



Comité consultatif pour l'environnement de la Baie James
James Bay Advisory Committee on the Environment
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The *Livre Vert* on the modernization of the authorization regime of the *Environment Quality Act* (CQLR c. Q-2)

JBACE commentary presented to the
Committee on Transportation and the Environment of the *Assemblée nationale*

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Introduction

The James Bay Advisory Committee on the Environment (JBACE), established under Section 22 of the James Bay and Northern Québec Agreement (JBNQA), oversees the administration and management of the Section 22 environmental and social protection regime. As the preferential and official forum of governments, the JBACE provides advice regarding the formulation of laws and regulations that may affect the environmental and social protection regime.¹

In accordance with its mandate, the JBACE is strongly involved in many issues raised in the *Livre Vert*. While the latter does not propose changes to the JBNQA environmental and social assessment and review procedure, proposed changes to the authorization system will impact and/or overlap with the Section 22 regime. Therefore, the JBACE wishes to express a number of comments, and recommendations, on the following three issues related to the *Livre Vert*: 1) Strategic Environmental Assessments; 2) changes to the environmental authorization system and finally 3) access to information, transparency and participation.

The JBACE comments pertain solely to the provisions of the *Livre Vert* that affect the Section 22 environmental and social protection regime. We refrain from commenting on the provisions in the *Livre Vert* that pertain to the environmental assessment and review procedure applicable in southern Québec.

Strategic Environmental Assessment (SEA)

The JBACE fully supports the intentions outlined in the *Livre Vert* relating to the inclusion of SEA in the text of the *Environment Quality Act* (hereafter, the 'Act'). We concur that SEAs can significantly improve planning initiatives given that they are a means of rigorously and credibly assessing planning alternatives and options upstream of development projects. Their utility is further accentuated if they are conducted transparently and if the data and findings of the SEAs are made publicly-available. Based on the reflections and discussions of the JBACE on the subject over the last ten years, we strongly believe that the integration of SEAs within the planning process can hasten the selection of the most advantageous options for land use planning and sectoral development initiatives.

In 2010, the JBACE recommended the use of SEA as a vehicle for sustainable development and strategic planning in the context of the Plan Nord. At the time, the JBACE strongly recommended that the Government conduct an SEA on the Plan Nord's transportation sector. The JBACE held that such an SEA would be especially relevant, because all of the developments proposed under the Plan Nord would rely on the implementation of a transportation network. Moreover, the development of the transportation network would 'open up' the Territory with possible impacts on the Crees' wildlife harvesting rights.

SEAs may be applied to large scale sectoral or territorial development policies, plans or programmes, may involve province-wide issues, and may target plans or policies that would apply to both the southern parts of the province and the Territory covered by Section 22 of the JBNQA. For instance, the recent inquiry on the issues related to uranium development is a fair example of initiatives that require the involvement of the Cree people while being applied to the whole of Quebec. We must thus point out that any SEA framework adopted through the Act should include the guiding principles of the environmental and social protection regime set out in Section 22.

¹ See paragraph 22.3.24 of the JBNQA relating the JBACE's mandate. Note that the Section 22 environmental and social protection regime also sets out a unique environmental assessment and review procedure, among other things.

The regime applicable to the James Bay Territory is subject to a unique set of nine guiding principles.² These principles were decidedly innovative at the time of their adoption in 1975, establishing a foundation for the protection of Cree society and of the environment, in light of development potential and the impacts of that development on the Cree people. These principles are as apt today as they were then, and we believe that important links can be made between the Section 22 guiding principles and the principles of sustainable development as outlined in the *Sustainable Development Act*.

Therefore, to the first question raised on the subject in the *Livre Vert* – “*Est-il pertinent que le Québec se dote d’un encadrement législatif pour les évaluations environnementales stratégiques ou devrions-nous plutôt privilégier une politique qui établirait un cadre administratif mais sans portée légale?*” – we express the view that while supporting the proposal for a legal framework, the latter would require due considerations and provisions for including the principles, the regime and the institutions of the Section 22 JBNQA regime. We discuss this matter further in expressing recommendations below.

Types of SEAs

SEAs, as they have been applied elsewhere, have shown their capacity to provide useful orientations and insights to assist strategic planning initiatives, while not replacing the planning process itself. Therefore, to the second question posed on the subject in the *Livre Vert* – “*Quels genres de stratégies, de plans ou de programmes gouvernementaux pourraient être visés par une ÉES?*” – the JBACE recommends that all territorial or regional resource development plans, program, and policies (PPPs) and strategies be subject to SEA. For instance, SEAs should be conducted for the Plan Nord and its components, as well as on all regional and municipal land use planning initiatives. The revised Act should also include provisions for the conduct of SEAs that focus on PPPs and strategies relating to specific development sectors (e.g. energy policy, mineral development strategy). A case in point is the conservation of the endangered woodland caribou and the extensive planning of the forestry road network.

The JBACE has repeatedly expressed the need to account for cumulative effects of past, current and future development projects. We hold that the assessment of cumulative effects at regional or landscape scales is the most desirable course of action. We recommend that cumulative effects be considered during SEAs on strategic planning initiatives. In so doing, development options can be assessed in light of cumulative effects – among other things – upstream from the tabling of individual development projects. This may also assist in the equitable treatment of proponents and in preventing the fragmenting of development projects. We are also of the opinion that issues related to climate change will be better addressed within the scope of SEAs of PPPs.

Beyond the types of SEA, the Committee is very concerned about the length and cost of recently-completed SEAs such as the ones on hydrocarbon and shale gas development. These have required several months to years to complete with budgets ranging to several thousands to millions of dollars. We do not believe that these previous experiences can be considered viable models. The JBACE is well aware that SEAs conducted in Europe (where they are mandatory for a number of specified sectors) and elsewhere, notably in many developing countries as requested by multilateral funding agencies, are conducted in a matter of weeks to a few months with modest budgets. The Government must thus focus on a process for SEA that is both cost and time-efficient. Systematic integration of SEAs through provisions of the revised Act should also help avoid ongoing crisis modes when facing decisions regarding forms of development.

² See paragraph 22.2.4 of the JBNQA for the guiding principles of Section 22.

Regulatory framework

We suggest that an independent institution should be established and devoted to the conduct or oversight of all SEAs. This institution should be light, inter-ministerial, involve representatives from northern communities, and provide flexible adaptations of SEA to various contexts. The institution should be able to recommend that alternative forms of public consultation be used in northern contexts with the assistance of existent bodies.

Based on the JBACE's recent experience with the uranium inquiry, any strategic-type of assessment must give due regard for already-existing institutions who may greatly assist in successful and meaningful participation of all stakeholders. Because SEAs will have scopes that will bear on both southern and northern parts of Québec, we believe that a distinct regulatory framework for SEA must be able to encompass the various assessment regimes of Québec and duly respect the attribution of local and regional governments, and organizations involved in environmental and social assessment. To be clear, the JBACE should assist whichever institution will be charged to carry out or oversee SEAs that are conducted in the James Bay Territory, or that involve stakeholders active therein, given its mandate to oversee the Territory's unique environmental and social protection regime.³

It may be useful to recall one of the most important provisions of Section 22 of the JBNQA in matters of public consultation: any consultation process must ensure that the Crees are consulted above and beyond what is provided for the public in general. In order to ensure the will and intent of the JBNQA, specific committees, such as the Evaluating Committee (COMEV) and Provincial Review Committee (COMEX), have been instituted with quasi-parity of Cree representatives. These committees have both experience and authority to carry public consultations. Consequently, we do not believe that SEA should be *exclusively* and automatically carried out by a single institution such as the BAPE.

As a result, flexibility must indeed be stressed in matters relating to logistics and public participation during the conduct of SEAs. Any SEAs that include public participation activities in the James Bay Territory must also respect the tenets of the JBNQA.

Link with the Ministère de l'Énergie et des Ressources naturelles (MERN) initiative on social acceptability

The JBACE is keenly aware of the importance of social acceptability in matters relating to the planning of development sectors and projects. We insist that the Government make tangible efforts to link the present initiative to revise the Act with the parallel MERN initiative concerning discussion tables on social acceptability. We are of the opinion that both issues are intimately linked and should complement each other for mutual benefit

For example, we feel that any SEA undertaken to assess a particular development sector with sustainable development in mind, must, by definition, consider the social impacts related to that sector; including elements related to the social acceptability of individual projects within that sector.

³ The participation of the JBACE during the inquiry on uranium facilitated its completion in a manner that accounted for the guiding principles of the Section 22 regime and for the Cree traditional way of life.

Recommendations on SEA

1. The JBACE strongly supports the intentions outlined in the *Livre Vert* relating to the inclusion of SEA in the text of the Act. All territorial, regional resource or sectoral development plans, program, and policies (PPPs) and strategies or initiatives should be subject to SEA. SEAs must also account for inter-community and trans-boundary issues, and must also include due consideration of cumulative effects.
2. While supporting the proposal, we insist that any legal or regulatory framework related to SEA must require due considerations for including the principles, the regime, and the institutions of Section 22 of the JBNQA.
3. The SEA process must be both cost and time efficient.
4. An independent institution should be established and devoted to the conduct or oversight of all SEAs. That institution should be light, inter-ministerial, involve representatives of northern communities, and provide flexible adaptations of SEA to various contexts.
5. The JBACE should assist whichever institution will be charged to carry out or oversee SEAs that are conducted in the James Bay Territory, or that involve stakeholders active therein.

Changes to the authorization system for development projects (a risk-based and simplified system)

In principle, a revised Act must ensure coherence with the environmental and social protection regime of Section 22 of the JBNQA. This may entail applying adapted rules for the authorization of development projects in the Territory or affecting the Territory.

The JBACE has recent experience with statutory changes that adopt a risk-based approach.⁴ Furthermore, the Committee has recently issued several recommendations regarding the revision of the Schedules of Section 22 of the JBNQA (project lists) based on a ranking of potential impacts, a form of risk-based assessment. Therefore, the JBACE welcomes the pragmatic approach (Orientation 3 in the *Livre Vert*) for a risk-based screening of projects and their respective mode of assessment and authorization per Chapter 1 of the Act.

However, we plead for coherence. We understand that this revision will have significant repercussions on the assessment of projects which required what was formally known as an 'Article 22' ministerial authorization, applicable throughout the province and the Territory, with some projects that may become exempted, and some others which might be newly submitted to environmental assessment – the latter procedure being specific to southern Québec. While we acknowledge that some thresholds and assessments of risk levels may be specific to the northern physical, cultural and social environment, special efforts must be made towards coherence and harmonization.

We furthermore insist that the risk-assessment criteria and thresholds include due consideration of the capacities of the receiving areas, the Cree land tenure system, and a clear consideration of the cumulative effects of multiple developments in given areas. For instance, a small sand and gravel pit may be deemed a no-risk project while a large number of them in a limited or sensitive area or in a single trapline (Cree family hunting territory) might collectively pose a moderate to a major risk. Here, it must be noted that Section 22 of

⁴ Several federal initiatives have adopted this approach (e.g. the revision of the *Canadian Environmental Assessment Act*, the revision of the *Fisheries Act*, and the revision of the *Navigation Protection Act*).

the JBNQA includes the protection of the rights and guarantees of the Cree people set out in the hunting, fishing and trapping regime established in Section 24 of the JBNQA.⁵

Finally, the proposed changes raise some issues of Cree participation and public consultation. We are particularly concerned by projects that do not undergo a full assessment under the JBNQA regime; these projects will then be left entirely to the Government or the MDDELCC to decide whether or not they are negligible, low or moderate risk. In so doing, the Cree would not be consulted or advised. As a rule, there can be no loss of regulatory oversight and environmental protection for development projects. Risk assessment must give due consideration to social impacts and social acceptability of projects.

Recommendations on the changes to the authorization system

1. At the level of guiding principles, the JBACE recommends that coherence and harmonization with the regime in the James Bay Territory be sought in the present proposal to modify the authorisation system of projects.
2. The JBACE holds that all determinations of what constitutes a negligible, low, medium or high-risk northern project must be made on careful and documented evaluation of potential impacts and related issues (including social impacts), consideration of the capacities of the receiving areas, and a clear consideration of the cumulative effects of multiple developments in the receiving areas.
3. Risk assessment screening may require public inputs. Some consideration must be given to matters and forms of such consultation as applied in the context of Section 22 of the JBNQA; this includes due respect for the special status established thereunder for Cree participation, which implies consultation above and beyond what is provided for the public in general (paragraph 22.2.2c of the JBNQA).

Access to information, transparency, participation, and the responsibilities of the ministry and proponents

The JBACE applauds the intention to increase access to information and opportunities for public involvement via an online registry. Indeed, we hold that the transparency and credibility of decision-making processes are inherent principles of good governance, and that the public's access to information on projects, and participation in the decisions that may influence them, should be standard practice. We have also always been of the opinion that proponents should be encouraged to open a dialogue with the communities affected by their projects before formal environmental assessment procedures are triggered. And, we concur with the intentions to clarify the roles of the MDDELCC and other actors involved in the authorization system, and to establish a framework for restoration upon project closure or the cessation of activities.

However, much of what is proposed in the *Livre Vert* has already been espoused by the JBACE over the past 8 years. We have repeatedly stressed that the inhabitants of the Territory must also benefit from a maximum of freely-available information relating to projects (small or large). We thus refer you to our previous recommendations concerning a registry, information in English and Cree, information in plain or non-technical language and the preparation of guidance material.⁶

⁵ See paragraphs 22.2.2a-f, and 24.11.1 of the JBNQA.

⁶ See the JBACE website (www.ccebj-jbace.ca) for additional information regarding the JBACE's previous interventions on matters relating to public access to information in the Territory.

By extension, we feel that all information relating to SEAs and authorizations must also be public. Most importantly, all of the conditions fixed in the authorizations that relate to the environment, public health, impact mitigation and monitoring should be published.⁷ Local governments must be systematically notified of the information relating to SEAs and of the issuance of all authorizations. All the while, ease of navigation for online registries must be addressed and printed documents should also be made available for those without Internet access or who prefer such a format.

In addition, we note that the current authorization system does not include mechanisms to involve the public or to notify local governments. We are unaware of any current mechanism that accounts for Cree concerns and expectations regarding projects under authorization. Without such a mechanism, we feel that this situation will become problematic if small projects no longer require any authorization at all.

Finally, we support the intention to further internalise costs but hold that a portion of the fees should be linked with initiatives to increase public participatory activities in their receiving areas.

Recommendations on access to information, transparency, participation, and the responsibilities of the ministry and proponents⁸

1. A maximum of information on projects subject to authorizations, EAs, and SEAs must be public, including all prescribed conditions relating to the environment, public health, and restoration works.
2. A mechanism must be established to account for Cree concerns in the authorization of projects in the region covered by the JBNQA.
3. Local governments must be systematically notified of the information relating to SEAs and of the issuance of all authorizations.
4. Fees levied for project EAs and authorizations should be linked with initiatives to increase public participatory activities in the areas affected by those projects.

⁷ For example, the JBACE notes that the current [registry](#) for authorizations issued per Article 22 of Chapter 1 of the Act is difficult to navigate and does not currently contain sufficient information (e.g. no attendant conditions are not provided).

⁸ The current recommendations are provided in addition to our previous ones made on these matters.

Conclusion

For the JBACE, both environmental and social impacts must be always considered on par in the development and revision of laws, regulations and policies. We believe that commonalities regarding sustainable development can already be found within Québec's *Sustainable Development Act* and the guiding principles of Section 22 of the JBNQA. These commonalities may strengthen and enrich this important exercise – namely in terms of SEA and public participation.

In the current context, where protection of ecosystems is now tantamount, and in the particular context of the James Bay Territory, where traditional activities and the health of the users of the territory depend directly on quality of the environment, rigorous oversight of those activities which are likely to significantly impact the territory is essential. Monitoring and follow-up conditions associated with project authorisations must include public information requirements and full disclosure.

In this respect, the comments offered in this brief are aimed at strengthening the Act in a manner that aligns it with the environmental and social protection regime of the JBNQA, and accounts for northern realities in the spirit of sustainable development.

Having said this, and given our mandate, the JBACE expects to be invited to provide additional commentary on the revision of the Act once a draft bill has been prepared.