



Comité consultatif pour l'environnement de la Baie James
James Bay Advisory Committee on the Environment
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**Recommendations by the James Bay
Advisory Committee on the Environment
concerning the Revision of the
Canadian Environmental Assessment Act
(*CEA Act*)**

October 4th 2011

Introduction & Preamble

The *James Bay and Northern Quebec Agreement* (hereafter ‘JBNQA’ or ‘the Agreement’), signed in 1975, is a treaty protected by Section 35 of the *Constitution Act* of 1982. Pursuant to the signing of the JBNQA, 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 and in accordance with [Section 22]*” (Par. 22.3.1). It is composed of representatives of three governments – the government of Canada, the government of Québec and the Cree Regional Authority – and, most notably, operates with the following mandate to:

- ▶ Advise these governments concerning the adoption of policies, laws and regulations or measures having environmental or social consequences on the James Bay Territory (Par. 22.3.24);
- ▶ Be consulted by these governments regarding issues related to the implementation of the environmental and social protection regime and land use measures on the territory (Par. 22.3.28);
- ▶ Examine and make pertinent recommendations regarding the environmental and social protection regime for the Territory (Par. 22.3.27). Please refer to [Appendix I](#) for a map of the Territory.

The JBACE also oversees the administration and management of the environmental and social protection regime established by the Agreement, which provides for a special status and involvement for the Cree people in the assessment of development projects in the Territory under the Agreement.

In accordance with its afore-mentioned responsibilities, this JBACE brief serves to provide recommendations regarding the revision of the *Canadian Environmental Assessment Act* (hereafter ‘CEA Act’ or ‘the Act’).

It must be noted that the impetus for this brief is for the dual need to protect the Territory and its inhabitants, the rights and representative processes of the Cree people as stipulated under Section 22 and 24 of the JBNQA, while also improving the environmental and social impact assessment and review procedures.

Furthermore, the importance and necessity of the current exercise cannot be overstated. Since the signing of the Agreement in 1975, the James Bay Territory has been subject to considerable biophysical and social change. The Territory’s appreciable natural resources are now, more than ever, the object of increasing industrial and government development pressure.

Major JBACE Concerns

1) The Special Status of the Crees

The JBNQA outlines the procedure of environmental and social impact assessment and review under Section 22, as well as fundamental Cree rights and protections under Sections 22 and 24. The special status conferred to the Cree, which greatly surpass those normally afforded to the public, represents a fundamental principle of the Agreement (Par. 22.2.2c). This special status affords Cree participation and representation in all aspects of the environmental and social impact assessment and review process. Although the Government of Canada is committed to “...*promote communication and cooperation between responsible authorities and Aboriginal peoples with respect to environmental assessment,*” and to “...*engage in consultation with aboriginal peoples on policy issues related to [the] Act*” (Art. 4(1)b3 and Art. 62h), the Act does not afford special status regarding Cree inclusion – in contrast to what is already afforded under the Agreement.

The JBACE must stress that Section 22 of the Agreement assures Cree participation and representation on all of the committees and at each stage of the environmental and social impact assessment and review procedure. A table illustrating some of these rights and guarantees is available in [Appendix II](#).

Clearly, the CEA Act does not provide the same guarantee and special status of Cree involvement as does the Agreement, whether regarding policy formulation or in the actual assessments or reviews carried out under the procedure.

Accordingly, the present revision of the CEA Act must include amendments that recognize these essential and existent elements of the Agreement’s environmental and social impact assessment and review procedure in order to guarantee active and significant Cree participation “...*over and above that provided for in procedures involving the general public*” (Par. 22.2.2c).

2) Clarity regarding application of the CEA Act in the Territory

The JBACE wishes to reiterate three pivotal contextual points:

Point #1: Guiding Principles of Section 22

The environmental and social protection regime outlined in Section 22 offers an adapted and effective mechanism to protect the Cree way of life in the face of development, and to ensure Cree rights and guarantees outlined in the Agreement. The nine guiding principles of Section 22 are as follows, per Par. 22.2.4:

- a) *“The protection of the hunting, fishing and trapping rights of Native people in the Territory, and their other rights on 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 the 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.”*

The CEA Act was not enacted with these same principles at heart and so does not explicitly address all of Section 22’s core principles.

As a result, the JBACE recommends the amendment of the CEA Act to recognize the guiding principles of Section 22.

Point #2: Harvesting Rights and the Link to Section 22’s Environmental and Social Impact Assessment and Review Procedure

Section 22 of the Agreement, in accordance with its guiding principles, recognizes that wildlife harvesting¹ is squarely at the center of Cree culture and its environmental and social impact assessment and review procedure is designed to protect the rights and guarantees related this activity (see [Point #1](#), above).

It is important to highlight these rights and guarantees, given their fundamental importance for the Cree, and their consequential consideration in Section 22’s environmental and social impact assessment and review procedure.

The hunting fishing and trapping regime applied in the James Bay Territory and the rights and guarantees afforded to the Cree,² as outlined in Section 24 of the Agreement and which are in

¹ Harvesting includes hunting, fishing and trapping activities (Par. 24.1.13).

² For the purposes of the current brief, the JBACE mentions ‘Cree Rights & Guarantees’ but recognizes that Section 24 applies to all eligible Native persons, party to the Agreement, and defined as such per the provisions of Schedule IV from Section 24 of the Agreement (modified pursuant to Complementary Agreement N° 1).

turn linked to Section 22's environmental and social protection regime per Par. 24.11.1, are outlined in [Appendix III](#).

The JBACE must reiterate that Section 22's environmental and social impact assessment and review procedure is designed to encompass these rights and guarantees, and that these rights and guarantees cannot be amended without the consent of all three signatory parties involved in the application of Section 22 (Par. 22.7.10).

Here again, the CEA Act was not enacted with these specific issues at heart and so does not explicitly address these rights and guarantees which are, in contrast, fundamental considerations at the core of Section 22's assessment and review procedure.

Consequently, the JBACE recommends an amendment of the CEA Act to explicitly address these rights and guarantees as applied in the Territory.

Point #3: Coordination

Section 22 outlines the environmental and social impact assessment and review procedures for projects affecting the Territory in light of their respective natures, either provincial, federal, or pertaining to Cree Category I lands. Moreover, the CEA Act is also currently in application on the Territory³ in concurrence with the procedures outlined in Section 22 of the Agreement, despite the ambiguities and uncertainties that this situation creates.

The JBACE respectfully acknowledges the duties and responsibilities of federal authorities under the Act, but stresses the inconveniences resulting from multiple assessment or review, namely increased costs, possible delays, apprehension and confusion amongst proponents and stakeholders alike, and the potential for contradictory recommendations for the same project.

Thus, the JBACE is of the opinion that in the interest of ensuring an efficient, timely, and systematic assessment and review process, development projects must ideally be the object of one environmental and social impact assessment or review.

The streamlining of the assessment and review process, when multiple procedures occur in the Territory, is both requisite and possible via existent coordination mechanisms:

- The JBACE acknowledges that the CEA Act provides four coordination mechanisms – namely, 'Cooperation' (Section 12), 'Delegation' (Section 17), 'Joint Panel Review' (Sections 40 to 42), and 'Substitution' (Sections 43 to 45); and,
- Paragraph 22.6.7 in Section 22 of the JBNQA, affords the possibility of combining the two impact review bodies, provincial and federal, for review of projects that involve both provincial and federal jurisdictions.

³ This reality was reiterated by the recent Supreme Court ruling in the *Québec (Attorney General) v. Moses* case - SCC 17 [2010] 1 S.C.R. 557.

Here, the JBACE recommends the inclusion of an amendment in the CEA Act that explicitly outlines the systematic coordination protocol(s) for one streamlined assessment or review when the Act and Section 22's assessment and review procedures occur in concert in the Territory. At the least, such an amendment should cover situations where both federal procedures (the CEA Act and Section 22's federal procedure) are triggered simultaneously.

However and as alluded to previously, the coordinated application of assessment and review procedures must afford due recognition of Section 22's guiding principles – including Cree rights and guarantees, and the special status of participation and representation of the Cree.

Recommendations for the Revision and Amendment of the CEA Act

Section 22 of the Agreement offers a culturally adapted environmental and social protection regime for the Cree that ensures the rights and protections as outlined in the Agreement. This same section's environmental and social impact assessment and review procedure is a key element which covers a myriad of issues: protection of Cree traditional land tenure and resource allocation, harvesting rights and guarantees, the environment, ecosystems, wildlife resources, society, communities and economies. This reality is manifest in the special status afforded to the Cree via their involvement and implication throughout all facets of the environmental and social impact assessment and review procedure, and in the guiding principles of the environmental and social protection regime.

The CEA Act is based on rules of application, purposes, and institutions that are quite different from those set out in Section 22 of the JBNQA. As a result, the CEA Act does not address several fundamental elements outlined in the Agreement and must be amended accordingly in order to ensure congruency, particularly when Section 22's assessment and review procedure and the CEA Act are triggered in the Territory at the same time.

For these reasons, the JBACE recommends that the following amendments to the CEA Act:

1. An amendment that recognizes Section 22's special status of involvement and participation of the Cree via representation and participation “...*over and above that provided for in procedures involving the general public*” (Par. 22.2.2c), in policy formulation, application of the regime, or in the actual assessments carried out under the CEA Act's environmental assessment procedure.
2. An amendment that acknowledges the guiding principles of Section 22's environmental and social protection regime.
3. An amendment that addresses Cree harvesting rights and guarantees as outlined in the Agreement.
4. An amendment that explicitly outlines the systematic coordination protocol(s) for one streamlined assessment or review when the Act and Section 22's assessment and review procedure occur in concert in the Territory; or, at the least, when both federal procedures are triggered.

These amendments would serve several important purposes:

- They would consolidate the ‘special status’ of the Cree per Section 22 and the responsibilities of federal authorities, operating under the CEA Act, in this regard;
- They would allow for an increasingly streamlined process, favouring one assessment or review per development or, at the least, when both federal procedures (the CEA Act and Section 22’s federal procedure) are triggered simultaneously, with well-defined roles and responsibilities for all of the federal actors; and,
- When viewed in the context of the Territory outlined by the JBNQA, they would provide a firm foundation and reference for future amendments of the CEA Act.

Final Remarks

It is important to note that aside from the *James Bay and Northern Quebec Native Claims Settlement Act* of 1977, which gives effect to and declares valid the JBNQA in a general sense, Canada has not passed specific legislation to implement Section 22 in particular, despite the brief mention of such legislation in paragraph 22.7.10 of the JBNQA.

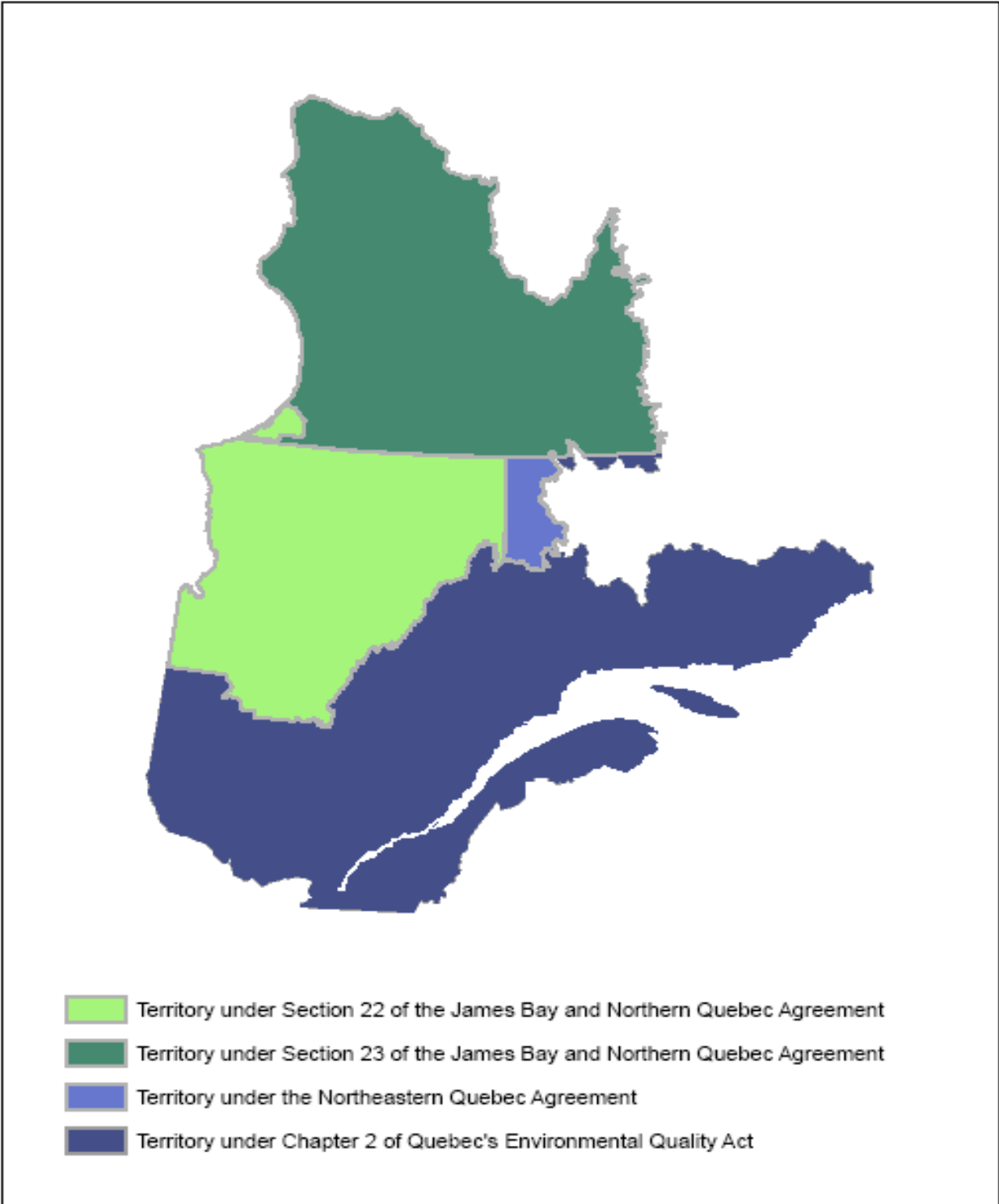
As such, in the event that the amendments to the CEA Act recommended in this brief are not adopted, the JBACE recommends the enactment of separate federal legislation to ensure consistency with Section 22’s environmental and social impact assessment and review procedure, as is stipulated in Par. 22.2.3 of the Agreement. The JBACE holds that such separate legislation is feasible, and that the province of Québec’s *Environmental Quality Act*⁴ serves as a provincial example thereof.

Regardless, the JBACE must again reiterate that amendments to the CEA Act or separate federal legislation must clearly address the following:

- Section 22’s special status and involvement and participation of the Cree via representation and active participation;
- The guiding principles of Section 22’s environmental and social protection regime;
- Cree harvesting rights and guarantees as outlined in the Agreement; and,
- The procedural modalities of the assessment and review procedures on the James Bay Territory when the Section 22 assessment and review procedure and that under the CEA Act occur in tandem.

⁴ Québec’s *Environmental Quality Act* was enacted in 1972 and amended in 1978 to recognize Section 22’s environmental and social impact assessment and review procedure.

Appendix I – Map of the Territory



Appendix II – Examples of Cree Participation and Representation

		Assessment and Review Procedure per Section 22 of the JBNQA
A. Decision-making and jurisdiction on lands set aside exclusively for the Cree as defined in the Agreement (i.e. Category I lands)		<p><i>“In the case of proposed development in Category I [lands], the Cree Local Government Administrator [is] responsible for the protection of the environment.”⁵</i></p> <p><i>“The local government shall have in Category I [lands] the by-law powers set forth in Section 9 and 10.”⁶</i></p> <p><i>“All developments and activities in category I lands shall have to meet all applicable provincial and federal environmental regulations and all applicable local government environmental and social land use regulations.”⁷</i></p>
B. First Nation representation on the assessment and review committees, panels or boards		Cree representatives sit on the Evaluating Committee (COMEV) and the permanent review committees (COMEX, COFEX-South), thereby guaranteeing Cree participation and representation at all times and through all phases of the process.
C. Assessment and review process	Scoping and Guidelines	E.g. At the scoping and screening stages, the environmental and social issues are identified and parameters are formulated with active and significant Cree participation.
		E.g. Development of the promoter’s guidelines are formulated with active and significant Cree participation.
	Review Phase	E.g. Environmental and social issues or impacts are evaluated by permanent review committees, which include Cree representatives.
		E.g. Recommendations are formulated by permanent review committees, which include Cree representatives.

⁵ See Par. 22.1.1iii

However, per the *New Relationship Between the Government of Canada and the Cree of Eeyou Istchee* of 2008, this has been updated to read:

“...in the case of proposed development in Category I [lands], the Administrator responsible for the protection of the environment is designated by the Cree Native Party” (Section 10.2).

This definition is further supported by Complementary Agreement N° 20 to the JBNQA, signed in the same year by federal, provincial and Cree representative. It states:

“...in the case of proposed development in Category I, the Administrator designated by the Cree Regional Authority” (p. 2).

Lastly, the *Cree-Naskapi (of Québec) Act* (CNQA) was also amended by Bill C-28 to include Pars. 62.01 – 62.06 of the CNQA so as to give effect to these jurisdictional and decision-making provisions regarding the CRA.

⁶ See Par. 22.4.1

⁷ See Par. 22.4.2.

Appendix III – Cree Harvesting Rights and Guarantees⁸ per Section 24⁹

Cree Rights & Guarantees	Section 24 Paragraph(s)
The sole and exclusive right to harvest (hunt, fish and trap any species of wild fauna).	24.3.1, 24.3.3 & 24.3.19
Right to harvest at all times of the year without prior administrative authorization, and in all of the Territory, with a minimum of control or regulations applied to them.	24.3, 24.3.10, 24.3.18 & 24.4.30
Crees’ harvesting activities are subject to the Principle of Conservation (they may not harvest species requiring complete protection to ensure their continued existence or that of a population).	24.2.1; 24.3.2
Crees’ harvesting activities are subject to limitations to ensure public safety (no harvesting within non-Native settlements; possible restrictions on harvesting methods and equipment).	24.3.5, 24.4.7, 24.3.9, 24.3.12, 24.3.14
Right to personal and community use and to the exchange and sale of harvests between Cree communities and between members of a Cree community or communities.	24.3.11a & 24.3.11c
Right to possess and transport the products of harvesting activity.	24.3.15
Right to commerce and trade in all harvest-related by-products.	24.3.16
The exclusive right to trap in the Territory, including the right to trap for commercial purposes.	24.3.19
Exclusive right to establish and operate, within Cat. I & II lands, commercial fisheries related to the species reserved to the Crees	24.3.26
Exclusive right to hunt for commercial purposes in designated areas where Crees have harvesting rights the species listed in Schedule 7 of Complementary Agreement # 12.	24.3A
Exclusive right to keep in captivity or practice the husbandry of the species listed in Schedule 8 of Complementary Agreement # 12	24.3A
Priority of Cree harvesting – whereby, in the event of scarcity or rarity of harvestable species, priority must be afforded to Cree harvesters in light of non-Native interests (e.g. sport hunting and fishing).	24.6.2 & 24.6.3
Certain species of mammals, fish and birds are reserved for the exclusive use of the Crees.	24.7.1 & Schedule 2 of Section 24

⁸ For the purposes of the current brief, the JBACE mentions ‘Cree Rights & Guarantees’ but recognizes that Section 24 applies to all eligible Native persons, party to the Agreement, and defined as such per the provisions of Schedule IV from Section 24 of the Agreement (modified pursuant to Complementary Agreement N° 1).

⁹ These harvesting rights and guarantees are directly linked to Section 22’s environmental and social protection regime (see Par. 24.11.1).

<p>The Crees have the exclusive right to hunt and fish within Category I & II lands within the Cree area of interest.</p> <p>Control is exercised over the number of non-Natives permitted to hunt and fish in Category III lands and over the places therein and times where they may hunt and fish with a view to giving effect to the principle of conservation and the rights and guarantees in favour of the Cree s established by and in accordance with the harvesting regime.</p>	<p>24.8.2</p> <p>24.8.6</p>
<p>Outfitting, being considered as a principal means of controlling non-Native hunting and fishing activity above the 50th parallel, and the Crees have a right of first refusal to operate as outfitters in Category III lands for a period of 30 years.</p>	<p>24.8.7 & 24.9.3</p>