



Comité consultatif pour l'environnement de la Baie James  
James Bay Advisory Committee on the Environment  
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## **JBACE commentary:**

# Information and consultation on mining sector projects in the James Bay Territory

In response to the *Aboriginal Communities Consultation Policy Specific to the Mining Sector*,  
published by the Ministère de l'Énergie et des Ressources Naturelles

May 2016

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## Introduction

With the signing of the James Bay and Northern Quebec Agreement (JBNQA) in 1975, the signatory parties established a unique environmental and social protection regime as outlined in Section 22. This regime is explicitly designed, among other things, to ensure the involvement of the Cree in all facets of its application, and to minimize the impacts of development on the Cree and on the James Bay Territory's wildlife and ecology.

The JBNQA established the James Bay Advisory Committee on the Environment (JBACE) to oversee the administration and management of the environmental and social protection regime for the James Bay Territory in accordance with Section 22. This section names the JBACE as the preferential and official advisory forum for governments regarding the formulation of laws, regulations and policies that may affect the environmental and social protection regime, or that may have an influence in the Section 22 environmental assessment and review procedure.<sup>1</sup> The JBACE exercises this mandate as a tri-partite committee composed of members appointed by the Cree, provincial and federal governments in equal measure.

The draft *Aboriginal Communities Consultation Policy Specific to the Mining Sector*, published by the Ministère de l'Énergie et des Ressources Naturelles (MERN), is specifically designed to outline new means of exchanging information and consulting Aboriginal communities throughout the province. Thus, it will implicitly influence the planning and handling of development projects in the James Bay Territory.

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<sup>1</sup> See paragraph 22.3.24 of the JBNQA relating the JBACE's mandate.

## 1. Clarifying objectives

The draft policy evidently seeks to address several objectives in light of a set of obligations. But the objectives, as well as the roles, obligations, and expectations of the MERN and of proponents to meet them, are vague.

First, we understand that a proponent's legal obligations relating to information-exchange and consultation, as outlined in the *Mining Act* (CQLR c. M-13.1), target municipalities only – with the exception of the requirement to establish monitoring committees that include Aboriginal community representatives. We thus appreciate that there are no legal obligations in the *Mining Act* for proponents to inform and consult Aboriginal communities. Instead, one of the objectives of the policy is to establish best practices that proponents will be encouraged to employ when informing and consulting Aboriginal communities. These best practices will not be legally enforceable. This is not entirely equitable. We have consistently suggested that proponents should have such obligations over the course of the three attempts to revise the *Mining Act* in recent years.

Second, the development of this consultation policy is an expressed obligation per section 2.3 of the *Mining Act*. But, the draft text – and in particular the introduction, the scope, the objectives, and the roles and responsibilities sections – focuses primarily on the objective of addressing the Honour of the Crown in relation to the Duty to Consult.

Thirdly, the *Mining Act* applies throughout the province but little attention is given to defining the information and consultation procedures for northern regions subject to the James Bay Northern Québec Agreement (JBNQA). Nor does it address the information and consultation-related activities that apply in the James Bay Territory as a result of the signing of the Governance Agreement in 2012.<sup>2</sup>

Fourthly, the consultation process section<sup>3</sup> starts by asserting that it applies to all mineral exploration activities and mining operations, whether they are subject to or exempt from the environmental impact assessment and review procedure specific to southern Québec per Chapter 1 of the *Environment Quality Act* (CQLR c. Q-2 – hereafter, 'EQA'). Again, its application in JBNQA territory is not clearly specified.

Indeed, the JBACE recognizes that the MERN may still wish to meet several objectives via the implementation of the policy. With this in mind, the introduction, scope, and objectives sections of the document should be revised and contextualized to avoid all confusion on the matter.

Here, we understand that:

- The scope of the policy's application is province-wide;
- Objective n° 1 is to meet an obligation per the *Mining Act*;
- Objective n° 2 is to outline how the MERN and the Ministère du Développement durable, de l'Environnement et de la Lutte contre les changements climatiques (MDDELCC) will meet the Duty to Consult in the mining sector;
- Objective n° 3 is to define best practices for proponents for engaging with Aboriginal communities.

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<sup>2</sup> In reference to the [Agreement on Governance in the Eeyou Istchee James Bay Territory between the Crees of Eeyou Istchee and the Gouvernement du Québec](#) (referred to as the 'Governance Agreement'), which was signed in July 2012.

<sup>3</sup> See page 7 of the English version of the draft policy.

## 2. Clarifying the role and actions of the MERN

The policy should outline the specific role and actions that must be undertaken by the MERN in meeting the objectives (see above). For instance, this should include explanations on the MERN's responsibilities in light of the Duty to Consult, and how the ministry will operate in light of existing institutions, governance regimes, and environmental and social impact assessment and review procedures throughout the province.

Having said this, the JBACE is pleased to note that the following actions are now taking place as a result of the signing of Governance Agreement (not exhaustive):<sup>4</sup>

- The MERN notifies Cree communities that proponents have obtained claims within 60 days of their obtention via monthly emails.
- The MERN notifies the Cree Nation Government (CNG) that proponents have obtained claims on Category II lands within 60 days of their obtention via monthly emails. Similar notifications are sent to the Eeyou-Istchee James Bay Regional Government (EIJBRG) for those on Category III lands.
- The MERN holds in-person technical training sessions on the GESTIM system for interested Cree communities.

We believe, and suggest that the MERN also consider, that the completion of a training session on the GESTIM system and the subsequent navigation thereon by a Cree community member or representative do not constitute veritable consultations in and of themselves.

Second, given some of the problems faced with the emailed notices and with the turnouts at training sessions held to date, we suggest that a more robust means of transmitting notifications and of exchanging reports and information is required. We also suggest, for example, that the MERN should invite a set of key persons from the CNG, EIJBRG, and Cree Mineral Exploration Board to undergo the training and to discuss a better means of notification as a first step. These persons may then be better tooled to advertise the importance of the training, to suggest the inscription of others, and to establish a more functional means of notification.

## 3. Clarifying expectations for proponents

Exactly what is expected of and suggested to proponents in order to meet the objectives (see above) must also be delineated.

For the moment, we understand that the following actions will be encouraged of proponents active in the James Bay Territory due to the coming into force of certain sections of the *Mining Act* (not exhaustive):

- In Category II and III lands, proponents are now encouraged to notify Cree communities of their intended exploration works on their claims 30 days before the works are to commence via email.
- Proponents will be encouraged to send annual reports of the exploration works conducted on their claims to the attention of the CNG for projects on Category II lands and to the EIJBRG for those on Category III lands.

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<sup>4</sup> All the while, and per paragraph 5.1.10 of the JBNQA, no mineral development activities can occur on Category I lands without the consent of the Cree community responsible for those lands.

**Recommendations relating to the clarification of objectives, roles, actions and expectations**

- Overall, the policy should clarify *why* the MERN and proponents are either obligated or encouraged to inform and to consult Aboriginal communities, as well as exactly *how* best to do so throughout the province in order to meet the various objectives that the MERN chooses to address for the implementation of the policy.
- The scope of application and the specific objectives of the final version of the policy should be clear. The specific role and actions that must be undertaken by the MERN (and the MDDELCC as necessary) in meeting its objectives, in light of existing institutions, governance regimes, and environmental and social impact assessment and review procedures throughout the province. And exactly what is expected of and suggested to proponents in order to meet all of the MERN's objectives should also be provided.

**4. Information made available to proponents to facilitate information-exchange and consultation with Cree communities in the James Bay Territory**

We understand that proponents are first notified that their projects, more specifically their exploration claims, are in JBNQA territory via pop-ups on the GESTIM system. We believe that additional information should be made available to proponents.

In order to further assist proponents, and indeed all of the players involved, the final policy should include clear and descriptive treatment of the elements cited in the previous sections. Beyond this, it will be important to encourage proponents to familiarize themselves with certain contextual realities that are unique to the Cree in the James Bay Territory, and with the JBNQA when their projects are in the territory subject to it. Indeed, the provisions and mechanisms outlined in the JBNQA provide the ministry and proponents with a roadmap for development. It would thus be very helpful to ensure that Internet Hyperlinks to material that describe these elements for proponents are provided, and that proponents are aware of the material, before they engage with Cree communities. For example:

- The Section 22 environmental and social impact assessment and review procedure provides for one assessment and two review bodies that have the mandate to provide opportunities for public consultations when projects are subjected to it.<sup>5</sup> For projects subject to a Section 22 review, proponents are thus not tasked with organizing public consultations at that stage.
- The Cree have a special status of involvement in all facets of the Section 22 environmental and social protection regime (see paragraph 22.2.2c of the JBNQA). It extends beyond the confines of the Section 22 environmental and social impact assessment and review procedure to policy initiatives like the one in question. As such, means of ensuring that the Cree have the fullest access to information and consultation opportunities on projects that may affect them are essential. This is especially true when projects are not subject to Section 22 assessment and reviews, because proponents will be encouraged to assume the role of informing and consulting the Cree communities on their own.

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<sup>5</sup> The Evaluating Committee (COMEV, the assessment body), the Provincial Review Committee (COMEX), and the Federal Review Panel (COFEX-South).

- The Cree have developed their own policies that can assist proponents in planning out their information-exchange and consultation activities. The *Cree Nation Mining Policy*, for instance, should be referenced in an Internet Hyperlink in the pop-ups on the GESTIM system for the benefit of proponents that will need to engage with them.<sup>6</sup>
- The Cree continue to practice wildlife harvesting activities throughout the Territory. These activities are central to Cree identity, tradition, culture, and community life. The planning of participatory activities must be adapted around certain important wildlife harvesting seasons. Proponents must be sensitized to these realities, and must be encouraged to remain flexible when planning these activities. A tangible example of this flexibility would be the avoidance of planning information and consultation activities during the spring 'Goose Break' period.
- Proponents should be aware that information in English and in Cree may facilitate consultation.

On the whole, the MERN, Cree community members and representatives, and especially project proponents need to know exactly *what* should be done, and *how* best to do it in the Territory. The communities need to know what to expect.

With this in mind, the JBACE is open to assist the MERN with the establishment of these links. Here, we must mention that the JBACE, with the assistance of the MDDELCC, intends to put together a guide for proponents on the Section 22 environmental assessment and review procedure. This guide will also include contextual information on the Territory, as well as information on public participatory activities that proponents may undertake for any project in the James Bay Territory, including projects that are subjected to or exempted from the Section 22 environmental assessment and review procedure.

Although this guide will not focus solely on mineral development projects, we believe that it will provide much contextual information of interest. Once ready, this Section 22-specific guide will be published. We suggest that it could be referenced in an Internet Hyperlink in the pop-ups for proponents on the GESTIM system when registering claims.

**Recommendations relating to the information made available to proponents to facilitate information-exchange and consultation with Cree communities**

- The MERN, Cree community members and representatives, and proponents need to know exactly *what* should be done, and *how* best to do it in the Territory. The communities need to know what to expect.
- Proponents should be provided with Internet Hyperlinks to references for additional information regarding the JBNQA, the James Bay Territory and the Cree, via the pop-ups on the GESTIM system when registering their claims. The JBACE is open to assist the MERN with the establishment of such Internet Hyperlinks.
- The MERN's work on social acceptability helps illustrate why proponents need to exchange information and consult communities. This issue should be highlighted in the final policy.

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<sup>6</sup> Grand Council of the Crees, 2010. *Cree Nation Mining Policy*. Online: [www.gcc.ca/pdf/ENV00000014.pdf](http://www.gcc.ca/pdf/ENV00000014.pdf).

## 5. Special attention for projects not subject to the environmental and social impact assessment and review procedure of Section 22 of the JBNQA

The JBACE fully concurs with the MERN's intentions to set out what best practices should be employed by proponents for information and consultation activities for projects that are not subject to an environmental assessment and review in southern Québec per Chapter 1 of the EQA.

We reiterate that the final policy should follow suit for projects in northern regions that are exempt from Section 22 assessments and reviews.<sup>7</sup> This is especially so because mechanisms for public information and consultation already exist for projects that are subjected thereto.

The policy should thus provide details on the encouraged actions relating to information and consultation that proponents should employ for smaller scale works or activities (e.g. preliminary exploration activities). They should address the special status of involvement of the Cree, and outline what measures are encouraged of proponents to account for this status.

On another note, the clean-up and restoration of smaller-scale projects once activities have ceased has been a serious source of concern for the Cree, and the JBACE, for many years. The lamentable legacy of abandoned and improperly cleaned, and unsecured exploration sites must be avoided from now on (e.g. abandoned equipment, wastes and drums of lubricant or fuel, unsecured excavations).<sup>8</sup>

As a matter of principle, Cree communities should be informed and consulted regarding these activities. The policy should thus provide guidance for proponents relative to these exchanges.

### **Recommendations relating to projects not subject to environmental assessments and reviews**

- The final policy should outline procedures that proponents will be encouraged to employ when their projects are exempt from assessments and reviews throughout Québec, including the territory subject to Section 22. Those procedures relating to Cree communities should address the special status of involvement of the Cree, and outline what best practice measures are encouraged of proponents to account for this status.
- The MERN must provide very clear prescriptions of what the ministry expects of proponents regarding the clean-up, removal of equipment, and restoration of smaller-scale projects that do not have to develop formal rehabilitation and restoration plans. As a matter of principle, the MERN should outline what information and consultation activities should occur when activities have ceased on such project sites, and on when site clean-up activities are to ensue.

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<sup>7</sup> Note that the Section 22 assessment and review procedure is implemented by Chapter 2 of the EQA.

<sup>8</sup> Section 216 of the *Mining Act* is very clear in this regard. It stipulates that all equipment must be removed from a claim within the 30 days following its abandonment, revocation or expiry.

## Conclusion

The proposed draft policy is a step in the right direction. We support the MERN in its efforts to increase understanding of its role in relation to information and consultation with communities, as well as the ministry's expectations of mineral project proponents in such matters.

The JBACE has repeatedly stressed that the inhabitants of the Territory must benefit from a maximum of freely-available information, and opportunities to voice their concerns, relating to projects (small or large). We have espoused the benefits of implementing predictable information and consultation processes for many years; both for projects that are subjected to formal Section 22 environmental assessments and reviews and for those that are not.<sup>9</sup>

The comments offered in this brief are thus aimed at strengthening and clarifying the policy's objectives, scope and application, for the benefit of all parties involved. Given that the policy will apply throughout Québec, it will be important to align its prescriptions – relating to the roles and actions of the MERN as well those encouraged of project proponents – with applicable legislation and existing governance regimes throughout the province, including the James Bay Territory.

The final policy must be very clear with regards to why and how the ministry and proponents will engage with Aboriginal communities. Proponents of smaller and larger-scale mineral development projects need to know exactly what should be done and how best to do it, over the course project works and through to the cessation of activities. All the while, proponents must be provided with the necessary tools and background information to effectively engage with Aboriginal communities, and the communities themselves need to know what to expect.

We reiterate that the JBACE is mandated to advise governments on matters such as this. As such, the JBACE remains always available to collaborate further with the MERN on information and consultation tools specific to the James Bay Territory.

Finally, we are aware that the MERN is sensitive to the important link between the current initiative and the recent one on social acceptability. We concur and feel that the work on social acceptability helps illustrate why proponents need to exchange information and to consult communities on their projects. It is in the interest of the MERN and project proponents that this link be highlighted in the final policy.

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<sup>9</sup> See the JBACE website ([www.ccebj-jbace.ca](http://www.ccebj-jbace.ca)) for additional information regarding the JBACE's previous interventions on matters relating to public access to information and consultation in the Territory.