Mi'gmawei Mawiomi Secretariat

Brief to the Special consultations and public hearings on Bill 43, Mining Act Committee on Agriculture, Fisheries, Energy and Natural Resources,

National Assembly of Québec

October 1st, 2013

As the Executive Director and Nutewistoq (Spokesperson) of the Mi'gmawei Mawiomi, I have been closely following the introduction of a new *Mining Act* by the National Assembly under Bill 43 and we thank the Committee for offering us, the opportunity to appear before you today and to express the views and comments of the Mi'gmaq on Québec's new *Mining Act.*

The organization that I represent, the Mi'gmawei Mawiomi, was founded in 2000, upon the spirit and intent of the political accord signed by the leadership of the Mi'gmaq communities of Gesgapegiag, Gespeg and Listuguj in Gespe'gewa'gi, the seventh district of Mi'gmagi, the National territory of the Mi'gmaq Nation.

The mission of the Mi'gmawei Mawiomi is to uphold, reaffirm and respect the Treaty and Aboriginal rights and aspirations of our people by strengthening the Nation through the repatriation of our lands, resources and surrounding waters.

In October of 2007, the Mi'gmawei Mawiomi issued its *Nm'tginen Me'mnaq ejiglignmuetueg gis na naqtmueg*, a Statement of Claim to the Seventh District of of Mi'gmagi.

In our Statement of Claim, we reiterated that as signatories to a covenant chain of Peace and Friendship Treaties with the British Crown in the 18th century, we have Treaty Rights and have never abrogated, surrendered nor ceded our aboriginal rights and title to our lands, waters and resources.

This unique relationship that we have with Gespe'gewa'gi, makes us caretakers of our traditional lands and waters for all future generations, in order to fulfill the rights, obligations and the sacred instructions of our ancestors.

The vision statement of the Mi'gmawei Mawiomi is to build a strong and independent Mi'gmaq government based on a Constitution that promotes and protects the rights, freedoms and well being of the L'nug, our people.

As part of our mission, it is imperative that we voice our preoccupations with respect to any piece of legislation that may infringe on our rights and title, including the territorial integrity of our territory, Gespe'gewa'gi.

Accordingly, here are some of our specific preoccupations, comments and recommendations pertaining to Bill 43 the Mining Act:

1. Preamble:

In the fifth paragraph of the preamble of Bill 43, it is written: "*that it is necessary to promote development that is associated with Québec communities and integrated into their environment".*

Surprisingly, there are no specific mentions relating to the Aboriginal Communities to that same effect. Therefore, we are of the opinion that it would be appropriate to add an additional paragraph in the preamble of the proposed Act that specifically makes reference to the necessity of promoting a development that respects the existing aboriginal and treaty rights of the aboriginal peoples occupying the territory.

We must remember that in 1983, Québec was the first Canadian province to adopt principles that support the recognition of Aboriginal Nations and confirmed the necessity of establishing harmonious relations. Two years later, in 1985, the National Assembly adopted resolutions that officially recognized ten Aboriginal Nations and the Inuit Nation. Québec also recognized the right of Aboriginal Nations to their culture, language, traditions, as well as the right to hunt, fish, trap, and to participate in the management of wildlife and economic development.

In that same spirit, we believe that the addition of an additional paragraph in the preamble of Bill 43 would serve as a constant reminder to all the concerned actors, of the sacredness of a Nation - Nation relationship.

2. Chapter 1. Application and Interpretation:

Section 3 of Chapter 1 of the proposed Act reads as follows: *"This Act must be construed in a manner consistent with the obligation to consult Native communities. The Minister must consult Native communities separately, having regard to all the circumstances".*

The importance of consultation was highlighted by the Supreme Court of Canada (SCC) in the Haida (2004), Taku (2004) and Mikisew Cree (2005) decisions.[1] The SCC has highlighted that the Crown has a legal duty to consult when three elements are present:

- Contemplated Crown conduct, such as approval of pipeline permits, land disposals, or construction of a bridge;

[1] Haida Nation v. British Columbia (Minister of Forests), (2004) 3 S.C.R. 511 see also Taku River Tlingit First Nation v. Tulsequah Chief Mine Project, (2004) 3 S.C.R. 550 and Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), (2005) 3 S.C.R. 388

- Potential or established Aboriginal and Treaty rights recognized and affirmed under section 35 of the Constitution Act 1982, such as hunting or fishing rights; and
- Impact contrary or unfavorable to the Aboriginal interests, such as a contemplated action or decision that could change where hunting rights can be exercised.

In some instances, where the potential impact may be more severe, a more comprehensive consultation may be required. This could include providing an opportunity for Aboriginal groups to make submissions to the Minister of Natural Resources, to participate in the decision-making process and providing Aboriginal group(s) with written reasons to demonstrate how their concerns were considered.

Therefore, it is obsolete to make reference to the Crown's obligation to consult Native communities if there is no mention of the obligation to accommodate the Aboriginal communities.

As it was written in the *Interim Guide for Consulting the Aboriginal Communities* updated in 2008 by *The Québec Government: "If, following consultation, it appears that the Crown must modify its project, the Supreme Court of Canada considers that an obligation to accommodate may arise. The Supreme Court points out that the Aboriginal communities do not have a veto right, but the interests of both parties must be weighed, and there must be give and take. In the accommodation process there is no duty to agree, but each party must make good faith efforts to understand the other party's concerns and move to address them, as the case may be".*

Considering that there seems to be some institutional resistance when it comes to trying to define accommodation in a context of resource development that may conflict with Aboriginal rights and interests, we hereby propose a definition for your consideration, which should be added to the list of definitions included in Bill 43.

"**Accommodation"** means Crown efforts to address the interests and concerns of the aboriginals in a tangible and meaningful manner; accommodation will be determined on a case by case basis and may include, but is not limited to: revenue sharing; land or resource allocation; environmental protection measures; compensation; aboriginal participation in decisions regarding land and resource use; changes in policy, or other proactive measures to be discussed among the Parties.

Accordingly, we recommend that section 3 of Chapter 1 be amended in order to include the concept of accommodation in order for the Mining Act to be construed

in a manner that is consistent with the obligation to consult and where appropriate, accommodate Native communities.

Moreover, Québec should also follow the lead taken by the Ontario Government, when it became the first province in Canada to adopt mining legislation that introduced a dispute resolution process for Aboriginal-related consultation issues.

As an example, we provide you with the pertinent paragraph taken from the Ontario Mining Act.

170.1 The Minister may designate one or more individuals, or a body, to hear and consider disputes arising under this Act relating to consultation with Aboriginal communities, Aboriginal or treaty rights or to the assertion of Aboriginal or treaty rights, including disputes that may occur,

(a) in relation to decisions on the issue, amendment, renewal or cancellation of, or the terms and conditions imposed on, an exploration permit issued under section ….;[2]

3. Division III: Claim

Section 33 (1) of the Act, reads*: " No person may, without the Minister's prior authorization, prospect on or stake a parcel of land*

(1) situated in an Indian reserve; or

Again, the drafting of Bill 43 completely ignores the principles laid out by the Supreme Court of Canada pertaining to Aboriginal Title and more specifically, the Supreme Court of Canada's seminal decision in Delgamuukw.[3] Since that decision was rendered, we all know and understand that Aboriginal Title cannot be extinguished anywhere in Canada by provincial legislation or by provincial land grant or other form of land tenure; nor can Aboriginal title be extinguished by express federal legislation since the promulgation of s. 35 of the *Constitution Act*, 1982.[4]

Delgamuukw also confirmed that Aboriginal title comprises a constitutionally protected, exclusive right and interest to the land itself, which includes a distinct

[2] Ontario Mining Act, R.S.O. 1990. c. M.14
[3] Delgamuukw v. British Columbia, (1997) 3 S.C.R. 1010
[4] Delgamuukw, supra footnote 1, at paras. 172-186; see also R. v. Sparrow, (1990) 1 S.C.R. 1075, and R. V. Van der Peet, (1996) 2 S.C.R. 507, at para. 28.

economic component, and that practice-based rights such has hunting, fishing or trapping may coexist with Aboriginal title rights.[5]

In October 2007, the Mi'gmaq of Gespe'gewa'gi respectfully submitted to the Government of Québec, the *Nm'tginen: Me'mnaq Ejiglignmuetueg Gis Na Naqtmueg,* a Statement of Claim to the Seventh District of the Mi'gmaq national territory of Mi'gmagi.

As stated by the Supreme Court of Canada, proof of title is not required before the Crown will be held to the strict obligation of proactively addressing the Aboriginal right being asserted.[6]

In line with these directives, we recommend that section 33 (1) of the Act, be amended in order to include a reference to Aboriginal title so that no person may, without the Minister's prior authorization, prospect on or stake a parcel of land situated in an Indian reserve, or a parcel of land where Aboriginal title has been recognized or claimed.

The same type of drafting should also be integrated to section 74, where it is said: *"If the claim is in the territory of a local municipality, the claim holder must also inform the municipality of the work to be conducted, at least 90 days before the work is to begin".*

When there is an Aboriginal title claim, the Crown cannot just run its business as usual and pretend that there is no existing claim on the contemplated territory for mining exploration or exploitation. The Crown has the obligation to act honourably, and that duty is triggered before the proof of s. 35 rights, as it was explained by the Supreme Court in *Haida:*

"Honourable negotiation implies a duty to consult with Aboriginal claimants and conclude an honourable agreement reflecting the claimants' inherent rights. But proving rights may take time, sometimes a very long time. In the meantime, how are the interests under discussion to be treated? Underlying this question is the need to reconcile prior Aboriginal occupation of the land with the reality of Crown sovereignty. Is the Crown, under the aegis of its asserted sovereignty, entitled to use the resources at issue as it chooses, pending proof and resolution of the Aboriginal claim? Or must it adjust its conduct to reflect the as yet unresolved rights claimed by the Aboriginal claimants?

"The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of

[5] Delgamuukw, supra, at paras. 133-139 and 166.
[6] Haida and Taku, supra, footnote 1.

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".[7]

5. Division V: Expropriation and Compensation

In the third paragraph of section 198 of the Act, it is stated: *Cemeteries within the meaning of the Act respecting Roman Catholic cemetery companies, cemeteries established under the Non-Catholic Cemeteries Act and Native cemeteries are exempt from expropriation.*

We believe that Bill 43 should go further on this issue by providing for the withdrawal of sites of Aboriginal cultural significance from claim staking on Crown lands to protect them from mineral activities. The Mining Act should also provide for the restriction of surface access on parts of existing claims where sites of Aboriginal cultural significance have been identified.

6. Impact and benefits agreements

Under Bill 43, all documents and information obtained from rights holders for the purposes of the *Mining Act* would be considered public: s. 163(1).

Bill 43 would also allow the Ministry to request "any document and any information relating to the mining project": s. 102(6). In any case, the holder of a mining lease or concession will be obliged to "send the Minister any agreement entered into with a community": s. 123(2).

Moreover, "any agreement entered into between a holder of a mining lease or a mining concession and a community" would be disclosed to the public: s. 163(3). The only restriction would be for documents needed for the administration of justice or law enforcement: s. 163(4).

Most commonly, companies will engage in IBA negotiations to secure Aboriginal support for their project and to reduce potential legal and business risks to their project. In order to do so, respectful relationship building is essential and will often

make the difference between a successful negotiation process and a failure to reach an agreement.

During the negotiations, the parties will have to disclose full information about the project, in order to reach IBA's that will usually address key points, such as:

- Protection of sacred aboriginal grounds;
- funding for aboriginal environmental monitoring;
- individual compensation for disruption of hunting, fishing, and other traditional pursuits;
- create an aboriginal compensation fund;
- provide preferential employment opportunities to the first nation;
- provide preferential contract opportunities to the first nation;
- provide workforce development fund;

Consequently, in order to address these particular issues, the parties will have to share sensitive information and to do so, will put in place confidentiality agreements.

From the Mi'gmaq perspective IBA's are not only a contract, but a step towards greater recognition of Aboriginal and Treaty rights and the reassertion of Aboriginal forms of governance over resource development in Mi'gmaq territory.

Therefore, we, as Mi'gmaq *section 35 of the Constitution Act, 1982*, rights holders in Gespe'gewa'gi, do not consider ourselves as communities as expressed under Bill 43 and more specifically under Sections: 123 (2), 163 (3), 163 (4) of the Act.

Therefore, we can understand when a CRÉ agrees with the fact that the Minister can make public any agreement entered into between the holder of a mining lease or a mining concession and a community, given that the mineral substance are there for the benefit of the collective stakeholders in the province of Québec, and in consequence must be transparent and be the object of a social consensus.

However, when agreements are negotiated between the holder of a mining lease or a mining concession and an Aboriginal group that hold constitutionally protected rights, it is clear in our minds at least, that the nature of the interests in the land is sacred and the particularities included in the IBA's will have been negotiated by distinct political societies, separated from others, capable of managing its own affairs and governing itself on its lands.

<u>We therefore recommend that Section 1 of Bill 43 be amended in order to specify that for the application and interpretation of the Mining Act, the word communities does not include the Aboriginal communities.</u>

Conclusion:

In June of 2012, The Mi'gmaq of Gespe'gewa'gi, the Government of Canada and le Gouvernement du Québec, ratified the Niganiljoga'taqan (Framework Agreement), with the objective of renewing the tripartite discussions initiated in 2001 and to establish a framework for negotiations that is intended to result in a final agreement.

The subject matters identified in the Framework Agreement include, among others, natural resources and economic measures.

Even though all parties have committed to negotiate in good faith in developing a relationship of reconciliation and co-existence, we are cognizant of the fact that negotiations are slow and costly and a successful outcome for all parties involved is often uncertain.

In the meantime, aboriginal communities require the benefits of economic activity in order to bridge the gap between the status quo and a final agreement.

Unfortunately, the need for interim results voiced by Aboriginal groups involved in negotiation processes are generally rejected by the federal and provincial negotiators who are working under strict, conventional and limited mandates.

In our own tripartite process, whenever the Mi'gmaq would express the need to access economic opportunities related to resource development in Gespe'gewa'gi, we would have to listen to our counterparts describe how they needed to obtain legal certainty pertaining to Mi'gmaq rights or keep peace in the valley.

These conservative attitudes convinced us that it was time for the Mi'gmaq to proactively develop a strategy in order to access resource development in Gespe'gewa'gi. Consequently, on April 11, 2009 the Mi'gmawei Mawiomi Secretariat engaged in negotiations with the federal and provincial governments and the private sector to secure a wind farm for our communities with the goal to improve the well being of our people.

Since that time, the Mi'gmawei Mawiomi consistently promoted its vision of a Mi'gmaq wind initiative that would foster Mi'gmaq economic and social development, improve services and build capacity amongst the three Mi'gmaq communities.

On May 10, 2013, the Québec government announced its acceptance of the Mi'gmaq wind initiative allowing for the development of a 150 MW wind farm in Gespe'gewa'gi.

This unique project located in a wind rich area is seen as a pivotal economic development initiative for the region and demonstrates that the Mi'gmaq can actively contribute to the economy of the Gaspésie. It also shows the ability of the Mi'gmaq communities of Gesgapegiag, Gespeg and Listuguj, to think strategically and remain steadfast under a common vision, serious organized and able to be partners in economic development projects throughout Gespe'gewa'gi.

For the Mi'gmaq, the development of this historical wind project is seen as a first step towards Mi'gmaq self-determination. As we have repeated continuously, we have Aboriginal and Treaty rights in our territory and we are here to stay. Mining companies, as well as any other non-renewable exploitation industries will come and go, but the Aboriginal Nations will always be present.

For the above noted reasons, the Québec Government should take the opportunity provided by the new Mining Act and confirm in section 16 of Bill 43 and confirm that the purpose of this Act is to promote mineral prospecting, exploration and development in keeping with the principle of sustainable development, while ensuring that Quebecers **and** **the aboriginal nations** get a fair share of the wealth generated by mineral resources and taking into account other possible uses of the territory.

From there and as it has been the case in some of the other provinces in this country, the Québec government could put some emphasis on negotiating resource development agreements, benefit-sharing agreements and economic measures agreements with the Aboriginal nations. These types of agreements would increase aboriginal involvement in the economic life of the province, while at the same time, balancing all parties' interests until a final agreement is concluded.

There are different ways that the Québec Government could use to increase its revenues stemming from mining activities, in order to make sure that **Quebecers and Aboriginal Nations get their fair share of the wealth generated by mineral resources.**

To that effect, we invite the Québec Government to reconsider the recommendations that were put forward by Mister Yvan Allaire, Professor emeritus at UQAM, in his February 2013 report: *Le Québec et ses resources naturelles: Comment en tirer le meilleur parti;* and more specifically, recommendation number 4, which consist in imposing a royalty on what is extracted at the actual market value (ad valorem), which would guarantee revenues anytime a mine makes profits.

Lets face it, when there is no more money to be made, the mining companies will pack up and move away as they always did, however, our people, Quebecers and Aboriginals, are here to stay!

Sincerely yours,

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