



Secrétariat  
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Premières Nations  
du Québec  
et du Labrador

Secretariat of the  
Assembly of  
First Nations  
of Quebec  
and Labrador

***THE RIGHT OF THE ABORIGINAL PEOPLES  
TO CO-MANAGE THE TERRITORY***

MEMOIR OF THE ASSEMBLY OF FIRST NATIONS OF QUEBEC AND LABRADOR

PRESENTED

WITHIN THE CONTEXT OF CONSULTATIONS ON BILL 122

TO

COMMITTEE ON LABOUR AND THE ECONOMY

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## INTRODUCTION

Bill 122, *Loi modifiant la Loi sur les terres du domaine de l'État et d'autres dispositions législatives*, presented to the National Assembly on October 19 2005 by the minister of Natural Resources and Wildlife, Mr. Pierre Corbeil, was adopted in principle on October 27 2005 and proposes several changes to the *Loi sur les terres du domaine de l'État et d'autres lois*. Some of these changes concern the First Nations of Quebec.

Bill 122 aims particularly at:

- the revision of the elaboration process of the allocation plans of public lands and the list of Aboriginal organizations which must be consulted;

and

- the conclusion of agreements between the governments regarding the conciliation of the State's land management with the aboriginal activities that are exercised for «living, ritual or social purposes».

This project follows the *External consultation on the new approach of public land allocation*, in which the Assembly of First Nations of Quebec and Labrador (AFNQL) along with three Councils of member communities participated.

Since the beginning of the revision process of the legislative framework on the management of public lands, numerous Aboriginal leaders of Quebec counted on the good faith of the government and accepted to collaborate to the consultations. Today, we have to realize that the will of the government to really take the First Nations into consideration in the management of public lands, was highly overestimated. Let's be clear: this Bill has nothing substantial to offer the First Nations. On the face of it, it appears more as an insult to the First Nations who must struggle every day to defend their rights on their ancestral territory and resources.

The First Nations have, on many occasions, expressed their visions, their aspirations and their will to be an integral part of the multiple decision-making processes which are implemented every day and which affect the territories and natural resources directly. Numerous memoirs, letters and other documents have been produced and tabled with several ministries in order to make known the needs and rights of the First Nations. Too often, these claims remained unanswered. Various initiatives have been undertaken with the government of Quebec over the past years.

Because of time constraint, the present memoir indicates preliminary reactions to Bill 122, by addressing the basic aspects that preoccupy the members of the First Nations: the development of the territory, the relations with the government of Quebec and the importance for the First Nations to participate. It is divided into two parts: the first part addresses the political and legal contexts within which the bill registers, while the second part directly addresses the Bill itself, by reminding certain basic elements linked to the participation of the First Nations in the management of the lands and resources.



## PART I – BACKGROUND

Bill 122 affects one of the most fundamental elements of the First Nations: the territory. In the analysis of the content of this bill, it is important to recognize to the First Nations a particular and specific character, because the First Nations are not just any interlocutor. They form distinct peoples who are holders of original and specific rights (the courts use the Latin expression "*sui generis*") on lands and resources. These rights have evolved constantly over the years. It is in this context that we must tackle the analysis of the Bill 122.

### 1. The Political Context

In June 2003, the Premier of Quebec signed with the Regional Chief of the AFNQL, a *Mutual Political Commitment*, which created the Joint Council of Elected Representatives. This Council, formed of an equal number of elected representatives, met on a few occasions. However, these meetings did not allow the achievement of objectives that had been set, in particular, the one agreed upon in the Mutual Political Commitment, which is to "progress with a better knowledge of each other's point of view". The present document indicates one of the elements on which the point of view of the First Nations was not understood or bluntly neglected.

Yet, the Joint Council of Elected Representatives had been mandated to address in priority the theme of the "territory and its resources". One of the first topics discussed at the working table was the importance for each First Nation to voice properly its opinion on any process of management of its territory. It was made obvious that prior to being able to aspire to any significant consultation of the First Nations, the harmonization of the governmental approach pertaining to community consultation and the implementation of principles underlying a true consultation of the First Nations, had to be addressed in priority. To this effect, the Consultation Protocol of the First Nations of Quebec and Labrador adopted in June 2003 by the Chiefs' Assembly was officially tabled before the government of Quebec. A second version of the Consultation Protocol, adopted in October 2005, was transmitted to the Native Affairs Minister; the government of Quebec has still not reacted to these initiatives.

On the other hand, it is important to stress that the last meeting of the Joint Council of Elected Representatives goes back to January 20 2005, in Kahnawake and that no synopsis has been produced yet since its inception.

One of these conflicts, with the Innus of Pessamit, lies presently before the courts. The recourse to legal proceedings by the Innu Council of Pessamit indicates the scope of the problem which resides in the management of public lands, especially in this case, in the management of forestry resources. The Innus of Pessamit do not represent an isolated case. Other First Nations use different means to make their helplessness known in regards to the indifference of the Quebec government towards Aboriginal rights, but the principles and the objectives remain the same.

In the same undertaking, the Anishnabeg of the Lac Simon and Winneway communities have expressed their disagreement with the "consultation" process of the government of Quebec which grants wood cutting permits (allocation of ligneous substance) without the consent of the concerned First Nations. This conflict which lasted way too long sets a precedent in the history of forestry relations by going as far as incarcerating the concerned leaders.

As stated on several occasions, the AFNQL and many of its members have expressed their visions, their aspirations and their will to be an integral part of the multiple decision-making processes which affect each day the territories and the natural resources. Numerous memoirs, letters and other documents have been



produced and filed with several ministries in order that their needs and the rights of the First Nations are made public.

Following the signature of the Mutual Political Commitment, the Joint Council of Elected Representatives received various documents which affirm the position of the First Nations on the necessity to participate fully in the decision-making process. One of these basic documents filed with this Council, "Harmonious Relations and Co-management of the Decision", reaffirms the urgent need to reexamine all the measures adopted by the government of Quebec, which affect the First Nations and which are adopted and implemented unilaterally, without the consent and without the participation of the First Nations.

## 2. The Legal Context

The First Nations never ceded their titles and their rights over their ancestral territories. Since 1973, the Supreme Court of Canada reiterated on many occasions that the ancestral occupation of the territory by the First Nations gives them, according to the Canadian Law, a title underlying to the title of the Crown. Consequently, the Canadian provinces are not holders, and have never detained exclusive rights on the public lands which they own. Their ownership right is subordinate to the aboriginal title (or Indian title) and to the other ancestral rights. Also, the provinces cannot legally draw any revenues from public lands encumbered with an aboriginal title. The revenues from these lands are reserved, in all logic, for the First Nations holders of the aboriginal title on the public lands.

The 1982 Canadian Constitution guarantees the ancestral rights of the Aboriginal Peoples. These rights include the aboriginal title which recognizes to the First Nations, the right to use and occupy their lands in exclusivity.

Let's keep in mind that the competence of the province of Quebec towards public lands is defined at article 109 of the Canadian Constitution of 1867. The limits to ownership right of article 109 define the implementation field of paragraph 92(5), and consequently, of all provincial laws that ensue from it. Among these provincial laws, are the *Loi sur les terres du domaine de l'État*, the Forestry Act, the *Loi sur les mines*, the *loi sur Hydro-Quebec*. The implementation field of all these Quebec laws is subordinate to the aboriginal title and to other ancestral rights, since it is clearly established by jurisprudence (particularly in the *Delgamuukw* ruling) that the provincial laws cannot extinguish these rights.

What is striking upon the reading of these Quebec laws is that nowhere, do we find any mention of the subordinate character of the ownership right of the province in relation to the aboriginal title and to the other ancestral rights. This fundamental omission is not in line with the Canadian Constitution. This gap gives the impression that the government of Quebec holds an exclusive ownership right on the territory, while this holds no truth. This ownership right has always been limited and conditional.

The government can no longer hide behind the ignorance of the state of right. The precedence of the historical occupation of the territory by the First Nations has created significant legal effects and the government must take them into consideration. In 1888, in the *St. Catherine's Milling*<sup>2</sup> case, the Privy Council, the then highest court in the British Empire, decided that when the provinces were granted ownership of public lands in 1867, this ownership right was subordinate to the aboriginal title<sup>3</sup>. The Supreme Court of Canada reaffirmed this ruling in 1997 in the *Delgamuukw case*.

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*Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010.

<sup>2</sup> *St. Catherine's Milling and Lumber Co. c. The Queen* (1888), 14 A.C. 46

<sup>3</sup> *Haïda Nation c. British Columbia Ministry of Forest*, 204 C.S.C. 73, see par. 59.



In 1888, the Privy Council had also put in doubt the capacity of the provinces to draw revenues from natural resources on public lands where the aboriginal title had not been extinguished. The Supreme Court of Canada used this wording in the *Haida Nation*<sup>3</sup> case in November 2004. Considering that the title of several First Nations has never been extinguished, we can question the legal capacity of the government of Quebec to draw revenues from the exploitation of resources, whether natural, hydro-electric, forestry, mining or wind power from the public lands.

Let's keep in mind that in the *Delgamuukw* case, the Supreme Court of Canada affirms that "the *Aboriginal title is the right to the territory itself*"<sup>4</sup> (the underlining originates from the Court). The Supreme Court defined the aboriginal title as "*being the right to utilize and occupy in an exclusive manner the lands referred to*"<sup>5</sup> (here again, the underlining originates from the Court). Since 1982, this title is guaranteed by the Canadian Constitution.

The Supreme Court added that the "*Aboriginal title includes the right to choose the uses that can be made of this parcel of territory*"<sup>6</sup>. It is clear by this reasoning that we are not referring only to the traditional uses, but also to those that can ensure the contemporary development. According to the Supreme Court, the province can infringe on the aboriginal title for the purposes of developing the society as a whole, at the condition that its fiduciary obligation towards the Aboriginals is respected. The Supreme Court stipulated the extent of the governments' obligation in this regard:

*"This aspect of the aboriginal title indicates that it is possible to respect the fiduciary relations between the Crown and the Aboriginal peoples by making the Aboriginal peoples partake in the decision-making process concerning their lands. There is always an obligation to consult. The question of knowing if an aboriginal group was consulted is pertinent to decide if the infringement to the aboriginal title is justified...The nature and extent of the obligation to consult will depend on the circumstances. Occasionally, when the breach is serious or relatively minor, it will be nothing more than the simple obligation to discuss the important decisions that will be made concerning lands that are detained in virtue of an aboriginal title. Evidently, even in the rare cases where the minimal acceptable standard is the consultation, the latter must be conducted in good faith, with the intent of truly taking into consideration the concerns of the Aboriginal peoples whose lands are at stake. In most of the cases, the obligation will require much more than a simple consultation. Certain situations could even require the consent of another Aboriginal Nation, particularly when the provinces take over hunting and fishing laws affecting the aboriginal territories"<sup>7</sup> (we underline)*

In this portion, the Supreme Court established a scale of the constitutional obligations of a province who is trying to infringe on an aboriginal title. This scale is graded in relation to the seriousness of the infringement. Occasionally, says the Court, when the infringement is not as grave or minor, there is only one obligation to consult, but the latter must really take into account the concerns of the Aboriginal peoples. According to the jurisprudence which followed the *Delgamuukw* ruling, the obligation to consult at that level includes the right to a true dialogue with the public authorities, the right to all the pertinent information and the right to a written justification of the governmental decisions taking into account the Aboriginal concerns.

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<sup>4</sup> See note 1, par. 140.

<sup>5</sup> See note 1, par 155.

<sup>6</sup> See note 1, par 168.

<sup>7</sup> See note 1, par 168.



In most of the cases, adds the Supreme Court, the fiduciary obligation will require much more than a simple consultation: it is an obligation to consult, to accommodate and to infringe as little as possible on the aboriginal title.

Finally, according to the Supreme Court, when faced with the most serious infringement to the aboriginal title, the consent of the First Nation could be required. The Supreme Court hereby gives the example of the provincial hunting and fishing laws which affect the aboriginal territories.

It should be noted that in the *Delgamuukw* ruling, the Supreme Court also questioned the legislative competence of the provinces on public lands that are subject to an aboriginal title. The Supreme Court reminded that the jurisprudence has long established a distinction between the ownership of public lands and the competence over these lands. The Federal Parliament holds an exclusive competence over the lands reserved for the Indians, which, according to the Court, does not aim only the "reserves" per say, but also the public lands as a whole which are encumbered by an aboriginal title.

Even if legislative modifications to Bill 122 do not impose any specific obligations or do not attempt to minimize the rights recognized to the Aboriginals, the upcoming agreements authorized and recognized by the bill, can have a direct impact on the legal aspects of the indianness and on the activities that are protected by an ancestral right. As a matter of fact, by allowing the government of Quebec to conclude agreements on the granting of land rights for restrictive uses, including land leasing and real property rights, the allocation in favor of Indian bands from reserves under the form of land usufruct, and the control of utilization of public lands with the goal of reconciling the management of the lands of the State with the activities of the Aboriginals exercised for living, ritual or social purposes (unequivocal of the ancestral rights) without any other guidelines, limits or monitoring, this bill does not comply with the jurisprudential criteria, and consequently, infringes on the federal competences.

A provincial government has the right to enact laws in order to empower itself to conclude agreements with the First Nations communities in as much as these agreements concern its own fields of competence and respect the jurisprudential criteria. This does not seem the case with Bill 122.

In the recent *Haida* judgement, the Supreme Court clarified its position a little further. It established a distinction between the legal situation which prevails before and after the definite proof of a title before a tribunal. Before the definite proof, if the title is plausible and credible, there is an obligation to accommodate substantially the preoccupations of the concerned First Nations.

It is therefore possible to affirm that the lands of the State are in reality in a domaine shared between the State and the First Nations holders of a title, and that the basic rights of these Nations have priority over those of the State.

## **PART II – Towards the Co-management of the Territory**

### **3. The Management of Public Lands**

Way before the arrival of the Europeans, the peoples who inhabited these territories, vowed an immense respect to the earth and to all natural resources. This respect is still very much present in the aboriginal values and embodies in the aboriginal tradition of occupation and land use planning.

Therefore, it is with great sadness and concern that the First Nations saw the newcomers and their descendants manage the lands and resources as if they were unending: the land rape, the dispersals, the



settling process, the shameless exploitation have caused various reactions, such as claims, demonstrations, legal contestations and even violent reactions.

Over the past years, (especially since the decisions of the Supreme Court of Canada), the governments started to react to the demands of the First Nations. Progress was achieved, but a lot remains to be done. Yet, the path is very clear: there is an obligation to make the First Nations partake in the management of lands and to consider them as an inescapable link in the decision-making process. Whether we like it or not, it is a path that Quebec will have to consider in the adoption of any new legislative measure.

In its current practice, the government of Quebec is very far from abiding by its constitutional obligations, as defined by the Supreme Court. The First Nations clearly have the right to demand that any significant infringement to their title be the object of a negotiated agreement, and that some form of co-management prior to the decision-making pertaining to the management of the territory, be instilled. This is how it should be, for example, before the issuing of a land use planning contract and forestry supply (CAAF), the authorization to construct a dam or the beginning of any other project of development and exploitation of natural resources. A simple invitation to participate in a consultation activity organized for the citizens of Quebec as a whole cannot be considered as a proper measure of consultation. A special consultation must be conducted with the First Nations and the means to get there must be ensured by the government of Quebec.

#### 4. The New Approach of Allocation of Public Territory

*The "Rapport de la Consultation externe sur la nouvelle approche d'affectation du territoire public"*<sup>8</sup>, made public in March 2005, outlines the undertakings that the MRNF took as measures of consultation with the public in general and the First Nations regarding a new approach of allocation of the public territory, namely:

- the invitation of fifty-five aboriginal communities to participate in the "consultation", seven sessions allowing to reach thirty-six invited organizations and twenty aboriginal communities in September 2003  
(See page 2 of the report)
- separate meetings with the representatives of seven Innu communities, of three Atikamekw communities and of the Micmaque Nation of Gespeg (see page 4 of the report)

Of all the comments made by the representatives of the First Nations, the key feature is the right to the co-management of the territory. In its memoir, the AFNQL recommended that the participation of the First Nations takes place through a protocol and a financial support to ensure an efficient consultation.

The *La Nouvelle approche d'affectation du territoire public* reveals that the government Quebec does not intend to really take into account the interests of the First Nations in their management of the territory called "domaine of the State".

Illustration 1 "General process at the government level for the management of the public territory" makes no reference to the First Nations of Quebec. Section 4.2 "The players of the regional and local circles and the aboriginal communities" includes promising proposals, while in reality, there are several gaps. The consultation planned with the First Nations is not scheduled early enough before the decisional process.

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<sup>8</sup> See: <http://www.mrn.gouv.qc.ca/publications/territoire/consultation/rapport-consultation-2005.pdf>. and, for general information on this matter, see: <http://www.mrn.gouv.qc.ca/territoire/consultation/index.jsp>.



The funding of the First Nations in order to ensure a valid participation in the process is not forecasted and there is no obligation to accommodate the aboriginal interests in a substantial manner in the allocation of territory.

## 5. The Reactions to Bill 122

This bill is highly deceiving. It seems clear that the ministry of Natural Resources and Parks did not take into account its true constitutional obligations, in accordance with section 35 of the Canadian Constitution of 1982 and the jurisprudence of the Supreme Court in this regard, particularly at the contemporary nature and the economic implication of the aboriginal land title and the obligation to consult and accommodate in the management of lands and natural resources

Article 1 of Bill 122 modifies article 1 of *Loi sur les terres du domaine de l'État* (L.R.Q., c.8-1), by the insertion of Article 1.1 "Provisions proper to aboriginal communities" which reads as follows:

1.1. In order to better reconcile the management of lands of the State's domaine with the activities that the Aboriginal exercise for living, ritual or social purposes, the government is authorized to conclude with any aboriginal community represented by its band council, agreements dealing with any matter referred to by section II of chapter III and chapter IV.

The provisions of these agreements prevail over those of the present law and of its rules. Any community, business or person affected by an agreement can be exempted from the implementation of the irreconcilable provisions of the present law or of its rules, only if it respects the agreement.

The agreements concluded in accordance with the present article are filed with the National Assembly within 15 days from the date of their signature if the Assembly is in session or, if it is not in session, within the 15 days following the resuming of its proceedings. Besides, they are published in the *Gazette officielle du Québec*.

The agreements must therefore be concluded with a band council and can only affect the matters mentioned at section II of chapter III (the allocation of land rights for restrictive uses, including land leasing and real property rights and the allocation in favor of reserve Indian bands under the form of land usufruct) and chapter IV (the control of utilization of public lands). The other powers of the minister are not affected.

The terms "exercised for living, ritual or social purposes" reflect a reductive and outmoded vision of the First Nations rights. They entail that in the allocation of land rights and the ruling of public land utilizations, the government of Quebec can only take into account the presence and rights of the Aboriginals by the conclusion of agreement affecting the living, ritual and social activities. Following the example of the Forest Act, the system of the public domaine would reflect that the ancestral rights of the type recognized by the Supreme Court in the *R.c. Sparrow* in 1990 (priority to aboriginal fishing, whether living, ritual and social over the sport and commercial fishing). On the other hand, Bill 122 totally ignores the fundamental nature and the contemporary economic content of the Aboriginals' rights, for example, the aboriginal title recognized by the Supreme Court in the *Delgamuukw case* in 1997. The agreements mentioned here above should therefore concern the exercise by the aboriginal peoples of their title and their ancestral rights, which would include, according to the jurisprudence, the contemporary economic activity and not only the traditional activities. The agreements should also concern any other matter affected by the law, particularly on the sale or the free cession of public lands by the minister, which are provided for at section I of chapter III. But most of all, these agreements, at no point in time, must be perceived as bringing the First Nations to subjugate their titles and their rights to the competence of the provincial government.



A particular problem stands out in articles 51 and 52 of the bill. Article 51 allows the government to reserve the usufruct of certain public lands in favor of various Indian bands of Quebec. Article 52 allows the transfer of the usufruct of these lands to the government of Canada, "to be administered in trust by the latter for these Indian bands". The third paragraph of article 52 stipulates that the mining rights are not included in this transfer. These provisions are not in line with the jurisprudence of the Supreme Court of Canada, to the effect that the land rights of the aboriginal peoples in a "reserve", are equal to those deriving from a title on their traditional territories, and that these rights include mining rights.

The consultations on the allocation plans of the territory proposed by Bill 122 are late and are not taking place early enough before decisions are made. It is not planned to adjust the level of involvement of the First Nations according to the potential effect on the rights protected by section 35 in the Canadian Constitution of 1982, and therefore the intensity of obligation to consult in each case. There is no obligation to really take into account and accommodate the interests of the First Nations. There is no mention of funding. Furthermore, the delay of 120 days between the transmission of the proposal to the groups mentioned earlier and the approval, is substantially deficient.



## CONCLUSION AND RECOMMANDATIONS

The *Loi sur les terres du domaine de l'État* does not reflect the constitutional limits of the provincial ownership right on the public lands of Quebec. This ownership right and the legislative competence that are linked are subordinate to the aboriginal title and to the ancestral rights of the First Nations. This title and these rights are protected by the Canadian Constitution. Therefore, there is a need to modify this law. However, the current bill only brings in modifications that are substantially deficient to the law and in no way remedy the situation. The provisions of Bill 122 ignore and minimize the constitutional obligations of the government of Quebec in regards to the titles and ancestral rights of the First Nations. They totally disregard the obligation to accommodate the concerns of the aboriginal holders of assumed rights, or the obligation to get their consent in certain cases where their rights are proven.

Also, the Bill does not meet the expectations of the First Nations as outlined in the *Consultation Protocol of the First Nations of Quebec and Labrador, October 2005*.

For political and economic considerations, as well as legal, the management of lands and natural resources in Quebec can no longer take place without the collaboration of the First Nations who hold rights over them.

In this perspective, an in-depth questioning of the *Loi sur les terres du domaine de l'État* and Bill 122 is imperative. Among other things, there is a need to elaborate a joint system of decision-making for any activities conducted on ancestral territories. This new joint system would allow the establishment of a functional process of local and decisional co-management in which the First Nations would play a leading role.

In the light of all of the above, there is a need for an in-depth review of the content of Bill 122, and even to reconsider its presentation totally under its current form. Here are some recommendations:

- withdraw from the bill the provisions which affect the First Nations;
- put in place a process of recognition of the aboriginal title and ancestral right.
- establish a procedure to get the consent of the First Nations for any development of territory and resources which can affect their title and their ancestral right;
- support the First Nations in the establishment of local structures of consultation and management enabling the co-management of ancestral rights.

These recommendations are not new. They can be found in many documents and memoirs transmitted to the government of Quebec. The AFNQL and the Chiefs as a whole which compose it are hoping today that this presentation will get a better reception than any other presentations made over the past years. If it is the case, Quebec will then be in a position to really pretend that it is coming out of the colonization policy, which, under different forms, continues to alienate the right to the development of the First Nations.

