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Projet de modernisation des débarcadères de la traverse d'Oka
Oka 6211-04-037

Kanehsata'kehró:non Kanien'kehá:ka Ratitsénhaiens

Oka Ferry Development Project

BAPE Presentation

Mohawk Council of Kanehsatake

April 26th, 2006

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I. Introduction

The Mohawk Council of Kanesatake is the elected government of the Mohawk people of Kanesatake and the Council is submitting this memorandum to the BAPE so that the voice of the Kanienkehaka of Kanesatake will be heard during this public hearing on the proposed Oka Ferry Development Project.

Kanienke'haka people have lived, hunted, fished and grew crops on these lands long before the arrival of Europeans. We continue to live on the traditional lands of our ancestors which includes the Seigneury of the Lake of Two Mountains and the community that we call Kanesatake. We have used the resources of the surrounding lands and of the Lake of Two Mountains for food, travel and survival. The Mohawks of Kanesatake continue to fish in the Lake of Two Mountains to this day.

In 2000, the "*Agreement with respect to Kanesatake Governance of the Interim Land Base*" was concluded by the Mohawks of Kanesatake and Canada. Sub-section 21(b) of this *Agreement* recognizes the jurisdiction of the Mohawk Council of Kanesatake over the protection and management of wildlife and fish on Kanesatake Mohawk Lands. The federal government formally implemented the *Agreement* through the *Kanesatake Interim Land Base Governance Act*.[1] The Mohawks of Kanesatake have a vested interest in protecting all lands and bodies of water within the Seigneury of the Lake of Two Mountains from any development that has the potential to harm the environment, fish and wildlife. The wording of the *Agreement* and the use of the word "*Interim*" in reference to the land base clearly indicates that Canada and the Mohawks of Kanesatake have agreed that more lands will be added to the current land base. It is

[1] 2001, c. 8 (Bill S-24).

also clear that the Interim land base as recognized in that *Agreement* extends to the shores of the Lake of Two Mountains, and the jurisdiction of the Mohawks of Kanesatake over fishing in their territory would necessarily include the fish in the Lake of Two Mountains.

The impact study produced by Genivar states that the area of proposed construction and development on the Oka side of the Ferry project is of high archaeological potential, since it is an area which had always been used historically and is within an area of ancient occupation (Summary of Impact Study, page 18). The attempt to consult the Mohawks of Kanesatake on December 7, 2005 did not take place and there were no further attempts to involve representatives of the Mohawks of Kanesatake, whose ancestors lived and travelled all over these lands, much beyond the current extent of the Kanesatake Mohawk Lands.

The promoter of the project, Claude Desjardins, would like to convince everyone that any impact will be very limited and contained to a small area and will not have further repercussions on the environment or the fish population in the Lake. However, Mohawk people know that it is very difficult to limit impact to one small area because all life, whether it be fish, plants, wildlife or people, are inter-connected and dependent on one another. The cumulative impact on both sides of the Lake of Two Mountains, in Hudson and Oka, must be considered and addressed.

L'Heureux-Dube, J., writing for a majority of the Supreme Court in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*[2] stated that the "precautionary principle" of international law must be respected. The precautionary principle is defined as follows:

> "In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible

[2] [2001] 2 S.C.R. 241.

> damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation."[3]

The Supreme Court continued[4]:

> "Scholars have documented the precautionary principle's inclusion "in virtually every recently adopted treaty and policy document related to the protection and preservation of the environment...As a result, there may be "currently sufficient state practice to allow a good argument that the precautionary principle is a principle of customary international law" (J. Cameron and J. Abouchar, "The Status of the Precautionary Principle in International Law", in ibid., at p. 52)...In the context of the precautionary principle's tenets, the Town's concerns about pesticides fit well under their rubric of preventive action."

II. Land Claim by the Mohawks of Kanesatake

As mentioned earlier, the land in the Seigneury of the Lake of Two Mountains, which includes the Municipality of Oka, is currently part of the land claim of the Mohawks of Kanesatake and this issue remains unresolved at the present time. The Oka Ferry has been landing on traditional Mohawk lands since 1909 and it is time that the Kanienkehaka be consulted on development in their territory. There are currently 52 lots in the village of Oka which are part of Kanesatake Mohawk Lands. These lots are within the vicinity of the Ferry and would be affected by the same concerns raised by the Town of Hudson in terms of traffic in the area of the Ferry, vehicle backlog, pollution, and maintaining a peaceful residential environment.

[3] Ibid., para. 31.
[4] Ibid., para. 32.

III. Inherent Aboriginal Right to Fish in the Lake of Two Mountains

The Supreme Court in *Adams v. The Queen*[5] held that an aboriginal right to fish, recognized and affirmed under section 35(1) of the *Constitution Act 1982*, existed for the Mohawk in Lake St. Francis, irrespective of whether title to land had been established or not:

> "...[S]ome aboriginal peoples varied the location of their settlements both before and after contact. The Mohawks are one such people; the facts accepted by the trial judge in this case demonstrate that the Mohawks did not settle exclusively in one location either before or after contact with Europeans. That this is the case may (although I take no position on this point) preclude the establishment of aboriginal title to the lands on which they settled; however, it in no way subtracts from the fact that, wherever they were settled before or after contact, prior to contact the Mohawks engaged in practices, customs or traditions on the land which were integral to their distinctive culture.[6]
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> ...
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> In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfil their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the Sparrow test."[7]

The Court concluded:

> "As we explained in *Gladstone*, the precise meaning of priority for aboriginal fishing rights is in part a function of the nature of the right claimed. The right to fish for food, as opposed to the right to fish commercially, is a right which should be given first priority after conservation concerns are met."[8]

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[5] [1996] 3 S.C.R. 101.
[6] Ibid., para. 28.
[7] Ibid., para. 54.
[8] Ibid., para. 59.

The Supreme Court in *R. v. Côté*[9] reiterated that "…aboriginal rights may indeed exist independently of aboriginal title."[10] The Supreme Court in *Côté* assumed, without deciding, the existence of a treaty right to fish. The Quebec Court of Appeal, however, had earlier held that the *Treaty of Swegatchy, 1760*, was a valid treaty that protected the hunting and fishing rights of the appellants in this case and was constitutionally protected under s. 35(1) of the *Constitution Act, 1982*. The *Treaty of Swegatchy, 1760* was concluded by representatives of the British Crown and the Seven Nations of Canada, which included the Mohawks of Kanesatake, Akwesasne, and Kahnawake.

Mr. Jean Dube, a biologist with the Quebec Ministry of Natural Resources pointed out in his advisory opinion ("*Recueil des avis issus de la consultation aupres des ministeres et organismes*") that the departure and arrival zones for the ferry are very close to a zone of fish reproduction and that even if the construction were to take place outside of the reproductive season, there were no preventative, corrective or compensatory measures included in the impact study to address the potential damages to the reproductive areas of the fish. Can the loss of fish habitats truly be compensated for when a number of fish species are considered endangered or threatened?

Many of the Kanienkehaka of Kanesatake continue to fish for food in the Lake of Two Mountains, catching a variety of fish such as sturgeon, walleye, perch, bass and pike. Any development project that threatens our inherent aboriginal and treaty rights to fish for food in the Lake of Two Mountains necessitates meaningful consultation with the Mohawk Council of Kanesatake.

[9] [1996] 3 S.C.R. 139.
[10] Ibid., para. 38.

IV. Duty to Consult

On November 18, 2004, the Supreme Court of Canada released two judgments on the duty to consult and accommodate Aboriginal peoples: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74.

These judgments represented a major legal change that will have an effect on all major projects in Quebec in the territory which is not governed by the *James Bay and Northern Quebec Agreement*.

The Supreme Court of Canada in *Haida* upheld the Crown's duty to consult Aboriginal peoples concerning their "potential rights" which are part of their land claims and which could be affected by decisions made by the Crown. The duty is based on the fact that "Aboriginal peoples were here when Europeans came, and were never conquered" (para. 25). The exercise of sovereignty by the Crown must be reconciled with the claims of Aboriginal peoples in order to respect the honour of the Crown, which obliges the Crown to consult with Aboriginal peoples and accommodate their interests (para. 16).

The Court explained (at paragraph 27):

> The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.

While the Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development, the legal responsibility belongs to the Crown alone. The Supreme Court of Canada suggested to governments (in the *Haida* judgment at para. 51) that they could adopt regulations or guidelines for decision makers: these would address the procedural requirements appropriate to consultation at different stages of project approval. In any case, Ministers and their delegates with decision-making power over development on the ground can be called upon to demonstrate how they have consulted the Aboriginal peoples concerned and what measures they have adopted to accommodate their rights.

The Bureau d'audiences publiques sur l'environnement (BAPE), as an administrative tribunal of the Government of Quebec, should follow the approach adopted by the National Energy Board, the federal tribunal which regulates inter-provincial projects such as pipelines and transmission lines. The NEB has since 2002 required that applicants for a permit provide evidence that there has been adequate Crown consultation with Aboriginal peoples that have an interest in the area of the proposed project and that they describe the potential project impacts and the mitigation measures meant to respond to them. The Crown nevertheless has a fiduciary obligation to ensure that such consultation is carried out.

The duty to consult has been raised by the Secretariat aux affaires autochtones in its letter to the BAPE dated October 14, 2005, in the context of these public hearings. The SAA stated that the Mohawks of Kanesatake should be consulted based upon the Supreme Court of Canada's findings in *Haida* and *Taku*. The governments of Quebec and Canada have a duty to consult the Kanienkehaka of Kanesatake on projects that are within the Seigneury of the Lake of Two Mountains, which is the subject of unsettled grievances and which is under the Federal land claims process. Meaningful consultation, carried out in good faith, goes beyond merely providing documentation.

V. Conclusion

The Mohawk Council of Kanesatake supports the Town of Hudson in its concerns for the increased traffic in areas that are primarily residential, as well as the impact that this development will have on the delicate balance of the fish and wildlife habitats in the Lake of Two Mountains, on both shores of the lake. The turtle is an important part of Mohawk culture and the habitat of the endangered map turtle (*tortue geographique*) on the Hudson side of the Lake of Two Mountains is being placed at risk unnecessarily. The aboriginal and treaty rights of the Kanienkehaka are also being placed at risk without any discussion having taken place with the Mohawk Council of Kanesatake.

In conclusion, the Mohawk Council of Kanesatake must emphasize that, as representative of the Kanienkehaka of Kanesatake, it must be consulted in a meaningful way and in accordance with the principles outlined by the Supreme Court of Canada, before any project, such as the proposed Oka Ferry Development Project, can move forward.