

PROVINCE OF NOVA SCOTIA CONSULTATION WITH THE MI'KMAQ

INTERIM CONSULTATION POLICY June 19, 2007



Application

This interim policy applies to all departments.

Purpose

The purpose of this interim policy is to provide general guidance to departments for considering when and how to consult with the Mi'kmaq. In some situations there may be a legal duty to consult. In others, departments may consult for policy reasons, regardless of whether or not a legal duty exists.

As Government and the Mi'kmaq begin to conduct consultations on a range of matters, both parties will learn and develop best practices in this emerging area of the law. This policy is therefore an interim step, with a more permanent and comprehensive policy to follow. This interim policy does not apply to discussions on issues where claimed treaty, title and aboriginal rights are not an issue (e.g. Tripartite Forum, health issues, etc.).

The interim policy is also intended to be a catalyst for departments to develop additional policies and procedures to deal with activities and initiatives specific to their department.

This interim policy does not obligate departments to consult with the Mi'kmaq in any specific instances. It is up to individual departments to decide when consultation is appropriate, using this document as guidance. This interim policy document should not be construed as an admission by the Province of the existence of a duty to consult with the Mi'kmaq in any particular situation.

Context

For various legal and public policy reasons, governments are increasingly more inclusive in dealing with legislation and policy matters, particularly so for matters that affect Aboriginal peoples. In Nova Scotia, this trend began in 1999 with the creation of the Office of Aboriginal Affairs (OAA).

In Nova Scotia, our relationship with the Mi'kmaq is largely grounded historically in the Peace and Friendship Treaties from the 1700s and more recently in the 2002 Umbrella Agreement. The Umbrella Agreement commits the Province, the Mi'kmaq and the Federal Government to developing a terms of reference on consultation.

From a legal perspective, a number of court cases (for example, Haida, Taku River, Mikisew Cree) have found that governments have a duty to consult with Aboriginal peoples where their claimed rights may be impacted or infringed. The legal situation continues to evolve, but the current legal context generally suggests:

- Governments may have a duty to consult Aboriginal peoples prior to making decisions that might adversely affect their claimed or asserted treaty rights, Aboriginal rights and title claims;
- There is a reciprocal obligation on Aboriginal groups to participate in consultation initiated by the Crown; and
- The extent of consultation and accommodation that may be required depends on the strength of the claim and the seriousness of the impact of the proposed activity. However, ultimate decision-making authority remains with government.

Guidance to Departments

Departments Responsible for Deciding to Consult

Each department is responsible for determining whether to consult with the Mi'kmaq on its actions and decisions. The decision to consult should be based on legal and policy considerations:

Legal

- Departments should consider whether there may, or may not be a legal duty to consult, particularly for issues affecting land and water under provincial jurisdiction. This may require advice from the department's solicitor regarding:
 - Known or potential existence of claims of treaty rights, Aboriginal rights or Aboriginal title;
 - the strength of the claims;
 - the likelihood of litigation;
 - whether or not there is a duty to consult and the likely extent of consultation required to meet the legal obligation.

Policy

- Departments may also choose to consult based on a policy rationale. Relevant policy considerations may include high levels of public or community interest, seeking information that may improve decisions, reconciliation and relationship-building with First Nations, avoiding regulatory delays, business climate issues, federal requirements for areas with shared/overlapping responsibilities, etc.
- The OAA is available to provide further advice, including information about how another department dealt with a similar situation.

Agencies, Boards, Commissions and Crown Corporations

Departments are also advised to review possible consultation requirements regarding the activities and decisions of their respective agencies, boards, commissions and crown corporations.

Determine Need for Department-specific Policies/Procedures

Departments should review the range of matters possibly requiring consultation and determine whether more specific policies and procedures are required.

Departments are advised to consult with the OAA to assist with the development of department-specific policies or procedures.

Designated Contacts in Departments

Deputy Ministers are asked to designate individuals who will have responsibility for consultation issues. These departmental designates will be required to be the primary contact on consultation matters. Expectations of designated contacts should include:

- Designate should be a member of the Senior Management Team of their respective department;
- understanding of departmental decision-making processes;
- timely access to senior decision-makers within the department;
- good understanding of the Mi'kmaq community in Nova Scotia;
- ability to lead the development and coordination of departmental approaches to consultation; and

- networking with the OAA and counterparts in other departments to facilitate development of common over-all provincial approaches and processes.

Role of the Office of Aboriginal Affairs (OAA)

The role of the OAA on consultation issues includes the following:

- Coordinate provincial policy issues for consultation, including development of broad, long-term policies and guidelines;
- build capacity and awareness within provincial government departments and agencies on how to undertake effective consultation with Aboriginal peoples;
- lead discussions on behalf of the province for the development and implementation of the Terms of Reference for Consultation, under the June 2002 Umbrella Agreement;
- provide advice to departments on consultation approaches and the implementation of this interim policy;
- provide information to departments about the nature of claims asserted by the Mi'kmaq;
- provide information to departments about Mi'kmaq processes, protocols and internal organization regarding consultation issues; and
- provide advice on intergovernmental and cross-jurisdictional consultation issues where Government of Nova Scotia departments are involved.

Principles to Guide Consultations

Identify groups to be consulted.

Key groups include:

Bands

- Consultation should always include the Chief and Band Council. For most situations they are the appropriate entities with authority to speak on behalf of communities.
- Band councils may authorize other organizations or individuals to represent them for some issues.
- Departments should provide copies of requests for consultation to the Assembly of Nova Scotia Mi'kmaq Chiefs (the Assembly), c/o Kwilmu'kw Maw-klusuaqn Negotiation Office.

Other Mi'kmaq organizations

- In addition to the above, departments may share information with and receive input from other Mi'kmaq organizations, including the Confederacy of Mainland Mi'kmaq, the Union of Nova Scotia Indians and the Unama'ki Institute of Natural Resources. These organizations provide services to various groups of bands and have technical expertise and a good understanding of community issues.
- These organizations may provide a Mi'kmaq perspective on issues. However, unless specifically authorized by band councils or the Assembly, the views of these organizations may not represent the official positions of band councils or the Assembly.
- The Native Council of Nova Scotia (NCNS) is an organization that includes non-status and off-reserve status Mi'kmaq, and has an interest in a variety of natural resource matters.

The OAA can provide advice on groups likely to be affected or interested.

Use available Mi'kmaq processes, to the extent possible

- Under the 2002 Umbrella Agreement, the Assembly of Nova Scotia Mi'kmaq Chiefs, Nova Scotia and Canada agreed to develop a Terms of Reference for Consultation. The terms of reference is currently being finalized. The interim consultation policy will be revised, as appropriate, to reflect the terms of reference.
- The Mi'kmaq may also establish internal mechanisms to coordinate consultation activities.
- Departments are encouraged, where possible, to make use of these mechanisms as the preferred choice for consultations.

OAA can assist departments to make use of these processes as they are developed and finalized.

Be clear that consultation is intended

- Departments should provide written notification to the appropriate groups when they wish to consult with the Mi'kmaq. There should be a clear indication in the letter that the provincial government is seeking to consult on a given issue, as well as a clear indication of the expected timelines and key issues.

No need to take legal position on consultation issues

- Given legal uncertainties, departments should avoid stating formal positions about the existence or extent of a legal duty to consult in specific situations. Regardless of whether or not there may be a legal duty to consult, there may be policy reasons to consult. Also, there may be situations where a department may choose, for policy reasons, to broaden the scope of a consultation beyond the minimum that may be required from a legal perspective.

Consult with OAA before considering accommodations

- Where a department, as a result of consultation, examines potential accommodations involving economic initiatives or significant expenditures, they must consult with the Office of Aboriginal Affairs to ensure a coordinated approach across government.

Reduce need for ad-hoc and transaction-by-transaction consultations

- Consider mechanisms to identify issues at the policy development or planning stages to reduce issues at the operational level.
- Consider coordinated approaches for classes of transactions.

Without Prejudice Discussions

“Without prejudice” is a legal term that means that the parties intend that the content of the discussions may not be used in court or litigation.

In some situations it may be desirable to hold “without prejudice” discussions with the Mi'kmaq to put legal matters aside to permit more frank, cooperative and solution-oriented discussions; or to seek candid process advice.

Where a department wishes to discuss matters on a “without prejudice” basis, the OAA can provide further advice.

Contact:

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