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MEMOIRE PRESENTED TO:

*THE NATIONAL ASSEMBLY'S PARLIAMENTARY
COMMISSION*

BY
THE MI'GMAWEI MAWIOMI

IN RESPONSE TO THE DOCUMENT ENTITLED:
*LE SECTEUR ÉNERGÉTIQUE AU QUÉBEC-
CONTEXTE, ENJEUX ET QUESTIONNEMENTS*

JANUARY 11, 2005



**Memoire presented by the Mi'gma'wei Mawiomí to Quebec's National
Assembly Energy Commission**

The Mi'gma'wei Mawiomí is pleased to have the opportunity to express its views before this Energy Commission. A very pertinent process established by the Quebec government in order to sensitize the population of the province to the principle stakes in the domain of energy. The reality is that it is time for the government of Quebec to allow a real debate to take place on the energetic security and its future by giving the occasion to the population to present their point of view in regards of the objectives to reach and the ways to deploy with the goal of influencing the orientations and the future initiatives of the Quebec Government in the field of energy. In our opinion, the final outcome of this process should allow the provincial government to take a clear decision in the field of natural resources for the benefit of our population and future.

Therefore, the Mi'gma'wei Mawiomí wishes by the present memoir to express its opinions, preoccupations, interests and suggestions with respect to the energetic sector of Quebec and its future.

To do so, we wish to brief the Parliamentary commission on Energy on the following aspects:

- 1) The role and implication of the Mi'gma'wei Mawiomí in the development of natural resources in the province of Quebec and in particular on the Gespe'gwa'gi territory.

- 2) Consultations protocol with the Mi'gmawei Mawiomi
- 3) Mi'gmawei Mawiomi suggestions to the National Assembly

Before approaching the above mentioned subjects in details, we will present to you the Mi'gmawei Mawiomi (MM). In August 2000, the governing Councils of the Mi'gmaq communities of Gespeg, Gesgapegiag and Listuguj founded the Mi'gmawei Mawiomi (MM) to develop and promote the mutual interests of the Mi'gmaq. The relationship between our three communities is designed to promote the economic and social development of Gespe'gewa'gi (our traditional territory) and provide a common voice in addressing political and joint ventures.

Our agenda is directed by the membership of Gespe'gewa'gi communities. We rely on strong two-way communication with all Gespe'gewa'gi Mi'gmaq to ensure that our goals and actions truly benefit the interests of a strong, united, and self-sufficient Mi'gmaq Nation. The Mi'gmawei Mawiomi is empowered and mandated as defined by the Governing Councils of Gespeg, Gesgapegiag and Listuguj to represent and to protect the Mi'gmaq nation within Gespe'gewa'gi on matters of aboriginal, treaty and inherent rights.

Asserting our inalienable rights and jurisdiction over the Gespe'gewa'gi territory through self-determination and nation status are the goals we envision to sustain our families, youth and elders towards the next seven generations.

The Mi'gmawei Mawiomi was founded upon the spirit and intent of the Political Accord of 2000 consented among the Gespe'gewa'gi Mi'gmaq governing councils of Listuguj, Gesgapegiag and Gespeg.

The Mi'gmaq Nation, having inhabited the traditional territory since time immemorial have inalienable title to the land, surrounding waters and have

unextinguished aboriginal rights, title and treaty rights throughout the territory.

It is therefore our mission to uphold, reaffirm and respect the treaty and aboriginal rights and aspirations of our people by rebuilding the nation through repatriation of lands, resources and surrounding waters.

We will forge alliances to support the pursuit of all paths to Mi'gmaq self-determination by engaged strategic national and international partnerships in economic, social, traditional, cultural and other nation-building developments as deemed necessary by the Mi'gmawei Mawiomi.

In our mission to uphold and reaffirm our aboriginal rights on our territory, we will start the vocalisation of our memoir by presenting our concept of appropriate and adequate consultations of the Mi'gmawei Mawiomi by the Quebec Government before allowing any particular development of the natural resources located on the Gespe'gewa'gi territory.

1) The role and implication of the Mi'gmawei Mawiomi in the development of natural resources in the province of Quebec and in particular on the Gespe'gewa'gi territory.

In the past, at the occasion of the public debate on energy, the regions of Quebec have claimed supplementary financial means, limited to the presence of energetic resources exploited on their territory.

To that specific claim presented by the regions, the Quebec government is of the opinion that regional tax returns resulting from the exploitation of natural resources would suppose the existence of a property right on the resources by the regions, which is not the reality. However, in our case, the Mi'gmawei

Mawiomi, it is common knowledge that we possess a property right known as an aboriginal title over the Gespe'gawa'gi territory. This title is a legal outcome of our anterior possession to the declaration of sovereignty by the British Crown. This aboriginal title has never been surrendered in any way by our Nation and is therefore legally valid today and should be respected by governments and any third parties when addressing any possibilities of infringement on the Gespe'gawa'gi territory.

It is also important to re-affirm and specify that our title allows our Nation to not only exercise our traditional activities on our land, but also gives us the right to exploit the mines, waters and forest. Therefore, the aboriginal title differs from the common law in Quebec in the sense that it is derogation to the principle of the public property of the mines or the reserve of the hydraulic forces in favour of the state.

It needs to be understood today that the Mi'gmawei Mawiomi will not tolerate any further encroachment on our territory unless there are specific agreements signed with government. These agreements will need to address specifically some agreeable form of sharing and co-management of our resources. This is not an option; this is a formal condition and if that specific condition is not respected, legal procedures will be undertaken by our Nation.

With that in mind, it is justifiable for the Mi'gmawei Mawiomi to expect resources rents from the government, whenever Natural resources are exploited on our traditional territory. Moreover, considering the property right on the territory by our Nation, it is expected that we hold a place of choice in any regional instances that could be created in relation with the development of natural resources on the Gespe'gawa'gi territory.

2) Consultation protocol with the Mi'qmawei Mawiom

The government of Quebec states in its energy policy entitled: "*L'énergie au service du Québec, une perspective de développement durable*". That you wish to establish a meaningful partnership with aboriginal peoples in Quebec and to that effect there is a link made to the engagements undertaken by Quebec's National Assembly on March 20th, 1985, in its resolution on the recognition of aboriginal rights by the former Premier, Mr. René-Levesque. Furthermore, in its energy policy, the government of Quebec states that a meaningful partnership with aboriginal peoples means that in the different processes to be put in place by the government, the participation of first Nations will have to take place on the basis of full and equal partnership, and be assured in the frame of specific consultations.

We believe as a first nation organization, that in order for the government of Quebec to encourage an harmonious energetic development that is profitable to everyone, and that will respect the rights and priorities of everyone, that Quebec's policy on energy needs to take into account and push ahead in an innovative way the concept of consultation of aboriginal peoples whenever there's a possibility of natural resources development on our territory.

To illustrate our vision of adequate consultation, we will make reference to recent Supreme Court of Canada decisions, that we will use to illustrate our positions on the subject and to make parallels with the present situation of natural resources development existing within the Gespe'gewa'gi territory.

On November 18th of 2004, the Supreme Court of Canada rendered two major decisions (**Haida Nation v. Minister of Forest and Weyerhaeuser Company Limited., and Taku River Tlingit First Nation v. British Columbia (Project assessment Director)**) in which the Chief Justice, Beverly McLachlin stated that there is a duty for the government to consult and accommodate first nations before allowing any developments on the lands that could be located on a territory where aboriginal rights and title could exist.

Moreover, the Chief Justice of the Supreme Court of Canada also stated in her assessment of the scope and content of the duty to consult and accommodate, that when a strong prima facie case for the claim is established, the right and potential infringement is of high significance to the Aboriginal Peoples, and the risk of non-compensable damage is high, in such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. Therefore, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision.

We firmly believe that the significance of these jurisprudential specifications should motivate the Quebec Government to bring the concept of consultations to another level and guaranty a genuine and significant participation of Mi'gmaq Nation in Consultation processes. Subsequently, in order for government to respond adequately to these specific parameters, strong consultation policies inspired by consultation protocol agreements will have to be adopted and respected by all parties. Also, to ensure that a Mi'gmawei Mawiomi consultation protocol could be officially proposed by our Nation and agreed upon with the Quebec Government, a distinct framework agreement that specifies the orientations and principles, responsibility for negotiations and the description of the principle purpose of the framework agreement should be signed as soon as

possible between the Minister of Native Affairs, The Minister of Natural Resources for the Quebec Government and the Mi'gmaq leadership. The existence of such a framework agreement would assure all parties involved of the necessity of assuring a prosperous environment for the development of natural resources in Mi'gmaq territory.

In light of these land mark decisions and our aboriginal title, the Mi'gmaq governing councils of the Mi'gmawei Mawiomi believe that it is imperative for our Nation to draft its own consultation protocol and that the document be proposed to the Quebec Government in order for both parties to conclude the process by the signing of a formal agreement pertaining to the recognition of the Mi'gmawei Mawiomi Consultation Protocol. The recognition of the said protocol would assure the application of its content and therefore allow the Mi'gmaq Nation to fully participate in specific consultations in a spirit of full and equal partnership.

As an example and to illustrate the importance of a distinctive Mi'gmawei Mawiomi consultation protocol, we enumerate some of the objectives that an adequate Mi'gmaq protocol will allow our Nation to attain:

- A. Respond to the specificity of our Mi'gmaq ways and principles of gathering information to test governmental policy proposals on resources developments;
- B. Seek the Mi'gmawei Mawiomi Assembly (Gespeg, Gesgapegiag, Listuguj) opinions on these resources developments proposals;
- C. Inform the Mi'gmawei Mawiomi Assembly of all relevant information upon which those proposals are based;
- D. Listen with an open mind to what the Mi'gmawei Mawiomi Assembly has to say;

- E. Prepare us as a Nation to alter the original proposal;
- F. Provide pertinent feedback to our communities both during the consultation process and after the decision process;
- G. Develop within our communities the capacity to participate to the consultation process in a maximal way by developing inside expertise composed of well-qualified Mi'gmaq individuals and assuring the financial support required by our communities;
- H. Address those different genuine consultation components, in regards of the resources developments specificities occurring on our traditional territory, the Gespe'gewa'gi;
- I. Assure that our communities are involved in the consultation process at the earliest stage possible;
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- J. Define the role and responsibilities of all parties involved in the consultation process in a precise way;
- K. Obtain the assurance that all parties involved in the consultation process are knowledgeable of the Mi'gmaq culture, traditions and values.

In the *Haida* decision, Chief Justice Beverly McLachlin, of the Supreme Court of Canada notes that it is open to governments to set up regulatory schemes to fulfill their duty to consult and accommodate. In line with previous Supreme Court rulings, she emphasized that key questions relating to Aboriginal rights cannot be left to the unfettered discretion of bureaucrats charged with decision-making. Rather, statutory provisions, regulations or at

least a written policy will be required to guide decision-makers in their treatment of Aboriginal interests (*Haida*, para 51).

Following this statement by the Supreme Court of Canada's Chief Justice, the Mi'gmawei Mawiommi presses the Quebec government to elaborate and adapt provisions, regulations or to include expressly in the energy policy, formal guidelines that will permit our tribal council to present its distinctive consultation protocol to the Quebec government which will serve as a guide for planning and implementation of successful and effective consultation processes in Gespe'gewa'gi territory that will bring the Quebec government to commit in good faith to evaluate and give a formal ministerial engagement to a Mi'gmawei Mawiommi consultation protocol.

3) Mi'gmawei Mawiommi suggestions to the Quebec government

As a supplement to the requirements that we have put forward in the previous sections, the Mi'gmawei Mawiommi deposits the following suggestions in order to improve the socio-economic development initiatives by our Nation and to ensure a greater participation of our Tribal Council in the value added activities of the natural resources of our territory: For your information, these suggestions are inspired by the suggestions presented in the Royal Commission's report on Aboriginal Peoples.

1. That the government of Quebec collaborate with the federal, regional and aboriginal governments to create co-management systems on traditional aboriginal territories where energetic projects are envisioned;

2. That these co-management systems will be used provisionally until the conclusion of negotiated conventional treaties with the aboriginal nations involved;
 3. That the co-management agencies respect and integrates the traditional aboriginal knowledge;
 4. That the Quebec Government assures the Co-Management agencies of sufficient and long term funding in order to allow their stability and the possibility to acquire the necessary competences and expertise;
 5. That the Quebec Government and the Mi'gmaq Governing Council should create a permanent round table on energy development and environment;
 6. That the Quebec government develop a distinctive professional training program to be offered in the Mi'gmaq communities to develop the acquisition of technical expertise and business development related to the development of Natural resources;
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Conclusion

The opinions expressed by the Mi'gmawei Mawiomi Assembly in this memoir are mostly related to the concept of aboriginal title and consultation. This fact is motivated by the necessity for Government to address title issues before engaging itself in any type of natural resources development and by the parameters set by the Supreme Court of Canada in relation with Consultations.

Moreover, if and after government has dealt with title issues, there will be an urgent need for our communities to participate in an adequate way to the planning of various development projects in the field of natural resources.

In order to assure a taking in charge by the Mi'gmawei Mawiomi of its economic sovereignty, the Quebec government will have to assure that the various concerns of our Nation and other aboriginal organizations are seriously considered and taken into account for the betterment of the general socio-economic conditions of the First Nations in the province of Quebec.

We as a First Nation respect and recognize the importance of the exploitation of natural resources for economic purposes attached to that concept. However, this development cannot be made in detriment of the respect of all environmental considerations, as the richness and beauty of our land must be at the centre of everyone's interests.

In peace and friendship.

The Mi'gmawei Mawiomi Assembly