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Objet : Réponse au Projet de loi n° 46, Loi modifiant la Loi sur la conservation du patrimoine naturel et d'autres dispositions

Monsieur le Premier ministre et les autres membres de l'assemblée,

Ceci est une réponse de Kitigan Zibi Anishinabeg au sujet de l'imminent projet de loi 46.

Le 14 novembre 2019, le ministre de l'Environnement et de la Lutte contre les changements climatiques, Benoît Charrette, a déposé le projet de loi 46, Loi modifiant la Loi sur la conservation du patrimoine naturel et d'autres dispositions (ci-après le « projet de loi 46 »).

Le gouvernement du Québec, tout comme celui du Canada et des autres provinces, a l'obligation constitutionnelle de consulter les communautés autochtones lors ce que leurs droits ancestraux sont potentiellement atteint de près ou de loin. Afin que l'activité aie des résultats positifs, certains principes s'appliquent :

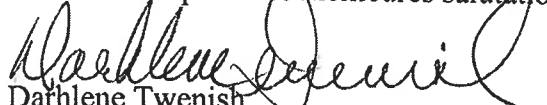
- Les deux parties doivent faire montre de bonne foi.
- Le gouvernement doit avoir l'intention de tenir compte réellement des préoccupations des communautés autochtones à mesure qu'elles sont exprimées ; c'est entre autres ce qui est attendu d'un comportement honorable.
- Le gouvernement doit accorder un délai raisonnable pour que la consultation soit adéquate.

Un projet de loi touchant la protection du territoire, l'accessibilité aux ressources et l'établissement de territoires protégés touche grandement nos droits ancestraux. Ainsi, le gouvernement se doit d'inclure les communautés autochtones de la province et doit leur laisser un délai raisonnable pour traiter d'un projet de loi si important.

Le texte qui suit a été produit par l'Institut de développement durable des Premières Nations du Québec et du Labrador en réponse à cette consultation. Kitigan Zibi Anishinabeg supporte les arguments soulevés et le présente comme réponse officielle.

Nous saisissons cette occasion pour renforcer le fait que vous opérez sur des terres ancestrales de Kitigan Zibi Anishinabeg qui ne sont pas sous traités et qui n'ont jamais été cédées. Jusqu'à ce que les gouvernements du Canada et du Québec règlent la revendication territoriale, cette consultation est non conforme, comme le rédige la décision Nation haïda c. Colombie-Britannique et la rivière Taku c. Colombie britannique.

Veillez accepter mes meilleures salutations.


Darlene Twenish
Conseiller pour Kitigan Zibi Anishinabeg

Commission des transports et de
l'environnement

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ANALYSIS

Bill 46 –

An Act to amend the Natural Heritage Conservation Act and other provisions

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Context

On November 14, 2019, the Minister of the Environment and the Fight against Climate Change, Benoît Charrette, tabled [Bill 46](#), *An Act to amend the Natural Heritage Conservation Act and other provisions* (hereafter “Bill 46”).

Before the fall 2020 parliamentary reopening, Bill 46 did not get beyond the stage of presentation to the National Assembly. It is currently the subject of special consultations from September 17 to 23, 2020. At this point, the Bill still has a long way to travel before coming into force and replacing the current legislation. During parliamentary debates, certain provisions could therefore be amended. The briefs submitted will be taken into account during these debates.

Earlier this year, the MELCC held two information sessions specific to First Nations: one in French on March 5, 2020 and one in English on July 17, 2020. From the outset, it should be pointed out that Bill 46 was not the subject of any upstream consultation with the Aboriginal communities, despite the direct impact that this Bill is likely to have on their rights and interests. We must therefore emphasize that once again, Aboriginal communities are excluded from the reflection, and therefore from the possibility of taking part in decisions that affect them. In particular, we can presume that the lack of prior discussion of the concept of Indigenous Protected and Conserved Areas (IPCAs) and its exclusion from the Bill, reflects the current government’s closure to efforts that may lead to greater First Nations self-determination. However, the government of Quebec has announced that one of the main objectives of the proposed amendments to the Bill is to more fully involve citizens and Aboriginal communities in the creation and management of protected areas. The government is also pushing forward to meet the expectations of actors involved in the processes of creating and managing protected areas. Several communities are already involved at various levels in protected area projects, whether in development, implementation or management. It should also be noted that the federal government has made significant funds available for the establishment of “Indigenous” protected areas via the Nature Fund. Coordination with the Quebec legislative framework is however necessary in order to carry out these initiatives.

It should be remembered that the establishment of protected areas without consulting First Nations has sometimes had dramatic consequences for communities that have been denied access to their ancestral lands to practice their traditional activities. In addition, the confidence of the First Nations has been shaken many times in the recent period as evidenced, for example, by the cancellation of caribou protection measures in favor of foresters. Although the Bill mentions that the Aboriginal communities must be consulted separately “when the circumstances so require”

and that they must be accommodated “when it is fitting to do so,” the Government of Quebec must ensure that the commitments made within the framework of this Bill are reflected in future initiatives.

Bill 46 has the potential to constitute an important lever for First Nations involved or wishing to become involved in the implementation, management, and even governance of protected areas in Quebec. It is therefore important to ensure that their rights and interests are adequately and sufficiently represented in the debates to come. This document therefore aims to identify the issues that could concern them.

General comments

Generally speaking, Bill 46 seems to represent a good opportunity to increase and accelerate the creation of protected areas in Quebec. Despite the absence of the concept of IPCAs, the proposed amendment to section 12 of the current Act would explicitly allow the Minister to delegate, by agreement, *“all or some of the powers assigned to the Minister under this Act or held by the Minister with regard to the management of an area that is under the Minister’s authority and that is covered by a conservation measure under this Act”* to an Aboriginal community. Although the notion of “delegation” of powers to First Nations may seem inadequate in view of their territorial rights, the involvement of First Nations in the management of protected areas is certainly a step forward.

Although Bill 46 proposes improvements to the current situation, some issues and reflections on its implementation remain unresolved. In addition, the initiatives resulting from Bill 46 will require alignment with those of the Government of Canada. Given the common targets of the two levels of government in terms of the protection of the terrestrial environment, freshwater and the marine environment, it would be beneficial for all to coordinate conservation efforts.

Specific comments on the intended legislative changes

I. Alignment with IUCN standards

With Bill 46, the Government of Quebec now plans to align itself with the international standards of the International Union for the Conservation of Nature (IUCN) to define the concept of “protected area” as well as that of “other effective area-based measures.” Although this change demonstrates the desire of the Government of Quebec to use a broader and more inclusive definition, it is our view that this alignment should be reflected more explicitly in the Bill. At no point is it mentioned that the Bill will rely fully on the *Guidelines for applying protected area management categories*, which would also include the six protected area management categories and the definition of the four protected areas governance types. However, alignment with the IUCN definitions must remain flexible and adapted to the specific context of Quebec.

- **RECOMMENDATION:** While rigorously relying on the IUCN guidelines, Quebec must retain a flexibility that will allow it to adapt to its specific context.

II. Indigenous Protected and Conserved Areas (IPCAs)

The absence of the concept of IPCAs is the main issue with Bill 46. There are several definitions of IPCAs, but the fundamental transversal principle aims at the conservation of Indigenous cultural values with regard to their close link with nature, in addition to the conservation of biodiversity.¹ The Indigenous Circle of Experts, for its part, defines three essential elements shared by IPCAs, regardless of their governance and management objectives: “They are Indigenous-led; they represent a long-term commitment to conservation; and they elevate Indigenous rights and responsibilities.”²

However, several visions of this concept are debated among the various environmental actors (would it be its own category of protected areas, or rather a form of management or governance that could apply to all categories of protected areas?). Without proposing a defined framework at this stage, there is consensus that this is a legislative tool that must absolutely be made available to First Nations communities in order to offer them the possibility of implementing their own vision of conservation and to manage the territories

¹ Kothari, et al., 2012. “Recognising and Supporting Territories and Areas Conserved By Indigenous Peoples And Local Communities.”

² The Indigenous Circle of Experts, 2018. “We Rise Together: Report and Recommendations.”



for this purpose. The incorporation of the concept of IPCAs into Bill 46 is therefore an essential opportunity, since the creation of “Indigenous” protected areas would then become a powerful tool for self-determination and the assertion of rights. It is also an opportunity for the government to take concrete action to contribute to reconciliation. In addition, the First Nations communities would thus be real partners in achieving conservation objectives.

The effectiveness of IPCAs has been demonstrated and the concept is increasingly being promoted in other provinces and territories in Canada, as well as around the world. IPCAs are of great interest to First Nations since they have a key role to play in determining management objectives and the governance structure, in the exercise of their right to self-determination. However, IPCAs should not represent a single model, but rather constitute a flexible tool in terms of management objectives and governance structure, which can thus be adapted according to the reality of each community or nation.

- **RECOMMENDATION:** Incorporate the concept of IPCAs into Bill 46 by providing a flexible tool that can be adapted to the different needs and objectives of Aboriginal communities. Establish the guidelines for this concept in concert with the Aboriginal communities.

III. The addition of category VI: the protected area with sustainable use

Bill 46 also proposes to add to the Quebec legislative framework the category of protected area “with sustainable use,” a concept which would already correspond to category VI of the international guidelines of the IUCN. As soon as the Bill was introduced, the Government of Quebec announced the possibility of registering Anticosti Island under this designation in order to ensure its protection, while carrying out certain “sustainable” economic activities.

It should be noted from the outset that there is no consensus on the definition of the concept of “sustainable use” among environmental stakeholders. For some, the possibility of carrying out so-called “sustainable” economic activities in a protected area constitutes a threat to conservation. Indeed, the establishment of category VI protected areas is concerning in that it could water down the concept of sustainable use to the benefit of industry, while making it possible to still look good by meeting the surface area objectives of protected areas. The government talks a lot about its “targets to hit” for protected area



size. It would be disastrous if this new category were to enable exploitation activities that go against the vision of communities or that undermine efforts to create new protected areas aimed at strict preservation of ecosystems. When developing the network of protected areas in Quebec, we must not lose sight of the fact that this network should ideally contain protected areas of various categories to ensure the best use of different management tools available. Thus, the increase in category VI protected areas should not come at the expense of other categories focused more on the strict preservation of ecosystems.

There is another line of thought, in which the category of “sustainable use” remains desirable from a conservation point of view and makes it possible to facilitate the establishment of protected areas by extending the concept to areas where there are certain forms of human activities. Alternatively, it is suggested that sustainably-used protected areas could also serve as “buffer zones” for more strictly protected areas, as part of the establishment of protected area networks. Moreover, for several communities, the addition of this category is not totally negative, because it would allow in particular forms of “sustainable” or community forestry (which would be closer to the concept of IPCAs, in a holistic approach to conservation). It could therefore be an opportunity for First Nations who wish to set up protected areas while carrying out certain forms of sustainable activities. However, it is not certain that Quebec’s vision of category VI will correspond to the visions of First Nations. In order to ensure greater objectivity in the interpretation of the concept of sustainable use, the governance of this type of protected area could at least be shared with Aboriginal or environmental groups.

Ultimately, although there is no consensus on the definition of the concept of “sustainable use,” it is clear that minimum guidelines should be established in the Bill, so that they can be the subject of in-depth debates and some consensus can be arrived at on what constitutes “sustainable use.”

- **RECOMMENDATION:** Establish minimum guidelines for the concept of “sustainable use” in the Bill.

IV. Delegation of power

Bill 46 also proposes an amendment to section 12 of the current law in order to explicitly allow the delegation of all or part of the powers of the Minister to an Aboriginal community



with regard to the management of an area covered by a conservation measure, which is *a priori* favorable.

In the current law, this delegation of power is already attributable to “*any natural person or legal person established in the public interest or for a private interest.*” However, this wording is likely to generate some confusion as to whether the power of the Minister can be delegated to an Aboriginal community.³ The wording proposed in Bill 46 is certainly positive in that it specifically includes “Aboriginal communities” as possible delegates, but can also cast doubts as to the legal form of the groups to which power can be delegated. It would therefore be appropriate to clarify the concept of “Aboriginal community.”

While this is an interesting step forward, it is not sufficient for several reasons, not the least of which is the inadequate principle of “delegating” power over ancestral and unceded lands. Delegation is also a paternalistic concept which means that the holder of the delegated power must fulfill objectives within a relatively rigid framework and be accountable to the ministry, since the government retains governance over the protected area and a decision-making power likely to affect its management. The delegation of power also relies on the negotiation of agreements, which tends to exacerbate inequalities between communities. Finally, these agreements are generally not accompanied by long-term funding, which can jeopardize the sustainability of the protected areas thus administered.

Finally, the addition of section 12.2 specifying that acts taken in the exercise of delegated power are not binding on the government raises concern. The government thus wishes to relinquish its responsibility without making a commitment to support the achievement of the conservation objectives. The government should remain responsible for the mandate it has given and how it delegates that power. Keep in mind that the delegation of power in connection with the management of a protected area can also be granted to individual persons or to private companies.

- **RECOMMENDATION:** Details on the terms and conditions governing the delegation of power should be developed jointly with First Nations.

³ The question of whether a Band Council constitutes a legal person governed by public law is the subject of contradictory case law (see in particular: *Bande indienne de Montana c. Canada*, 1997 CanLII 6380 (CF), [1998] 2 CF 3 and *Durepos c. Pakua Shipi Construction inc.*, 2006 QCCQ 6715 (CanLII)).

V. The procedure for the recognition of protected areas

Bill 46 will also change the process of recognition of protected areas, in particular by eliminating the preliminary step aimed at the granting of a temporary protection status.

In fact, the current law allows the establishment of “proposed” ecological reserves, aquatic reserves, biodiversity reserves and man-made landscapes. This procedure makes it possible to delimit the territory of a future protected area in order to immediately remove it from the possibility of certain industrial activities being carried out there while awaiting the advent of its permanent status. For “proposed” ecological, aquatic and biodiversity reserves, the law in force provides in particular that mining, gas and petroleum exploration, forest development activities, any production of energy on a commercial basis or any other activity identified in the conservation plan for the proposed area is prohibited.⁴ This mechanism thus guarantees some minimal protection during periods when the status is “temporary.” It should be mentioned that in practice, the proposed reserves are subjected to enormous delays before their permanent status is granted, delays which often go well beyond the maximum of six years provided for by law.

Although the acceleration of deadlines for the establishment of protected areas can only be welcomed, the approach the government wishes to take with Bill 46 raises concerns. Indeed, although imperfect, the current procedure for the establishment of temporary protection at least immediately protects the “proposed reserve” from industrial activities. By removing this preliminary step, can the government ensure that the granting of permanent protection status will be radically faster, or is there still a need for a temporary mechanism to avoid industrial development until the protected area is designated permanent? How the government plans to tackle this issue is not addressed at all in the regulations. It is well known that the cumbersome process needed to arrive at the designation of a permanent protected area does not necessarily result from the temporary protection procedure, but rather from the lack of communication and coordination within the various ministries involved. During information sessions specific to Aboriginal communities, the MELCC assured them that the temporary designation would be replaced by administrative agreements, but we do not have any more details on this subject.

- **RECOMMENDATION:** Ensure better coordination between the ministries in order to accelerate the processes of designation of protected areas. Provide in Bill 46 for a

⁴ For proposed man-made landscapes, the law does not provide for any restrictions other than the activities identified in the conservation plan (sec. 35 of the current Act).



temporary protection mechanism for “proposed” areas and impose a strict deadline for designating permanent status.

VI. The recognition of man-made landscapes

Man-made landscapes aim “to protect the biodiversity of an inhabited area, whether land or water, where the landscape and its natural components have been shaped, over time, by human activities in harmony with nature and have distinctive features the conservation of which depends to a large extent on the continuation of the practices that originally shaped them.”⁵ According to the terms used in this definition, it can undoubtedly be an interesting tool for communities that would like to get involved in the protection of such sites. However, Bill 46 seems to indicate that the application to have a man-made landscape recognized must be filed by an Aboriginal community AND the RCM (or metropolitan community) concerned. It appears incoherent that communities cannot submit an autonomous request for recognition of a man-made landscape. Having to be accompanied by an RCM is once again a compromise of the autonomy of Aboriginal communities and a perpetuation of a paternalistic attitude towards them. In addition, some communities, such as Kahnawake, are simply not part of an RCM.

Lastly, the sustainability of the conservation of man-made landscapes also largely depends on the funding associated with them, which is currently the main explanation for their failure in Quebec.

- **RECOMMENDATION:** Allow Aboriginal communities to submit a request for recognition of a man-made landscape independently. Provide long-term funding to ensure their implementation, but also their sustainability.

VII. Amending the protection status

The current law already allows the Minister to amend the boundaries of a land designated as a natural setting or to terminate the designation. This power is accompanied by the obligation to consult the “Native communities concerned, represented by their band council.”⁶ When the Minister exercises this power in such a way as to decrease the area of natural settings, the Minister must create new ones with the objective of “no net loss.”

⁵ Sec. 65, Bill 46.

⁶ Sec. 14, 18 and 18.1 of the current Act and of Bill 46.



These principles are repeated in Bill 46, but the Bill also contemplates granting a similar power to the government for protected areas on “*lands in the domain of the State.*”⁷ Indeed, the government could, “*if the public interest justifies it, assign any other protection status to a protected area, apply any other conservation measure to it, amend its boundaries or terminate its designation.*”⁸

In this case, a “public information” period shall be held,⁹ and “depending on the concerns raised” by “the groups to be consulted,” the Minister shall also hold “targeted consultations.”¹⁰ It should be noted that, unlike the wording concerning natural settings, these provisions relating to the power of the government to amend or terminate protected areas take great care not to expressly specify consultation with Aboriginal communities, but rather refer to “targeted consultation.” This formulation is irritating to say the least in that it dismisses the special constitutional status of Aboriginal rights by diluting them in with the interests that other groups might claim.

In addition, for both natural settings and protected areas, the amendment or termination of a status may be motivated by “public interest,”¹¹ which is always likely to generate concern. Indeed, past experiences have unfortunately shown that the interests of Aboriginal communities are often absent from the governments’ notions of the public interest. In addition, the public interest remains a largely discretionary ground for amending or terminating the protection of a territory.

We should also mention that section 41 of Bill 46 provides that if the government’s decision to amend or terminate a protected area has the effect of decreasing the total area of protected areas in Quebec, it “*must take other appropriate conservation measures to compensate for that decrease.*”¹² However, it should be ensured that this provision does not facilitate the relaxation of conservation objectives in protected areas.

⁷ Sec. 27, (amended by sec. 32) Bill 46.

⁸ Sec. 41, (amended by sec. 32) Bill 46.

⁹ Sec. 30, 41 and 42, (amended by sec. 32) Bill 46.

¹⁰ Sec. 33, 41 and 42, (amended by sec. 32) Bill 46.

¹¹ Sec. 41 (government) and 18(2) (minister), (amended by sec. 32) Bill 46.

¹² Sec. 41, (amended by sec. 32) Bill 46.



- **RECOMMENDATION:** Expressly specify that any designation of or amendment to a protected area must be the subject of adequate consultations with the Aboriginal communities concerned.

VIII. Minister's discretionary power

Several provisions of Bill 46 provide for granting the Minister wide discretion, which may give rise to concerns. The discretionary power of the Minister must be subject to some framing so that it is not exercised according to political opportunities and give rise to aberrations.

For example, an authorization from the Minister is required to carry out an activity in a natural setting, but the Minister may, "if the public interest justifies it," exempt an activity from this obligation.¹³ In addition, an activity that is already the subject of an authorization under the *Environment Quality Act* (EQA) is not subject to the obligation to obtain an authorization under the *Natural Heritage Conservation Act* (NHCA),¹⁴ which is already the case. Nevertheless, the EQA stipulates that the Minister "may" refuse to issue an authorization on the grounds that "*the project is to be carried out in an area entered in the register of protected areas [...] or in the register of other conservation measures.*"¹⁵ Once again, this decision is discretionary and there are few criteria governing the exercise of its power. In any event, any decision on the granting or the lifting of an area's protection must be made with the provision for adequate consultation and accommodation of Aboriginal communities.

- **RECOMMENDATION:** The use of discretion to authorize or exempt an activity from the requirement to obtain authorization should be subject to adequate consultation with the Aboriginal communities concerned.

¹³ Sec. 13.2, (amended by sec. 12) Bill 46.

¹⁴ Sec. 13.1 and 13.2, (amended by sec. 12) Bill 46

¹⁵ 31.0.3(3) *Environment Quality Act*