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STATEMENT
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TO THE SIXTH SESSION OF THE
UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES

AGENDA ITEM 3:
SPECIAL THEME: TERRITORIES, LANDS, AND NATURAL RESOURCES

NEW YORK, MAY 16, 2007

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DÉCLARATION
DE DANIEL WATSON
SOUS-MINISTRE ADJOINT PRINCIPAL
AFFAIRES INDIENNES ET DU NORD CANADA

À LA SIXIÈME SESSION DE L'INSTANCE PERMANENTE
DES NATIONS UNIES SUR LES QUESTIONS AUTOCHTONES

TROISIÈME POINT DE L'ORDRE DU JOUR
THÈME SPÉCIAL : TERRITOIRES, TERRES ET RESSOURCES NATURELLES

NEW YORK, 16 MAI 2006

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Canada wishes to commend the Permanent Forum for selecting "Territories, Lands and Natural Resources" as the special theme of this sixth session. Clearly, the important issues contained in this theme are central to indigenous peoples' identities, rights and well-being, and to the nature of their relationships with States and non-indigenous societies. Canada welcomes this opportunity to address this theme, by sharing information on the Government of Canada's approaches to resolving Aboriginal lands and resources issues, in partnership with Aboriginal peoples.

Introduction: Aboriginal and Treaty Rights in the Canadian Context

Today in Canada there are more than 600 First Nation communities, as well as many Inuit and Métis communities. Together, these comprise 52 nations or cultural groups, 11 major linguistic families and more than 50 Aboriginal languages. Accommodating this diversity in government policy is challenging but essential.

Section 35 of Canada's Constitution Act, 1982 recognizes and affirms existing Aboriginal and treaty rights of First Nations, Inuit and Métis. Aboriginal rights stem from prior, longstanding occupancy and use. Treaty rights are those rights set out in treaties entered into between the Crown and a particular group of Aboriginal people.

The Canadian domestic lens for addressing Aboriginal and treaty rights is reconciliation. As the Supreme Court of Canada has expressed in many decisions, the fundamental purpose of the constitutional recognition of existing Aboriginal and treaty rights in Section 35 is reconciliation, which involves the recognition and balancing of the rights of Aboriginal peoples with the sovereignty of the Crown and the rights and interests of other Canadians.

Reconciliation is not just a legal exercise. It is an ongoing process of establishing and maintaining a framework for living together within Canada on the basis that we are all here to stay. Given the differing circumstances of Aboriginal peoples across Canada, workable reconciliation will take different forms. "One size fits all" approaches are not practical. First Nations, Inuit and Métis have distinctive perspectives on how their rights should be recognized and reconciled. Provincial and territorial governments also have differing views with respect to the interpretation of Section 35 rights and their roles and responsibilities. The rights of non-Aboriginal Canadians must also be respected. A major challenge in achieving reconciliation is securing public understanding and support for reconciliation which is often misperceived as granting special rights to Aboriginal peoples, rather than reconciling existing constitutional rights.

There are very differing views of the exact form that reconciliation should take. While it is difficult to build a national consensus, workable reconciliation in the Canadian state requires mutual commitment to certain broad outcomes, including: respect for the distinctive rights and the continuing place of Aboriginal societies within Canada; respect for the values we share as Canadians, including the Charter of Rights and Freedoms

and gender equality; predictability for government relationships in the Federation and clarity for the application of laws; certainty for management and rights to lands and resources, and finally; as observed by the Royal Commission on Aboriginal Peoples, a recognition that Canada and the Canadian economy are a shared enterprise to which all contribute and from which all should benefit.

The Legal Scope of Aboriginal Rights to Lands and Resources

Over 40 Supreme Court decisions since the constitutional recognition of section 35 of the Constitution Act,1982 have significantly expanded our understanding of Aboriginal and treaty rights and government obligations in relation to those rights. In the space of 25 years , these court decisions have established a robust body of Aboriginal constitutional law and have set the parameters within which reconciliation must occur. These decisions have set tests for the recognition of Aboriginal rights and principles for interpretation of treaty rights. They have established tests regarding the infringement of rights and requirements for consultation and accommodation where government contemplates action that could impact treaty rights or asserted Aboriginal rights. And they've established guidance for upholding the honour of the Crown and for fulfilling fiduciary responsibilities.

Just as the Canadian Charter of Rights and Freedoms has revolutionized the relationship between citizens, governments and the courts relating to protection of individual rights, Section 35 has established a new balance between Aboriginal peoples, governments and the courts relating to the protection of the collective rights of Aboriginal people.

So far, Canadian law has confirmed that Aboriginal rights: exist in law; may range from rights not intimately tied to a specific area of land, to site-specific rights, to Aboriginal title, which is a right to exclusive use and occupancy of land; are site, fact and group-specific; and, are not absolute and may be justifiably infringed by the Crown.

With respect to Aboriginal title, the Supreme Court of Canada has made important distinctions between Aboriginal title and other forms of individual property ownership. The most important decision on Aboriginal title is the 1997 Delgamuukw decision from the Supreme Court of Canada. In that case, the Court said that: Aboriginal title is a communal right; Aboriginal title, like other types of Aboriginal rights, is protected under section 35 of the Constitution Act, 1982; Aboriginal title lands can only be surrendered to the federal Crown; Aboriginal title lands must not be put to a use which is irreconcilable with the nature of the group's attachment to the land; and, in order for the Crown to justify an infringement of Aboriginal title, it must demonstrate a compelling and substantive legislative objective, it must have consulted with the Aboriginal group prior to acting and, in some cases, compensation may be required.

Resolution of Aboriginal Claims to Lands and Resources

Despite these findings, the extent and nature of Aboriginal rights in Canada are the subject of considerable and continuing debate. The Supreme Court of Canada has indicated on numerous occasions that negotiations are the best way to resolve issues associated with Aboriginal rights and title.

Just as there has been a very significant investment in Canada in clarifying Aboriginal rights through the courts, there has also been a significant investment in negotiation processes to achieve reconciliation in the area of land claims and self-government. There has also been investment in exploratory treaty processes and commissions to find common ground for addressing issues relating to historic treaties.

Through the negotiation of comprehensive land claim agreements, or modern treaties, Canada seeks to resolve longstanding differences, create stronger ties and build lasting solutions; and we are determined to bring economic and social opportunities to Aboriginal communities across Canada and show Canadians that partnership is the best way to create better lives for us all.

Together, we strive for a future in which the Aboriginal peoples of Canada are able to assume greater control over issues affecting their people; to make choices about how to use their resources to deliver programs and services; to protect and nourish their culture; and to create business partnerships and build self-reliant communities that are better prepared to participate in the overall economic growth and development of Canada.

The comprehensive land claims process provides for a negotiated resolution of Aboriginal land rights and claims in those portions of Canada where Aboriginal rights and title have not been dealt with by treaty or other legal means. These negotiations seek to: obtain legal certainty with respect to Aboriginal rights, title and claims to land and resources; provide clarity for ownership, use and regulation of land and resources; contribute to the social and economic self-sufficiency of Aboriginal people; and propels economic growth by giving certainty and clear rules to investors and the public in general.

Since 1995, Canada has explored and developed new approaches to achieving certainty with regards to lands and resources as an alternative to the traditional approach based on exchange and surrender of Aboriginal land rights. The Nisga'a Final Agreement that came into effect in 2000, for example, provided for the Nisga'a Aboriginal rights to continue as modified by the treaty. Another example is the non-assertion technique, whereby the Aboriginal group in question agrees not to exercise or assert any rights other than those agreed to through negotiations.

These new certainty approaches, developed with Aboriginal groups, are not merely a "semantic" change. They represent a different approach developed in partnership with

Aboriginal groups. Other approaches are under development with Aboriginal groups at negotiation tables.

Over the past 30 years in Canada, we have negotiated 20 comprehensive land claim agreements or modern treaties, bringing certainty with respect to Aboriginal rights in approximately 40% of Canada geographically. These 20 modern treaties include some 90 Aboriginal communities with over 70,000 members.

These modern treaties have confirmed Aboriginal ownership of over 600,000 square kilometres of land, (almost equal to the size of the Province of Manitoba or the size of France, Switzerland and Belgium combined). They have provided Aboriginal groups with over $2.4 billion in capital transfers. They have confirmed Aboriginal access to a variety of economic benefits: royalties, impact and benefit agreements, and employment and contracting opportunities. They provide protection for the traditional Aboriginal economy and harvesting rights and for participation in environmental and land and resource management regimes within the traditional territories of Aboriginal peoples.

Most of these modern treaties have associated self-government or political rights: including the creation of the Nunavut territory, the Kativik regional government, the Cree Naskapi Act, 11 Yukon self-government agreements, and self-government arrangements in the Nisga'a, Tlicho and Labrador Inuit land claim agreements.

Treaty Implementation

The process of negotiating a comprehensive land claim agreement is a complex undertaking. Once an agreement is signed and brought into effect, a new and equally challenging phase begins for the parties, one which focuses on implementing the many provisions contained in the agreement. This is not a passing phase, but rather an enduring one, marking a new relationship among the parties - the federal government, the Aboriginal group and the provincial or territorial government involved.

This new relationship involves fulfilling the many legal obligations each party has assumed. Comprehensive land claims agreements also include self-government and, therefore, this new relationship also begins interaction on a government-to-government basis.

One key tool to facilitate the transition to this new relationship is the implementation plan that accompanies each final agreement. The implementation plan describes what must be done to bring an agreement into effect, identifies who is responsible for implementation activities and when those activities must be undertaken.

Traditionally, implementation plans have focused on the formal obligations of the parties, breaking these down into activities and schedules. While this remains indispensable, it is important to realize that the implementation management stage of

an agreement is neither merely a collection of activities, nor another passing phase. Where self-government is involved, the implementation management phase should reflect and support a stable government-to-government relationship. Implementation management should, therefore, give effect to certain processes that are essential to such a relationship, including ongoing monitoring and reporting, information-sharing, consultation and dispute resolution processes.

Lands and Resources within the Comprehensive Claims Process

Lands are, of course, of central importance in the comprehensive claims process. Negotiations address land title, or ownership, and land use. Land title and use are closely linked to related issues including, for example, wildlife harvesting and management, water rights management, forestry, parks and protected areas, and environmental management. Aboriginal groups' interests when selecting land for inclusion in a comprehensive land claims agreement are broad, ranging from cultural and spiritual, to economic, to social and recreational, and to residential uses. In negotiating land provisions, Canada seeks to address these interests while also ensuring that the interests of third parties and the broader Canadian public are also respected.

A wide range of natural resources are the subject of Aboriginal claims. Canada addresses many such claims in the context of the comprehensive claims process.

One of the most important examples is the fisheries resource, which is often a central topic because of its importance to diet and culture, as well as to the economy of entire regions. Agreement may be required on allocations of fish species for food, social and ceremonial purposes and/or to expedite participation in the commercial fishery, and allocation of the resource internal to the Aboriginal group.

Innovative management tools have been implemented in some areas of the country where Fisheries Management working groups have brought together commercial, sports and Aboriginal fishers with federal and provincial officials.

Negotiations of Aboriginal claims also take place in relation to a range of natural resources, including: forestry, parks and protected areas, plants, subsurface resources, water and wildlife.

Other Natural Resource Activities

Canada also works on natural resource activities with Aboriginal peoples outside of the context of comprehensive claim negotiations. One example is the Aboriginal Fisheries Strategy, administered by the Department of Fisheries and Oceans, which is designed to provide a framework for the management of fishing by Aboriginal groups for food,

social and ceremonial purposes, and to provide Aboriginal groups with an opportunity to participate in the management of fisheries.

This program has resulted in: better monitoring of Aboriginal fishing; improved cooperation on enforcement; more selective fishing; and the creation of approximately 1,300 seasonal jobs per year since 1993 in such areas as commercial fishing, processing, monitoring, and fishery enhancement activities.

Another example is the First Nations Forestry Program, which provides funding and support to First Nations to participate in the forest sector. Jointly funded by Natural Resources Canada and Indian and Northern Affairs Canada, and delivered in partnership with First Nations, the objectives of the First Nations Forestry Program are: to enhance the capacity of First Nations to sustainably manage their forest lands; to enhance the capacity of First Nations to operate and participate in forest-based development opportunities and their benefits; to advance the knowledge of First Nations in sustainable forest management and forest-based development; and, to enhance the institutional capacity of First Nations at the provincial and territorial level to support their participation in the forest-based economy.

Natural Resources Canada is also active with Aboriginal groups in relation to the Canadian mining industry. The Department's Minerals and Metals Sector promotes the participation of Aboriginal peoples and communities in the mining industry. The Sector encourages dialogue and partnerships between the industry, Aboriginal groups and governments, promotes capacity-building and economic and business development, supports environmentally and socially responsible mineral development, and generates and disseminates information products and tools.

Mineral exploration and mining development in Canada are experiencing strong growth, particularly in the North, offering great potential for the creation of wealth and economic self-sufficiency for many Aboriginal communities located in close proximity to mining sites. Mining provides employment, training and new business opportunities which in turn contributes to higher standards of living for communities. The primary means of ensuring that benefits are shared among companies and Aboriginal communities is through agreements such as Impact and Benefit agreements, which have become common practice in Canada. These agreements are negotiated between companies and Aboriginal groups, an approach the government strongly encourages.

Impact-Benefits Agreements address issues such as employment and training, identification of business opportunities, social, cultural and community support, financial provisions and equity participation, and environmental protection and cultural resources.

In order to support Aboriginal peoples and communities in taking advantage of the opportunities, Natural Resources Canada produces information tools such as the Mining Information Kit for Aboriginal Communities which is distributed to Aboriginal

communities across Canada and to interested indigenous communities/organizations abroad. The Mining Information Kit informs Aboriginal communities about all the stages of the mining cycle from early exploration to mine closure, and helps Aboriginal peoples better understand mining activities and identify the opportunities that mining can bring to communities.

This tool is designed in four modules corresponding to the main stages of the mining cycle. It provides examples of community experiences, positive relationships, and partnerships with mining companies. It also outlines the regulatory process to ensure Aboriginal peoples are well informed of the economic, social and environmental effects, benefits and opportunities in making decisions.

Natural Resources Canada, both directly and in cooperation with Indian and Northern Affairs, has provided technical and financial support to communities to facilitate the use of local energy resources to support their communities' operation. Projects have included small hydro and biomass projects such as the Ouje-Bougoumou district heating system. In 1995, the village received the «We the Peoples: 50 Communities Award» and was selected as one of fifty communities in the world which best expressed the objectives of the United Nations.

Lessons Learned and Recommendations

Based on the Canadian experience, we would summarize the following observations and recommendations, which may be useful in other national or international contexts:

- Processes to address Aboriginal rights to lands and resources in Canada exist within the context of a dynamic, evolving relationship between various levels of government, Aboriginal peoples, and non-Aboriginal citizens. Courts' decisions have contributed to this evolving relationship. Rights to lands can range from title or ownership, to exclusive use and possession, to lands over which indigenous peoples may exercise rights short of ownership or exclusive use and possession.

- The basis for resolution lies in the principles of reconciliation and negotiation, and requires recognition and balancing the rights and interests of Aboriginal peoples, the State and other Canadians. There are very differing views of what reconciliation should look like and those views change over time.

- Reconciliation is not just a legal exercise. It is an ongoing process of establishing and maintaining a framework for living together. Given the differing circumstances of indigenous peoples across Canada, workable reconciliation will take different forms. "One size fits all" approaches are not practical.

- Significant investments of time and financial and human resources in negotiation processes are required to achieve reconciliation.

- A structured and agreed plan for the implementation of agreements is essential. This is not a passing phase, but rather an enduring one, marking a new relationship among the parties. While the negotiated agreement defines the new relationship, the implementation plan describes how this new relationship should operate.

- Implementation management should include certain processes that are essential to such a relationship, including ongoing monitoring and reporting, information-sharing, consultation and dispute resolution processes.

- Meaningful involvement of indigenous peoples in the development and management of natural resources is essential to avoid conflict and achieve sustainable economic and social development of indigenous communities.

- The transfer or development of skills and capacity to take full advantage of natural resources and related economic opportunities takes time, as young people become convinced of opportunities and direct their training and careers. Accordingly, the period of transition during which capacity is developed must be recognized and accommodated if success, in the long term, is to be realized.

Canada remains committed to negotiations as the best means of resolving outstanding Aboriginal claims to lands and resources. It must be acknowledged that there are those who remain skeptical of this approach or who believe that for one group to advance another must recede. In this regard, we recall the words of one of the First Nations architects of the British Columbia Treaty Process. He said that negotiated settlements are not meant to draw thick lines between neighborhoods; they are not about excluding anyone. Instead, they are about bringing people together and figuring out how we are going to live together and share.

Thank you.