

# The Environmental Assessment Process and Public Participation in Québec: Concrete Elements for Sustainable Development

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Résumé de l'article

Au Québec méridional, les projets ayant des impacts environnementaux majeurs doivent suivre le processus d'évaluation environnementale. Ce dernier prévoit une étape d'information et de consultation du projet permettant à tous citoyens, groupes ou municipalités de demander au ministre de l'Environnement qu'il tienne une enquête à cet effet, par le biais du Bureau d'audiences publiques sur l'environnement. L'ensemble de ce processus, appliqué depuis 1978, a été un des précurseurs du concept de développement durable. Ce texte se veut donc une analyse pratique du processus d'évaluation environnementale et ce, à un niveau gouvernemental.

### **The Environmental Assessment Process and Public Participation in Québec : Concrete Elements for Sustainable Development**

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#### **ABSTRACT**

*In southern Québec, projects having major environmental impact are subjected to the environmental assessment process which provides a period of information and consultation. During this period, any citizens, groups or municipalities can ask the Minister of the Environment and Wildlife to conduct, through the BAPE, a public inquiry on the project. This environmental impact assessment process, in place since 1978, was a precursor of sustainable development. The present paper is a presentation of the practical working of the environmental process at the government level.*

#### **RÉSUMÉ**

*Au Québec méridional, les projets ayant des impacts environnementaux majeurs doivent suivre le processus d'évaluation environnementale. Ce dernier prévoit une étape d'information et de consultation du projet permettant à tous citoyens, groupes ou municipalités de demander au ministre de l'Environnement qu'il tienne une enquête à cet effet, par le biais du Bureau d'audiences publiques sur l'environnement. L'ensemble de ce processus, appliqué depuis 1978, a été un des précurseurs du concept de développement durable. Ce texte se veut donc une analyse pratique du processus d'évaluation environnementale et ce, à un niveau gouvernemental.*

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\* Until recently a commissioner with the *Bureau d'audiences publiques sur l'environnement* (BAPE).

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## INTRODUCTION

In fall 1987, the Report of the World Commission on Environment and Development was tabled at the 42<sup>nd</sup> session of the United Nations General Assembly, introducing the concept of sustainable development. Defined as “development which meets the needs of the present generation without compromising the ability of future generations to meet their own needs”,<sup>1</sup> sustainable development implies that “resource and environmental considerations must be integrated into the industrial planning and decision-making processes of government and industry”.<sup>2</sup>

The *Rio Declaration on Environment and Development*,<sup>3</sup> adopted at the United Nations Conference on Environment and Development in Brazil (June 3-14,

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1. World Commission on Environment and Development, *Our Common Future*, London, Oxford University Press, 1987, p. 43.

2. *Id.*, p. 219.

3. *Rio Declaration on Environment and Development*, United Nations document. Two BAPE commissions have used this declaration as the guideline for their work, namely, the Commission studying the “Projet d’agrandissement d’un lieu d’enfouissement sanitaire à Sainte-Anne-de-la-Rochelle” [project to enlarge a sanitary landfill site in Sainte-Anne-de-la-Rochelle], and the Commission studying the “Projet d’établissement d’un dépôt de matériaux secs à Saint-Pie” [project to establish a dry disposal site in Saint-Pie].

1992), reaffirmed through its 27 principles the concept of sustainable development<sup>4</sup> defined by the World Commission on Environment and Development.

Sustainable development incorporates complex ecological, economic and social concerns that require integrated decision-making. The existence of systems guaranteeing public participation in the decision-making process therefore ensures a more efficient democratic structure whereby the empowerment of parties is a crucial factor in achieving sustainable development or, at the very least, a better understanding of the complexity, fragility and diversity of the elements making up the biosphere.

With this in mind, eighteen years ago, the *Bureau d'audiences publiques sur l'environnement* (BAPE), Québec's environmental hearings board, instituted a public participation process that has demonstrated the imperative of harmonizing development and the environment so that we, as a society, can adopt sustainable projects and solutions.

Developments over these eighteen years led the BAPE in early 1994 to implement a new public participation process known as environmental mediation.<sup>5</sup> This process, which is flexible and less costly, allows parties interested in dialogue and consensus to work out a solution to their dispute of their own accord, while protecting the rights of third parties, including future generations, and the environment.

This article discusses the experience of Québec (with the exception of the *Nord du Québec* region, which is governed by its own procedure) in the field of sustainable development through the application of environmental impact assessment and public participation.

## I. IMPLEMENTATION

The BAPE, a permanent agency separate from the ministère de l'Environnement et de la Faune (MEF),<sup>6</sup> was established in 1978 with the adoption of the *Act to amend the Environment Quality Act*.<sup>7</sup> In creating this new agency, the Québec government acknowledged the public's right to information, consultation and participation in decisions having an impact on the environment.<sup>8</sup>

Essentially, the BAPE is a government advisory body which reports directly to the Minister of the Environment and Wildlife. Its role is to inform and confer with the public on environmental issues or projects subject to the

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4. See principles 3, 4 and 10 of the *Rio Declaration on Environment and Development*.

5. See P. RENAUD, "Environmental Officials in Québec Serve as Mediators", (1994) 24 *Consensus*, MIT-Harvard University.

6. See the *Environment Quality Act*, R.S.Q., c. Q-2, ss. 6.1-6.12.

7. S.Q., 1978, c. 64.

8. A commission under the authority of the Service de Protection de l'Environnement du Québec (precursor of the ministère de l'Environnement et de la Faune) held the first public hearings in 1978. These hearings dealt with the planned Autoroute 440 and its impact on the Beauport flats. On March 28, 1979, the first BAPE president was appointed under Order in Council 896-79, and the inquiry report on the planned Québec-Atlantic pipeline was the first report submitted to the Minister for the Environment on November 1, 1979.

environmental impact assessment and review procedure with a view to submitting a report on its findings and its analysis thereof to the Minister to enable enlightened decisions.<sup>9</sup> The BAPE thus provides the government with important information which is a legitimate reflection of the opinions expressed by the individuals, groups or municipalities affected by a given project.

The BAPE's first mandate in the environmental assessment procedure is to hold public information and consultation sessions on various types of projects, including road construction, power transmission lines, hydroelectric dams or dykes, the dredging or backfilling of watercourses, the diversion of rivers, and the construction or expansion of marinas or airports. These types of projects are subject to the environmental impact assessment and review procedure under section 2 of the *Regulation respecting environmental impact assessment and review*.<sup>10</sup> Waste disposal site projects are also subject to this procedure,<sup>11</sup> as are projects involving the opening and operation of mines, gas pipelines, metal production plants, chemical and petrochemical plants, and pulp and paper mills.<sup>12</sup>

The BAPE's second mandate in this process, also at the Minister's request, is to institute commissions to conduct general inquiries, inquiries and mediation, or inquiries and public hearings, by virtue of the powers conferred upon it by subsections 6.3 and 31.1 and following of the *Environment Quality Act*.<sup>13</sup>

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9. The case *Bellefleur c. Procureur général du Québec*, [1993] R.J.Q. 2320 (A.C.) confirmed the fact that subsection 6.3 of the *Environment Quality Act* confers on the BAPE only the obligation to gather opinions and to clarify dissents, without the power to make formal recommendations to the Minister. He is not bound by the BAPE's opinions or suggestions.

10. R.R.Q., 1981, c. Q-2, r. 9, s. 2. This regulation came into force on 30 December 1980. For an interpretation of each paragraph of section 2, see the case *Procureur général du Québec c. Béchard*, [1989] R.J.Q. 732 (A.C.).

11. Since 1993, waste disposal sites have been subject to the environmental impact assessment and review procedure under the *Act respecting the establishment and enlargement of certain waste elimination sites*, S.Q., 1993, c. 44. However, on 4 December 1995, the *Act to prohibit the establishment or enlargement of certain waste elimination sites* (S.Q., 1995, c. 60) came into force, thereby prohibiting the establishment or enlargement of sanitary landfills, dry disposal sites, and solid waste incinerators until the coming into force of the legislative provisions which will eventually replace the *Regulation respecting solid waste*, R.R.Q., 1981, c. Q-2, r. 14. The National Assembly adopted this Act following the announcement of the creation of a special commission to study the issue of waste management, and following publication of BAPE report n° 92 entitled *Projet d'établissement d'un dépôt de matériaux secs à Saint-Pie*, in which the Commission mentioned "le manque de cohérence de la réglementation des déchets" [the lack of consistency in waste legislation]. For more on this special commission, refer to the following BAPE reports: n° 89, *Projet d'agrandissement d'un lieu d'enfouissement sanitaire à Lachenaie*; n° 86, *Projet d'agrandissement d'un lieu d'enfouissement sanitaire à Sainte-Anne-de-la-Rochelle*; and n° 80, *Centrale de valorisation du biogaz au centre de tri et d'élimination des déchets de la Ville de Montréal*.

12. For the complete list of projects subject to the procedure, see Order in Council 101-96 of 24 January 1996, which subjects these types of projects to the environmental impact assessment and review procedure. See also the *Act to amend the Environment Quality Act*, S.Q., 1995, c. 45, which came into force on 22 June 1995. This Act empowers the government to prescribe other time frames applicable to the environmental impact assessment and review procedure.

13. R.S.Q., c. Q-2.

The BAPE may also be entrusted with special mandates such as public review of government policy or programs.<sup>14</sup> To date, the BAPE has received three special mandates resulting in the creation of as many commissions of inquiry, namely, the Commission d'enquête sur les déchets dangereux (hazardous waste), the Commission d'enquête sur la protection des forêts (forest protection), and the current Commission d'enquête sur la gestion des matières résiduelles au Québec (waste management). This type of mandate, which normally includes so-called special public hearings, takes place over a relatively long period, exceeding the four months provided for in the legislation, with hearings held in most regions of Québec.<sup>15</sup>

In eighteen years, the BAPE will have held over 259 information sessions on various projects and tabled 21 inquiry reports, 27 inquiry and mediation reports, 80 inquiry and public hearing reports, and 2 special public hearing reports with the Minister.

## II. THE ENVIRONMENTAL IMPACT ASSESSMENT AND REVIEW PROCEDURE AND PUBLIC PARTICIPATION IN DECISION-MAKING

The concept of sustainable development embodies the spirit in which environmental assessment should be carried out. It reflects the time frame, long-term objectives, and multifaceted character of environmental assessment. This concept, as we have already mentioned in the introduction, ensures that a concern for future needs is an inherent aspect of any decisions made or actions taken.

Thus, a project designed and carried out based on an integrated approach, that is, an approach that attempts to take into account the links between optimum exploitation and responsible use of resources, will be more likely to respect the balance between the economy, the environment, and society.

The environmental assessment and impact review procedure, in force since 1980, integrates these environmental concerns into the design, planning and carrying out of projects. To this end, the environmental impact assessment statement that must be prepared by the proponent testifies to the latter's efforts to take the project's environmental and social components into account. In 1978, Québec became the first province in Canada to enshrine the concept of an environmental impact assessment statement in its legislation.

The aim of the impact statement is thus to assess the potential consequences of a given project on the environment and, to this end, it must provide for

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14. The Minister may use subsection 6.3 of the *Environment Quality Act* to request that the BAPE conduct an inquiry into any question relating to the quality of the environment, and not solely those subject to subsection 31.1 and following of the said Act. Concerning these discretionary powers, see the case *Construction Bérou inc. c. Paradis*, [1993] R.J.Q. 507 (S.C.) and *Service Sanitaire R.S. inc. c. Paradis*, [1993] R.J.Q. 1431 (S.C.). As for the expression "any question relating to the quality of the Environment", see *Construction Bérou inc. c. Paradis*, [1993] R.J.Q. 1497 (S.C.).

15. For example, the Commission d'enquête sur les déchets dangereux completed its mandate in 21 months on a budget of \$1.9 million, and the Commission d'enquête sur la protection des forêts carried out its work in 8 months at a total cost of \$914,000. Finally, the Commission sur la gestion des matières résiduelles au Québec began its mandate on January 8, 1996, and is to submit its report to the Minister of the Environment and Wildlife by December 31, 1996. The budget earmarked for this 12-month period is approximately \$1.2 million.

and analyze the project's repercussions on the various elements of the natural and human environment. The proponent must also identify and describe alternative solutions or other project options, assessing the environmental impact of each, in order to choose the one that is most environmentally, economically, technically and socially acceptable.

Since 1980, over 750 projects have undergone the environmental assessment impact and review procedure. Of this number, more than 200 were the object of a governmental decision.

### A. PROJECT PROCESSING

From a legal standpoint, the environmental impact assessment and review procedure is set in motion by subsection 31.1 of the *Environment Quality Act*.<sup>16</sup>

This section of the Act provides for a preventive mechanism for projects that are likely to have environmental impacts. The proponent must thus consult section 2 of the *Regulation respecting environmental impact assessment and review*,<sup>17</sup> which lists 24 project categories that are subject to the impact assessment and review procedure.

If the project is subject to the procedure, the proponent must complete five important steps before beginning the project, and an additional step during and after the carrying out of the project. The first step concerns the notice of project and directive; the second, the preparation and submission of the environmental impact assessment statement; the third, environmental analysis; the fourth, public participation; and the fifth, decision-making. The sixth or additional step concerns monitoring and follow-up.

The BAPE intervenes only at the fourth step of the assessment and review procedure, which pertains to public participation. The other steps illustrated in the following diagram are overseen by the ministère de l'Environnement et de la Faune (MEF).

#### 1. Step 1 : notice of project and directive (MEF)

The procedure begins with the proponent filing a notice of project with the Minister of the Environment and Wildlife. The notice of project must specify the project site, objective, justification, description, and timetable. The environ-

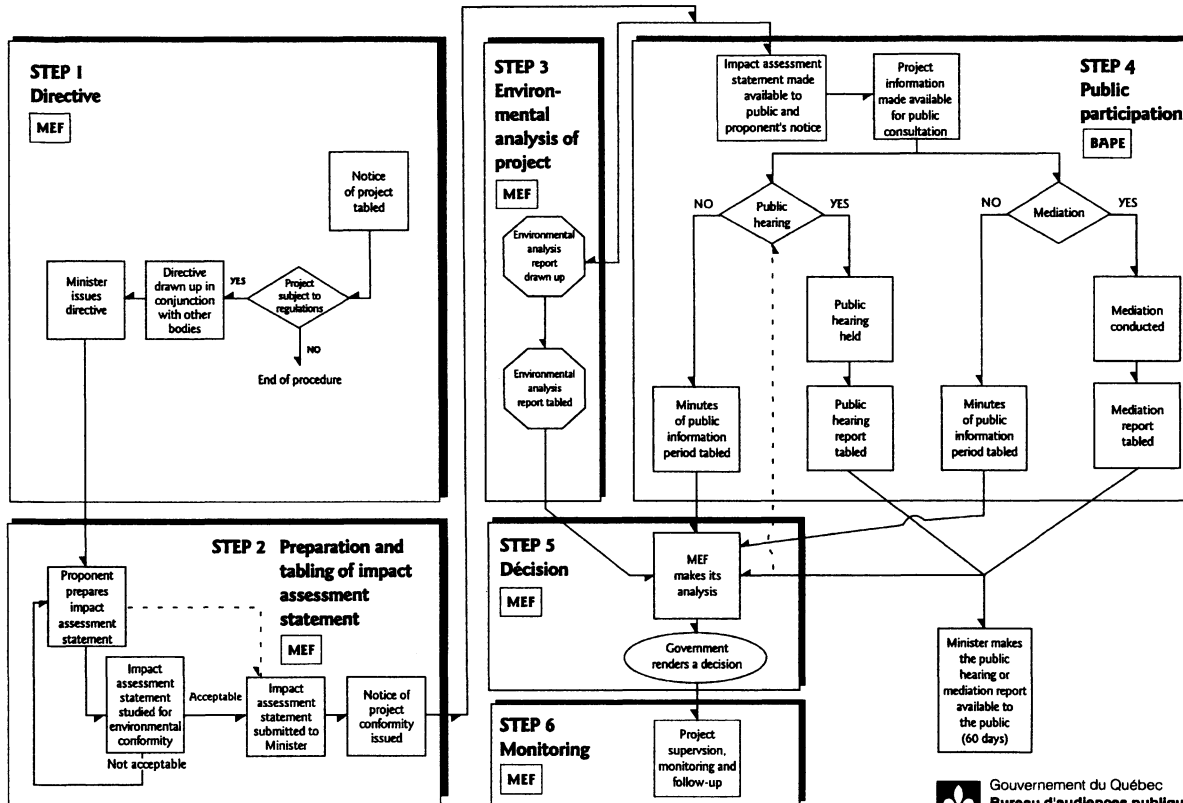
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16. Subsection 31.1 states that "No person may undertake any construction, work, activity or operation, or carry out work according to a plan or programme, in the cases provided for by regulation of the Government without following the environmental impact assessment and review procedure and obtaining an authorization certificate from the Government". The first meaning of the expression "to undertake" is clearly "to start" the exploitation as in the case of *Lafarge Canada inc. c. Procureur général du Québec*, [1994] R.J.Q. 1832 (A.C.). Further, the expression "plan or programme" means what is defined by the law in the cases defined in the regulation; such plan or programme being submitted before obtaining governmental authorization, *Château-Richer (ville de) c. Procureur général du Québec*, J.E. 93-151 (S.C.). As for the discretionary powers of the Minister or of the government, an analysis of subsections 31.1 to 31.4 was done by the Court of Appeal in *Guy Bellefleur c. Le procureur général du Québec*, [1993] R.J.Q. 2320 (A.C.).

17. R.R.Q., 1981, c. Q-2, r. 9, s. 2.



# STEPS IN PROJECT PROCESSING





ment in which the project is to be situated, that is, agricultural, aquatic, urban, or other, must also be described.<sup>18</sup>

Once he has received the notice, the Minister forwards it to one of MEF's three Environmental Assessment Branches (land, aquatic, or industrial), thus formally setting the assessment and review procedure in motion. These branches are responsible for the application and coordination of this procedure. A directive is then formulated by the appropriate branch, in conjunction with other departments directly or indirectly concerned by the project.

Following this ministerial consultation, the Minister forwards the directive, which specifies the nature, scope and extent of the environmental impact assessment statement that must be prepared for the project, to the proponent. The directive indicates all information and details that must be included in the proponent's impact statement.<sup>19</sup>

## 2. Step 2 : preparation and submission of the environmental impact assessment statement (MEF)

In compliance with the directive issued by the Minister, the proponent prepares the impact statement for his project. The goal of this impact statement is to draw as accurate a portrait as possible of the environment concerned, the potential impacts thereon, and the proposed mitigation measures both during and after the carrying out of the project. This statement should also include, where applicable, various project alternatives, describing the advantages and drawbacks of each and, finally, the reasons justifying the option chosen by the proponent. The impact statement must be formulated and prepared according to a scientific method in order to assess as accurately as possible the impacts of the project on environment quality.<sup>20</sup> A non-technical summary must also be produced for public consultation.<sup>21</sup>

Once completed, the preliminary version of the impact statement is submitted to the appropriate Environmental Assessment Branch, which studies it for environmental conformity and consults the other departments concerned a second time. If the impact statement does not comply with the Minister's directive, additional information may be requested from the proponent.

Subsection 31.4 of the *Environment Quality Act*<sup>22</sup> stipulates that the Minister may at any time request any information from the proponent that he considers necessary to fully evaluate the impact of the proposed project on the environment.

When the branch deems the project acceptable, that is, in compliance with the Minister's directive, the Minister issues a notice on the acceptability of the impact statement with regard to its conformity with the directive, and makes it available to the public.

18. "Every person wishing to undertake the realization of any of the projects contemplated in section 31.1 must file a written notice with the Minister describing the general nature of his project [...] (*Environment Quality Act*, s. 31.2).

19. "[...] the Minister, in turn, shall indicate to the proponent of the project the nature, the scope and the extent of the environmental impact assessment statement that he must prepare" (*Ibid.*).

20. *Regulation respecting environmental impact assessment and review*, R.R.Q., 1981, c. Q-2, r. 9, s. 3.

21. *Id.*, s. 4.

22. R.S.Q., c. Q-2.

It is at this stage that the Minister asks the BAPE to participate in the environmental assessment procedure by initiating the public information and consultation phase<sup>23</sup> and, if necessary, the public participation process if applications for public hearings or mediation, in relation to the project, have been submitted.

### **3. Step 3 : environmental analysis of the project (MEF)**

The Environmental Assessment Branch analyzes the impact statement from a technical standpoint to ensure that the project is environmentally acceptable in terms of the proponent's objectives. Following this analysis, the branch files its report with the Deputy Minister who, in turn, submits it to the Minister. The report prepared by the BAPE is tabled at the same time. Step 3 thus takes place concurrently with Step 4, which is under BAPE authority.

### **4. Step 4 : public participation (BAPE)**

Step 4 takes place in two phases, that is, the information period followed by inquiry and mediation or by inquiry and public hearing. The following diagram illustrates the stages in project processing for inquiry and mediation.

#### *a) public information and consultation phase*

The Minister mandates the BAPE to make the proponent's impact statement available to the public. To do so, the BAPE opens local consultation centres for a 45-day period for the benefit of citizens directly affected by the project.<sup>24</sup> During this same period, it must also make the statement available for public consultation in its Québec City and Montréal offices, as well as in two university libraries.<sup>25</sup> The impact statement, the summary, and other relevant documents are all tabled at these places.

At the beginning of the public information and consultation phase, BAPE professionals<sup>26</sup> travel to the region targeted by the project to inform all interested parties about the environmental assessment procedure and the role of the BAPE. As a rule, the proponent attends the information sessions organized by the BAPE and may be called upon to answer certain questions regarding the project.

It is important to point out that the public information and consultation phase is not intended to turn into a public debate. However, it is during this period that citizens, groups or municipalities may request a public hearing or mediation process when they consider that a project contains any number of contentious elements.<sup>27</sup> All applications for a public hearing or mediation must be addressed directly to the Minister and must specify the applicant's motives and interests with

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23. In accordance with the *Environment Quality Act*, s. 31.3, 1<sup>st</sup> par., it is the responsibility of the proponent to initiate the stage of public information and consultation; however, in practice, it is the BAPE that does so. To date, no objections have been made in this regard.

24. *Regulation respecting environmental impact assessment and review*, R.R.Q., 1981, c. Q-2, r. 9, s. 11.

25. The BAPE made arrangements with the libraries of Université du Québec à Montréal and Québec City's Université Laval.

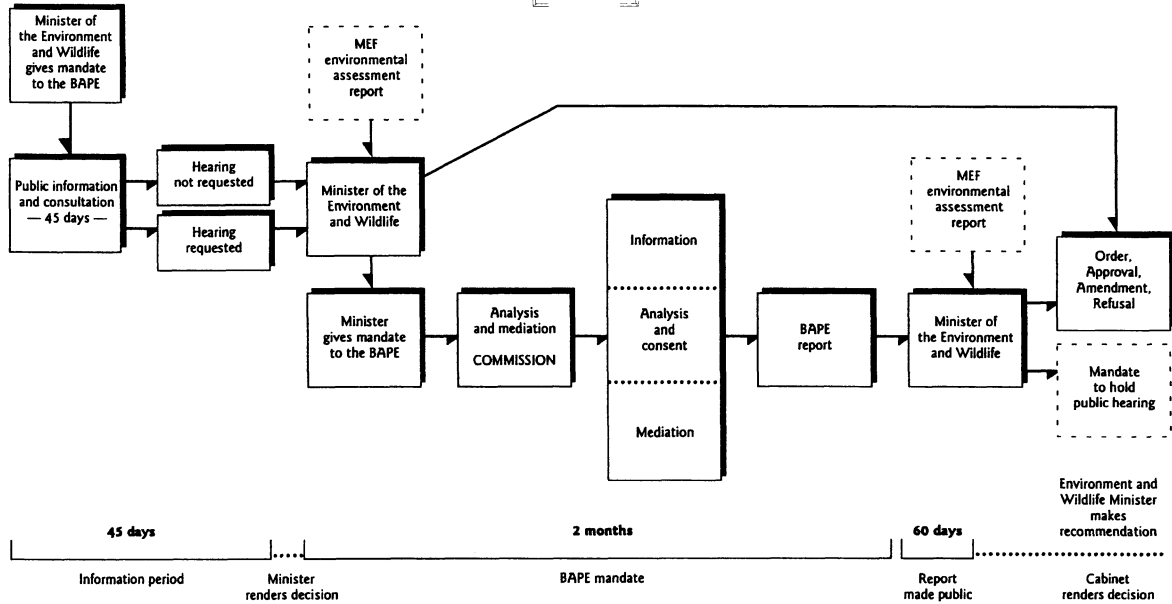
26. Communication officers and analysts.

27. *Environment Quality Act*, s. 31.3, 2<sup>nd</sup> par.



# STAGES IN PROJECT PROCESSING AT THE BAPE

## INQUIRY AND MEDIATION



regard to the project environment. The Minister must then analyze the application and deem whether or not it is "frivolous"<sup>28</sup> (justified). He then mandates the BAPE to conduct one of the following: an inquiry and mediation, or an inquiry and public hearing. This decision is a ministerial prerogative.

If no applications for a public hearing or mediation are submitted to the Minister, the second part of Step 4 is simply omitted. This second part is optional and has no legal substance until one or more applications have been submitted to the Minister.

*b) inquiry and mediation*<sup>29</sup>

When the Minister of the Environment and Wildlife receives one or more applications for an inquiry and public hearing or mediation, he may, if he deems them not to be frivolous, entrust the BAPE with an inquiry and mediation mandate under subsection 6.3 of the Act. However, in a case where the applicants have submitted a request for an inquiry and public hearing, they maintain their right to this request.

Once the BAPE has received this mandate, to be carried out over a two-month period, the BAPE president appoints a commissioner who is responsible for conducting the inquiry and mediation process and submitting a report to the Minister within the prescribed time frame. The inquiry and mediation process is unique to the BAPE and is founded on the principle of transparency. It can thus be qualified as administrative and public and, in this sense, differs from the traditional mediation process.<sup>30</sup>

In December 1995, the BAPE adopted rules of procedure relating to the conduct of environmental mediation.<sup>31</sup> All BAPE commissioners are under oath

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28. *Id.*, s. 31.3, 3<sup>rd</sup> par. Until 1994, all the successive Ministers of environment have never used their powers under subsection 31.3, 3<sup>rd</sup> par., to refuse a request for a public hearing. In fact, in 1991, in the case of *L'aluminerie Luralco*, the government adopted a special law rather than using the Minister's powers under subsection 31.3, 3<sup>rd</sup> par., see *Loi concernant la construction et la mise en exploitation de postes de manœuvre et de transformation électrique et d'une usine d'aluminium dans le parc industriel Deschambault-Portneuf (Luralco inc.)*, L.Q. 1991, c. 6. For recently using the Minister's powers under subsection 31.3, 3<sup>rd</sup> par., see the following Orders in Council #1654-94 of November 24, 1994, #316-96 of March 13, 1994, #418-96 of April 3, 1996 and #1003-96 of August 14, 1996.

29. The mediation process is described in a document published and distributed by the BAPE entitled *La médiation en environnement: une nouvelle approche au BAPE*, Québec City, BAPE, coll. Nouvelles pistes, 1994, 65 pages.

30. For more information on the BAPE's inquiry and mediation process, see the following articles: P. RENAUD, "Comparaison entre la médiation administrative et publique appliquée dans le domaine de l'environnement et la médiation privée", (1994) 25 *R.D.U.S.* and "La médiation en environnement au BAPE: un processus administratif et public", in *Développements récents en médiation (1995)*, Cowansville, Les Éditions Yvon Blais inc., 1995, pp. 117-137. For more information about public mediation process see J. POITRAS, P. RENAUD, *La médiation et la réconciliation des intérêts dans les conflits publics*, Scarborough, Les éditions Carswell, 1996, 148 pages.

31. *Règles de procédure relatives au déroulement des médiations*, BAPE, 1995, adopted on 5 December 1995. These are administrative rules that ratify the inquiry and mediation process, in application at the BAPE since June 1994. They were inspired by the *Rules of procedure relating to the conduct of public hearings*, R.R.Q., 1981, c. Q-2, r. 19 and target the same principles, namely, fairness, impartiality, neutrality, respect, and transparency.

and bound by the BAPE Code of Ethics, adopted in 1992 and amended in 1995 to include the concept of environmental mediation.<sup>32</sup> This Code stipulates that the Commission of Inquiry and Mediation must “foster public understanding of environment-related projects and shall encourage the public to express their opinions freely”. It also stipulates that members shall avoid any situations involving a conflict of interest, act with impartiality, and foster mutual respect among participants. Commissioners also hold all powers conferred upon them by the *Act respecting public inquiry commissions*.<sup>33</sup> For example, persons who refuse to appear before the Commission, produce documents, or answer questions that may lawfully be put to them can be held in contempt, and the commissioner is entitled to proceed in the same manner as any court or judge in similar circumstances.<sup>34</sup> However, no commissioner has had to exercise this power to date, since all mediation sessions and public hearings held have been conducted in a transparent manner, this principle being agreed to in advance by all participating parties.

Despite these powers, commissioners who act as mediators cannot impose a decision. The commissioner is an impartial third party who helps the dissenting parties identify the points on which they agree and disagree, and seek solutions. The commissioner is present at all mediation sessions.

The BAPE has broken the mediation process down into three phases : information, analysis and consent, and mediation as such. The following diagram illustrates the logical progression of a dossier submitted for inquiry and mediation.

(i) information<sup>35</sup>

Before the mediation process begins, the applicants must be identified. In a case where applications have been made by government departments, private or public organizations, or groups, the designated spokesperson must be officially appointed and empowered to make decisions.

During the first mediation session, the Commission may meet with the parties individually to provide basic information on such things as how the BAPE and the Commission work, the mandate and the actual mediation process, and how the meetings will proceed.

This phase is essential to create an atmosphere of trust between the commissioner and each of the parties and between the parties themselves.

As the leader of the process, the commissioner oversees all meetings. The dissenting parties are responsible for the content of the discussions, while the commissioner is responsible for the unfolding of the meeting.

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32. The Code of Ethics was amended on 5 December 1995 by the BAPE to take into account the reality imposed on mediating commissioners by the application of the inquiry and mediation process.

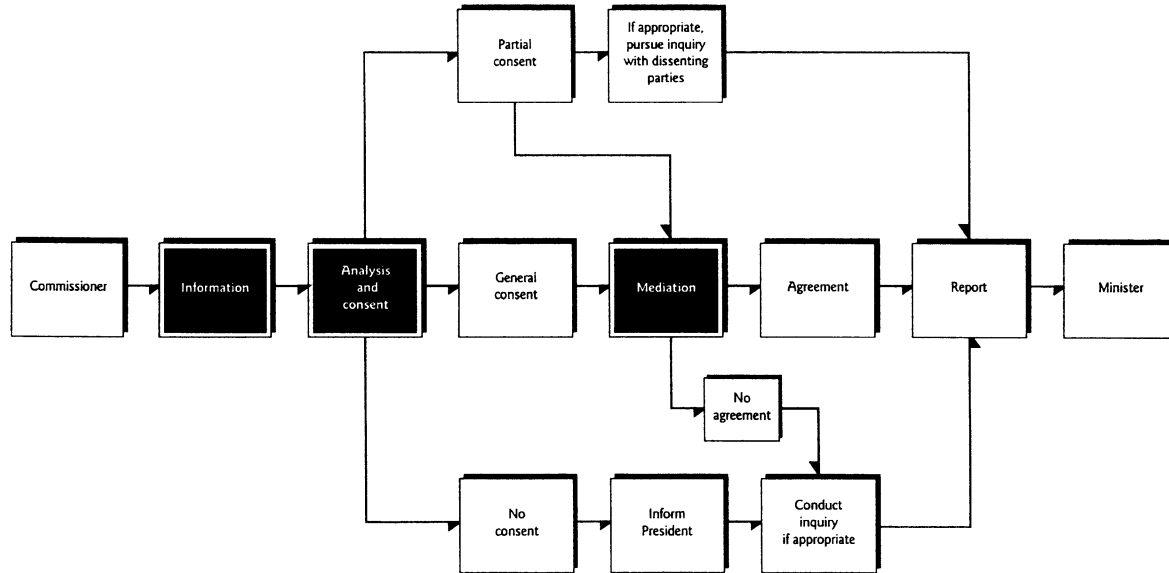
33. R.S.Q., c. C-37 and see subsection 6.5 of the *Environmental Quality Act*. On the use of powers and the immunity of the commissioners, see *Le Comité paritaire de l'industrie du verre plat c. M<sup>e</sup> Yves Ouellette*, [1994] R.J.Q. 1375 (S.C.) et *Lorna Coppin c. Régie du logement*, [1992] R.J.Q. 1572 (S.C.).

34. *Act respecting public inquiry commissions*, R.S.Q., c. C-37, ss. 11, 12 and 13.

35. *Règles de procédure relatives au déroulement des médiations*, *supra*, note 31, s. 13.



# CURRENT FORMAL MEDIATION



(ii) analysis and consent<sup>36</sup>

In his analysis, the commissioner identifies the issues and problems involved in the dossier. The parties are asked to clearly state and explain their position and the commissioner seeks out the salient points, facts or elements that will be targeted by discussions or negotiations. When all parties are receptive to mediation, they are more likely to agree to the mediation process. This process cannot begin until consent is obtained, hence the importance of all parties giving a clear answer. The presence of a stenographer ensures that a record is made of the parties' consent or dissent.<sup>37</sup>

(iii) mediation<sup>38</sup>

Once all parties have given their consent, the actual mediation process can begin. The commissioner brings the parties together to try and solve the dispute. These mediation sessions are to be conducted under the commissioner's leadership, while leaving the parties substantial leeway, since they are the ones who make the final decision. During this phase, the commissioner must be creative in suggesting options: he must facilitate communication while clarifying the parties' statements. Under the right conditions, an agreement can be worked out and mediation can be terminated.

At the last scheduled meeting, the proponent tables his commitments and the commissioner asks the applicants to sign a letter stating that they withdraw their request for a public hearing. This letter is then forwarded to the Minister of the Environment and Wildlife.<sup>39</sup> This phase in the mediation process enables the parties to exercise veritable decision-making powers with regard to the outcome of their dispute. Once the actual mediation process is complete, the commissioner drafts his report based on the documents tabled, the transcripts, and the agreement reached by the parties.

The commissioner may terminate the process at any time if the parties seem unlikely to come to an agreement. He then conveys this decision to the parties and reports to the Minister.

During the process, if one or more applicants refuse mediation, the commissioner can continue his analysis to assist the consenting parties in reaching an agreement. If the commissioner deems mediation to be impossible, he notifies the BAPE president and continues his analysis in order to inform the Minister. He then drafts his report, which must comprise as much information as possible from the analysis, including the applicants' grounds for refusal and the reasons leading the commissioner to conclude that mediation is impossible.

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36. *Id.*, s. 14.

37. *Id.*, s. 20.

38. *Id.*, s. 16.

39. *Id.*, ss. 23 and 25.

At the end of the Commission's mandate, the BAPE submits the commissioner's report to the Québec Minister of the Environment and Wildlife, who has 60 days to make it public.<sup>40</sup> The following table illustrates the various phases in the mediation process and their content.

## INQUIRY AND MEDIATION

### Phases in the mediation process and their content

Information	Analysis and consent	Mediation
<p>Explain how the BAPE and the Commission work.</p> <p>Describe the mandate and the procedure.</p> <p>Outline the mediation process.</p> <p>Identify the parties involved in the mediation process.</p> <p>Explain the BAPE's corporate culture.</p> <p>Empower the parties to determine when to make transcripts available during the process.</p> <p>Inform the parties of the mediator's moral duty to protect the rights of third parties and the environment.</p>	<p>Gather the facts.</p> <p>Determine whether enough information is available to fully understand the case.</p> <p>Identify the points of contention, the problem and the issues.</p> <p>Explore the reasons for the parties' positions.</p> <p>Establish objective sources of additional information.</p> <p>Obtain consent.</p>	<p>Seek solutions.</p> <p>Develop hypotheses and suggestions.</p> <p>Establish options.</p> <p>Foster dialogue in negotiation and sector-based decision-making.</p> <p>Identify common ground.</p> <p>Clarify and propose a general agreement.</p> <p>Verify the social and environmental acceptability of the proposed solutions.</p> <p>Obtain commitments from the proponent.</p> <p>Ensure that the applicants withdraw their requests for public hearings.</p>

### c) inquiry and public hearing

Instead of issuing a mandate for inquiry and mediation, or when mediation has proved impossible and the Minister has not deemed the applications frivolous,<sup>41</sup> the Minister can mandate the BAPE to proceed with an inquiry and hold a

40. See the following reports for examples of how this new process is applied by the BAPE: n° 71, *Autoroute 55: doublement de la chaussée entre Bromptonville et l'intersection avec le chemin de la Rivière*, the first project to undergo this new mediation process; n° 74, *Prolongement de la Côte du Passage à Lévis et réaménagement des accès à l'autoroute Jean-Lesage*; n° 90, *Station ferroviaire Autoroute 640 à Deux-Montagnes*; and n° 91, *Réaménagement de la route 337 de l'autoroute 640 au chemin Martin-Newton*.

41. In the case of the *Programme décennal de dragage aux abords des quais de Cargill Limitée à Baie-Comeau*, report n° 70, the Minister deemed the application for a public hearing submitted by one of the applicants frivolous under subsection 31.3 of the *Environment Quality Act*, *supra*, note 7, particularly since this applicant had refused to participate in the mediation process. See the Order in Council 1654-94 of November 24, 1994.



public hearing. In such a case, the Commission must observe the *Rules of Procedure Relating to the Conduct of Public Hearings*<sup>42</sup> approved by the government. The following diagram illustrates the stages in project processing for inquiry and public hearing.

The BAPE president begins by forming an independent inquiry commission mandated to conduct an inquiry, hold public hearings in two parts, and submit a report to the Minister within the prescribed time frame of four months. All such commissions are mandated to clarify and make information concerning the project comprehensible to the public.

Depending on the scope and complexity of the project undergoing the environmental assessment procedure, commissions are composed of between two and five BAPE members. These commissions are normally chaired by a member of the BAPE and include other members selected for their knowledge or expertise on the elements and issues specific to the project.

Since public participation is the key to the hearing, the public is strongly encouraged to contribute information, express opinions, or suggest improvements to the project; in short, to use their concrete knowledge of the situation to help identify project repercussions and thereby enable Cabinet to reach a more informed decision.

The purpose of the first part of the public hearing<sup>43</sup> is to gather and disseminate as much information on the project as possible to enable participants to better understand the project and its impacts. It is thus the ideal occasion for all those involved to gain a better understanding of the different aspects of the project undergoing environmental assessment.

The current procedure is simple and is based on a direct public exchange between commission members and the public, the proponent, and the organizations and government departments concerned. The Commission ensures that an atmosphere of mutual respect is maintained and that the consultation and inquiry process is fair.

Once this part of the public hearing is completed, individuals, groups or organizations have a minimum of three weeks to prepare their written brief or oral presentation.<sup>44</sup>

During the second part of the public hearing,<sup>45</sup> individuals, groups and organizations are invited to present their opinions on the project. They may voice their support, express their objections, or suggest changes that could make the project more acceptable. In general, the quality of these testimonies is impressive and the public participates actively. After the briefs are presented and the oral presentations heard, the Commission hears all other persons, including the applicants and the proponent, who may wish to rectify any project-related matters that have been raised during this part of the hearing.

The second part of the hearing provides the Commission with concrete knowledge of the project environment. It helps to better identify project repercussions and the values of the communities involved, thereby enabling members to consider all pertinent elements in their analysis.

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42. R.R.Q., 1981, c. Q-2, r. 19. These rules came into force on 30 December 1980.

43. *Rules of procedure relating to the conduct of public hearings*, R.R.Q., 1981, c. Q-2, r. 19, s. 22.

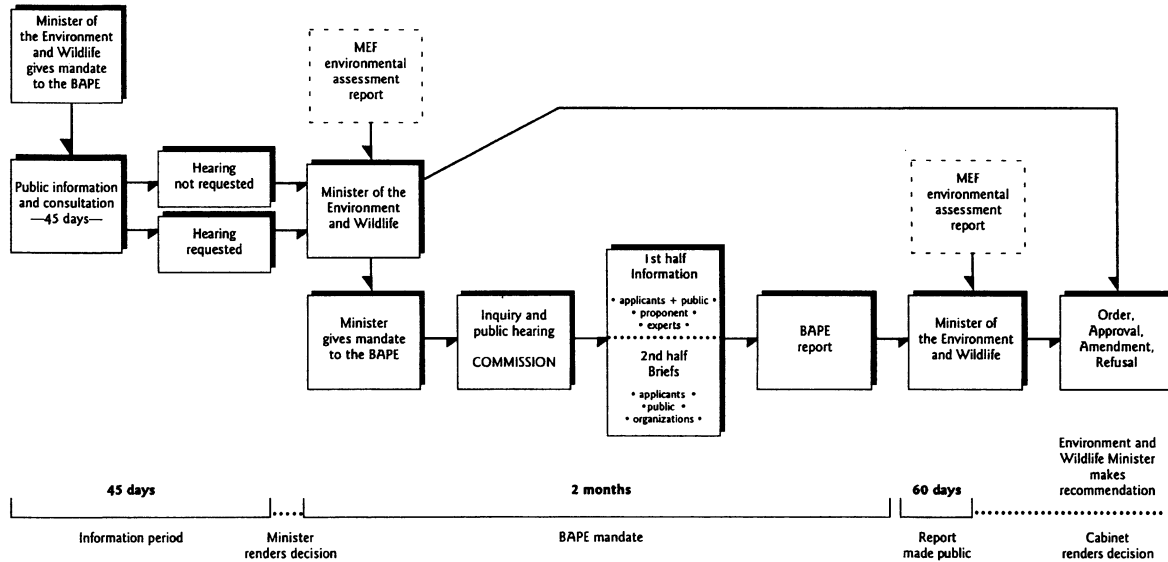
44. *Id.*, s. 14.

45. *Id.*, s. 27.



# STAGES IN PROJECT PROCESSING AT THE BAPE

## INQUIRY AND PUBLIC HEARING



Holding the public hearing in two separate parts, that is, gathering information and allowing the public to express its opinion, is a uniquely Québec-style approach. It enables participants to be better informed so that they can make more relevant comments during the second part of the hearing. This results in superior testimonies and more enlightened, productive opinions.

Once the hearing is over, the Commission continues studying the project using the documents tabled at the hearing, including the briefs submitted by the public and the transcripts of the proceedings, and drafts its report. At the end of its mandate, the BAPE submits the Commission's report to the Minister of the Environment and Wildlife, who has 60 days to make it public.

### 5. Step 5 : decision (MEF and the government)

Under the *Environment Quality Act*,<sup>46</sup> the environmental impact assessment and review procedure culminates in a final decision handed down by Cabinet which, under our parliamentary system, is the highest political authority in the government. However, before it reaches Cabinet, the Minister of the Environment and Wildlife analyzes the BAPE report as well as the report of the Environmental Assessment Branch submitted by the Deputy Minister. Following this analysis, the Minister submits his recommendations to Cabinet, which hands down a decision based on the Minister's recommendations in the form of an order in council.<sup>47</sup>

### 6. Step 6 : monitoring (MEF)

Environmental monitoring, which is the responsibility of the MEF regional offices, occurs during and after the carrying out of the project. Environmental monitoring ensures that the project complies with the conditions set forth in the order in council and with the authorizations<sup>48</sup> issued by the ministère de l'Environnement et de la Faune.

## CONCLUSION

Thus, since 1980, the environmental assessment impact and review procedure has shown itself to be a veritable exercise in land use planning and development whose sole objective is to safeguard the sustainability and quality of everything on which human life and ecosystems depend.

This procedure enables participants, before a project is carried out, to take into account, analyze, and interpret all factors which exert an influence on the ecosystems, resources and quality of life of individuals and collectivities.

To this end, public participation in the environmental impact assessment and review procedure, through mediation and hearings, aims to provide the individuals, groups or municipalities affected by a project with access to technical information, enable them to express their opinions and concerns on the project in question, and highlight the individual or collective values that must be considered in the decision-making process. It also enables participants to determine whether or

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46. R.S.Q., c. Q-2.

47. *Environment Quality Act*, R.S.Q., c. Q-2, s. 31.5.

48. *Id.*, s. 31.7.

not the project will have consequences other than those anticipated, thereby averting future costs related to environmental mediation measures.

Public participation thus results in projects that are as economically, environmentally and socially viable as possible, and that respect the individuals concerned as well as local and regional imperatives. In this way, human beings empower themselves to improve their social organization, develop a more efficient democratic structure, and concretely apply the concept of sustainable development as defined by the World Commission on Environment and Development and the *Rio Declaration on Environment and Development*.

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