

INFORMATION FOR DEVELOPERS AND GENERAL INFORMATION REGARDING RELATIONS WITH ABORIGINAL COMMUNITIES IN NATURAL RESOURCE DEVELOPMENT PROJECTS

This document was prepared through the work of an interministerial group consisting of representatives from the Ministère du Développement durable, de l'Environnement et de la Lutte contre les changements climatiques (MDDELCC), the Ministère de l'Énergie et des Ressources naturelles (MERN), the Ministère des Forêts, de la Faune et des Parcs (MFFP), the Ministère de la Justice du Québec (MJQ), and the Ministère des Transports du Québec (MTQ), coordinated by the Secrétariat aux affaires autochtones (SAA) and with the cooperation of the Ministère des Affaires municipales et de l'Occupation du territoire (MAMOT).

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An electronic version of this publication is also available at www.saa.gouv.qc.ca,
under the Publications and documentation section.

Legal deposit– 2015
Bibliothèque et Archives nationales du Québec
Library and Archives Canada
ISBN 978-2-550-72374-5 (printed version)
ISBN 978-2-550-72375-2 (electronic version)

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FOREWORD

This document presents general information and some practical advice for developers who would like to establish relations with Québec's Aboriginal communities, for natural resource development projects. The information and advice herein are provided for reference purposes and do not represent the viewpoint of any Aboriginal community or nation. This document does not constitute a recommendation or legal advice. It should not be interpreted as such and should not be used for this end.

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INTRODUCTION

Prior to receiving the required government authorizations, any natural resource development project in mining, energy, or other areas must fulfill a number of obligations stemming from current laws, regulations, and practices. Developers must also take into account the context in which the project is being developed.

Natural resource development projects are increasingly taking into consideration factors related to social acceptability. This approach is leading developers to be more conscious of the issues involved in consulting and informing local communities, such as Aboriginal communities, and to demonstrate interest in these initiatives.

The Gouvernement du Québec has prepared this document in response to the numerous developers that are contacting it to learn more about their obligations toward Aboriginal communities. The text first describes some of the aspects that characterize Aboriginal affairs in Québec. It then offers a number of avenues for establishing harmonious and constructive relations between developers and Aboriginal communities. Finally it specifies the roles and responsibilities of developers and the Gouvernement du Québec in relations with Aboriginals. This document may be subject to change, based on relevant jurisprudence, for example

1. GENERAL INFORMATION ON ABORIGINAL COMMUNITIES

IN QUÉBEC, WHICH ABORIGINAL NATIONS ARE RECOGNIZED BY THE NATIONAL ASSEMBLY?

In the 1980s (1985 and 1989), the National Assembly recognized the existence of 11 Aboriginal nations within Québec's territory: the Abenakis, Algonquins, Attikameks, Crees, Huron-Wendats, Innu, Inuit, Malecites, Micmacs, Mohawks, and Naskapis. These nations are spread over roughly 55 communities in Québec. (See map on the next page.)¹.

The brochure *Amérindiens et Inuits : portrait des nations autochtones du Québec* gives an overview of the 11 Aboriginal nations in Québec, describing their situation and the evolution of their relations with Québec.².

WHO REPRESENTS ABORIGINAL COMMUNITIES?

Aboriginal communities are generally represented by an elected band council or, in the case of the Inuit, by the municipal council of a northern village. Relations with the communities should therefore generally occur through these official representatives. In some cases, however, contact is through other duly mandated organizations. In fact, supra-local organizations sometimes represent groups of Aboriginal communities or entire nations, depending on their chosen representation structure or the mandate assigned to them by other organizations.³.

WHAT ABOUT ABORIGINAL ANCESTRAL AND TREATY RIGHTS?

Part of Québec's territory is covered by treaties while other parts are still the subject of land claims whose existence and scope have yet to be determined.

1. Map available online at:
http://www.autochtones.gouv.qc.ca/nations/cartes_communautes_en.htm.

For more information on territories of interest to Aboriginal nations in Québec, see the agreements listed in the appendix to this document, including their Internet links, or contact the representatives listed in the Government Assistance section.

2. *Amérindiens et Inuits : portrait des nations autochtones du Québec* is available online at:
http://www.saa.gouv.qc.ca/publications_documentation/publications/document-11-nations-2e-edition.pdf.

3. A non-exhaustive list of these groups may be consulted at:
http://www.autochtones.gouv.qc.ca/nations/organismes_autochtones.htm.



Various Aboriginal groups claim ancestral or treaty rights within Québec. The lands being claimed are not limited to the current location of members of Aboriginal communities, such as reserves, and some claims by more than one Aboriginal community overlap.

Beyond recourse to the courts, an Aboriginal group can approach governments to establish the existence of a right being claimed. Treaties may be signed by the Government of Canada, a province, and an Aboriginal group. It is therefore a government domain, and not that of a third party, to recognize the existence of these rights and agree to their scope with the Aboriginal group in question, when possible.

Existing rights

In Québec, two land claims agreements also called “modern treaties” have been signed with the Cree, Inuit, and Naskapi nations. The *James Bay and Northern Québec Agreement* (signed in 1975) and the *Northeastern Québec Agreement* (signed in 1978) often referred to as the “northern agreements” determine the scope of Aboriginal treaty rights within the agreement territories.

The northern agreements and the socio-economic development agreements that complement them are the foundations of the Gouvernement du Québec’s relationship with the Crees, Inuit, and Naskapis⁴.

In 1990, the Supreme Court of Canada recognized the existence of the historic treaty of 1760 between Governor James Murray and the Huron-Wendats, but did not determine the territorial scope or the breadth of rights.

The existence of an ancestral or treaty right is also sometimes questioned before the courts. Judicial decisions have recognized the existence of specific ancestral rights, other than Aboriginal title (such as the right to hunt and fish), in certain areas of Québec; however, these rights are limited to the Aboriginal communities involved in the legal challenge. Also, the territorial scope and breadth of these ancestral rights remain undetermined.

Rights claims

Several parts of Québec are still the subject of ancestral or treaty land claims. Various negotiations are underway with Aboriginal communities to determine the scope of the rights being claimed.

Some Aboriginal communities are participating in a global territorial negotiation process with the governments of Québec and Canada, which fits within the federal policy to determine or define the scope of a group’s rights through agreements. This is the case for negotiations with the Innu communities of the Côte-Nord and the Saguenay–Lac-Saint-Jean region, which led to an agreement in principle in 2004. This agreement serves as a basis for ongoing negotiations toward the signing of a treaty with the communities of Mashteuiatsh, Essipit, and Natashquan (Nutashquan).⁵ In the agreement in principle, in particular, the treaty is to apply to lands within territories called “Nitassinan.”

4. The agreements may be consulted at these addresses:

For the Naskapis:

http://www.autochtones.gouv.qc.ca/relations_autochtones/ententes/naskapis/entente-naskapis-quebec.pdf;

For the Inuit:

http://www.autochtones.gouv.qc.ca/relations_autochtones/ententes/inuits/20020409.pdf;

For the Crees:

http://www.autochtones.gouv.qc.ca/relations_autochtones/ententes/cris/entente_cris_20020207.pdf.

5. For more information about this negotiation, see the Vers un traité Web site at the following address:

http://www.versuntraite.com/accueil_en.htm.

Negotiations regarding a global land claim are currently underway with the Attikamek nation and the governments of Québec and Canada, the goal of which is to sign an agreement in principle and eventually a treaty.

In addition, while other Aboriginal communities are not participating in such processes, it is important to recall that they are also making claims, to different degrees, regarding ancestral and treaty rights over vast stretches of territory. The Gouvernement du Québec favours dialogue and negotiations toward viable consensus for everyone in terms of the scope of the rights being claimed.

Aside from global land claims negotiations, the Gouvernement du Québec participates in other types of negotiations with Aboriginal communities. Their goal is not to recognize ancestral rights, but rather to improve cohabitation within the province, for example in terms of economic development and hunting.⁶

Development projects may have significant impacts on one or more Aboriginal communities. As such, establishing and maintaining harmonious relations between developers and the communities concerned can be a considerable asset for development projects. This may also help the consultation process required for the permits, rights, or authorizations involved in carrying out projects, in situations in which the Gouvernement du Québec is obliged to consult a subject covered under Part 3 of this document.

Developers wanting to know more about Aboriginal communities in Québec, especially regarding existing rights, rights claims, or negotiations underway, are encouraged to contact the ministries identified in Chapter 4 of this document.

DEFINITIONS

Ancestral right:

An ancestral right constitutes an element of custom, practice, or tradition that prior to contact with Europeans was an integral part of the distinctive culture of the Aboriginal group claiming the right in question.

Aboriginal title:

This is a category of ancestral right held collectively by an Aboriginal group, resulting mainly from the exclusive occupation and use of lands at the time of the Crown's assertion of sovereignty.

Treaty right:

These rights are established by a treaty, including land claims settlements, between the Crown and an Aboriginal nation or community. Among other things, treaties include mutually binding obligations and a certain element of formality.

Constitution Act, 1982, paragraph 35(1) :

Paragraph 35(1) of the *Constitution Act*, 1982, recognizes and confirms the "existing aboriginal and treaty rights of the aboriginal peoples of Canada."

6. The agreements entered into may be consulted at:
http://www.autochtones.gouv.qc.ca/relations_autochtones/ententes/ententes_conclues_en.htm.

2. RELATIONS BETWEEN DEVELOPERS AND ABORIGINAL COMMUNITIES: DIFFERENT APPROACHES FOR DIFFERENT SITUATIONS

Whether to encourage the social acceptability of a project, mitigate the negative effects in the community, create a favourable climate to safeguard investments, or maximize a project's positive effects in the local communities through a socially responsible approach, developers may want to establish ties with the Aboriginal communities involved.

Such ties may manifest themselves in different ways according to the needs of the parties involved, the nature or phase of the project, the significance of the work, the real impact on the territory, the specific reality of the Aboriginal community concerned, etc. In some cases, it may be limited to an exchange of information, and in others the relationship may involve formal agreements on various subjects, such as the environmental impact of the project and its socio-economic benefits. In all cases, developers are encouraged to approach Aboriginal communities as soon as possible in the preparation and accomplishment of their project. They are also encouraged to keep government representatives informed of their actions in this regard.

WHAT ACTIONS ARE POSSIBLE THROUGH A PROJECT'S DIFFERENT PHASES?

Various steps may be undertaken to establish, maintain, and strengthen ties with Aboriginal communities, depending on the situation (see Table 1).⁷ Regular contact enables discussions on the project's development and on community concerns, thus fostering harmonized usage of the area. This communication process may promote a cooperative relationship that keeps expectations at a realistic and acceptable level for all parties concerned.

The following are suggestions for developers seeking to establish and maintain such ties, according to their project's advancement and circumstances.

Preliminary phase

Preliminary steps involve a developer's initial work in terms of the exploration, investigation, and evaluation of a potential site. Such interventions may involve, for example, the first mine exploration work, field studies of a site's wind or hydro potential, or an assessment of the limits associated with a given territory.

Throughout the preliminary work, developers may communicate their intentions to the Aboriginal communities that may be affected and encourage them to express their concerns about the project. For example, developers may inform the communities when they obtain a mining right and provide information about their work plan; they may also invite the communities to visit the sites and ask them to participate in identifying sensitive zones, etc. This will enable developers to learn the concerns and expectations of Aboriginal communities as early as possible and to take them into account in developing their project.

7. For example, the following link features a table that details the different phases associated with the development of a mining project:
<http://www.mern.gouv.qc.ca/publications/mines/publications/publication-2011-annexeiii.pdf>

If any of this work requires permits, rights, or authorizations, the Gouvernement du Québec may have an obligation to consult certain Aboriginal communities beforehand, as discussed in Part 3 below. In this case, the Gouvernement du Québec may solicit the developer's participation.

Detailed study phase

At this stage, the overall project's features are taking shape and its potential effects are better known and documented. In a mining project, for example, this phase involves the feasibility study in which the conditions for mining the deposit are determined.

The steps taken in the previous phase by developers to build ties with Aboriginal communities may continue and increase. At this stage, developers may describe changes made to a project in response to Aboriginal concerns. If applicable, developers may also indicate why some concerns were not met. Depending on the circumstances, this process may lead to agreements that include provisions for communicating information, protecting the environment, training manpower, and offering jobs, as well as socio-economic development measures.⁸

The content of agreements and the relevance of signing them will vary according to the nature of the project and its effects in the area, and according to the reality specific to the Aboriginal community concerned. In this regard, the possibility that several Aboriginal communities have concurrent claims to the same land should be considered.

It should be noted that in Québec there is currently no legal obligation for a developer to reach an agreement with an Aboriginal group for a development project. However, the Gouvernement du Québec is generally in favour of such agreements, when circumstances dictate. It has even made a commitment to the Crees, Inuit, and Naskapis to encourage and facilitate agreements in the energy, mining, and forestry sectors.⁹ Similarly, in its mineral strategy the Gouvernement du Québec also fosters dialogue between mining companies and Aboriginal communities affected by the development of a mining site, which may lead to impacts and benefits agreements.

However, it is the role of the government to assess the credibility of a claim and to recognize, if applicable, the existence and scope of Aboriginal ancestral rights and therefore whether or not the communities will receive a share of the royalties generated by natural resource development

Development, production, and restoration phases

After the economic, environmental, and social viability of a project is established; after it is deemed permissible under applicable legislation; and after the required permits, rights, and authorizations have been obtained, developers start implementing their project. Relations between developers and Aboriginal communities thus continue and with all the more reason if an agreement has been signed between them.

8. Depending on the circumstances, this type of agreement may be referred to as a "partnership agreement," "cooperative agreement," "collaboration agreement," or "impacts and benefits agreement."

9. See note 4.

3. PROJECT APPROVAL PROCESS: THE OBLIGATIONS OF EACH PARTY

For natural resource development projects, the Gouvernement du Québec may be required to consult and, if applicable, accommodate the Aboriginal communities affected. The agreements signed with Aboriginal groups, such as the northern agreements, include mechanisms for the participation of signatory Aboriginals in the decision-making process. Whether or not the project involves an area covered by a northern agreement, developers may be called upon to play a significant role in some governmental processes. In this case, a developer's constructive relations with an Aboriginal community can facilitate the consultation and decision-making processes.

WHAT IS THE GOVERNMENT'S OBLIGATION TO CONSULT ABORIGINAL COMMUNITIES?

In accordance with decisions of the Supreme Court of Canada, the Crown may have the obligation to consult and accommodate Aboriginal communities in certain circumstances when it foresees authorizing projects related to the development of natural resources.

This obligation arises when the government is aware of the existence of an established or claimed ancestral or treaty right and when it foresees a measure that could prejudice the right. The strength of the evidence supporting the existence of a right that is claimed and the gravity of the adverse effects on this right will have an impact on the extent of the government's obligation.

HOW ARE CONSULTATIONS WITH ABORIGINAL COMMUNITIES CONDUCTED?

In 2006, the Gouvernement du Québec adopted guidelines that are described in the *Guide intérimaire en matière de consultation des communautés autochtones*¹⁰. This guide is intended for provincial departments to ensure they respect the parameters set by the Supreme Court of Canada.

When a department receives a request for a permit, right, or authorization under the laws and regulations related to natural resource development projects, prior to making a decision it must verify if an obligation to consult Aboriginal communities exists so it must carry out the consultation according to the guidelines mentioned above. The consultation may then lead it to apply accommodation measures, which aim to mitigate the project's potentially adverse effects on the rights of Aboriginals as much as possible under the circumstances. This may involve a modification to the project or the imposition of conditions to this effect.

10. The guide is available online at:

http://www.saa.gouv.qc.ca/publications_documentation/publications/guide_inter_2008_en.pdf.

The Gouvernement du Québec's consultation process is designed according to a variety of factors and takes into consideration, as much as possible, existing procedural mechanisms, such as those described below.

Procedure for the examination and evaluation of environmental impacts applicable to southern Québec

This procedure described in Chapter I of the *Environment Quality Act*, which applies to southern Québec, is adjusted to account for the details of consultations specific to Aboriginal communities when an obligation to consult them arises. Individual processes may also be agreed to with the Aboriginal communities concerned.

Procedure for the examination and evaluation of repercussions on the applicable social milieu and environment under northern agreements

As mentioned above, some Aboriginal nations the Inuit, Crees, and Naskapis are beneficiaries of northern agreements that determine how the development of natural resources on the applicable lands must take place.

These northern agreements also specify the terms for participation by signatory Aboriginal nations in the managing of natural resources and lands, particularly in terms of the examining and evaluating project repercussions on the environment and social milieu. These terms were included in Chapter II of the *Environment Quality Act*.

For more information on this subject, see the MDDLCC's¹¹ Web site.

WHAT IS THE ROLE OF DEVELOPERS IN GOVERNMENT-LED CONSULTATIONS WITH ABORIGINALS?

While the obligation to consult, and if applicable accommodate, Aboriginal communities is the responsibility of the Gouvernement du Québec, some procedural aspects such as the communication of information on technical aspects of a project may be delegated to developers. As such, a developer's prior efforts to establish ties with Aboriginal communities may prove useful.

As mentioned earlier, developers are encouraged to keep the Gouvernement du Québec informed of the steps they have taken with the Aboriginal communities concerned and the measures they have implemented to take their concerns into account. This may facilitate the consultation process and, if necessary, the determination of accommodation measures. Furthermore, the information in any agreement between the developer and an Aboriginal community may help the Gouvernement du Québec ensure that any accommodation measures it may adopt after the consultation process are more harmonized.

In consultations led by the government, developers are often in the best position to provide information to an Aboriginal community and to respond to some of its concerns. Developers are generally in a better position to effectively present their project and communicate useful information to the community affected.

11. The evaluation procedures may be consulted online at: <http://www.mddelcc.gouv.qc.ca/evaluations>.

In addition, developers may be called upon to discuss accommodation measures that may prove necessary. In some cases, the accommodation measures adopted by the government may become conditions for the authorizations required by developers to carry out their project.

4. GOVERNMENT ASSISTANCE

The Gouvernement du Québec may offer support to developers in the steps they take with Aboriginal communities. Simply contact the administrative branch of the department from which the project requires authorization.

MINISTÈRE DE L'ÉNERGIE ET DES RESSOURCES NATURELLES

Direction des affaires autochtones
(native affairs branch)
Atrium
5700, 4^e Avenue Ouest, bureau C-422
Québec (Québec) G1H 6R1
Phone: 418 627-6254

MINISTÈRE DU DÉVELOPPEMENT DURABLE, DE L'ENVIRONNEMENT ET DE LA LUTTE CONTRE LES CHANGEMENTS CLIMATIQUES

Direction de l'évaluation environnementale
des projets nordiques et miniers
(mining and northern projects environmental
assessment branch)
Édifice Marie-Guyart
6^e étage, boîte 83
675, boulevard René-Lévesque Est
Québec (Québec) G1R 5V7
Phone: 418 521-3933

MINISTÈRE DES FORÊTS, DE LA FAUNE ET DES PARCS

Bureaux en région :
[http://www.mffp.gouv.qc.ca/nousjoindre/nousjoindre-
ministere.jsp](http://www.mffp.gouv.qc.ca/nousjoindre/nousjoindre-ministere.jsp)
Direction des relations avec les nations autochtones
(Aboriginal nations relations branch)
Atrium
5700, 4^e Avenue Ouest, bureau A-203
Québec (Québec) G1H 6R1
Telephone: 418 266-8180

For its part, the Secrétariat aux affaires autochtones provides information on the Aboriginals of Québec and can ensure coordination between the different departments concerned by a project.

SECRÉTARIAT AUX AFFAIRES AUTOCHTONES

Direction des négociations et de la consultation
(negotiations and consultation branch)
905, avenue Honoré-Mercier, 1st floor
Québec (Québec) G1R 5M6
Phone: 418 643-3166
Web site: www.autochtones.gouv.qc.ca

TABLE 1: EXAMPLES OF ACTIONS THAT MAY BE PLANNED AT DIFFERENT PHASES OF A PROJECT

	PROJECT'S PRELIMINARY PHASE	PROJECTS' DETAILED STUDY PHASE	DEVELOPMENT, PRODUCTION, AND RESTORATION PHASES OF THE PROJECT
POSSIBLE STEPS TAKEN BY DEVELOPERS WITH ABORIGINAL COMMUNITIES	<p>Development of relations</p> <p>Examples :</p> <ul style="list-style-type: none"> Establish a communications channel Determine mutual goals and expectations Share information 	<p>Maintaining and strengthening of ties</p> <ul style="list-style-type: none"> Take concerns into account Adopt measures that foster project benefits for the communities 	<p>Continuing relations</p> <p>Examples :</p> <ul style="list-style-type: none"> Implement the conditions required for the project's authorization Carry out the commitments made by the developer to the communities
POSSIBLE COORDINATION BETWEEN THE DEVELOPERS' STEPS AND THOSE OF THE GOVERNMENT WITH ABORIGINAL COMMUNITIES	<p>Developers are encouraged to keep the government informed of their steps with communities and the related measures they expect to implement.</p> <p>The government may delegate procedural aspects of the consultation to the developer, such as providing information to the communities, and may call upon the developer in determining of accommodation measures, if applicable.</p>	<p>Possible agreement</p>	<p>Continue actions undertaken in the preliminary phases.</p>
POSSIBLE STEPS BY THE GOVERNMENT WITH ABORIGINAL COMMUNITIES	<p>Upon receiving a request for a permit or authorization in the preliminary phase, the government may be obliged to consult with and, if necessary, accommodate the communities affected. It may also have to apply mechanisms described in northern agreements.</p>	<p>Upon receiving a request for a permit, right, or authorization (e.g. project subject to the procedure for examining and evaluating environmental impacts), the government may have to pursue consultations and, if necessary, accommodations with the communities; it may also have to apply mechanisms described in northern agreements.</p>	<p>Information on the decision to communities</p> <p>Follow-up on the project's conditions</p>

APPENDIX 1 – USEFUL LINKS

The following links may be useful to the reader seeking further information:

- » Environmental assessment of northern projects:
<http://www.mddelcc.gouv.qc.ca/evaluations/mil-nordique /index-en.htm>
- » Relations between the Gouvernement du Québec and the Innus and the general agreement in principle between Canada, Québec, and the Innu communities of Mashteuiatsh, Natashquan (Nutashkuan), and Essipit:
http://www.versuntraite.com /accueil_en.htm
- » List of the main Aboriginal organizations:
http://www.autochtones.gouv.qc.ca/nations/organismes_autochtones.htm
- » List of Aboriginal communities:
http://www.autochtones.gouv.qc.ca/nations/liste_communautes_en.htm
- » Secrétariat aux affaires autochtones:
http://www.autochtones.gouv.qc.ca /index_en.asp
- » Ministère de l'Énergie et des Ressources naturelles:
<http://www.mern.gouv.qc.ca/english/department/index.jsp>
- » Ministère de l'Économie, de l'Innovation et des Exportations (in French):
<http://www.economie.gouv.qc.ca>
- » Ministère du Développement durable, de l'Environnement et de la Lutte contre les changements climatiques :
http://www.mddelcc.gouv.qc.ca /index_en.asp
- » Aboriginal participation in the mining industry:
<http://www.rncan.gc.ca/mining-materials/aboriginal/bulletin/7817>
- » Québec's mineral strategy:
<http://www.mern.gouv.qc.ca/english/mines/strategy/index.jsp>
- » Cree Mineral Exploration Board:
<http://www.cmeb.org>

