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**Specific Consultations and Public Hearings  
Working Document:**

**The Occupation of Forest Land in Quebec and  
the Constitution of Forest Management Corporations**

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**INTRODUCTION**

The proposal to reform the Quebec Forest Regime which was submitted to reflection by means of a Green Paper, publication of a working document, and public hearings of this Parliamentary Commission, is another eloquent proof of the ignorance of the government towards the rights and interests of the First Nations on the territory. Unless it is just an intentional blindness, which leads to the same results: the negation of our rights.

Upon reading the documents submitted for reflection purposes and the pertinent information provided to us, it appears that the government takes for granted that the whole of the Quebec territory is subjected to its full and only authority, and that there is no First Nations ancestral title or right that is in direct link with the forest. And yet, those who take the slightest interest in First Nations-related issues recognize that the Quebec territory was never the object of a historical treaty; therefore, the issue of land rights of the first inhabitants of this country remains unresolved.

For more than 400 years, the relations between the First Nations and the European immigrants, who subsequently became Canadians or Quebecers, have greatly evolved; but most of all, for the past century, it has been marked by a state-controlled colonialism aimed more or less at the extinction of First Nations peoples. Today, the views are taking a new line, the methods evolved, but the basis remains the same. It consists in limiting to the maximum the recognition and the exercise of rights that have not been transferred by the First Nations to a State that imposes regulations, without giving too much thought to its failure to honor its obligations towards the First Nations and their rights, obligations which are also of a constitutional nature.

The renewal project of the Quebec Forest Regime is symptomatic of this attitude marked by a colonialist basis which does not seem to disappear. On the contrary, it seems that the government of Quebec, with its multiple projects of territorial development, land occupation, Plan Nord or new economic space, devotes itself more and more to putting forward initiatives which would certainly have major and harmful effects on the titles and the rights of the First Nations, and in a more fundamental way, on the relations between the Quebec government and the First Nations governments.

Since the beginning of this process to renew the forest regime, many leaders of the First Nations of Quebec have expressed their concerns and their apprehension. Several communities have submitted briefs in which they were expressing their comments and proposing a certain number of recommendations. Today, we have to admit that the comments and the will of the government to really take into account the First Nations in the management of the forest were greatly overestimated. It is absolutely astonishing to see that the comments and the proposals of the First Nations have more or less been ignored. The project submitted for the purposes of reflection offers nothing substantial to the First Nations. At the outset, it seems more like an insult to the First Nations who must fight on a daily basis for the protection of their rights on their ancestral territory and resources.

The current Paper presents general reactions to the renewal project of the Act, by broaching the fundamental aspects which preoccupy the Chiefs of the First Nations of Quebec: the development of the territory, the relations with the government of Quebec and the importance for the First Nations to participate.

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**THE DEVELOPMENT OF LAND IN QUEBEC: A MODERN TERRA NULLIUS (NO MAN'S LAND)**

Quebec never took into account the rights and interests of the First Nations in the management of the forest, as in the exploitation of any other natural resources. Adopted in 1970, the first forest policy made no mention of the First Nations. In 1986, the new Forest Act adopted by the National Assembly included some considerations for the interests of the First Nations, but they were very incomplete and based on an obvious colonialist view.

It is interesting to note that in 2002, in the agreement known under the name of “La Paix des Braves” (Peace of the Braves), between the Cree Nation and the provincial government, Quebec adopts a position towards forestry, which seems very interesting at first sight, and most of all brings hope for the future of relations with the other First Nations. But, since that time, experience indicates that the government is not prepared to recognize the same type of relations on forest management with the other First Nations. We had to wait for the 2004 Commission on the management of public forest in Quebec, in order for the government to pay special attention to the concerns of the First Nations. This Commission has the virtue of breaking down a barrier, by inciting the governments and the players of the setting to include the First Nations in the management of resources. There is no mention of a true co-management, but things are improving. The idea of a co-management of forest resources between Quebec and the First Nations is gaining ground, even if, in many cases, this idea is germinating in the mind of contributors who have no knowledge on the ancestral rights of the First Nations, and even less on the constitutional issues which are linked to it.

And then, in 2007, the participants in the Summit on the Future of the Quebec's Forest sector adopt a declaration affirming that “the First Nations participate in a way that is particular and distinct from the other interveners in the decisions pertaining to forest management, within the respect of their identity and their ancestral rights”. This declaration is fraught with meaning and must pave the way to a guiding principle in the current initiative of the government.

In the current initiative, based on the intention of the government to regionalize the management of forest resources, the latter is hoping that the First Nations “will get involved in the administration of the future forest management corporations”, adding that these corporations constitute “privileged venues to be at the heart of decision-makings, to set objectives of development, to maintain or forge business links, and to emphasize special concerns”. In the eyes of Quebec, are the rights of First Nations “special concerns” that can be the object of a discussion, and even an approval, at a table made up mostly of municipal representatives and regional organizations?

For quite a while, and mostly since the creation in 2006, *Conférences régionales des élus* (CRÉ), the AFNQL, and the whole of the First Nations of Quebec have been warning the Quebec government against wanting to constitute the First Nations into “municipalities”, and its intent of delegating its constitutional responsibility to deal on a “nation to nation” basis with them. The current project is another attempt to force the First Nations in negotiating their rights with regional entities that have no jurisdiction, no authority to do so. When it's written in the working document that “the nation to nation relation which characterizes the relations between the First Nations communities and the government, would in no way be questioned or diminished by the

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proposed revision of the forest regime”, the government is wrong and contradicts itself. In fact, it is quite astonishing to see the government persist in believing that the First Nations will give in to the game of the CRE and other organizations of that type. How is it possible to believe, even without knowing the rule of law and the existing political relation, that the First Nations communities would give way to the obligation of trading their rights to the territory, at a table that is made up mainly of municipal elected officials, and whose preoccupations for the First Nations are for the most part, perceived as aggressions.

This being the situation, the First Nations are not against regional development and are absolutely not against the creation of alliances between communities and municipalities. On the other hand, fundamentally, the political relation must not be altered between the State and the First Nations.

The real answer of the First Nations to the project of the new forest regime is “co-management”, or more concretely, “co-elaboration” of the standards between the government of Quebec and the First Nations in question, as regards the concerned territories. A regional table, no matter what form it takes, could never take into account the rights and titles of the First Nations in the management of resources.

**THE PLAN NORD: NOT WITHOUT THE FIRST NATIONS**

Recently, the Premier of Quebec announced what he calls the “Plan Nord”, which consists in an ambitious vision of occupation of the territory and development of the vast territory situated beyond the 49<sup>th</sup> parallel. In a theatrical speech before supporters gathered at a General Council of the Quebec Liberal Party, the Premier gave emphasis to “it is ours”, thus trying to touch the nationalist cord of the Quebecers to legitimize a development project on a territory which does not entirely belong to Quebec. This “ours”, although it’s meant to be inclusive, does not take into account the existence of distinct nations with particular rights on these territories. It is a speech similar to those expressed over four centuries ago by explorers who, referring to the New World, qualified it as “terra nullius”, meaning a no man’s land.

It is therefore easy to understand that the First Nations adopted a skeptical attitude, and even an attitude of apprehension in regards to this Plan Nord. The Plan Nord will be a success if essential conditions are met: the respect of rights, the settlement of land claims and co-management in the development of the territory. The Plan Nord would thus be an opportunity to abandon the policy of exclusion that the governments of Canada and Quebec impose on the First Nations, exclusion from governance on the territory, exclusion from economic development, exclusion from the Employment Pact, etc. Quebec now has a opportunity to distinguish itself, to give concrete expression to its words, and to put an end to the colonialist attitude which still prevails in the relation with the First Nations. This means a new paradigm, based on the recognition of a true co-management of the territory.

It has been more than 10 years since the Royal Commission on First Nations Peoples recommended in its report that systems of co-management and mixed jurisdiction be established in traditional territories of the First Nations nations. The composition of these systems should be based on the principle of equal representation between the representatives of First Nations

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nations and those of the government. Thus, the elaboration of standards and measures of exploitation of the territory should be conducted on the basis of equality, within a framework of shared sovereignty.

This recommendation was made for Canada as a whole, but it applies even more importantly to Quebec, of which a large portion of the territory is burdened by an First Nations ancestral title.

Whether we like it or not, this is a road that Quebec will have to travel one day or the other. The Plan Nord is an ideal opportunity for it.

**A POLITICAL RELATION TO BE TAKEN INTO ACCOUNT**

In June 2003, The Premier of Quebec signed with the Chief of the AFNQL, a *Mutual Political Commitment* which created the Joint Council of Elected Representatives. This Council, composed of an equal number of elected representatives, met on several occasions. However, these meetings were not instrumental in reaching the objectives set forth in the Mutual Political Commitment, particularly the agreed-upon objective to “progress within a better knowledge of each other’s viewpoint”. The current document shows one of the elements on which the viewpoint of the First Nations peoples has not been understood or was bluntly disregarded.

Yet, the Joint Council of Elected Representatives had been mandated to broach as a matter of priority the theme of “territory and resources”. One of the main topics addressed at this working table was the importance for each First Nation to express itself properly on any process of territorial management. It was clearly emphasized that, prior to aspiring to any significant consultation of the First Nations, the harmonization of the government approach in the area of community consultation and the implementation of principles underlying the idea of 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. We are still expecting a proper answer to this protocol.

On the other hand, it is important to bring to mind that the last meeting of the Joint Council of Elected Representatives goes back to January 20, 2005 and no political assessment has been produced since its creation. Since then, several conflicts have developed or aroused. These conflicts between First Nations and the Quebec government, stem, for a large portion, from the management of forests.

One of these conflicts, involving Innus of Pessamit, is now before the Courts. The recourse to legal proceedings by the Conseil des Innus de Pessamit shows the extent of the problem which stems from the management of natural resources, particularly in the management of forest resources, in this case. The Innus of Pessamit do not represent an isolated case. Some First Nations use other means to show their disarray towards the indifference of the Quebec government towards their rights, but the principles and the objectives remain the same.

On many occasions, the AFNQL and several of its members have expressed their visions, their aspirations and their will to be an integral part of the numerous decision-makings which affect the territories and its natural resources on a daily basis. Countless letters, briefs and other

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documents have been drafted and presented to several ministries in order to make the needs and the rights of the First Nations, known. Too often, these requests remained unanswered.

**A LEGAL CONTEXT TO BE TAKEN INTO CONSIDERATION**

The First Nations of Quebec have never transferred their titles and their rights on their ancestral territories. Since 1973, the Supreme Court of Canada reiterated on several occasions that the ancestral occupancy of the territory by the First Nations confers to them, in the Canadian Law, a priority title over the title of the Crown. Consequently, the Canadian provinces do not hold, and have never held exclusive rights over the public lands which they own. Their ownership right is subordinate to the First Nations title (or Indian title) and to other ancestral rights. Also, the provinces cannot legally draw income from public lands that are burdened with an First Nations title. The revenues stemming from these lands are reserved, in all logic, for the First Nations who hold the First Nations title over the public lands.

The 1982 Canadian Constitutional Act guarantees the ancestral rights to the First Nations peoples. These rights include the First Nations title which recognizes to the First Nations the right to use and occupy their lands in all exclusivity.

It should be noted that the jurisdiction of the province of Quebec towards public lands is defined in article 109 of the 1867 Constitutional Act. The limits to the ownership right of article 109 define the field of application of section 92(5) and, therefore, of all provincial laws which stem from it. Among these provincial laws, we find the Act respecting the lands in the domain of the State, the Forest Act, the Mining Act and the Hydro-Québec Act. The field of application of all these Quebec laws is subordinate to the First Nations title and to other ancestral rights, since it is clearly established by the jurisprudence (particularly in the *Delgamuukw*<sup>1</sup> judgment) that the provincial laws cannot extinguish these rights.

What is most striking when reading these Quebec laws is that it gives the impression that the government of Quebec holds an exclusive ownership right over the territory, while there is no such thing. This ownership right has always been limited and subject to confirmation.

The government can no longer hide behind the ignorance of the Rule of Law. The precedence of the occupation of the territory by the First Nations had major legal consequences and the government must take it into account. In 1888, in the *St. Catherine's Milling*<sup>2</sup> case, the Privy Council, the then highest Court of the British Empire, decided that, when the provinces received the property of public lands in 1867, this ownership right was subordinate to the First Nations title<sup>3</sup>. The Supreme Court of Canada reaffirmed this Rule of Law in 1997 in the *Delgamuukw case*.

In 1888, the Privy Council had also questioned the capacity of the provinces to draw revenues from natural resources on lands where First Nations title had not been extinguished. The Supreme Court of Canada repeated the same terms in the *Haïda Nation case*<sup>3</sup> in November 2004.

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<sup>1</sup> *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> *Nation Haïda c. Colombie-Britannique (Ministère des Forêts)*, 204 C.S.C. 73, voir par. 59.

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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 stemming from natural resources from hydro-electricity, forestry, mining or wind energy.

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

**TOWARDS A NEW APPROACH**

The First Nations are not interlocutors like others. They form distinct peoples who hold original and specific rights (the courts use the latin expression "*sui generis*") (unique in its characteristics) to lands and resources. These rights have been the object of a constant evolution over the years. It is within this context that we must address all the questions which concern the development of the territory, particularly the exploitation of resources.

The project to renew the forest regime does not reflect the Rule of Law and the constitutional boundaries which require that the provincial government recognizes the ancestral rights of the First Nations.

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

Within this perspective, it will be necessary to call into question, not only the reform project of the forest regime, but also the Plan Nord. Among others, there is a need to elaborate a joint decision-making plan for all activities achieved on ancestral rights. This new joint plan would allow the establishment of a functional process for local and decisional management, in which the First Nations would play a dominating role.

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**LIST OF ANNEX**

- ▶ The First nations in Québec reaffirm the fundamental principles of peaceful co-existence – May 19, 1998
- ▶ Resolution No. 13/2004 – Opposition to the effects of the establishment of regional conferences of representatives by the Québec (Law 34)
- ▶ Mutual Political Commitment – June 17, 2003
- ▶ Harmonious Relations and Decision-Making Co-Management: The Joint council of Elected Representatives' Challenge
- ▶ Memoirs tabled at the Québec Government:
  - Within the scope of consultations on the Sustainable Development Strategy, November 1<sup>st</sup> 2007
  - AFNQL Position on the Energy issue in Quebec, January 11, 2005
  - The Right of the First Nations Peoples to Co-Manage the Territory – Within the context of consultation on Bill 122, November 17, 2005
  - Scientific, Public and Independent Study Commission on the Management of Forests in the Public Domain, August 2004
  - Within the scope of Bill amending the Forestry Law and the Holding of the General Parliamentary Commission, August 2000