

# Listuguj Mi'gmaq Government

Gespe'gewaq (THE PEOPLE OF THE LAST LAND)



January 28, 2004

The Honourable Sam Hamad  
Minister of Natural Resources  
Government of Québec

Mr. André Caillé  
President - Director General  
Hydro-Québec

Me Lise Lambert  
Chairperson  
Régie de l'Énergie

Dear Sirs / Me,

I am writing you with respect to apparent failure of your Ministry, the Government of Québec and Hydro-Québec to accommodate Aboriginal interests, especially those of the Listuguj Mi'gmaq, in the development of the wind energy sector.

We have made our concerns known before. Notably, on February 12, 2003, together with the other Mi'gmaq communities of Gespegewagi making up the Mi'gmawei Mawiomí, we met with former Minister of Energy Rita Dionne-Marsolais. The Ministry of Natural Resources was to designate a contact person in order to address on an urgent basis ways of including our people in the development of this new energy sector. There was also an engagement to establish a working group on energy development issues in general. There has been no follow-up by the Ministry of Natural Resources on these positive initiatives. The matter was again raised with Minister Benoit Pelletier on December 3, 2003.

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PEACE AND FRIENDSHIP THROUGH UNITY AND DIVERSITY FOR PROSPERITY AND PROGRESS.

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Mi'gmaq Nation

Gespegewagi, the traditional territory of the Seventh District of the Mi'gmaq Nation, includes the lands, waters, marine areas and resources of the Gaspé Peninsula. We have never ceded our lands. We have Mi'gmaq Aboriginal rights and title, augmented by our Treaty rights, most notably under the Treaties of 1760-61 and 1779. These rights are recognized and affirmed under s.35 of the *Constitution Act, 1982*.

The effect is to impose constitutional conditions on both the process and the economic outcome of the allocation of public resources. These obligations bind the National Assembly, the Government of Québec and its administrative regulatory bodies such as the Régie de l'Énergie and public corporations like Hydro-Québec. What is required is much more than mere consultation. There must be genuine accommodation. Required measures in some circumstances include compensation and full Mi'gmaq consent. There must always be a genuine good faith effort at substantially addressing our concerns and economic interests before decision-making on resource allocation. Failure to respect our rights exposes legislation, orders in council, decisions, permits and contracts to legal challenge. We prefer negotiation, accommodation of our rights and partnership.

The Province has largely forgotten our people and our rights in the allocation of forest resources. Oil and gas permits and leases have been attributed without including the Mi'gmaq. We are now struggling to gain our fair share of these resources.

The wind power sector offers a new opportunity to work together in partnership for economic development under arrangements that respect Mi'gmaq rights and the relationship between our people and the Province.

The current process for the purchase by Hydro-Québec of 1,000 MW of wind-generated electricity primarily from the Gaspésie - Îles-de-la-Madeleine region apparently makes no provision for including the Mi'gmaq in decision-making nor for Aboriginal employment, contracting and economic benefits. I refer notably to the Régie de l'Énergie *Regulation on wind energy* and the Government's Décret 353-2003 (both made on March 5, 2003), the proceedings of the Régie de l'Énergie in this regard (most recently its decision D-2003-69), and Hydro-Québec's call for tenders A/O 2003-02 and the business dealings flowing therefrom.

In this context, we are disappointed and disturbed to see that by Order in Council 28-204 made on January 14, 2004, and published on January 28, 2004, the Government of Québec is proceeding with the allocation of sites for wind power generation on public lands in our traditional territory, again without any regard for Aboriginal interests.

We understand the energy and regional development objectives of the Province. However, at the same time, the process and result of resource allocation decisions must accommodate Mi'gmaq interests in our traditional territory. Concretely, beyond consultation, this could mean measures such as reserved sites and reduced rents for Aboriginal providers or for Aboriginal joint-ventures, affirmative action for contracting and employment opportunities and Mi'gmaq sharing in revenues from lands used for wind energy generation.

I am sure that the Province wishes to live up to the spirit of the Mutual Political Commitment. I ask that you give the important matter raised in this letter prompt and careful consideration. We will follow up with you and your officials in the coming days in order to discuss concrete and practical measures addressing our concerns in a spirit of partnership and fair sharing of economic benefits.

In peace and friendship, I remain yours sincerely,



Chief Allison Metallic  
Listuguj Mi'gmaq Government

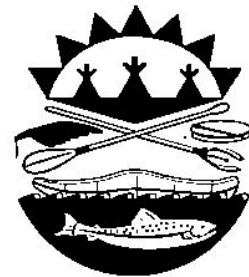
- cc. Jean Charest, Premier
- Benoit Pellerin, Minister for Native Affairs,
- Nathalie Normandeau, Minister for Regional Development and Tourism
- Ghislain Picard, Vice Chief - Assembly of First Nations of Quebec and Labrador
- Chief John Martin, Chair for Mi'gmawei Mawioini

# Listuguj Mi'gmaq Government

Gespe'gewaq (THE PEOPLE OF THE LAST LAND)

November 30, 2004

The Honourable Sam Hamad  
Minister of Natural Resources, Wildlife and Parks  
5700, 4<sup>e</sup> Avenue Ouest  
Bureau A-308  
Charlesbourg Qc G1H 6R1



**BY FAX AND BY POST  
WITHOUT PREJUDICE**

Re: URGENT---Listuguj Wind Energy Project

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Dear Minister:

We are glad that you have been able to return to your duties, and wish you all the best for the future.

I write you today in my capacity as Chief of the Listuguj Mi'gmaq Government, to address a specific and vital matter that requires your urgent intervention, namely the Listuguj Wind Energy Project. I seek to ensure its prompt resolution in a fair, equitable, and non-confrontational manner.

We consider this matter independent of all other matters with respect to which the Government of Quebec is currently engaged in discussions with the Listuguj Mi'gmaq Government ("LMG") or with the three Mi'gmaq communities of Gespegewagi through the Mi'gmawei Mawiomi. The Mi'gmaq of Listuguj, and particularly our youth, need hope, economic development, and employment now, not just the promise of far-off agreements of a general nature. Happily, the Listuguj Wind Energy Project is a stand-alone business venture that we believe can and must be dealt with independently, quickly and easily.

For the sake of absolute clarity, allow me to summarize the history of this file, which goes back at least to February 2003. At that time, the Mi'gmaq sought a role in the decision-making process and a share of the substantive economic benefits of the development of wind power on Mi'gmaq traditional territory. This territory includes the lands, waters, and resources of Gespegewagi, which we have never ceded. At a meeting on February 12, 2003, it was agreed (among other things) that the Ministry of Natural Resources would designate individuals to urgently address ways of including our people in wind power development. These individuals were not in fact designated until the end of December, 2003, long after the government had begun to implement its wind energy development policy in the Gaspésie region without any regard for Mi'gmaq rights.

On March 5, 2003, without any consultation with the Mi'gmaq or seeking any meaningful accommodation of our rights and concerns, the government adopted *Décret* 353-2003, calling for Hydro-Québec Distribution ("HQD") to issue a request for proposals (an "RFP") for the generation of 1000 MW of wind power in the Gaspésie and Matane regional county municipality. HQD issued the RFP in May 2003. We understand that HQD is a division of Hydro-Québec, whose sole shareholder is the province of

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Mi'gmaq Nation

Quebec. The Crown must respect and protect our rights, even when it chooses to act through a Crown corporation.

We were, and we remain, deeply concerned that the government proceeded with the allocation of scarce wind power resources on Mi'gmaq traditional territory with a cavalier disregard of our Aboriginal title and Treaty rights and of the economic interests they imply. However, there remained at the time a moratorium on the release of Crown lands for purposes of wind power generation. We trusted that in accord with the honour of the Crown, the new government would, before lifting the moratorium, hold to Quebec's commitment and to its duties to the Mi'gmaq with respect to wind power development in the Gaspé Peninsula. Both the LMG and the Mi'gmawei Mawiomi continued to attempt, formally and informally, to communicate with your government in this regard.

In the summer and autumn of 2003, LMG refused to be deterred or discouraged by the lack of progress with your government. HQD's RFP process was under way, and though we continued to contemplate broader negotiations with your government (and still do), the LMG decided to forge ahead with an independent business venture that would fit the context of that RFP process, if necessary. To be eligible to submit a bid under the RFP, we had to install wind meter towers for the collection of wind data by October 15, 2003. LMG sought out expert engineers and private investors as joint venture partners, to maximize its chances of a successful bid. The bid we submitted under the RFP on June 15, 2004 contemplates a wind park with a generation capacity of either 213 MW, 168 MW, or 124.5 MW.

Our confidence that the government would secure the respect of our rights prior to lifting the moratorium proved misplaced in January 2004, when the government adopted *Décret 28-2004*. Again without any consultation of the Mi'gmaq of Gespegewagi, the lease and sale of "lands in the public domain" on Mi'gmaq traditional territory for purposes of wind power development would henceforth be permitted.

I refer to two letters addressed to you, one from my predecessor, then Chief Allison Metallic, dated January 28, 2004 (enclosed), and another from the Chairman of the Mi'gmawei Mawiomi dated February 11, 2004. Both letters describe the numerous Mi'gmaq attempts to engage the Quebec Government with respect to natural resources generally and wind energy in particular. Both express alarm at the fact that none of the government's decisions with respect to wind power, in their conception or their implementation, take into account Mi'gmaq rights, issues raised by the Mi'gmaq, nor our requests for talks specifically on opportunities for cooperation in the wind energy sector. And both letters urge prompt talks to discuss and resolve these matters, fairly and equitably to the satisfaction of all.

In March and April 2004, meetings were held among yourself and your officials, and representatives of the Mi'gmawei Mawiomi and LMG. At those meetings LMG presented its project, explaining that its bid was being prepared to fit the requirements of HQD's RFP process, but that LMG preferred to enter into a power purchase agreement (a "PPA") with Hydro-Québec Production ("HQP") outside of the RFP process, as contemplated in section 17 of *Décret 28-2004*. Such an arrangement would have significantly reduced the initial costs and delays involved in complying with the RFP process.

At those meetings, your officials congratulated the LMG representatives on their initiative in pursuing the RFP process, and encouraged LMG to continue with it. We were clearly given to understand that if the bid under that process was not successful, every reasonable effort would be made to facilitate a PPA with HQP as had been proposed by LMG. LMG takes this commitment very seriously. Your officials further suggested that we present our project to HQP so as to "leave the door open" for negotiation of a PPA if

our bid under the RFP process were unsuccessful. The then Chief Negotiator for the LMG subsequently met with HQP to present the project, and sought the opportunity to negotiate a PPA directly. HQP's representatives thanked LMG for the presentation, but stated that HQP was under clear instructions to avoid any new negotiations in the Gaspésie region during the RFP process.

On October 4, 2004, we learned that the bid submitted by LMG and its joint venture partners had not been accepted by HQD. On October 29, 2004, our representatives met with HQD to discuss the reasons for this decision. Immediately thereafter, LMG requested a meeting with you and your officials, and a meeting with your officials was arranged.

On November 19, 2004, our representatives met with Mr. Richard Boucher and Mr. Richard Garand of your Ministry. As our representatives explained there, it was evident from our meeting with HQD that the Listuguj Wind Energy Project is a highly competitive one. The reasons it was not accepted by HQD had more to do with the RFP process itself than with the quality of the bid. The price per kilowatt/hour contemplated by our bid (6.9¢/kWh in the 213 MW variant) is in the same range as that of the bids that HQD accepted. This, even though HQD appears not to have considered the low cost of integration due to our proximity to an existing high-capacity grid, which renders our project's overall price per kilowatt/hour even more advantageous.

Minister Hamad, with great respect, we have stressed time and time again the provincial Crown's obligation to include the Mi'gmaq of Gespegewagi as part of the decision-making process, with a view to substantially addressing our concerns and accommodating our interests in the development and exploitation of resources in our traditional territorial lands and waters. We have made it clear that we have never ceded our Aboriginal rights and title and Treaty rights on this territory. A consistent line of decisions from the Supreme Court of Canada confirms our assertion that government consultation and accommodation of Aboriginal interests is required during the decision-making process regarding the use and allocation of resources. This is so even when, as in the *Haida* decision delivered by the Supreme Court on November 18, 2004, the Aboriginal interests have not been finally adjudicated before the courts.

At our meeting on November 19, your Ministry's officials suggested that LMG wait and submit another bid in the next round of the RFP process. I must tell you that this is entirely inadequate in the circumstances, especially given the commitment made to facilitate a PPA with HQP if the LMG's bid was not successful under the RFP process. This is not consultation, accommodation, negotiation, and reconciliation, as required by the honour of the Crown, in the words of Chief Justice in the *Haida* decision. Indeed, it amounts to total disregard for our rights, which we cannot accept. At a time when the government of Ontario, for example, is starting to make Aboriginal participation and agreement in project development a cornerstone of its renewable energy RFP process, the Government of Quebec continues to act as if we were irrelevant.

We see no impediment to entering into a PPA with HQP. HQP has entered into PPAs with the companies running the Mount Copper and Mount Miller sites, and most recently with the Rivière-du-Loup project announced last week. PPAs with HQP outside of the RFP process are permitted under Section 17 of *Décret 28-2004*. The project is a solid project, ready to implement and commercially competitive; it would bring benefits to Listuguj, to other local communities, and to the region, and would constitute some evidence of a desire and an intention, on the part of the Government of Quebec, to begin to take into account the rights of the Aboriginal peoples in resource allocations.

We made this position clear at our meeting with your officials on November 19, and they stated in turn that clearly, "*une solution politique s'impose*". They agreed to brief you on our meeting and to recommend that a meeting be held between yourself and me, with our officials, as soon as possible and, at all events, this week of November 29.

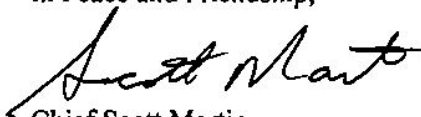
In response to questions and protests from our people since October 4 when we learned of HQD's refusal of our bid, LMG has urged patience and has concentrated on gathering information from HQD, and on attempting still to bring a successful resolution to this matter. This is why, in the face of a constant media clamour over the past two months for comments from my office on the RFP process and the failure of our bid in that process, LMG has remained circumspect. However, with the announcements of winning bids under the RFP and the most recent PPA announcement, our people once again see the government allowing others to benefit handsomely from the resources of our territory while our rights go ignored. Now it is time for action.

A negotiated solution remains by far our first choice because it is advantageous for all, but we can wait no longer. Both the Government's decision-making process and its allocation of resources must meet the test of compliance with the Constitution, and the Supreme Court has confirmed that the provincial Crown's property and jurisdiction with respect to public lands and natural resources are subject to Aboriginal interests and rights. The Supreme Court also has ruled that our rights cannot be made to depend on discretion and uncertain future processes. In this light, we consider the Government's and Hydro-Québec's decisions and policies with respect to wind power development so far, and the resource allocations they allow, to be subject to challenge.

We understand that December 15 is the deadline for signature of contracts between HQD and the successful bidders under the RFP process. We must therefore, by December 10, have a firm commitment and the Government's support for the negotiation of a PPA with HQD on the basis of the Listuguj Wind Energy Project. If we remain without any commitment after December 10, we, the Chief and Council of LMG will consult with our population and our attorneys and consider all options available to us.

I remain very hopeful, as do my Council and my community, that the "win-win-win" arrangement we propose above will be implemented, and I truly believe it can be. Please contact me as soon as possible to discuss these matters and arrange a face-to-face meeting. I am in Quebec City this week on Tuesday and Wednesday, November 30 and December 1, and can be reached on my mobile phone at (506) 789-3765.

In Peace and Friendship,



Chief Scott Martin  
Chief of the Listuguj Mi'gmaq Government

cc. Hon. Jean Charest, Premier of Quebec  
Hon. Benoit Pelletier, Minister for Canadian Intergovernmental Affairs and Native Affairs  
Hon. Nathalie Normandeau, Minister responsible for the Gaspésie – Îles de la Madeline region  
Mr. André Caillé, President and Chief Executive Officer, Hydro-Québec