

**WRITTEN BRIEF OF THE MOHAWK COUNCIL OF
KAHNAWÀ:KE PREPARED FOR THE BAPE HEARINGS : Projet
portant sur Les enjeux liés à l'exploration et l'exploitation du gaz de
schiste dans le shale d'Utica des basses-terres du Saint-Laurent**

Submitted on May 29, 2014

The rights and interests of the Mohawks of Kahnawà:ke on the St. Lawrence lowlands

The Mohawks affirm Aboriginal title rights to their ancestral lands, which include lands that are part of the St. Lawrence lowlands (the “study area”). The Mohawks of Kahnawà:ke also exercise their Aboriginal rights throughout the lands and bodies of water included in the study area. In addition, the boundaries of Kahnawà:ke’s reserve lands are also within the study area. Finally, the Mohawks of Kahnawà:ke have Seigneurial rights to the Seigneurie of Sault St. Louis lands, which are also a part of the study area.

First Nations that possess Aboriginal title enjoy the exclusive use and occupation of the land subject to that title, which includes the underlying mineral rights¹. This also includes the right to determine what activities can be carried out on these lands. Kahnawà:ke is also in a unique situation because, in addition to owning the mineral rights to its reserve lands, its Seigneurial rights to the Seigneurie of Sault St. Louis lands also includes ownership of the mineral rights to these lands. Furthermore, the Mohawks of Kahnawà:ke also have a direct interest in any activity that is carried out in proximity to its reserve lands and that could have a potential impact on the integrity of its reserve lands.

In terms of Aboriginal rights, the Mohawks of Kahnawà:ke possess and exercise Aboriginal fishing hunting and harvesting rights (used for the production of traditional medicines) within the study area lands. These lands and their resources are also used to exercise trade and cultural rights, and include gathering sites of spiritual and recreational importance.

The Mohawks of Kahnawà:ke also rely on the bodies of water in the study area for our source of drinking water. Furthermore, the Mohawks of Kahnawà:ke are directly concerned with the conservation of numerous vulnerable species of plants and animals, including Species at Risk and the protection of important nesting and spawning sites in the study area.

The 2011 BAPE report and 2014 ÉES Report’s conclusions pertaining to Aboriginal engagement and rights

There is an alarming lack of consideration for the issue of Aboriginal rights and engagement in the works completed thus far in Quebec on the shale gas issue, including the February 2011 BAPE Report “*Développement durable de l’industrie des gaz de schiste au Québec*”² (“BAPE Report”), and the February 2014 ÉES Report “*Évaluation environnementale stratégique sur le gaz de schiste*”³ (ÉES Report) that followed.

The BAPE report was completed without any apparent outreach or consultation of First Nations in Quebec. In fact, in the entire report, there are only two specific mentions of First Nations stemming

¹ *Delgamuukw v. British Columbia* [1997] 3 SCR 1010, at para. 122.

² <http://www.bape.gouv.qc.ca/sections/rapports/publications/bape273.pdf>

³ http://ees-gazdeschiste.gouv.qc.ca/wordpress/wp-content/uploads/2014/02/EES-rapport-synthese_final_web_janv-2014.pdf

from observations of the systems in place in British Columbia. There are no observations, discussion or recommendations on how First Nations issues should be considered in the Quebec context. The BAPE Report's conclusions did, however, include recommendations that municipal authorities must be engaged in order to ensure a comprehensive approach to the management of shale gas resources on municipal lands. In contrast, the absence of any discussion of First Nations, their rights and interests in the Quebec context is a glaring omission and flaw in this report.

The ÉES Report did include one section on "aboriginal communities". The content of this section consisted of a very brief overview of certain First Nation reserves within the study area (including Kahnawà:ke), and of the duty to consult and accommodate First Nations. The ÉES Report also outlined some consultation and participation processes in place in Alberta and British Columbia.

However, the ÉES Report did not adequately capture the scope of Aboriginal title and rights of the First Nations, and more specifically the Mohawks' rights and title within the study area. Moreover, the ÉES Report's conclusions pertaining to "aboriginal communities" are incorrect. The Report concludes that:

Authorizations delivered by the Government of Québec to proceed with the exploration and exploitation of shale gas resources may be elements which trigger consultations with First Nation communities if there is a potential impact to their established or potential Aboriginal or treaty rights⁴

This statement is incorrect for two reasons: 1) it implies that the duty to consult may be triggered only following the issuance of authorizations for the exploration and exploitation of shale gas by Quebec and 2) it implies that the duty to consult would not necessarily be triggered in the case that the issuance of such permits were found to have potential impacts on established or claimed rights.

The Mohawks of Kahnawà:ke rectify this statement as follows:

- 1) The duty to consult and accommodate will be triggered whenever Quebec contemplates conduct that could have a potential negative impact on established or claimed rights including actions such as registering mining claims and issuing permits, including both exploration and exploitation permits. The province must consult and accommodate prior to issuing these authorizations⁵;
- 2) This duty to consult and accommodate is necessarily triggered in the case where such authorizations are found to have potential impact on established or claimed rights;

⁴ Unofficial translation of « Les autorisations délivrées par le gouvernement du Québec pour procéder à l'exploration ou l'exploitation du gaz de schiste pourraient constituer des éléments déclencheurs d'une consultation des communautés autochtones si une atteinte à leurs droits ancestraux ou issus de traités, établis ou potentiels, était appréhendée » http://ees-gazdeschiste.gouv.qc.ca/wordpress/wp-content/uploads/2014/02/EES-rapport-synthese_final_web_janv-2014.pdf; at page 205

⁵ *Ross River Dena Council v. Yukon* 2012 YKCA 14

- 3) While the duty to consult and accommodate varies according to assessment of the strength of the claim or right and an appreciation of the scope of the potential negative impact, the Mohawks of Kahnawà:ke further submit that free and informed consent would be required with respect to the issuance of a shale gas exploitation permits, due to the severity of the impacts involved.

The Mohawks of Kahnawà:ke submit that the Reports completed thus far in Quebec pertaining to the shale gas issue have failed to adequately consider the government of Quebec's legal and moral obligations to First Nations. The BAPE must take these issues into account in the report that it will provide to the Minister following the current process.

Summary of the Crown's duty to consult and accommodate the Mohawks of Kahnawà:ke regarding shale gas exploration and exploitation permits

Given the Aboriginal title rights, Seigneurial rights, Aboriginal rights and reserve land rights asserted above, Quebec must at the very least consult and accommodate the Mohawks of Kahnawà:ke regarding any future government action pertaining to shale gas exploration and exploitation in the St. Lawrence lowlands that could potentially adversely impact these rights and interests⁶

In practice, this means that Quebec must engage in meaningful consultation of the Mohawks of Kahnawà:ke whenever it contemplates the registration of mining claims and the issuance of any mining permits that occur on the lands subject to our rights and interests⁷. The registration of claims and the issuance of exploration permits on these lands cannot be completed without the prior and informed consent of the Mohawks of Kahnawà:ke.

The Mohawks of Kahnawà:ke also take the position that no shale gas exploitation permits can be issued on lands subject to our Seigneurie of Sault St. Louis land grievance, Aboriginal title lands or in proximity to our reserve lands, without our prior and informed consent. The impacts of oil and natural gas exploitation on the environment and land base are so important that consent is required.

The Mohawks of Kahnawà:ke submit that this duty also arises in relation to the government's broader decision making regarding this issue, for example, pertaining to the moratorium question and the general decision to pursue shale gas exploration and/or exploitation activities.

Absence of meaningful consultation with the Mohawks of Kahnawà:ke regarding shale gas exploration and exploitation permits

The Quebec government has thus far failed to engage in meaningful consultation with the Mohawks of Kahnawà:ke. The Mohawks of Kahnawà:ke have never been contacted by the province of Quebec on

⁶ *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* 2010 SCC 43, at para. 31.

⁷ *Ross River Dena Council v. Yukon* 2012 YKCA 14

the issue of shale gas exploration and exploitation. The Mohawks of Kahnawà:ke were never informed or invited by the province to participate in these BAPE hearings. Nor were they ever contacted to engage in a separate and meaningful consultation on the issue of shale gas exploration and exploitation.

In 2010, the Quebec government issued numerous oil, natural gas, and underground reservoir exploration permits on lands subject to the exercise of the Mohawks of Kahnawà:ke's aboriginal rights and Seigneurie of Sault St. Louis land grievance and aboriginal title lands. This included Utica shale exploration permits on Seigneurie of Sault St. Louis lands, in very close proximity to "reserve" lands.

These permits were issued without any information sharing or consultation with the Mohawks of Kahnawà:ke. The registration of mining claims and the issuance of exploration permits have potential adverse impacts on our seigneurial and title lands and the exercising of our aboriginal rights, including those exercised on the St. Lawrence River.

The oil and gas exploration industry has also failed to engage and communicate with the Mohawks of Kahnawà:ke regarding any activities that have taken place pursuant to these permits.

All authorizations issued and all activities carried out thus far have been in violation of Quebec's constitutional duties towards our First Nation and a complete disregard for any of our rights or interests in the lands subject to these authorizations and is certainly nowhere near upholding the honor of the Crown.

Preliminary concerns related to shale gas exploration and exploitation

Generally, the Mohawks of Kahnawà:ke have similar concerns to those expressed by many other presenters at this commission and Canadians across the country. Many of these concerns are summarized in the ÉES Report. We agree with the finding that the development of the shale gas industry in Quebec is not appropriate within the current social and economic climate. We take issue with certain claims in the report which we have elaborated on below within the presentation of our concerns. Concerns relate both to exploration and exploitation as both activities expose the Mohawks of Kahnawà:ke, and the citizens of Quebec, to similar environmental threats.

Prior to outlining specific concerns, we would first like to register our overall concern at the lack of baseline information available concerning the risks (both short and long-term) surrounding the extraction of natural gas through hydraulic fracturing. As noted recently by the Canadian Council of Academies⁸, the environmental and health impacts of shale gas exploitation are not well understood nor are they being adequately studied.

⁸ Council of Canadian Academies, 2014. *Environmental Impacts of Shale Gas Extraction in Canada*. Ottawa (ON): The Expert Panel on Harnessing Science and Technology to Understand the Environmental Impacts of Shale Gas Extraction, Council of Canadian Academies.

In the USA and parts of Canada, we have seen a ‘gold rush’ mentality as extraction is occurring without appropriate regulations, without consideration for the impact on people, communities, and the environment, and with no forward planning to deal with the scarred landscape, conduits for groundwater contamination, residual wastewater and the fallout from major incidents. When it comes to shale gas exploration and particularly exploitation it is in everyone’s best interest to look before we leap.

The following should be considered our preliminary concerns pertaining to shale gas exploration and exploitation. Since the Mohawks of Kahnawà:ke have not been consulted by the Crown or by any proponents, these concerns should not be considered exhaustive or based on a review of actual exploration or exploitation activities that have or that may take place.

Water:

The Mohawks of Kahnawà:ke have major concerns regarding the possible depletion of surface water and groundwater resources resulting from hydraulic fracturing activities. With respect to the fracturing fluid, we have concerns both with the quantity of water required and the impairment of the water quality owing both to the addition of chemicals and sand to the water and the possible leakage of natural gas. The wastewater generated from hydraulic fracturing is not easily restored; as noted in the ÉES, traditional municipal wastewater treatment cannot remove the chemical additives used in the fracturing process. This has led to the loss of significant quantities of water from the hydrologic cycle as water gets disposed of in deep ground storage or remains polluted in surface reservoirs. The costs, potential for spills, and air pollution associated with trucking the waste fluid are also considerable and undesirable.

The ÉES notes that enough water exists in the region to fully exploit the shale reserves without concern for the overall water balance in the region. The Mohawks of Kahnawà:ke dispute this statement. Given the lack of a permitting system for the removal of water from groundwater and surface water sources in Quebec and a minimal stream flow monitoring network, we believe it is not currently possible to determine the amount of water that would be available while maintaining necessary biological functions for resident fish and other aquatic species. Further, a changing climate is leading to an increase in the frequency of droughts around the globe. This may ultimately impact the water availability in this region.

The potential for groundwater contamination as noted in the ÉES, is another major concern for the Mohawks of Kahnawà:ke. Even if the large majority of wells are properly sealed, the number of poorly sealed wells has led to many instances of contaminated groundwater. It is likely that many more leaks have occurred in areas that are not widely inhabited and have therefore gone undetected. Given that the Utica Shale formation is the most populated formation in Canada with over two million people living in the area, the impact of groundwater contamination will be more severe. In addition, the stated

unknowns in the ÉES, the inherent limitations of modeling complex systems, and the real possibility of practices in the field failing to live up to regulated standards, prevent us from finding reassurance in the modeling exercise carried out and reported on in the ÉES that stated that methane leakage would be relatively low. Although we are not against sustainable development, we do question whether hydraulically fractured natural gas is more important to our collective survival than clean surface and groundwater?

Food Production:

The Utica Shale formation is located under prime agricultural land within the province. This region is known as the ‘bread basket’ of Quebec for good reason. The Mohawks of Kahnawà:ke do not believe that Quebec should be gambling with its food security for the minor economic benefits associated with this project.

Air pollution:

The Mohawks of Kahnawà:ke have concerns with the increased pollution that will result on a local and regional scale from shale gas exploration and exploitation. It is noted in the report that the exploitation phase generally has quite high associated emissions of pollutants owing to high equipment and transportation usage during this phase. Emissions related to fugitive releases of gas, an area that has not been adequately studied, may also be dramatically increasing greenhouse gas emissions associated with hydraulic fracturing. Finally, we note that the cumulative impacts of poor air quality have not been well studied but can be considered significant. Kahnawà:ke’s reserve lands are exposed to air pollution stemming from the large urban centres nearby, the numerous highways traversing our Territory, the large ocean vessels using the St. Lawrence Seaway, numerous railways traversing the territory with an increase in the number of trains in recent years and the proximity of the Dorval Airport. Adding an additional major source of emissions adjacent to the “Reserve” will have health implications for the residents of Kahnawà:ke.

Safety:

The ÉES notes that there have been a number of serious accidents associated with hydraulic fracturing. We are also aware of numerous explosions and other major incidents. These accidents expose nearby populations to major risks. Given the large populations nearby, these risks are a major concern.

Wildlife:

The lands and waters located above the Utica formation are home to some of the most imperiled plants and animals in all of Quebec. Expanding urban centres and residential suburbs, intensive

agriculture, and other human induced changes have eliminated habitat and concentrated remnant populations in isolated areas.

The Mohawks of Kahnawà:ke believe in the intrinsic value of all creatures and the need to protect Species at Risk. Many species are at risk of extirpation if appropriate management strategies are not implemented. The additional negative consequences and threats to these species resulting from disturbed landscapes, increased pollution in the form of noise, air pollution, water contamination, toxic lagoons, truck traffic, and light pollution will be detrimental to sensitive species regardless of possible mitigation measures that may be incorporated.

To reiterate, the Mohawks of Kahnawà:ke are concerned that shale gas exploration and exploitation activities may negatively impact the land, water and air of our reserve, seigneurial and title lands. The Mohawks of Kahnawà:ke are also concerned that these negative impacts may compromise the carrying out of our aboriginal rights, including, hunting, fishing, gathering, and trading activities that are carried out on and in proximity to the study area. Finally, the Mohawks of Kahnawà:ke are concerned about the potential impacts on the health and safety of our community members, and of the numerous vulnerable plant and animal species located on our lands.

Moving forward: the Quebec Mining Act amendments and future government action

The Mohawks of Kahnawà:ke have taken note of the recent amendments that have been made to the Quebec *Mining Act*⁹ pertaining to “native communities”. Firstly, it is important to acknowledge that Quebec’s duty to consult and accommodate First Nations predates and exists independently of these statutory provisions.

The Mohawks of Kahnawà:ke submit that Section 2.1 of the Act must be interpreted as requiring separate and meaningful consultation of First Nations regarding the registration of mining claims and the issuance of any mining permits that occur on aboriginal title lands and on lands where aboriginal rights are exercised. The registration of claims and the issuance of exploration permits on these lands cannot be completed without the prior and informed **consent** of affected First Nations.

Given the significant concerns and potential impacts outlined above, the Mohawks of Kahnawà:ke also take the position that no shale gas exploitation permits can be issued on lands subject to their Aboriginal title and rights.

Finally, the Mohawks of Kahnawà:ke submit that the principles outlined in this brief must be integrated in the content of Quebec’s “Native community consultation policy” that will be developed pursuant to Section 2.3 of the Act.

⁹ *Mining Act*, RSQ, c M-13.

Recommendations

The Mohawk Council of Kahnawà:ke hereby recommends that the following points be included in the BAPE's report to the Minister:

1. An acknowledgment that the BAPE and ÉES Reports completed thus far were deficient in as much as they failed to adequately consider the government of Quebec's legal and moral obligations to First Nations;
2. An acknowledgment that Quebec and the shale gas industry have not consulted First Nations at all, including regarding the exploration permits issued and activities carried out thus far;
3. That the duty to consult and accommodate is triggered whenever Quebec contemplates conduct that could have a potential negative impact on established or claimed aboriginal rights including actions such as registering mining claims and issuing permits, including both exploration and exploitation permits;
4. A recommendation to the Minister that Quebec must consult and accommodate prior to issuing these authorizations and that this duty is necessarily triggered in the case where such authorizations are found to have potential impact on established or claimed aboriginal rights;
5. An acknowledgement that, while the duty to consult and accommodate varies according to assessment of the strength of the claim or right and an appreciation of the scope of the potential negative impact, free and informed consent would be required with respect to the issuance of shale gas exploitation permits, due to the severity of the impacts involved;
6. An acknowledgment of the concerns expressed by the Mohawks of Kahnawà:ke: 1) that shale gas exploration and exploitation activities may negatively impact the land, water and air of our reserve, seigneurial and title lands; 2) that these negative impacts may compromise the carrying out of our aboriginal rights, including, hunting, fishing, gathering, and trading activities that are carried out on and in proximity to the study area; 3) that there are potential negative impacts on the health and safety of our community members, and of the numerous vulnerable plant and animal species located on our lands;
7. An acknowledgment of the preliminary nature of these concerns, and of the fact that an actual Crown consultation and accommodation process with First Nations needs to take place in order for the honour of the Crown to be upheld.