authorized.

4. In December 1999, the Dogrib AIP and the mandate to conclude a final Agreement ('the Dogrib Agreement') were approved. The Dogrib AIP was signed on January 7, 2000 and negotiations to conclude the Dogrib Agreement are proceeding smoothly.

5. When the Dogrib AIP mandate was approved, it was recognized that an important part of the Dogrib Agreement was missing - the legal technique for achieving certainty and finality with respect to the section 35 land-based rights. It was missing because, when the mandate was approved, there were no approved techniques that were acceptable to the Dogrib Council.

6. Because the Dogrib confirmed they would refuse to finalize the Dogrib Agreement on the basis of surrender or on the basis of a technique that appeared to them to be the same as surrender, and because the Minister of Indian Affairs and Northern Development (IAND) had yet to complete the exploration of techniques for achieving certainty and finality as authorized in 1998, he was instructed by Cabinet to continue this exploration and then return to Cabinet with recommendations on the acceptability of techniques for achieving certainty and finality with respect to the section 35 rights of the Dogrib and other Aboriginal groups, other than way of cede, release and surrender. This work was to be undertaken in consultation with the Department of Justice (DOJ).

## CONSIDERATIONS

### The Comprehensive Claims Policy and the Surrender Technique

7. The 1986 comprehensive claims policy provides two approaches for achieving certainty in relation to land-based rights:

- The cession and surrender of Aboriginal land-based rights throughout the settlement area in exchange for the rights defined in the land claim treaty; or
- The cession and surrender of Aboriginal land-based rights except on specified lands retained by the Aboriginal party.

These approaches resulted from past experience with real conflicts between the traditional uses of land and other natural resources by Aboriginal groups and uses by other persons and government.

8. The Yukon Land Claim Agreements are the only modern treaties to use the second approach by allowing Yukon Indians to retain Aboriginal rights to the surface of certain of their settlement lands.

9. The modification/release technique used in the Nisga'a Agreement is unacceptable to the Dogrib who interpret it as involving a release or surrender in relation to any Aboriginal rights not set out in the Agreement.

### The Search for an Alternative to the Surrender Technique - The "Non-Assertion" Technique

10. Because "surrender" is an anathema to most First Nations across Canada, there has been a search for an alternative for the past few years.

11. In 1993, the Liberal platform document *The Aboriginal Peoples of Canada* stated that a Liberal government would not require blanket extinguishment for land claims based upon Aboriginal title. In 1994, the report of the House Standing Committee on Aboriginal Affairs and Northern Development recommended that the Minister of IAND "consider the feasibility of not requiring a blanket extinguishment of Aboriginal rights or title in future land claim agreements". In the fall of that year, Mr. Justice Hamilton was authorized to consult across the country on alternatives to surrender and his report in 1995 suggested an "alternative to surrender" in comprehensive claim treaties. Also in 1995, the interim report of the Royal Commission on Aboriginal Peoples on "extinguishment" recommended that the federal government no longer require an Aboriginal party to agree to blanket extinguishment of Aboriginal land-based rights in exchange for rights or other benefits contained in comprehensive land claim treaties.

**12.** In 1996, Cabinet approved a set of principles for consultations that could constitute the basis for a legal technique for achieving certainty and finality in comprehensive land claim treaties without the requirement for a surrender of Aboriginal land-based rights. This resulted in the development of the "non-assertion" technique. The main features of the non-assertion technique are that the assertable section 35 rights of an Aboriginal group are set out in that group's treaty and that the group commits to not asserting any section 35 rights which are outside its treaty.

#### The Delgamuukw Decision and the "Fall-Back Release"

**13.** In December 1997, the Supreme Court rendered its decision in Delgamuukw in which it discussed, for the first time, the nature and scope of Aboriginal title and made a number of statements on the scope of Aboriginal title, including the statement that where land was subject to Aboriginal title, unless that title was surrendered, the land could not be put to a use irreconcilable with the uses on which that title was based. For this reason, the concept of coupling the non-assertion technique with a "fall-back" release was developed. A fallback release would require that, if the purpose of the non-assertion is not achieved for any particular land-based right or if the non-assertion were unenforceable, the Aboriginal party would release that right.

**14.** The purposes of the non-assertion commitment would be described in the treaty. These purposes would be

**(a)** To prevent the imposition of any obligation on government or others in relation to the rights covered by the commitment',

**(b)** To permit the Aboriginal group to exercise all its authorities, jurisdictions, rights and privileges that are set out in its treaty; and

**(c)** To permit government and others to exercise all their authorities, jurisdictions, rights and privileges as if the rights not to be asserted did not exist.

**15.** The new technique would provide for a non-assertion commitment coupled with a fall-back release in relation to land-based rights. If the non-assertion commitment was not enforceable or its purpose was not achieved for a particular land-based right, the Aboriginal group would provide, as a fallback, a release of that right.

## The Modification/Release Technique

**16.** In May 1998, Cabinet approved an alternative technique to achieve certainty and finality in the Nisga'a Agreement. At the same time, the Minister of IAND was authorized to continue consultation on alternatives to the surrender technique for achieving certainty and finality, with respect to land-based rights, that have an acceptable level of risk. The modification/release technique in that Agreement provides that the Aboriginal land-based rights of the Nisga'a are modified to be those set out in the Agreement and, to the extent the technique of modification leaves any Aboriginal rights outside the scope of the Agreement, it provides for their release. That Agreement also provided for a release for past infringement of all section 35 land-based rights.

**17.** The modification/release technique along with the release for past infringements met the requirements of the comprehensive claims policy with respect to land-based rights - that is, achieve a full and final settlement of any such rights.

**18.** For section 35 rights which are not land-based, the Nisga'a Agreement applied the same technique that had been applied for land-based rights - that is, one that achieved a full and final settlement. It is the first comprehensive land claim or self-government treaty to affect Aboriginal rights which are not land-based - surrenders and releases in other treaties apply only to land-based rights. The Government of British Columbia insisted on a full and final settlement of all Aboriginal rights and the Nisga'a did not wish to distinguish between land-based rights and other Aboriginal rights. Such an approach remains acceptable to Canada where all parties agree. However, it is not a viable approach with most Aboriginal groups across the country, particularly in areas of Canada where there are existing land claim agreements or historic land cession treaties.

**19.** The Dogrib interpret the modification/release technique as involving an up-front surrender of all Aboriginal rights not set out in the treaty. They have confirmed they will not finalize the Dogrib Agreement on the basis of a technique that appears to them to be the same as surrender. Other Aboriginal northern comprehensive land claim treaties have included rights that are not land-based but have not provided a release of rights that are not land-based and that are not set out in those treaties.

## Differentiating between Land-Based Rights and Other Rights

**20.** Another approach for Agreements like the Dogrib Agreement - that is, that are both land claim and self-government treaties - is one that reflects the objectives of Canada's comprehensive land claims policy for land-based rights and the different objectives of the *Policy Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* ("the inherent right policy") for other rights.

**21.** This approach would be to treat section 35 land-based rights (which may include some self-government rights) differently from other section 35 rights (which may include, for example, self-government rights related to "education" and "language"). Differentiation between section 35 rights is not unique. Except for the Nisga'a Agreement, all historic numbered treaties and all land claim agreements have distinguished between land-based rights and other rights, and used the surrender technique only for land-based rights.

#### Section 35 Land-Based Rights

**22.** The exercise by Aboriginal people of section 35 land-based rights has historically had a direct impact on the use of land and other natural resources by other people. Consequently, Canada has required, through its comprehensive claims policy, certainty and finality for land-based rights in order to avoid the very real conflict between the use by Aboriginal groups of land and other natural resources and their use by other persons and government.

**23.** For any section 35 land-based right, the new technique would require a release for any infringements where the infringement occurred before the effective date of the treaty. The release for past infringement of any land-based rights in the new technique would be essential to provide certainty for third parties and developers and government with regard to use land and other natural resources.

**24.** With respect to section 35 land-based rights, the new technique would achieve substantially the same certainty and finality as either the modification/release technique approved for the Nisga'a Agreement or the up-front surrender provided by other land claim agreements, and would therefore meet the certainty and finality requirements of the comprehensive claims policy.

**25.** The new technique would be acceptable, in relation to land-based rights, to the Dogrib and the Government of the Northwest Territories.

**26.** Consultation with Aboriginal groups across the country about the new technique for land based rights and other alternatives to the surrender technique for achieving substantially the same certainty and finality for land-based rights would continue. The unique circumstances of each negotiating table must be taken into account when attempting to reconcile the views of the province or territory and of the Aboriginal group. An example of such endeavor is a recent joint statement from Canada, British Columbia and the First Nations Summit - committing Canada and British Columbia to work with each First Nation in treaty negotiations facilitated by the British Columbia Treaty Commission in an effort to determine an acceptable legal technique for achieving the certainty they all seek.

## Section 35 Rights which are not Land-Based

27. The proposed approach to section 35 rights that are not land-based is directly related to federal policy objectives which reflect the path the federal government has taken to arrive at the current policy on Aboriginal self-government.

28. In 1982, the Penner Report (*Special Committee on Self-Government - sub-committee of House of Commons Standing Committee on Indian Affairs and Northern Development*) drew a direct connection between the creation of a new relationship between the Crown and First Nations, Aboriginal self-government and the improvement of the social and economic well-being of Aboriginal people.

29. *Gathering Strength* further reaffirmed the commitment to building new self-government relationships and strengthening Aboriginal governance. Partly in response to the Penner Report, the federal government announced its community-based self-government policy in 1985 as a means to create a new relationship between the Crown and Aboriginal people outside of the *Indian Act* through legislated agreements. While participation was high, the consequence of reliance on delegated authority and concerns about the transfer of jurisdiction and responsibility without adequate capacity building and financial arrangements to build sustainable governments was that few agreements were achieved.

30. At the same time, the Charlottetown process was underway which, in part, sought constitutional recognition of the Aboriginal right of self-government and the recognition of Aboriginal government as one of three orders of government in Canada. The process ended in 1992 with the failure of the Charlottetown Accord.

31. This is the backdrop against which the 1995 inherent right policy that recognized the inherent right of self-government as an existing Aboriginal right within section 35 of the Constitution Act, 1982 was adopted. Through it Canada continues to seek a new relationship with Aboriginal peoples by enabling them govern themselves, thereby reducing dependency, fiduciary duties and dysfunctional relationships created by the *Indian Act* and promoting stronger, healthier communities.

32. *Gathering Strength* reaffirmed the commitment to building new self-government relationships and strengthening Aboriginal governance.

33. The inherent right policy also sought to establish a process to manage the jurisdictional "uncertainty" that could arise from unilateral exercise of the inherent right and to avoid confrontation in the courts over the nature, scope and content of the right. The inherent right policy was designed to create a process that was accessible, flexible and attractive to Aboriginal groups and provinces for negotiation of practical and workable self-government arrangements within the Canadian constitutional framework

**34.** Government has not, to date, considered whether certainty and finality in a land claim sense are appropriate or necessary to meet its public policy objectives when entering treaties which address self-government. The inherent right policy provides that self-government arrangements can be included in land claim treaties, in stand-alone treaties, or as an addition to existing treaties. The policy is silent on whether or not land claim certainty techniques and releases would be applied to Aboriginal self-government rights in such cases.

**35.** The self-government arrangements can be set out in treaties or in non-treaty agreements dealing with a single jurisdiction or a comprehensive range of jurisdictions. A central focus of the policy approach is the establishment of clarity, harmony and predictability regarding the relationship between Aboriginal, federal and provincial laws. Unlike the comprehensive claims policy, which contemplates a one-time full and final settlement, the inherent right policy was designed to be flexible to accommodate the growth and evolution of self-government arrangements and intergovernmental relations.

#### The Non-Treaty Self-government Agreements

**36.** A significant number of self-government arrangements currently under negotiation (particularly those that are not part of a comprehensive land claim) do not currently envision being treaties. As with treaty agreements, non-treaty agreements are designed to provide clarity, harmony and predictability regarding the exercise of laws. The agreements rely on the mutual benefit to the parties' accordance with the agreement.

**37.** Non-treaty agreements are without prejudice to existing section 35 rights to self-government and do not create any new section 35 rights to self-government. Therefore, an Aboriginal party could unilaterally assert an inherent right and exercise jurisdiction outside the scope of the agreement, advance compensation claims against Canada for alleged infringements of their inherent right, and advance claims or challenge laws on future actions of Canada as an infringement on their inherent right.

**38.** The certainty and finality approach used in comprehensive land claims would not be appropriate for non-treaty agreements for the following reasons. The Aboriginal parties could not be expected to release or surrender their section 35 right of self-governance for a package of jurisdictions that are not protected under section 35. In addition, since most non-treaty agreements do not include specific benefits or "compensation" related alleged past infringement of Aboriginal rights, the Aboriginal parties could not be expected to provide a release of claims for such infringement.

## Treaty Agreements: "Uniform" Approach

**39.** The inclusion of self-government arrangements in treaties or land claim agreements raises questions for all parties regarding the appropriate relationship between the section 35 self-government rights set out in the treaty and any section 35 self-government rights not set out in the treaty. For Canada, there are concerns that even after a treaty is in place, the Aboriginal party could still assert and exercise an Aboriginal right or jurisdiction in addition to, or in conflict with, the self-government arrangements set out in the treaty. This could create jurisdictional uncertainty and leave Canada exposed to legal claims for infringing undefined Aboriginal self-government rights. In addition, because some land-based rights could be characterized as "self-government rights", there is concern that assertion by the Aboriginal party of these types of self-government rights could impact on the use of land and other natural resources by third parties or government.

**40.** One option to minimize such risks would be to require a uniform approach, namely one that achieves finality, for all section 35 rights outside a treaty and for any claims for past infringement of all section 35 rights. This "uniform" approach was adopted in the Nisga'a land claim and self-government treaty. In that instance, British Columbia insisted on a full and final settlement of all Aboriginal rights and the Nisga'a did not wish to distinguish between land-based rights and other Aboriginal rights.

**41.** A "uniform" approach still accommodates the potential for the future evolution of self-government rights through negotiated amendments to the treaties and would reduce the incidence of litigation in which government challenges Aboriginal activities as being unauthorized. Such an approach remains acceptable to Canada where all parties agree. However, it is not a viable approach with most. Aboriginal groups across the country, particularly in areas of Canada where there is existing land claim agreements or historic land cession treaties.

**42.** Any federal policy decision to now require adoption of a "uniform" approach for all section 35 rights would be strongly condemned by most Aboriginal groups as a fundamental reversal of the inherent right policy. That policy now permits treaty status as a negotiable option for self-government agreements. If the "price" of such status were too high, the result would be to remove treaty status for such agreements as a real option. Canada would be perceived by many Aboriginal groups as shifting its focus from implementing the inherent right to extinguishing the inherent right. In response, many groups would renounce negotiations in favor of unilateral exercise of the inherent right. This would result in the jurisdictional uncertainty and confrontation, including by litigation, that the inherent right policy was designed to avoid. Insisting on a "uniform" approach would encourage a rights based approach to self-government. This would jeopardize the achievement of the primary policy objectives of the inherent right policy and Gathering Strength - the implementation of practical governance arrangements to promote healthier communities and cooperative intergovernmental relationships.

43. The "uniform" approach is also problematic because it would require the Aboriginal party to provide a release for any claim for past infringement of the inherent right, (an example of such a claim might be that the prohibition on the use of Aboriginal language in residential schools infringed Aboriginal rights to educate children, resulting in cultural loss and damages). It is recognized that government may be liable for such claims. However, no such claims have been addressed by the courts and no criteria exist for acceptance or compensation. In *Gathering Strength*, Canada provided an apology to Aboriginal people for the impact of past social policies, but chose not to establish a policy or process to compensate for such claims. If Canada were to insist upon a release of such claims as a condition of entering self-government treaties, it would engender claims for compensation.

44. Unlike comprehensive claim settlements which include significant cash compensation self-government negotiation mandates and stand alone self-government treaties include no such benefits for the Aboriginal party. Seeking a release of past infringement claims would turn self-government negotiations into a grievance resolution process, requiring development of policy criteria and identification of resources for their acceptance, negotiation and compensation. Even if Canada were to offer cash compensation for such a release, the likelihood of settlements is low.

#### Basic Requirements for Self-Government Treaties

45. In order to reflect the different public policy objectives set out in the inherent right policy and the comprehensive land claims policy; basic requirements to be met when negotiating treaties, which include section 35 rights to self-government, could be developed. Those requirements would recognize a distinction between the treatment of land-based rights and rights that are not land-based. Where those treaties were also comprehensive land claim Agreements, the requirements would be designed to ensure that certainty is achieved for all land-based rights in accordance with the comprehensive land claims policy. With respect to rights that are not land-based, the requirements would be designed to ensure a high level of jurisdictional predictability, consistent with the intent of the inherent right policy.

46. The basic requirements would provide that a new self-government treaty, that is also a comprehensive land claim agreement, would meet the certainty and finality requirements of the comprehensive claims policy in relation to section 35 land-based rights. If a new self-government treaty is not a comprehensive land claim agreement, that treaty could not prejudice the certainty and finality achieved with respect to section 35 land-based rights by existing land claim treaties or historic treaties. Also, a new self-government treaty would provide predictability with respect to section 35 rights which are not land-based by ensuring that the arrangements set out in the treaty provide a stable framework for the implementation of self-government and to guide jurisdictional and intergovernmental relations; and that if the treaty allows the exercise of any continuing Aboriginal rights that are not land-based and not set out in the treaty, that exercise would be subject to an orderly process being followed before those rights could be exercised.

The orderly process would include negotiations to try to deal with the exercise of such rights within the treaty or by otherwise amending the treaty. If such negotiations were unsuccessful, the scope of any such rights would be clarified by a court before they could be exercised. The basic requirements would recognize that the treaty would have precedence over any conflicting Aboriginal rights and would prevent claims being made for alleged infringement of such Aboriginal rights where the alleged infringement occurred before the scope of the right had been clarified by a court and all other parts of the process had been completed.

**47.** The specific techniques for applying these requirements would need to be developed taking into account the different types of self-government treaties being negotiated and their link to existing treaties and land claim agreements.

**48.** With regard to section 35 rights that are not land-based, the basic requirements would be reflective of the *Gathering Strength* commitment to "recognize Aboriginal government and to provide a framework of principles to guide jurisdictional and intergovernmental relations". Without requiring the Aboriginal party to release to Canada their inherent right of self-government, it would provide mutual security for ongoing government relationships with Aboriginal groups. The Aboriginal party would receive the security of section 35 protection for the self-government rights set out in the treaty. In return, government would receive the security that the Aboriginal party could no longer assert or exercise any Aboriginal right without first going through an orderly process to amend the treaty or to prove the scope and content of the right in court. In addition, government would receive the security that, when it is acting in accordance with the treaty, it would not be subject to claims that it is infringing Aboriginal rights unless such a right is first established through an orderly process set out in the treaty.

**49.** While the basic requirements would manage most risks associated with Canada's recognition of the inherent right, there are some residual legal risks. There is a risk that the courts could affirm the existence of Aboriginal rights other than those rights and jurisdictions that Canada is currently prepared to negotiate and include in a self-government treaty. However, because the nature and scope of such additional rights are not known, the potential impact for the Crown cannot be assessed at this time. There is some risk that the future exercise of some rights which are outside the treaty and which are not land-based could adversely impact on the certainty obtained for land-based rights. However, this risk could be minimized with suitable language. In any event, this is a risk Canada has already taken in all historic numbered treaties and all land claim agreements (except Nisga'a) since those treaties and agreements distinguished between land-based rights and other rights and obtained certainty and finality only for land-based rights.

**50.** Approval of the basic requirements for self-government treaties and of the new technique for the Dogrib Agreement would provide a means for Canada to simultaneously advance the objectives of the comprehensive land claims policy and the inherent right policy, consistent with *Gathering Strength*.

Distinguishing between the certainty requirements for land-based rights and jurisdictional predictability required for other rights would provide a sound, interest-based approach for future treaty negotiations. With respect to the Dogrib claim, the new technique should enable Canada to conclude an agreement providing necessary certainty for resource development, including diamond mining and hydro electric projects in that portion of the Northwest Territories.

### Failure to Approve

**51.** Failure to approve the new technique for land-based rights or the basic requirements for rights that are not land-based would likely result in a collapse of the Dogrib negotiations. In addition, even if the new technique was approved, any federal proposal to apply it to rights that are not land-based, instead of the predictability approach of the basic requirements, would likely touch off a nation-wide confrontation with Aboriginal groups over the goals of the inherent right policy. It would likely be perceived by Aboriginal parties as an attempt to retrofit the inherent right policy with extinguishment approaches which have been repeatedly condemned in land claim negotiations. The inherent right policy sought to de-emphasize the focus on rights in favor of developing practical governance arrangements that would improve conditions in Aboriginal communities and provide a framework for new intergovernmental relationships. Requiring a release of the inherent right and claims for past infringements would shift the balance of the policy from a forward-looking focus on workable self-governance arrangements to a regressive rights-based approach focused on full and final settlement of rights and compensation for alleged past infringements.

### Issues Related Only To the Northwest Territories

#### Treaty 11 Harvesting Rights

**52.** When their land claim treaties came into effect, the Gwich'in and Sahtu Dene surrendered their Treaty 11 rights, except for harvesting rights in areas of the Mackenzie Valley outside their settlement areas. Their Treaty 11 harvesting rights were to be surrendered in each of those other areas of the Valley when the Dene of each such area surrendered their Treaty 11 harvesting rights in the Sahtu and Gwich'in settlement areas.

**53.** In order to prevent the Gwich'in and the Sahtu Dene from continuing to exercise their Treaty 11 harvesting rights in the Dogrib settlement area after the Dogrib Agreement is in effect, either the Dogrib must surrender their Treaty 11 harvesting rights in the Gwich'in and Sahtu settlement areas, or the Gwich'in and Sahtu Dene and Metis would have to agree to amend their treaties to accommodate the new technique. The Dogrib would be responsible for trying to persuade the Gwich'in and the Sahtu Dene and Metis to amend their treaties. If the Dogrib do not succeed, the certainty clause in the Dogrib Agreement would provide for a surrender of their Treaty 11 harvesting rights in the Gwich'in and Sahtu settlement areas.

## Yellowknife Dene First Nation

54. Most of the Yellowknife Dene Band, who live in Dettah, across Yellowknife Bay from the City of Yellowknife and Ndilo, within the City of Yellowknife, are eligible to become beneficiaries and to participate in the ratification vote of the Dogrib Agreement because they are either of Dogrib ancestry or they are indigenous to the North Slave region. However, they are not represented at the Dogrib negotiating table because, as adherents of Treaty 8, they have aligned themselves with other NWT Treaty 8 First Nations and are pursuing the Akaitcho Treaty 8 process. Because they are not represented at the Dogrib negotiating table, the certainty provisions and any applicable Treaty harvesting provisions of the Dogrib Agreement would not apply to them unless they elect to participate in the ratification vote or enroll as beneficiaries under the Dogrib Agreement.

### Eligible Metis

55. Certain Metis in Yellowknife are eligible to become beneficiaries and to participate in the ratification vote of the Dogrib Agreement because they are of Dogrib ancestry and are members of the four Dogrib bands. They have chosen to separate themselves organizationally and politically from the Dogrib Council and are either seeking a Metis-only land claim process or unique representation within the Dogrib negotiating structure. However, they are officially represented at the Dogrib negotiating table by the Dogrib Council because they are members of the bands that have authorized the Dogrib Council to represent them. The Dogrib Agreement as a whole, including the certainty provisions, would therefore apply to them whether or not they elect to vote or enroll as beneficiaries under the Dogrib Agreement.

56. There is also a small number of Metis in Yellowknife who are eligible to become beneficiaries and to participate in the ratification vote of the Dogrib Agreement because they are indigenous to the North Slave region. They are not of Dogrib ancestry. They are not members of one of the four Dogrib bands. The Dogrib Council does not represent them. Their number is insufficient to warrant their own land claim. Because they are not represented at the negotiating table, the certainty provisions of the Dogrib Agreement would not apply to them unless they elect to participate in the ratification vote or enroll as beneficiaries under the Dogrib Agreement.

### Constitutional Protection

57. It is intended that all rights in the Dogrib Agreement would be protected under section 35 of the *Constitution Act, 1982*.

### Gender Equality

58. Rights and benefits under a Dogrib Agreement would apply equally to Dogrib men and women.

### Environmental Assessment

59. The new technique and the basic requirements have no environmental implications.

### Gathering Strength

60. The new technique and the basic requirements would meet the Gathering Strength objectives of "Strengthening Aboriginal Governance" and "Developing a New Fiscal Relationship".

### Charter

61. The Charter of Rights and Freedoms would apply to the Dogrib First Nation Government and its institutions.

### Consultation with Aboriginal Groups

62. The Dogrib Council has been consulted regarding the principal components of the new technique and of the basic requirements and is prepared to finalize the Dogrib Agreement on those bases.

63. Other Aboriginal groups have not been consulted on the new technique or on the basic requirements

64. There may be other techniques for achieving substantially the same certainty and finality for land-based rights and for achieving predictability for other rights- so the exploration of alternative techniques could continue. The unique circumstances of each negotiating table could be taken into account to endeavor to reconcile the views of the federal government, the province or territory and of the Aboriginal group. Consultations and negotiations on ways to achieve these objectives would continue at individual tables. Other techniques may emerge as negotiations and consultations continue.

### Federal/Territorial/Provincial Relations

65. The GNWT will be a party to the Dogrib Agreement and is supportive of the principal components of the new technique and of the basic requirements.

66. It is not likely that application of the basic requirements for rights that are not land-based would be considered sufficient by the British Columbia or Newfoundland governments. Although they have not been consulted on these requirements, in the past, they have stated that they will require a surrender of section 35 rights. They may express concern at the possibility the approval of the basic requirements for rights that are not land-based would make Aboriginal groups less willing to accept a surrender or modification/release approach for all rights.

## OPTIONS

67. The options considered include: approving the new non-assertion/fall-back release technique for land-based rights and the basic requirements for achieving predictability for the exercise of rights which are not land-based; and approving the new technique and requiring a certainty and finality technique for rights that are not land-based.

### Option 1: Approve Approach which distinguishes between Section 35 Land-Based Rights and other Section 35 Rights

68. This option would be to approve the principal components of the new non-assertion/fall-back release technique for land-based rights and to approve the basic requirements for achieving predictability for the exercise of rights which are not land-based rights.

69. Advantages: For land-based rights, provides an alternative to the surrender or modification/release techniques while achieving substantially the same certainty and finality as those techniques. For rights that are not land-based, would be consistent with the inherent right policy and *Gathering Strength*, would enable government to avoid future infringements, would avoid need to identify, value and compensate for past infringements, would reduce confrontation over rights outside the treaty, would ensure that the exercise of such rights is consistent with the treaty, and would provide a sound, interest-based approach for future self-government treaty negotiations. Negotiations with the Dogrib would continue. Provides an incentive to other Aboriginal groups, in other parts of Canada, particularly the Northwest Territories, to pursue treaty negotiations, including negotiations for self-government treaties.

70. Disadvantages: For land-based rights, increases lack of uniformity in approaches across Canada. No finality in respect of section 35 rights which are not land-based, so that an Aboriginal group could ultimately exercise such rights outside a negotiated Agreement and government would remain to claims for past infringements of such rights.

### Option 2: Approve a Uniform Approach

71. This option would be to approve the new non-assertion/fall-back release technique and to require, for rights, which are not land-based, treaties to apply the same techniques required by the comprehensive claims policy for land-based rights.

72. Advantages: Provides an alternative to the surrender or modification/release techniques while achieving substantially the same certainty and finality as those techniques. Achieves uniformity of approach for all rights. Achieves finality for all rights. New rights could only be exercised with agreement of government. Provides a release for past infringements of all rights.

**73. Disadvantages:** Establishes a new, more demanding bottom line because, at this time, finality is only required for land-based rights. Changes the inherent right policy approach from one directed at achieving practical and workable arrangements while allowing governmental relations to evolve to one requiring full and final settlements, thus, forcing all First Nations, regardless of capacity, to seek a full range of jurisdictions. Not appropriate for sectoral agreements and multi-sectoral agreements, as they are not designed to deal exhaustively with self-government rights. Seeking a release for past infringements would transform the approach into a grievance resolution process requiring policy guidelines, financial resources and a process for the acceptance and resolution of claims. Likely to be rejected by most Aboriginal groups and to encourage unilateral exercise of Aboriginal rights. The Dogrib would break-off negotiations. It would be very unlikely that new treaties with First Nations, particularly in the Northwest Territories, could be attained. Failure to achieve land claim and self-government agreements would result in increased litigation to resolve disputes. Canada's commitments to its self-government policies would be questioned both domestically and internationally.

PRINCIPAL COMPONENTS OF TECHNIQUES

1. The following definitions apply in Annex A.
  - "Land-based" means, in relation to a section 35 right, related to or affecting land or another natural resource.
  - "Section 35 right" means a right of the Aboriginal group protected by section 35 of the Constitution Act, 1982.
  - "New treaty" means a comprehensive land claim agreement or a self-government agreement, which is a treaty.

Part I - New Technique for Land-Based Rights

2. The Aboriginal group would make a commitment not to exercise or assert a section 35 land-based right which is not set out in that Aboriginal group's treaty.
3. In relation to section 35 land-based rights, the purposes of the non-assertion commitment would be described as being
  - (a) to prevent the imposition of any obligation on government or others in relation to the rights covered by the commitment;
  - (b) to permit the Aboriginal group to exercise all its authorities, jurisdictions, rights and privileges that are set out in the treaty; and
  - (c) To permit government and others to exercise all their authorities, jurisdictions, rights and privileges as if the rights covered by the commitment did not continue to exist.
4. If it were found that the non-assertion commitment was not enforceable or did not achieve its purposes for a particular section 35 land-based right, a "fall-back release" of that land-based right would apply. The release would apply whether or not the land-based right was characterized as a "self-government right".
5. The Aboriginal group would provide a release for past infringement of section of 35 land-based rights and for any infringement of section 35 land-based rights alleged to have occurred while the non-assertion commitment applied.
6. The non-assertion commitment would not be required for Treaty 11 Aboriginal groups in the Northwest Territories in relation to Treaty 11 harvesting rights in unsettled areas or to rights under Natural Resource Transfer Agreements.

7. To ensure the Gwich'in and Sahtu Dene no longer exercise their Treaty 11 harvesting rights in the settlement area of another Treaty 11 Aboriginal group, that Aboriginal group would, unless the Sahtu Dene and Metis and Gwich'in have amended their comprehensive land claim treaties to recognize the new technique, be required to provide in its new treaty a surrender of its Treaty 11 harvesting rights in the Gwich'in and Sahtu settlement areas.

#### Part 2 - Dogrib Technique for Rights That Are Not Land-Based

8. The Dogrib would make a commitment not to exercise or assert a section 35 right which is not land-based and which is not set out in the Dogrib Agreement.
9. In relation to section 35 rights which are not land-based, the purposes of the non-assertion commitment would be described as being
  - (a) To prevent the imposition of any obligation on government or others in relation to the rights covered by the commitment;
  - (b) To permit the Dogrib to exercise all their authorities, jurisdictions, rights and privileges that are set out in the Dogrib Agreement; and
  - (c) To permit government and others to exercise all their authorities, jurisdiction rights and privileges as if the rights covered by the commitment did not continue to exist.
10. In relation to a section 35 right that is not land-based, the Dogrib would provide a release of any infringement of that right alleged to have occurred while the non-assertion commitment applied.
11. If the Dogrib ever wished to exercise what they believed to be an Aboriginal right which is not a land-based right and which is not set out in the Dogrib Agreement, the Parties must attempt to negotiate an amendment to the Agreement in order to define, in the Agreement, what the Dogrib wished to exercise.
12. Government could require the Dogrib to obtain a judicial affirmation of the existence of any such Aboriginal right and its scope, as a condition of such negotiations.
13. For an Aboriginal right which is not a land-based right, if the Parties failed to reach agreement on how to amend the Dogrib Agreement and if the Dogrib affirmed their intention to exercise that right without such an agreement and if there had been a judicial affirmation of its existence and scope,
  - (a) The non-assertion commitment would no longer apply to the Aboriginal right described in the affirmation; and
  - (b) The Dogrib could not exercise the Aboriginal right described in the affirmation in any way that would be inconsistent with any provision of the Dogrib Agreement.

**PRINCIPLES FOR THE EXERCISE OF SECTION 35 RIGHTS  
IN NEW TREATIES THAT CONTAIN SELF-GOVERNMENT RIGHTS**

1. The following definitions apply in Annex B.
  - "Land-based" means, in relation to a section 35 right, related to or affecting land or another natural resource.
  - "Section 35 right," means a right of the Aboriginal group protected by section 35 of the *Constitution Act, 1982*.
  - "Self-government treaty" means an agreement, whether or not it is also a comprehensive land claim agreement, which contains self-government rights that are section 35 rights.
  
2. A new self-government treaty, that is also a comprehensive land claim agreement, shall meet the certainty and finality requirements of the Comprehensive Claims Policy in relation to section 35 land-based rights whether or not the rights are characterized a self-government rights.
  
3. A new self-government treaty, that is not a comprehensive land claim agreement, shall not prejudice the certainty and finality achieved with respect to section 35 land-based rights by existing land claim treaties or historic treaties.
  
4. A new self-government treaty shall provide predictability with respect to section 35 rights which are not land-based rights by ensuring that
  - (a) the arrangements set out in the treaty provide a stable framework for the implementation of self-government and to guide jurisdictional and intergovernmental relations; and
  - (b) if the treaty allows the exercise any continuing Aboriginal rights that are not land-based and not set out in the treaty, that exercise is subject to:
    - (i) An orderly process being followed before they are exercised, that includes negotiations (**government could require the Aboriginal group to obtain a judicial affirmation of the existence of any such Aboriginal rights and their scope, as a condition of entering such negotiations**) to try to deal with their exercise within the Treaty, through amendments and, if such negotiations fail, the scope of any such rights being clarified by a court,
    - (ii) the treaty having precedence over any such Aboriginal right with which it conflicts; and

(iii) The prevention of claims being made for alleged infringement of such Aboriginal rights where the alleged infringement occurred after the effective date of the treaty and before the scope of the right had been clarified by a court and all other parts of the process had been completed.

5. Where a self-government treaty deals with a single jurisdiction or a limited number of jurisdictions, the principles in 4(b) may be adapted to restrict only the exercise of Aboriginal rights dealing with subject matters covered by treaty.

## COMMUNICATION PLAN

### 1. Communications Goals

Note: There would not be an announcement of the Cabinet decision. The information on the "Dogrib technique" would become public as part of the news release and backgrounder to be issued when the Dogrib Agreement is finalized.

- To demonstrate the federal government's commitment to
  - The resolution of land claims and the negotiation of agreements which address the self-government aspirations of First Nations in the NWT and in other parts of Canada; and
  - Negotiate comprehensive land claim agreements to achieve stability and certainty of land use and tenure—especially in a part of the NWT which is critically important with respect to non-renewable resource development, such as diamond and gold mining, and to hydro-electric development.

### 2. Public Environment

Regarding the section 35 rights of the Dogrib, the Dogrib Treaty 11 Council and the Government of the NWT have been consulted on the principal components of

- The new technique for achieving certainty and finality with respect to section 35 rights related to land and other natural resources ("land-based rights"); and
- The technique for achieving predictability for other section 35 rights.

Both parties are supportive.

Natural resource industries, environmental and wildlife organizations, municipal Representatives and the general public have all expressed their desire for certainty of land tenure and a stable decision-making environment for resource exploration and development. They will see the provisions of the Dogrib Agreement, which deal with land-based rights as a positive step.

### **3. Key Messages**

- The certainty and predictability provisions of the "Dogrib technique" are essential to the successful conclusion of the Dogrib Agreement.
- The Dogrib technique achieves the objectives of Canada's inherent right policy and comprehensive land claims policy.
- The Dogrib Agreement will provide
  - certainty and finality about the use and ownership of land or other resources, consistent with the intent of the comprehensive claims policy; and
  - A high level of jurisdictional predictability regarding the self-government rights of the Dogrib, consistent with the intent of the inherent right policy.
  - When the Dogrib Agreement is in effect, a stable atmosphere for environmental protection, resource exploration and development and the management of renewable resources will be achieved.

### **4. Strategic Communications Considerations**

The information about the certainty and predictability provisions of the Dogrib Agreement will become public as part of general communications carried out when the Dogrib Agreement is finalized. Therefore, the communications approach at this stage would be reactive, with information supplied only if an inquiry is made.

Since the new certainty technique for land-based rights and the basic requirements for other rights could be applied in other areas of the country, DIAND spokespersons should be prepared to address the national implications of these issues.

When information about the certainty and predictability provisions of the Dogrib Agreement is released, there could be some negative reaction from eligible Metis who Object to being committed to provisions of an agreement in which they have not participated.

### **5. Target Audiences and Reactions**

Media-daily, business, weekly and Aboriginal: NWT residents are generally supportive of land claims because they feel it will create a stable environment for environmental protection, exploration and development, and management of renewable resources. It is likely that they will welcome the new certainty technique for land-based rights and predictability for other rights. Although the NWT media are generally critical of DIAND, it is unlikely that local reporters will have enough background on land claim and self-government issues to do their own analysis of the certainty and predictability provisions. It is more likely that they will depend on the reactions of stakeholders including the Dogrib, other Aboriginal groups and the business and resource sectors.

Business and Resource Sectors: Business and resource sectors have repeatedly indicated the need for a stable resource environment for exploration and development. It is likely that they will welcome the new certainty technique for land-based rights.

First Nations in the NWT: First Nations continue to state that the conclusion of land claims in the NWT is their number one priority. They would likely welcome the new certainty technique because it is an alternative to the much-criticized surrender technique.

Secondary Target Audiences: NWT public associations; national and international media; Aboriginal organizations across Canada; and general public.

## **6. Activities and Vehicles**

There would be no separate announcement by the Minister of IAND to explain the new certainty technique for land-based rights or the basic requirements for other rights-this information would become public as part of the news release and backgrounder to be issued when the Dogrib Agreement is finalized. However, key messages and Questions and Answers would be developed in case inquiries are made in the interim.

## **7. Territorial and Regional Communications**

The approval of the new certainty technique for land-based rights is essential in finalizing negotiations for a Dogrib Agreement. Successful conclusion of a Dogrib Agreement would establish a template for negotiations with other NWT Aboriginal groups that have outstanding claims.

## **8. Horizontal Coordination**

The October 12, 1999 Speech from the Throne highlighted the fact that "Land claim Agreements... are essential to create certainty for Aboriginal people and their...communities - providing the climate needed for partnerships, investments and economic opportunities."

Extensive coordination with the relevant federal departments and agencies has taken place.

This initiative links to the federal government's Red Book commitments and Gathering Strength, Canada's Aboriginal Action Plan.

## **9. Sustaining a Communication Presence**

The Parties will work to complete the Dogrib Agreement. Federal information will remain on the DIAND web site. Communications documents will continue to highlight the federal government's commitment to the completion of First Nation Agreements.

## **10. Partnerships**

Negotiation towards a Dogrib Agreement will require close coordination with the other Parties regarding communications and information initiatives.

## **11. Budget**

No funds are required for communications products at this time. Should new products be required, funds will need to be identified from the program's budget.

## **12. Evaluation Criteria and Plan**

Media coverage will be monitored and analyzed. Messages will be refined to reflect the public environment.