

CHAPTER RC: RECOGNITION OF RIGHTS AND CERTAINTY
With footnotes of Canada's concerns – Feb. 2, 2012

Recognition of Rights

RC.1.1 The Dehcho Agreement will recognize¹ and affirm the Aboriginal and Treaty rights of the Dehcho Dene², including Aboriginal title³ and rights under Treaties 11 and 8. It will clarify and build upon⁴ Treaties 11 and 8, but will not replace⁵ or extinguish them.

RC.1.2 The historical and cultural importance of Treaties 11 and 8 will be recognized in the Dehcho Agreement. The Dehcho Agreement will provide that annual meetings will be held to affirm this importance and to make treaty payments.⁶

RC.1.3 Subject to RC.1.9, RC.4.2, RC.4.3 and GP.xx⁷ (territorial application of Dehcho Agreement) the Dehcho Agreement will recognize and exhaustively⁸ set out the section 35 rights of the Dehcho First Nations, their attributes, the geographic extent of those rights within the Northwest Territories, and the limitations to those rights to which the Parties have agreed, and those rights are:

- a. the aboriginal rights⁹, including aboriginal title¹⁰, modified as a result of this Agreement and the Settlement Legislation, of the Dehcho First Nations in and to the Dehcho Settlement Area lands and resources;
- b. the jurisdictions, authorities and rights of the Dehcho Regional Government and Dehcho Community Governments¹¹; and
- c. the other section 35 rights of the Dehcho First Nations.

RC.1.4 Self-government, as an inherent right, is included among the Aboriginal rights of the Dehcho Dene¹². It will have the effect and be exercised collectively by the Dehcho Dene and by each Dehcho First Nation community according to the manner set

¹ "Recognize" is a concern for Canada

² As defined "Dehcho Dene" includes ADK and FL Metis.

³ Reference to title is problematic for Canada

⁴ "Build upon" is a concern for Canada

⁵ Is this accurate in context of modification?

⁶ Likely more of a policy issue, but may be affected by certainty approach. Clause is similar to 2.5.1 in T'licho.

⁷ This language is inconsistent with the modification certainty model. Modification provides a finality on the nature and extent of s.35 rights for the Aboriginal signatory.

⁸ Will this allow for additional rights to be added later?

⁹ Should be "Aboriginal and treaty rights...".

¹⁰ Reference to title is problematic for Canada.

¹¹ Canada is reviewing whether a public government can exercise section 35 rights

¹² As defined "Dehcho Dene" includes ADK and FL Metis.

out in the Dehcho Agreement within the Dehcho Settlement Area and, when the Dehcho Agreement so provides, outside of the Dehcho Settlement Area.¹³

RC.1.5 Self-determination¹⁴, as an inherent right, is also included among the Aboriginal rights of the Dehcho Dene. It will have the effect and be exercised collectively by the Dehcho Dene according to the manner set out in the Dehcho Agreement within the Dehcho Settlement Area and, when the Dehcho Agreement so provides, outside of the Dehcho Settlement Area.

Full and Final Settlement

RC.1.6 Subject to RC. 4.2 and 4.2¹⁵, Dehcho Agreement will constitute the full¹⁶ and final settlement in respect of the aboriginal¹⁷ rights, including aboriginal title¹⁸, of the Dehcho First Nations in the NWT¹⁹.

Recognition and Modification

RC.1.7 Subject to RC.1.9 and GP.xx (territorial application of the Dehcho Agreement), but notwithstanding the common law, as a result of this Agreement and the Settlement Legislation, the aboriginal²⁰ rights, including the aboriginal title²¹, of the Dehcho First Nations, as they existed anywhere in the NWT before the Effective Date, including their attributes and geographic extent, are recognized²², continued and modified, and continue as modified²³, as set out in this Agreement²⁴.

RC.1.8 For greater certainty, subject to RC1.9 and GP.xx (territorial application of the Dehcho Agreement)²⁵ the aboriginal title²⁶ of the Dehcho First Nations anywhere that it existed before the Effective Date, are recognized, continued and modified, and continue as modified as the estates in fee simple to those areas identified as Dehcho Ndehe and Dehcho Community Lands.

¹³ Some concern around the recognition of Dehcho aboriginal self-government rights

¹⁴ Is this an inherent right? Need to know distinction between inherent right of self-government and inherent right of self-determination.

¹⁵ This language is inconsistent with the modification certainty model. Modification provides a finality on the nature and extent of s.35 rights for the Aboriginal signatory.

¹⁶ Is “full and final” consistent with option to add rights later?

¹⁷ “...and treaty...”

¹⁸ Reference to title is problematic for Canada

¹⁹ Canada prefers “in Canada, excluding Alberta, and the Yukon” instead of “in the NWT”.

²⁰ Canada prefers “aboriginal and treaty” rights

²¹ Reference to title is problematic for Canada

²² “Recognize” is a concern for Canada

²³ Canada suggests “...including their attributes and geographic extent, are modified, and continue as modified, as set out in this agreement”

²⁴ This provision is inconsistent with the modification certainty technique

²⁵ This language is inconsistent with the modification certainty model. Modification provides a finality on the nature and extent of s.35 rights for the Aboriginal signatory.

²⁶ Reference to title is problematic for Canada

RC.1.9 Nothing in the Dehcho Agreement will be construed to affect hunting, trapping or fishing rights under a Natural Resources Transfer Agreement²⁷, or under treaty, or pursuant to custom²⁸, outside of the NWT, of any person who is eligible to be enrolled as a Dehcho Citizen.²⁹

Purpose of Recognition and Modification

RC.1.10 The purpose of the recognition and modification referred to in RC.1.7 and RC.1.8 is to ensure that, subject to RC1.9 and GP.xx (territorial application of the Dehcho Agreement)³⁰, as of the Effective Date:

- a. the Dehcho First Nations have, and can exercise, their section 35 rights set out in this Agreement to which the Parties have agreed;
- b. Canada, the GNWT and all other persons can exercise their rights, authorities, jurisdictions and privileges in a manner consistent with this Agreement³¹; and
- c. Canada and the GNWT do not have any obligations in respect of any aboriginal³² rights, including aboriginal title³³, of the Dehcho First Nations to the extent that those rights, including title, might be in any way other than or different in attributes³⁴ from the section 35 rights of the Dehcho First Nations as set out in this Agreement.

Release of Past Claims

RC.1.11 Subject to RC.1.9 and GP.xx³⁵ (territorial application of the Dehcho Agreement), the Dehcho First Nations release Canada and the GNWT³⁶ and from all claims, demands, actions or proceedings, of whatever kind, whether known or unknown, that that the Dehcho First Nations ever had, now have or may have in the future, relating to or arising from any act or omission before the Effective Date that may have affected, interfered with or infringed any aboriginal³⁷ right, including aboriginal title³⁸, of the Dehcho First Nations.

²⁷ Canada suggests deleting reference to NRTAs.

²⁸ The reference to “custom” is of concern to Canada. It is too broad and is unclear in what it intends to capture in the context of the provision.

²⁹ Have to await outcome of certainty approach particularly as it may relate to NRTA. Canada would like to get more information on the reasoning for this clause.

³⁰ This language is inconsistent with the modification certainty model. Modification provides a finality on the nature and extent of s.35 rights for the Aboriginal signatory.

³¹ Canada needs to review this clause.

³² Add “treaty rights...”.

³³ Reference to title is problematic for Canada

³⁴ Canada suggests adding “or geographic extent”

³⁵ This language is inconsistent with the modification certainty model. Modification provides a finality on the nature and extent of s.35 rights for the Aboriginal signatory.

³⁶ Canada suggests adding “and all other persons”

³⁷ Canada suggests adding “or treaty”

³⁸ Reference to title is problematic for Canada

Indemnities

RC.1.12 Subject to RC.1.9 and GP.xx (territorial application of the Dehcho Agreement)³⁹, the Dehcho First Nations will indemnify and forever save harmless Canada and the GNWT from any and all damages, costs excluding fees and disbursements of solicitors and other professional advisors, losses or liabilities, that Canada or the GNWT, respectively, may suffer or incur in connection with or as a result of any suit, action, cause of action, claim, proceeding or demand initiated or made before or after the Effective Date relating to or arising from:

- a. the existence of an aboriginal⁴⁰ right, including aboriginal title, of the Dehcho First Nations that is determined to be other than, or different in attributes⁴¹ from, the section 35 rights of the Dehcho First Nations set out in this Agreement; or
- b. any act or omission by Canada or the GNWT, before the Effective Date, that may have affected, interfered with or infringed any aboriginal⁴² right, including aboriginal title, of the Dehcho First Nations.

RC.1.13 A Party who is the subject of a suit, claim, demand, action or proceeding that may give rise to a requirement to provide payment to that Party pursuant to an indemnity under this Agreement:

- a. will vigorously defend the suit, claim, demand, action or proceeding; and
- b. will not settle or compromise the suit, claim, demand, action or proceeding except with the consent of the Party who has granted the indemnity, which consent will not be arbitrarily or unreasonably withheld or delayed.

OTHER ABORIGINAL PEOPLES

RC.2.1 No provision in the Agreement shall be construed to

- (a) recognize or provide any Aboriginal or treaty rights for any Aboriginal people other than the Dehcho First Nations; or
- (b) affect
 - (i) any treaty right of any Aboriginal people other than the Dehcho First Nations where the right existed before the provision of the Agreement was in effect, or

³⁹ This language is inconsistent with the modification certainty model. Modification provides a finality on the nature and extent of s.35 rights for the Aboriginal signatory.

⁴⁰ Canada suggests adding “or treaty”

⁴¹ Canada suggests adding “or geographic extent”

⁴² Canada suggests adding “or treaty”

- (ii) any Aboriginal rights of any Aboriginal people other than the Dehcho First Nations.

RC.2.2 If a superior court of the NWT, the Federal Court of Canada or the Supreme Court of Canada finally determines that RC.2.1 has the effect of rendering a provision of the Agreement wholly or partially inoperative or ineffective because that provision of the Agreement would otherwise affect any right referred to in RC.2.1(b),

- (a) upon notice by a Party, the Parties shall enter into negotiations for the amendment of the Agreement in order to resolve any problems caused by that provision being inoperable or ineffective and to provide new or replacement rights that are equivalent to or compensate for any rights of Dehcho Citizens, the Dehcho First Nations or the Dehcho Government that would have been enjoyed under the provision; and
- (b) if the Parties fail to reach agreement on an amendment under (a) within 90 days of the notice, a Party may refer the matter for resolution in accordance with chapter DR.

RC.2.3 Notwithstanding any other provision in the Agreement, the Dehcho Government may, pursuant to an agreement with another Aboriginal people, agree to share with that Aboriginal people rights held by Dehcho Citizens, the Dehcho First Nations or the Dehcho Government under this Agreement, provided that no such sharing agreement shall affect the rights held by persons or peoples who are not party to that sharing agreement.

RC.2.4 If an Aboriginal people reaches an agreement with the Dehcho Government and with government to modify the authority or structure of [Any board established or referred to for the management or administration of resources in the Dehcho], the Parties shall amend the Agreement accordingly.

VALIDITY OF AGREEMENT

RC.3.1 None of the Parties shall challenge the validity of any provision of the Agreement.

RC.3.2 Subject to RC.1.1, none of the Parties shall have a claim or cause of action based on a finding that any provision of the Agreement is invalid.

RC.3.3 If any provision of the Agreement is found by a court of competent jurisdiction to be invalid, the Parties shall make best efforts to amend the Agreement to remedy the invalidity or replace the invalid provision.

AMENDMENT

RC.4.1 Except as provided in RC.4.9, [or any other provisions that require an amendment], the Agreement may only be amended with the consent of the Parties as evidenced by

- (a) in respect of the Government of Canada,
 - (i) an order of the Governor in Council, or
 - (ii) in the case of an amendment to the land description, of an amendment under any other part of the agreement that references a specific amendment, the signature of the Deputy Minister of Indian Affairs and Northern Development;
- (b) in respect of the Government of the Northwest Territories,
 - (i) an order of the Commissioner in Executive Council,
 - (ii) in the case of an amendment to the land description, the signature of the Deputy Minister of Aboriginal Affairs,
 - (iii) in the case of an amendment under **XXXX**, the signature of the Deputy Minister of Municipal and Community Affairs, or
 - (iv) in the case of an amendment under **XXX** the signature of the Deputy Minister of the Department of Resources, Wildlife and Economic Development; and
- (c) in respect of the Dehcho Government, as provided for in the Dehcho Constitution.

RC.4.2 If the Dehcho Government proposes the exercise by Dehcho Citizens, the Dehcho First Nations or the Dehcho Government, of a right⁴³ that is not set out in the Agreement⁴⁴, the Parties shall enter into discussions to determine what their interests are in relation to the proposed right. The Parties may, after these discussions, agree to enter into negotiations for the amendment of the Agreement to incorporate the proposed right⁴⁵.

RC.4.3 If the Parties do not agree to enter into negotiations within 90 days of receipt under XXX by government of the proposed right or do not consent to the text of the amendment within one year of agreement to enter into negotiations or such longer period set by the Parties, the Dehcho Government may apply to the Supreme Court of the Northwest Territories for a decision on whether the proposed right is an Aboriginal right of the Dehcho First Nations or Dehcho Citizens, as the case may be. Government has the status of a party in any such application.

⁴³ Tlicho says "...of a right that is not a land right and...". This is an integral part of Canada's approach to the "orderly process".

⁴⁴ The "orderly process" for amendment to add rights was created for Tlicho Agreement. Not clear whether Canada will agree to it in context of modification model for certainty.

⁴⁵ This provision is inconsistent with the modification certainty technique.

RC.4.4 The Dehcho Government may not make an application under RC.4.3 if it has already made an application in relation to the same proposed right⁴⁶ within the preceding five years.

RC.4.5 If the highest court in which an application under RC.4.3 is considered confirms the existence of an Aboriginal right of the Dehcho First Nations, the Parties shall enter into negotiations to incorporate the right into the Agreement.

RC.4.6 If the Parties fail to consent to the text of an amendment within one year of the decision by the highest court in which an application under RC.4.3 is considered, or such longer period set by the Parties, the Dehcho Government may submit the issue, as to the text of the amendment, for resolution in accordance with chapter DR.

RC.4.7 Subject to RC.4.8, an arbitrator under DR [arbitration provisions] is limited to drafting the text to fit the language and format of the Agreement, after consultation with the Parties,

- (a) in order to describe the nature and scope of the right, as confirmed by the court; and
- (b) where the right includes a law-making power, in order to confirm that
 - (i) the law-making power is concurrent with that of government⁴⁷,
 - (ii) a federal law of overriding national importance prevails over any conflict between it and a Dehcho First Nations law made under that power, to the extent of the conflict,
 - (iii) a provision of federal legislation that implements an obligation of the Government of Canada under an international agreement prevails over any conflict between it and a Dehcho law made under that power, to the extent of the conflict,
 - (iv) except where provided otherwise by the court, federal legislation other than that referred to in (ii) or (iii) prevails over any conflict between it and a Dehcho law made under that power, to the extent of the conflict,
 - (v) a provision of territorial legislation that implements an obligation of the Government of Canada under an international agreement prevails over any conflict between it and a Dehcho law made under that power, to the extent of the conflict, and
 - (vi) except where provided otherwise by the court, a Dehcho law made under that

⁴⁶ Canada suggests adding “or another”.

⁴⁷ Canada suggests that “government” should be defined to mean Canada or the GNWT

power prevails over any conflict between it and territorial legislation other than that referred to in (v), to the extent of the conflict.

RC.4.8 The arbitrator shall not include in the draft text any financing obligations for any of the Parties notwithstanding any finding of the court.

RC.4.9 The Agreement shall be considered to be amended in accordance with the text drafted by the arbitrator. The amendment shall be deemed to have been made 30 days after the release of the arbitrator's decision.

RC.4.10 For the purpose of RC.4.7(b)(ii), a federal law of overriding national importance includes a federal law that relates to preservation of peace, order and good government, that relates specifically to the criminal law, human rights or the protection of health and safety of all Canadians or that is essential to national security.

RC.4.11 For the purpose of RC.4.2, the tax treatment of Dehcho Citizens will be deemed to be set out in the Agreement.

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⁴⁸ Tlicho says: "For the purposes of RC.4.2, a right that is a law-making power shall be where the power is in relation to any of the following: (list)". Canada would prefer to use the same approach in the context of the use of the "orderly process".