



## **Presentation to the Senate Committee on Energy, the Environment and Natural Resources**

First Nations and Canada: Working Together for a  
Sustainable Energy Future

November 24, 2011

## Introduction

Honourable Senators, I do not want to paint you a picture that First Nations all support development or that First Nations are all opposed to development. First Nations support Responsible Developments and oppose irresponsible developments. One key to understanding First Nations and the energy sector is to understand the difference between responsible and irresponsible developments. To understand this difference, one must understand the importance of responsibilities and rights.

First Nations also have responsibilities. First Nations have the responsibility to honour our ancestors by preserving and promoting our cultures and languages. First Nations also have a responsibility to future generations, to ensure they enjoy prosperity, while maintaining the same relationship with the air, the waters and the land that our ancestors had. Most important, First Nations, like all peoples, have a sacred duty to ensure the balance of the earth.

In Canada, First Nations rights are often expressed as aboriginal rights or treaty rights. In some cases, First Nations may assert aboriginal or treaty rights directly over natural resources. In others, First Nations may assert that energy development will cause harmful environmental impacts which will prevent them from pursuing activities guaranteed by a treaty, or asserted to be an aboriginal right.

The far reaching effects of energy development are not limited to Canada. The UN Special Rapporteur on Indigenous Peoples, S James Anaya, concluded recently in a report to the Human Rights Council on extractive industries and indigenous peoples that there are several direct and indirect effects of development which implicate the human rights of indigenous peoples globally.

Let me be clear, there is one right that matters more than all others for First Nations – the right to self-determination. First Nations have the inherent right to determine the appropriate path for our development and the development of our lands, territories and resources. It has been so since time immemorial.

This right is articulated in the UN Declaration on the Rights of Indigenous Peoples. Article 32 of the Declaration states, “Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources”. International experts assert that First Nations enjoy *Permanent Sovereignty of Natural Resources*. Canada is bound to enforce the right to self-determination, particularly with respect to natural resources, through Article 1 and Article 27 of the International Covenant on Civil

and Political Rights, through the Convention on the Elimination of all forms of Racial Discrimination and through other binding international obligations. Our rights to resources are human rights – collective human rights held by First Nations.

It is hardly a surprise that discussions about land claims, treaty rights and international human rights are often seen as an impediment to development. It need not be so. And, in fact, this is becoming the way of the past. Greater First Nations control over our lands and resources, to uphold our obligations to our ancestors, our youth and future generations is leading to more First Nations being involved in development, not less. Even better, the types of development being pursued are more sustainable and more environmentally friendly than in the past.

One reason for this is the recognition in Canadian law of the duty to consult and accommodate. This duty forces the Crown and First Nations to engage in good faith discussions on the impact of Crown conduct on aboriginal and treaty rights. It is a rights-driven process that is evolving. There is no doubt that Canada's consultation and accommodation policy and practice needs improvement, and any improvement in this regard should be seen as an investment in Canada's energy and natural resource regulatory regime, rather than as a cost.

I'm here today to tell you that First Nation rights are good for development. That involving First Nations in our role as caretakers for the lands and the waters is good environmental policy. And that by recognizing a strong and equitable role for First Nations in the development of an energy strategy will make for a more robust and more sustainable energy infrastructure for Canada.

### **Responsible Development**

- Responsible Development respects First Nations responsibilities and rights.
- Our responsibilities include ensuring that future generations may have the same relationship as our ancestors did with the air, waters and land.
- Our rights include the inherent right to determine the appropriate path for our own development and the development of our territories.
- First Nations rely on our rights to fulfil our responsibilities to Mother Earth.
- First Nations responsibilities and expertise are closely linked to sustainable development through Principle 22 of the Rio Declaration, which states that Canada should enable our “effective participation in the achievement of sustainable development”.
- Connections between environmental damage and our human rights are not new. The 1972 *Declaration of the United Nations Conference on the*

*Human Environment* links a healthy environment to the enjoyment of human rights.

- First Nations retain our sovereignty over our natural resources, as confirmed by a report of then UN Special Rapporteur on Indigenous Peoples Erica Irene Daes, *Indigenous Peoples Permanent Sovereignty over Natural Resources*.
- The *United Nations Declaration on the Rights of Indigenous Peoples* also supports our rights, though Article 3 (self-determination); Article 23 (right to development); Article 26 (land rights) and Article 29 (conservation and protection of the environment).
- Article 32 of the UNDRIP states, “States shall **consult** and cooperate **in good faith** with the indigenous peoples concerned through their own representative institutions in order to obtain their **free and informed consent** prior to the approval of any project **affecting their lands or territories and other resources**, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”
- The most basic right of First Nations is the right to self-determination. Only First Nations have the ability to define how to fulfil our responsibilities and only First Nations will determine the appropriate course of development over our lands, territories and resources.
- The *Rio Declaration*, the *Convention on Biological Diversity* and other international environmental treaties recognize the importance of the full and effective participation of First Nations, as well as the importance of traditional knowledge in protecting the environment. See, for example, Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II. Doc. 56/09 at para. 17 (30 December 2009).
- First Nations rights, as well as the unique expertise of First Nations in determining and fulfilling our responsibilities to nature, means that any discussion of sustainable or responsible development, particularly at the national level, must fully and effectively engage First Nations.

### **Land Claims and Treaty Rights**

- There is no question that failure to resolve land claims and the failure to implement treaty rights may slow down development projects. This is more so for large mega-projects.
- The recent report of the UN Special Rapporteur on Indigenous Peoples, James Anaya, recognizes that extractive development may have profound

negative impacts on resolution of land claims, and vice versa. The Special Rapporteur specifically highlighted the situation of the Lubicon Lake Cree, which has had outstanding land claims issues for decades, despite having secured a finding from the Human Rights Committee that their land rights were being violated by Canada.

- In terms of treaties, the situation is not much better. Treaties are sacred constitutional documents, with very profound legal effects. Yet the failure to implement treaties in an honourable fashion, combined with a growing gap between the Crown and First Nations on the meaning of treaties means that treaties themselves offer no guarantee that development within treaty territories will proceed.
- A large number of resource developments impacting First Nations occur ‘off-reserve’ – and have profound impacts on First Nations culture and rights
- Some of these ‘off reserve’ activities occur within territories that First Nations claim as their own by way of aboriginal title and/or having continuing legal interests based on their treaties. Developmental activities have far-reaching impacts that affect indigenous lands, territories or resources, particularly water resources or wildlife migration patterns.
- UN Special Rapporteur on the Rights of Indigenous Peoples in his report on Extractive Industries notes the human rights and environmental impacts of development in traditional territories

### **Rights-driven process provides the path forward**

- Despite these major obstacles, AFN sees a clear path forward.
- At the basis of most of these issues is the need to respect First Nations. Respect our responsibilities and respect our rights.
- Treaties were formed in order to bring nations together. It is shameful and unnecessary that treaties have become so divisive. Canada and First Nations need to go ‘Back to the Future’ on treaties – to return to the original purpose of the treaties in order to create a robust process to move forward. Many First Nations have a nation to nation relationship which is articulated through treaties; making treaty federalism one path forward.
- Settling land claims needs to be a greater priority for Canada. In fact, settling such claims while development is being contemplated may seem impossible, but may be more likely. AFN directs the Committee’s attention to the *James Bay and Northern Quebec Agreement*. Development can be a catalyst for settling land claims and vice versa.
- The Supreme Court recognizes that where aboriginal or treaty rights are asserted, consultation and accommodation and in some cases, the consent of the First Nation may be required before development can proceed.

- In addition, for quite some time now, industry has made a practice of negotiating impact and benefit agreements (IBAs) with First Nations. This allows willing First Nations to benefit from development and to exert influence over the course of development in their territories.
- Many First Nations are seeking to become even more active players in the business of development. For these First Nations, the ability to access capital is critical.

### **Engagement – The Timing is Critical**

- Developing a sustainable energy strategy requires First Nations to be at the table and participating as equal members in the dialogue.
- Many First Nation traditional lands contain plentiful natural resources that will influence the content of a sustainable energy strategy. As stewards of the land, First Nations must be fully involved in the decision-making process.
- Current estimates indicate that there will be \$400 Billion of resource-based economic activity in Canada in the coming years, much of which will involve the traditional territories of First Nations. First Nations will play a significant role in determining whether or not these projects proceed.
- AFN has referenced the legal duty to consult, accommodate and in some cases acquire the consent of First Nations in the development of resources on their lands. But what does this look like in practice?
- First Nations need to be engaged and consulted at the outset of any initiative.
- Once meaningful consultation is properly viewed as an investment, First Nations' rights will be respected and industry projects will proceed faster, smoother and at less cost.
- Engagement with First Nations must be the first step in exploring the possibility of resource or energy development on our traditional lands.
  - Engage early, and engage often.
  - The Expert Mechanism on the Rights of Indigenous Peoples at the UN Human Rights Council has recognized the right of indigenous peoples to participate in decision-making where they may be affected.
  - The report has also recognized that mere participation by indigenous peoples in non-indigenous decision-making does not address power imbalances between parties and the experience may be hampered by forcing indigenous peoples to operate in an environment they are unfamiliar with.

- Cross-cultural awareness must be promoted between all parties so that we can understand each others concerns and where we are all coming from.
- First Nations feel a strong connection to the land and take our environmental stewardship responsibilities seriously.
- Sometimes this has been misunderstood as being against development, but First Nations are for development in an environmentally and sustainably responsible manner.
- There are some examples of good and bad engagement and consultation. The James Bay hydro developments in Quebec on traditional Cree lands are one example of both.
  - Initially there was no consultation with the Cree communities and development stalled due to opposition by the communities affected
  - But, the province of Quebec reengaged the affected communities and a deal was eventually reached between the Crees, Quebec and Canada which has been widely seen as a success.
- Principals and relationships as set out in our treaties with the Crown and the *United Nations Declaration on the Rights of Indigenous Peoples* provide a base for our engagement on natural resource development.
- Engagement with First Nations should be advanced by government as well as industry, NGOs and other organizations.
- Engagement with First Nations must be advanced from all organizations that are involved in sustainable development including government, industry, NGOs and even professional associations with relevant expertise.
- There are many organizations which have expertise and knowledge that can be shared with First Nations in the area of resource development, especially with communities new to the extractive industry. These can come from industry, environmental, health or other perspectives.
- All organizations that address energy issues need to reach out to First Nations across the country and not just areas where a new project is currently being considered or is under development.
- Training and capacity building at the community, regional and national levels are required for meaningful engagement.
- These challenges have been recognized at the international level. The Special Rapporteur on the Rights of Indigenous Peoples at the UN Human Rights Council has highlighted challenges that Sucker Creek First Nation in Alberta has faced. Sucker Creek, not unlike other First Nations, has had to address difficulties in seeking accurate information regarding the potential

impact of proposed extractive industry projects and navigating complex technical information in consultation and negotiation phases.

- Sucker Creek is not unique. Often First Nations are engaged by resource companies as technical equals and are expected to have the same ability to navigate complex technical reports and the fiscal resources to fund their own impact assessments. This is a luxury few communities can afford. First Nations are often left to assess the viability, social, economic and environmental impacts of a project solely with the company's own reports.
  - These reports are more often than not, unable to assess the full impact of the project on the First Nation concerned because there had not yet been significant engagement with the community by the company and First Nations were not involved in the drafting of the report.
- Technical training and capacity building will facilitate First Nation contributions to a national sustainable energy strategy and more positive experiences in resource development.
- Based on our information, at least 150 First Nation communities are working with mining companies, but there are many more that have not been properly involved despite the interest being there.
- First Nations are willing and able to play an integral role in developing and implementing a national energy strategy but we require the capacity and technical knowledge that is gained through early engagement and partnership to assess the environmental impacts and benefits to our communities from energy developments.

### **Partnerships take trust and time**

- Respectful engagement at the idea-stage builds strong and prosperous partnerships.
- Equal partnership begins at the idea-generating stage and continues throughout the project at all levels to contribute to a strong relationship between partners.
- Strong partnerships take time and relationship-building to develop trust among all parties which is why it is critical to engage early.
- There have been cases where a lack of meaningful engagement at the outset and respect for First Nations by a deaf industry has led to delays, court injunctions, mistrust and harm to our environment and our communities.
- Lack of meaningful consultation leads to divisiveness between First Nations and industry. This then leads to delays, higher legal costs, and mistrust among all parties.



- First Nations will have different ideas on how partnerships will work best for them, which is why early engagement is so important.
  - For example, some communities may want to be fully involved in all aspects of the project. Others may want to hear about how the development will benefit their community through jobs, training and infrastructure while minimizing the impact to the environment.
  - Addressing the need for information and resources should be reflected in an impact benefit agreement and resource revenue sharing agreement.
  - Each community will have their own set of questions which will require different types of information and resources.
  
- The flow of information and resources such as capacity, technical and regulatory knowledge to First Nations is critical.
- When First Nations are engaged at every step of the process and respectfully treated as equal partners, there is a better understanding of project and regulatory requirements, of cultural awareness between parties, of environmental impacts and economic benefits.
- Nurturing strong relationships and providing a regular forum for partners to meet enables the flow of critical information and the resources with which it can be understood.
  
- Addressing First Nations' concerns is key to the success of development initiatives.
- Partnership means more than simply a seat at the table; it encompasses having First Nations' concerns meaningfully addressed.
  - It also means sharing in all benefits of the project: jobs, training, infrastructure, energy, profits and increased environmental knowledge. These can be addressed through impact benefit agreements and resource revenue sharing negotiated between the partners.
- The successful partnership will be the one that respects First Nations' views and adequately addresses First Nations rights and concerns.
- Efforts to establish a collaborative approach as recommended in the report by the Energy Ministers in Kananaskis must include First Nations governments so that our rights and concerns are addressed from the outset at the conceptual and strategizing stage.
  
- We need to work together to create the conditions that will enable strong partnerships.

- In the Report of the Special Rapporteur on the Rights of Indigenous Peoples report regarding extractive industries, James Anaya notes that industry has identified a lack of clarity around regulatory frameworks. These uncertainties are seen to be a major obstacle to conducting business in a way that respects the right of indigenous peoples. Legal uncertainties (i.e. treaty rights and land claims) are seen as creating costly conflict with indigenous communities. We cannot continue the glacial pace at which land claims are currently being negotiated and settled and need to move ahead now if we want to see the much needed investments and jobs in our communities.
- We need to work together on a process to address specific issues around engaging and partnering with First Nations in energy and extractive industries. We need to collectively create a dialogue that will answer some of the questions facing industry:
  - When should First Nations be engaged?
  - How should First Nations be engaged?
  - What does a mutually-beneficial and equal partnership look like?
  - How does free, prior and informed consent work in practice when a community says no?

### **Moving Sustainable Energy Development Forward**

- There is considerable potential for growth and partnership with First Nations in the development of sustainable energy.
- We have the potential to double the current number of 150 First Nation communities involved in mining.
- First Nations want to work with the energy industry to advance a sustainable future for Canada by providing our own expertise in our traditional lands.
- In addition to the significant and ongoing investment by industry in energy and natural resources the federal government is increasingly looking to markets in Asia for export. We are expecting an increase in demand for energy from First Nations lands.
- There is a critical need for economic development which must be balanced with our obligations to Mother Earth.
- First Nations values should be introduced to Canadians to encourage solutions which encourage individual and collective conservation, rather than simply expansion of power projects
- The health of our environment must be balanced against economic need to ensure the prosperity of our future generations.

- First Nations recognize the current need for investment in our economies and jobs, but we want to ensure that there will still be jobs for our children, our children's children and indeed all of our descendents. We also want to leave a healthy environment so that traditional activities may still be practiced at any point in the future.
- First Nations are involved in wind, solar and hydro generation – these are fast-growing segments of the energy industry.
- Some key partnerships in energy development include:
- Chemainus First Nation in B.C. has become an investor and partner in a new \$200 million natural gas plant that will create local jobs and deliver clean energy on Vancouver Island.
- The Haida Nation, the Lax Kw'alaams First Nation and the Metlakatla First Nation are partners in NaiKun Wind Development, Canada's largest offshore wind energy project. They are actively participating in planning, ownership, operations, employment, and training.
- Cowessess First Nation signed an agreement with the Government of Saskatchewan in 2011 build a multi-million dollar wind farm just outside Regina.
- The Kitchi-Nodin Wind Farm at Swan Lake First Nation in Manitoba will generate 10 megawatts of power for the community, eventually feed into the provincial power grid.
- On July 14, 2010 Membertou First Nation in Nova Scotia entered into a business partnership with GrupoGuascor, a Spanish renewable energy company with projects around the world. Membertou and GrupoGuascor will specifically develop wind, solar, and bio-energy projects for rural and remote First Nation communities.
- Many First Nation communities in Ontario are involved in renewable development projects that span wind, water, solar and biomass production. Some examples include:
- Moose Cree First Nation has a 25 per cent ownership in Ontario Power Generation's new \$2.5 billion project that will add 440 Megawatts of generation on the Lower Mattagami River.
- The Chapleau Ojibwe First Nation has signed a deal with HydroMega in Quebec to help build and maintain a 20 Megawatt generator on the Kapuskasing River.
- Henvey Inlet First Nation has signed the largest Indigenous Feed-In-Tariff contract with the Province of Ontario. Once completed, their \$1 billion 300 megawatt wind farm will supply energy to 70,000 homes.

- Building partnerships between First Nations, industry and government with tangible social and economic benefits flowing to First Nations communities will assist in eliminating the gap between First Nations people and other British Columbians."

## **Our Future Relies on Creating a Green Economy**

- The move toward a green economy is happening on a scale and at a speed never seen before. It is expected to generate as much growth and employment, or more, compared to the current business as usual scenario and it outperforms economic projects in the medium and long term, while yielding significantly more environmental and social benefits, according to the UN Environment Program Report "Towards a Green Economy".
- We have an opportunity to craft a green economy with First Nations now; using momentum of upcoming Rio+20, the UN Conference on Sustainable Development.
- A green economy can help address the fact that ever-expanding extractive industry operations<sup>1</sup> continue to be a pressing issue for many First Nations, as outlined in the Report of the Special Rapporteur on the Rights of Indigenous Peoples.
- To address issues around extractive industry operations, components of a green economy should include:
  - Clean/renewable energy initiatives
  - Corporate Social Responsibility
  - Free, Prior and Informed Consent (FPIC) requirements and mandatory impact and benefit agreements and resource revenue sharing
  - Valuation of ecosystem services
- Valuation of ecosystem services: Forests that absorb carbon from the atmosphere should be valued in an economic system that values the oil we take from underground and puts carbon into the atmosphere. This provides a necessary balance that should be reflected in a new green economy.
- Reducing extractive industrial activity will reduce environmental damage which is critical to ensuring FN ability to produce and harvest uncontaminated food, water and medicine locally. Food sovereignty and

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<sup>1</sup> Extractive industries are the industries engaged with the discovery or extracting of natural resources, such as minerals, petroleum (oil), or gas. By their nature, they harm the land they are taken from, infringe upon indigenous peoples rights and are generally considered as producing unacceptable environmental damage.

access to safe water (or water rights) are critically important to FN well-being.

- Reducing extractive industrial activity will also help us to evolve toward a low-carbon economy, thereby situating our energy strategy within the forces shaping the world's energy future, as recommended in the Annual Energy and Mines Ministers' Conference held in Kananaskis in June.
  
- Diverse and local opportunities for First Nations' economic development that do not deplete natural assets should be a key strategy in developing a green economy to increase prosperity.
- Local economic development is essential to sustaining our culture, well-being and improving prosperity in FN communities.
- Our cultures have developed over thousands of years of living as communities. A green economy must ensure FNs have the ability to make decisions and work locally in all sectors including natural resource management, infrastructure, energy, etc.
  
- Green power generation is generally seen by First Nations as a sustainable activity.
- First Nations are driving innovative approaches to energy development that is environmentally responsible and sustainable. Some of these projects include:
  - The Innu community of Ekuanitshit that is building a mini-station on the Sheldrake River in Quebec, while the Atikamekw partnership will harness power on the Manouane River.
  - Nipissing First Nation in Ontario is building a bio-fiber plant that will supply power to the North Bay District Hospital.
  - The Acho Dene Koe First Nation in the Yukon is using geo-thermal energy to heat a greenhouse complex in order to produce food for the local communities.
  - Whitefish Lake First Nation, northeast of Edmonton, plans to build a \$10 million "green" sports complex that will use geo-thermal energy. The community has risen over \$3 million while another \$4 million has been pledged by local industries.
  - Swan Lake First Nation in Manitoba is developing a multi-million dollar 10 Megawatt wind farm that will feed into the province's power grid.

- First Nations are involved in developing green local economies through our involvement in wind, solar and hydro generation on our traditional lands. Just a few examples include:
  - Moose Cree First Nation in Ontario has a 25% ownership in a new Ontario Power Generation \$2.5 billion hydro project
  - Chemainus First Nation in BC has become an investor and partner in a new \$200 million natural gas plant that will create local jobs and deliver clean energy.
  - Gitga'at First Nation in BC is addressing demand issues by using energy management software to analyze, shift and reduce electricity consumption and new technologies to improve the efficiency of diesel generators.

### **A Green Economy can be a key tool to increase prosperity among First Nations**

- There is a clear need to address social and economic disparities.
  - Aboriginal peoples have unemployment rates double the national average and income that is almost half that of the general population. Aboriginal Canadians are half as likely to hold any certificate, diploma or degree.
- Canada is experiencing a major demographic shift. Aboriginal people represent a rapidly growing segment of Canada's home-borne population and they have the potential to play a larger role within the Canadian economy.
- At present, under-employed First Nations youth cost Canada both in increased social transfers and lost opportunity costs.
- There is a great deal of room for improvements in education, training and skill development as almost half of First Nations are under 25 and could soon be joining the labour force if the job prospects are there.
- First Nations are located proximate to where major projects will be located.
- Raising the participation rate in the workforce of Aboriginal people from 63 percent to the national average of 67 percent would add 32,000 more workers to the Canadian workforce according to the Conference Board report from 2010 entitled, "Sustaining the Canadian Labour Force Alternatives to Immigration".
- Research by other organizations suggests that Aboriginal employment could grow by 200,000 by 2026 if the national average for labour force engagement can be attained.

- As Canada's population ages, there will be shortages of skilled workers. The Conference Board report further suggests that education investments in First Nations will help to alleviate these shortages.
- Addressing such shortages is important for two reasons:
  - Because immigrant destinations are usually large cities (consumers of electricity), whereas most First Nations are already rurally and remotely located where the resources are.
  - Because development of major projects has not likely been accounted for in projections of future labour force requirements (meaning the need is greater than thought).
- Bringing First Nations into the labour force will increase prosperity in poor communities with the socio-economic benefits that accrue, and decrease social assistance requirements by government.
- Economic development must include not only individuals, but also capacity development of First Nation governments and institutions.

## **Recommendations**

We have an opportunity to move forward together to reach mutually beneficial outcomes in developing a sustainable energy strategy that will bring prosperity to our communities and across Canada as a whole.

Industry and government need to shift to a new approach to deal with First Nations that respects our rights and title to the land and our clear right to determine the course and shape of development in our territories and to benefit from development activities on our lands.

- First Nations must be included in future meetings of federal, provincial and territorial Energy and Natural Resources Ministers
- First Nations need a Joint Federal-Provincial-Territorial-First Nation dialogue process to implement a National Energy Strategy.
- First Nations must be involved in the upcoming UN Conference on Sustainable Development (Rio +20), as well as domestic initiatives like *Canada's Sustainable Development Strategy*, which must be implemented with the full and effective participation of First Nations.
- In its conclusions on federal and provincial/territorial roles in the energy sector, the Senate should address the inherent jurisdiction of First Nations over resources, as well as consultation and accommodation.

- First Nations values and traditional knowledge should be reflected in the final report of the Committee and future work on this subject.

The federal government could:

- Increased training, including education for trades for First Nations youth is required immediately.
- Provide capacity support, in the form of technical assistance and in the form of access to capital flows, for First Nations to work as equal partners in development of energy projects.
- Develop an environmental assessment process, through the seven year review of the Canadian Environmental Assessment Act, that respects First Nation traditional knowledge and rights
- Assist First Nations facilitation of a national discussion to develop a best practices guide for a process of consultation between energy firms, government and First Nations.
  - This could be addressed through the development of a national First Nations Resource Institute.