PRESENTATION OF GRAND COUNCIL OF THE CREES
ROMEO SAGANASH
COMMONWEALTH POLICY STUDIES UNIT
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Wachiya!

We are grateful for the invitation we received to participate in this important Commonwealth process. We acknowledge the role of the Commonwealth Policy Studies Unit and its funders in convening this important series of consultations.

We believe that the Commonwealth, as an organization born from foundations of global colonialism, has a responsibility and special experience in the challenges faced by indigenous peoples.

We welcome this opportunity for dialogue, exchange and advocacy, in our on-going campaign to build foundations for post-colonial, nation-to-nation relationships between aboriginal peoples and the nation-states in which they live or are enclaved.

The Grand Council of the Crees has been very active in the WGIP and other international forums for more than 15 years, and we know well that the member states of the U.N., the OAS, and the Commonwealth are showing colonial-style resistance to the full international affirmation of our rights.

We are Eeyouch – the James Bay Cree people. We are a hunting people, and 40% of our people still derive their living from the land. We have always governed, occupied and used Eeyou Istchee, our traditional territory of over 400,000 square kilometres on and offshore of the east coast of James Bay and Hudson Bay.

The socio-economic conditions facing Aboriginal peoples in Canada are, almost without exception, appalling. The government of Canada's approach with respect to the persistent, gross disparities facing Aboriginal peoples in Canada, it seems, is to make continuous pronouncements about how it is trying to narrow them, and to make comparisons that state, in effect that "Our Indians are better off than Indians in other countries."

However, the federal government's own analyses establish that while Canada consistently scores at the very top of the U.N. Development Index, the average ranking of First Nations in Canada would be approximately 63rd on the UNDP scale – that is, lower than the standard of living of Viet Nam, Botswana, El Salvador or Tunisia.

Numerous independent authorities, including the federal government of Canada's own Royal Commission on Aboriginal Peoples and the Canadian Human Rights Commission, as well as the U.N. Human Rights Committee and Economic, Social and Cultural Rights Committee, have condemned the Aboriginal status quo in Canada.

There are 800 thousand First Nations people in Canada, comprising 631 First Nations. First Nations peoples are the fastest-growing segment of the Canadian population of 31 million, approaching 4 percent growth per year. However, lands officially set aside for First Nations peoples make up less than one-half a percent of the Canadian land mass. Most of this tiny allocation of land is marginal, non-arable and devoid of resources.

In 1996, the Royal Commission on Aboriginal Peoples stated (and I quote):

> Access to potable water, adequate sanitation and waste disposal services has been routine for so long … that most Canadians take them for granted. The same access is not guaranteed for Aboriginal people, however, and their health suffers as a result. The current state of Aboriginal housing and community services poses acute threats to health. … Such direct threats to health would not be tolerated in other Canadian communities. They must not be allowed to persist among Aboriginal people either.
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> Aboriginal people have tried for more than a century to maintain their own land base and derive a decent living from the natural resources and revenues on their traditional territories but these aspirations have been frustrated. Reserves and community lands have shrunk drastically in size over the past century and have been stripped of their most valuable resources. Moreover, as governments allocated resources and economic opportunities on traditional territories, Aboriginal peoples found themselves either excluded or positioned at the back of the line.
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> It is not difficult to identify the solution. Aboriginal nations need much more territory to become economically, culturally and politically self-sufficient. If they cannot obtain a greater share of the lands and resources in this country, their institutions of self-government will fail. Without adequate lands and resources, Aboriginal nations will be unable to build their communities and structure the employment opportunities necessary to achieve self-sufficiency. Currently on the margins of Canadian society, they will be pushed to the edge of economic, cultural and political extinction. The government must act forcefully, generously and swiftly to assure the economic, cultural and political survival of Aboriginal nations. (End of quote.)

In 1972 the government of Quebec began construction of the La Grande hydroelectric mega-project in our territory, which included the damming of 10 rivers and the flooding of 25,000 square kilometres of our territory. The phase of

ecological exploitation and wholesale denial of our rights had begun.

We opposed this threat to our economy and ways of life vigorously, in public and in the courts. We were told by governments and courts that we had no rights, that we were merely squatters on land belonging to others.

We challenged the project in court while the construction continued, but it was ultimately ruled that in 1670 an English King had granted absolute ownership of our territory to the Hudson's Bay Company, and that any rights our people may have had were long extinguished.

It was clear to our leaders that this giant project would be built whether we liked it or not, and so we chose to enter into negotiations with the governments of Quebec and Canada in the hope that we would be able to obtain changes to the project, and reduce its impact on the environment and our Aboriginal and human rights. The negotiation of the James Bay and Northern Quebec Agreement (JBNQA) of 1975 was carried out under duress and serious disadvantage.

Soon after the JBNQA was signed, it became clear to us that the governments had got what they wanted and quickly forgot about the promises they had made to the Crees. In fact, for all intents and purposes the only part of the Agreement that proceeded as planned was the construction of the dams, the taking of our trees and the extraction of our minerals.

Our people was forced to approach the courts dozens of times, almost every year since 1975, to fight to force governments to live up to the promises it made to us – promises of benefits like safe water, education, health, roads and fire protection services, that other inhabitants of Canada receive without court challenges and without being required, as the government of Canada now claims we did, to surrender our fundamental rights.

We have learned through bitter experience that non-implementation of treaties by the Crown is systemic. Our treaty has become infamous as Canada's first modern broken treaty. We have no doubt that the signatories of the agreements that have followed ours are having and will continue to have the same experience.

You have already heard that Canada is a federal state, and the traditional lands and resources of the James Bay Crees lie predominantly within the province of Quebec. This has both challenges and benefits. While the federal government, or the Crown in Right of Canada, has exclusive jurisdiction in respect of "Indians and lands reserved for Indians", the provincial Crowns assert jurisdiction over Crown lands and natural resources. Accordingly, the James Bay Cree people must relate comprehensively to two other orders of government.

In February 2002, a breakthrough occurred between the James Bay Crees and the provincial government of Quebec, when we entered into an "Agreement to Establish a New Relationship between the Government of Quebec and the Crees". We reached an understanding and a level of mutual respect and recognition that we believe could well be a model approach useful for Aboriginal rights around the world. We have fought long and hard for this and feel that the government of the province of Quebec has finally heard and understood our people, the Cree Nation.

Our new Agreement establishes a relationship between the government of Quebec and the Cree Nation based on cooperation, partnership and mutual respect. It sets up structures through which we work with Quebec in a cooperative spirit. In the future, industrial development in our traditional lands must be compatible with our way of life and must be sustainable. This is now being applied in the new joint regulation structures in forestry and mining, and through a scaling-down of the of hydroelectric projects that Hydro-Quebec will promote.

By this agreement, the Crees also assume the responsibility and costs of the government of Quebec's treaty obligations for Cree economic and community development. To fund the Cree government for this, Quebec will make an annual payment of $70 million to the Crees, and this payment will increase annually to reflect the growth in the total value of production in the forestry, hydroelectricity and mining sectors.

The fact that both the Cree Nation and the government of Quebec will now both receive benefits from new economic opportunities generated from the territory changes the dynamics between the parties. For the first time, the benefits received by our people under an agreement are not based on damages, exchanges or surrender of rights, but rather upon recognition of our status in all of our traditional territory and our right to benefit from its resources. For the first time, development activities in our territory will proceed based on our consent and participation, rather than our legally-enforced exclusion.

We believe that our new agreement is a positive development consistent with our internationally-recognized right to self-determination. Through this Agreement, we are now able to begin to define a future for ourselves. Individually and collectively, we will choose our paths for the future, and this freedom of choice will transform our identity as Crees, but will ensure that there remains a vibrant Cree People in our territory.

Our new agreement with the government of Quebec causes us to ask: when will the federal government of Canada realize that the current conditions of Aboriginal peoples are historically rooted, but neither necessary nor inevitable? When will the government of Canada act to reverse the conditions of colonial entrapment?

I will now provide a few summary details of the legal situation regarding aboriginal and treaty rights in Canada.

The section in the Grand Council's paper provides additional details for those who are interested in looking into this more deeply.

Canada is the only Common Law country with Aboriginal rights unconditionally entrenched in the constitution. Section 35 of the *Constitution Act, 1982*, provides that "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

As a result of this provision, we are told, those of our Aboriginal rights that have not yet been validly extinguished, and our treaty rights, are now part of the highest law of the land in Canada, and cannot be taken away without our consent.

To some extent, the courts have taken this to heart, and have elaborated a number of declarations and tests regarding our Aboriginal and treaty rights, including an increasing jurisprudence regarding the circumstances under which Crown infringements of our Aboriginal and treaty rights can be justified.

In addition, the courts have ruled:

- in the Delgamuukw case, that Aboriginal title exists in Canada wherever it has not been surrendered or validly extinguished.
- that the Crown is subject to fiduciary obligations in respect of its dealings with Aboriginal peoples;
- that the interpetation of our treaties should be subject to"fair, large and liberal construction" in favour of the aboriginal party;
- that the honour of the Crown is at stake in its dealings with Aboriginal peoples, and to quote the Supreme Court, "It is always assumed that the Crown intends to fulfil its promises. No appearance of 'sharp dealing' will be sanctioned."

Unfortunately, the practical reality in Canada of Crown-Aboriginal relations in Canada (as opposed to the theoretical constitutional and legal context) is that the Crown almost never fulfils its promises, and that sharp dealing in the pursuit of the extinguishment of Aboriginal and treaty rights remains national policy to this day.

The most recent actions of the federal government of Canada show that the protective and affirmative pronouncements made by the Supreme Court of Canada regarding our Aboriginal and treaty rights have been understood by the Crown. However, rather than taking these to heart and acting honourably to respect its obligations and truly affirm our rights, the government of Canada is persisting in its efforts:

- to circumvent the spirit of the constitutional protections provided by s. 35(1);
- to limit the scope of judicial review of its actions with respect to Aboriginal peoples; and
- to displace, or "do an end-run" around, any future developments in recognition of the rights of indigenous peoples in the common law or in international law.

In 1973, when our people negotiated the James Bay and Northern Quebec Agreement with the Crown, we were told that the proposed extinguishment provisions of the treaty were non-negotiable. We had no choice but to negotiate, as the dams were clearly to be built regardless, and therefore had no choice but to "agree" to the extinguishment of our Aboriginal rights.

Our people came to the table to negotiate for recognition of our on-going relationship with the other societies on our traditional lands, and for affirmation of our stake in those lands and our status and rights as a people. The Crown, by contrast, made it clear to us that it was seeking full and final settlements, to achieve "certainty" and "finality" so that Cree rights would never in the future interfere unexpectedly with resource extraction in the north. They wanted us "out of the way".

As history has shown, this "certainty" has proven elusive. Policies of extinguishment that are used to sanitize injustice and dispossession will not bring about social or legal certainty. Despite the extinguishment provisions (which are reproduced in an appendix at page 43 and following in our written submission), our people successfully opposed and prevented the construction of the second phase of the James Bay hydroelectric project; and we continued to campaign at international and national levels for the full and just recognition of our human and Aboriginal rights. Like Aboriginal peoples across Canada, we have shown again and again that we will not go away; this is our land and the way of life we have chosen and will continue to choose.

The federal government of Canada, however, continues to insist right across Canada on an approach based on extinguishment, both with respect to our people and treaty and other Aboriginal nations in Canada. All the modern treaties with the government of Canada purport to extinguish Aboriginal rights, in exchange for the granted and limited rights and benefits defined in the treaty document or settlement agreement. According to the federal government, the function of the extinguishment requirement is to provide "confirmation from Aboriginal groups that the rights written down in claims settlements *are the full extent* of their special rights related to the subjects of the agreements".

The government of Canada's continuing position is based on the view that existing inherent Aboriginal rights are "ambiguous" and "uncertain" and – despite their paper-recognition and affirmation in section 35 of the Canadian Constitution – must be "exchanged" for limited and defined rights as set down in settlement agreements, in order for Aboriginal peoples to gain any benefit from activities on our traditional lands or any recognition by the Canadian state of

our rights and status.

This extinguishment policy is also predicated on the assumption that resource and other development activities by the dominant society on the traditional territories of Aboriginal peoples can only proceed through legally entrenched exclusion of the first occupants of these lands.

All negotiations with the federal government take place under circumstances of serious socio-economic, legal and cultural duress. These were the circumstances under which we negotiated the JBNQA with the federal government, as described earlier. We know that all of the leaders and peoples who have negotiated "modern" agreements after us faced similar unenviable circumstances and were forced to do the best they could in an unjust context. We have no criticism of them.

In many cases, the desired certainty of extinguishment has been achieved by the federal Crown only through a two-step process. In the first stage, inherent Aboriginal rights are surrendered and exchanged for defined treaty rights, which have typically included federal promises of community infrastructure and essential services, and also of socio-economic development programmes. Later, after decades of non-implementation and frequently also of heavy infringement of treaty rights, the federal Crown party returns to seek the extinguishment of the perpetual benefits promised under the original treaty, offering a one-time payout as full and final settlement of its obligations.

Extinguishment is fundamentally discriminatory. The surrender of constitutional rights has in Canada been imposed and enforced only with respect to Aboriginal peoples. All other foundational relationships between non-Aboriginal governments and peoples within the Canadian federation are seen as continuing and evolving, and hence are open for renegotiation over time, as demographic, political, economic and environmental changes bring new needs and opportunities.

In the case of Aboriginal peoples, by contrast, the federal Crown purports through extinguishment to freeze our relationship for all time, denying us the benefit of an evolving relationship in the context of changing demographic, social and legal circumstances. Aboriginal peoples in Canada have learned through bitter experience that the only lasting certainty gained through the federal comprehensive claims process is the certainty of our continued marginalization and exclusion from the economic and political wealth now derived from our traditional lands.

Over the last two decades, Canada's federal policy of extinguishment has been repeatedly condemned, on both pragmatic and human rights grounds. Each succeeding government commission or task force studying Canadian government policy with respect to Aboriginal peoples has recommended the abandonment of the policy of extinguishment.

The *Royal Commission on Aboriginal Peoples* 1996 Final Report outlined several insurmountable objections to the policy of extinguishment. First and foremost, it concluded that by purporting to sever historical links with the land, the policy (and I quote) "purports to extinguish rights that are part and parcel of Aboriginal identity. . . effect[ing] a radical discontinuity between, on the one hand, historical Aboriginal relationships with land and, on the other hand, contemporary treaty rights". (End of quote)

The policy, it found, is also inconsistent with the constitutional recognition and affirmation of Aboriginal rights in the Constitution Act, 1982. Lastly, it stated that extinguishment violates the Crown's fiduciary duty (and I quote):

> Requiring Aboriginal peoples to extinguish title in order to benefit from the protection of a modern treaty does not fit comfortably with the fact that the Crown is in a fiduciary relationship with Aboriginal peoples. Such a requirement... serves to exploit the very vulnerability and impoverished condition of Aboriginal peoples that treaties aim to redress." (End of quote.)

The Royal Commission concluded that federal Crown extinguishment policy "subordinates Aboriginal interests to the interests of the Crown" and "is incompatible with the principles of respect, recognition, and reconciliation that ought to underpin relationships between Aboriginal peoples and the Crown". The royal Commission recommended that the policy be abandoned.

In 1999, in the context of Canada's third periodic review under the International Covenant on Civil and Political Rights, the Human Rights Committee of the United Nations explicitly declared that Canada's practice of extinguishment and conversion of Aboriginal rights was inconsistent with its obligations under Article 1 of the International Covenant concerning self-determination.

To Aboriginal peoples, it seems that the government of Canada provides the same response to each and every succeeding criticizing official recommendation regarding its extinguishment policy: Following consultation and review, it is promised, a new policy is being adopted. Most recently, the federal government has given assurances in international fora – for example, before the UN Committee on the Elimination of Racial Discrimination (CERD) in 2002 – that extinguishment is no longer a requirement in land claims agreements.

The actual truth of Canada's continuing "certainty" policy emerges, however, through leaked confidential cabinet documents, the endless struggles behind closed-door treaty and implementation negotiations with the federal Crown up to the present day, and the texts of carefully legally entrenched comprehensive agreements.

In preparing for this session, we instructed our legal counsel to review the texts of all of the major land claims

agreements concluded with First Nations since 1975. We have ascertained that the policy of extinguishment is being relentlessly pursued by the Crown in Right of Canada to this day. And as mentioned yesterday by the speakers from Nunavut, it is also being pursued in agreements with the Inuit.

Land claims, as they continue to be practised under the policy of the federal government of Canada, continue to be based on the mistaken idea that Aboriginal peoples must *relinquish* their human rights to benefit meaningfully from their traditional lands and resources, so that Canada can allow the dominant society to develop the natural resource economies of the regions.

In the two latest so-called land claim settlement agreements, the Nisga'a and Dogrib Agreements, the Aboriginal rights of the First Nations involved are not explicitly extinguished. The Federal government has rather devised new legal techniques to achieve the identical result with different terminology. Instead of extinguishment, the Crown insisted upon and obtained a promise from the First Nations concerned that they would never again assert their Aboriginal rights "as though they never existed", and would release the Crown from any future judicial finding that their Aboriginal rights remained in force and effect.

The purportedly "new" techniques employed by the federal government of Canada in its treaty negotiations with Aboriginal peoples as "alternatives" to extinguishment share all the fundamentally colonial features which have made the extinguishment policy unacceptable and unjust. These techniques:

- attempt to sever the relationship of Aboriginal peoples with our traditional lands, thus denying a fundamental facet of our identities as nations;
- continue to make a mockery of the good-faith, non-adversarial, fiduciary relationship which Canadian common law requires of the federal Crown;
- prevent the natural evolution and development of Aboriginal rights, thereby freezing the relationship between Aboriginal peoples and the dominant society.

In contrast to the present continuing colonial context in Canada, our people aspire to a vision of respectful, honourable and reconciliatory nation-to-nation relationships between Aboriginal peoples and the dominant governments and societies of Canada. We believe that the government of Canada's national interest and that of Aboriginal peoples are not incompatible. If Aboriginal peoples prosper in Canada, then Canada will prosper.

Our vision of a non-colonial future Canada is supported by an emphasis on respect and recognition of rights: our human rights and our Aboriginal rights. The federal government of Canada persists in labelling our rights-based campaign as "regressive" and "grievance-based" – as if justice and respect for rights are problems to be avoided whenever possible, as if workable solutions can somehow be created through the violation of rights.

We are seeking concrete approaches to improve the lives of our peoples, and we know that this vision will only be achieved and sustained if it rests on a solid foundation of recognition and respect for our fundamental and inalienable rights.

And with these words, Miigwetch, Merci, Thank You.