Key Note Presentation of Grand Chief Dr. Ted Moses to the

International Association of Impact Assessment

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I thank the organizers for this opportunity to speak today and I wish success to all of the participants in this conference and a safe return home afterwards.

Environmental assessment is an important tool for the regulation of development. However, it is not the only tool as both the federal and provincial governments and also aboriginal peoples have interests in other means, outside of the environmental review process, to approve or disapprove and to monitor the impacts of development.

Most of you probably already recognize federal and provincial interests in development and their ability to approve or refuse development proposals. There may however be those among

you who do not accept that aboriginal peoples should have similar powers, particularly outside of their reservation lands. I will address this issue first, before describing what I propose about environmental review processes and governmental -- federal, provincial or aboriginal -- approvals.

The relationship between aboriginal peoples and states has long been based on a legal fiction which facilitated the occupation of indigenous territories by powerful states, which then used these territories for their own purposes.

European powers created legal theories in the 18th century, such as “Terra Nullius” – where aboriginal peoples were deemed to be uncivilized or barbarous and therefore could not actually have occupied the territory in question as European or (and I quote) “civilized” peoples do. This concept is out of date and not used today… you might think, but in fact it was finally rejected by the Australian High Court only recently, in 1992 in the Mabo case.

Here in Canada there has been a long-standing recognition of "Aboriginal Rights", but here again it has been put forth as a concept to legitimize the denial of aboriginal title to land. It is argued that aboriginal rights do not include title to land because we never had such concepts in our traditional cultures. Aboriginal lands, it is claimed, were shared and used in a communal manner. Therefore, we could only ever have rights over continued traditional use of the land, *usufruct rights* that could be relocated to make room for development and the granting of title to others. In such a view of the world, I wonder why the collectivity could not hold title. In our Cree society we have family hunting territories, but cultural differences on the issue of title are not recognized in Canadian law.

It was only in 1997 that the Supreme Court of Canada recognized, in the case of *Delgamuukw* versus *British Columbia*, that there was such a thing as "aboriginal title". However, the Court took

away the right at the same time as it recognized it, by establishing such stringent and ethnocentric constraints of proof for the acceptance of it that no aboriginal people has been able to secure recognition of title since. This was a very convenient caveat, a legal trick unworthy of the highest court, and not unlike that of “Terra Nullius”. In 2002 this fact prompted the United Nations Committee on the Elimination of Racial Discrimination to severely criticize this aspect of Canadian law.

In spite of the complete lack of any positive examples of Canada recognizing aboriginal title, Canada nevertheless continues to make it a condition of Aboriginal Peoples signing treaties that they accept a clause or clauses that have the effect of extinguishing aboriginal title! In 1999 the United Nations Committee on Human Rights soundly criticized this extinguishment policy.

It has always been clear that the aboriginal peoples can only prosper if they can benefit from their lands and resources. This is

the most fundamental theory of survival on earth: *The land gives and is cared for, and without it there is poverty*. This fundamental principle forms the basis of the human rights dicta of both International Covenants- that all peoples have the right of self-determination and that by virtue of that right they have the right to benefit from, and use as they choose, their own lands and resources.

Here in Canada the poverty of aboriginal peoples and the exodus of aboriginal citizens from their lands are not coincidences, most often these are the historical result of these policies of dispossession. What is the alternative?

In 1975, when we signed the James Bay and Northern Québec Agreement with Canada and Québec we thought that we were turning our backs on the colonial policies that were obviously impoverishing those, as it is said living "on the rez". For the first time in Canada in 1975 a treaty was signed with a Province and

the Federal Government that engaged both levels of jurisdiction. Cree rights were not restricted to reserve lands; they covered our traditional territory in Québec.

We signed the James Bay Agreement because development was on our doorstep and we were not ready for it. As we were unprepared, we would have missed the benefits of development and worse, the way of life we pursued in the bush would have suffered a severe blow. We were not against all development but we needed terms for development that allowed us to define a future for our lands and communities. When we signed the Agreement in 1975 that is what we thought we had secured.

The James Bay and Northern Québec Agreement is an agreement on hydroelectric, forestry, mining, tourism, and traditional land use and on social and governmental development in Northern Québec. It contains land rights that do not restrict aboriginal interests to reserves. It contains commitments of

Canada and Québec in respect to lands, education, health, justice, social and environmental protection, hunting, fishing and trapping, governance, community development, economic development etc. In other words, it is a development agreement in all of the senses of this term. The Agreement describes the federal-provincial relationships that it creates with the Cree and Inuit Peoples.

At the time of the negotiation there were no laws for environmental and social impact review. Instead, for the La Grande Project that was already under construction, the Agreement itself sets out a series of remedial works and also sets up a joint Cree-Developer corporation with oversight on works to remediate impacts on the hunting, fishing and trapping way of life as well as for the some bio-physical impacts. The Agreement also called for design changes to the project to lessen its impacts and it defined the project in terms of the numbers of powerhouses, approximate output, flood level limits, location, etc.

We complied with the development and its requirements, although the rights of Hydro Québec changed. In 1978 we agreed to a change in the project to allow for the relocation of the LG 1 Dam so that more power and energy could be produced. In exchange, Hydro Québec paid most of the cost of moving the community of Chisasibi from the island on which it had been located to a place chosen by the community further on the mainland where there was more room for community expansion.

The very next year Hydro Québec discovered that is could not respect the agreed-to flood levels on the Sakami Reservoir. This led to the signature of the Sakami Agreement. With the money provided the Cree community of Wemindji financed a mini-hydroelectric dam, recreation facilities, and several community economic enterprises including a small airline, a trucking company, an internet provider and other initiatives.

In 1985 Hydro Québec decided that it wanted to change the utilization factor of the La Grande Project to better meet peak-power demand in Québec. This entailed another change in the project design and led to the signing of the La Grande 1986 Agreement. Part of the reason that the Crees agreed to this change was that between 1980 and 1985 it was discovered that the fish in the La Grande reservoirs were highly contaminated with mercury. This meant that use of the waters of the project for subsistence activities would be practically eliminated for an unspecified period of time. Only now, in 2004, it seems the mercury levels are beginning to subside.

The 1986 Agreement provided for funds to conduct research on mercury and to locate alternative sources of fish for the communities concerned. Funds from the Agreement were also made available for on-going trapper programs and for some community development.

Cree good faith in cooperating with Hydro Québec on the project was shown by the fact that even during the fight against the Great Whale Project; in 1993 the Crees approved the addition of the La Forge II Dam to the original La Grande Project. This Dam was to be built in an already disturbed area of fast water between the headwater Caniapiscau Reservoir and the La Forge I Dam downstream. La Forge II was subjected to environmental review under the James Bay and Northern Québec Agreement regime. The related Opimiscau Agreement has since provided funding for remedial works important to the Crees and funds to help reduce community energy costs.

During the period from 1975 to the late 1980's, problems with the implementation of the James Bay and Northern Québec Agreement plagued our relations with Canada and Québec. In part these problems were magnified by political differences and the resultant lack of cooperation between Canada and Québec during much of this period. In 1975 once the ink was dry on the

Agreement, Federal and Québec political support for the implementation of the Cree and Inuit rights in it dried up. There followed many court actions over health services, sewer and water systems, local government and other matters. The development of the communities lagged. Houses were overcrowded and remain so today. Job opportunities and business opportunities were lost because the agreed-to means to provide Cree access to the benefits of development on their territory were not implemented.

In 1989 the Crees clearly saw that development in the north was done to benefit the south. The means for Cree development had been largely refused or only sparingly and grudgingly provided by governments.

In a sense both the Crees and developers had been cheated by the lack of implementation by the governments. The Crees were cheated because they paid the social costs of lagging

development and the developers, Hydro Québec and mainly the forestry companies, were cheated because they now were about to pay the cost of having a Cree population in the territory that was very adverse to further development. The Crees voted to stop the Great Whale and NBR projects because they saw impacts, but did not see lasting benefits of development.

The Great Whale campaign took 5 years to complete, but by 1994 the project was stopped.

In 2000 we did a review of the state of our own exclusion from development. In a territory where the Crees are the main occupants of the land, we had less than 1% of the permanent jobs in hydroelectric development, less than 5% of the forestry jobs and fewer than 10% of the mining jobs. The James Bay Agreement was still failing the Crees.

We subsequently also commissioned another economic study that revealed that the James Bay developments brought to Canada and Québec an added economic worth of between $2.5 and $2.8 billion each year, in comparison to the next most cost efficient investment that might have been made to provide electricity. To the Canadian Government alone, the annual tax benefit of this development is conservatively estimated by Québec's leading economist, Mr. Pierre Fortin of Groupe d'analyse, to be $800 million dollars per year.

The James Bay Agreement was a huge boon to Québec and Canada.

During this time, Hydro Québec proposed the construction of the EM-1A-Rupert Diversion Project. They offered a partnership with the Crees for project construction and for investment. Again, the Crees rejected the new deal because it would not solve the problem of Cree development that would have been the only way

to off-set the social and environmental disruption that the proposed project would surely bring to the Cree communities. Between 1989 and 2001 little progress had been made.

It was in this context that Premier Landry and I met and decided to hold a short negotiation to see if a deal was possible. For me the deal had to at least implement the outstanding obligations of Québec to the Crees from the 1975 Agreement. For the Premier, the deal had to include improved relations with the Crees and Cree consent to more development in the territory.

After three months of intensive negotiation and community consultation the final agreement was completed.

Among other things the Agreement provides for relations between the Cree Nation and Québec based on cooperation, partnership and mutual respect. Québec agrees to special measures to bring Crees into the employment and entrepreneurial opportunities

created by development on the territory. Problems with forestry development are to be resolved by a new Cree-Québec Forestry Board and forestry regime.

The Crees consented to the construction of the EM 1 Project and, subject to it passing environmental and social impact review, to the EM1A-Rupert Diversion project.

Québec agreed to cancel the massive NBR Project (three times the size of the once proposed Great Whale Project).

Québec also agrees to pay to the Crees an annual amount of $70 million indexed to the increase in value of the natural resource production of the Territory. With this the Crees will assume the responsibility of implementing Québec's obligations to the Crees under the James Bay Agreement for community and economic development.

- A variety of other matters are to be dealt with in separate negotiation tables and Cree court proceedings against Québec and Hydro Québec are resolved.

This new Agreement, known in Québec as the “Paix des Braves” is in my view in keeping with the Cree right to self determination and consistent with the Rights of Aboriginal Peoples set out in the current United Nations Declaration of the Rights of Indigenous Peoples. The Agreement builds on our treaty rights and does not seek conversion or relinquishment of these rights. Those who deny a rights-based aboriginal agenda are only seeking to deny Aboriginal Rights.

Québec Premier Jean Charest supported this initiative before he was Premier and continues to support and implements it with me now. This Agreement puts Québec in the forefront of international governments in terms of their respect for Aboriginal Rights.

The point that I want to make is that such a complex agreement would never result from a process of environmental impact review. If the EM1A Project was only subjected to environmental impact review, there would never have been cancellation of the NBR Project. Six thousand sq. km. of habitat may eventually have been flooded and two rivers diverted and the other dammed.

Even the Rupert River that we have agreed might be dammed if the EM-1A Project is accepted, under NBR would have only had about 30% flow at the mouth. While under EM-1A proposal, almost 50% of the natural flow would continue at the mouth the river. We negotiated a residual flow that I believe is above standards elsewhere and that exceeds what the Federal CEAA process would have provided.

Moreover, all of the other elements of the Agreement, quite likely including the $800 million of contracts for the Crees on the

construction of the EM1 and EM1A Project would never have been negotiated. It would at best have been a policy adopted by the proponent to train Crees and perhaps to favour contracts with aboriginal people and aboriginal enterprises.

The recognition by Québec of the Cree Nation means that in the future development will be the result of Agreements between the Crees and Québec. If we had accepted that our right to benefit from the resources on our lands was to be decided by whatever kind of environmental impact review process, the solution favoured by the review process on development would likely have favoured a liberal view of the world where there are only individuals, where everyone has the same rights and where distinct rights to protect aboriginal peoples, even with constitutional protections, are taboo and to be denied.

It is only because we negotiated with Québec, that has a perception of its own cultural identity, that we were able to

negotiate a deal based on the permanent presence of the Cree Nation in the Québec cultural landscape.

In the context of ‘La Paix des Braves”, we signed on April 19, 2004 a ‘New Relationship Agreement” with Hydro-Québec. The new Agreement calls for many things but perhaps most important, it sets out a new spirit of reconciliation and partnership with Hydro-Québec. We will in the future attempt to resolve our differences in new exchange forums. We will strive to respect our differences and to find mutually beneficial solutions to our differences.

What about the situation in Canada’s processes for the review of proposed development projects in James Bay?

When we negotiated the James Bay Agreement we insisted that there be a process for the review of future development projects. Moreover, we insisted that the process involve the creation of

committees that would include members nominated by Québec, Canada and the Crees. We did not want ad hoc committees for two reasons:

1. We knew that if the process involved ad hoc committees created each time anew, that the members would not necessarily be familiar with the biophysical and social nature of the territory;
2. We were not convinced that such panels would be very understanding of Cree rights and needs.

The first general clause of the section of the James Bay Agreement that establishes the social and environmental impact review process states:

“22.2.1 The environmental and social protection regime applicable in the Territory shall be established by and in accordance with the provisions of this Section.”

When the Canadian Environmental Assessment Act was being considered by Parliament, we made representations to the effect that James Bay should be exempted from the application of the Act. This fell on deaf ears.

As a result we are left with the CEAA regime that is managed largely by strangers to Northern Québec. The local Cree environmental administrators are effectively disempowered. Moreover, rather than implement the regime agreed to in 1975 and working with the Crees to improve it, Canada makes little room for regional, in this case Cree-Federal regimes, even if they have constitutional protection.

I am glad that Minister Abbott brought up his favourite gravel pit. I also have one and it is located in the community of Whapmagoostui – at Great Whale River. The community of 500 people wanted to create a gravel pit with a rock crusher at a site just outside of town. They needed the gravel for municipal

development. The site was a clean rock site used in the past for storage and it was of such a nature and location that there would be very little environmental impact.

Approval of the site was a condition placed by the Department of Indian and Northern Affairs on financing the rock crusher necessary to make the gravel. It would take some months for the sea-lanes to clear of ice so that the crusher could be delivered by ship. Therefore, the community had arranged to rent out the crusher for that period to a construction project in the territory and thereby they hoped to obtain some funding to cover part of the costs of developing the pit.

The project was presented to the committee set up under the James Bay and Northern Québec Agreement that decides whether a project warrants a full review or not. The members of the committee were aware of the proposed site, having been to

the community many times and they decided to exempt it from review on the basis of the information presented.

It must be remembered that the James Bay Agreement Committee, known as the Evaluating Committee, is made up of members appointed by the Crees, Québec and the Federal Government. After careful review of the facts presented, all agreed to the exemption. However, after the exemption was delivered, CEAA from Ottawa decided to review the project and sent out the usual formulaic outline for the review of a gravel pit. The community called for tenders on the work to write a report and the costs came in at more than $70,000. It doesn't sound like much, but the delay caused the community to lose the contract, so the real costs are more than $150,000. When the community complained about the extent of the outline, the CEAA responded saying that this was just an outline and that it wasn't necessary to respond to all it demanded. This was such an arbitrary reply!

This is just one example. In the 10 Cree communities we have many many more that are similar.

We are ready to contest the application of CEAA in the courts and in my view, after having examined the possible outcomes; I would prefer that CEAA did not apply at all in the James Bay Territory to the status quo. We want the Federal Regime that Canada agreed-to in 1975.

If Canada is to be involved in the development of Northern Québec, then it is going to have to seriously take into account the reality in Northern Québec. It is going to have to seek ways to implement the federal obligations in the 1975 treaty and it is going to have to find the means to implement these.

Canada has many and diverse regions with cultural characteristics, both aboriginal and other that are important not only to preserve and protect but also to recognize, promote and

empower. This does not diminish the presence of Canada, it enhances it.

Aboriginal Peoples are part of the cultural, social, political, and economic life of Canada. We have negotiated terms of mutual cooperation and respect with Québec that build upon our 1975 Agreement. We are ready to implement these negotiated terms of federalism with Canada also.

Environmental impact assessment is a tool for the planning of development. However, it cannot replace the larger political and human rights context of which it is a part. Technical and rights issues can be dealt with in such a process but even they are guided by the regulatory framework of standards and policies. The fundamental decision to build or not must be guided by not only technical considerations but also by larger human rights and political considerations.

Meegwetch, Thank You, Merci Beaucoup!