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August 15, 2011

Premier Jean Charest
Édifice Honoré-Mercier,
3e étage
835, boul. René-Lévesque Est
Québec (Québec) G1A 1B4

BY FAX

Re: Comments on Proposed Changes to Quebec Mining Act (Bill 14)

Dear Premier Charest:

We offer you greetings from the Algonquin First Nations of Wolf Lake and Eagle Village.

We are writing you today out of great concern for the existing Quebec Mining Act, the proposed changes to Quebec's Mining Act under Bill 14 and the lack of a meaningful consultation and accommodation process to address our two First Nation's Aboriginal Rights and Title.

Quebec's Mining Act allows exploration activities, including aerial surveying, blasting and drilling, trenching and the construction of temporary roads and shelters, without any consultation with First Nations or environmental assessment. Such provisions are inconsistent with other responsibilities of the province, including its higher constitutional duty to respect and uphold the Aboriginal and Treaty rights of First Nations.

Canadian courts have held, over and over again that there is a clear, constitutional obligation for governments to carry out meaningful consultation and accommodation before any decisions are made that could impact on the rights and interests of First Nations. The purpose of such consultation is to identify and address any First Nation concerns.

This did not happen before claims/leases to explore for Rare Earth Elements, Uranium, Gold and Copper were issued to mining exploration companies in lands subject to our shared Algonquin Aboriginal Rights and Title.

Implementation of an antiquated Quebec Mining Act based upon "free entry" has meant that our rights as First Nations to protect our communities, lands and waters are quickly

being eroded by existing mining staking and exploration activities within our shared traditional territory.

We are calling on you as the Premier and the Leader of the Liberal Party of Quebec to act honourably before any further injustices to our First Nations are committed.

At this time, our shared traditional territory and our constitutionally protected rights are being significantly impacted by mineral exploration authorized by Quebec. Several projects are advancing through the mining sequence with the most advanced project estimating a possible start date of operation in 2015.

Without an agreed upon process for addressing our Aboriginal Rights and Title, mineral development activities in our territory are likely to result in increasing tension and conflict between mining companies, Quebec and our Algonquin peoples. It is our hope that we can resolve the issues in a timely way and see the reform of the current Quebec Mining Act as an important step in this process.

While we are encouraged by the initiative of the Quebec Government to reform the Mining Act we must inform you that the consultation process you have offered to our First Nations is completely inadequate and does not meet the requirements for meaningful consultation as set out in national and international standards, particularly the right to Free Prior Informed Consent as is set out in the United Nations Declaration on the Rights of Indigenous Peoples.

Quebec's Ministry of Natural Resources & Wildlife has merely offered our two First Nations to be consulted by submitting written comments on Bill 14 to the relevant Quebec National Assembly Commission, because the Quebec National Assembly's Commission on Agriculture, Fisheries, Energy and Natural Resources has already decided to hear only from three Indigenous groups: 1) the Grand Council of the Crees of Quebec; 2) the Katavik Environmental Advisory Committee; and 3) the Innu Community of Nutashkuan by August 25, 2001.

Your government's officials from MRNF have indicated to us that Bill 14 (**An Act respecting the development of mineral resources in keeping with the principles of sustainable development**) will be sent back to the National Assembly for a vote during the fall session of the legislature.

Our two Algonquin First Nations want to make it clear to you and your government that by way of this letter we are formally rejecting the legislative and policy process that has led to the introduction of Bill 14 into the National Assembly, because the National Assembly process is not consistent with the legal standards set out in Canadian law or the international standards set out in the **United Nations Declaration on the Rights of Indigenous Peoples**.

Moreover, the three Indigenous groups that have been selected to appear before the National Assembly Commission on Bill 14—as significant as their testimony may be—

cannot purport to represent the range of concerns or circumstances that First Nations in Quebec may have regarding Bill 14.

The National Assembly's legislative process did not provide an opportunity for meaningful government-to-government consultation with our First Nations, nor time for our leadership to engage with our respective community members to follow appropriate decision making processes.

There has been no attempt made by Quebec to engage our two Algonquin First Nations in a developing an appropriate process for consultation on the Quebec Mining Act which should include joint Quebec-First Nation processes to establish the nature of potential infringements, identify appropriate means for consultation/accommodation and set appropriate timelines.

An appropriate consultation process would begin with face to face meetings between First Nation Leaders and the responsible Minister(s) in order to initiate a meaningful consultation process and establish a framework that could be further refined and implemented at the technical staff level.

The problems, and in some cases illegal aspects of the current Mining Act that must be addressed through a Quebec-Algonquin First Nations consultation process includes the following:

1. Need for Quebec to provide natural resource inventories to Algonquin First Nation's for land use planning prior to mineral exploration and development.

2. Infringements on our Algonquin Aboriginal Rights and Title by claim staking and exploration with no provisions for consultation, accommodation and Free Prior Informed Consent of our two Algonquin First Nations (UNDRIP standard).

3. No established process to engage our Algonquin First Nations in an environmental assessment process of mining projects consistent with the *Haida* decision.

4. No provisions for consultation/accommodation and Free Prior Informed Consent of our Algonquin First Nations for the granting of a mining lease.

5. No provision for financial support to Algonquin First Nations for engaging with the mining industry or Quebec regarding mineral development.

6. No provisions for revenue sharing of mining operations on our shared Algonquin Territory.

Below we will comment on specific aspects of Bill 14. These comments should not be taken as an exhaustive statement of concerns but are provided to indicate some of our

concerns with Bill 14. We look forward to further assessment of proposed changes within a mutually agreed upon consultation-accommodation process.

Notably, Bill 14 (Sec 2.1) provides as follows:

> *This Act must be construed in a manner consistent with the obligation to consult Native communities. The Minister must consult Native communities specifically, depending on the circumstances."*

We are concerned about the phrase "*depending on the circumstances*" in the draft section 2.1 of Bill 14. This phrase should be clarified to be consistent with the *Haida* decision, which provides that the degree of consultation by the Crown depends on the nature of the right being asserted by a First Nation. In any case, the statement lacks specific mechanisms for implementation or even a requirement to develop specific measures through regulations. Much more prescriptive measures for consultation and accommodation are required to provide the necessary clarity to the industry, the Quebec Government and our First Nations about how this duty will be discharged.

We cannot accept Quebec's 2008 "**Interim Guide For Consulting The Aboriginal Communities**" as the basis for Quebec to fulfill its consultation/accommodation obligations under a revised Quebec Mining Act.

The Quebec 2008 "Guide" has been legally critiqued through an opinion commissioned by the **Algonquin Nation Secretariat**, who found six main problems with the 2008 "Guide", which are as follows:

1) The threshold in the 2008 Guide for triggering the duty to consult appears to be inconsistent with *Haida*;

2) The 2008 Guide is premised on the government of Quebec being the sole decision-maker, particularly with regard to whether consultations give rise to accommodation;

3) The 2008 Guide does not take account of the nature of the right affected particularly with regard to contemplated accommodation measures;

4) Resource revenue sharing is all but precluded as an appropriate accommodation measure;

5) It is out of step with the **United Nations Declaration on the Rights of Indigenous Peoples**; and

6) The 2008 Guide is not strong enough in requiring that consultation take place at the strategic planning stage.

We have attached a copy of the **Algonquin Nation Secretariat's** critique to this letter for your information.

We note that Ontario's recently reformed Mining Act, though not a perfect model has gone much further in including First Nation consultation requirements including land use planning, consultation before exploration activities, a dispute resolution mechanism and a requirement for greater details on consultation to be developed through the regulations.

Of particular concern to our two Algonquin First Nations is claim staking and exploration as these activities are occurring across our EVFN-WLFN shared territory.

First Nations consultation on claim staking and exploration activities must occur – Quebec is one of the few jurisdictions in Canada that has not acknowledged the need to consult early in the mining sequence. We point you to recent case law in the *West Moberly*, *Constance Lake*, *Ardoch* and *Kitchenuhmaykoosib Inninuwug* decisions, which have affirmed the Crown's duty to consult on mineral exploration activities.

The establishment of mining claims on our EVFN-WLFN shared Algonquin territory creates a significant third party interest that becomes entrenched as the claim holder invests in work on the site and proceeds through the mining sequence. Exploration activities can have direct impacts through effects on fish and wildlife habitat, increasing access to otherwise remote parts of our EVFN-WLFN shared territory, establishment of camps, and a further entrenchment of third party interests and potential further alienation of lands that are part of our EVFN-WLFN shared territory over which our two Algonquin First Nations asserts Aboriginal Rights and Title.

Bill 14 continues Quebec's position of reducing requirements for authorization of exploration activities by consistently removing reference to exploration licenses. Re-instating exploration licenses would provide the Quebec government with an opportunity to discharge its duty to consult on exploration activities and represents an important decision point as to the appropriateness of mineral development on a given area of our EVFN-WLFN shared Algonquin territory. Establishing the appropriateness of mining development as early as possible in the mining sequence will reduce uncertainty and investment risk for the industry and significantly reduce the potential for conflict with our two Algonquin First Nations.

Section 51 of Bill 14 provides some additional conditions on the granting of a mining lease – acceptance of a closure plan and holding of public consultation and Section 57 gives the Minister the authority to refuse or terminate a mining lease on the grounds of public interest. However, there is no explicit reference to also include First Nations in consultations and accommodations in these sections.

As it is currently drafted, Bill 14 fails to recognize the unique constitutional status of First Nations, the Crown's Duty to Consult and Accommodate First Nations rights & interests, or Canada's international obligations towards First Nations as Indigenous Peoples.

We request that Section 51 be modified so that the amendments include an ability for First Nations to refuse a Mining Lease if the Free Prior Informed Consent of First Nations is not achieved.

Our EVFN-WLFN shared territory contains identified uranium deposits and the current Rare Earth Elements exploration projects are located in areas of uranium enrichment. For these reasons we are pleased to see improvements made to reporting and rehabilitation requirements for exploration for uranium and in areas of elevated uranium concentrations. (Sec. 41, 68 and 70) As many of the areas of uranium enrichment are already known, applying these requirements should not depend on the analysis of Uranium in core or other samples. Areas of uranium enrichment should be identified through a schedule to the regulations and requirements applied across these areas from the beginning of exploration, including provisions to protect wells.

We recognize the proposed improvements made to the Quebec Mining Act for more complete payment of financial assurances to ensure adequate site rehabiliation. We do however, insist that First Nations be included in the approval of restoration and rehabilitation plans because if mines are developed in our shared territory we, will be the ones living with them long after the companies have departed. Likewise in addition to the consent of the Minister of Natural Resources and the Minister of Sustainable Development, Environment and Parks, First Nation consent should be required for release of a company from it's obligations for restoration and rehabilitation.

Section 80 continues the ability of companies to expropriate land for exploration. Again this should be subject to a proper consultation-accommodation process with First Nations, as well as, obtaining the Free Prior Informed Consent of any affected First Nation territory.

We have several additional concerns related to environmental management of the industry and recommend the following for incorporation into the reformed Mining Act.

- A clearer definition and application of sustainable development and principles for application in decision making regarding mineral development that include values, rights and expectations of First Nations.

- All mining projects should undergo environmental assessment and the 3,000 tonnes per day threshold should be removed.

- The lack of regulatory environmental standards needs to be corrected. Directive 019 should be reviewed and given the force of law.

- Proposed mine operation closure plans should include a full consideration of alternatives including back-filling open pits and tailings management options that reduce or eliminate the need for perpetual care and maintenance of the site post-closure.

In conclusion, while we are positing these suggested changes with you, as Premier of Quebec, it remains our hope that you will have your relevant Ministers initiate a proper consultation-accommodation process with First Nations regarding Bill 14, which is consistent with the *Haida* decision, including improving the 2008 Quebec Consultation Guide as the **Algonquin Nation Secretariat** has suggested in it's critique.

However, should the Quebec Mining Act be amended without regard for the legitimate concerns and requests we have expressed to you in this letter, rest assured that our two Algonquin First Nations reserve the right to take whatever actions we deem appropriate to defend our rights.

We will await your prompt response.

Respectfully,

Chief Harry St. Denis
Wolf Lake First Nation

Chief Madeleine Paul
Eagle Village Lake First Nation-Kipawa

CC. Quebec Chiefs
Regional Chief Ghislain Picard, AFNQL
National Chief Shawn Atleo, AFN
Hon. Nathalie Normandeau, Quebec Minister of Natural Resources & Wildlife
Hon. Serge Simard, Quebec Minister of Natural Resources & Wildlife
Hon. Pierre Arcand, Quebec Minister of Sustainable Development, Environment & Parks
Hon. Geoffrey Kelley, Quebec Minister Responsible for Native Affairs
Hon. Joe Oliver, Minister of Natural Resources, Canada
Hon. John Duncan, Minister of Aboriginal Affairs & Northern Development, Canada
Mr. Daniel Bernard, Quebec MNA, Rouyn-Noranda-Temiscamingue
Ms. Christine Moore, M.P., Abitibi-Temiscamingue
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COMMENTS REGARDING THE GOVERNMENT OF QUEBEC'S

INTERIM GUIDE FOR CONSULTING FIRST NATIONS
(Updated Version 2008)

Prepared by the Algonquin Nation Secretariat

April 5, 2011

Our Tribal Council, the Algonquin Nation Secretariat, has been asked by our member First Nations to provide a critique of Quebec's 2008 *Interim Guide for Consulting The Aboriginal Communities* (the "2008 Guide"). More specifically, our Tribal Council has been requested to provide an analysis of the impacts of the Guide and its adherence to recent case law, including *Haida, Taku River, Mikisew, Carrier Sekani* and *Little Salmon*.

It is appropriate to consider at the outset the status of the 2008 Guide. Paragraph 51 of *Haida* appears to contemplate some government regulatory regime to address the application of the duty to consult and accommodate. It provides as follows:

> It is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts. As noted in *R. v. Adams*, 1996 CanLII 169 (S.C.C.), [1996] 3 S.C.R. 101, at para. 54, the government "may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance". It should be observed that, since October 2002, British Columbia has had a Provincial Policy for Consultation with First Nations to direct the terms of provincial ministries' and agencies' operational guidelines. Such a policy, while falling short of a regulatory scheme, may guard against unstructured discretion and provide a guide for decision-makers.

Like the BC Consultation Policy referred to by the Supreme Court, the 2008 Guide, though not a regulatory scheme, appears to be a response to the Court's call for regime to "guard against unstructured discretion" in decision-making by government officials. It appears to meet the general requirement of providing some structure to the exercise of Crown discretion, though there are deficiencies in the 2008 Guide, as we will point out.

The 2008 Guide is stated to serve as a "guide" or to propose "guideposts" for ''... government departments and agencies whose activities could infringe certain Aboriginal rights ...." It is also stated to be "inspirational" for departments or agencies of the Québec Government to develop their own sectoral consultation policies. This choice of words appears to weaken the 2008 Guide and gives some cause for concern in that departments and agencies may have considerable latitude to deviate from the "guideposts" outlined in the Guide. This allows each department or agency to create their own process and procedure for consultation. The resulting inconsistencies make meaningful consultation more difficult from a First Nations perspective because consultation procedure will be different depending on the department or agency conducting the consultation.

The question of the status of the Guide was raised in the 2006 comments of the Algonquin Nation Secretariat. Jules Brière, the lawyer sent by the Québec government to conduct consultation, addressed this question about the Guide at the September 15, 2006 meeting with the Algonquin Nation Secretariat. At that time, Mr. Brière and his team assured us that the Guide was mandatory, but acknowledged that there was no real way to judge compliance. We believe a compliance review of the Guide's implementation vis-à-vis our member First Nations is now in order.

It is interesting to note that the 2008 Guide is still stated to be "interim." It is not clear why. While this creates some uncertainty regarding the status of the 2008 Guide, it might be helpful in that it leaves some further room for revision.

We would now like to turn to our comments on the substantive aspects of the 2008 Guide. Our comments have been separated out under the same section headings found in the Guide for easy reference. However, this critique begins with some general over-arching comments about the Guide.

I. GENERAL COMMENTS

We see six main problems with the 2008 Guide:

1) The threshold in the 2008 Guide for triggering the duty to consult appears to be inconsistent with *Haida*;
2) The 2008 Guide is premised on the government of Quebec being the sole decision-maker, particularly with regard to whether consultations give rise to accommodation;
3) The 2008 Guide does not take account of the nature of the right affected particularly with regard to contemplated accommodation measures;
4) Resource revenue sharing is all but precluded as an appropriate accommodation measure;
5) It is out of step with the *UN Declaration on the Rights of Indigenous Peoples;* and
6) The 2008 Guide is not strong enough in requiring that consultation take place at the strategic planning stage.

Threshold for Triggering the Duty to Consult

Haida provides for two main stages: the first is to determine whether a duty to consult arises or is triggered in the circumstances; and the second is to determine the scope and content of the duty. At paragraph 37, the Supreme Court states:

> There is a distinction between knowledge sufficient to trigger a duty to consult and, if appropriate, accommodate, and the content or scope of the duty in a particular case. Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate. The content of the duty, however, varies with the circumstances, as discussed more fully below. A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. The law is capable of differentiating between tenuous claims, claims possessing a strong *prima facie* case, and established claims. Parties can assess these matters, and if they cannot agree, tribunals and courts can assist. Difficulties associated with the absence of proof and definition of claims are addressed by assigning appropriate content to the duty, not by denying the existence of a duty.

The "Preliminary Analysis" section of the 2008 Guide appears to be equated to the first of these stages. The problem is with regard to the threshold required to trigger the duty. *Haida* makes it clear that the threshold is low, which is reaffirmed by the Supreme Court in *Mikisew*, at paragraph 34:

> The question in each case will therefore be to determine the degree to which conduct contemplated by the Crown would adversely affect those rights so as to trigger the duty to consult. *Haida Nation* and *Taku River* set a low threshold. The flexibility lies not in the trigger ("might adversely affect it") but in the variable content of the duty once triggered.

However, the 2008 Guide does not make clear that the threshold is low in the Preliminary Analysis stage. In fact, the Guide provides that the credibility of the claim is to be evaluated, and "[w]hen a claim is considered not credible or when the planned action does not affect an Aboriginal community, a consultation may not be necessary." This is particularly problematic, given that it is government officials who will be deciding the credibility of a claim. It is important that the 2008 Guide make it clear that the threshold is low at the Preliminary Analysis stage.

Crown is the Sole Decision-Maker

The 2008 Guide is premised on the notion that the designated decision-maker is the government. The government determines: the credibility of the claim; the degree of the impact; if there is reason to consult; how deep the consultation should be; and subsequently, what sort and how much accommodation will be required. This is a problem because the Crown is in a conflict of interest with regard to its role as the promoter and regulator of resource development activities, and as protector of Aboriginal rights and interests. One would hope that the government would err on the side of caution when making these determinations in order to avoid litigation, particularly given the honour of the Crown. Unfortunately, all too often government officials pay little regard to the honour of the Crown and Aboriginal interests are subordinated to those of others, as the experience of our member First Nations to date shows.

In light of *Haida* and the assumed control and jurisdiction that the Crown exercises over Aboriginal lands and resources, it is probably unavoidable that the Crown is the *de facto* decision-maker. However, the 2008 Guide could make an effort at being more balanced. There are hints of this scattered throughout the Guide. For example, in the section entitled Preliminary Analysis, the Guide provides:

> The department will also endeavour, when the situation lends itself to such action, to establish a **collaboration** with the Aboriginal communities concerned in order to obtain a better knowledge of the rights that they are claiming and that would be affected on a given territory. (emphasis added)

The requirement for collaboration ought to be made stronger and more consistently throughout the 2008 Guide. The Guide should also identify decision-points, with processes for joint decision-making and dispute resolution mechanisms in the event of a failure to agree.

Nature of the Rights Affected

The 2008 Guide provides that consultations are to allow Aboriginal claimants the opportunity to describe the nature of their rights and to explain how an envisaged project or decision will impact on their rights and interests. However, it does not direct a response which corresponds to the nature of the right asserted. More particularly, if the right asserted is Aboriginal title, then the response ought to take account of the nature of Aboriginal title, which according to *Delgamuukw*, includes the right to "exclusive occupation" and an "inescapable economic component". Yet, the 2008 Guide does not describe how consultation or, more importantly, accommodation is supposed to address these aspects of Aboriginal title.

The 2008 Guide simply proposes mitigation measures:

> It is up to the department concerned to apply the accommodation measures adapted to its reality and to evaluate their importance. These measures can take various forms, for example, the modification of a project, the introduction of mitigation measures or the participation of the Aboriginal people in environmental monitoring. What is important is that the accommodation measures mitigate, as much as possible and taking into account the circumstances, the disturbance of the rights and interests of the Aboriginal communities caused by the envisaged action.

Resource Revenue Sharing

Another major concern with the 2008 Guide, which flows from the former point, is that resource revenue sharing is all but precluded as an appropriate accommodation measure. The 2008 Guide provides as follows:

> In this respect, the payment of financial compensation should not be an automatic reflex or even a means that is favoured to the detriment or exclusion of other accommodation measures. It should only be envisaged when the infringement of the rights and interests of the Aboriginal communities ensuing from a planned government action entails a high degree of seriousness and other measures cannot adequately accommodate the Aboriginal communities concerned.

As aforesaid, Aboriginal title has been described by the Supreme Court of Canada, in the *Delgamuukw* case, as having an "inescapable economic component". This would suggest that any infringement ought to give rise to economic compensation. But, the Guide indicates a strong resistance to financial compensation. It should also be noted that the resistance to resource revenue sharing is inconsistent with trends in other provinces and in relations with industry.

UN Declaration on the Rights of Indigenous Peoples

Given Quebec's aspirations towards statehood and desire to be recognized within the global society, it is important to point out that the 2008 Guide is out of step with the *UN Declaration*, especially Articles 26 and 32:

> **Article 26**
>
> 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
>
> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
>
> 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.
>
> **Article 32**
>
> 1. 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.

2. 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.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Consultation at the Strategic Planning Level?

The 2008 Guide suggests that consultation should occur at the strategic planning level. But the reference is weak; it states: "The consultation must be initiated as far as possible upstream from the decision-making process, notably at the strategic planning stage of the envisaged actions."

This is a requirement identified specifically by the Supreme Court of Canada in the *Haida* case and it notable that Quebec has specifically provided for it in the Guide. However, the provision is not sufficient to achieve substantive consultation. Making the language of the Guide strong enough "**to require"** consultation during the strategic planning level would ensure that Aboriginal rights claims are identified at the earliest stages of the process. This would allow accommodation of First Nations interests when there is still room to modify a plan prior to investment. Imposing the requirement to consult during the strategic planning stages would have a far greater and more positive impact for First Nations.

II. SPECIFIC COMMENTS

1. Introduction

There are very few comments that can be made on the introduction. It does not take a strong stand or impose any requirements for meaningful consultation. It is general and inoffensive. Equally, it does not make any positive requirements for the implication of the Guide. Overall, it captures the legal obligation of the government of Québec to consult First Nations when a proposed activity may impact Aboriginal rights of a given group and does little else.

2. Objectives

This section makes clear that the Guide is to serve as a starting point for each Department to develop a consultation policy. This is demonstrated in statements such as "the guide proposes guideposts" in the first paragraph and "the government departments and agencies must draw inspiration from the guideposts set by the guide to define their own sectoral guidelines in the consultation field".

While the commitment to "make more operational the constitutional duty incumbent upon the Government of Québec to consult the Aboriginal communities" is admirable, it is not fully accomplished because of the deficiencies in the document. The same can be said of the statement that attempts will be made to avoid "wherever possible compromising the rights and interests claimed." There is no obligation for the departments to develop consultation policies which meet the stated goals or for the Québec government to work toward these goals. The absence of oversight and penalties for non-compliance with the Guide provides little incentive for compliance.

3. Scope

Past Impacts

Some of the issues raised under this section have subsequently been addressed by the Supreme Court of Canada (SCC) in *Rio Tinto Alcan Inc., v Carrier Sekani Tribal Council*[1] ("*Carrier Sekani*"). A significant issue is whether the duty to consult and accommodate applies to past impacts. The *Carrier Sekani* case involved a hydro dam and reservoir, constructed in the 1950s by Alcan (now Rio Tinto), on the Nechako River, which flooded the traditional lands of the Carrier Sekani. They were not consulted at the time. Power generated at the dam was used by Alcan for smelting aluminum; but the excess was sold to BC Hydro since 1961. An Energy Purchase Agreement (EPA) entered into in 2007 by Alcan and BC Hydro and Power Authority, a provincial Crown corporation, was the subject of review at the BC Utilities Commission. The Carrier Sekani asserted that the 2007 EPA gave rise to a duty to consult. The Commission ruled that a duty to consult did not arise in this case.

The case focussed on the three elements that trigger to duty to consult: (1) the Crown must have real or constructive knowledge of a potential Aboriginal claim or right; (2) there must be Crown conduct or a decision; and (3) there must be a possibility that the Crown conduct or decision will adversely impact on the asserted Aboriginal right or claim. The Commission found the third element to be missing: while the dam construction and flooding created past impacts on the Carrier Sekani's asserted rights, the Commission ruled that there was no duty to consult in this case because the EPA created no new impacts.

The Supreme Court of Canada agreed with the Commission and stated as follows, at paragraphs 45-50:

> The third element of a duty to consult is the possibility that the Crown conduct may affect the Aboriginal claim or right. The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, including previous breaches of the duty to consult, do not suffice.
>
> .....
>
> Mere speculative impacts, however, will not suffice. As stated in *R. v. Douglas*, 2007 BCCA 265 (CanLII), 2007 BCCA 265, 278 D.L.R. (4th) 653, at para. 44, there must an "appreciable adverse effect on the First Nations' ability to exercise their aboriginal right". The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice.
>
> Adverse impacts extend to any effect that may prejudice a pending Aboriginal claim or right. Often the adverse effects are physical in nature. However, as discussed in connection with what constitutes Crown conduct, high-level management decisions or structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no "immediate impact on lands and resources": Woodward, at p. 5-41.
>
> .....

[1] *Rio Tinto Alcan Inc., v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650.

> An underlying or continuing breach, while remediable in other ways, is not an adverse impact for the purposes of determining whether a particular government decision gives rise to a duty to consult. The duty to consult is designed to prevent damage to Aboriginal claims and rights while claim negotiations are underway: *Haida Nation*, at para. 33. The duty arises when the Crown has *knowledge*, real or constructive, of the potential or actual existence of the Aboriginal right or title "and contemplates conduct that might adversely affect it": *Haida Nation*, at para. 35 (emphasis added). This test was confirmed by the Court in *Mikisew Cree* in the context of treaty rights, at paras. 33-34.
>
> The question is whether there is a claim or right that potentially may be adversely impacted by the *current* government conduct or decision in question. Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right. This is not to say that there is no remedy for past and continuing breaches, including previous failures to consult. As noted in *Haida Nation*, a breach of the duty to consult may be remedied in various ways, including the awarding of damages. To trigger a fresh duty of consultation — the matter which is here at issue — a contemplated Crown action must put current claims and rights in jeopardy .[2]

So, it is clear that the duty to consult does not apply to past impacts. However, if there are new undertakings contemplated or a decision is being made which could adversely impact Aboriginal rights in new way[3], those new undertakings will require consultation. This premise is not entirely captured by the 2008 Guide, likely because the Guide was published in 2008 prior to the 2010 *Carrier Sekani* decision. A request to update the Guide in light of the newest case law is recommended.

Departments and Agencies

It is a benefit that the 2008 Guide requires that Departments supervising a public agency or public corporation retain and fulfill the obligations imposed under the duty to consult. This is specifically outlined in the first paragraph of the 'Scope' section where it is stated that:

> However [the Guide] does not apply to public agencies which, although they are mandataries of the government for the purposes of their Constituting Act, have a separate legal personality and are not authorized to engage the responsibility of the government. In the case of actions planned by such an entity, it is the government or the lead department – the department to which the agency reports – that remains in charge of the consultation in its capacity as duty bearer. However, it will be advisable to closely associate the entity in question in each stage of the consultation.

The foregoing provision would appear to exclude Crown corporations, like Hydro Quebec, from being covered by the 2008 Guide. Though not itself bound by the Guide, Hydro Quebec would be indirectly bound through its supervising department. In the past, government officials considered Hydro Quebec

[2] *Ibid* at 48.

[3] *Ibid* at 49.

autonomous and immune from government control. It will be important for First Nations to bear this in mind and push to have all public agencies, including Hydro Quebec, at the table in all consultation.

Further to this issue, it is to be noted that the Supreme Court of Canada does not view Crown corporations as mere third parties. In the *Carrier Sekani* case, at paragraph 81 the Court found that the conduct of BC Hydro, a Crown corporation, constituted Crown conduct for the purposes of the *Haida* test:

> BC Hydro's proposal to enter into an agreement to purchase electricity from Alcan is clearly proposed Crown conduct. BC Hydro is a Crown corporation. It acts in place of the Crown. No one seriously argues that the 2007 EPA does not represent a proposed action of the Province of British Columbia.

Presumably, Hydro Quebec would fall into the same category as BC Hydro. The 2008 Guide will have to be amended to reflect this.

Role of Commissions and Tribunals

The other issue that came up in the *Carrier Sekani* case is the role of Commissions and Tribunals in the consultation process. This issue is not specifically addressed in the 2008 Guide, but it needs to be mentioned in this opinion because it is emerging as an important issue. In the *Carrier Sekani* case, the Commission narrowed the scope of its inquiry on the 2007 EPA to the impact issue. The Carrier Sekani challenged the Commission's Scoping Order, arguing that the Commission should have considered consultation and not just the impact. The BCCA ruled that the Commission ought to have considered the consultation issue and made a mistake by prematurely jumping to just the impact issue. As aforesaid, the Supreme Court of Canada agreed with the decision of the Commission, based on its finding that the duty to consult was not triggered because the element of prospective impact was absent.

The Supreme Court took the occasion to discuss the role of commissions and tribunals and made the following points in this regard:

- First of all, at paragraph 55, the Court said the "....duty on a tribunal to consider consultation and the scope of that inquiry depends on the mandate conferred by the legislation that creates the tribunal."
- Secondly, at paragraph 56, the Court said that the "... legislature may choose to delegate to a tribunal the Crown's duty to consult."
- Thirdly, at paragraph 57, the Court said "... the legislature may choose to confine a tribunal's power to determinations of whether adequate consultation has taken place .... In this case, the tribunal is not itself engaged in consultation. Rather, it is reviewing whether the Crown has discharged its duty to consult with a given First nation about potential adverse impacts on their Aboriginal interest relevant to the decision at hand."
- Fourthly, at paragraphs 59 and 60, the Court rejected the view that commissions or tribunals who had authority to consider questions of law automatically had authority or a duty to themselves engage in consultations if the Crown failed to do so. The Court said:

  > This argument cannot be accepted, in my view. A tribunal has only those powers that are expressly or implicitly conferred on it by statute. In order for a tribunal to have the power to enter into interim resource consultations with a First Nation, pending the final settlement of claims, the tribunal must be expressly or impliedly authorized to do so. The power to engage in consultation itself, as distinct from the jurisdiction to determine whether a duty to consult exists, cannot be inferred from the mere

> power to consider questions of law. Consultation itself is not a question of law; it is a distinct and often complex constitutional process and, in certain circumstances, a right involving facts, law, policy, and compromise. The tribunal seeking to engage in consultation itself must therefore possess remedial powers necessary to do what it is asked to do in connection with the consultation. The remedial powers of a tribunal will depend on that tribunal's enabling statute, and will require discerning the legislative intent: *Conway*, at para. 82.

Notwithstanding the fact that it is not covered by the 2008 Guide, First Nations will need to consider this aspect when it has matters before commissions and tribunals in Quebec, such as the BAPE. It would be prudent to assess the scope of the mandate of the tribunal before deciding how and whether to participate and if the jurisdiction of the tribunal needs to be expanded or challenged.

Legislative and Policy Decisions

Initially, it appears that the commitment to consultation during the planning and drafting of statutes and regulations is generous and positive. However, the extent to which this is meaningfully implemented remains to be seen. The lack of meaningful consultation on the *Sustainable Forest Development Act* certainly raises questions about the implementation of the Guide or the legislature's commitment to highest and best practices of consultation. Again, it is a dubious example being set by the Legislature for their Departments.

Comprehensive Claims Negotiations

The recognition that the 2008 Guide "does not seek to settle the question of the recognition of Aboriginal rights or treaty rights for each of the Aboriginal communities or to address more comprehensive elements being discussed within certain communities" is consistent with the case law. Specifically, the duty to consult arises in the context of undetermined Aboriginal rights and was developed in *Haida*[4] to ensure that the subject of the right still had substantial meaning after the right had been determined.

However, the remainder of that paragraph raises some concerns, when it states:

> These matters will have to be dealt with by resorting to the processes agreed upon, among others, within the context of the comprehensive territorial negotiations, in which the federal government is a participant. The objective here is to make sure that the rights and interests of the Aboriginal communities are given fair consideration within the current context of government activities.

The problem is that the 2008 Guide presupposes that Aboriginal claimants will enter into comprehensive claims negotiations. Many groups refuse to do so because the federal Comprehensive Claims Policy is objectionable for many reasons including its policy of extinguishment.

Land Claims Settlements and Sectoral Agreements

Paragraph 4 of the 2008 Guide raises a number of concerns. The *Beckman v Little Salmon/Carmack First Nation*[5] case ("*Little Salmon*") clearly established the idea that despite prior treaties, the duty to consult is

[4] *Haida Nation v British Columbia (Minister of Forestes)* [2004] S.C.R. 511.

[5] *Beckman v Little Salmon/Carmack First Nation*, 2010 SCC 53.

not necessarily extinguished. First, the Supreme Court of Canada recognizes that the honour of the Crown is always engaged when dealing with Aboriginal people[6] and treaties – even modern treaties – do not negate this assumption.[7] Specifically, "a different mechanism which, nevertheless, in the result, upholds the honour of the Crown" could be implemented in a treaty in place of consultation.

In the 2006 comments by the Algonquin Nation Secretariat provided to Quebec, it was noted that the last paragraph of this section of the Guide was problematic. Specifically, the concern was with the statement that read "… the guide does not apply when specific consultation measures have already been agreed upon with the Aboriginal communities, notably within the context of sectoral agreements." It is to be noted that all First Nations within the Algonquin Nation Secretariat have sectoral agreements. This last paragraph has undergone some significant changes. In particular, it now reads:

> Finally, the guide will apply when the guideposts it contains correspond more to an adequate consultation and when they are preferable to the provisions stipulated in certain sectoral agreements signed with the Aboriginal communities prior to the *Haida* and *Taku River* decisions. At the very least, these later agreements should be re-examined to take these guideposts into account.

Although significantly different from the 2006 version, there are still concerns as to who decides which provisions for consultation are preferable. We recommend this paragraph should be clarified.

It is important to note that in the *Little Salmon* decision, the Supreme Court held that consultation through a process that pre-dated the treaty was sufficient to satisfy the duty to consult. It did not matter that the process was created in 1992 and the treaty was signed in 1997 and the issue arose in 2007 – the mechanism appropriately conducted the consultation.[8] This means that if the sectoral agreements allow for proper and appropriate consultation given the circumstance, that consultation may be sufficient to execute the duty to consult.

4. Duty to Consult

In 2006 it was determined that this section accurately described the case law. The 2008 Guide could be further updated to include *Carrier Sekani* and *Little Salmon* decisions.

5. The Consultation that the Crown Must Hold

The first sentence of this section sets an excellent tone. It is positive and accurately reflects the obligations laid out in the SCC case law:

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[6] *Ibid* at 38

[7] *Ibid* at 12: Modern comprehensive land claim agreements, on the other hand, starting perhaps with the James Bay and Northern Québec Agreement (1975), while still to be interpreted and applied in a manner that upholds the honour of the Crown, were nevertheless intended to create some precision around property and governance rights and obligations. Instead of ad hoc remedies to smooth the way to reconciliation, the modern treaties are designed to place Aboriginal and non-Aboriginal relations in the mainstream legal system with its advantages of continuity, transparency, and predictability.

[8] *Ibid* at 39.

> Since the honour of the Crown requires that the rights and interests claimed by Aboriginal communities be addressed, departments must consult and, in certain cases, accommodate these communities.

The process outlined in the second paragraph is internal to the government and leaves the possibility that a determination of no Aboriginal rights claim will take place where, in fact, an Aboriginal right has been claimed. It is important to remember that in these situations legal action is still an option. Of course, the ultimate goal is to minimize legal recourse, it can still be used. The Preliminary Analysis section which follows this paragraph seems to address the issue of determining if a claim for an Aboriginal right has been made. It is in best interest of the government to consult prior to the implementation of a proposed course of action as there is less likelihood of the success of a duty to consult claim if some form of consultation has occurred.

1. Preliminary Analysis & Parameters of an Adequate Consultation

Concerns about this section are identified in the General Comments above. While aspects of this section are acceptable, certain specific concerns exist as follows:

1. In paragraph 2 of the Preliminary Analysis section, the 2008 Guide says:

   > the department will also endeavor, when the situation lends itself to such action, to establish a collaboration with the Aboriginal Communities concerned in order to obtain a better knowledge of the rights that they are claiming and that would be affected on a given territory.

   It would be unacceptable if this were only to occur in a situation which 'lends itself to such action.' The very foundation of consultation is that it ought to occur in every instance, save emergency situations which are provided for elsewhere. This statement could also be interpreted to mean that so long as the Department feels it sufficiently understands a concern it will 'accommodate' the concern without consulting the First Nation regarding such accommodation. Such unilateral action would result in *Mikisew Cree*[9] situations and would completely violate the very concept of consultation.

2. The *Parameters* section is an improvement from the 2006 Guide. It recognizes the importance of Consultation from the earliest phases and well before a decision is made. It also recognizes the importance of agreeing to a timeline for consultation. The ambiguity is in agreeing to a timeline – the wording could be interpreted to allow a Department to *impose* a timeline. This section currently reads "The parties must agree to the time constraints inherent to carrying out the project or to the legal and regulatory constraints, while granting themselves a reasonable time period so that the consultation is adequate."

3. The subsection on "objectives of adequate consultation" is problematic, when it says: "The purpose of the consultation must be to promote, while awaiting the settlement of the claims, the reconciliation of the rights claimed by the Aboriginal communities with the government actions that ensue from the affirmation of the State's sovereignty." First Nations will not agree to an affirmation of the State's sovereignty.

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[9] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* 2001 SCC 33, [2001] 1 S.C.R. 911.

4. Finally, the Guide has provided that First Nations can delegate consultation duties to another organization. This was a recommendation made by the Algonquin Nations Secretariat in 2006. The Guide clearly provides that, should a Band Council properly mandate another body to conduct the consultation on their behalf, the government department should recognize this.

2. Consultation Stages

The opening paragraph of this subsection is positive in its expression to a commitment to address aboriginal rights and interests.

The description of the "**First stage**: create an adapted consultation process" is adequate as well, though it could be improved.

The first point under this first stage has been changed from the 2006 Guide to give effect to comments made by the Algonquin Nation Secretariat in 2006. This is encouraging as it shows that some suggestions have been considered. The next seven points/paragraphs are very good and were changed only slightly in a way that improves the document by clarifying their meaning. Of particular importance to the Algonquin Nation Secretariat is the point which recommends facilitating consultation by having the documentation translated into English. This is an improvement, but the wording is still too weak.

> When the documentation is essential for the smooth unfolding of a consultation, it could be translated into English, if it is intended for Aboriginal communities whose main language or business language is English.

Basically, it still leaves too much latitude for government officials to refuse to translate documents. Translations should be mandatory if the First Nation Council operates in English and requests the documentation in English.

The point dealing with the sharing of information has been changed at the eleventh bullet where it calls on the Department to provide their expert reports and other documentation quickly and objectively. If this informational exchange occurs, it will make the consultation process more accessible.

The last point, which says the Department should document the steps taken toward consultation, should be applied equally to all Aboriginal communities, with the Crown providing assistance to enable them to do this.

The "**Second stage**: implement the consultation" says that government should validate the information obtained from Aboriginal communities in order to avoid confusion or misunderstandings due to ambiguities. This is good advice for both parties during consultation. Always ensure that what has been communicated is understood in order to avoid confusion.

"**Third stage**: analyze the consultation" would benefit from the inclusion of a requirement to consider abandoning an action entirely. Clearly, *Haida* and *Taku River*[10] say that Aboriginal claimants do not have a veto; however, neither do those cases say that projects will inevitably go ahead. Considering abandoning a project would not result in a veto, but it would inform any decision on the proposed action.

[10] *Taku River Tlingit First Nation v. British Columbia (Profect Assessment Director)* [2004] 3 S.C.R. 550.

The principles to guide the actions of a Department at the end of consultation are positive. They clearly indicate that a Department must make every attempt to accommodate. The wording of the second bullet point is border-line confrontational - it reads:

> ultimately, there is no obligation to reach agreement with the Aboriginal communities as these communities have no veto right

Clearly this bullet would benefit from revisions that render the statement less hostile.

The issue of who does the analysis and who decides whether accommodation is required needs to be examined. It should not be a unilateral decision by the Crown. At the very least, the Guide should direct that the analysis incorporate the Aboriginal perspective. Alternatively, the Crown could establish a mechanism which provides for some joint decision on this matter as well as a process for dispute resolution as aforesaid.

6. Adjustment of the Accommodation

The big concern in this section is the same as that referred to in the preceding section: who decides whether accommodation is required? This section has undergone significant changes from the 2006 Guide. As in the 2006 Guide, the recommendation for negotiations once it has been determined that accommodation is required remains. This continues to be a positive aspect of the Guide. However, the 3rd paragraph provides that "it is up to the department concerned to apply the accommodation measures adapted to its reality…." Unfortunately, as the Department has the final say over a proposed action, accommodation measures will ultimately be at their discretion. That being said it is still within the rights of the First Nation to bring a legal action where they feel that the negotiations were undertaken in bad faith or if the accommodation measures do not minimally infringe their rights. Short of agreeing to some alternative dispute resolution process, a final decision will have to be made by the Department.

The fifth paragraph discusses financial compensation as a method of accommodation. Specifically, this paragraph reads:

> the payment of financial compensation should not be an automatic reflex or even a means that is favoured to the detriment or exclusion of other accommodation measures. It should only be envisaged when the infringement of the rights and interests of the Aboriginal communities ensuing from a planned government action entails a high degree of seriousness and other measures cannot adequately accommodate the Aboriginal communities concerned

As noted in the General Comments, this is highly problematic. First of all, it is ambiguous. Secondly, accommodation necessarily involves an attempt to reconcile the right claimed with the proposed action. Accommodation should aim to ensure that an Aboriginal community can continue their claimed right unimpeded. Only when this is not possible should financial compensation be considered – that is what the beginning of this paragraph outlines. However, the paragraph goes on to limit the instances where financial compensation will be considered to rights claims that are of 'a high degree of seriousness.'

Limiting the instances of considering financial compensation to those claimed rights with a high degree of seriousness may mean that, where a claimed right is of significant cultural value, the government may determine that it is not of an appropriate degree for financial compensation. This paragraph seems to create opportunities for adversity rather than set out ways to avoid confrontation. Finally, financial compensation

as a means of achieving accommodation should only be an option when the Aboriginal community claiming the right is satisfied with compensation as accommodation. It should not be assumed that financial compensation in lieu of accommodation will be acceptable to all Aboriginal communities.

Involving other agencies and explaining the reasons for the accommodation measures can only serve those involved. It is an excellent addition to this section and has the potential to avoid the same issue being raised across Departments.

The final paragraph specifically addresses the concerns raised with the 2006 Guide regarding the inclusion of Aboriginal communities in the accommodation process. Again, this is a welcome addition to the Guide and will hopefully be reflected in Department policies developed from this Guide.

7. Emergency Situations

It is understandable that in the situations of high emergency the normal consultation requirements should be relaxed. The addition of justifying the departure is welcome, but the concern regarding post-fact consultation has not been addressed. It would still benefit the Guide, the government and First Nations immensely if post-emergency action included a requirement for consultation after the emergency has passed.

8. Decision

The section indicates that the assessment will be appended to a brief submitted to Cabinet. Again, this signifies that the decision will be at the highest level within government, which is certainly a positive.

The final paragraph differs from the 2006 Guide and is an improvement – when a Department makes a decision or a recommendation to Cabinet a summary of the reasons for it will be provided in writing to the affected First Nations. Of course, to be fully consistent with principles of fairness and natural justice, government ought to make a full disclosure of its reasons, including supporting materials and not just a summary. Such full disclosure will allow First Nations to understand how a decision was made and to evaluate if a challenge to an unfavourable decision would succeed.