



NOVA SCOTIA OFFICE OF ABORIGINAL AFFAIRS

Proponents' Guide:

Engagement with the Mi'kmaq of Nova Scotia



May 2009

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.

Contact Information:

Office of Aboriginal Affairs
1660 Hollis Street, Halifax, NS B3J 1V7

Website: www.gov.ns.ca/abor

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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 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 questions, technical and others. To assist proponents in their engagement efforts with the Mi'kmaq, the Province has developed guidelines. The guidelines provide 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 regarding decisions or taking 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/officeofaborigin/alaaffairs/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 the Province's delegation of 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

- To ensure timely and smooth application processes, proponents are advised to contact the Mi'kmaq well in advance of submitting applications for permits, licences, leases, etc.
- Prior to contacting the Mi'kmaq, advise the responsible provincial department and the Office of Aboriginal Affairs (OAA) of your plans to engage the Mi'kmaq.
- 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).
 - ✓ Please provide copies of all correspondence to the OAA & Kwilmu'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:
 - ✓ Identify the name 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. Share new information, when it becomes available.
- ✓ Offer to meet and discuss the project. Suggest potential meeting dates.

- 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.
- Additional meetings could be required.

Step 4 – Next Steps

- 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.
- Identify strategies to avoid, minimize, mitigate or otherwise address potential impacts, where reasonably possible, in collaboration with the Province and the Mi'kmaq.
- Work together with the Mi'kmaq to develop mutually beneficial solutions, and consider how the Mi'kmaq could make a contribution to the project.
- If the proponent intends to establish a Community Liaison Committee, invite the Mi'kmaq to participate on this committee to provide a Mi'kmaq perspective.

Mi'kmaq Ecological Knowledge Study

The Province strongly recommends proponents undertake Mi'kmaq Ecological Knowledge Studies (MEKS), particularly for projects of a larger scope, or those that are located on Crown land, prior to submitting applications for permits and approvals. There are sites in Nova Scotia that have particular cultural significance for the Mi'kmaq of Nova Scotia, who may utilize them to support traditional or current practices for food, social or ceremonial purposes. A MEKS can identify areas of historical and current use in the project area pertaining to lands and natural resources. Contact the provincial government department responsible for issuing permits or approvals for your project, or the KMKNO to discuss whether a MEKS is required.

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 two Mi'kmaq organizations that do MEKS:

- ✓ The Confederacy of Mainland Mi'kmaq
P.O. Box 1590
Truro, NS B2N 5V3
Phone: 902-895-6385
Email: MEKS@cmmns.com

- ✓ Membertou Geomatics Consultants
1969 Upper Water Street
Suite 1703
Halifax, NS B3J 3R7
Phone: 902-429-0212
Email: jasongoogoo@membertou.ca

Step 5 – Documenting 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.

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.

Review of Proponent Engagement

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.

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 with the Mi'kmaq; undertaking 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 at the time of contact with the Europeans (*Van der Peet*). Generally, these rights are fact and site specific.¹

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 come together 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 thirty-nine (39) reserve locations in Nova Scotia scattered across the province.

Crown: Refers to all government departments, ministries (both federal and provincial) and Crown agencies, boards and commissions, and includes all government employees that are doing the work of the government. The duty to consult is an administrative act and it is an obligation of the government as a whole. In *Haida and Taku River*, the Supreme Court of Canada held that provincial and federal governments have a legal obligation to consult when the Crown contemplates conduct that might adversely affect established or potential Aboriginal or treaty rights.²

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.³

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 a historic treaty, 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, Sioui*).⁴ 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 the 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.⁵

Appendix B

The following map illustrates the 13 Mi'kmaq communities in Nova Scotia.



Appendix C

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Joe B. Marshall, Executive Director
Union of Nova Scotia Indians
47 Maillard Street
Membertou, NS B1S 2P5

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

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

END NOTES

¹ *Aboriginal Consultation and Accommodation: Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult.* Government of Canada. February 2008.

² Ibid.

³ Ibid.

⁴ *Mi'kmaq Ecological Knowledge Protocol*, Assembly of Nova Scotia Mi'kmaq Chiefs, November 22, 2007.

⁵ Ibid