



Government of Nova Scotia
Policy and Guidelines:

**CONSULTATION
WITH THE MI'KMAQ
OF NOVA SCOTIA**

April 2015

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EXECUTIVE SUMMARY

In 2004 and 2005, the Supreme Court of Canada released three landmark decisions that established the common law duty to consult with Aboriginal peoples. The Supreme Court of Canada held that provincial and federal governments have a duty to consult with Aboriginal peoples, and accommodate their interests, where appropriate, when contemplating conduct that may adversely impact established and asserted Aboriginal or treaty rights.

The Government of Nova Scotia recognizes the duty to consult with the Mi'kmaq of Nova Scotia and, beginning in 2007, established an institutional framework for consultation. This includes an Interim Consultation Policy, the Mi'kmaq–Nova Scotia–Canada Consultation Terms of Reference, a Consultation Cooperation Agreement with the federal government, a Guide for Proponents, a Consultation Division at the Office of Aboriginal Affairs, a number of training and capacity-building initiatives, and supporting tools to ensure the duty is met.

The Government of Nova Scotia Policy and Guidelines: Consultation with the Mi'kmaq of Nova Scotia achieves another important step in developing a consistent process that respects the established and asserted rights of the Mi'kmaq of Nova Scotia. The Policy and Guidelines provide detailed direction to Nova Scotia government departments that may have a duty to consult with the Mi'kmaq of Nova Scotia. This document outlines why and when consultation may be required, and how to proceed with consultation.

The Policy was developed in consultation with the Mi'kmaq of Nova Scotia, key consultation practitioners from provincial and federal government departments, and industry representatives that have played an active role in consultation practice. Key elements of the Policy include clear principles for consultation, the legal and policy considerations for consultation, the clarification of roles and responsibilities of all participants in consultation, and a full description of Nova Scotia's six steps of consultation.

This Policy demonstrates the Government of Nova Scotia's commitment to carrying out the duty to consult in collaboration with the Mi'kmaq of Nova Scotia and the Government of Canada.

LIST OF ABBREVIATIONS

Assembly: Assembly of Nova Scotia Mi'kmaq Chiefs

OAA: Office of Aboriginal Affairs

KMKNO: Kwilmu'kw Maw-klusuaqn Negotiation Office (Mi'kmaq Rights Initiative)

SCC: Supreme Court of Canada

TOR: Mi'kmaq–Nova Scotia–Canada Consultation Terms of Reference

INTRODUCTION

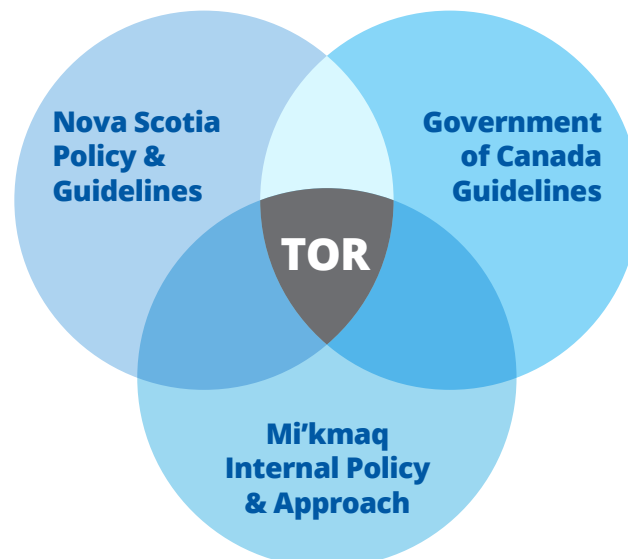
The Government of Nova Scotia Policy and Guidelines: Consultation with the Mi'kmaq of Nova Scotia sets out the Government of Nova Scotia's policy and procedures for administering one of the most important aspects of its relationship with the Mi'kmaq of Nova Scotia: the Crown's duty to consult and accommodate, where appropriate. This Policy reflects the hard work and collaboration of all parties to strengthen their mutually beneficial relationships.

The Haida and Taku River Tlingit Supreme Court of Canada decisions of 2004 held that the Crown has a duty to consult and, where appropriate, accommodate Aboriginal peoples when contemplating decisions that might adversely impact potential or established Aboriginal and treaty rights. Since 2004, governments across Canada have worked together to develop policies, frameworks, and practices that respect their particular contexts, and are consistent with Supreme Court of Canada decisions about the duty to consult and accommodate, where appropriate. This Policy will help provincial staff determine when consultation is required, how consultation should take place, and which parties should be involved.

In Nova Scotia, the provincial government has focused on implementing the Terms of Reference as the preferred approach to consultation agreed to by the three parties and developing consultation tools to support the Terms of Reference, including:

- the development of this Policy
- a *Terms of Reference for a Mi'kmaq–Nova Scotia–Canada Consultation Process* ("TOR" or "Consultation Terms of Reference")
- a *Proponents' Guide: The Role of Proponents in Crown Consultation with the Mi'kmaq of Nova Scotia*
- a *Memorandum of Understanding on Consultation Cooperation* with the federal government
- a number of departmental guidelines to support consultation
- a Consultation Division within the Office of Aboriginal Affairs to manage and administer the process

The federal and provincial governments, as well as the Mi'kmaq of Nova Scotia, have developed policies and procedures for meeting the duty to consult that reflect their own circumstances, structures, and processes.



PURPOSE

POLICY STATEMENT

The Government of Nova Scotia will consult with the Mi'kmaq of Nova Scotia and accommodate, where appropriate, when contemplating conduct that has the potential to adversely impact established and/or asserted Mi'kmaq Aboriginal rights, including Title, and treaty rights (together referred to in this document as “asserted rights” or “asserted Mi'kmaq rights.”¹) The Government of Nova Scotia is committed to making decisions in a manner that is consistent with the recognition and affirmation of existing Aboriginal and treaty rights in Section 35 of the Constitution Act, 1982, and within the legal parameters established by the Supreme Court of Canada concerning the duty to consult. The Policy and any form of consultation conducted by the Government of Nova Scotia are not intended to prove or disprove any asserted Aboriginal or treaty rights.

POLICY OBJECTIVES

The purpose of this Policy is to provide clear direction and practical, consistent guidance to ministers of the Crown and to provincial government staff, including those working at departments, agencies, Crown corporations, boards, and commissions, when they are contemplating decisions or actions that have the potential to adversely impact established and/or asserted Mi'kmaq rights. The Policy outlines the reasons the Crown consults with the Mi'kmaq of Nova Scotia, the principles that guide consultation, the roles and responsibilities of the principal participants, and the procedures for consultation. The Policy is consistent with the *Terms of Reference for a Mi'kmaq–Nova Scotia–Canada Consultation Process* and replaces the *Province of Nova Scotia Consultation with the Mi'kmaq: Interim Consultation Policy* (June 19, 2007).

As the law and practice around the duty to consult continues to evolve in Canada, the Policy and any associated documents, such as guidelines, protocols, and agreements, will be updated to reflect the current status and practice. The Policy allows the Government of Nova Scotia to issue policy statements that address matters associated with consultation that arise from time to time.

POLICY SCOPE

The Policy applies to all provincial government departments, offices, agencies, Crown corporations, boards, and commissions that are contemplating decisions or actions that have the potential to adversely impact established and/or asserted Mi'kmaq rights, including the ability to exercise these rights (e.g., access to lands). Those rights may include, but may not be limited to, the following:

- hunting
- fishing
- gathering (black ash, sweetgrass, medicinal plants, etc.)
- trapping
- other traditional uses

¹ The expression “Mi'kmaq rights” is used since the Mi'kmaq are the only First Nation officially recognized in Nova Scotia.

The types of government decisions that may trigger consultation are:

- decisions affecting Crown and other provincially owned land
- policies, permits, approvals, licences, initiatives, plans, and procedures related to managing or using natural resources (environment, fish, wildlife, forests, water, minerals, petroleum, or other resources)
- development in proximity to Mi'kmaw communities, or lands used by the Mi'kmaq of Nova Scotia (the scale of proximity depends on the scope of the project and the potential level of impact)
- other actions or decisions that may negatively impact asserted Mi'kmaw rights

The introduction of new legislation or regulation may also trigger a duty to consult if it has the potential to adversely impact established and/or asserted Mi'kmaq rights. However, based on current direction from the Courts, consultation regarding the law-making process requires special consideration in terms of if, when and how consultation should take place.

The Government of Nova Scotia regularly engages in processes of public consultation and stakeholder engagement with the general public of Nova Scotia. These processes are separate from, but complementary to, the duty to consult with the Mi'kmaq of Nova Scotia. Mi'kmaw individuals and organizations are welcome to participate in public consultation and stakeholder engagement processes as interested members of the general public. However, any such participation does not constitute consultation for the purposes of fulfilling the Crown's duty to consult. This Policy does not address the broader processes of public consultation and stakeholder engagement.

THE DUTY TO CONSULT

The Government of Nova Scotia's approach to provincial Aboriginal relations includes

- consultation
- negotiation (Made-in-Nova Scotia process)
- community and intergovernmental relations (e.g., Tripartite Forum)

Consultation deals with operational and strategic-level decisions, and is meant to ensure fair consideration is given to the asserted rights and interests of the Mi'kmaq of Nova Scotia in government decision making.

The Policy and associated consultation do not seek to settle the question of the recognition or practice of Aboriginal or treaty rights for the Mi'kmaq of Nova Scotia. These matters are being addressed through the Made-in-Nova Scotia negotiation process. The negotiation process is the forum for the Mi'kmaq, Nova Scotia, and Canada to resolve issues related to Mi'kmaw treaty rights, Aboriginal rights (including Aboriginal title), and Mi'kmaw governance.

The Mi'kmaq–Nova Scotia–Canada Tripartite Forum is a partnership between the Mi'kmaq, Nova Scotia, and Canada to strengthen relationships and work on socio-economic issues of mutual concern in the modern context.

Courts have generally directed First Nations and governments to achieve negotiated solutions to resource disputes through consultation rather than resorting to litigation.

LEGAL CONTEXT

Long before Europeans settled in Canada, indigenous peoples occupied these lands and waters, and as such have a unique legal status. Existing and proven Aboriginal and treaty rights received constitutional protection in Canada in 1982 with the patriation of the Constitution. Section 35 of the Constitution Act, 1982, states, "The existing aboriginal and treaty rights of Aboriginal peoples of Canada are hereby recognized and affirmed." While the constitution protects existing rights, the nature and extent of those rights have not been exhaustively defined, and Section 35 does not deal with asserted, but still unproven, Aboriginal rights. Accordingly, one of the purposes of consultation is to consider the impact of Crown decisions on these not yet proven, but asserted, rights.

Please refer to Appendix B: Glossary of Terms for definitions of Aboriginal rights, Aboriginal title, and treaty rights, particularly in the Nova Scotia context.

Canadian law concerning Aboriginal peoples continues to develop and evolve. This is especially true of the law on the duty to consult. To date, there are several Supreme Court of Canada cases that define the Crown's duty to consult with Aboriginal peoples: *Haida Nation v. BC (Minister of Forests)*

2004, Taku River Tlingit First Nation v. BC (Project Assessment Director) 2004, Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) 2005, Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council 2010, and Beckman v. Little Salmon/Carmacks First Nation 2010. These cases provide a general and consistent framework, with the expectation that governments will provide clarity around process by creating policies, guidelines, and procedures to fulfill the duty to consult.

The Supreme Court of Canada decisions provide a legal framework that the Government of Nova Scotia recognizes as its duty to consult. The following section lists some of the more significant observations from the SCC decisions listed above:

- “The government’s duty to consult with Aboriginal peoples and accommodate their interests is grounded in the principle of the honour of the Crown, which must be understood generously.”²
- The Crown (both federal and provincial), having knowledge of asserted and/or proven Aboriginal and treaty rights, has a duty to consult Aboriginal peoples when contemplating decisions or actions that have the potential to adversely impact those rights, and accommodate their interests, where appropriate. The court recognized the duty exists even though rights have not been proven in a court of law.
- The goal of consultation is to reach consensus or agreement on how to avoid adverse impacts on asserted Aboriginal and/or treaty rights. However, there is no duty to reach an agreement, and Aboriginal groups do not have a veto over government decision making.
- Aboriginal groups have a reciprocal duty to express their interests and concerns once they have had an opportunity to consider the information provided by the government. However, they must not frustrate the government’s attempts to consult, or take unreasonable positions.
- It is the government’s duty to consult; however, third parties can be delegated some procedural aspects of consultation.
- Consultation must engage First Nations directly and cannot simply be a component of a public consultation process.
- The duty to consult exists to protect the collective rights of Aboriginal peoples. Therefore, the duty to consult is owed to the First Nation as a collective or community, not to individuals. However, an Aboriginal group can authorize an individual or an organization to represent it for the purpose of asserting its constitutionally protected rights.
- Past decisions, including breaches of the duty to consult, do not trigger consultation obligations. The duty to consult is triggered by a current proposed government action that creates a further or new adverse impact. Speculative impacts and impacts on future negotiating positions do not trigger the duty to consult.
- The duty to consult is not limited to the exercise of statutory powers and may extend to strategic higher-level decisions that may impact rights.
- Tribunals may carry out the duty to consult if they are explicitly mandated to do so through their enabling statutes. In addition, tribunals may be delegated the duty to consult or to consider the adequacy of consultation by legislatures.

New court cases will continue to further define the duty to consult, requiring governments and Aboriginal peoples to refine their approaches to consultation.

² Haida Nation v. British Columbia (Minister of Forests) [2004] 3 S.C.R. 511, 2004 SCC 73, para 1.

POLICY CONSIDERATIONS

In addition to the constitutional and common law obligations outlined above, there are a number of policy reasons for ensuring meaningful consultation takes place with the Mi'kmaq of Nova Scotia. One of the benefits of consulting with the Mi'kmaq of Nova Scotia is building, strengthening, and maintaining long-lasting relationships and engaging the Mi'kmaq as partners in the sustainable development of the province. A well-defined consultation process supported by clear consultation policies and procedures helps create an environment of trust and certainty that is good for business development that ultimately benefits all Nova Scotians. The Mi'kmaw people and the Government of Nova Scotia have a historical relationship that has improved and strengthened in recent years. Consultation supports the advancement of this relationship.

Although the Province consults with the Mi'kmaq of Nova Scotia for legal reasons, consultation helps the Province ensure it is making the best strategic and operational decisions possible by including information and ideas that may not necessarily come to light without proper consultation. Although at times there may appear to be no duty to consult on a particular issue as legally required, the Government of Nova Scotia may wish to include the views and ideas of the Mi'kmaq of Nova Scotia in the strategic planning of important areas of public policy. In this instance, the processes outlined in this Policy can be applied as it provides a clear administrative process.

Consultation also contributes to the process of reconciliation between the Government of Nova Scotia and the Mi'kmaw people, and the reconciliation of the interests of Mi'kmaw people with those of broader society. Strong, long-lasting, and equitable relationships with the Mi'kmaq benefit all Nova Scotians.

GUIDING PRINCIPLES

The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown.³

The Government of Nova Scotia will take a proactive, meaningful, consistent, and coordinated government-wide approach to consultation, based on the following principles:

GOOD FAITH

Consultation must be carried out in good faith. Consultation will be undertaken in the spirit of trust, collaboration, and mutual respect among all parties.

RECONCILIATION

Consultation will be carried out with the goal of reconciliation of government and Mi'kmaw interests, and the reconciliation of Mi'kmaw interests with broader society.

TRANSPARENCY

Information that supports or contributes to the decision or action that is the subject of consultation is generally shared with the Mi'kmaq of Nova Scotia. The exception to this practice may be when there are statutory obligations or confidentiality agreements in place to protect proprietary or financial information, or when the parties agree that information will not be shared for other reasons.

ACCOUNTABILITY

All parties share the responsibility to ensure the consultation process is carried out in a manner consistent with agreements and the principles of consultation. The Government of Nova Scotia will provide information related to the decision or action under consideration; participate in a meaningful process of dialogue that considers all interests and concerns of the Mi'kmaq of Nova Scotia; and provide a response, once decisions are made, that outlines how the government is responding to those interests and concerns, including any accommodation measures, where appropriate.

TIMELINESS

Consultation will take place in a timely and efficient manner, within reasonable time periods, and with respect for Mi'kmaw decision-making processes and any statutory or legislated timeframes. Consultation should begin as early in the decision-making process as reasonably possible. Parties should remain flexible and adjust time periods as needed based on the complexity of the file and when exceptional circumstances arise.

³ Haida Nation v. British Columbia (Minister of Forests) [2004] 3 S.C.R. 511, SCC 73, para 17.

ROLES AND RESPONSIBILITIES

NOVA SCOTIA OFFICE OF ABORIGINAL AFFAIRS

The Office of Aboriginal Affairs, through its Consultation Division, provides policy leadership, guidance, and advice to government departments and proponents about the duty to consult with the Mi'kmaq of Nova Scotia, and advise on the process to fulfill consultation obligations. OAA works directly with departments to determine if consultation should be initiated, and if so, then guides and coordinates the consultation process from start to finish. This includes facilitating all consultation with the Mi'kmaq of Nova Scotia, tracking the progress of consultation, helping keep the process on track with respect to timelines and procedural requirements, and maintaining a record of all consultations. The Consultation Division regularly provides training to provincial government staff, and also provides outreach services to organizations and businesses that are interested in learning more about consultation with the Mi'kmaq of Nova Scotia or their role in the consultation process. Consultation advisors are assigned to departments that are regularly involved in consultation. Please contact OAA's Consultation Division for a current list of assigned consultation advisors.

GOVERNMENT OF NOVA SCOTIA DEPARTMENTS

Government of Nova Scotia departments may have different roles in the consultation process. The **lead department** is the department (or office, agency, Crown corporation, board or commission) that has the broadest scope of authority for the proposed measure or action, and has authority for the type of project under consideration. For complex, multi-phased projects, the lead department may change from one department to another during the development of a project, depending on which department has the primary authority at the time. OAA will work with departments to identify their roles in the consultation process. Lead departments will be accountable for ensuring the consultation process takes place according to the principles outlined in this document, as well as the Consultation Terms of Reference, or any other consultation arrangements with the Mi'kmaq of Nova Scotia. Lead departments should be aware of and coordinate the involvement of other provincial and federal departments in consultation in conjunction with OAA. Lead departments are required to keep their own consultation records and to monitor the implementation of any accommodation that may be reached as a result of consultation.

Supporting departments may provide an approval or authorization that contributes to the overall project. Those departments will be expected to participate in the consultation process as needed. Some departments may be asked to contribute technical advice on some aspect of the project, even though they do not have any direct authority for approvals. Supporting departments and technical advisors will be invited to participate in consultations at the discretion of the lead department.

Departments may also be asked to contribute funds to support their specific consultation activities. Departments should consult with OAA, Consultation Division, before providing any funding to support consultation activities.

Departments will develop operational procedures for consultation that are consistent with the Policy, TOR, and any other consultation arrangements. Department- and program-specific procedural guidelines more accurately align the consultation process with departmental business practices, and provide practical, step-by-step guidance to operational staff. OAA's Consultation Division will provide guidance and assistance in developing and carrying out these procedures. Departments may also wish to develop streamlined mechanisms with the Mi'kmaq of Nova Scotia to establish mutually acceptable and efficient processes of consultation (for example, quarterly notifications of Crown Land transactions or sectoral consultation roundtables). Any streamlined mechanisms for consultation must be consistent with this Policy, the TOR, and any other consultation arrangements. Departments should collaborate with OAA's Consultation Division to develop alternative mechanisms.

To date, the following provincial government departments have either led or supported consultation with the Mi'kmaq of Nova Scotia:⁴

- Department of Communities, Culture and Heritage
- Department of Economic and Rural Development and Tourism
- Department of Energy
- Department of Environment
- Department of Fisheries and Aquaculture
- Department of Justice
- Department of Municipal Affairs
- Department of Natural Resources
- Department of Transportation and Infrastructure Renewal
- Office of Aboriginal Affairs

MI'KMAQ OF NOVA SCOTIA

The Mi'kmaq of Nova Scotia have developed their own institutions, structures, and procedures to represent the collective rights of the Mi'kmaw people and to facilitate consultation with the governments of Nova Scotia and Canada. There are three main entities that may be involved in consultation:

- *Thirteen Mi'kmaw chiefs and councils (band councils)*: Band councils are legal entities democratically elected under the federal Indian Act by the on- and off-reserve members of their communities to represent their interests with government authorities, and make decisions related to the community. In 2010, all 13 Mi'kmaw communities signed the TOR, giving authority to the Assembly of Nova Scotia Mi'kmaq Chiefs to consult on their behalf. Presently, 12 of the 13 communities operate under the TOR, while the community of Sipekne'katik consults independently.
- *The Assembly of Nova Scotia Mi'kmaq Chiefs*: The Assembly consists of the 13 elected Mi'kmaw chiefs and 2 ex officio members, supported by staff and advisors. Two chiefs serve as co-chairs of the Assembly, and most chiefs have responsibilities for specific portfolios (e.g., Fisheries, Mining, Lands, Wildlife, Forestry, etc.). The Assembly plays a significant role in collective decision making for the Mi'kmaq of Nova Scotia, particularly on issues pertaining to Mi'kmaw rights and governance. On behalf of 12 Mi'kmaw communities under the TOR, the Assembly leads negotiations with the provincial and federal governments, and oversees the consultation process. The Assembly meets regularly to deliberate on issues related to consultation with the federal and provincial governments.

⁴ This is a general list of key departments, in alphabetical order. There may be other departments, as well as agencies, boards, and commissions that will, from time to time, need to consult with the Mi'kmaq of Nova Scotia. If you have questions about whether or not you may need to consult with the Mi'kmaq, please contact the Office of Aboriginal Affairs, Consultation Division, at (902) 424-4174.

- *Kwilmu'kw Maw-klusuaqn Negotiation Office*: The KMKNO is the technical and administrative office that coordinates and supports the work of negotiation and consultation for the Assembly. Together with the chiefs and councils, the KMKNO is the main interface of consultation for 12 of the 13 Mi'kmaw communities. The KMKNO administers and facilitates the consultation process on behalf of the 12 communities that are signatories to the TOR, and conducts research and analysis on government decisions and actions requiring consultation. The KMKNO takes its direction from the Assembly.

THE GOVERNMENT OF CANADA

The Government of Canada also has a duty to consult, and accommodate, where appropriate, the Mi'kmaq of Nova Scotia when contemplating conduct that may adversely impact potential or established Mi'kmaw rights. The Government of Canada is also a signatory to the TOR.

The Government of Nova Scotia takes a collaborative approach to consultation and has worked closely with the Government of Canada through Aboriginal Affairs and Northern Development Canada to develop and sign a *Memorandum of Understanding (MOU) on Consultation Cooperation*. The MOU is the first of its kind in Canada, and outlines co-operation for the coordination of consultation, information sharing, capacity building, and funding.

The Nova Scotia–Canada Memorandum of Understanding on Consultation Cooperation can be found on the Office of Aboriginal Affairs website.

The following federal government departments may be responsible for consultation with the Mi'kmaq of Nova Scotia:⁵

- Fisheries and Oceans Canada
- Transport Canada
- Canadian Environmental Assessment Agency
- Public Works and Government Services Canada
- Natural Resources Canada
- Environment Canada
- Parks Canada
- Aboriginal Affairs and Northern Development Canada

BEST PRACTICE:

When working with federal government departments on consultation, establish consistent methods of communication to ensure all parties have the same information.

⁵ Although not exhaustive, this is a list of key federal government departments that have coordinated consultation with the Province of Nova Scotia. There may be other federal departments, as well as agencies, boards, Crown corporations, and commissions, that will, from time to time, need to consult with the Mi'kmaq of Nova Scotia.

PROJECT PROPONENTS OR THIRD PARTIES

The duty to consult always belongs to the provincial and/or federal Crown, and the Crown cannot delegate the duty to consult to a third party. Courts have been clear, however, that procedural aspects of consultation may be delegated to proponents or third parties.⁶ This is because it is the proponent that knows the details of their project best and will be best suited to mitigate or avoid any potential adverse impacts. Unmitigated potential impacts to Mi'kmaq interests can delay decision-making and other related processes. Establishing positive relationships and regular communications with the Mi'kmaq of Nova Scotia early in the project development process is beneficial to all parties involved and can help build better projects.

Procedural aspects of consultation, such as information exchange, conducting studies, and communication and relationship building between proponents and communities (including the Mi'kmaq of Nova Scotia), is commonly called "engagement." Proponents have an opportunity to engage the Mi'kmaq of Nova Scotia early and throughout the development of their projects. In Nova Scotia, this has resulted in partnership opportunities with the Mi'kmaq, improved and more efficient decision making, and project improvements that benefit all Nova Scotians.

Proponents have asked governments to provide clear instructions regarding the delegation of procedural aspects and their role in Crown consultation. Nova Scotia has developed a *Proponents' Guide: The Role of Proponents in Crown Consultation with the Mi'kmaq of Nova Scotia* that outlines third-party responsibilities in consultation, and lays out a step-by-step process for proponents to follow. It is the proponents' responsibility to be informed and carry out those tasks. Government of Nova Scotia departments should ensure this document is accessible to proponents seeking permits and authorizations. OAA can help proponents to develop an engagement plan with the Mi'kmaq of Nova Scotia; however, the lead department will be the main contact for the proponent throughout the consultation process.

Proponents are also expected to cover their own costs for engaging the Mi'kmaq of Nova Scotia, including costs for studies that are recommended by the Crown to identify potential impacts on Mi'kmaq rights in the proposed area of the project. Where potential impacts can be identified, proponents should make every reasonable effort to avoid, minimize, or mitigate those impacts, and to seek ways to involve the Mi'kmaq of Nova Scotia in their project. The Government of Nova Scotia encourages proponents to work with the Mi'kmaq to develop mutually favourable agreements where potential impacts on asserted rights are significant.

***The Proponents' Guide: The Role of Proponents in Crown Consultation with the Mi'kmaq of Nova Scotia* can be found on the Office of Aboriginal Affairs website.**

⁶ Haida Nation v. British Columbia (Minister of Forests) [2004] 3 S.C.R. 511, SCC 73, para 53.

DELEGATION OF PROCEDURAL ASPECTS OF CONSULTATION (PROPONENT ENGAGEMENT)

1. Seek guidance from OAA.
2. Notify the Mi'kmaq of Nova Scotia as early as possible in the development process.
3. Provide as much project information as possible.
4. Meet with potentially impacted Mi'kmaw communities (project dependent).
5. Complete a Mi'kmaq Ecological Knowledge Study (project dependent).
6. Address potential project-specific impacts.
7. Document the engagement process.

TERMS OF REFERENCE FOR MI'KMAQ–NOVA SCOTIA–CANADA CONSULTATION

The Mi'kmaq of Nova Scotia, the Government of Nova Scotia, and the Government of Canada recognized a need to establish formal processes and institutions for consultation long before the 2004 SCC consultation decisions. In fact, in 2002 when the three parties signed an Umbrella Agreement that led to the establishment of the Made-in-Nova Scotia negotiation process, they identified consultation as one of the key issues requiring resolution. As a result of that agreement, the three parties entered into discussions to develop a TOR for consultation.

The *Terms of Reference for a Mi'kmaq–Nova Scotia–Canada Consultation Process* describes how consultation will take place and with whom. It was the first consultation agreement in Canada to cover an entire province. After a three-year pilot project, and a joint evaluation of the TOR document and the process, the three parties revised and formally signed the TOR in August 2010.

The TOR applies to all potential consultations undertaken by both the federal and provincial governments with the Mi'kmaq of Nova Scotia, unless another arrangement is reached with the Assembly or a particular Mi'kmaw community. Any other negotiated consultation arrangements will strive to follow the same approach as the TOR. This Policy is consistent with the TOR.

***The Terms of Reference for a Mi'kmaq–Nova Scotia–Canada Consultation Process* can be found on the Office of Aboriginal Affairs website.**

OPTING OUT OF THE TOR

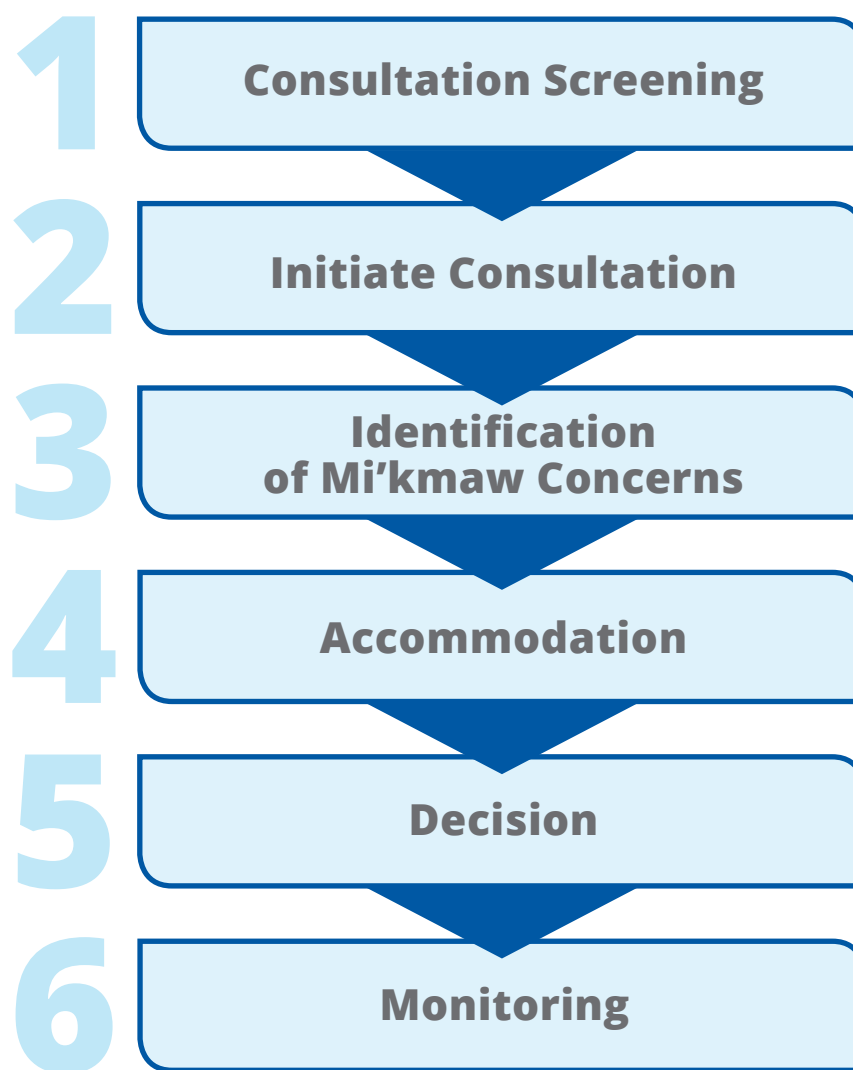
A Mi'kmaw community may decide to opt out of the TOR on a particular issue, or terminate their participation under the agreement completely.

According to Articles 6–8 of the TOR, a Mi'kmaw chief and council may conduct their own consultation outside of the TOR process on a specific project or decision. In practice, this is the exception and not the norm. If a chief and council decide to conduct their own consultation, they will notify the Government of Nova Scotia directly, and the Assembly will notify the Government of Nova Scotia through the KMKNO.

Article 22 of the TOR provides for withdrawal from the TOR altogether. If a Mi'kmaw community decides to opt out of, or withdraw, from the TOR altogether, the Government of Nova Scotia will strive to follow a similar approach to consultation under the TOR, as outlined below.

THE CONSULTATION PROCESS

The Government of Nova Scotia will consult with the Mi'kmaq of Nova Scotia, and accommodate their interests and concerns, where appropriate, before making decisions that have the potential to adversely impact established and/or asserted Mi'kmaq rights. The following section describes in plain language how decisions are made on whether or not consultation will be carried out, and if so, what the appropriate steps are in the consultation process.



STEP 1: CONSULTATION SCREENING

Not all decisions, actions, measures, or authorizations listed in the Policy Scope section will require consultation. Before undertaking any actions related to consultation, a consultation screening should be undertaken to determine whether or not consultation is necessary. There are three potential outcomes of a consultation screening: no duty to consult, notification, or consultation. These are explained in more detail below.

At times, the determination may be straightforward. There may be some decisions, however, that are more complex. OAA provides assistance to all provincial departments that need to complete a consultation screening to determine whether or not they should consult on decisions or actions that are under consideration.⁷ While this is not mandatory, this advice is helpful when a department is assessing how to proceed.

The consultation screening is focused on understanding if the contemplated action or decision has the potential to adversely impact established and/or asserted Mi'kmaw Aboriginal and/or treaty rights.

In assessing the potential for an adverse impact, the consultation screening examines a number of elements related to the decision or action being contemplated by government. There may not be complete information available to indicate an explicit adverse impact—that is the subject of consultation. However, there are a number of questions that can be asked to help determine the potential for an adverse impact.

The following list provides examples of the type of information examined during a consultation screening:⁸

- existing information on Mi'kmaw land use
- proximity of Mi'kmaw reserve lands and lands of interest (e.g., lands used for hunting, recognized historic sites, and lands set aside for the potential future use of the Mi'kmaq of Nova Scotia)
- size, nature, duration, and location of the proposed project, and level of ground disturbance
- activities proposed during all phases of the project (e.g., preparation, construction, operation, decommissioning, and reclamation, if applicable)
- land ownership, land description, and potential interests in the land (e.g., private or public land, is there an existing specific claim or asserted title, is the land currently subject to negotiation or accommodation, is it reserve land?)
- potential environmental, social, and cultural impacts
- potential impacts on cultural sites (see Special Places Protection Act)
- potential impacts on asserted Mi'kmaw rights (hunting, fishing, gathering, cultural)
- existing statutory deadlines for decision making

The Mi'kmaq of Nova Scotia generally assert both Aboriginal rights (including Title) and treaty rights to all of Nova Scotia and its offshore. While the extent of the practice of those rights is currently the subject of negotiations, the Government of Nova Scotia proactively manages risk using a low threshold when determining whether or not consultation should be initiated.

⁷ For a legal opinion on whether or not there is a duty to consult, please contact your department's solicitor.

⁸ Note: These are examples and do not constitute an exhaustive list.

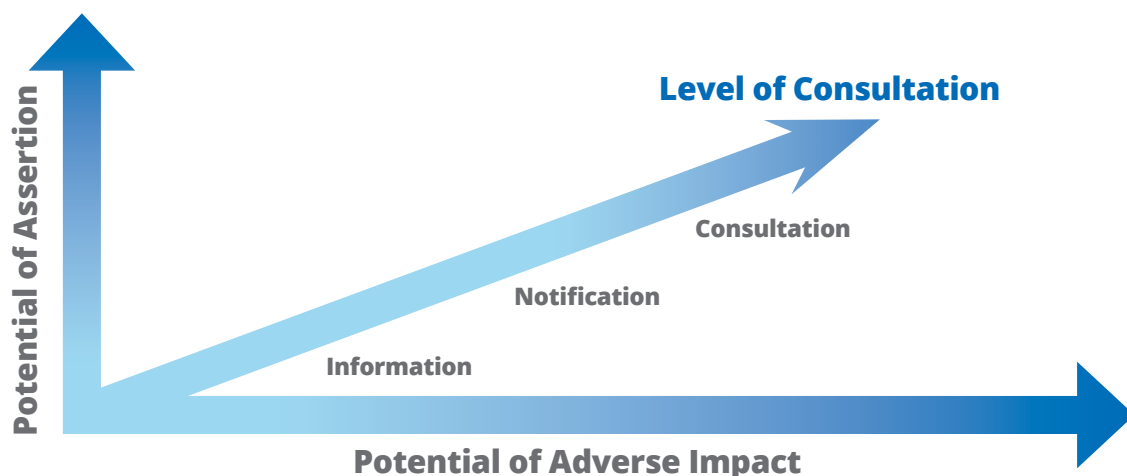
Based on the results of the consultation screening, there are three potential outcomes:

- **No duty to consult:** No action required. However, departments may decide to share information.
- **Notification:** If it is determined that the Mi'kmaq of Nova Scotia should be notified about the pending decision, the process described below under the Notification section will be followed.
- **Consultation:** If it is determined that there is a duty to consult with the Mi'kmaq of Nova Scotia, the process described in detail below in Steps 2–6 will be followed.

SPECTRUM OF CONSULTATION

The scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed. The Crown is not under a duty to reach an agreement; rather, the commitment is to a meaningful process of consultation in good faith. The content of the duty varies with the circumstances and each case must be approached individually and flexibly. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal people with respect to the interests at stake.⁹

Canadian courts have been clear that the depth of consultation will vary according to the strength of the claim of asserted rights and the potential level of impact of the measure under consideration on those asserted rights. It is important to note that it is not the size or type of project or decision or the size of the proponent that determines consultation and accommodation, but rather the magnitude of potential impact on asserted Mi'kmaw rights and the credibility of the assertion. In any case, the honour of the Crown is always at stake, and the government must act in "utmost good faith"¹⁰ in assessing and carrying out the duty to consult. A consultation assessment (see above) will help determine whether or not there is a duty to consult, and if so, the scope or depth of consultation required. Please contact OAA for assistance with the consultation screening. Should OAA do the screening, a recommendation on consultation is issued to the lead department.



⁹ Haida Nation v. British Columbia (Minister of Forests) [2004] 3 S.C.R. 511, SCC 73

¹⁰ Haida Nation v. British Columbia (Minister of Forests) [2004] 3 S.C.R. 511, SCC 73, para 34

KEEPING CONSULTATION RECORDS

It is important to note that the consultation process is on the record. This means that it is essential for all departments to keep good consultation records. From the screening stage, and unless agreed otherwise by all parties in advance, all correspondence, information exchanged, electronic files, e-mail messages, meeting notes and minutes, agendas, consultation screenings, written legal advice, records of funding provided for additional studies or consultation activities, and notes from telephone conversations become part of the overall consultation record. Lead departments should keep all records of their involvement in consultation. All correspondence and related files should be copied to OAA. OAA keeps centralized consultation records and tracks all consultation.

STEP 2: INITIATE CONSULTATION

IDENTIFY LEAD AND OTHER RESPONSIBLE DEPARTMENT(S)/JURISDICTIONS AND COORDINATE CONSULTATION

There may be more than one department or jurisdiction involved in making decisions about a government action under consideration. The Government of Nova Scotia takes a “whole-of-project” approach to consultation (“one project = one consultation”). An effective and efficient consultation process requires coordination, collaboration, and co-operation between all parties, including the Mi’kmaq of Nova Scotia, provincial government departments, the Government of Canada, and proponents.

OAA provides coordination support to all provincial departments and helps coordinate with the federal government. The lead department will work with OAA to identify all authorizations that are required for the project and their provincial or federal authorities. OAA and the lead department will then coordinate the consultation process among departments and jurisdictions, where necessary.

While proponents do not have a duty to consult, they will be delegated certain procedural aspects of consultation, where appropriate. OAA and the lead department will inform third parties of their delegated responsibilities, in writing (see section on Roles and Responsibilities, “Project Proponents or Third Parties”).

GATHER AND PROVIDE RELEVANT INFORMATION

Lead departments should gather all relevant information that will assist the Mi’kmaq of Nova Scotia in their deliberations about potential impacts on asserted rights. This could include a project description, maps, available studies, or other documents of interest. This information should be provided in electronic or printed format, and it should be attached to the offer to consult. If all relevant information is not available at the time of the offer to consult, it should be forwarded as soon as it becomes so.

The Government of Nova Scotia will ask proponents to share all relevant information with the Mi’kmaq of Nova Scotia. At times, however, there may be legislative or regulatory requirements to protect certain information. For example, there may be information that is not accessible because of confidentiality agreements in place to protect proprietary or financial information, or when the parties agree that information will not be shared for other reasons.

OFFER TO CONSULT

If it has been determined that consultation should take place with the Mi’kmaq of Nova Scotia under the TOR, the lead department will prepare a consultation letter to be sent to all Mi’kmaq chiefs and councils that have formally adopted the TOR, and provide a copy to the KMKNO, OAA, and any other identified responsible provincial or federal government departments.

If it has been determined that the decision being considered may impact a Mi'kmaw community that does not participate in the TOR process, the lead department will send a separate letter to the chief and council, and provide a copy to any identified responsible provincial or federal government departments.

The letter should include (if applicable):

- a description of the proposed decision, action, or project
- a list of all permits, authorizations, and other decisions required, and their responsible authorities
- timelines for decisions
- a request for the Mi'kmaq of Nova Scotia to indicate whether they are interested in consultation and how they would prefer to proceed
- a request that the Mi'kmaq of Nova Scotia provide comments about any concerns and potential impacts on rights
- a deadline for response, typically 30 days
- contact information
- any other relevant information

All relevant information to support deliberations will be attached to the offer to consult.

Please contact OAA for a copy of the template letter for consultation.

ONE PROJECT = ONE CONSULTATION

Many projects require multiple authorizations and permits by various government departments or ministries and, at times, different jurisdictions. Where multiple permits or authorizations are required, Nova Scotia has adopted the practice of opening one consultation for an entire project. This requires careful coordination and planning. If it has been determined that consultation should take place, OAA will identify all authorizations and permits required over the life cycle of the project, as well as the responsible authorities (lead and supporting departments). Once the consultation has been opened, it continues until the last permit has undergone consultation.

RESPONSE FROM THE MI'KMAQ OF NOVA SCOTIA

The Mi'kmaq of Nova Scotia will provide a written response to the offer to consult that:

- indicates whether or not the Mi'kmaq are interested in consultation
- states whether the consultation will take place with the Assembly or an individual chief and council
- identifies any known potential impacts on asserted Mi'kmaw rights
- provides any other relevant information to begin the consultation process

Typically, responses are received within 30 calendar days of receiving the request for consultation. Departments should remain flexible with this timeframe, as it could vary according to the scale and complexity of the project, the potential impact on asserted Mi'kmaw rights, or unforeseen circumstances. If no response is received within 30 calendar days, the lead department should send a reminder to provide additional time for response. This additional timeframe is at the discretion of the lead department. If no response is received within the additional timeframe, the Government of Nova Scotia will proceed with making decisions.

NOTIFICATION

If it has been determined to not proceed with an offer to consult, but the decision or measure may be of interest to the Mi'kmaq of Nova Scotia or on the low end of the spectrum of consultation, the lead department will prepare a notification letter to be sent to the Mi'kmaw communities in closest geographic proximity to the location or site of the proposed decision or action, with a copy to OAA and the KMKNO. If a Mi'kmaw community is outside the TOR process and is notified, then a separate letter should notify the KMKNO as well. The purpose of this letter is to provide general information that may be of interest to the Mi'kmaq of Nova Scotia. It is not an offer to consult. After receiving a notification, the notified Mi'kmaw community (or communities) or the KMKNO may request consultation, which should be accompanied by an explanation of any potential impacts on asserted Mi'kmaw rights. The lead department and OAA will use this information to assess whether it will proceed with its decision or consult with the Mi'kmaq of Nova Scotia as requested. If no reply is received within the required response period, the Government of Nova Scotia will proceed with making decisions.

Please contact OAA for a copy of the template letter for notification.

BEST PRACTICE:

To avoid confusion, be concise and use non-technical, clear language when describing projects, timelines, and actions required for decision making.

STEP 3: IDENTIFICATION OF MI'KMAW CONCERNS

The objective of consultation is to have a full understanding of Mi'kmaw concerns, interests, and asserted rights that may be negatively impacted by the decision or action under consideration, and, if appropriate, accommodate those concerns or interests. The Mi'kmaq of Nova Scotia are responsible for outlining potential adverse impacts on any asserted rights during the consultation process. For the Government of Nova Scotia to give full consideration to potential impacts and contemplate appropriate accommodation, claims must be specific in nature. According to the SCC, First Nations "must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending claims or rights. Past wrongs, including breaches of the duty to consult, do not suffice."¹¹

Understanding is created through a thorough exchange of information—this can be done in face-to-face dialogue or through written correspondence, or both. Although the process below is described in a linear manner, consultation is often iterative, and may consist of a number of meetings, deliberations, and information exchanges. The success of any consultation depends on the collaboration and commitment of all parties involved. All parties will work together to provide complete information, have meaningful dialogue, provide appropriate time to respond, and to respect any statutory or regulatory timeframes that are already in place.

INFORMATION MEETINGS

To initiate the dialogue process, the Mi'kmaq of Nova Scotia may request an information meeting before beginning internal deliberations and the consultation dialogue. This meeting is an opportunity to clarify any questions or concerns about information provided about a decision or action under consideration with the lead and responsible department(s).

MI'KMAW INTERNAL DELIBERATIONS

The Mi'kmaq of Nova Scotia will hold internal deliberations. This could include background research, review of available documents, and discussions with chiefs, councils, committees, communities, individuals, organizations, and the Assembly to determine any negative impacts on asserted rights. The Mi'kmaq of Nova Scotia will decide the format and methodology of their internal deliberations.

ADDITIONAL STUDIES

After review of the information provided by the Government of Nova Scotia to support the consultation process, the Mi'kmaq of Nova Scotia may request additional studies, such as Mi'kmaq Ecological Knowledge Studies (MEKS), archaeological studies, or engineering analyses, to supplement gaps in the existing information, particularly about impacts on asserted rights. The studies support the consultation process and may provide important information to the Mi'kmaq of Nova Scotia and the Province to help determine potential impacts on asserted rights. The lead department will consider these requests on a case-by-case basis in collaboration with OAA based on specific information provided by the Mi'kmaq of Nova Scotia about the impact of the proposed activity on asserted rights. The Province may recommend that proponents provide these additional studies before seeking approvals or registering documents for review. As these studies take time, proponents should contact OAA for guidance as early in the process as possible. Where applicable, proponents are expected to cover the costs of additional studies.

EXCHANGE OF INFORMATION AND DIALOGUE

Meetings may be convened between the Mi'kmaq of Nova Scotia, government(s), and sometimes proponents as well, to hold more in-depth dialogue about information related to the decision or action under consideration, potential impacts on asserted rights, any Mi'kmaw concerns or interests, and any potential accommodation, where appropriate. At the conclusion of discussions, the Assembly or, if outside of the TOR, the Mi'kmaw chief and council involved in the consultation, will provide a written response to the government(s) outlining all potential impacts on asserted rights and any other concerns or interests.

In practice, the Mi'kmaq of Nova Scotia and the Government of Nova Scotia often agree to conduct the consultation through written correspondence, particularly when a measure or action is perceived to have a low potential impact or in the interest of efficiency.

Through the use of the TOR, the Mi'kmaq of Nova Scotia and the Government of Nova Scotia have developed a number of innovative approaches to consultation. One of those approaches is the use of consultation roundtables. For example, there are currently consultation roundtables in the mining, energy, fisheries, transportation, and infrastructure sectors, as well as an environment technical committee. A consultation roundtable is a bilateral committee that meets regularly to discuss issues related to consultation in a particular sector. The committee consists of representation from the Mi'kmaq of Nova Scotia, the lead department responsible for the sector, and the OAA. Proponents and federal departments may be asked to attend by invitation. The roundtables meet on a regular basis to discuss strategic issues in their sector, to build capacity, and to consult on decisions or actions that are currently under consideration.

GOVERNMENT INTERNAL DELIBERATIONS

Once discussions between the parties have concluded, the lead department and any responsible or supporting departments will hold internal discussions to consider all information arising from the dialogue process or correspondence with the Mi'kmaq of Nova Scotia, and how to respond to any expressed potential impacts on asserted rights or other Mi'kmaw concerns or interests. Deliberations should include the identification of options for accommodation, where applicable. This may require further dialogue with the Mi'kmaq of Nova Scotia to attempt to reach an agreement on accommodation measures.

STEP 4: ACCOMMODATION

“*Consultation that excludes from the outset any form of accommodation is meaningless.*”¹²

Consultation carries with it a concurrent obligation to consider the accommodation of Mi'kmaw interests. For consultation to be meaningful, it must consider accommodation from the outset.¹³ This does not mean that every consultation process will result in accommodation—that will depend on the strength of the asserted Mi'kmaw claim and the potential for adverse impact on those claims. Since there is no “one-size-fits-all” approach to accommodation, all parties involved in consultation should be flexible and consider all avenues of addressing any adverse impacts to asserted rights expressed during the consultation process—“responsiveness is a key requirement of both consultation and accommodation.”¹⁴ However, in discussing accommodation measures, the government may have to balance Mi'kmaw interests with broader societal interests.

The primary goal of consultation and accommodation is to avoid adverse impacts on asserted rights. If the consultation process also reveals a duty to accommodate, accommodation measures should be proportionate to the level of impact a particular government action will have on asserted

¹² *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, para 54.

¹³ *Ibid.*

¹⁴ *Taku River Tlingit First Nation v. BC (Project Assessment Director)*, 2004 SCC 76, para 25.

rights. Accommodation can take many forms, including placing terms and conditions in permits, licences, or authorizations, as well as other avoidance, minimizing, or mitigation measures. Mitigation measures may be as varied as, for example, requiring the carrying out of a plan to protect heritage resources, re-routing a pipeline, or adjusting the proposed construction schedule. Depending on the circumstances, where avoidance or mitigation is not possible, compensation (financial and/or non-financial) may also be considered.

SPECTRUM OF ACCOMMODATION



Since the Government of Nova Scotia takes a collaborative approach to consultation, the same approach should be taken for accommodation. If accommodation measures are needed, joint efforts should be made by all parties (provincial and federal departments and agencies, proponents and other third parties, and the Mi'kmaq of Nova Scotia) to negotiate appropriate avoidance, mitigation, or compensation measures. During discussions about potential accommodation measures, parties should take a strategic approach and attempt to arrive at agreement.

Any mitigation or compensation measures provided by project proponents will also be considered to be part or all of Crown accommodation, since the proponent engagement process is delegated by the Crown. Proponents should ensure they capture accommodation measures, including the reasons for accommodation in their engagement reports to the government and the Mi'kmaq of Nova Scotia. All accommodation measures should be provided in writing to the Crown and shared with the Mi'kmaq of Nova Scotia.

If a benefit agreement is developed between a proponent and the Mi'kmaq of Nova Scotia as an accommodation measure, the Crown will request documentation from the proponent and the Mi'kmaq that confirms that an agreement has been signed. For example, this could be a copy of the actual agreement or a letter from the Mi'kmaq of Nova Scotia confirming that an agreement has been signed. The Crown needs to be in possession of all relevant information to determine if potential adverse impacts on Mi'kmaw rights have been adequately addressed.

The table on page 26 lists examples of possible accommodations. The list is based on actual accommodation measures made as a result of consultation in Nova Scotia and in other jurisdictions across Canada. Note: Some accommodation measures may overlap between avoidance, mitigation, and compensation.

EXAMPLES OF POSSIBLE ACCOMMODATIONS

| AVOIDANCE | RESPONSIBILITY ¹⁵ |
|--|--------------------------------------|
| Specific habitat protections | Crown ¹⁶ and/or proponent |
| Alter/change project location | Crown and/or proponent |
| Reduce project footprint | Crown and/or proponent |
| Modify or abandon project components | Crown and/or proponent |
| Use different techniques (e.g., reduce quantity of materials extracted) | Crown and/or proponent |
| Adjust/change timing of work to avoid impacts on species of interest (e.g., fish or plants) | Crown and/or proponent |
| MITIGATION | RESPONSIBILITY |
| Habitat restoration | Crown and/or proponent |
| Include the Mi'kmaq of Nova Scotia in environmental monitoring (e.g., contracts) | Proponent |
| Involve the Mi'kmaq of Nova Scotia in site restoration (e.g., mine site rehabilitation) | Proponent |
| Include Mi'kmaw archaeologist to observe/ monitor materials removed when there are known heritage resources in proximity | Proponent |
| Use techniques to minimize disturbance | Proponent and/or Crown |
| Undertake additional projects studies not required by legislation or regulation | Proponent and/or Crown |
| Create alternative areas for traditional use | Crown |
| COMPENSATION | RESPONSIBILITY |
| Habitat restoration | Crown and/or proponent |
| Profit and/or resource sharing | Proponent |
| Direct payment | Crown and/or proponent |
| Benefit agreement | Proponent |
| Trusts | Crown and/or proponent |
| Board of directors appointments | Proponent |
| Scholarships | Crown and/or proponent |
| Skills training | Crown and/or proponent |
| Employment contracts | Proponent |
| Direct procurement opportunities | Proponent |

¹⁵ To the extent possible, proponents should be responsible for carrying out avoidance or mitigation measures. The Crown may include these measures as terms and conditions of permits/authorizations.

¹⁶ Appropriate federal or provincial agency should coordinate these measures.

STEP 5: DECISION

Once a course of action has been decided, the lead department will report back in writing to the Mi'kmaq of Nova Scotia on the decision made and how information provided during the consultation process was used in the decision, including any accommodation measures. This correspondence will be copied to all parties that have been involved in the consultation process.

Please contact OAA for a copy of the template letter for informing the Mi'kmaq of Nova Scotia of the government's decision.

STEP 6: FOLLOW-UP/MONITORING

The lead department responsible for consultation should ensure that, with support from OAA, all requested information is provided to the Mi'kmaq of Nova Scotia, and any agreed-to accommodation measures are carried out. Accommodation measures may be expressed as terms and conditions of a permit, authorization, or licence. These should be treated in the same manner as other terms and conditions when they are found not to be in compliance.

During the consultation process, proponents and lead departments should establish ongoing communication channels with the Mi'kmaq of Nova Scotia that will continue throughout the life cycle of the project and allow for better monitoring.

For more information, as well as departmental guidelines, please contact OAA.

CLOSING STATEMENT

This Policy provides clear direction and practical, consistent guidance to the provincial government when contemplating decisions or actions that have the potential to adversely impact established and/or asserted Mi'kmaw rights. While this Policy should be followed as closely and consistently as possible across provincial government, the diversity of projects and approvals, and the constantly evolving legal landscape, requires flexibility by all parties in its implementation.

The Consultation Policy and Guidelines provide a strong foundation for a broader government-wide approach to build and maintain an enduring relationship with the Mi'kmaq of Nova Scotia based on the shared goals and principles of peace and friendship—a relationship that is inclusive, respectful, and focused on building a successful future for Mi'kmaw communities and for all Nova Scotians.

APPENDIX: GLOSSARY OF TERMS

Aboriginal: Section 35(2) of the Constitution Act states that “Aboriginal peoples of Canada” includes Indian, Inuit, and Métis peoples of Canada.

Aboriginal Rights: Aboriginal rights refer to any activity that has an element of a practice, custom, or tradition integral to the distinctive culture of the Aboriginal group claiming the right.¹⁷ They generally refer to the right to exercise traditional activities, such as fishing, hunting, trapping, and gathering for food, social, and ceremonial purposes (including spiritual and cultural use). Activities that are encompassed by the term Aboriginal rights must have continuity with practices, customs, or traditions that existed prior to contact with Europeans, which in Nova Scotia is around the 1500s.

Aboriginal Title: Aboriginal title is a form of Aboriginal right and is a unique and beneficial interest in the land itself. Aboriginal title confers ownership rights similar to fee simple, including the right of enjoyment and occupancy of the land and the right to decide how the land will be used, possess the land, reap economic benefits of the land, and practically use and manage the land.

Aboriginal title is not absolute and must be held collectively for the present and future generations. It cannot be alienated except to the Crown, nor encumbered in a way that would prevent future generations of the group from enjoying and using it. To prove Aboriginal title, an Aboriginal group must have exclusively occupied the land at the time of sovereignty and occupied it sufficiently and continuously (if relying on present occupation), along with exclusivity, to satisfy the standard of occupation. This standard is context-specific with respect to the manner of the people and the nature of the land. On June 26, 2014, the Supreme Court of Canada granted the Tsilhqot-in Nation a declaration of Aboriginal title to approximately 1,700 square kilometres of land. This was the first granting by the Supreme Court of Canada of Aboriginal title to an Aboriginal group.

Adverse Impacts: The phrase “adverse impacts on asserted Mi’kmaw rights” refers to possible negative effects or impacts, including, but not limited to, negative environmental effects, on asserted Mi’kmaw Aboriginal and treaty rights.

Band: An organizational structure defined in the Indian Act that represents a particular body of indigenous peoples, also defined in the Indian Act. Bands are legal entities that are constructs of the Indian Act. There are 13 bands with 34 reserve locations in Nova Scotia.

Chief and Council: Chiefs and councils are elected by band members to govern the band and pass laws on reserve lands. They are elected according to provisions of the Indian Act, charged with the responsibility for “the good government of the band,” and delegated the authority to pass by-laws on reserve lands.

Crown: Refers to the provincial or federal government generally, and in this document refers to both the provincial and federal governments including departments, agencies, Crown corporations, boards, and commissions, and includes Ministers of the Crown and all government employees that are doing the work of the Nova Scotia government. The term Crown is used interchangeably in this document with the terms government, Nova Scotia government, Government of Nova Scotia, Province of Nova Scotia, and Province.

¹⁷ *R. v. Van der Peet*, [1996] 2 S.C.R. 507, para 46.

Crown Conduct: This refers to the exercise of the Crown's jurisdiction and authority either as a proponent or by approving an activity through permits and authorizations.

First Nation: A term that came into common usage in the 1970s to replace the word "Indian" (an Indian Act term) which some people found offensive. Although the term "First Nation" is widely used, no legal definition exists. Among its uses, the term "First Nations peoples" refers to the indigenous peoples of Canada identified as "Indian" under the Indian Act. Some bands have also adopted the term "First Nation" to replace the word "band" in the name of their community.

Honour of the Crown: The honour of the Crown arises from the Crown's de facto assertion of sovereignty over all lands and peoples in Canada. The honour of the Crown requires governments to determine, recognize, and respect Aboriginal and treaty rights as outlined in Section 35 of the Constitution Act (1982). This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.¹⁸

Impact Benefits Agreements (IBA): IBAs (sometimes referred to as Community Agreements, Benefits Agreements, Good Neighbour Agreements, etc.) are formal, binding agreements developed between First Nations and proponents to establish formal relationships, reduce potential impacts of a project, and secure economic benefits for affected communities. For proponents, entering into IBAs can provide a social licence for operation—reducing risk and helping to garner local support for their project. IBAs also contribute to the overall reconciliation goals of governments by providing opportunities for increased employment, participation, and economic development for First Nations.

Project Proponent: The term "project proponent" may include, but is not limited to, industry and various levels of government including a department, ministry, other government agencies, Aboriginal governments, Crown corporations, municipalities, boards, private entities, and individuals requiring an authorization from the Crown.

Specific Claim: Specific claims are grievances brought by First Nations against the federal government for failure to fulfill certain obligations, either in treaties or the management of lands and assets of a band on behalf of that community.

Statutory Decision-Making Period: A period of time required by law, through legislation or regulation, in which the Minister/Department must render a decision on an application for a permit or authorization.

Traditional Uses: First Nation traditional uses of lands and resources, such as the gathering of plants for food and medicinal purposes and the carrying out of ceremonial and spiritual observances and practices on unoccupied Crown lands and other lands to which First Nations may have a right of access for these purposes.

Treaty Rights: Treaty rights refer to those rights outlined in treaties signed with the Crown. There were several treaties signed with the Mi'kmaq in the Maritimes, but the most relevant for the purpose of consultation are the pre-Confederation Peace and Friendship Treaties of 1760–61. The Mi'kmaq treaty rights to hunt, fish, and gather to obtain a moderate livelihood were affirmed in the *R. v. Donald Marshall* decision in 1999¹⁹ and are protected under Section 35 of the Constitution Act, 1982. It is important to note that in Nova Scotia, the treaties did not include extinguishment of rights or ceding of territory, as was the case in many of the treaties signed in other parts of Canada.

Tribal Council: A self-identified entity that represents a group of bands or Aboriginal people sharing a common interest. The tribal council may provide a range of advice and/or services to its members. There are two tribal councils in Nova Scotia: the Confederacy of Mainland Mi'kmaq and the Union of Nova Scotia Indians.

¹⁸ Haida Nation, supra, note 3 at para 25.

¹⁹ Shortly after the release of this decision, the SCC released a second decision about Marshall that added the caveat that activities recognized in the treaties are still subject to government regulation.

