



Comité consultatif pour l'environnement de la Baie James  
James Bay Advisory Committee on the Environment  
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Brief of the James Bay Advisory Committee on the Environment  
(JBACE)

***Toward Mine Development that Respects the  
Environment and the Population***

Presented to the Committee on Agriculture, Fisheries, Energy and  
Natural Resources of the National Assembly for the hearings on  
Bill 79

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## Introduction

The James Bay Advisory Committee on the Environment (JBACE) was established to "review and oversee the administration and management of the environmental and social protection regime established" by Section 22 of the James Bay and Northern Québec Agreement (JBNQA, 22.3.1). It is a tripartite organization involving the Cree Regional Authority, the Government of Québec and the Government of Canada. The governments must consult the JBACE on the development of measures that have an impact on the physical or social environments of the James Bay Crees. The role of the JBACE includes:

- advising the governments on the formulation of laws;
- studying existing laws and regulations and making proposals to ensure they are compatible with the environmental and social protection regime provided in Section 22; and
- overseeing application of the assessment and review procedure for projects having an impact on the physical and social environment, as provided in Section 22.

Environmental protection is central to the mandate and activities of the JBACE, which is of the opinion that Bill 79 does not go far enough in overseeing mineral exploration and actual mining. Even though improvements have been made, Bill 79 could have been more ambitious with a view to aligning mine development with sustainable development principles, as proposed by the Auditor General.<sup>1</sup> For example, the Bill should be more demanding with respect to monitoring of restoration plans and should provide greater control over mineral exploration. More specifically, the JBACE is concerned about four matters that deserve consideration because they will have direct impacts on the environment and the population of James Bay:

- Consultation of the Cree communities;
- Oversight of mineral exploration;
- Maintenance of a register of mining activities;
- Restoration plans and environmental monitoring.

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<sup>1</sup> *Report of the Auditor General of Québec to the National Assembly for 2008-2009*. Chapter 2 concerns "Government interventions in the mining sector" by the MRNF.

# 1- Public consultation on the James Bay territory

## *Public consultation*

Section 33 of Bill 79 provides for "a public consultation in the region concerned, in the manner prescribed by regulation" prior to application for a mining lease. We understand that this section does not apply to mining projects in the territory covered by the James Bay and Northern Québec Agreement (JBNQA), because Schedule 1 of Section 22 specifies that all major mining operations<sup>2</sup> are automatically subject to the environmental and social impact assessment and review procedure. Even so, the JBACE would like to point out that: a) these consultations must not substitute for the governments' duty to consult; and b) proponents should be encouraged to consult the populations, upstream from the environmental assessment procedure, within an established framework.

The JBACE is of the opinion that it is in the interest of proponents and governments alike to consult the population when projects are at the development stage. Public consultation, generally speaking, complies with the principles of the environmental and social protection regime and of the JBNQA (see Appendix 1). The MRNF or proponents may therefore consult the population about mine development or any other type of development in James Bay, provided that: a) they ensure "status and involvement for the Cree people over and above that provided for... the general public" (ch. 22.2.2); and b) such consultation does not replace the assessment and review procedure under Section 22. It should be noted that public consultation is a basic sustainable development principle that is recognized in Québec.<sup>3</sup>

In the event that a proponent takes the initiative of consulting the population of James Bay upstream from the environmental procedure, the JBACE is of the opinion that such an initiative should not be conducted only by the proponents, but under the aegis of a third party, to ensure that the process has maximum transparency, integrity and credibility (in other words, to give the participants the assurance that their comments and concerns will be taken into

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<sup>2</sup> The consultations provided in section 33 of Bill 79 will take place only for mining projects that are not automatically subject to environmental assessment, as defined in section 2(p) of the Regulation respecting environmental impact assessment and review (EQA, R.9): "the opening and operation of: a metals mine or an asbestos mine that has a production capacity of 7,000 metric tons or more per day; a uranium mine; any other mine that has a production capacity of 500 metric tons or more per day." In the case of James Bay, all major mining operations are automatically subject to the environmental and social impact assessment and review procedure provided in Section 22 of the JBNQA.

<sup>3</sup> Report of the Auditor General, p. 18.

consideration). These public consultations should also take place according to the guiding principles of Section 22, notably in partnership with the local authorities and with more significant participation for the Crees.

Lastly, we would like to point out that the consultations provided in section 33 of Bill 79 concern only mines in operation or about to go into operation, in other words only a very small portion of overall mining activities. The consultations should also cover advanced mineral exploration projects and mine development. We shall return to this point later.

### ***Notice to the owner***

The purpose of section 17<sup>4</sup> of Bill 79 is to oblige new claim holders to inform owners or lessees of their claims. The JBACE is of the opinion that tallymen and other users of the territory should be systematically notified of mining activities that take place in the territory. We would like to point out that the James Bay territory is organized according to a traditional system of traplines, which is recognized by the JBNQA (para. 24.3.25). This system provides for the designation of a tallyman who supervises the wildlife harvest in each trapline, hence the importance placed on protection of the environment, including wildlife resources, in the JBNQA (para. 22. 2.4).

It would be relevant for the proponents to specifically notify the tallymen as well as the users of the territory when they are concerned by projects, as soon as the projects are developed. Currently notification of the tallymen by mining companies that they are present in the territory is a matter of goodwill. We understand that the government informally encourages mining companies to engage in a dialogue with Native communities as early as possible in the mineral exploration process.<sup>5</sup> We believe, however, that such consultation should be formal and should be stipulated in Bill 79. Such consultation should also involve Cree institutions that can assist the tallymen with an administrative process for which they may not be adequately equipped.

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<sup>4</sup> "As well, with respect to lands granted, alienated or leased by the State for purposes other than mining purposes or lands under an exclusive lease to mine surface mineral substances, the claim holder must notify the owner, lessee or holder of the exclusive lease to mine surface mineral substances of the claim obtained within 60 days following its registration, in the manner prescribed by regulation." (section 17, Bill 79).

<sup>5</sup> Lucie Ste-Croix, Direction générale de la gestion du milieu minier, MRNF, personal communication, December 15, 2009.

### **Recommendations of the JBACE regarding public consultations**

- Public consultations pursuant to sections 33 and 36 of Bill 79 must not substitute for the governments' obligation to hold consultations.
- Proponents should be encouraged to consult the population, upstream from the environmental assessment process, within an established framework. In all cases, the JBACE recommends that such consultations be conducted under the aegis of a third party according to the guiding principles set out in Section 22 of the JBNQA (see Appendix 1).
- The JBACE also recommends that tallymen be referred to in section 17 of Bill 79 so that they are informed systematically of work taking place in their hunting, fishing and trapping territories.

## **2- Oversight of mineral exploration**

In several sections of Bill 79 (8, 64, 83.6, 83.7, 100, 127 to 139, 142 and 207, among others), the expressions "seabed exploration licences," "seabed mining leases" and "exploration licences for surface mineral substances" have been removed. We understand that a claim, in itself, gives the exclusive right to explore for all mineral substances belonging to the State.

We would like to point out that numerous mineral exploration activities are taking place in the territory. In Québec alone, mineral exploration and development represents \$450 million a year.<sup>6</sup> In its report on the review of Schedules 1 and 2 of Section 22 of the JBNQA,<sup>7</sup> the JBACE considered the matter of mineral exploration. The resulting report concluded that some mineral exploration activities, including drilling, stripping and subsurface exploration, can have negative impacts on the environment. Indeed, environmental impacts can vary considerably with the five phases of exploration:

1. Initial prospecting;
2. Minor sampling;
3. Excavation to rocky substratum;
4. More substantial sampling, sometimes using blasting; and
5. If positive results are obtained, the first stage of mining consisting of drilling and extraction of substantial amounts of ore.<sup>8</sup>

<sup>6</sup> Source: Rapport sur les activités d'exploration minière 2008, MRNF, p. iii.

<sup>7</sup> JBACE 2008 report: *Review of Schedules 1 and 2 of the Environmental and Social Protection Regime: Lists of Development Projects Subject to and Exempt from Impact Assessment and Review.*

<sup>8</sup> *Ibid.*, p. 28.

The report also states that "Although mineral exploration is generally exempted from [environmental and social] impact assessment, it still creates problems because the distinctions between mineral exploration and actual mining are sometimes vague."<sup>9</sup> It is therefore important to provide a better definition, at the outset, of the impacts arising from mineral exploration.

For the time being, mining title involves very few obligations and they concern the nature of the work to be done in the field. The JBACE is of the opinion that certain mineral exploration activities that are referred to as "advanced" or that involve mine development<sup>10</sup> should require a licence or, at the minimum, the obligations related to mining title should be strengthened to include a restoration plan and public consultations. We do not want to add to the administrative requirements, but it is essential to be able to determine how the physical and social environments are affected by such projects and how to protect them: according to the JBACE, the ultimate goal is to be able to establish a comprehensive and fair portrait of the operations taking place at the same time in the territory to be able to measure their cumulative impacts.

The JBACE recognizes that the government is making an effort in this area by requiring restoration plans for certain mineral exploration activities, as defined in section 108<sup>11</sup> of the

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<sup>9</sup> *Ibid.*, p. 29.

<sup>10</sup> In the Mining Duties Act, mine development is defined as "all work subsequent to mineral deposit evaluation work, the purpose of which is to bring into production an orebody situated in Québec, if the work consists in: (1) open pit stripping of overburden and waste rock above an orebody; (2) shaft sinking, the excavation of ramps, drifts and raises and other related mine development works, except work performed to make such openings in a mineralized zone, or giving access to a mineralized zone if the total length of the opening is less than 20 metres" (section 1).

<sup>11</sup> This section of the Regulations stipulates that:

"The following constitute the exploration work referred to in subparagraph 1 of the first paragraph of section 232.1 of the Act:

- (1) any excavation for the purpose of mining exploration, involving one of the following:
  - (a) the movement of 10 000 m<sup>3</sup> or more of unconsolidated deposits;
  - (b) rock stripping or the movement of unconsolidated deposits covering an area of 10 000 m<sup>2</sup> or more;
  - (c) *the extraction or movement of mineral substances for geological or geochemical sampling in amounts of 500 metric tons or more;*
- (2) any work carried out in respect of material deposited in accumulation areas, in particular either of the following:
  - (a) drill-holes;
  - (b) the excavation, movement or sampling of accumulated material or cover material;
- (3) any underground work related to mining exploration, in particular one of the following:
  - (a) the sinking of access ramps and shafts, and any other excavation;
  - (b) the dewatering of mine shafts and keeping of excavations dry;
  - (c) the restoration of worksites or other underground works;
  - (d) the hoisting of mineral substances to the surface;
- (4) the preparation of accumulation areas for the activities referred to in subparagraph 1, 2 or 3.

Regulation respecting mineral substances other than petroleum, natural gas and brine. Even so, the thresholds defined in the Regulation are not restrictive enough in terms of protection of ecosystems, and some are not specific enough, such as those concerning "drill-holes." The JBACE recommends that the thresholds for mineral exploration be better defined and also revised downwards so as to ensure more effective oversight of activities that are potentially harmful from the environmental and social standpoints.

We have noted that legislation in other Canadian jurisdictions is far more stringent in terms of assessment of mineral exploration projects (Yukon and the Northwest Territories, among others). For example, in the Mackenzie Valley in the Northwest Territories, joint environmental management committees have been created, and all development projects are, at the minimum, subject to a brief assessment. The criteria to be respected are clear and make it possible to take into account the concerns of the people living in the territory. It should be noted that these procedures in no way prevent mine development from taking place.

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For the purposes of subparagraph 1, "unconsolidated deposits" means any mineral substance covering the bedrock, except those deposited in accumulation areas.

### **Example of the Mackenzie Valley, Northwest Territories**

In the case of the Mackenzie Valley, all aspects of mining activities are subject to environmental assessment with only a few exceptions. The environmental impact assessment procedure comprises three stages: screening, assessment and review. Not all projects are subject to all three stages: those included in the exemption list do not even require screening and, for the others, the stages preceding project approval depend on decisions by members of the designated committees.

The relevant clauses of the *Nunavut Land Claims Agreement* refer to the *Territorial Land Use Regulations – Northwest Territories and Nunavut (C.R.C., c. 1524)*, with respect to criteria and thresholds defining whether a project is subject to or exempt from the assessment procedure. Here are several aspects of mineral exploration that require a licence:

- The use of more than 50 kg of explosives in any 30-day period;
- The use, except on a public road or trail maintained wholly or in part by federal funds, of any vehicle that is more than 5 tonnes or that exerts pressure on the ground in excess of 35 k pa;
- The use of any power-driven machinery for earth drilling purposes whose operating weight exceeds 500 kg, excluding the weight of drill rods or stems, bits, pumps and other ancillary equipment.
- The establishment of any campsite that is to be used by more than two persons for more than 100 man-days.
- The establishment of any petroleum fuel storage facility that has a capacity of more than 4,000 litres, or the use of a single container for the storage of petroleum fuel that has a capacity of more than 2,000 litres.

It is essential to bear in mind that mining activities, particularly when they are "advanced," involve other developments in proximity. In addition to activity on the site itself, roads must be built, camps set up, fuel stored, etc. A combination of activities is therefore involved, and the existing mechanisms do not make it possible to take their cumulative effects into account. Thus the government and the Cree Regional Authority should be better informed of mining activities in general so as to:

- oversee such activities more effectively;
- perform adequate environmental monitoring; and
- obtain an overview of the projects taking place in the territory simultaneously and to measure their cumulative impacts.



### **Recommendations of the JBACE concerning mineral exploration**

- Mineral exploration activities should be characterized as a function of the damage they are likely to cause to the physical and social environments.
- The thresholds for mineral exploration should be better defined and reviewed downward to oversee such activities more effectively.
- All mineral exploration activities that are harmful should include restoration plans in addition to being subject to public consultation.

### **3- Register of mining activities**

The revision of the Act has provided clarification regarding the development of a register of mining activities (sections 13 and 14). Such a register already exists, but it is rather difficult for the layman to access it. Moreover, because the register contains only registrations related to mining leases, the JBACE is of the opinion that it is impossible to obtain an overview of the activities taking place simultaneously in the territory. The register should be easy to access and should contain information on mining titles, mineral exploration and actual mining (proposed mines as well as active mines) in addition to restoration plans and environmental monitoring reports and public consultation reports, as the case may be. All this information should be included in the same register, which should be easily accessible to citizens.

Even though most of the risks of mineral exploration impacts may be minor when taken individually, it is reasonable to think that a significant proliferation of this type of activity may have a multiplier effect. As already stated, however, it is impossible to assess the cumulative nature of such impacts if there is no public register documenting the nature, location, scope and duration of planned work. At present the information publicly available is limited to:

- The MNR's map of mining titles (which currently shows that almost all properties are staked);
- The list of authorization certificates issued for exploration projects (containing only the project name, the proponent's name, a description consisting of about 10 words and the place concerned);

- Reports on mineral exploration activities in Québec, published annually by the MRNF (in other words, after the work begins or even on completion); and
- Technical reports and press releases issued by exploration companies.

These sources of information are incomplete (e.g. authorization certificates and press releases) or become available only after the work has been carried out (e.g. MRNF reports). The JBACE therefore recommends that a single register be made available and that it include all information on mining activities and that it be accessible and easy to consult.

#### **Recommendation of the JBACE concerning the register of mining activities**

The register should be easy to access and should include information on mining titles, mineral exploration activities, mine operation activities (proposed mines and operating mines) and, as the case may be, restoration plans, environmental monitoring reports for each mining activity and public consultation reports.

## **4- Restoration plans and environmental monitoring**

According to several sections (216, 232.1<sup>12</sup> and 232.4, 232.10), companies must submit rehabilitation plans for the land affected before work is carried out. The idea of having to restore sites is strengthened in Bill 79. This change could prove to be positive with respect to environmental protection but may be of little consequence if clear provisions are not included for monitoring of restoration plans and environmental inspection.<sup>13</sup>

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<sup>12</sup> "A person described in any of subparagraphs 2 to 4 of the first paragraph of section 232.1 must furnish a guarantee covering the anticipated cost of (1) the rehabilitation and restoration of accumulation areas; (2) geotechnical soil stabilization; (3) stabilizing mine openings and surface pillars; (4) water treatment; and (5) roadwork." (Section 232.1) "[...] If a water treatment plant is constructed for mining purposes, the amount of the guarantee is reduced by the cost of construction." "232.4.2. A person described in subparagraph 1 of the first paragraph of section 232.1 must furnish the guarantee determined in accordance with section 232.4 to the Minister before the work begins."

<sup>13</sup> The administrative measures for monitoring of restoration plans are not found in the Mining Act or Bill 79 but in an action plan submitted to the Sustainable Development Commissioner as a result of his report on government interventions in the mining sector. It should be noted that the Auditor General slammed the MRNF for its lack of interest in resource conservation and that more effective monitoring would be positive in this area.

Sections 50 to 54 inclusive of Bill 79 are intended to increase significantly the requirements regarding restoration plans, which will now be related to payment of financial guarantees. Moreover, section 64 of Bill 79 introduces a substantial penalty in the event of failure to respect the payment schedule for the financial guarantee, namely 10% of the total amount of the guarantee.

Generally speaking, the Bill increases the costs and guarantees (section 232.4) that the companies must pay the government. It will allow the State to collect 50% of the total cost of restoration during the first years of the work, and the remainder within five years. The fines for contravention of the Act (sections 314 to 319) have been increased and are described in greater detail. The JBACE is of the opinion, however, that it is necessary first to reinforce the incentives designed to limit, and even avoid, damage. Punitive measures could then be added.

With respect to environmental monitoring, the JBACE would like to reiterate several recommendations already made by the Auditor General in his report on government interventions in the mining sector (for 2008-2009). Among other things, it is necessary to do the following:

- ensure a shorter period between submission of a restoration plan and its approval (currently the period is about three years);
- ensure that the financial guarantees are paid according to a known schedule and that the schedule is respected; and
- properly document inspection activities and ensure that related reports are prepared in a systematic way (according to an analytical grid and pre-established criteria) and that they are made public.<sup>14</sup>

In general, the JBACE is of the opinion that the design and approval of restoration plans must be based on a transparent, public process. First, restoration plans should be made public and submitted for public consultation. They should then be placed in the register of mining activities, as already suggested. Lastly, the stakeholders, including the tallymen, as the case may be, should be involved not only in the development of restoration plans but also in the monitoring committees stipulated in project authorization certificates and sections 33 and 36 of Bill 79.

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<sup>14</sup> *Ibid.*, p. 4

We would like to emphasize that, as a result of its mandate to oversee the environmental and social protection regime (Section 22 of the JBNQA), the JBACE should be consulted regarding the design criteria of restoration plans for projects that concerned the James Bay territory. This regime, which is unique to the territory, provides that equal importance be placed on the social and environmental aspects, and the JBACE would like to ensure that social considerations are taken into account adequately in restoration plans.

Lastly, the JBACE is concerned that the proponents themselves must carry out environmental monitoring, which may affect the integrity of the process. Even in cases where the MDDEP or the MRNF can provide at least partial oversight of the data from environmental monitoring, the JBACE is of the opinion that: a) the reports submitted by the proponents, as well as the audits done by the government departments, should be made public; and b) environmental monitoring should be carried out under the aegis of a third party to increase its credibility.

**Recommendations of the JBACE concerning restoration plans and environmental monitoring**

- Restoration plans and monitoring reports should be properly documented and made public. The reports should be included in the register of mining activities.
- Restoration plans should be subject to public consultation.
- Stakeholders should be involved not only in the development of restoration plans but also in the monitoring committees stipulated by project authorization certificates, including tallymen, as the case may be.
- Under its mandate to oversee environmental and social protection, the JBACE would like to be consulted on the design criteria of restoration plans for projects involving the James Bay territory.
- Environmental monitoring reports submitted by proponents, as well as audits done by government departments, should be made public, and environmental monitoring should be carried out under the aegis of a third party to increase its credibility.

## Conclusion

The JBACE is of the opinion that the government must significantly increase its vigilance over mining activities. Bill 79 must include provisions to that end, especially as it comes at a time when the government is preparing to accelerate mine development in northern Québec pursuant to the Northern Plan. In the current context, in which protection of ecosystems has become vital, and in the specific context of James Bay, where the traditional activities and health of the users of the territory depend directly on environment quality, rigorous oversight of activities likely to damage the territory is essential.

It is important to point out that, for the time being, there are no land-use plans or development plans for James Bay. It is therefore necessary to ensure that mining activities are not at odds with the traditional activities carried on by the Cree populations and that they respect the guiding principles of the environmental and social protection regime established by Section 22 of the JBNQA.

The JBACE's recommendations are intended to improve Bill 79 so as to provide better oversight of mining activities and to ensure it is compatible with the environmental and social protection regime of the JBNQA.

### ❖ **Recommendations regarding public consultations**

- Public consultations pursuant to sections 33 and 36 of Bill 79 must not substitute for the governments' obligation to hold consultations.
- Proponents should be encouraged to consult the population, upstream from the environmental assessment process, within an established framework. In all cases, the JBACE recommends that such consultations be conducted under the aegis of a third party according to the guiding principles set out in Section 22 of the JBNQA
- The JBACE also recommends that tallymen be referred to in section 17 of Bill 79 so that they are informed systematically of work taking place in their hunting, fishing and trapping territories.

### ❖ **Recommendations regarding mineral exploration**

- Mineral exploration activities should be characterized as a function of the damage they are likely to cause to the physical and social environments.
- The thresholds for mineral exploration should be better defined and reviewed downward to oversee such activities more effectively.

- All mineral exploration activities that are harmful should include restoration plans in addition to being subject to public consultation.

❖ **Recommendations regarding the register of mining activities**

- The register should be easy to access and should include information on mining titles, mineral exploration activities, mine operation activities (proposed mines and operating mines) and, as the case may be, restoration plans, environmental monitoring reports for each mining activity and public consultation reports.

❖ **Recommendations regarding restoration plans and environmental monitoring**

- Restoration plans and monitoring reports should be properly document and made public. The reports should be included in the register of mining activities.
- Restoration plans should be subject to public consultation.
- Stakeholders should be involved not only in the development of restoration plans but also in the monitoring committees stipulated by project authorization certificates, including tallymen, as necessary.
- Under its mandate to oversee environmental and social protection, the JBACE would like to be consulted on the design criteria of restoration plans for projects involving the James Bay territory.
- Environmental monitoring reports submitted by proponents, as well as audits done by government departments, should be made public, and environmental monitoring should be carried out under the aegis of a third party to increase its credibility.

## **Appendix 1: Guiding principles of Section 22 of the JBNQA**

22.2.4 The responsible governments and the agencies created in virtue of this Section shall within the limits of their respective jurisdictions or functions as the case may be give due consideration to the following guiding principles:

- a) The protection of the hunting, fishing and trapping rights of Native people in the Territory, and their other rights in Category I lands, with respect to developmental activity affecting the Territory;
- b) The environmental and social protection regime with respect to minimizing the impacts on Native people by developmental activity affecting the Territory;
- c) The protection of Native people, societies, communities, economies, with respect to developmental activity affecting the Territory;
- d) The protection of wildlife resources, physical and biotic environment, and ecological systems in the Territory with respect to developmental activity affecting the Territory;
- e) The rights and guarantees of the Native people within Category II established by and in accordance with section 24 until such land is developed;
- f) The involvement of the Cree people in the application of this regime;
- g) The rights and interests of non-Native people, whatever they may be;
- h) The right to develop by persons acting lawfully in the Territory;
- i) The minimizing of negative environmental and social impacts of development on Native people and on Native communities by reasonable means with special reference to those measures proposed or recommended by the impact assessment and review procedure.