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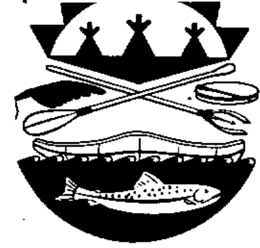
Projets de parcs éoliens à L'Anse-à-Valleau
et à Baie-des-Sables
Côte-de-Gaspé 6211-09-200

Listuguj Mi'gmaq Government

Gespe'gewaq (THE PEOPLE OF THE LAST LAND)



brief to the

Bureau d'audiences publiques sur l'environnement

regarding

Wind Power Development in Gespegewagi

Cartier Énergie Éolienne inc. projects in

Baie-des-Sables and l'Anse-à-Valleau

June 2005

BAPE 217

PEACE AND FRIENDSHIP THROUGH UNITY AND DIVERSITY FOR PROSPERITY AND PROGRESS.

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Appendix 1 : *The Natural Resources of Gespegewagi: Counting the Mi'gmaq In on Decisions and Benefits*, Brief of the Mi'gmawei Mawiomi Assembly to the Commission d'étude sur la maximisation des retombées économiques de l'exploitation des ressources naturelles dans les régions ressources, February 6, 2003

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Appendix 3: Letter, Chief John Martin, Chairperson of the Mi'gmawei Mawiomi Assembly to Minister Sam Hamad, February 11, 2004

Appendix 4: Letter, Chief Scott Martin to Minister Sam Hamad, November 30, 2004

1. Introduction

1. On behalf of the Listuguj Mi'gmaq, the Listuguj Mi'gmaq Government (LMG) welcomes you as our ancestors welcomed the first European visitors to what was to them unknown territory, to the region we have always known as the Last Land or Gespegewagi. Ours is the Seventh District of the wider Mi'gmaq Nation.

2. This is the brief of the Listuguj Mi'gmaq with respect to the BAPE's examination of the Baie-des-Sables and L'Anse-à-Valleau wind power projects of Cartier Énergie Éolienne Inc. But our concerns are not limited to these individual projects.

3. Rather, this brief addresses the failure of the Government of Quebec to fulfill its constitutional duties toward our people with respect to this new development of the natural resources of Gespegewagi. What is required is genuine consultation at the strategic planning level of resource allocation and development with a view to substantially accommodation of the rights and interests of Mi'gmaq.

4. We have been treated with courtesy and consideration by the members of the BAPE panel and staff and we thank you for your assistance. However, unless both the process and substance of wind resource allocation and development are adjusted, these projects and the associated leases, environmental and energy authorizations, tenders and contracts are vulnerable to legal challenge.

5. Our participation in these BAPE hearings is yet another step in the good faith efforts of the Mi'gmaq of Gespegewagi, and especially of the Listuguj Mi'gmaq, to be heard and reach a mutually beneficial accommodation.

6. We sincerely hope that the BAPE takes a broad view of its environmental mandate to include the democratic and intergenerational equity implications of sustainable development and concern for the effects of resource allocation and development on the rights, negotiations and aspirations of the Mi'gmaq.

7. We believe that the BAPE can play a positive role both with respect to these projects and more broadly for the future with respect to the planning and carrying out of land use and resource development in our Territory. This means renouncing the old rules of the game and making a conscious effort to refuse to follow the superficial logic and seeming inevitability of resource development as currently practiced. Wind power development need not, should not and cannot proceed on the current course.

8. As the Supreme Court of Canada said in *Sparrow*, its landmark 1990 ruling on government regulations restricting Aboriginal fishing rights protected under section 35(1) of the *Constitution Act, 1982*:

> [....] Our history has shown, unfortunately all too well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute *de facto* threats to the existence of aboriginal rights and

> interests. By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. [1]

9. Our participation in these hearings is not uncontroversial. Many of our people feel strongly that the Nation-to-Nation relationship as reflected in our Treaties with the Crown is diminished if we participate in and therefore lend legitimacy to a process which does not meet the constitutional requirements of consultation and accommodation. So we challenge the BAPE, the Government of Quebec (including the Cabinet, the Régie de l'énergie and Hydro-Québec) and the project promotor to prove these fears to be unfounded.

10. At the same time, we are obliged to underline that our participation in this process is in no way an acknowledgment that the present process is proper consultation. Consequently, this brief is submitted under reserve of and without prejudice to the rights, positions and interests of the Listuguj Mi'gmaq.

---

[1] *R. v. Sparrow*, [1990] 1 S.C.R. 1075, p. 1110.

11. Our brief deals with the following topics:

- our people, territory, resources and rights;
- Mi'gmaq exclusion from the benefits of the natural resources of our territory;
- preparation for negotiations with the Crown;
- the implications of Mi'gmaq rights for natural resource development;
- the failure of Quebec's process and approvals to meet the requirements of consultation and accommodation; and
- the recommendations of the Listuguj Mi'gmaq Government.

12. The Appendices to this brief provides various documents we are filing with the BAPE for public distribution. These include a brief and previous correspondence in which our concerns have been made very clear. We refer the BAPE to them and avoid repeating all of the detail here.

2. Mi'gmaq People, Territory, Resources and Rights

13. For the purposes of the BAPE, these are the Quebec administrative and resource regions of Gaspésie - Îles-de-la-Madeleine and Bas-Saint-Laurent. But, as acknowledged in the environmental impact studies, Gespegewagi has been inhabited for 10,000 years. [2]

14. This land, the air above, its rivers and lakes and surrounding marine waters as well as the resources found here are in our traditional territory. Every river, place and resource area important to our people was given a name in our language. Maps and records from the historical period, together with the knowledge of our Elders, yield hundreds of Mi'gmaq names for places and resources.

15. Mi'gmaq territorial presence is acknowledged in the environmental impact studies:

> Quant aux Micmacs, il s'agit d'un peuple bien établi dans les provinces maritimes canadiennes et en Gaspésie. On leur reconnaît une économie étroitement axée sur l'exploitation des ressources du littoral, bien qu'ils ne négligeaient pas pour autant les ressources de l'hinterland. Le domaine de Baie-des-Sables se situe sur un territoire fréquenté saisonnièrement par les Micmacs. À la suite de l'établissement d'établissements français au Bas-Saint-Laurent, les Micmacs les fréquenteront sur une base régulière, entre autres pour traiter leur fourrure en échange de biens européens. [3]

[2] Cartier Énergie Éolienne inc., Parc éolien de Baie-des-Sables, *Volume 1 – Étude d'impact. Rapport principal*, 16 novembre 2004, PR 3.1, p. 2-65.
[3] *Id.*, p.2-65.

16. The territory of the Listuguj Mi'gmaq includes lands and waters in what are now Quebec and New Brunswick. We have had a settlement – first a summer village, and then a permanent community – in the estuary of the Restigouche River from time immemorial and certainly at the time of the assertion of Crown sovereignty and throughout the historic period. This is not far from the confluence of the Matapedia and Restigouche Rivers. Seasonal hunting, fishing and gathering, trade, diplomacy and warfare made the Matapedia Valley and the south shore of the St.Lawrence River, including the Baie-des-Sables area, part of our territory. For our forebears, the north-south traverse of the Gaspé Peninsula was a short trip.

17. The l'Anse-à-Valleau project is in the immediate territory of the Mi'gmaq of Gespeg. More broadly, it is important to understand that our economy and ecological adaptation were carried out throughout Gespegewagi and the surrounding waters and territories, out far enough to include Anticosti Island and the Magdelen Islands.

18. We have never ceded out our rights to lands, waters and resources. We have Mi'gmaq Aboriginal rights and title. Our Treaties of Peace and Friendship from 1725 to 1789 confirm our right to remain undisturbed in the possession of our lands. Our rights now enjoy constitutional protection. As such, they provide the basis for peaceful coexistence and resource sharing as well as for challenges to resource allocations and development that do not respect our rights.

3. Our Exclusion From the Benefits of Natural Resources

19. Our rights have been ignored in the rush to settle, fish, lumber and mine. For over three hundred years, under cover of legislation and government policy, we have been thrust aside, confined to limited lands, criminalized for attempting to derive our livelihood from our territory and forced to stand by as these bountiful lands, waters and resources have yielded great wealth.

20. The salmon fishery is a well known case in point. Our people suffered the incursions of Loyalist settlers from the 1760s on. They ejected us from prime fishing stations and petitioned government for targeted fishing regulations to restrict our access and the exercise of our rights. Two hundred years of petitions and complaints did not remedy the situation.

21. This sad history came to a breaking point with 1981 when the Sureté du Québec invaded our lands and waters. Only then was some access restored, but Quebec continued to deny our rights even after the 1990 *Sparrow* decision. Indeed, in the early 1990s, dozens of our fishermen faced multiple salmon fishing charges brought by Quebec. In a lengthy and expensive legal battle, all of the charges were eventually dismissed. Over the objections of the province, Listuguj adopted and fishes under its own conservation-based Fishing Plan. Our Rangers now patrol the river and our scientific and technical staff conduct salmon research.

22. This is the true story of confrontation and poisoned

relations that is behind the bland statement on the website of the Secrétariat aux affaires autochtones:

> However, salmon fishing is still part of the Micmac way of life. Since 1982, the aboriginal community of Listuguj has signed agreements on this subject with the Government of Québec. The community is now applying its own fishing plan, in accordance with resource conservation objectives. [....] [4]

23. Forest resources have seen similar confrontation. The province has allocated all of the Crown public forests to pulp and paper producers and sawmills by way of CAAFs under the *Forest Act*, (R.S.Q., c. F-4.1). Exclusion of our workers and entrepreneurs from the forest wealth resulted in a standoff and blockade on Route 132 in the summer of 1998. This followed the December 1997 decision of the Supreme Court of Canada in *Delgamuukw* [5]. The Court recognized Aboriginal title as a property interest with a substantial economic component and determined that Crown interferences in the form of logging (for example) must pass a test of justification.

24. This new confrontation resulted in a short-term agreement with the province to give some limited access to Listuguj to the forest resources of our traditional territory. However, the fundamental forest issue remains unresolved. The 2001 *Framework Agreement between Quebec and Listuguj* [6] promised best efforts for agreement on the fundamentals of arrangements to facilitate forestry access by June 15, 2002. No comprehensive agreement

[4] http://www.autochtones.gouv.qc.ca/relations_autochtones/profils_nations/ .
[5] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, esp. par. 111 and 160-169.
[6] http://www.autochtones.gouv.qc.caa/relations_autochtones/ententes/micmacs/listuguj/20010615_en.htm .

has been reached. In the meantime, we have negotiated limited access, while the clock is ticking toward two more Supreme Court of Canada judgments, this time on Mi'gmaq Aboriginal title and rights under our Treaties to engage in commercial exploitation of forest resources. [7]

25. We have also been excluded from commercial fishing in the waters of the Baie des Chaleurs and the Gulf of St.Lawrence surrounding Gespegewagi. Again, it took the Supreme Court's 1999 decision in *Marshall* [8] on the Mi'gmaq Treaties of 1760-61 and the violent and dangerous lobster fishing confrontations in Esgenenoôpetitj (Burnt Church) in 2000 before some limited access was gained by our people to the lobster, shrimp and crab fisheries.

26. The same settlers who dominated the forest and fishing sectors took over our lands. There is, of course, the overarching issue of Mi'gmaq Aboriginal title and Treaty rights to remain in possession of our whole territory of Gespegewagi. We will discuss below the preparation for negotiations in this regard.

27. In the area immediately surrounding Listuguj, we have finally regained since 1993 possession of the lands of the Catholic Mission that were set aside for our use. But, our other lands have never been returned and are the subject of litigation regarding Aboriginal title and compensation. [9]

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[7] *R. v. Joshua Bernard*, [2003] N.B.J. n°320 (CA), heard and judgment reserved by the Supreme Court of Canada, January 17-18, 2005, n°30005 ([2003] S.C.C.A. n°467); and *R. v. Stephen Frederick Marshall*, [2003] N.S.J. n°361 (CA), heard and judgment reserved by the Supreme Court of Canada, January 17-18, 2005, n°30063 ([2003] S.C.C.A. n°516).
[8] *R. v. Donald Marshall Jr.*, [1999] 3 S.C.R. 456 and motion for rehearing [1999] 3 S.C.R. 533.
[9] *Busteed v. Restigouche Indian Band*, S.C. Bonaventure n°105-05-000231-073; and *Listuguj Mi'gmaq First Nation v. Her Majesty the Queen in right of Canada*, Federal Court n°T-2478-03.

28. Oil and gas exploration and some limited production are emerging on our lands and waters of Gespegewagi. The provincial Crown has granted claims and leases throughout the promising areas of our territory and is financing exploration through Hydro-Québec. [10] But again, this new resource is being developed in our territory without consultation or accommodation of Mi'gmaq.

29. This history of injustice, exclusion and disenfranchisement has real human, social, economic and political consequences. In income, education, health, life expectancy, employment and most other measures of social and economic development, the Mi'gmaq population is clearly and gravely disadvantaged. The pressure is mounting as our young population grows up without an adequate standard of living and lacking opportunity for the future.

30. We are of course also well aware of the economic, social and demographic challenges faced by our English and French neighbours. But a legitimate, fair and successful economy and society in this region requires embracing and not denying or minimizing Mi'gmaq rights. We offer our friendship and collaboration in pursuing a just and prosperous future together.

31. So, the challenge for the Minister of Natural Resources, Hydro-Québec and the private promoters in the wind energy sector is to avoid a repeat of exclusion of Mi'gmaq and confrontation over resource allocation. The question for the BAPE is how it can assist in moving toward

arrangements that remove obstacles to collaborative and inclusive development of natural resources that respects our rights.

[10] http://www.mrnfp.gouv.qc.ca/publications/energie/exploration/permis_gaspesie.pdf .

4. Preparing for Negotiations with the Crown

32. Listuguj is joined together with the other Mi'gmaq communities in the Mi'gmawei Mawiomi. This contemporary manifestation of our self-government was constituted on August 4, 2000 when the Mi'gmaq of Gespegewagi through the Chiefs and Councils of Listuguj, Gesgapegiag and Gespeg concluded a historic Political Accord. The rights and territory of the Mi'gmaq Nation in Gespegewagi, including the lands and surrounding waters of the Gaspé Peninsula, form the cornerstone of our Accord. Our communities come together in the Mi'gmawei Mawiomi Assembly (MMA) to address common concerns and take political decisions regarding access to land and resources and the economic and social development of our communities.

33. Following the *Marshall* decision, and its recognition of the contemporary force of Mi'gmaq treaty rights, the Crown as represented by the Government of Canada approached the Mi'gmawei Mawiomi regarding exploratory talks with a view to comprehensive negotiations on the territory and rights of the Mi'gmaq.

34. After exploratory talks and a historical and legal assessment by the federal Department of Justice, the federal Cabinet granted a mandate to Thomas Malloy, Q.C. as chief federal negotiator, to commence talks on a Framework Agreement, typically the first stage of negotiations under the federal Comprehensive Claims Policy.

35. The Mi'gmawei Mawiomi is taking the time to carefully prepare and consult before entering into negotiations and declines to follow the standard federal model for negotiations. In this context, Canada has agreed to enter into an agreement to participate in a Niganita'suatas'gl Ilsutaqann or "reflection before deciding" process and the Government of Quebec has agreed to participate in an observer role for the time being. This process has been described in the following terms:

> After many discussions, Canada has agreed to participate in the NI Process. Quebec requires more time to define their role in this process and are currently participating in an observer role. Once the Niganita'suatas'gl Ilsutaqann Agreement is signed by all, the parties (Mi'gmawei Mawiomi Assembly, Canada and Quebec) will then enter into discussions and negotiations, as full and equal partners, on a nation-to-nation basis, in peace and friendship, with the common goal of developing a Framework Agreement.
>
> The Framework Agreement will address such issues as Land Title over our traditional territories, Mi'gmaq governmental powers and jurisdiction over our interests, territory and resources, the promotion, protection and strengthening of our Mi'gmaq culture, spirituality, language, and heritage, and our sustainable development of our resources. [11]

36. The nature and state of discussions with Canada and Quebec is detailed in the brief of the Mi'gmawei Mawiomi to be submitted in the Murdochville project hearings.

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[11] *Gespisiq*, Mi'gmawei Mawiomi, Spring 2005, vol. 3, n°1, p. 12.

37. As acknowledged by the representative of the Secrétariat aux affaires autochtones in the first part of the hearings on the Murdochville project, [12] the Mi'gmaq have not ceded our rights. Our territory and "claim" include the whole territory and all of the resources of the Gaspé and beyond. The Crown, represented by the federal government has agreed to negotiate, although Quebec is still reserving its position. Nonetheless, the result is that the obligation to consult and accommodate applies.

[12] DT 2, p. 7-8, 13-16 and 18.

5. The Implications of Mi'gmaq Rights for Natural Resource Development

38. Section 35 (1) of the *Constitution Act, 1982* provides as follows:

> RIGHTS OF ABORIGINAL PEOPLES OF CANADA
> **35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

39. Through the application of s. 35, it has become indisputable that Mi'gmaq rights, title and Treaties are not just folklore for subsistence hunting and fishing. They cannot be honored by simply hearing our viewpoint. As clearly recognized especially since the 1997 decision of the Supreme Court in *Delgamuukw*, we have the collective right to occupy and possess our lands and waters and to use them for a variety of traditional and modern purposes to meet present-day economic needs. Our rights place specific constitutional and legal conditions on the process and substantive economic outcome of the allocation of lands, resources and resource revenues.

40. These obligations bind the National Assembly in making laws, the regulations, decisions and policies of the Cabinet and Government of Quebec, administrative and regulatory bodies such as the BAPE and the Régie de l'énergie and public corporations like Hydro-Québec.

41. The Assembly of First Nations of Quebec and Labrador (AFNQL) provides us guidance on the nature, content and implications of the duty to consult and accommodate where, as here, the province is aware of serious

unresolved questions of Aboriginal rights and title and Treaty rights that may be affected by proposed resource development decisions. We can do no better than to reproduce in full the provisional text of Chapter 2 of the AFNQL Consultations Protocol (Revised 2005):

THE DUTY TO CONSULT AND ACCOMMODATE:
Origins, Context and Implications

2.1 The Duty : Origins

The of duty of the Crown to consult and accommodate First Nations when making decisions that may affect Aboriginal rights and title and treaty rights is the result of several converging circumstances, namely:

- prior Aboriginal occupation;
- constitutional recognition of Aboriginal rights;
- accelerating development pressure on natural resources and growing economic development needs of First Nations;
- the general trend towards public participation in decision-making regarding public and private sector projects, as reflected notably in environmental impact assessment; and, of course,
- the environmental, economic and democratic principles of sustainable development.

2.1.1 Prior Occupation

At the most fundamental level, Canada and Quebec's duty to consult and accommodate First Nations flows from the fact of prior First Nations occupation of their traditional territories as self-governing peoples relying on the natural resources of the land and maintaining a sustainable way of life and economy.

2.1.2 Section 35 Rights Limit Government Power

Section 35 of the *Constitution Act, 1982* recognizes and affirms First Nations' Aboriginal and treaty rights, including Aboriginal title. Aboriginal rights and title and treaty rights in lands and resources have, thus, gained recognition as legal rights. This constitutionally limits the exercise of the legislative jurisdiction of Quebec and Canada and the Crown's territorial rights and property in natural resources. In concrete terms, section 35 has given rise to process requirements of involving First Nations in decision-making and substantive economic rights of accommodation and compensation.

Consequently, in the 1990 case of *R* v. *Sparrow*, the Supreme Court of Canada found that if the federal or provincial government makes a decision that infringes First Nation' rights, it must justify that decision. To determine whether the infringement is, in fact, justified, a court will look at a number of factors including whether the affected First Nation was consulted in the decision-making process.

More recently, in November 2004, the Supreme Court of Canada rendered two pivotal decisions regarding the duty to consult: *Haida* and *Taku* [13]. In these cases, the Court confirmed that the provincial government is required to consult with First Nations when contemplating a decision that may affect their rights, regardless of whether the right in question has been proven in a court of law, or recognized by other means such as a concluded treaty.

[13] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, par. 51 and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550

In *Haida*, Chief Justice McLachlin summarized the Court's thinking regarding the origins, nature and scope of the duty to consult and accommodate:

> Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.
>
> (*Haida SCC*, para 25)

2.2 The Duty: Its Substantive Component

A key question is the extent to which the duty owed to First Nations extends beyond the process of consultation to include a substantive duty to accommodate First Nations' rights in ways that have real significance in jurisdictional (resource governance) and economic (resource allocation) terms with respect to development in traditional territory.

The revised AFNQL Consultations Protocol reflects the view that the duty has a significant substantive component. This interpretation is based on the fact that aboriginal rights are constitutionally protected, and thus, they must be interpreted broadly. The view also flows from reading *Haida* and *Taku* in the context of prior Supreme Court decisions, notably *Gladstone* and *Delgamuukw*.

In *Haida*, the Supreme Court provided the broad outline of the basis and methodology of consultation and accommodation:

Meaningful consultation may oblige the *Crown* to make changes to its proposed action based on information obtained through consultations (...)

When the consultation process suggests amendment of Crown policy, we arrive at the *stage* of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim.

(*Haida SCC*, paras 46-7)
[emphasis added]

In *Delgamuukw*, the claim was for Aboriginal title. Chief Justice Lamer wrote the main reasons. He defined the content of Aboriginal title in following terms:

[....] Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities

(*Delgamuukw*, para 111)
[emphasis added]

On the test of justification, he wrote the following:

The exclusive nature of aboriginal title is relevant to the degree of scrutiny of the infringing measure or action. For example, if the Crown's fiduciary duty requires that aboriginal title be given priority, then it is the altered approach to priority that I laid down in *Gladstone* which should apply. What is required is that the government demonstrate (at para. 62) "both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest" of the holders of aboriginal title in the land. [....]

Moreover, the other aspects of aboriginal title suggest that the fiduciary duty may be articulated in a manner different than the idea of priority. [....] First, aboriginal title encompasses within it a right to choose to

> what ends a piece of land can be put. [....] This aspect of aboriginal title suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, [....] The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.
>
> (*Delgamuukw*, paras 167 and 168)
> [emphasis added]

2.3 Consultation and Accommodation Must Be at the Strategic Planning Level to Fulfil to Duty

In *Haida*, the Court found that the province had a duty to consult with First Nations at the strategic planning stage, in that case, at the stage of granting tree farm licenses. The duty to consult is not fulfilled if consultation occurs only at the operational level. First Nations must be involved in decision-making at the higher level where fundamental resource allocations are made. The revised AFNQL Protocol incorporates this important principle.

To take a concrete forest-sector example, beyond involvement in ground-level management and cutting decisions, there must also be Aboriginal involvement through consultation and

accommodation at the Ministerial and high level of deciding which Crown lands will be cut, overall sustainable yield policy, the setting of allowable cuts and the allocation of cutting rights.

The requirement of Aboriginal involvement in these higher level decisions has profound implications. The whole regime of Quebec forest resource legislation, policy and allocation is vulnerable if the Court's findings in *Haida* and other cases is taken seriously. Given the developments in the duty to consult and accommodate, First Nations with serious Aboriginal title and treaty right claims are in a good position to demand recognition of extensive resource and economic rights through negotiation or by other means.

2.4 The Duty in the Quebec Context

The case law on consultation and accommodation has developed primarily in cases from British Columbia. Consequently, these precedents deal with issues involving Aboriginal (mostly fishing) rights and assertions of Aboriginal title that are still being negotiated. With some exceptions, British Columbia First Nations rely on neither historic treaties, agreements in principle, nor settled land claims. In contrast, such rights, recognition of rights, advanced negotiations and agreements exist with respect of most First Nations rights at issue in Quebec.

The result is that the rights of First Nations in Quebec have greater substantive economic content. This imposes correlatively stronger duty on Quebec and Canada to involve Quebec First Nations in decision-making and resource allocation. The duty may, in fact, go beyond the consultation and eventual accommodation process

set out in *Haida* and *Taku*. First Nations have constitutionalized rights, not just the option as "stakeholders" along with the rest of the public to comment on government decisions from the sidelines.

2.5 The Duty and Existing Consultations Mechanisms

In *Taku*, the Crown was successful in its defence that it had fulfilled its duty to consult and accommodate by following the then environmental assessment process in deciding whether to open a 160-km mine road through traditional territory. It is important however to note that: (i) under the British Columbia *Environmental Assessment Act*, there were specific provisions giving Aboriginal peoples an important role in the process; (ii) adequate consultation and accommodation did in fact occur; and (ii) the decision attacked was not the final stage in the approvals process, and thus, other measures to consult and accommodate would occur later on in the process. Thus, provincial and federal governments will not always be able to fulfill their duty to consult and accommodate by simply following an existing mechanisms.

For example, Quebec may put forward the existing regimes of BAPE environmental assessment hearings under the *Environment Quality Act* and forest management established pursuant to the *Forest Act* as adequate mechanisms. However, amendments and modifications will be required to these regimes to satisfy the legal duty to consult and accommodate First Nations.

42. The work of this BAPE Panel is one part of the wider arrangements under which the dominant regime of the Government of Quebec together with regional and local authorities, industry and private interests allocate the

lands, waters, resources and revenues of this region. Our fundamental message is that both the process and the economic outcome of this allocation must respect the history and rights we have referred to and must provide the Listuguj Mi'gmaq with access to resources and our rightful part in decisions and benefits. What is required is much more than mere consultation. There must always be a genuine good faith effort at substantially addressing our concerns and economic interests before decision-making on resource allocation.

43. The process and substance of the current drive of the Government of Quebec to allocate and develop wind power resources unfortunately fall very short of these binding legal requirements. The value of your process and results are consequently thrown into doubt. Concretely, this means that leases regarding wind power resources on public land for these projects and any eventual certificates of authorization under s. 31.1 and following and s. 22 of the *Environment Quality Act* (R.S.Q., c. Q-2) are vulnerable to legal challenge.

6. Failure to Meet the Requirements of Consultation and Accommodation

44. Through briefs, meetings with Ministers and official correspondence, the Listuguj Mi'gmaq and the Mi'gmawei Mawiomi have attempted to bring attention to the requirements of process and substance that bind the Government of Quebec with respect to wind power and other natural resource allocation and development in Gespegewagi.

45. We refer in particular to the February 6, 2003 brief of the Mi'gmawei Mawiomi to the Commission d'étude sur la maximisation des retombées économiques de l'exploitation des ressources naturelles dans les régions ressources, to the January 28, 2004 letter of the then Chief of the Listuguj Mi'gmaq to Minister Hamad and others, to the letter of Chief John Martin of February 11, 2004 to Minister Hamad (already filed with the BAPE in this hearing as DB 36.1a), and to the letter of Chief Scott Martin of the Listuguj Mi'gmaq Government again to Minister Hamad on November 30, 2004. (Copies of all of these documents are filed as appendices with this brief).

46. In this context, it is important to realize that good will and *ad hoc* exercise of discretion by the BAPE Panel, government officials and Ministers to consult and accommodate the Mi'gmaq will not suffice. The Supreme Court has repeatedly said that constitutionally protected Aboriginal rights cannot depend on the pleasure of discretionary decision-makers. [14]

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[14] *R. v. Adams*, [1996] 3 S.C.R. 101, par. 54 and *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, par. 51.

47. This point is summarized in the *AFNQL Consultations Protocol* (Revised 2005), p. 2:

> In Quebec, there are currently several general consultations mechanisms, such as the environmental assessment process that includes hearing by the Bureau d'audience publique sur l'environnement. The Supreme Court has made it clear that key questions relating to Aboriginal rights cannot be left to the unfettered discretion of bureaucrats charged with decision-making. Rather, statutory provisions, regulations or at least a written policy will be required to guide decision-makers in their treatment of Aboriginal interests. Broad and general powers, for example to allocate and manage resources, and actions taken under such regimes may be invalid. It is not enough for Canada or Quebec to commit to exercising powers with due regard for the duty to consult and accommodate. Explicit written guidance must govern the protection of constitutional rights.

48. Over the last six months, since our official correspondence with Minister Hamad, the situation has not improved.

49. The directives for the preparation of the environmental impact assessments for the Baie-des-Sables and l'Anse-à-Valleau projects make only minimal and general reference to Aboriginal presence and interests (PR 2a, Tableaux 1 and 2). There is no requirement that ensures consultation and accommodation with respect to Mi'gmaq interests clearly known to the Government of Quebec.

50. The environmental impact assessment studies produced by Cartier reflect this failure to give genuine consideration to Mi'gmaq rights and interests.

51. The letters regarding "consultation" (DB 36a) on the *Plan régional de développement du territoire public, volet éolien* (DB 16 filed in the Murdochville hearing [216]) were rejected by the Mi'gmawei Mawiomi as not being in any way adequate consultation (DB 36.1a).

52. Further to the questions submitted by the Listuguj Mi'gmaq Government (DC 3a), certain information has been obtained on contacts between the promoter and the Chief of Gespeg regarding project impact on forest resources and possible employment and contracting benefits for the Mi'gmaq of Gespeg, all with respect to the l'Anse-à-Valleau project (DT 5, p. 48-55). Several points require underlining.

53. First, the contacts in question were only with respect to l'Anse-à-Valleau project, not the Baie-des-Sables project in which Listuguj has a greater direct interest.

54. Second, the Supreme Court has specifically held in the *Haida* case that the duty to consult and accommodate falls on the government of the province and cannot be delegated to the project promoter.

55. Third, the consultation in question was improvised and cursory. It had none of the process protections which might have allowed for genuine consideration of Mi'gmaq interests.

56. Similarly, the responses of MM. Carl Lizotte, Jean-Marc Hurdy and Alain Tremblay to the questions submitted by the Listuguj Mi'gmaq Government regarding measures of consultation and accommodation by the Government of Quebec and Hydro-Québec reveal a patchwork of inadequate half measures (DT 5, p. 53-60).

57. The Listuguj Mi'gmaq Government has also raised concerns with respect to the BAPE process itself and the requirements of consultation and accommodation (DC 1b and DC 2a). The membership, mandate, scheduling of hearings, language of documentation, information obtained and provided, all fail to make the required place for Mi'gmaq interests. Furthermore, there is no provision for funding for Mi'gmaq participation to ensure translation, adequate research, internal consultation and representation of the Listuguj Mi'gmaq Government.

58. With respect to these process issues, we refer you to the *AFNQL Consultations Protocol* (Revised 2005) and to the brief of the Mi'gmawei Mawiomi to be submitted in the Murdochville hearings.

59. On the question of the substantial accommodation of the Listuguj Mi'gmaq, it is difficult to know where to begin to remedy such a flawed record.

60. Certainly, vague provision for possible future consultation and accommodation will not suffice. We refer in this regard to the Murdochville lease provision that reads as follows:

> **8. Clause particulière**
> Le bail modèle annexé à la présente entente pourra faire l'objet de modalités additionnelles, suite à la consultation que le MINISTRE pourrait tenir, si requis en application de l'article 35 de la *Loi constitutionnelle de 1982*, auprès des nations Gespeg, Gesgapegiag et Listuguj, et suite aux accommodements qui pourraient en résulter. [15]

61. This shows some late awareness of the requirements of consultation and accommodation, but the Supreme Court has specifically required that these obligations not be discretionary and that they must be at the strategic planning level, not after the fact. [16]

[15] *Entente concernant le développement du Parc éolien de Murdochville*, (17 janvier 2005) filed in the Murdochville hearing (216) as DB 11.]
[16] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, par.76.

7. Recommendations

62. In all of these circumstances, the Listuguj Mi'gmaq Government cannot recommend that these projects be authorized unless the following measures of consultation and accommodation are implemented as part of the approvals process:

- ➢ Adaptation of the BAPE and other applicable processes to include the protections required for genuine consultation as set out in the *AFNQL Consultations Protocol* (Revised 2005);

- ➢ Full consultation of the Mi'gmaq on our rights and interests; and

- ➢ The study, discussion and choice in a joint Quebec - Mi'gmaq process of adequate measures of accommodation that recognize the economic nature of our rights and interests, including measures such as:

  - royalties and rents from wind projects;
  - joint ventures and Aboriginal set asides, including in the form of power production contracts with Hydro-Québec Production;
  - employment and contracting opportunities; and
  - provision for Aboriginal participation as set aside components in further calls for tenders for wind power.

64. We thank you for this opportunity to begin to make our views known.

65. In closing, we wish to sound a positive note. Over time, all of the people of the Gaspé will benefit from effective measures to make the Mi'gmaq partners in resource allocation and management and provide for

the equitable sharing of resources and revenues. We are practical and modern. We believe that the interests of all communities and partners may be met by positive joint efforts deployed in the spirit of peace and friendship.

Listuguj Mi'gmaq Government

June 14, 2005

Appendix 1

MI'GMAWEI MAWIOMI

2 Riverside West, P.O. Box 135 Listuguj Qc. G0C 2R0, E-mail: secretariat@migmawei.ca
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THE NATURAL RESOURCES OF GESPEGEWAGI:

COUNTING THE MI'GMAQ IN ON DECISIONS AND BENEFITS

Brief of the

MI'GMAWEI MAWIOMI ASSEMBLY

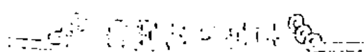
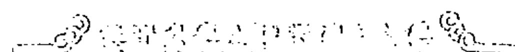
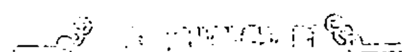
Presented by

Sagamaw John Martin,
Chair of the Mi'gmawei Mawiomi Assembly and
Chief of the Mi'gmaq of Gesgapegiag

To

La Commission d'étude sur la maximisation des retombées économiques de l'exploitation des ressources naturelles dans les régions ressources

Ste-Anne-des-Monts,
Thursday, February 6, 2003

Territory, People and Resource Rights

Good (morning/afternoon). My name is John Martin. I am the Chief of the Micmacs of Gesgapegiag and Chair of the Mi'gmawei Mawiomi (Mi'gmaq) Assembly. I welcome you, as my ancestors welcomed the first European visitors to what was to them unknown territory, to the region we have always known as the Last Land or Gespegewagi. Ours is the Seventh District of the wider Mi'gmaq Nation.

I address you on behalf of the Mi'gmawei Mawiomi (Mi'gmaq) Assembly. This contemporary manifestation of our self-government was constituted on August 4, 2000 when the Mi'gmaq of Gespegewagi through the Chiefs and Councils of Listuguj, Gesgapegiag and Gespeg concluded a historic Political Accord (the text in Mi'gmaq, French and English is annexed to our brief). The rights and territory of the Mi'gmaq Nation in Gespegewagi, including the lands and surrounding waters of the Gaspé Peninsula, form the cornerstone of our Accord. Our communities come together in the Mi'gmawei Mawiomi Assembly (MMA) to address common concerns and take political decisions regarding access to land and resources and the economic and social development of our communities.

For the purposes of your Commission, this is the Quebec administrative and resource region of Gespésie-Îles-de-la-Madeleine, but it has been inhabited for 10,000 years. This land, its surrounding waters and the resources found here are in our traditional territory. Every river, place and resource area important to our people was given a name in our language. Maps and records from the historical period, together with the knowledge of our Elders, yield hundreds of Mi'gmaq names for places and resources.

We have never ceded our rights to lands, waters and resources. We have Mi'gmaq Aboriginal rights and title. Our Treaties of Peace and Friendship from 1725 to 1789 confirm our right to remain undisturbed in the possession of our lands. They provide the basis for peaceful coexistence and resource sharing.

However, our rights have been ignored in the rush to settle, fish, lumber and mine. For over three hundred years, under cover of legislation and government policy, we have been thrust aside, confined to limited lands, criminalized for attempting to derive our livelihood from our territory and forced to stand by as these bountiful lands, waters and resources have yielded great wealth.

The work of this Commission is one part of the wider arrangements under which the dominant regime of the Government of Quebec, regional and local authorities, industry and private interests allocate the lands, waters, resources and revenues of this region. **Our fundamental message today is that both the process and the economic outcome of this allocation must respect the history and rights we have very briefly referred to in this presentation** and must provide the Mi'gmaq people with access to resources and our rightful part in decisions and benefits.

We are of course well aware of the economic, social and demographic challenges faced by our English and French neighbors. But a legitimate, fair and successful economy and society in this region requires embracing and not denying or minimizing Mi'gmaq rights. We offer you our friendship and collaboration in pursuing a just and prosperous future together.

Required Mi'gmaq Role in Decision Making and the Respect of Our Rights

The mandate of this Commission is (1) to analyze the current level of resource revenues, their use by the provincial government and the distribution of economic benefits to the resource regions and (2) to propose an action plan to maximize the economic benefit derived by the resource regions from the exploitation of local resources.

Our participation today is under reserve of and without prejudice to Mi'gmaq rights. We are well aware of the limitations of your mandate and that the key decisions on resource allocation and revenues will be made by the government in Quebec City and by resource companies. Our governments and leaders are regularly called upon to participate in processes of consultation that fall well short of providing the real involvement and concrete results that fairness, law and good policy require. We have limited means and our leadership is overburdened with the challenges of ensuring the economic and social well-being and future of our population. So, it is tempting to simply ignore inadequate processes. However, the issues raised by the work of this Commission are of fundamental importance to us and it is unthinkable in 2003 to contemplate new arrangements for resource exploitation and revenues without considering our rights and including us as equal partners.

Mi'gmaq rights, title and Treaties are not just folklore for subsistence hunting and fishing. They cannot be honored by simply hearing our viewpoint. As clearly recognized especially since the 1997 decision of the Supreme Court in *Delgamuukw*, we have the collective right to occupy and possess our lands and waters and to use them for a variety of traditional and modern purposes to meet present-day economic needs. Our rights give rise to specific constitutional and fiduciary legal duties as regards the process and substantive economic outcome

of the allocation of resources and resource revenues. What is required is much more than mere consultation. Full Mi'gmaq consent will be required in some circumstances. There must always be a genuine good faith effort at substantially addressing our concerns and economic interests before decision-making on resource allocation.

This Commission unfortunately falls very short of these binding legal requirements. The value of your process and results are consequently thrown into doubt.

As to process, we were not consulted on the mandate or membership of the Commission. Given the presence of Aboriginal peoples and the importance of our rights in the resource regions of Quebec, it is startling and unconscionable that there are no Aboriginal members among you. We were given no invitation to these hearings and only heard of them late in the day. We have not been provided with necessary and timely information for meaningful participation, nor with funding for consultant and legal fees.

As to substance, the mandate, background materials and hearings schedule of the Commission makes almost no mention of the Aboriginal people. Certainly, there is no sign that the work of the Commission and the subsequent decisions of the government will substantially address and accomodate Aboriginal concerns and economic interests.

The inadequate nature of the process and substance of the work of the Commission as it would apply to our territory and this region is difficult to reconcile with the policies pursued and agreements made by the government in other parts of Quebec. We hope that confrontation and litigation are not necessary in order to obtain the benefit of the best approaches that Quebec has to

offer. Of course we do not necessarily endorse all aspects of these policies and agreements, but we do note the following.

The Cree-Quebec Agreement on a New Relationship of February 2002, recognizes the Aboriginal role in resource regulation, management and allocation. It ensures Cree Nation economic development through access to resources, resource revenues, employment and contracting opportunities.

The Innu Agreement in Principle of 2002, in its Chapter 6, promises meaningful, distinct, government-to-government Innu Nation participation in the management of the territory, environment and resources of over 200,000 km^2 . Chapter 7 provides for Innu Nation sharing in resource revenues. Chapter 13 addresses access to resources and economic development opportunities with a view to the Innu Nation attaining the level of socio-economic development of neighboring non-Aboriginal communities.

Even Partnership, Development, Achievement, the 1998 general Quebec policy on Aboriginal relations, with all of its many flaws, promises Aboriginal access to a standard of living and level of development similar to the general population and a fair share of the public resources of Quebec (Introduction, p.8).

Conclusion

The Mi'gmawei Mawiomi Assembly therefore recommends that the membership, process, mandate and findings of the Commission be modified to reflect the reality of our rights and the process and substantive requirements that flow from them. The level and distribution of resource revenues must at a minimum live up to the standard indicated by the agreements and polices of the province.

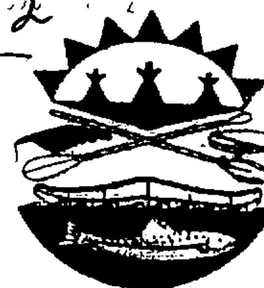
In closing, we wish to sound a positive note. Over time, all of the people of the region will benefit from effective measures to make the Mi'gmaq partners in resource allocation and management and provide for the equitable sharing of resources and revenues. We are practical and modern. We believe that the interests of all communities and partners of the region may be met by positive joint efforts deployed in the spirit of peace and friendship.

Thank you for your attention.

Listuguj Mi'gmaq Government

Appendix 2

Gespe'gewaq (THE PEOPLE OF THE LAST LAND)



January 28, 2004

The Honourable Sam Hamad
Minister of Natural Resources
Government of Québec

Mr. André Caillé
President - Director General
Hydro-Québec

Me Lise Lambert
Chairperson
Régie de l'Énergie

Dear Sirs / Ms,

I am writing you with respect to apparent failure of your Ministry, the Government of Québec and Hydro-Québec to accommodate Aboriginal interests, especially those of the Listuguj Mi'gmaq, in the development of the wind energy sector.

We have made our concerns known before. Notably, on February 12, 2003, together with the other Mi'gmaq communities of Gespegewag making up the Mi'gmawei Mawiomi, we met with former Minister of Energy Rita Dionne-Marsolais. The Ministry of Natural Resources was to designate a contact person in order to address on an urgent basis ways of including our people in the development of this new energy sector. There was also an engagement to establish a working group on energy development issues in general. There has been no follow-up by the Ministry of Natural Resources on these positive initiatives. The matter was again raised with Minister Benoît Pelletier on December 3, 2003.

PEACE AND FRIENDSHIP THROUGH UNITY AND DIVERSITY FOR PROSPERITY AND PROGRESS.

P.O. Box 298 Listuguj, Qc. G0C 2R0
Tel: (418) 788-2136

Mi'gmaq Nation

Gespegewagi, the traditional territory of the Seventh District of the Mi'gmaq Nation, includes the lands, waters, marine areas and resources of the Gaspé Peninsula. We have never ceded our lands. We have Mi'gmaq Aboriginal rights and title, augmented by our Treaty rights, most notably under the Treaties of 1760-61 and 1779. These rights are recognized and affirmed under s.35 of the *Constitution Act, 1982*.

The effect is to impose constitutional conditions on both the process and the economic outcome of the allocation of public resources. These obligations bind the National Assembly, the Government of Québec and its administrative regulatory bodies such as the Régie de l'Energie and public corporations like Hydro-Québec. What is required is much more than mere consultation. There must be genuine accommodation. Required measures in some circumstances include compensation and full Mi'gmaq consent. There must always be a genuine good faith effort at substantially addressing our concerns and economic interests before decision-making on resource allocation. Failure to respect our rights exposes legislation, orders in council, decisions, permits and contracts to legal challenge. We prefer negotiation, accommodation of our rights and partnership.

The Province has largely forgotten our people and our rights in the allocation of forest resources. Oil and gas permits and leases have been attributed without including the Mi'gmaq. We are now struggling to gain our fair share of these resources.

The wind power sector offers a new opportunity to work together in partnership for economic development under arrangements that respect Mi'gmaq rights and the relationship between our people and the Province.

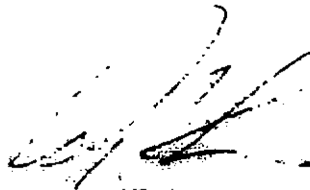
The current process for the purchase by Hydro-Québec of 1,000 MW of wind-generated electricity primarily from the Gaspésie - Îles-de-la-Madeleine region apparently makes no provision for including the Mi'gmaq in decision-making nor for Aboriginal employment, contracting and economic benefits. I refer notably to the Régie de l'Énergie *Regulation on wind energy* and the Government's Décret 353-2003 (both made on March 5, 2003), the proceedings of the Régie de l'Énergie in this regard (most recently its decision D-2003-69), and Hydro-Québec's call for tenders A/O 2003-02 and the business dealings flowing therefrom.

In this context, we are disappointed and disturbed to see that by Order in Council 28-204 made on January 14, 2004, and published on January 28, 2004, the Government of Québec is proceeding with the allocation of sites for wind-power generation on public lands in our traditional territory, again without any regard for Aboriginal interests.

We understand the energy and regional development objectives of the Province. However, at the same time, the process and result of resource allocation decisions must accommodate Mi'gmaq interests in our traditional territory. Concretely, beyond consultation, this could mean measures such as reserved sites and reduced rents for Aboriginal providers or for Aboriginal joint-ventures, affirmative action for contracting and employment opportunities and Mi'gmaq sharing in revenues from lands used for wind energy generation.

I am sure that the Province wishes to live up to the spirit of the Mutual Political Commitment. I ask that you give the important matter raised in this letter prompt and careful consideration. We will follow up with you and your officials in the coming days in order to discuss concrete and practical measures addressing our concerns in a spirit of partnership and fair sharing of economic benefits.

In peace and friendship, I remain yours sincerely,



Chief Allison Metallic
Listuguj Mi'gmaq Government

cc. Jean Charest, Premier
Benoit Pelletier, Minister for Native Affairs,
Natahlie Normandeau, Minister for Regional Development and Tourism
Ghislain Picard, Vice Chief - Assembly of First Nations of Quebec and Labrador
Chief John Martin, Chair for Mi'gmawei Mawiomi

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February 11, 2004

CABINET DU MINISTRE
18 FEV. 2004
20040218-74

The Honourable Sam Hamad
Minister of Natural Resources, Wildlife and Parks
5700, 4e Avenue Ouest
Bureau A-308
Charlesbourg Qc
G1H 6R1

Dear Mr. Minister:

As on June 4, 2003, I write you in my capacity as Chairperson of the Mi'gmawei Mawiomi Assembly. Please consider this a response to your letter addressed to me and dated December 16, 2003 , which was received by my office on January 14, 2004. This letter is also a response by the Mi'gmawei Mawiomi on behalf of all three of its constituent communities to the letter addressed by Mr. Marc Lauzon of your Rimouski office to my fellow Chief Allison Metallic of Listuguj on February 3, 2004, and to the "Regional Plan" transmitted with that letter. I also refer to Chief Metallic's letter to you of February 1, 2004.

It is with frustration and disappointment that the Mi'gmaq of Gespegewagi have witnessed the Quebec government's recent initiatives with respect to developing wind power resources in the Gaspé Peninsula. I will not repeat the concerns of the Mi'gmaq on this issue here in detail, for they have been expressed to you and your predecessors on numerous occasions and by a variety of means. Suffice it to say that those concerns appear to have been disregarded by your government.

At our February 12, 2003 meeting with the Honourable Rita Dionne-Marsolais, the Minister of Energy at the time, it was agreed that the Ministry of Natural Resources would designate a contact person in order to address, on an urgent basis, ways of including our people in the development of the wind power sector. It was also agreed that a Quebec-Mi'gmaq working group would be formed to study energy development matters in general.

On December 16, 2003 and in response to my letter of June 4, 2003, you named representatives to the "*comités conjoints*" meant to discuss energy development matters; for some reason your letter arrived in my office only on January 14, 2004. With respect, however, your letter did not address the other aspects of my letter of June 4, 2003, notably my request for a response to my letter of December 2, 2002 regarding the role of the province in possible broad negotiations on Mi'gmaq rights and title and our Treaties of Peace and Friendship. In addition, the naming of the Minister's representatives came too late for a Quebec-Mi'gmaq working group to be able to deal with the issue of wind energy.

The manner in which the government has proceeded in the meantime does not correspond to the spirit of Ms. Dionne-Marsolais's commitment, nor to the expectations of openness and good faith that I expressed in my letter of June 4, 2003. While the Mi'gmaq were politely asking to be included in the decision-making process so as to ensure accommodation of Mi'gmaq rights and title on our traditional territory, the decision-making process was proceeding without our input. The government passed *Décret* 353-2003 on March 5, 2003 setting out its policy for developing wind power in the Gaspésie and Matane regional county municipality. On January 14, 2004, by *Décret* 28-2004, the government lifted the moratorium on the lease and sale of public lands for purposes of wind power installations, and set out the manner in which it will grant land rights on public lands for such purposes. None of these decisions, in their conception or their implementation, take into account Mi'gmaq rights, issues raised by the Mi'gmaq, nor our requests for talks specifically on opportunities for cooperation in the wind energy sector. Mi'gmaq participation with respect to natural resource allocation has not been solicited except in our capacity as members of the public, disregarding our aboriginal rights and title and Treaty rights. When we participate in such routine public consultations, as when we presented our brief to the "***Commission d'étude sur la maximisation des retombées économiques de l'exploitation des ressources naturelles dans les régions resources***", it is apparent that our contribution is similarly disregarded.

On February 3, 2004, Chief Metallic received the letter from Mr. Lauzon and the "Regional Plan for Public Land Development: Preliminary proposal – January 22, 2004", with the statement that "we must ask you to submit your comments on this proposal by **February 14, 2004**" (bold in original). This is a general public consultation document which in no way addresses Mi'gmaq rights and concerns; it essentially sets out the government's policy for implementing what it has already decreed into force on January 14, 2004.

Despite the Mi'gmaq proposing and seeking a cooperative approach to dealing with Mi'gmaq rights in the allocation of natural resources for years, and in particular with respect to wind energy for over a year, the Ministry has made its own rules, and sent the Mi'gmaq a general consultation document intended for the municipalities of the region. To add insult to injury, it insists on an effective 10-day deadline for "submission" of "comments".

We do not accept this purported consultation. In the first place, in its manner and in its deadline it does not qualify as consultation with aboriginal peoples having legitimate claims to aboriginal rights, title and Treaty rights, as required by the courts. In the second place, as I made clear in my letter of June 4, 2003, "the province's fiduciary duty related to infringements of Mi'gmaq rights, title and Treaties [must be] respected. This means a good faith effort to ensure that both the process and economic outcome of the resource development genuinely accommodates the Mi'gmaq. Mere consultation will not suffice".

Mr. Minister, we must reject the deadline of February 14, 2004 for talks regarding Mi'gmaq participation in the development of wind energy on public land in our traditional territory. We furthermore reject the framework for discussion proposed in the draft Regional Plan; we expect discussions and negotiations between representatives of the Quebec government and representatives of the Mi'gmaq of Gespegewagi, whereby the latter are effectively accommodated in the allocation of land and resources derived from our traditional territory.

And we must sit down at the table soon. We, the Chiefs and Councils of our communities, are gravely concerned that as has happened so many times in our history, Mi'gmaq requests, entreaties, and demands are going unheeded while the rights we claim are sold or given away from under our feet. Your government's plans for the development of wind energy are obviously

well under way, and as time goes by they will be implemented; equally obviously, those plans do not include any form of meaningful Mi'gmaq participation in the decisions nor in the benefits.

We must answer to our people as to why our methods—writing to ministers, seeking meetings and negotiations with government representatives, participating in public consultation processes—have resulted in our once again not being taken into account with respect to the wind energy file, among others. We have repeatedly expressed our preference for cooperation and negotiation based on mutual interests. It is on this basis that we have recently begun negotiations on a Framework Agreement with the federal government in the context of its comprehensive land claims process. Such methods appear to have proved ineffective, however, and other options are currently being urged.

Because of the imminence of the process put in place by your government, and because of the immediate requirements of our people, we consider it urgent that you, the Minister, meet with the Chiefs of the Mi'gmawei Mawiomi at the earliest possible opportunity. In this way we may put into practise our belief that the best solutions always result from cooperation and negotiation. A meeting is already scheduled for the first week of March, 2004 (as postponed by your office from February 4, 2004). We must take the opportunity of this meeting to begin setting out how best to include the Mi'gmaq of Gespegewagi in the decisions and the benefits relating to the development of wind energy resources on our traditional territory. Discussions relating to other natural resources can follow.

In this way we hope to avoid drastic measures. We have expressed before our understanding of your busy schedule and important responsibilities, and we do so here again. We therefore approach you again in a spirit of friendship, asking that you meet with us to discuss matters of accommodation of Mi'gmaq rights. We seek to impress upon you however that we require an urgent meeting to discuss concrete Mi'gmaq participation in the development of wind power resources on Mi'gmaq traditional territory and the benefits deriving therefrom.

Please respond at your earliest convenience to arrange a place, date and time for our meeting.

In peace and friendship,

I remain yours,

Sincerely,

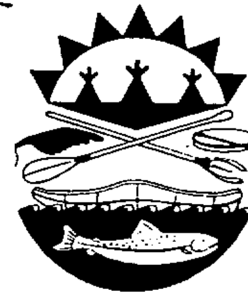
John Martin
Chief, Micmacs of Gesgapegiag
Chairperson of the Mi'gmawei Mawiomi

cc. Rt. Hon. Jean Charest, Premier of Quebec
Hon. Benoit Pelletier, Minister for Canadian Intergovernmental Affairs and Native Affairs
Hon. Nathalie Normandeau, Minister responsible for the Gaspésie – Îles de la Madeline region
Ghislain Picard, Regional Vice-Chief - Assembly of First Nations of Quebec and Labrador
Chiefs of the Mi'gmawei Mawiomi Assembly

Appendix 4

Listuguj Mi'gmaq Government

Gespe'gewaq (THE PEOPLE OF THE LAST LAND)



November 30, 2004

The Honourable Sam Hamad
Minister of Natural Resources, Wildlife and Parks
5700, 4ᵉ Avenue Ouest
Bureau A-308
Charlesbourg Qc G1H 6R1

BY FAX AND BY POST
WITHOUT PREJUDICE

Re: URGENT—Listuguj Wind Energy Project

Dear Minister:

We are glad that you have been able to return to your duties, and wish you all the best for the future.

I write you today in my capacity as Chief of the Listuguj Mi'gmaq Government, to address a specific and vital matter that requires your urgent intervention, namely the Listuguj Wind Energy Project. I seek to ensure its prompt resolution in a fair, equitable, and non-confrontational manner.

We consider this matter independent of all other matters with respect to which the Government of Quebec is currently engaged in discussions with the Listuguj Mi'gmaq Government ("**LMG**") or with the three Mi'gmaq communities of Gespegewagi through the Mi'gmawei Mawiomi. The Mi'gmaq of Listuguj, and particularly our youth, need hope, economic development, and employment now, not just the promise of far-off agreements of a general nature. Happily, the Listuguj Wind Energy Project is a stand-alone business venture that we believe can and must be dealt with independently, quickly and easily.

For the sake of absolute clarity, allow me to summarize the history of this file, which goes back at least to February 2003. At that time, the Mi'gmaq sought a role in the decision-making process and a share of the substantive economic benefits of the development of wind power on Mi'gmaq traditional territory. This territory includes the lands, waters, and resources of Gespegewagi, which we have never ceded. At a meeting on February 12, 2003, it was agreed (among other things) that the Ministry of Natural Resources would designate individuals to urgently address ways of including our people in wind power development. These individuals were not in fact designated until the end of December, 2003, long after the government had begun to implement its wind energy development policy in the Gaspésie region without any regard for Mi'gmaq rights.

On March 5, 2003, without any consultation with the Mi'gmaq or seeking any meaningful accommodation of our rights and concerns, the government adopted *Décret* 353-2003, calling for Hydro-Québec Distribution ("**HQD**") to issue a request for proposals (an "**RFP**") for the generation of 1000 MW of wind power in the Gaspésie and Matane regional county municipality. HQD issued the RFP in May 2003. We understand that HQD is a division of Hydro-Québec, whose sole shareholder is the province of

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Quebec. The Crown must respect and protect our rights, even when it chooses to act through a Crown corporation.

We were, and we remain, deeply concerned that the government proceeded with the allocation of scarce wind power resources on Mi'gmaq traditional territory with a cavalier disregard of our Aboriginal title and Treaty rights and of the economic interests they imply. However, there remained at the time a moratorium on the release of Crown lands for purposes of wind power generation. We trusted that in accord with the honour of the Crown, the new government would, before lifting the moratorium, hold to Quebec's commitment and to its duties to the Mi'gmaq with respect to wind power development in the Gaspé Peninsula. Both the LMG and the Mi'gmawei Mawiomi continued to attempt, formally and informally, to communicate with your government in this regard.

In the summer and autumn of 2003, LMG refused to be deterred or discouraged by the lack of progress with your government. HQD's RFP process was under way, and though we continued to contemplate broader negotiations with your government (and still do), the LMG decided to forge ahead with an independent business venture that would fit the context of that RFP process, if necessary. To be eligible to submit a bid under the RFP, we had to install wind meter towers for the collection of wind data by October 15, 2003. LMG sought out expert engineers and private investors as joint venture partners, to maximize its chances of a successful bid. The bid we submitted under the RFP on June 15, 2004 contemplates a wind park with a generation capacity of either 213 MW, 168 MW, or 124.5 MW.

Our confidence that the government would secure the respect of our rights prior to lifting the moratorium proved misplaced in January 2004, when the government adopted *Décret* 28-2004. Again without any consultation of the Mi'gmaq of Gespegewagi, the lease and sale of "lands in the public domain" on Mi'gmaq traditional territory for purposes of wind power development would henceforth be permitted.

I refer to two letters addressed to you, one from my predecessor, then Chief Allison Metallic, dated January 28, 2004 (enclosed), and another from the Chairman of the Mi'gmawei Mawiomi dated February 11, 2004. Both letters describe the numerous Mi'gmaq attempts to engage the Quebec Government with respect to natural resources generally and wind energy in particular. Both express alarm at the fact that none of the government's decisions with respect to wind power, in their conception or their implementation, take into account Mi'gmaq rights, issues raised by the Mi'gmaq, nor our requests for talks specifically on opportunities for cooperation in the wind energy sector. And both letters urge prompt talks to discuss and resolve these matters, fairly and equitably to the satisfaction of all.

In March and April 2004, meetings were held among yourself and your officials, and representatives of the Mi'gmawei Mawiomi and LMG. At those meetings LMG presented its project, explaining that its bid was being prepared to fit the requirements of HQD's RFP process, but that LMG preferred to enter into a power purchase agreement (a "**PPA**") with Hydro-Québec Production ("**HQP**") outside of the RFP process, as contemplated in section 17 of *Décret* 28-2004. Such an arrangement would have significantly reduced the initial costs and delays involved in complying with the RFP process.

At those meetings, your officials congratulated the LMG representatives on their initiative in pursuing the RFP process, and encouraged LMG to continue with it. We were clearly given to understand that if the bid under that process was not successful, every reasonable effort would be made to facilitate a PPA with HQP as had been proposed by LMG. LMG takes this commitment very seriously. Your officials further suggested that we present our project to HQP so as to "leave the door open" for negotiation of a PPA if

our bid under the RFP process were unsuccessful. The then Chief Negotiator for the LMG subsequently met with HQP to present the project, and sought the opportunity to negotiate a PPA directly. HQP's representatives thanked LMG for the presentation, but stated that HQP was under clear instructions to avoid any new negotiations in the Gaspésie region during the RFP process.

On October 4, 2004, we learned that the bid submitted by LMG and its joint venture partners had not been accepted by HQD. On October 29, 2004, our representatives met with HQD to discuss the reasons for this decision. Immediately thereafter, LMG requested a meeting with you and your officials, and a meeting with your officials was arranged.

On November 19, 2004, our representatives met with Mr. Richard Boucher and Mr. Richard Garand of your Ministry. As our representatives explained there, it was evident from our meeting with HQD that the Listuguj Wind Energy Project is a highly competitive one. The reasons it was not accepted by HQD had more to do with the RFP process itself than with the quality of the bid. The price per kilowatt/hour contemplated by our bid (6.9¢/kWh in the 213 MW variant) is in the same range as that of the bids that HQD accepted. This, even though HQD appears not to have considered the low cost of integration due to our proximity to an existing high-capacity grid, which renders our project's overall price per kilowatt/hour even more advantageous.

Minister Hamad, with great respect, we have stressed time and time again the provincial Crown's obligation to include the Mi'gmaq of Gespegewagi as part of the decision-making process, with a view to substantially addressing our concerns and accommodating our interests in the development and exploitation of resources in our traditional territorial lands and waters. We have made it clear that we have never ceded our Aboriginal rights and title and Treaty rights on this territory. A consistent line of decisions from the Supreme Court of Canada confirms our assertion that government consultation and accommodation of Aboriginal interests is required during the decision-making process regarding the use and allocation of resources. This is so even when, as in the *Haida* decision delivered by the Supreme Court on November 18, 2004, the Aboriginal interests have not been finally adjudicated before the courts.

At our meeting on November 19, your Ministry's officials suggested that LMG wait and submit another bid in the next round of the RFP process. I must tell you that this is entirely inadequate in the circumstances, especially given the commitment made to facilitate a PPA with HQP if the LMG's bid was not successful under the RFP process. This is not consultation, accommodation, negotiation, and reconciliation, as required by the honour of the Crown, in the words of Chief Justice in the *Haida* decision. Indeed, it amounts to total disregard for our rights, which we cannot accept. At a time when the government of Ontario, for example, is starting to make Aboriginal participation and agreement in project development a cornerstone of its renewable energy RFP process, the Government of Quebec continues to act as if we were irrelevant.

We see no impediment to entering into a PPA with HQP. HQP has entered into PPAs with the companies running the Mount Copper and Mount Miller sites, and most recently with the Rivière-du-Loup project announced last week. PPAs with HQP outside of the RFP process are permitted under Section 17 of *Décret* 28-2004. The project is a solid project, ready to implement and commercially competitive; it would bring benefits to Listuguj, to other local communities, and to the region, and would constitute some evidence of a desire and an intention, on the part of the Government of Quebec, to begin to take into account the rights of the Aboriginal peoples in resource allocations.

We made this position clear at our meeting with your officials on November 19, and they stated in turn that clearly, "*une solution politique s'impose*". They agreed to brief you on our meeting and to recommend that a meeting be held between yourself and me, with our officials, as soon as possible and, at all events, this week of November 29.

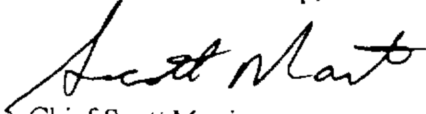
In response to questions and protests from our people since October 4 when we learned of HQD's refusal of our bid, LMG has urged patience and has concentrated on gathering information from HQD, and on attempting still to bring a successful resolution to this matter. This is why, in the face of a constant media clamour over the past two months for comments from my office on the RFP process and the failure of our bid in that process, LMG has remained circumspect. However, with the announcements of winning bids under the RFP and the most recent PPA announcement, our people once again see the government allowing others to benefit handsomely from the resources of our territory while our rights go ignored. Now it is time for action.

A negotiated solution remains by far our first choice because it is advantageous for all, but we can wait no longer. Both the Government's decision-making process and its allocation of resources must meet the test of compliance with the Constitution, and the Supreme Court has confirmed that the provincial Crown's property and jurisdiction with respect to public lands and natural resources are subject to Aboriginal interests and rights. The Supreme Court also has ruled that our rights cannot be made to depend on discretion and uncertain future processes. In this light, we consider the Government's and Hydro-Québec's decisions and policies with respect to wind power development so far, and the resource allocations they allow, to be subject to challenge.

We understand that December 15 is the deadline for signature of contracts between HQD and the successful bidders under the RFP process. We must therefore, by December 10, have a firm commitment and the Government's support for the negotiation of a PPA with HQP on the basis of the Listuguj Wind Energy Project. If we remain without any commitment after December 10, we, the Chief and Council of LMG will consult with our population and our attorneys and consider all options available to us.

I remain very hopeful, as do my Council and my community, that the "win-win-win" arrangement we propose above will be implemented, and I truly believe it can be. Please contact me as soon as possible to discuss these matters and arrange a face-to-face meeting. I am in Quebec City this week on Tuesday and Wednesday, November 30 and December 1, and can be reached on my mobile phone at (506) 789-3765.

In Peace and Friendship,



Chief Scott Martin
Chief of the Listuguj Mi'gmaq Government

cc. Hon. Jean Charest, Premier of Quebec
Hon. Benoit Pelletier, Minister for Canadian Intergovernmental Affairs and Native Affairs
Hon. Nathalie Normandeau, Minister responsible for the Gaspésie – Îles de la Madeline region
Mr. André Caillé, President and Chief Executive Officer, Hydro-Québec

LOCALISATION DES PERMIS ET BAUX

RÉGION DE LA GASPÉSIE

MINISTÈRE DES RESSOURCES NATURELLES ET DE LA FAUNE
SECTEUR DE L'ÉNERGIE ET DES CHANGEMENTS CLIMATIQUES
DIRECTION DU DÉVELOPPEMENT DES HYDROCARBURES

Ressources naturelles et Faune
Québec

Projection Lambert du Québec
Ellipsoïde de référence: GRS80
Système de référence géodésique: NAD83
Conception: Stéphane Beauséjour
Mise à jour: 6/13/2005

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Kilomètres

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LÉGENDE

Liste des détenteurs

- Corridor Resources inc
- Fonds d'exploration minière du Bas-St-Laurent
- Hydro-Québec
- Intragaz Exploration, Sec
- Anne McCullough
- Junex inc
- Prospection 2000 inc
- Pétrolia inc
- Questerre Energy Corporation
- Ressources Manicouagan inc
- En cours de délivrance

Point d'attache des permis

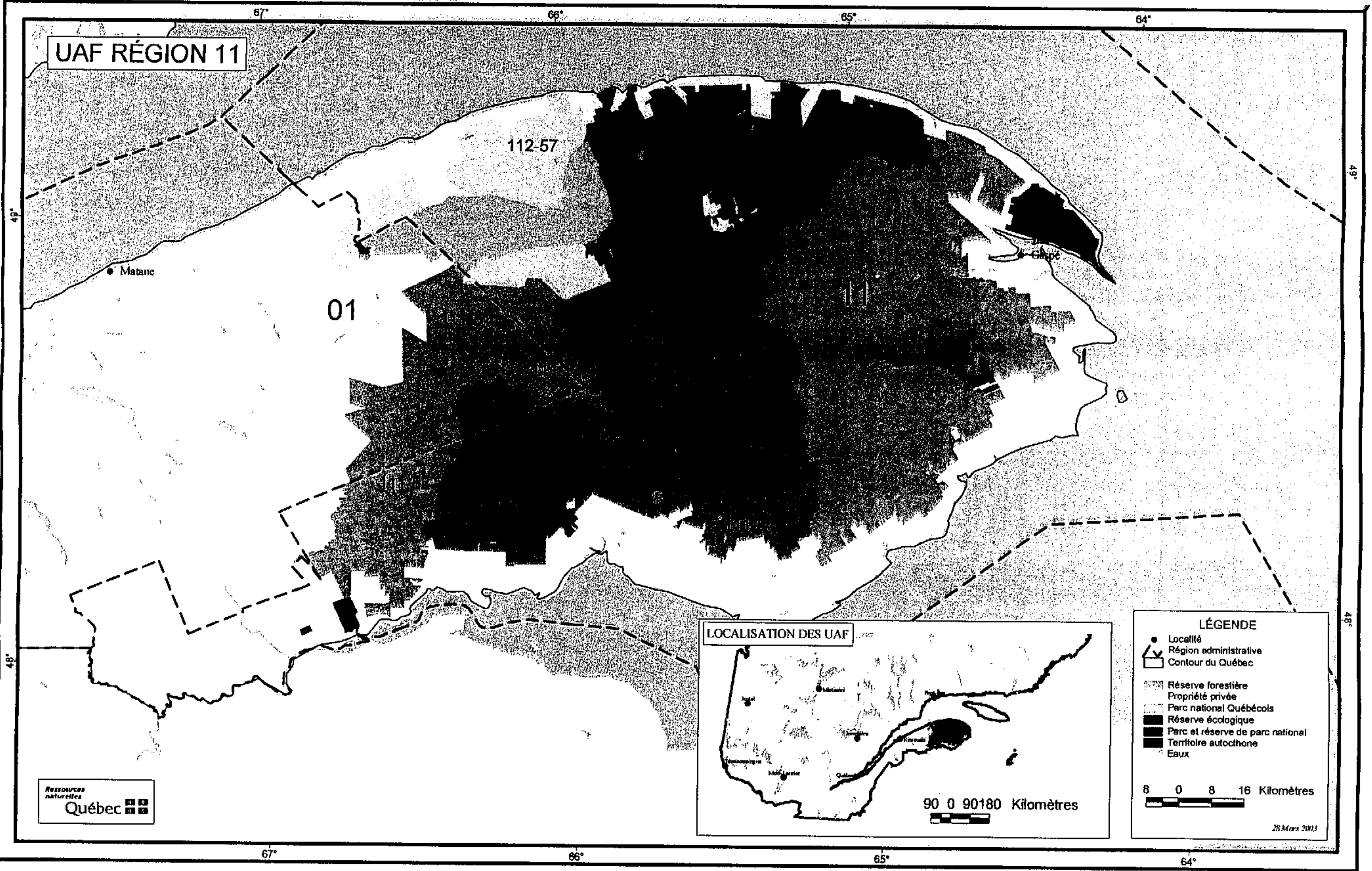
Signes conventionnels

- Ville
- Cours d'eau principal
- Frontière
- Route principale
- Lac
- Île
- Aire protégée

Permis et baux en vigueur

- Permis de recherche de pétrole et de gaz naturel
- Permis de recherche de réservoir souterrain
- Date d'émission du permis
- Bail d'exploitation de réservoir souterrain
- Bail d'exploitation de pétrole et de gaz naturel
- Bail d'utilisation de gaz naturel
- 2/28/2003 Date d'émission du bail

ÉTATS-UNIS



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Réserve écologique
Parc et réserve de parc national
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