



OFFICE OF
Aboriginal
AFFAIRS

Proponents' Guide:

THE ROLE OF PROPONENTS IN CROWN CONSULTATION WITH THE MI'KMAQ OF NOVA SCOTIA

NOVEMBER 2012




NOVA SCOTIA

PLEASE NOTE:

This document is intended to provide practical guidance to proponents, however, on any specific provincial government decision or process, specific advice and guidance from the responsible provincial department, or in some cases, the Office of Aboriginal Affairs, should be sought.

This document does not contain and is not intended to provide legal advice.

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Proponent Engagement with the Mi'kmaq of Nova Scotia

INTRODUCTION

The Government of Nova Scotia (the Province) is developing a new relationship with the Mi'kmaq of Nova Scotia (the Mi'kmaq) that includes greater opportunities for Mi'kmaq participation in social and economic development, and meaningful consultation with the Mi'kmaq on decisions that impact land and natural resources.

The Province is committed to meeting its legal obligations to consult with the Mi'kmaq, and within that process, believes there is an important role for proponents in engaging the Mi'kmaq. Proponents can include, for example, private industry, consulting firms, government departments and municipalities. The proponent knows the details of proposed projects intimately and is in a good position to answer technical questions and project-specific inquiries.

Some proponents may be required to complete an Environmental Assessment (EA) prior to advancing their projects. The EA Regulations made pursuant to the Environment Act, make specific reference to proponent engagement with the Mi'kmaq of Nova Scotia:

9(1A)(xiii to xv) "As part of an undertaking, proponent must identify: All steps taken to identify, list and address concerns of the public and aboriginal people about the adverse effects or the environmental effects of the proposed undertaking."

This Proponents' Guide provides advice on how to fulfill this obligation under the EA Regulations.



The Guide also provides practical assistance to proponents considering development or other activities that may impact Mi'kmaq interests in Nova Scotia. Please contact the department responsible for authorizing your permits/ approvals for advice on whether these guidelines should be used for your project. The Province believes that better engagement and consultation processes will mean clearer communication, more efficient and improved decision-making, and lasting outcomes that benefit all Nova Scotians. Appropriate and meaningful consultations with the Mi'kmaq are key to promoting collaboration and strong relationships.

BACKGROUND

In 2004 and 2005, the Supreme Court of Canada (SCC) handed down three landmark decisions that found the Crown (provincial and federal) has a duty to consult with Aboriginal peoples when contemplating decisions or actions that might adversely affect their established or potential Aboriginal rights and treaty rights (*Haida and Taku*, 2004, *Mikisew Cree*, 2005). In response, the Governments of Nova Scotia and Canada, and the Mi'kmaq have agreed to follow a Consultation Terms of Reference that clearly lays out a process for Crown consultation with the Mi'kmaq.

The Terms of Reference can be found at: <http://www.gov.ns.ca/abor/officeofaboriginalaffairs/whatwedo/consultation>



The SCC also stated that proponents have no legal duty to consult with Aboriginal peoples. However, the SCC said that prior to or concurrent with Crown consultation, the Province may delegate certain procedural aspects of consultation to proponents. This document outlines how the Province may delegate the procedural aspects of consultation to the proponent, and how the proponent can play a proactive role in engaging the Mi'kmaq throughout the approval process. In instances where there is no Crown duty to consult, proponents may still wish to engage the Mi'kmaq to share information about their project.

The Province recognizes that some concerns, such as those related to assertions of rights, may arise during discussions between the proponent and the Mi'kmaq that are beyond the scope of the proponent's involvement in a particular project. The Province is committed to consulting with the Mi'kmaq, as appropriate, on matters outside the proponent's scope, in accordance with the Consultation Terms of Reference, and as required by provincial regulations and legislation.

The Province retains accountability for consultation. Therefore, the Province is responsible for ensuring proponent engagement with the Mi'kmaq has been adequate in the circumstances.

PRINCIPLES OF ENGAGEMENT

Mutual Respect

Engagement with Mi'kmaq communities must be based on mutual respect for all participants, taking into account different interests, perspectives, cultures, understandings and concerns.

Early Engagement

Engagement is most effective if initiated as early as possible, before final decisions are made. Clear and reasonable timelines should be established and communicated, and should be appropriate and proportionate in respect of the decision being made.

Openness and Transparency

There should be transparency throughout the process based on open lines of communication and the provision of timely, accurate, clear and objective information. The Mi'kmaq should be informed of how their concerns have been considered, and where appropriate, addressed in the planning and decision-making process.

Adequate Time to Review/Respond

Engagement should allow a reasonable amount of time that is appropriate and proportionate in respect of the decision being made for the Mi'kmaq to review information, hold internal discussions and respond.

STEPS FOR PROPONENTS TO FOLLOW WHEN ENGAGING THE MI'KMAQ

Step 1 - Notify Mi'kmaq Early in the Development Process

- Advise the responsible provincial department and the Office of Aboriginal Affairs (OAA) of your plans to engage the Mi'kmaq.
- Contact the Mi'kmaq well in advance of submitting applications for permits, licences, leases, etc., to ensure timely and smooth application processes.
- Contact the Chiefs and Councils of the Mi'kmaq communities in Nova Scotia nearest your project. (A map of Mi'kmaq communities and a contact list are provided in Appendix B and Appendix C).
- Provide copies of all correspondence to the OAA & Kwiłmu'kw Maw-klusuaqn Negotiation Office (KMKNO or Mi'kmaq Rights Initiative).
- Contact the Native Council of Nova Scotia (NCNS).

Step 2 – Provide as Much Information as Possible

- Your letter should contain the following:
 - The names of the proponent and representatives.
 - In clear language -- details of the scope and location of the project, what type of work will be carried out, any potential short and long-term adverse impacts, project and regulatory timelines, and any anticipated benefits to the Mi'kmaq, etc.

- Relevant data, reports, studies and reviews.
- An offer to meet and discuss the project. Suggest potential meeting dates.
- Share new information, when it becomes available.
- Be proactive & follow up on communication.

Step 3 – Meet with the Mi'kmaq Community(s)

- Develop an engagement plan with the Mi'kmaq, if desired.
- Meet face-to-face to share information and discuss appropriate follow up.
- Hold additional meetings, if required.

Step 4 – Complete a Mi'kmaq Ecological Knowledge Study (MEKS)

- Prior to submitting applications for permits and approvals, the Province may require proponents undertake a MEKS, particularly for projects that are:
 - Of a larger scope;
 - Located on Crown land;
 - Situated close to First Nations land;
 - Located in areas of known high archaeological significance; and,
 - Situated in areas that have particular cultural significance for the Mi'kmaq of Nova Scotia.



- A MEKS identifies areas of historical and current use in the project area pertaining to lands, water and natural resources.
- A MEKS Protocol has been prepared on behalf of the Assembly of Nova Scotia Mi'kmaq Chiefs. Proponents are encouraged to review this protocol carefully to gain a better understanding of MEKS, including seasonal limitations that may impact project planning.

The Protocol can be found at:
www.aboriginalsustainabilitynetwork.org/wp-content/uploads/2009/01/mikmaq-ecological-knowledge-study-protocol.pdf

There are three Mi'kmaq organizations that do MEKS in Nova Scotia:

- The Confederacy of Mainland Mi'kmaq
P.O. Box 1590
Truro, NS B2N 5V3
Phone: 902-895-6385
- Membertou Geomatics Consultants
1969 Upper Water Street
Suite 1703
Halifax, NS B3J 3R7
Phone: 902-429-0212
- Mi'kma'ki All Points Services
Paul (PJ) Prosper
515 Church Street
Indian Brook
PO Box 63
Shubenacadie, NS B0N 2H0
Phone: 902-236-6277

Step 5 – Address Potential Project-Specific Impacts

- The Mi'kmaq may request, and the proponent may wish to consider, funding to assist the Mi'kmaq with the review of technical details of the project.
- If the proponent intends to establish a Community Liaison Committee, invite the Mi'kmaq to participate on this committee to provide their perspective.
- In collaboration with the Province and the Mi'kmaq, the proponent should identify strategies to avoid, minimize, mitigate or otherwise address potential impacts, where reasonably possible.

Step 6 – Document the Engagement Process

- Document what steps you have taken to engage the Mi'kmaq and how your project has considered, and where appropriate, has attempted to address potential impacts.
- Share documentation with applicable government departments throughout the engagement process.
- Provide a summary report to government on the engagement process that was followed, including:
 - Attempts to contact the Mi'kmaq;
 - A summary of Mi'kmaq concerns;
 - Identification of how Mi'kmaq concerns were considered, and where appropriate, addressed by the proponent;
 - Any outstanding issues the proponent was unable to address; and,
 - Whether any other agreements were developed with the Mi'kmaq.

Best Practice : Benefit Agreements

In some circumstances, proponents choose to enter into Benefit Agreements (BAs) with Aboriginal groups that are potentially impacted by a specific project. The use of BAs reflects the principle that Aboriginal people should share in the benefits of resource development.

- BAs usually refer to the agreements negotiated in the context of resource development between a company and Aboriginal communities, and in some special situations also with governments. Typically agreements with private companies are confidential contracts with minimal government involvement.
- BAs can establish good will and positive relationships among Mi'kmaq and industry proponents and government. Other beneficial outcomes include employment and financial benefits to the Mi'kmaq that enable self-sufficiency and help to diminish the existing economic gap between Aboriginal and non-Aboriginal society.
- The agreements establish the terms under which affected Aboriginal people will benefit from development projects. BAs are also sometimes referred to as participation agreements, partnership agreements, impact benefit agreements, exploration agreements, accommodation agreements, or revenue sharing agreements.

BAs can include a wide range of mutually agreed-upon provisions, for example:

- Employment opportunities
- Training and skills development
- Information sharing
- Revenue sharing
- Compensation
- Environmental regulation
- Establishment of joint monitoring and implementation committees
- Social and cultural provisions
- Aboriginal content formulas for contracts.



OTHER ROLES AND RESPONSIBILITIES

The Mi'kmaq of Nova Scotia

In those instances where a proponent engages the Mi'kmaq:

- The individual Mi'kmaq communities in Nova Scotia may decide whether to engage the proponent or advise the proponent to contact the Assembly of Nova Scotia Mi'kmaq Chiefs;
- The Mi'kmaq have the option to direct any concerns they have regarding the project in writing to either the proponent, the Province or both.
- The Mi'kmaq will provide information on their concerns and interests in a reasonable and timely manner.

The Province of Nova Scotia

In those instances where a proponent engages the Mi'kmaq, the Province may assist and be involved by:

- Providing Mi'kmaq contact information for engagement purposes and government contact information for further information and support;
- Providing guidance and advice to assist in planning engagement;
- Ensuring issues that arise during engagement that are outside of the proponent's scope are addressed in the appropriate forum;
- Assessing adequacy of proponent's engagement efforts;

- Assessing proposed mitigation strategies developed by the proponent in response to Mi'kmaq concerns; and,
- Outlining any other steps or measures the Province deems necessary.

PROVINCIAL GOVERNMENT REVIEW OF ENGAGEMENT PROCESS

The Province will assess proponent-led engagement activities by reviewing the information submitted by project proponents. The Province may verify information with the Mi'kmaq and seek advice from internal government personnel during the review process. The Province will undertake the review in a timely manner.

Summary

In summary, third parties or proponents have an important role to play by engaging the Mi'kmaq as part of the Crown's consultation process. This may include early engagement; sharing information; exploring collaborative initiatives and economic development opportunities with the Mi'kmaq; completing a Mi'kmaq Ecological Knowledge Study (MEKS); and, understanding Mi'kmaq concerns and attempting to address those concerns, where appropriate.

The Province is working to improve its collaborative relationship with the Mi'kmaq of Nova Scotia. This guide is meant to provide third parties or proponents with more clarity on the Province's duty to consult; and the expectations of the Province regarding proponent engagement of the Mi'kmaq. Having an established process will mean clearer communication, more efficient and improved decision-making, and lasting outcomes that benefit all Nova Scotians.

APPENDIX A: DEFINITIONS

Aboriginal rights: Practices, traditions and customs integral to the distinctive culture of the Aboriginal group claiming the right that existed prior to contact with the Europeans (*Van der Peet*). Generally, these rights are fact and site specific.ⁱ

Aboriginal title: An Aboriginal right to the exclusive use and occupation of land. A right that requires evidence of regular, exclusive use, continuity and effective control since sovereignty (1713 for mainland Nova Scotia and 1763 for Cape Breton).

Assembly of Nova Scotia Mi'kmaq Chiefs:

All 13 Chiefs in Nova Scotia meet on a regular basis as the Assembly of Nova Scotia Mi'kmaq Chiefs. The Assembly plays a significant role in the collective decision making for the Mi'kmaq of Nova Scotia, particularly on issues pertaining to Mi'kmaq rights and governance. The Assembly directs the Mi'kmaq negotiations with the provincial and federal governments on treaty rights, Aboriginal rights, including Aboriginal title, Mi'kmaq governance, and also oversees the consultation process that was established with Nova Scotia and Canada in 2007.

Bands / First Nations: A band is a group of First Nation people for whom lands have been set apart under the federal *Indian Act*. Each band has its own governing band council, consisting of a Chief and several Councillors who are elected. The members of a band generally share common values, traditions and practices rooted in their ancestral heritage. Today, some bands prefer to be known as First Nations. Chief and Council have wide ranging authority within their communities including governance of municipal-like services such as water and sewage and provincial-like services such as education and social services.

In Nova Scotia, there are thirteen (13) bands. Each of the bands has one or more parcels of land called reserves. There are over forty (40) reserve locations in Nova Scotia scattered across the province.

Crown: Refers to all government departments, ministries, (federal, provincial and territorial) and Crown agencies.ⁱⁱ

Kwilmu'kw Maw-klusuaqn Negotiation

Office: Also known as the Mi'kmaq Rights Initiative, supports the Assembly of Nova Scotia Mi'kmaq Chiefs in the Made-in-Nova Scotia Negotiation Process and the Mi'kmaq-Nova Scotia-Canada Consultation process. The negotiation and consultation processes were mandated through the Umbrella Agreement (2002).

Meaningful consultation: Consultation depends on the circumstances, but it must always be meaningful. Some consultation may only involve notification, however where the strength of the claim is strong, or the right is established, and the potential adverse impact is strong, consultations may entail: the opportunity to make submissions; formal participation in the decision-making process and provision of written reasons to show that the Aboriginal concerns were considered and to reveal the impact the Aboriginal group had on the decision.

Mi'kmaq Ecological Knowledge (MEK):

Includes the collection and adaptation of knowledge that Mi'kmaq people have with all components of the natural environment and the interrelationships that exist between all life forms from a unique historical, cultural and spiritual perspective. A Mi'kmaq Ecological Knowledge Study refers to the planning, collection, analysis, reporting and distribution of Mi'kmaq Ecological Knowledge in Nova Scotia.ⁱⁱⁱ



Native Council of Nova Scotia (NCNS): The Native Council of Nova Scotia advocates for Aboriginal people primarily residing off-reserve in Nova Scotia. The NCNS provides a variety of programs and services, ranging from education and labour market programming to housing and resource management services. The regional structure of the NCNS consists of 13 zones. Along with the President, The Board of Directors is composed of representatives from each zone. The NCNS is affiliated with the Congress of Aboriginal People, a national Aboriginal organization.

Proponent: A company, individual, organization, or government agency proposing a project that requires permits, authorities or approvals from the provincial government.

Treaty rights: Rights that are defined by the terms of an historic Treaty, rights set out in a modern land claims agreement or certain aspects of some self-government agreements. In general, treaties (historic and modern) are characterized by the intention to create obligations, the presence of mutually binding obligations and a measure of solemnity (*Simon, Siouz*).^{iv} In Nova Scotia, treaty rights include the right to hunt, fish and gather in traditional hunting and fishing grounds.

Tribal Councils: Tribal councils represent the collective interests of a group of bands/ First Nations. These organizations can provide a unified political voice and often deliver common programs and services to their member bands. In Nova Scotia there are two tribal council organizations, the Confederacy of Mainland Mi'kmaq and the Union of Nova Scotia Indians.^v

APPENDIX B: CONTACT INFORMATION

Contact List: Mi'kmaq Chiefs and Councils

Chief and Council
Acadia First Nation
RR#4
Box 5914-C
Yarmouth, NS, B5A 4A8

Chief and Council
Membertou First Nation
111 Membertou Street
Membertou, NS, B1S 2M9

Chief and Council
Annapolis Valley First Nation
P.O. Box 89
Cambridge Station
Kings County, NS, B0P 1G0

Chief and Council
Millbrook First Nation
P.O. Box 634
Truro, NS, B2N 5E5

Chief and Council
Bear River First Nation
P.O. Box 210
Bear River, NS, B0S 1B0

Chief and Council
Pictou Landing First Nation
RR#2, Site # 6, Box 55
Trenton, NS, B0K 1X0

Chief and Council
Chapel Island First Nation
Box 538
Chapel Island, NS, B0E 3B0

Chief and Council
Paq'tnekek First Nation (Afton)
R.R.#1 Afton
Antigonish, NS, B0H 1A0

Chief and Council
Eskasoni First Nation
P.O. Box 7040
Eskasoni, NS, B1W 1A1

Chief and Council
Wagmatcook First Nation
P.O. Box 30001
Wagmatcook, NS, B0E 3N0

Chief and Council
Glooscap First Nation
P.O. Box 449
Hantsport, NS, B0P 1P0

Chief and Council
We'koqma'q First Nation
P.O. Box 149
Whycocomagh, NS, B0E 3M0

Chief and Council
Indian Brook First Nation
Indian Brook Post Office
522 Church St.
Indian Brook, NS, B0N 1W0



**Contact List: Mi'kmaq and Aboriginal
Organizations in Nova Scotia**

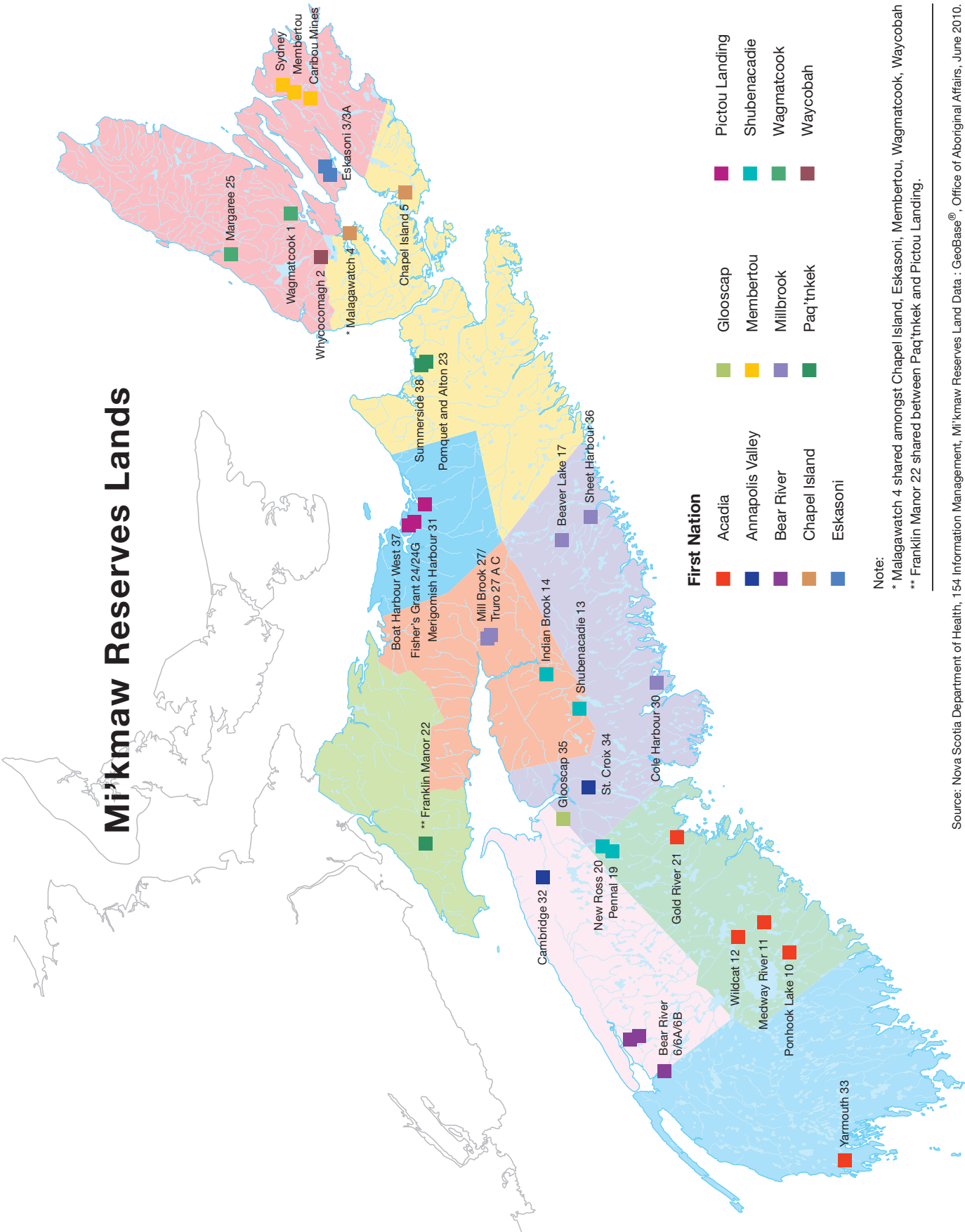
Kwilmu'kw Maw-klusuaqn
Negotiation Office
851 Willow St.
Truro, NS B2N 6N8

Unamak'i Institute of Natural Resources
4123 Shore Rd.
P.O. Box 8096
Eskasoni, NS, B1W 1C2

Confederacy of Mainland Mi'kmaq
57 Martin Crescent
P.O. Box 1590
Truro, NS B2N 5V3

Union of Nova Scotia Indians
47 Maillard Street
Membertou, NS B1S 2P5

Native Council of Nova Scotia
P.O. Box 1320
Truro, NS B2N 5N2



ENDNOTES

- ⁱ *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult. Government of Canada. March 2011.*
- ⁱⁱ *Ibid.*
- ⁱⁱⁱ *Mi'kmaq Ecological Knowledge Protocol, Assembly of Nova Scotia Mi'kmaq Chiefs, November 22, 2007.*
- ^{iv} *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult.*
- ^v *Mi'kmaq Ecological Knowledge Protocol, Assembly of Nova Scotia Mi'kmaq Chiefs.*

