

**Nova Scotia's Response to the Crown's Duty to Consult with Aboriginal Peoples: Assessment and Recommendations**

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## **EXECUTIVE SUMMARY**

The following report is produced for the Nova Scotia Office of Aboriginal Affairs. The Province of Nova Scotia, like other governments in Canada, is obligated to respond to Supreme Court of Canada (SCC) decisions that found governments have a legal duty to consult with Aboriginal peoples when contemplating actions that have the potential to infringe on Aboriginal and treaty rights. To add incentive for governments, subsequent court decisions on consultation have imposed fines, stop work orders, injunctions, negotiation processes, and reversed decisions on governments who neglected to consult. Therefore, there are compelling political, economic and social reasons for governments to accelerate the pace of implementing responses to the SCC decisions.

Nova Scotia, like other provinces and territories in Canada, has a unique set of historical circumstances of settlement and interaction with indigenous peoples. Nova Scotia was first settled by Acadians, then the English after a battle for the territory with the French. The Mi'kmaq had a relationship of peaceful co-existence with the original Acadian settlers, but were adversaries to the English. Once they obtained power and signed treaties with the Mi'kmaq, the colonial British government legislated a series of acts meant first to eradicate the Mi'kmaq, and when those policies failed, to assimilate them into European culture. Although some contend these policies were meant to assist the indigenous populations to adjust to permanent European settlements; others insist the policies were meant to eliminate what was referred to as the "Indian problem". This forms the backdrop to the second half of the 20<sup>th</sup> century and the increasing struggle for recognition and reclamation of rights by indigenous peoples in Canada.

The need for governments to act accordingly as a result of the 2004 *Haida* and *Taku* decisions, and the 2005 *Mikisew Cree* decision, has posed a number of challenges, given the historical relationship, and to some extent, the nature of representative government in Canada. Consulting with Aboriginal peoples on decisions that have the potential to impact rights opens up the planning and decision-making processes of governments and exposes them to scrutiny and input. It is not enough to merely provide an opportunity for the Mi'kmaq to bring forward their concerns, in many cases, governments may have to act and change course on their decisions. This is contrary to most current consultative practices in Canada's representative parliamentary system of democracy.

### **Objectives**

The objectives of this report are to review the policies, procedures and processes developed and put in place by the Government of Nova Scotia from May 2007 to May 2009 in response to the 2004-05 SCC decisions, and subsequent court decisions regarding consultation with Aboriginal peoples in Canada; and, to provide recommendations to the Nova Scotia Office of Aboriginal Affairs on the

creation of an Aboriginal consultation program, and a long-term strategy to address the duty to consult. Although Nova Scotia initiated its response later than most other provinces, it has made great progress in just two years of development and implementation. The report reviews the institutional framework of policies, guidelines and legislation; capacity, coordination mechanisms, and examines a number of important policy questions. The result of the report is a series of recommendations aimed at improving the current program; and building a sustainable, transparent, respectful, effective and efficient Aboriginal consultation program and management regime for the Province of Nova Scotia.

### **Summary of Method**

Since the purpose of this report is to assess Nova Scotia's progress in setting up an administrative approach to meet the duty to consult, the author used a quasi-experimental methodology using a variety of quantitative and qualitative research techniques. The consultation approach described here is only emerging as a provincial government program in 2009. Therefore, the evaluation examined the administrative activities undertaken to provide the policy infrastructure for a potential program. A future project contingent on the acceptance of the recommendations of this report would involve the design, development and implementation of an Aboriginal consultation program with performance measures (both qualitative and quantitative).

This project required a multi-technique approach to research in order to give the client a thorough set of recommendations that addresses the breadth of challenges encountered during the first two years of implementation.

The literature review was limited to primary sources and a small selection of secondary sources. Because this is original research, primary sources such as the legal cases themselves, were the best sources of information, although subject to interpretation. Secondary sources included literature on Aboriginal law, and magazine and newspaper articles on legal disputes over consultation on natural resource management decisions and development projects across Canada, as well as in the US, Guatemala, El Salvador, Honduras, Peru, Chile, Ecuador and Bolivia. In addition, various policies and guidelines that have been put in place by provinces, territories, industry associations and non-government organizations across Canada and presentations from conferences were reviewed. The literature review provides the legal and policy parameters for the topic.

Comparative studies were undertaken to review policy responses across jurisdictions. This information is evolving as governments adapt their policies, programs and procedures to the changing legal and policy landscape. A comparative study provides an understanding of the overall policy environment for a particular timeframe; establishes commonalities and differences between

jurisdictions; and, provides a framework for creating a consultation management regime.

A survey of government staff from August 2007 was employed to narrow the scope from a broad comparative analysis to Nova Scotia's response. The results of the survey were used to scope the needs for capacity building in Nova Scotia.

And finally, a series of structured and semi-structured, group interviews were used to assist in the evaluation of Nova Scotia's formal consultation protocol and process – the Mi'kmaq-Nova Scotia-Canada Consultation Terms of Reference (ToR). The evaluation process was done in two phases – the first phase consisted of structured interviews with key provincial staff, and semi-structured, group interviews with Mi'kmaq and Government of Canada representatives. Phase II consisted of group discussion and analysis, and the development of joint recommendations with the Mi'kmaq and Canada for each of the challenges identified in the review, and a plan to ratify the ToR. These recommendations are included in the general section on Recommendations at the end of the report.

## **Key Findings**

The legal framework provided by the 2004-05 trilogy of SCC consultation cases gives the Crown consistent direction, and emerging court cases continue to do so. The courts are telling the Crown that they must consult when they are considering activities that have the potential to negatively impact asserted Aboriginal and Treaty rights. Clearly, the government has the responsibility to ensure they consider the duty, carry it out properly and in a meaningful way, and provide support to Aboriginal groups to do so.

The majority of the findings in this report are similar to those in other jurisdictions. There must be a strong institutional framework in place to support consultation. Nova Scotia, similar to other governments across Canada has responded to the SCC decisions by developing an interim consultation policy, a consultation protocol with the Mi'kmaq and Canada, a guide for proponent engagement, and is in the process of developing more department-specific consultation guidelines according to each department's lines of business. Nova Scotia is currently one of only four provinces that have a full consultation management regime in place consisting of policies, guidelines, protocols, funding mechanisms and in-house coordination and management.

To implement the institutional framework that supports consultation, Nova Scotia, Canada and the Mi'kmaq need to improve their consultation capacity – including the knowledge and skills required to consult properly, and adequate staff and monetary resources to do the work. A survey of Nova Scotia government staff in 2007 revealed a very low level of knowledge of the trilogy of consultation cases and what they mean for the daily operations of government. The survey also showed that although 60% of those that responded to the survey have interacted

professionally with Mi'kmaq representatives, very few have knowledge or interest of Mi'kmaq culture and history.

As the need and capacity for consultation increases, there will be a greater need for coordination of consultation efforts. Over 50% of all consultations conducted by the Government of Nova Scotia involve more than one level of government, and over 70% involve more than one provincial government department. Better coordination will improve the efficiency of consultation for all parties.

The requirement to consult has raised many questions that have not been answered by the courts. Jurisdictions continue to discuss and develop approaches to deal with these emerging policy questions. The questions include:

- What is the appropriate role for proponents or third parties, and how is the delegation of the procedural aspects of consultation handled? What is the connection to Crown consultation on rights issues? When is it appropriate for proponents to be involved in engagement and/or Crown consultation? Who pays for what?
- How do governments reconcile legislated decision-making timeframes with the duty to consult?
- The differing views of the interpretation of the duty to consult between the Mi'kmaq and the Crown relate to the outstanding resolution of rights and title issues in Nova Scotia and will continue to be a source of friction until resolved. How do governments and Aboriginal peoples bridge the gap regarding the differing views of consultation?
- There are a few provinces where treaty or modern land claims negotiations and consultation are occurring at the same time (for example, Nova Scotia, British Columbia, Ontario, New Brunswick, Quebec) – it is important to understand the implications of accommodation arising from consultation and the relationship to treaty or modern land claims settlements arising from negotiation.
- Is consultation required for activities that are being permitted exclusively on private land?
- Is there a legal duty to consult with non-status Aboriginal peoples in Nova Scotia?

### **Recommendations:**

The report provides a series of recommendations centred around four key themes.

- Institutional Framework: Policies, Guidelines, Procedures and Legislation
- Capacity
- Coordination
- Policy Issues

### *Institutional Framework: Policies, Guidelines, Procedures and Legislation*

Recommendations in this section focus on taking current policies and procedures beyond the pilot phase by reviewing and revising the interim policy; implementing all recommendations to strengthen the ToR process; long-term ratification of the ToR; developing departmental/sector-specific consultation procedures; providing clarity to third parties/proponents regarding their role in carrying out the procedural aspects of consultation; and, reviewing legislation to ensure it meets the honour of the Crown.

### *Capacity*

All three parties are challenged with a lack of capacity, although the challenges differ. Governments must understand the connection between the level of investment in consultation inputs and desired outcomes. The amount of effort and resources invested in consultation is reflected in the results. If governments choose to invest little time and effort, there will be numerous legal, economic and political challenges that may negatively impact the Province's long-term relationship with the Mi'kmaq, and ultimately, the resolution of rights issues.

The governments of Nova Scotia and Canada provide \$500,000 annually to the Mi'kmaq to coordinate all of their consultation efforts with all levels of government. Courts have been clear that it is the Crown that must provide the support for meaningful Aboriginal participation in consultation. Those provinces most active in consultation provide some type of consultation capacity fund to First Nations. Improvements to Mi'kmaq participation in consultation can be achieved by providing an adequate level of stable, sustainable, multi-year funding to build further administrative and technical capacity to participate in consultation.

The Province of Nova Scotia can improve its own capacity by adequately resourcing its consultation management regime, and continuing to develop its training and awareness program. It is believed that improvements to capacity will result in better consultation timing, improved process and outcomes.

Currently, the Office of Aboriginal Affairs is the only provincial agency/department that contributes directly to consultation efforts, both with staff and funds. It should be noted that some departments have assigned staff as consultation contacts, but it is not their full-time responsibility. OAA should secure its own Consultation Unit with adequate personnel and funding, and increase its contribution to the Mi'kmaq Consultation Capacity Fund. In addition, the Departments of Natural Resources, Environment and Energy should each secure a full-time equivalent position to coordinate consultation within their own departments and with OAA. The Departments of Natural Resources, Environment, Energy and Transportation should also make an annual financial contribution to the Mi'kmaq Consultation Capacity Fund.

### *Coordination*

It is important that all parties take their roles in coordination seriously, given limited resources. Coordination efforts to date have been helpful in resolving issues in a more comprehensive, efficient and satisfactory manner. Coordination efforts at the bilateral, tripartite and internal levels should be formalized and improved to ensure maximum value and effectiveness.

### *Policy Issues*

There are a number of challenging policy issues that arise from the various legal decisions regarding consultation that require careful consideration by all parties. Those issues are identified above, and require discussion and consideration at all levels of government.

The Province is already investing in consultation with the Mi'kmaq in Nova Scotia, and has shown its commitment over the past two years. However, a thorough review of current policies, programs and procedures, as well as a growing demand for consultation and the slow pace of implementation, reveals a high level of risk that can be mitigated by increasing support to meet the duty to consult over the next three years to consolidate a respectful, transparent, sustainable, effective and efficient institutionalized system for consultation.

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## INTRODUCTION

The duty to consult with Aboriginal peoples in Canada is a new and emerging, and increasingly more important and challenging area of the legal and policy environment for federal, provincial and municipal governments. The duty to consult, and where appropriate, accommodate Aboriginal peoples in relation to decisions that may impact asserted Aboriginal and/or treaty rights emerged as a challenge for governments in 2004 after the Supreme Court of Canada (SCC) handed down two significant legal decisions that defined the direction governments must take regarding decision-making that may impact Aboriginal rights. Following on the heels of those decisions, a third SCC decision was rendered in 2005 that extended the same duty to the Crown where treaty rights have the potential to be impacted.

The duty to consult (hereafter referred to as Consultation) involves significant policy and legal risk assessment for governments, given the extent of government decision-making and the potential for hundreds of thousands of decisions to impact Aboriginal rights and/or treaty rights every year. The duty to consult could be triggered by permitting, authorizations, policy development, and licensing and development activities, and applies to both the federal and provincial levels of government, as well as their agencies, boards and commissions. Courts have not been as clear regarding whether or not the duty to consult applies to municipal governments.

Many governments across Canada have been slow to respond to the direction provided by the SCC in 2004-05, but the provincial/territorial and federal governments have all responded in some form. Some jurisdictions that have been slow to respond, or have failed to implement an adequate consultation management regime in response to the need for consultation, have found themselves in court over a failure to consult, or to consult adequately. The costs of failing to consult adequately or at all may be significant – resulting in court-ordered payments to Aboriginal groups, an unstable business and policy environment, and damaged relationships between governments and Aboriginal peoples.

The Province of Nova Scotia officially responded to the SCC decisions in 2007 with the release of an Interim Consultation Policy, a consultation protocol between Nova Scotia, Canada and the Mi'kmaq First Nations in Nova Scotia, and the creation of a Consultation Division within the Office of Aboriginal Affairs. Between May 2007 and May 2009 significant progress has been made in implementing a consultation management regime in Nova Scotia. Significantly, the Province of Nova Scotia is currently the only government in Canada that has a consultation agreement with all First Nations in the province on how to consult, and who to consult with, and where all provincial consultation is managed through one Mi'kmaq and one government organization. This is in part because there are only 13 First Nations in Nova Scotia – all are Mi'kmaq. Nova Scotia is

also the only province in Canada with no ongoing litigation on consultation or Aboriginal/treaty rights issues. While Nova Scotia has responded more slowly to the direction of the SCC, and has committed some serious errors along the way; it has made significant advances in just two years of implementation.

The objective of this project is two-fold: 1) to identify and analyze the challenges encountered by the Province of Nova Scotia in the first two years of implementing an approach to address the Crown's duty to consult with the Mi'kmaq of Nova Scotia; and, 2) to provide recommendations to the Province of Nova Scotia and the Nova Scotia Office of Aboriginal Affairs on how to improve its Aboriginal consultation program; and, address the challenges encountered during this first two years of implementation. This report will also provide opportunities for Nova Scotia and other jurisdictions to learn from Nova Scotia's experience.

## BACKGROUND

### The Mi'kmaq of Nova Scotia

Historical documentation of the presence of Aboriginal peoples in the Atlantic region can be traced back anywhere from 9,000 – 13,000 years. The Mi'kmaq are believed to be the descendants of the original Aboriginal inhabitants of the Atlantic Region of what is now called Canada. The Mi'kmaq people currently reside in Newfoundland, Nova Scotia, Prince Edward Island and New Brunswick, as well as the Gaspé Region of Quebec. It is not the intention of this report to chronicle the experience of Aboriginal peoples in this part of the country. However, it is important to understand the context of the current Mi'kmaq population in Nova Scotia, and the historical relationship between the Mi'kmaq and the governments of Canada and Nova Scotia, in order to understand and apply the law regarding Consultation.

The Aboriginal population in 2009 in Nova Scotia is 24,175 (Census 2008). Less than 10% of the total Nova Scotian population is Aboriginal. Of the total Aboriginal population, 15,240 are First Nations (recognized as status Indians under the *Indian Act*), and 8,935 are non-status (including Metis). Of the 15,240 First Nations, 8,770 live on reserve, and 6,470 live off reserve. The First Nation population in Nova Scotia is much younger than the general population with a median age of 25.4 versus 41.6 for the total population. While there is a Metis Association in Nova Scotia, and it claims to have a membership of 7,680, the Nova Scotia government does not recognize Metis in Nova Scotia at this time.

There are 13 First Nations in Nova Scotia (see Map 1, p. 12), each with an elected Chief and Council. Elections are held every two years according to the *Indian Act*. Several of the Chiefs in Nova Scotia have held office for over 15 years. There are two tribal councils in Nova Scotia – the Union of Nova Scotia Indians (UNSI), which has seven member First Nations (bands), all but two of which are located in Cape Breton; and the Confederacy of Mainland Mi'kmaq (CMM), which has six member bands. The tribal organizations are part service provider, part political organization. Both councils work in the areas of natural resource management (fisheries, forestry, ecology, mining, etc.), rights-related research (historical, archaeological, legal), and economic development. The governing body of the First Nations is the Assembly of Nova Scotia Mi'kmaq Chiefs. The Assembly is made up of the 13 elected Chiefs supported by their advisors. There is also a traditional Mi'kmaq Grand Council that has both secular and religious duties. The governments of Nova Scotia and Canada have their principal relationship with the Assembly of Nova Scotia Mi'kmaq Chiefs.

Map 1



Another prominent Aboriginal organization in Nova Scotia is the Native Council of Nova Scotia (NCNS) who claim to represent more than 8,935 status off-reserve Indians, and non-status Aboriginal peoples. They have an elected structure of 13 zones, a President and Board of Directors (consisting of elected representatives from the 13 zones), and an administrative organization. They are primarily a service provider in the areas of natural resource management and social programs (housing, labour market programs, healthcare, education, etc.).

The political relationship between the Assembly governance structure and the NCNS is acrimonious. This poses particular challenges for the Nova Scotia government, which is often called on to explain its relationship to both organizations. The dispute centres on who represents Mi'kmaq people in Nova Scotia, and who is truly Mi'kmaq. The governments of Canada and Nova Scotia formalized rights negotiations with the Assembly, but both have an operational relationship with the NCNS through the funding of programs and services for the non-status/off-reserve Aboriginal population.

## Historical Relationship

The historical relationship between first the British colonial, and then the Nova Scotia colonial governments and the Mi'kmaq can be characterized as antagonistic, paternalistic, condescending and deceitful. Prior to their history with the British, the Mi'kmaq had a relatively peaceful relationship of coexistence that included trade and a strong alliance with the French Acadian settlers. With the arrival of the British, and during the violent disputes between the French and the British for control of the territory, the Mi'kmaq sided with the French. When the British eventually won, an antagonist relationship with the Mi'kmaq was already established.

The British eventually signed several treaties with the Mi'kmaq, but the most important were the Treaties of 1725, 1752 and 1761 – a series of treaties meant to establish more peaceful and friendly relations between the two societies, and to protect the Mi'kmaq way of life. However, with the settling of Nova Scotia, and the indiscriminate granting of land to European and United Empire Loyalist settlers, the Mi'kmaq eventually lost their land and were denied their rights. The government's approach to what was termed the "Indian problem", was a series of policies first aimed at elimination, and then control and assimilation. The Mi'kmaq were forced to settle on reservations designated by the government, despite the fact that their own culture was not one of permanent settlement or agricultural cultivation. All issues related to Aboriginal peoples came under the control of the *Indian Act*, and to a great extent, remains this way today.

Aboriginal peoples in Canada were systematically denied the same rights as other Canadians until well into the 20<sup>th</sup> century. Throughout the 1800's and the first half of the 1900's, the Mi'kmaq of Nova Scotia experienced the same application of government policies as did other Aboriginal peoples in Canada, for example, residential schools, the Indian Agent, no suffrage, and discrimination against women. It wasn't until the late 1960's and early 1970's when the Indian Rights movement developed internationally, that Aboriginal peoples began to win important legal rights recognition in Canada.

As an extension of the rights movement, the Mi'kmaq in Nova Scotia became actively organized in the 1970's with the founding of the Union of Nova Scotia Indians, the Native Council of Nova Scotia, the Native Women's Association, and later, the Confederacy of Mainland Mi'kmaq. It was also in the late 1970's that the Mi'kmaq Grand Council and the UNSI presented their Aboriginal rights position paper to the federal Minister of Indian Affairs outlining a claim to all of Nova Scotia, which later included the offshore. The position paper was rejected in favour of a negotiation process much further into the future.

## Aboriginal Rights and Treaty Rights

Existing or proven Aboriginal and treaty rights received constitutional protection in Canada in 1982 with the repatriation of the constitution. Section 35 of the *Constitution Act* states “The existing aboriginal and treaty rights of aboriginal peoples of Canada are hereby recognized and affirmed.” However, Section 35 does not deal with asserted, but still unproven Aboriginal rights. To some degree, the case law for the duty to consult helps to fill in this gap, while governments and First Nations negotiate land claims settlements.

The *Constitution Act, 1982* was accompanied by the Canadian *Charter of Rights and Freedoms*. The Charter outlines rights that individuals possess so as to protect those rights from unjustifiable government infringement (Isaac, 2001, p. 43-44). Section 25 of the Charter protects Aboriginal rights from being infringed by Charter rights. Section 25 of the Charter states:

“The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.”

With the formal recognition of established Aboriginal and treaty rights in the constitution, Aboriginal peoples began to challenge the government and the court system to further define and broaden those rights.

In Nova Scotia, modern rights-based legal cases began in 1985 with the Supreme Court of Canada *R. v. Simon* case that ruled that the provisions in the 1752 treaty to protect the land and the Mi'kmaq way of life were still valid. There have been a small number of cases that test rights in the Maritimes, but there has been a steady growth nationally in the area of Aboriginal law since the 1982 constitution entrenched the protection of established Aboriginal and treaty rights.

The seminal rights case for the Mi'kmaq is the 1999 Supreme Court of Canada *R v. Donald Marshall Jr.* case, known as the Marshall decision. This case focused on whether or not Mi'kmaq Donald Marshall Jr was allowed to fish for eels without a licence. The defence argued that Donald Marshall Jr., as a Mi'kmaq, was able to fish without a licence at any time of the year thanks to the Peace and Friendship Treaties signed by the Crown and the Mi'kmaq in 1760-61. The SCC found that the treaties affirmed the right of the Mi'kmaq (as well as the Maliseet in New Brunswick) to hunt, fish and gather for a moderate livelihood. This decision has given the Mi'kmaq a strong foundation for the negotiation of modern treaty rights in Nova Scotia.

The government's understanding of rights concepts like Aboriginal rights, Aboriginal Title (the highest form of Aboriginal right) and Treaty rights were developed through litigation in the Canadian court system and are driven by a

Eurocentric understanding of the concepts of rights and title. Aboriginal peoples may have different interpretations of these concepts. For the purposes of this report, the legal definitions will be used, as they form the context for the government operations being examined.

### *Aboriginal Rights*

Aboriginal rights refer to any activity which has an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right (*Van der Peet*, 1996, p.507, para 46). They generally refer to the right to exercise traditional activities, such as fishing, hunting, trapping and gathering for food, ceremonial (including spiritual and cultural use) or, in some cases, commercial purposes. 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 distinct variation of Aboriginal rights and refers to a right to the land itself. It is the highest form of Aboriginal right. It should be noted, however, that Aboriginal rights can exist independent of Aboriginal title – that is, it is not necessary to prove Aboriginal title to enjoy Aboriginal rights. Title applies to lands occupied by Aboriginal peoples prior to the date of sovereignty, which is about 1713 for Mainland Nova Scotia and 1763 for Cape Breton. To establish title, claimants must prove exclusive pre-sovereignty occupation of the land, and continuity between pre-sovereignty and existing occupation (Delgamuukw, 1997; *R. v. Marshall/Bernard*, 2005). This is a very stringent and difficult test to achieve, and there have not been any successful cases of Aboriginal title in Canada to date.

The Mi'kmaq submitted a comprehensive title claim for the entire province of Nova Scotia in 1977 to the federal and provincial governments. The claim was rejected at that time. The claim was submitted again in 2005, and was extended to include the offshore, but no response has been forthcoming to date. While the Mi'kmaq continue to assert this title claim, in the SCC cases in *R. v. Marshall/Bernard* in 2002 which dealt with a treaty right to log and sell logs, the SCC rejected the Mi'kmaq's claim to the entire province. According to Isaac, however, while the judge did not find grounds for title to all of Nova Scotia, the test has not yet been applied to a smaller geographic area. This may leave the door open for the Mi'kmaq to attempt to prove this or another, less comprehensive title claim at any time in the future. The preferred approach in Nova Scotia at this time is to negotiate a settlement that deals with treaty rights and Aboriginal rights, including title.

### *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 Atlantic provinces, but the most relevant for the purpose of this report are the pre-Confederation Peace and Friendship Treaties of 1760-61. As previously discussed, the Mi'kmaq treaty rights to hunt, fish and gather in order to obtain a moderate livelihood were affirmed in the *R. v. Donald Marshall* decision in 1999, and are protected under Section 35 of the *Constitution Act*. The SCC concurred that the treaty granted the Mi'kmaq the right to continue to trade in the products that they had traditionally traded with Europeans. The treaty right to trade includes a corresponding right of access to resources for the purpose of engaging in trading activities (hence the rights to hunt, fish and gather). 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.

In Nova Scotia, Aboriginal rights may co-exist alongside treaty rights (Isaac, 2001, p. 62), which, together with an asserted title claim to Nova Scotia, makes Nova Scotia's circumstances somewhat unique, and certainly does raise the bar on the duty to consult.

This report only highlights the key aspects of the historical relationship between the Mi'kmaq and the government of Nova Scotia; however, it provides the background for understanding the current relationship and the status of the recognition of Aboriginal rights in Nova Scotia. Nova Scotia, like many other provinces in Canada, is currently engaged in a process of negotiation to understand and define what Mi'kmaq rights are in Nova Scotia today through the Nova Scotia Office of Aboriginal Affairs.

### **The Nova Scotia Office of Aboriginal Affairs (OAA)**

The Nova Scotia Office of Aboriginal Affairs (OAA) was created in 1998 not long after the Marshall Inquiry into the wrongful imprisonment of a member of Nova Scotia's Mi'kmaq community, Donald Marshall Jr. The OAA is the lead agency in Nova Scotia on Aboriginal issues. Its mission statement says "OAA will lead Nova Scotia in Aboriginal Affairs by building mutual understanding, respect and a lasting relationship" (Nova Scotia Office of Aboriginal Affairs, 2007).

The three key areas of responsibility for the OAA are the Mi'kmaq-Nova Scotia-Canada Tripartite Forum, the Made-in-Nova Scotia Negotiation Process; and, Consultation. The Tripartite Forum deals primarily with social and economic issues through a series of tripartite committees; the Made-in-Nova Scotia negotiation process is focused on the long-term resolution of issues related to Aboriginal and treaty rights in Nova Scotia; and, the Consultation section develops and implements policy and provides strategic advice on the Crown's duty to consult with Aboriginal peoples.

As a result of the 1999 Marshall decision on treaty rights, in 2001, the federal and Nova Scotia governments announced their intention to enter into negotiations with the Mi'kmaq of Nova Scotia to seek long-term resolution to Aboriginal and treaty rights. The goal of the Made-in-Nova Scotia negotiation process is to eventually enter into agreements that set out the scope and nature of Mi'kmaq rights to land, resources and self-governance. At the same time, a complementary initiative was launched by Fisheries and Oceans Canada to facilitate the immediate participation of the Mi'kmaq in commercial fisheries.

In 2002, the Mi'kmaq of Nova Scotia, the Nova Scotia government and Canada signed an Umbrella Agreement that committed the three parties to work in three areas:

1. The Tripartite Forum;
2. a broad negotiation process to consider constitutionally-protected rights of the Mi'kmaq of Nova Scotia; and,
3. a consultation process.

*(Mi'kmaq-Nova Scotia-Canada Umbrella Agreement, 2002, p. 3)*

### **The Consultation Trilogy**

It is challenging to understand the context of the duty to consult with Aboriginal peoples without some understanding of the law regarding the duty to consult. It is not the intent of this report to provide an overview of Aboriginal law in Canada, or all cases (upper and lower court) involving the duty to consult. However, for background purposes, this report will provide a synopsis and analysis of the three key cases regarding the duty to consult in Canada, as well as references to some of the lower court rulings that have broadened the understanding of the duty to consult since 2004, and have generated a number of policy questions.

There are three bellwether court cases in Canada that define the Crown's duty to consult with Aboriginal peoples: *Haida Nation v. BC (Minister of Forests)*, *Taku River Tlingit First Nation v. BC (Project Assessment Director)*, and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*. Prior to these three cases, there were several cases that dealt with the duty to consult as part of a broader rights-related issue; however, this trilogy of cases was the first to address the duty to consult directly, and they have provided a foundation for further court cases (at the provincial and federal court levels) that deal with grievances from Aboriginal groups with regard to a lack of consultation by the Crown.

*Haida Nation v. British Columbia (Minister of Forests), SCC 2004*

The *Haida Nation v. BC (Minister of Forests)* case was initiated by the Haida Nation over a series of three renewals and one transfer of a tree farm licence by

the government of British Columbia on Haida Gwaii (Queen Charlotte Islands) since 1961. The tree farm licence gave the company permission to harvest trees on that plot of Crown land for a given period of time. The Haida Nation had been building a case for Aboriginal title in Haida Gwaii.

The Haida claimed that neither the Crown nor the company (in this instance, Weyerhaeuser) consulted with the Haida Nation prior to granting the licence. The claim stated by granting the licence to harvest on Crown land, the company and the Province of BC were infringing on the Haida claim of title. The case was heard in the British Columbia Supreme Court and the British Columbia Court of Appeals before finally ending up in appeals at the Supreme Court of Canada.

The SCC confirmed the existence of the Crown's duty to consult and, where appropriate, to accommodate Aboriginal peoples prior to proof of rights or title claims. The key issue in this case was the owing of the duty to consult prior to proving a claim. In other words, Aboriginal groups need only assert a claim of rights (albeit a credible claim) to be owed the duty to consult.

The duty to consult stems from the honour of the Crown. The duty "flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group" (*Haida*, p. 29-30, s53). The SCC said "To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable." (*ibid*, p.18, s27). So, in their dealings with Aboriginal peoples, the Crown must act honourably, and this includes consultation.

In order to uphold the honour of the Crown – governments must consult when contemplating activities that may impact asserted and/or proven Aboriginal and/or Treaty rights. The goal of Consultation is to reconcile the interests of Aboriginal peoples with other interests, and to move further down the path of reconciliation, pending resolution of claims through a negotiation process. Because assertions of claim take a long time to research and prove, the government has the responsibility to consult and possibly accommodate, pending resolution of claims. As the Chief Justice in the case stated, "The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, yet unproven, interests." However, it was also noted that "The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution" (*Haida*, supra note 1, para 27). This is an important point, as the courts were saying that governments clearly have mandates to govern, and are expected to do so, regardless of their duty to consult.

The Haida case provided general guidelines as to when it is appropriate to consult, although each decision must be assessed individually. The scope,

depth and content of the duty to consult lies on a spectrum that is proportionate to the strength of the asserted claim, and the level of potential impact of the action being contemplated on the claimed right. This could range from notification of an activity where the claim is weak and the infringement is minor, to deeper consultation when the claim and level of infringement is strong, to requiring consent when the claim is proven and the infringement is strong. Knowledge of a credible, but as yet unproven claim suffices to trigger the duty to consult, particularly when a jurisdiction is actively pursuing a negotiated settlement with First Nations. Difficulties with proof should not lead to a denial of the existence of the duty to consult – just the opposite. “When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable” (Haida, p. 21, Sec. 33).

When a strong *prima facie* case exists of the right or claim, and the proposed decision has the potential to infringe that right or claim, accommodation may be necessary. Accommodation means that governments may need to adapt their decision to harmonize or reconcile Aboriginal interests with broader societal interests -- “responsiveness is a key requirement of both consultation and accommodation” (Haida, p. 16, s25). To conclude, the ultimate goal of consultation may not be agreement, or a complete resolution of the issues, but rather, a deeper understanding on the part of the Crown as representative of the people of Nova Scotia, of Aboriginal interests, and the reconciliation of those interests with broader societal interests.

Other important points made or affirmed by the Haida decision include:

- While there may be a duty to consult, there is no duty to reach an agreement.
- Aboriginal groups do not have a veto over government decision-making.
- Aboriginal groups must not frustrate the Crown’s attempts to consult, or take unreasonable positions.
- There is a reciprocal duty on Aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown.

In the Haida’s original claim before the courts, the Haida argued liability for consultation also applied to the company receiving the tree farm licence, Weyerhaeuser. This was originally confirmed by the BC Supreme Court; however, it was overturned by the BC Court of Appeal and upheld by the SCC. The Crown cannot delegate the duty to consult to a third party (proponent), and third parties do not owe an independent duty to consult and accommodate. However, the Crown can delegate procedural aspects of consultation to third parties. Although legal responsibility for consultation and accommodation lies with the Crown, this doesn’t mean third parties cannot be held liable to Aboriginal peoples for negligent conduct, breach of contract or dishonest dealings (Haida, para 52);

and it does not mean that “industry is now excused from the consultation arena” (Isaac et al, 2005, p. 684).

All court decisions regarding the duty to consult have stressed the importance of meaningful consultation. Meaningful consultation means that the Crown must show that it made reasonable attempts to notify the Aboriginal group, hear and understand their concerns, and attempt to address their concerns, in accordance with the strength of the asserted claim and the level of impact on rights. It is important to note, in what seems at times to be over-shadowed by highly technical descriptions of a correct legal assessment of rights and impacts that the focus is on the process, and not necessarily on the outcome (Isaac, 2005, p. 676). And while the process need not be perfect, the Crown must show that an adequate assessment of the asserted rights, and the potential infringement on those rights by the Crown’s decision has been made, and that there have been meaningful attempts to consult.

*Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), SCC 2004*

The companion case to Haida is the *Taku River Tlingit First Nation v. BC (Project Assessment Director)* decision. This case involved a mining company (Redfern) that received permission from the Province of British Columbia through its environmental assessment process to re-open the Tulsequah Chief Mine in Northern BC. The proposed project included building a new access road in Taku River Tlingit First Nation traditional territory. The First Nation objected to the building of the road through their claimed territory and petitioned the court to have the decision to let the mine go ahead quashed based on a lack of adequate consultation.

The court examined the strength of the asserted claim and the potential for adverse impacts to the claim and found there was a duty to consult. The Taku River Tlingit were also in the process of treaty negotiations with the government which triggered the duty to consult. Potential adverse impacts were serious and recognized to be so by various experts who “recognized the Taku River Tlingit’s reliance on its system of land use to support its domestic economy and its social and cultural life” (Taku, para 70).

The court also looked at the consultation process followed by the Crown, and found that the Crown met its duty to consult, and the consultation and accommodation process was adequate. The Crown consulted through its established environmental assessment process, which included extensive involvement of First Nations in the process. For example, a First Nations Project Committee was established, and First Nations participated on all working groups associated with the project. The First Nations Project Committee provided a separate, dissenting report which was considered by decision-makers. A traditional ecological knowledge study was also undertaken. The decision

included several mitigation measures to address First Nation concerns outlined in their report – these were expressed as terms and conditions of the environmental assessment approval. Accommodations that could not be made within the environmental assessment process were referred to other processes. For example, some concerns were best addressed at the permit stage and others through either the negotiation process or land-use planning process.

The Taku decision confirmed the salient points in Haida, and provided further clarification on the process of consultation. The Taku decision made clear that consultation does not necessarily begin and end with one permit or approval. Rather, “it is expected that, throughout the permitting, approval and licensing process, as well as in the development of a land use strategy, the Crown will continue to fulfill its honourable duty to consult and, if appropriate, accommodate” (Taku, 2004, p.4).

It is also worth noting that the Province of British Columbia’s *Environment Act* at the time made specific reference to involvement of First Nations at several stages of the environmental assessment process. The *Environment Act* requires that Aboriginal peoples whose traditional territory includes the site of a reviewable project be invited to participate on a project committee, and also more generally provides for participation by First Nations. As Isaac states, “Taku provides a positive example of a situation in which the Crown’s duties of consultation and accommodation can be properly discharged, provided the appropriate procedures are developed and followed” (Isaac et al, 2005, p. 684).

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

In 2000, the federal government approved a winter road to run through the Mikisew Reserve in Wood Buffalo National Park, Alberta. The Mikisew Cree are signatories to Treaty 8 – one of the numbered post-confederation treaties. After the Mikisew objected to the road, the government modified the alignment of the road to run along the boundary of the reserve. The Mikisew took the government to court claiming the government had failed to consult prior to approving the road.

This case went to trial in the Federal Court, then appeal at the Federal Court, and finally ended in appeal at the Supreme Court of Canada. The SCC found that the government breached its legal obligation by failing to consult with the Mikisew Cree prior to approving the road. The court reiterated many of the findings made in the Haida and Taku cases.

The court began its judgment with an important statement of principle:

“The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and

misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies. And so it is in this case" (Mikisew, 2005, para. 1).

The significance of the Mikisew case is in the confirmation that the duty to consult also applies where there are potential infringements of treaty rights, respecting the entrenchment of those treaty rights in the Constitution. However, the decision also broadened the understanding of consultation and the importance of accommodation. Mikisew stressed the importance of accommodation in the consultation process, noting that "Consultation that excludes from the outset any form of accommodation would be meaningless. The contemplated process is not simply one of giving the Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along" (Mikisew, 2005, para. 54).

The court also noted a number of other important principles:

- Consultation is a procedural obligation that must be satisfied prior to the making of a Crown decision – the failure to consult is grounds to quash a decision on a purely procedural basis;
- Consultation must engage First Nations directly, and cannot be simply a component of a public consultation process, or an afterthought to such a process.
- The threshold to trigger the duty to consult is low.

The importance of the Mikisew decision for Nova Scotia relates to the constitutional protection of treaty rights. The assumption of the Crown in this case was that the Mikisew Cree had extinguished their claim to rights with the signing of their treaty (Treaty 8). The numbered treaties in Canada involved Aboriginal people "ceding, releasing, and surrendering their rights to land and to their traditional activities in return for specific rights specifically outlined within the terms of the negotiated treaty" (Isaac, 2001, p. 27). The Maritime Peace and Friendship Treaties did not involve the surrendering of rights or ceding land.

### **Other Interesting Legal Cases Regarding the Duty to Consult**

Since 2004, there have been a number of upper and lower court cases that have provided additional direction, and have further developed the understanding, concept and practice of the Crown's duty to consult. While not a comprehensive review of all cases referencing the duty to consult, the cases reviewed here further expand on Haida, Taku and Mikisew. Brief descriptions of those cases and their outcomes, and the lessons learned from them are provided below.

*Dene Tha' First Nation v. Canada (Minister of Environment) – Federal Court of Canada (FCC) 2006*

This case dealt with a breach of the duty to consult on the MacKenzie Gas Pipeline project from Inuvik in the Northwest Territories to northern Alberta. The Dene Tha' claimed they had been excluded from discussions on the design of the proposed pipeline's regulatory and environmental review process with governments. The Ministers of the federal government departments of Environment, Fisheries and Oceans, Indian and Northern Affairs, and Transport Canada felt they had consulted adequately with the Dene Tha'. The government consultation efforts consisted of 1) sending the Dene Tha' a general media release on the public comment period for a draft Environmental Impacts Terms of Reference and Joint Review Panel Agreement; and, 2) providing a 24-hour deadline to comment on the documents. To add insult to injury – the 24 hour deadline for comment occurred after months of discussions with everyone but the Dene Tha'.

The Court's conclusion was that the First Nation had "a constitutional right to be, at the very least, informed of the decisions being made and provided with the opportunity to have its opinions heard and seriously considered by those with decision-making authority" (*Dene Tha' v Canada*, 2006, p. 5). As a remedy, the court ordered work on the pipeline stopped until the parties could attend a remedies hearing to address the issue of consultation. Prior to the remedies hearing, the government of Canada settled with the Dene Tha' by offering them \$25 million. The \$25-million settlement was meant to satisfy all consultation costs, and to address the socio-economic, cultural and heritage impacts from the project's construction and operation on the community. By accepting the settlement, the Dene Tha' gave up all rights to further challenge the project based on a lack of consultation.

Other interesting findings in this case include the following:

- The application of the standards of reasonableness and correctness when looking at government efforts in consultation. The efforts made by government will be judged on standards of reasonableness, while the determination of when the duty to consult arises will be judged on standards of legal correctness (Isaac, 2008).
- Governments cannot compartmentalize or divorce individual decisions on a project from the larger objective, which is to approve/reject a particular project. The court said "It is a distortion to understand these processes as hermetically cut off from one another" (*Dene Tha' v Canada*, p. 38).
- Public consultation processes "cannot be sufficient proxies for Aboriginal consultation requirements" (*ibid.*, p. 43) ... "That right to consultation takes priority over the rights of other users" (*ibid.*, p. 40).
- The court further elaborated on when the duty to consult is triggered in a multi-layered permitting process. In cases where follow-up permits are

required to actually undertake physical work, the original permits still may owe a duty to consult because they are considered “strategic planning for utilization of the resource” and that “[d]ecisions made during strategic planning may have potentially serious impacts on Aboriginal right and title” (Haida, para76).

*Platinex v. Kitchenuhmaykoosib Inninuwug First Nation (KIFN) & A.G. Ontario – Ontario Superior Court, 2007*

Platinex Inc., a junior mining company, was given an exploration permit by the Ontario government to carry out test drilling for platinum and other minerals in KIFN traditional territory. The KIFN blocked the company’s access to the land, so the company took the KIFN to court. In their first court visit in July 2006, the Ontario Superior Court gave the company and the KIFN five months to reach an agreement to address both the KIFN’s and the company’s needs before any further exploration work could be undertaken. The parties could not reach agreement, so the case ended up back in the Ontario court.

In the first judgment in April 2007, the Ontario Superior Court allowed exploration to begin, but ordered Platinex, the KIFN and the Ontario government to develop and adhere to a consultation protocol. Platinex and Ontario were able to agree on a protocol framework, but the KIFN did not agree. In May 2007, the court further ordered the implementation of a Consultation Protocol and a Memorandum of Understanding that laid out the process and issues to be addressed in consultation, including funding for KIFN participation in the consultation process. The court imposed itself as referee of this process to ensure the two agreements were implemented by all parties. The court urged the parties to work toward an agreement that would make sure that Platinex’s work on the land was carried out in a way that was respectful of the land and of KIFN’s treaty rights.

Unfortunately, this string of rulings did not resolve the issue, and eventually the KIFN refused to participate in the consultation and physically blocked the company’s right of access for exploration purposes, which resulted in the imprisonment of six KIFN leaders in early 2008. By May 2008, the six KIFN leaders were released from jail, pending the appeal of their sentence. Also pending the appeal, Platinex agreed not to enter the exploration site, and the KIFN leadership has agreed to curtail its’ protests of Platinex’s exploration activities (Dominion, June 5, 2008).

*Ahousaht First Nation v. Canada (Minister of Fisheries and Oceans) –Federal Court of Appeal, 2008*

This case dealt with a judicial review of the process that led to an April 2006 decision by Fisheries and Oceans Canada (DFO) to implement a commercial groundfish pilot plan in the Pacific Region. The applicants in the case were 14

First Nations belonging to the Nuu-chah-nulth Tribal Council (NTC). The NTC asked that the decision to implement the pilot plan be quashed on the basis of a breach of the duty to consult by the Crown.

Fisheries and Oceans Canada designed a multi-phased consultation process with both stakeholders and First Nations that involved the following:

- NTC participation on a multi-stakeholder advisory group
- Notification of the draft groundfish pilot plan to all coastal First Nations (four month comment period)
- Public open houses and multi-stakeholder dialogue meetings in various BC locations (First Nations were invited to these sessions)
- Consultation with First Nations in various BC locations
- Development of a consultation protocol with the NTC
- A number of meetings and correspondence with the NTC were held regarding the pilot groundfish plan
- Concerns of NTC (and other First Nations) were provided to the Minister for decision.

The ruling in this case found that “given that the duty to consult in this case is located on the lower side of the spectrum, and given that the applicants were represented in the multilateral process ... and were thus aware of the situation as it developed, I am satisfied that there was no need for the Minister to take any extra steps to consult the applicants while the Reform Proposal was being developed” (*Ahousaht v. DFO*, 2006, para 52). Further, the court said that the NTC shared a lot of the blame for delaying the process to the point where there was no time for them to present their official submissions before the Minister adopted the pilot plan. They cancelled meetings, including a meeting scheduled much earlier in September 2005, and they did not submit their consultation protocol until November 23, 2005, even though they proposed bilateral consultations as early as January 2005. More importantly, they insisted that DFO agree to their protocol, before they proceeded to discuss the substance of the issues (*ibid.*, para 60).

In the end, the importance of this case rests on the court’s recognition that while the consultation process was not perfect; the multilateral consultations that were held, the nature of the plan in question, the accommodations made by the Crown, and the obstructive behaviour of the NTC resulted in a finding that the duty to consult had not been breached.

The courts clearly intend consultation as a means to advance the process of reconciliation; and to provide a process for the consideration and accommodation of adverse impacts on rights in the absence of fully negotiated settlements. The scope of the duty to consult, and any accommodation should be proportionate to the strength of the rights assertion, and the level of impact a proposed activity has on those asserted rights. There is no requirement to reach an agreement,

and Aboriginal people do not have a veto over decisions on proposed activities, and they cannot frustrate the consultation process. Governments must conduct meaningful consultation and make reasonable efforts to understand and address the concerns of Aboriginal peoples. They must also create a level playing field for Aboriginal participation in the consultation process.

## **Challenges and Responses**

The key court cases on consultation provide a general, yet consistent framework for governments, but they have also posed considerable challenges.

Governments have been exceedingly reliant on the courts to deal with questions related to Aboriginal consultation. As a result, they have been slow to react, and slow to develop the proper institutional framework to support consultation, such as policies, legislation and regulations, guidelines and procedures, and a consultation management regime.

The courts have provided their general instructions, and in some cases, have refined their decisions to provide more clarity around ambiguous issues, such as questions like “can a particular activity count as consultation.” However, the courts did not provide a prescription for consultation, and there is a perceived lack of clarity from the courts regarding the process or procedure for consultation, the definition of meaningful consultation, and when the Crown has fulfilled the duty to consult. The courts have been very clear, however, that it is government that must seek solutions to meet its duty to consult. Well meaning governments have now rushed to fill the gap with internal policies, procedures and structures, without discussing how consultation might be achieved from an Aboriginal perspective, and without engaging Aboriginal peoples in those discussions. This has resulted in confusion, conflict, delays, and of course, more court cases.

Regardless of the duty to consult, governments have been told that they must govern. This requires that some decisions be made within tight legislated timeframes, and without adequate consultation. There is a natural tension between the duty to consult and the process involved in meeting that duty, and the regulated authority of decision-making of government.

Most governments and Aboriginal groups have discovered serious capacity shortcomings associated with meeting the duty to consult. Nova Scotia lacks the institutional capacity to meet its consultation obligations, and so do the Mi'kmaq. A lack of institutional capacity refers to a lack of people, funds, training, knowledge, analytical capacity and integrated decision-making. However, Nova Scotia and the Mi'kmaq have taken steps to improve their governance and administrative structures around consultation.

The sudden explosion in requests for consultation has inundated Aboriginal communities, with some Aboriginal communities in Canada saying they receive at least one hundred requests a month from federal and provincial governments. The challenge for government is to find an effective and efficient way to coordinate efforts on consultation together with the Mi'kmaq, and look for a number of creative means to meet the duty to consult.

Despite the number of court decisions that detail the responsibilities and rationale for consultation, a number of policy questions have been generated that need to be examined and addressed. For example:

- Is there a duty to consult on private land, when the activity (and its potential impacts) are contained within its boundaries?
- What is the appropriate role of the proponent, or third parties, in consultation; and what are the delegated aspects of consultation?
- When is the duty to consult triggered?
- What is the nature of the duty to consult regarding the Metis in Nova Scotia, and non-status Aboriginal people and those First Nations that live off-reserve?

These are the challenges created by the formal and legal introduction of the Crown's duty to consult Aboriginal peoples to the daily operation of government. Nova Scotia did not directly address the need to consult for several years, but since the development and implementation of a consultation management regime, the Province has progressed rapidly in a short period of time.

Nova Scotia has responded to the challenges posed by the SCC decisions by addressing the capacity issues first – providing funding to support an administrative structure for the consultation process within the Mi'kmaq and the Nova Scotia governments, and introducing an institutional framework and consultation management regime to develop capacity, policies, protocols and coordination mechanisms. It is material to note that there are currently no active litigations concerning Aboriginal issues in Nova Scotia.

Shortly after the Haida/Taku decisions were released by the SCC in 2004, the three parties in the "Made-in-Nova Scotia" (MINS) negotiation process began discussions to develop a Consultation Terms of Reference (ToR). The ToR is essentially a protocol that lays out the three parties' commitment to meet the duty to consult, and a process for consultation. The Umbrella Agreement and the commitment to begin discussions on consultation began several years before the SCC handed down its historical decisions on the Crown's duty to consult. The final draft of the ToR was completed in 2006.

In May 2007, the Office of Aboriginal Affairs hired a strategist to develop a long-term strategy for addressing the duty to consult, and to implement the Interim Policy and the ToR.

In June 2007, the Province of Nova Scotia released an Interim Consultation Policy which provides some high level guidance on the duty to consult. Shortly after that, in July 2007, the Mi'kmaq, Nova Scotia and Canada agreed to pilot the ToR for one year. The agreement included a commitment to evaluate the ToR prior to the end of the one year pilot and provide recommendations to each of the parties, as well as the MINS main negotiation table. In 2008, the ToR was renewed as a pilot for an additional year, and in July 2009, the main negotiation table began a process to finalize and formally adopt the ToR.

Prior to 2007, Nova Scotia was not consulting in any direct or meaningful way with the Mi'kmaq of Nova Scotia on natural resource-related projects or issues - with the exception of the Deep Panuke offshore oil and gas project. In light of this, it is logical to conclude that between the end of 2004 when the SCC gave its direction on the duty to consult to governments, and 2007 when the Nova Scotia government began to implement a management regime for Consultation, the Nova Scotia government was operating in a climate of considerable legal risk, and to a certain extent, continues to do so. Since May 2007, the Province of Nova Scotia has gone from consulting on one project to over 40 formal consultations under the ToR. It is estimated that the Nova Scotia government currently spends approximately \$300,000 on consultation-related administration and activities, and with contributions from Canada through Indian and Northern Affairs Canada and other agencies, there is currently a total of \$850,000 being spent on consultation with Aboriginal peoples in Nova Scotia. This represents a substantial increase in the investment in consultation activity in just two years, although it is only scratching the surface of the breadth of government decisions that have the potential to impact asserted Aboriginal and treaty rights of the Mi'kmaq of Nova Scotia.

## METHODOLOGY

The purpose of this report is to assess Nova Scotia's progress in setting up an administrative approach to meeting its duty to consult with the Mi'kmaq of Nova Scotia; and to provide recommendations to strengthen and improve the approach by increasing efficiency and effectiveness. The period examined in the report from 2007-09 was a formative period for developing a consultation approach. Prior to adopting measures to formalize Aboriginal Consultation as a program, it is likely that decision-makers had not previously anticipated the need for a formal program to carry out the duty to consult. Therefore, the recommendations in this report may assist in setting up a formal program that includes a set of performance measures to assess progress on an annual basis, as well as an overall program design.

Evaluation during the development stage of a program is helpful in that it identifies strengths and challenges of current practice, and best practices; creates a space for the dialogue needed to explore creative solutions to problems; gathers and secures useful data; and identifies goals, outcomes and costs associated with the activity.

The author of this report used a quasi-experimental, multi-technique research design (see Table 1) for evaluation that utilized both quantitative and qualitative research methodologies. Quantitative instruments included a self-selecting survey, some baseline data on consultation and to a degree – the comparative studies do allow statistical analysis.

TABLE 1

<p><b><u>Research Process:</u></b></p> <ol style="list-style-type: none"><li>1. Literature Review (qualitative)</li><li>2. Comparative Studies (quantitative/qualitative)</li><li>3. Self-selecting Survey (quantitative/qualitative)</li><li>4. Structured and Semi-structured interviews (qualitative)</li><li>5. Analysis and Recommendations</li></ol>
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Qualitative instruments include structured and semi-structured (group) interviews, as well as the literature review of documents, policies, guidelines, legislation, court cases, articles and books. The interviews and the survey required ethics approval for human participant research through the Human Research Ethics Board at the University of Victoria. Approval for both the use of the survey and conducting the interviews was received on March 20, 2008 for a period of one year.

The author of this report relied heavily on experiential evidence as the Province of Nova Scotia's Senior Strategist, Provincial Consultation, and as such, was able to include original research, statistical analysis of the process, and work developed during the planning, design and implementation phases of the consultation approach. In addition, collaboration with staff at the OAA, key staff in provincial government resource-related departments, the federal department of Indian and Northern Affairs Canada, legal professionals, and the Kwilmu'kw Maw-klusuaqn Negotiation Office contributed to the identification of success, challenges and recommendations.

## **Literature Review**

A literature review was undertaken to identify key writings in this field. These are mainly secondary sources, with the exception of a number of significant legal cases at the Federal and Supreme Court of Canada levels that deal with the duty to consult, and two texts on Aboriginal rights and Treaty rights. Secondary sources include journal and newspaper articles, policy documents, websites and conference presentations and papers.

Most journal articles tend to date themselves quickly, as the field is changing constantly, and new examples or cases emerge to move the goalposts. However, they provide a good historical reference of the development of the issue across Canada. The journal articles examined for this report deal mainly with consultation cases in British Columbia and Ontario, with minor references to cases in Alberta. Those are the three provinces where economic development activities in natural resources have been most active, and where those activities have clashed with the unsettled claims of Aboriginal peoples.

Newspaper articles examined for this report dealt primarily with current legal cases around the duty to consult related to conflict over natural resource extraction and development activities.

The most informative secondary sources are conference presentations and papers in the field collected by the author of this report. These presentations are usually very current, presented by practitioners, and deal with important emerging policy and legal themes in the field. They also assist in providing a historical record of developments in other jurisdictions.

Policy documents from each province and territory were reviewed and are described below in the section Comparative Studies. Most of this information was obtained on-line or through conference presentations and papers.

## **Comparative Studies**

A comparative study was done on the spectrum of policy responses to the 2004-05 SCC decisions by provinces, territories and the federal government. The

comparison provides a snapshot in time (2007-08) of the current state of policy response, and the implementation of consultation management regimes across the country. This landscape is changing constantly, as governments improve their processes. It is also important to note that the historical context, number of Aboriginal groups and the status of land claims settlements are all different across Canada. For example, there are 209 First Nations in British Columbia of various cultural backgrounds. There are 13 First Nations in Nova Scotia – all of them Mi'kmaq. Nova Scotia was settled long before BC, and therefore, the period of contact has been much longer. BC has two historic treaties and one modern treaty, but is in the process of developing modern treaties with a number of First Nations. Nova Scotia has one historic treaty that covers all Mi'kmaq peoples in the Maritimes, and is engaged in discussions to modernize and further interpret that treaty. Many of the treaties in Canada included the ceding of land and rights. The Peace and Friendship treaties in the Maritimes did not. Individual circumstances are a variable in determining the success of implementing a consultation management regimes across the country.

The author of this report represents Nova Scotia on a national Deputy Minister's Federal, Provincial, Territorial Consultation and Accommodation Working Group, and is familiar with developments in all parts of the country.

This report compares four core elements that form the foundation of a consultation management regime within government. The comparison is done across provincial, territorial and the federal governments. While each jurisdiction has unique characteristics, there are a number of common approaches that structure the public administration of the duty to consult.

The four core elements are:

- Overarching consultation policy, guidelines or framework;
- Consultation protocols or agreements with Aboriginal groups;
- Consultation capacity funding for Aboriginal groups; and
- A consultation unit with appropriate resources to coordinate and manage consultation across government.

## **Survey**

The OAA's Consultation Unit designed and implemented a voluntary survey of staff in key resource-related departments in the summer of 2007. The survey was designed and implemented by the author of this report in her capacity at the Office of Aboriginal Affairs.

The objectives of the survey were to gather baseline data and conduct an initial assessment to gauge:

1. level of awareness of the duty to consult;
2. level of awareness of Mi'kmaq history and culture;

3. level of experience working with the Mi'kmaq;
4. best practices;
5. challenges faced; and
6. type of assistance and support needed to properly engage in consultation.

It was anticipated that the survey results would assist in identifying core elements for a consultation management regime, and the needs of provincial staff related to consultation.

The survey was sent by blanket e-mail to all employees in the following provincial government departments: Economic Development (ED), Energy (DOE), Environment and Labour (DEL), Fisheries and Aquaculture (FA), Natural Resources (DNR) and Transportation and Public Works (TPW) using inclusive, "all-employee" lists. The blanket e-mails had the potential to reach more than 2,000 employees, although an exact number is difficult to determine because of the number of casual, part-time and term employees that continue to have active e-mail accounts, but are no longer employed. An approximate number is given because departments are unable to provide precise employment figures. If the figure of 2000 employees is used, the resulting survey response rate is .02%. This is an extremely low response rate and a weakness of the survey. The low response rate could be the result of timing – the survey was administered in July – a key summer month for Nova Scotia employee holidays. Alternatively, because this was a "self-selecting" survey, it could be assumed that only those with a current interest in the topic, or those who felt it related directly to their work replied.

The survey and a full analysis of survey results can be found in Appendix C.

### **Interviews – Evaluation of the ToR**

Interviews focused specifically on the implementation of the Consultation Terms of Reference (ToR) developed by the Province, the Mi'kmaq and Canada, which defines the process for consultation between the Crown and the Mi'kmaq. This important document outlines who the Crown should consult with and how, and is unique in Canada in that it provides one centralized consultation process for all First Nations in the province. It is this process that provincial government staff follow when they wish to consult with the Mi'kmaq in Nova Scotia.

The ToR contains a provision for review "prior to the second anniversary of the signing of these Terms of Reference" (ToR, p. 7). The evaluation was initiated after one year due to timing constraints and the cumbersome internal review processes of all Parties. In addition, when the ToR was initially developed, it was assumed it would be formally adopted. Due to concerns expressed by the federal government, it was agreed that the parties would pilot the process for one year. The pilot was then extended for an additional year, and then an additional five months.

The ToR itself sets out five objectives for the review:

- a. “Determine whether the Parties are opting to use this process with regularity;
- b. If they are not opting to use the process, assess why not;
- c. Consider if amendments to these Terms of Reference are desirable;
- d. Consider whether operational adjustments to the Consultation Table and process are desirable; and
- e. Consider whether it is worth continuing with the optional Consultation Table and process and these Terms of Reference” (ibid).

The interviews conducted for the ToR evaluation identified operational and process adjustments; however, the final discussion on recommendations at the MINS main negotiation table, items a, b, c and e outlined above were discussed.

Table 2 describes the process for the evaluation of the ToR.

Table 2

Evaluation of the Mi'kmaq-Nova Scotia-Canada Consultation Terms of Reference (ToR):

Phase I

1. Structured interviews with staff from key provincial departments
2. Semi-structured, group interviews with OAA, KMK and INAC staff
3. Preliminary findings to the MINS negotiation table

Phase II:

4. Group discussion and analysis with key provincial staff
5. Group discussion and analysis with Deputy Minister's Advisory Committee on Aboriginal Affairs
6. Recommendations finalized by tri-partite Consultation Table
7. Findings presented to MINS negotiation table

*Phase I:*

*Structured Interviews (April 2008)*

The author carried out structured interviews with six provincial government employees from the Office of Aboriginal Affairs, and the Departments of Energy, Environment, Natural Resources and Transportation and Infrastructure Renewal.

Interview participants were selected by the author for their direct exposure to the use of the ToR through active participation in consultation, or through development and approval of consultation policies and strategies. Because the consultation process is so new, there are not very many provincial government employees that are well-acquainted with the ToR. Interviews were conducted individually. Participants were asked to draw on their experience to identify the strengths and challenges of using the ToR document and process to fulfill the Crown's duty to consult. The author of this report, as the province's Senior Consultation Strategist, also relied heavily on her own experience providing policy, risk assessment and process advice and support in implementing the ToR over the preceding year (see Appendices B, C and D for contact information, sample interview guide and letter).

#### *Semi-structured, Group Interviews (May 2008)*

In May 2008, federal, provincial and Mi'kmaq representatives met to initiate the group evaluation process. Prior to coming to the table for these discussions, each party held their own internal process. The three parties met as a group and conducted the evaluation in a semi-structured interview environment using the same questions posed to provincial government employees in the structured interviews (see above). When data was analyzed, it was noted that the three parties identified the same challenges through their internal processes, albeit from slightly different perspectives. The three parties then agreed on eight key challenges to be addressed in the coming year.

#### *Phase II:*

#### *Group Discussions (October 2008)*

Group analysis and discussions were held in October 2008 with the same key provincial government employees that participated in the initial structured and group interviews, as well as Deputy Ministers of Aboriginal Affairs, Natural Resources, Energy, Environment, Municipal Services, Fisheries and Aquaculture, and Justice, and the representatives of the Made-in-Nova Scotia (MINS) Consultation Table. The author discussed the eight key findings at length with these groups, and a number of recommendations were developed. At this point, one challenge was removed from the list because it was considered to be repetitive.

#### *Final Recommendations (November 2008)*

Recommendations on how to address the seven challenges were finalized by the MINS Consultation Table and presented to the MINS negotiation table in November 2008. Recommendations requiring Nova Scotia Cabinet approval will be brought to Cabinet in fall 2009 for discussion and approval. The

recommendations will be discussed in greater detail in the Recommendations section of this report.

## **FINDINGS AND ANALYSIS**

The findings, analysis and recommendations for this report focus on four thematic areas:

- The need for a strong institutional framework that includes policies, legislation and regulations, guidelines and protocols to guide consultation.
- The lack of capacity contributes to confusion and delays, and increases legal risk and the need for crisis management.
- The importance of provincial and federal government coordination of consultation.
- The implementation of the duty to consult has raised a number of unresolved policy questions.

### **Consultation Needs a Strong Institutional Framework**

A solid institutional framework to support the duty to consult should consist of policies, legislation, regulations, guidelines and protocols to guide consultation. Comparative research shows Nova Scotia compares favourably with most jurisdictions in Canada in regards to advancement in putting a strong institutional framework in place.

#### *Policies/Guidelines/Protocols*

A review of core practices across Canada reveals that all but four provinces have a publicly-available draft, interim or final consultation policy. Provinces without a publicly-available policy are New Brunswick, PEI, Newfoundland and Manitoba, although New Brunswick and PEI are in the process of developing policies. Other exceptions include the Yukon, Northwest Territories and Nunavut. Yukon and the Northwest Territories are almost entirely covered by Land Claims and Self-Government Agreements. Consultation requirements are described in these agreements. Nunavut already includes Aboriginal groups in all decision-making processes as a matter of good governance.

The majority of governments have developed their consultation policies, guidelines and frameworks unilaterally, or internal to government. That is – none of them consulted meaningfully with Aboriginal groups in their development. While Nova Scotia developed its interim consultation policy without external consultation, the presence and use of an agreed protocol makes this less controversial. In places where governments have developed consultation protocols with Aboriginal groups in addition to, or instead of their policies, guidelines and frameworks, there seems to be less friction with the consultation process.

The only province that is actively developing an Aboriginal consultation policy together with Aboriginal peoples is Saskatchewan, although Ontario and Alberta

have also signaled a willingness to do so. Saskatchewan released an interim consultation policy in January 2008. However, it was developed without Aboriginal involvement, which resulted in most Aboriginal groups opposing the policy. In May 2008, Saskatchewan decided to revisit the policy and involve not only Aboriginal groups, but also industry and other levels of government in the development of a new Aboriginal consultation policy. A draft policy was released for further comment by all participants in December, 2008 (Government of Saskatchewan, 2008).

The Government of Canada did not respond publicly to the *Haida* and *Taku* (and subsequent) decisions until November 2007, when they announced that the government would be developing and carrying out an action plan to “address the legal duty of federal departments and agencies to properly consult with First Nation, Métis and Inuit groups when Crown conduct may adversely impact established or potential Aboriginal and Treaty rights” (Indian and Northern Affairs Canada, 2007). Prior to this announcement, some federal departments developed their own approaches to consultation. Since that time, Indian and Northern Affairs Canada has released interim guidelines for all federal government departments on consultation and accommodation; they have created a Consultation and Accommodation Unit in Ottawa; and released the Action Plan.

“The Action Plan consists of the following measures:

- create a repository for information on location and nature of potential or established Aboriginal and Treaty rights;
- establish mechanisms to coordinate and monitor government-wide consultation practices and accommodation precedents;
- develop policy positions to address many legal and policy gaps and engage with Aboriginal groups on elements of such a policy;
- meet with Provinces, Territories and Industry groups to discuss elements of the policy;
- release interim guidelines to officials, provide related training;
- set up a small Interdepartmental Team to implement the Action Plan” (ibid., 2007).

In addition to the pan-federal initiative, several federal government departments, including Transport Canada, Fisheries and Oceans Canada, the new Major Projects Management Office and Justice Canada have created their own consultation units, although this practice does not appear to be consistent in either the National Capital Region or regional federal offices across the country.

Only four provinces/territories -- Nova Scotia, Quebec, British Columbia and the Yukon -- have consultation protocols or agreements with First Nations outside of land claims agreements.

The following table captures a comparative analysis of the common elements of provincial, territorial and federal government consultation management regimes:

Table 3

Government	Consultation Policy/Guidelines	Protocols / Agreements	Capacity Funds	Consultation Unit
Nova Scotia	√	√	√	√
NB	X <sup>1</sup>	X	X	√
PEI	X <sup>2</sup>	X	X	X
Nfld	X	√ <sup>3</sup>	X	X
Quebec	√	√ <sup>4</sup>	√	√
Ontario	√ <sup>5</sup>	X	X	√
Manitoba	X <sup>6</sup>	X	X	X <sup>7</sup>
Alberta	√	X	√	√
Sask	√	X	√	√
BC	√ <sup>8</sup>	√ <sup>9</sup>	√	√
Yukon	X	√ <sup>10</sup>	X	X
NWT	X	√ <sup>11</sup>	√	X
Nunavut <sup>12</sup>	n/a	n/a	n/a	n/a
Federal	√ <sup>13</sup>	X	X	√

Nova Scotia's ToR consultation process has been somewhat successful in its first two years as a pilot. A full evaluation of the ToR was conducted in 2008 (see Methodology section, p. 31-33). There are a number of strengths or positive aspects identified by the evaluation. They include the recognition of a well-defined and accepted process; the importance of timeliness, centralized management and coordination; the success achieved to date in capacity-building; and, the focus on a meaningful process that works toward the goal of reconciliation.

1 Internal draft

2 Internal draft

3 Consultation protocols contained in Land Claims Agreements

4 Protocol with 5/45 First Nations

5 No Ontario-wide policy – sector-specific guidelines

6 Draft in process

7 Proposal in development

8 No updated BC-wide policy – sector-specific guidelines. Nisga'a Final Agreement also contains specific protocols for consultation.

9 Protocols/agreements have been worked out with some individual bands and tribal councils.

10 11/14 First Nations have Final Land Claims and Self-Government Agreements that have specific consultation requirements. 9/14 have protocols that define how consultation will take place under their Agreements.

11 The Sahtu, Gwich'in, Inuvialuit and Tlicho Final Agreements identify specific consultation requirements/processes. Interim measures agreements have specific consultation requirements. Co-management boards incorporate Aboriginal groups in decision-making. Some sectors have their own consultation guidelines.

12 The government of Nunavut is based on a public system of government that ensures the active participation and consultation of the Inuit in all systems of government and matters concerning Nunavut.

13 Interim federal plus department-specific

Table 4 below shows statistics compiled by OAA as part of an initial internal assessment of the ToR. These statistics are based on consultation activities during the first year of the pilot phase of the ToR between July 2007 and July 2008:

Table 4

Number of provincial issues engaged in ToR consultations	31
% of consultations that involve multiple departments	70%
% of consultations that involve multiple jurisdictions	52%
Number of ToR consultations initiated by the Mi'kmaq	13/31
Number of ToR consultations initiated by the Province	18/31
Number of "remedial" ToR consultations	4/24
Avg # of days: letter offering to consult until initial meeting date	Approx. 123 days (4 months)
# of issues resolved	6
Avg # of participants per consultation meeting	14: Fed (4), Prov (6), MK (6)
# of Provincial staff trained	166 Fed (11), Mun (2), Other (4)
# of briefings/presentations on Nova Scotia's approach to consultation	Internal (15) Fed (4) Other (10)

The ToR consultation protocol provides a recognized, well-defined process for consulting with First Nations, and respectfully recognizes the Mi'kmaq as a government. It includes all 13 First Nations belonging to the Assembly of Nova Scotia Mi'kmaq Chiefs, and a centralized coordination process within the

Mi'kmaq and Nova Scotia governments, which makes consultation less onerous for all parties, and eliminates the need for a number of repeated consultations. The ToR does leave the door open for any First Nation to opt out of the process, however, this has not been an issue to date. The ToR makes the Nova Scotia process unique in Canada. Having agreement with all First Nations in the province on how Consultation takes place can be viewed as a distinct advantage. However, it also points to the need for careful consideration of the developing relationship between the Province and First Nations – if the Province cannot make this process work with the Assembly of Chiefs, there is no alternative process or group to work with. And, if the Province continues to make decisions on major projects without adequate consultation, they will likely find themselves in court.

The ToR was developed by negotiators at the MINS negotiation table prior to the development of a provincial consultation strategy or management regime. The ToR document provides a framework and mechanism for a jointly-agreed process, but the actual consultation process was developed during the pilot implementation period between July 2007-08. Since this was a new process for all parties – the learning process unfolded through direct experience. A “plain language” description of the ToR was developed by OAA as the consultation process was operationalized in 2007/08 to create broader understanding of the process.

All parties agreed that initiating consultation under the ToR as early as possible in the decision-making process yields better outcomes. First Nations have more time to consider complex information, and government, not always capable of fast response times, has more time to consider Mi'kmaq interests and concerns, and where appropriate, accommodate them.

The importance and success of centralized consultation management was stressed in the ToR evaluation. The OAA and the KMK provide a “one-stop shop” approach to consultation management, including coordination, risk assessment and process advice. The federal government does not currently have a centralized coordination unit in Nova Scotia, although all parties agree that this would be helpful.

In addition to the strengths identified by the ToR evaluation process, the Province of Nova Scotia will benefit from the implementation and support of the ToR by demonstrating proactive national leadership in its approach to Aboriginal issues. By demonstrating they are serious about meeting the duty to consult, the Province will be able to progress in its relationship and the process of reconciliation with the Mi'kmaq.

The uncertainty caused by governments that have either been unclear about expectations around consultation, or have failed to consult adequately, could have an impact on investment and economic development opportunities. A well-

defined, somewhat predictable and stable consultation process provides third party investors with a more secure environment for investment.

Finally, another residual effect of the ToR process could be better social and economic outcomes for all Nova Scotians. Of the 13 First Nations in Nova Scotia, nine of them are the poorest communities in the entire province. By ensuring First Nations are included in a meaningful way in government decision-making, the communities themselves will benefit economically, and this could have broader spin-off effects on the entire provincial economy.

The evaluation of the use of the consultation protocol uncovered a number of challenges. These include timing, capacity, differing views of the duty to consult, the need for a cultural shift, the unclear role of the proponent, statutory timelines, and the competition between the negotiation and consultation processes. These will be discussed in detail under the Capacity, Coordination, and Policy Question sections.

### **A Lack of Capacity is the Most Pervasive Problem**

In the author's opinion, the most pressing issue to resolve is the consultation capacity issue – both for the Mi'kmaq and the government. The Mi'kmaq, provincial and federal governments all have capacity problems. Capacity includes adequate staff and funding resources, increased knowledge, analytical ability, awareness, and integrated decision-making.

The importance of improving/increasing consultation capacity is reflected in efforts by provincial and territorial governments across the country. Six of the provinces/territories have established consultation capacity funds for Aboriginal involvement in consultation. Eight of the governments have consultation units housed in either their Aboriginal Affairs ministries/agencies, or in individual ministries/agencies, or both. However, the only three provinces/territories with all four core elements of a consultation management regime (policies, protocols, capacity funds, consultation units) in place are Nova Scotia, Quebec, and British Columbia, although the design and administration of those processes differ between jurisdictions.

#### *Mi'kmaq capacity*

There are 13 Mi'kmaq First Nation communities in Nova Scotia – the largest, Eskasoni, has 3,807 registered members (3,238 on-reserve and 569 off-reserve), and the smallest, Annapolis Valley, has 233 registered members (96 on-reserve, 137 off-reserve) (Indian and Northern Affairs Canada, 2006). There are 13 elected Chiefs that make up the Assembly of Nova Scotia Mi'kmaq Chiefs, the decision-making body on collective issues related to rights. These 13 Chiefs face many difficult challenges in their communities – high rates of unemployment, health issues, family violence, suicide, housing and education. Chiefs have a

two-year mandate once elected, which means there is a high potential for turnover, although in Nova Scotia, many Chiefs are re-elected for a number of consecutive terms. These same 13 Chiefs are now being asked, in addition to their community mandates, to consider an increasing number of broad collective issues in consultation and negotiation.

To support the Assembly of Nova Scotia Mi'kmaq Chiefs, the Kwil'muk Maw-klusuaqn Negotiation Office (KMKNO), or Mi'kmaq Rights Initiative, was created in 2004. The KMKNO has a consultation management staff of five. In order to participate effectively and meaningfully in consultation, however, the Mi'kmaq must have access to technical expertise in many areas, such as oil and gas, alternative energy technologies, engineering, geology, plant, animal and marine biology, hydrology, etc. Due to the small population of the Mi'kmaq, the scarcity of expertise in these areas, and the concentration by the KMKNO on administration of consultation, it has been a challenge for the Mi'kmaq to review large technical reports in order to identify possible impacts on their rights. This has resulted in delays in consultation, and unclear responses or vague assertions of rights and impacts. As a consequence, it has resulted in frustration on the part of both the Mi'kmaq and the Province.

#### *Provincial Government Capacity*

Although the provincial government does not lack capacity to consider complex technical issues, and has access to any number of experts in most fields of expertise; there are capacity issues within the government in three areas:

1. Lack of knowledge of the duty to consult and the ToR process;
2. The need for a cultural shift; and,
3. Lack of resources to deal with the increasing demands of consultation (both human and financial).

#### *Lack of Knowledge Regarding Consultation*

Respondents to the 2007 provincial staff survey were not familiar with Aboriginal consultation case law, and only somewhat familiar with when they should be consulting, who to consult with, and how the process works. Charts 1 and 2 below show a lack of familiarity with the case law on Aboriginal consultation and when the Crown needs to consult.

Chart 1

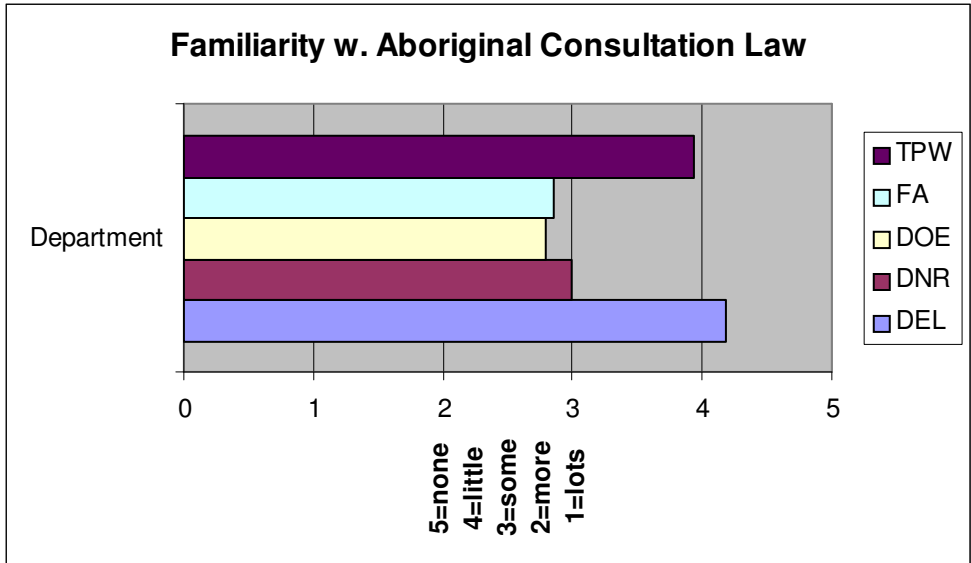
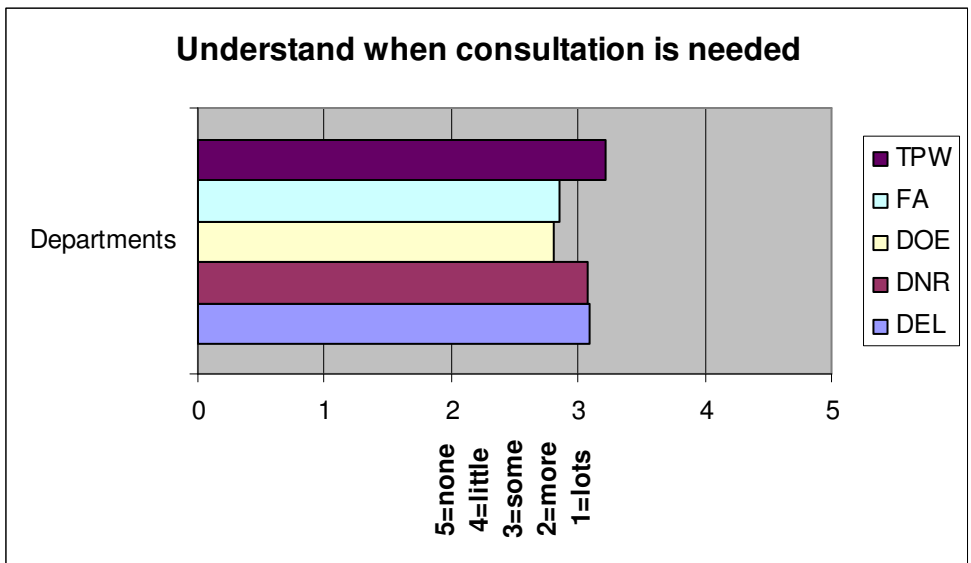


Chart 2



There are approximately 16 Nova Scotia government departments and agencies that make hundreds of resource-related decisions every day that could impact the Aboriginal rights and treaty rights of the Mi'kmaq to some degree. The question has been raised as to whether it is realistic or desirable to expect the government to consult on all decisions that have the potential to impact rights. Raising awareness with so many provincial employees is a lengthy process, and departments will have to carefully examine their own lines of business to determine the best way to handle consultation.

It is a requirement of the Province's Interim Consultation Policy that individual departments develop consultation guidelines according to their lines of business

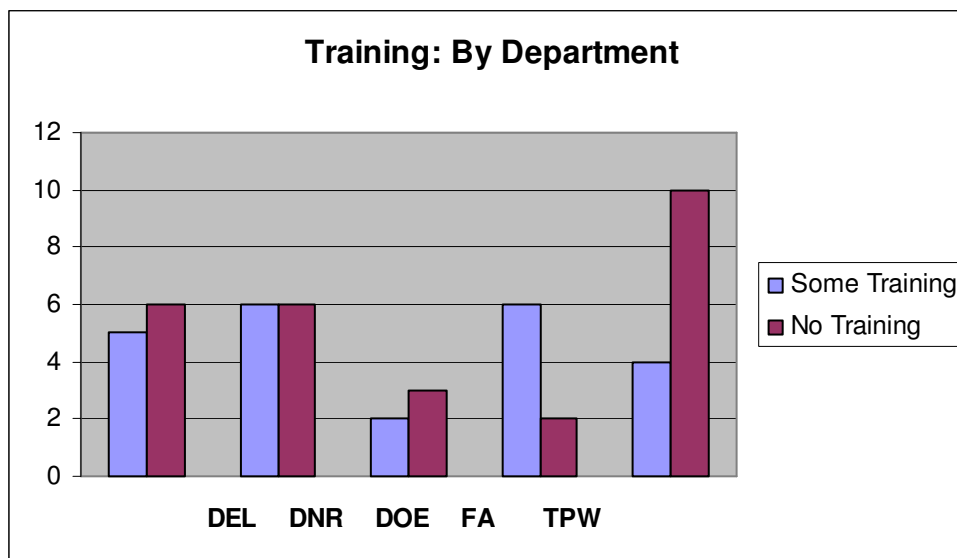
that fit within the framework of the ToR. To date, only two departments (Energy and Transportation and Infrastructure Renewal) have accomplished the task, although the Mining and Crown Land Management divisions of the Department of Natural Resources and the Environmental Assessment Branch of the Department of Environment have initiated discussions with the Mi'kmaq to streamline consultation.

*The Need for a Cultural Shift*

As with any large organization, making a paradigm shift is a lengthy and sometimes frustrating process. There are established beliefs, norms, processes and practices that have been applied for years, if not centuries, and it can be difficult for employees to make a shift to a new way of doing business. Some may view the introduction of the duty to consult or the inclusion of Aboriginal people in decision-making processes as an intrusion on the “normal” way of doing business, and an unnecessary addition. Employees must be given the appropriate tools and skills for undertaking consultation. One of those tools is exposure to Mi'kmaq history and culture.

The 2007 provincial staff survey results show that although respondents felt they were somewhat familiar with Mi'kmaq history and culture, only 16% regularly interacted with Mi'kmaq, while nearly 60% had met with Mi'kmaq representatives for work-related reasons. Only 35% had taken Aboriginal Perceptions or cultural awareness training. The majority of respondents had not taken any Aboriginal cultural awareness training. Of those who responded that they had taken cultural awareness training, almost half had taken the Aboriginal Perceptions training offered by the provincial government. Chart 3 below shows training by department.

Chart 3



The results of the survey were used to design a two-day Aboriginal Consultation training course for provincial employees, as well as presentations to build awareness and capacity with various audiences. The survey results demonstrated a lack of knowledge about Mi'kmaq history and culture, and this contributed to an important design element in the training program that was not originally contemplated – the inclusion of an historical component on the Mi'kmaq-colonial government relationship, and linkages to other training options both inside and outside of government. The training program includes historical and cultural awareness and a full examination of case law. As of July 2009, 235 provincial employees have taken this training.

There may be another problem endemic to the province and that is the problem of systemic or institutional racism. This may impact the speed with which change can be implemented. Nova Scotia has a strong colonial, predominantly European settlement history. The predominant views and opinions of Aboriginal people in current mainstream Nova Scotian society are based on stereotypes, misinformation, ignorance and the assumption that one cultural norm is preferable to another. One need only listen to talk-radio programs on Aboriginal issues, or read the comments section in the local paper when Aboriginal issues are discussed to see the predominant view of Aboriginal people is a racist view. External opinion polls conducted by OAA corroborate this anecdotal observation. It is logical to assume that this would pervade provincial institutions. This is a systemic issue that will take years to change, and will require considerable political will to make substantial progress.

### *Timing*

The lack of capacity within the Mi'kmaq and provincial and federal governments has translated to a number of difficulties regarding timing. Table 4 (p. 37) above shows that the average amount of time between requesting consultation and an actual meeting to discuss concerns and interests is approximately four months (120 days). This poses problems for government, as decision-making is often dictated by much shorter statutory timelines in legislation and regulations. Decisions may also face time pressures because of budget cycles, market fluctuations, seasonality of work, political decisions (for example, when the legislature is sitting), the timelines of other jurisdictions, and the desire to be viewed as having a business-like approach to regulation. There have been four cases where consultation occurred after a decision was made as a result of time lags. There are other cases where statutory decisions were made prior to concluding a consultation process. This has been frustrating for the Mi'kmaq community, and portrays the government as not being serious about its obligations.

There are also timing challenges between consultation meetings. For example, in the case of some large development projects, there have been time lags of up

to one year between consultation meetings. The process loses momentum, opportunities are missed, and issues do not get addressed in a timely or meaningful way.

By properly addressing capacity issues, the Province may resolve some of the related issues such as timing, the cultural shift and triggers for the ToR.

#### *Lack of Funding and Staff:*

As the demand for consultation increases, more and more employees will become involved in an activity that is outside the traditional scope of their work – both from a mandate and a skills perspective. Consultation is not a cost-neutral activity – it requires both human and financial resource support.

At the current time, the OAA handles the coordination, risk assessment and facilitation of all consultation with the Mi'kmaq. The Province currently has two staff (senior strategist and policy analyst, with 30% administrative support), and no departments have created new positions to coordinate consultation. This is an unsustainable activity with the current level of resourcing at OAA. This observation is supported by Isaac, who notes “Governments have an obligation to ensure that their mechanisms for consultation and engagement are appropriately resourced and that they are given a clear message to engage at a substantive level appropriate to the situation at hand” (2001, p. 95).

As previously mentioned, the KMK has five consultation staff (a coordinator, two researchers, a communications person, and an administrator). However, the Mi'kmaq lack adequate technical expertise to consider some of the complex scientific and technical information that is provided as part of a decision-making process or consultation.

The Province provides between \$100,000 and \$150,000 annually to the KMK to build consultation capacity within the Mi'kmaq community. The federal government adds another \$350,000 to this fund. It is estimated that an additional \$350,000 is spent in Nova Scotia on activities related to Aboriginal consultation. Aside from staff salaries, OAA does not have a discretionary consultation fund for additional related expenditures, although it does generate revenue through its training efforts of approximately \$9,000. This revenue goes to General Revenue.

#### **Coordination**

There are numerous federal and provincial government departments that have the duty to consult. If not coordinated properly, the requests for consultation will become unmanageable and overwhelming, particularly given the small number of Mi'kmaq consultation representatives. Table 4 (p. 37) shows that 70% of provincial consultations in Nova Scotia involve decisions by more than one department; and 52% of consultations with the Mi'kmaq of Nova Scotia involve

both the federal and provincial levels of government, and within those two levels of government, several departments.

In 2007, the Province and the federal government initiated consultation with the Mi'kmaq on a major gateway infrastructure project. There were four provincial and three federal departments involved in decision-making at some point on the project. All consultation was coordinated through the Province's OAA, including meetings with the Mi'kmaq, correspondence, evaluation of the impacts of the project on asserted rights, and accommodation.

Nova Scotia's "one-stop-shop" or centralized approach to consultation has worked well to date. This is also in keeping with a more holistic or integrated approach to management and problem-solving. The OAA coordinates all consultation with the Mi'kmaq for the Province of Nova Scotia, and the KMK coordinates consultation on behalf of the Assembly of Chiefs. The federal government does not have a centralized consultation management regime in Atlantic Canada, although Fisheries and Oceans Canada, Transport Canada and Parks Canada all have designated Aboriginal consultation liaisons in the region.

### **Emerging Policy Questions**

A number of policy questions have emerged as a result of the Haida, Taku and Mikisew Cree, and subsequent court decisions. Those questions most applicable to Nova Scotia are outlined below.

#### *What is the Role of the Proponent in Consultation?*

The Haida case was very clear that third parties or proponents (generally industry) do not have a legal duty to consult with Aboriginal peoples, but they may be delegated procedural aspects of consultation by the Crown. However, the courts have not specifically outlined or defined procedural aspects.

As outlined by Isaac, it is clear that proponents or third parties have a significant role to play in the consultation process, although they are not legally bound by the *Constitution Act 1982*, Section 35 to consult with First Nations: "Interested parties, such as proponents of resource development, would be well advised to be involved in the consultation process to ensure that the Crown properly discharges its duty, to ensure that their interests are properly addressed, and perhaps to prevent any undue delays in reaching a resolution to the issue in question" (2005, p. 684).

It is important to note that "procedural requirements imposed on third parties are only supplementary to the Crown's consultation obligation" (ibid). In other words, the Crown cannot rely on procedural requirements involving proponents, through regulation or other means, to cover the Crown's duty to consult.

In Alberta, British Columbia, Saskatchewan, the Northwest Territories, Ontario, Quebec, New Brunswick and Newfoundland, proponents play a significant role in consultation, including entering into Impacts and Benefits Agreements (IBAs) at an early stage of the project if it is determined that the asserted Aboriginal claim is credible, and the impacts of a proposed action on the claim are significant. IBAs are viewed as the cost of doing business. They involve any combination of benefits, including jobs, training, education, monetary payments, contributions to social and cultural programs, and profit sharing. In Labrador, the Innu have a clause for IBAs written into their land claims agreement. Any company wanting to develop within the land claims area must enter into an IBA with the Innu. In Alberta, the Crown has delegated many procedural aspects of Consultation (as per Haida) to industry proponents. This process is closely monitored in order to determine triggers for the Crown duty to consult. The Business Council of BC and the Prospectors and Developers Association of Canada have been proactive in trying to understand the problem and seek solutions. It is important to note that the governments of these provinces and territories have been clear with proponents about their expectations for engaging Aboriginal groups, including providing them with written guidelines, and requesting written reports describing their engagement activities.

In Nova Scotia, there is no consistent practice by proponents regarding consultation with the Mi'kmaq, and there are no legislated requirements for consultation, other than through the environmental assessment regulations. Until recently, the Province did not provide clear guidance to proponents, either through legislation, regulations or policy guidelines, regarding what expectations it has of proponents vis-à-vis consultation. Larger companies wanting to do business in Nova Scotia, particularly those companies from other parts of Canada, should be familiar with the legal environment and practices in other provinces. In practice, some larger companies have been proactive in working with the Mi'kmaq, others have not. The Mi'kmaq have also been inconsistent in their response to proponents. As a result, proponents do not know what to expect or how to approach the Mi'kmaq.

*How do you fit ToR consultation into regulated or legislated timelines?*

Provinces are often under pressure in Consultation from statutory decision-making timelines. The best example of this in Nova Scotia is the environmental assessment (EA) process, which currently has a total public comment period of 30 days before the Minister is required by law to make a decision. The total decision-making period is 50 days. Nova Scotia has the second shortest public comment period in the country, and this has become a flash point between the Mi'kmaq and the government of Nova Scotia, particularly when the EA approval is the only provincial government approval required to move a project forward. When the public comment period begins, notification is sent to all 13 First Nations in the province. There are several problems with this approach:

- The letter sent to the 13 First Nations is not a notification or request for consultation as described in the ToR; rather, it is the same letter that goes to the public and stakeholders;
- The ToR process does not fit within the mandated 50 day timeline. The minimum amount of time it takes from requesting consultation to a first meeting using the ToR is 60 days;
- The Mi'kmaq are being asked in many cases to consider complex, highly-technical and lengthy documentation, and respond quickly;
- The current timeline, and perhaps even the regulations, may not be considered to meet the standard of meaningful consultation, and therefore, may not uphold the honour of the Crown.

The Taku decision dealt directly with environmental assessment processes, and whether or not they are adequate to meet the duty to consult. In Taku, the court found that the existing environmental assessment process met the duty to consult. However, it must be stressed that the process in question in British Columbia was designed to include substantial Aboriginal input (see analysis of the Taku decision in Background section), rather than rely solely on the public consultation process.

*How to bridge the gap between the differing views of the duty to consult between the Crown and Aboriginal Peoples?*

The Province and the Mi'kmaq have differing views of the triggers for, and the content and expected outcomes of the duty to consult. This was identified as a challenge during the ToR evaluation process by all three parties; however, discussion around this theme was often difficult.

The differing views of the duty to consult between the Mi'kmaq and the provincial government are connected to the Mi'kmaq's unresolved title claim and outstanding rights issues. As outlined previously, a title claim to all of the Province of Nova Scotia was submitted to the federal and provincial governments in 1977, but was rejected by both governments. It should be noted that this was 20 years before the historic *Delgamuukw* decision that set out the universal test for determining title before the courts in Canada. While another court case (*Marshall/Bernard*, 2002) concluded that the comprehensive claim to all of Nova Scotia was not valid, the title issue remains unresolved in Nova Scotia. The current negotiation process is focused on resolving a number of issues, including title.

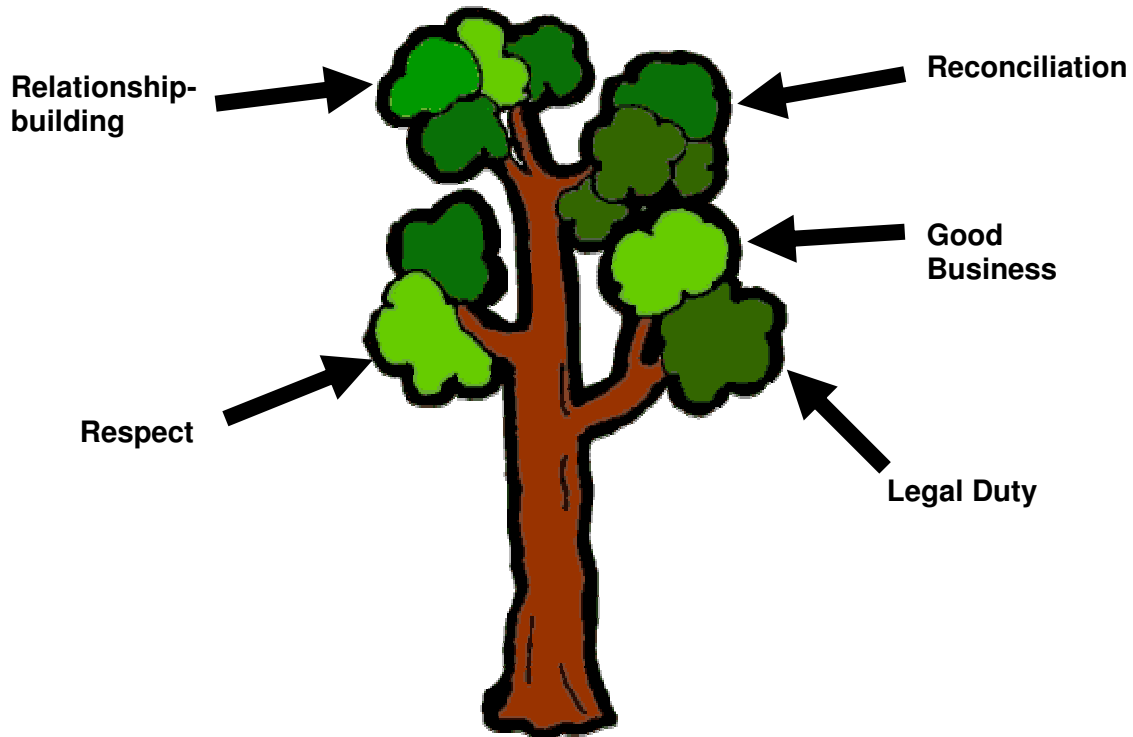
Despite the outcome of more recent court rulings such as *Marshall/Bernard*, the title claim to all of Nova Scotia is asserted by the Mi'kmaq in all consultations. It would be logical to assume that if the Mi'kmaq assert a claim to all of Nova Scotia, any action whatsoever that may impact on their asserted claim would be subject to the duty to consult. This would then apply to nearly all provincial government decisions related to natural resources.

Although more narrow in scope than the Mi'kmaq view of the duty to consult, the Province of Nova Scotia does take a broad policy approach to consultation (see Diagram 1 below). The policy approach includes many reasons for consulting, including the legal duty, good business, reconciliation, respect and relationship-building. This approach is all the more important in Nova Scotia where the government is working with only one First Nations group and there are no other options. The rationale behind the policy approach is that a strict legal view of the duty to consult may not encompass broader issues. There may be other good reasons, besides a legal duty to consult, for consultation to take place. This is particularly relevant in Nova Scotia where the Department of Justice has taken a narrow view of the province's duty to consult and a corresponding narrow view of Aboriginal rights, title and treaty rights. Regardless of that view, the courts have been clear that the threshold to trigger the duty to consult is low, and only requires a credible assertion of a right to be triggered.

The Province takes a risk assessment approach to deciding whether or not the duty to consult is triggered. The OAA has developed a risk assessment tool for employees to assist with their decision whether or not to consult. In addition to the policy risk assessment, employees are recommended to seek a legal opinion from their solicitor, and they are also recommended the two-day Aboriginal consultation training course. The use of a risk assessment approach means that the Province and the Mi'kmaq will not always agree on whether or not a legal duty to consult is triggered.

Diagram 1

## BROAD POLICY APPROACH TO CONSULTATION



### *How do Consultation and the Long-Term MINS Negotiation Process Interact?*

The MINS negotiation process is currently engaged in substantive discussions on issues related to Aboriginal rights, including title, and treaty rights, and what those mean in a modern context. A number of working groups have been established to explore and advance issues related to fisheries, forestry, lands and natural resource management. Negotiations on such important and complex topics are slow, as they are in other areas of the country.

At the same time, consultation is becoming a more expeditious way of dealing with impacts on Aboriginal rights and treaty rights in the same areas of resource management under discussion in the MINS negotiation process. This poses problems for both the consultation and negotiation processes. Accommodations reached in consultation must be coordinated with long-term agreements in the negotiation process. At the same time, it must be clear to provincial employees involved in consultation that the consultation process is not meant to prove or authenticate Aboriginal and treaty rights in Nova Scotia – that is a task for the negotiation process.

The negotiation process must also be cautious about becoming bogged down in discussions about operational issues, which are the purview of consultation.

Isaac goes out on a limb to hypothesize that good consultation procedures and processes may replace much of the treaty process: “The ability of the Crown to engage in “hard bargaining” may lead to an understanding that consultation and any resulting agreements may prove more efficient than the treaty negotiation process. If the crown implements comprehensive consultation and accommodation processes and procedures, the need for specific treaty agreements could diminish accordingly or treaties may become less about extinguishment and more about acceptance of binding procedures and understandings related to consultation” (Isaac et al, 2005, p. 686).

### *Triggers for the ToR*

The Mi’kmaq may not be interested in, nor do they have the capacity to consult on every decision made by government. In this new and emerging practice of consultation, there are questions about what kinds of decisions trigger the ToR, and what are the issues that generate the highest Mi’kmaq interest. Resources dedicated to consultation are very precious, and therefore, consideration should be given to not squandering time, energy and financial resources on issues that are of little concern to the Mi’kmaq, or those that could be addressed in a different manner. For example, the Mi’kmaq are not interested in being consulted on the issuance of every hunting licence, but they are interested in the overall policies and regulations regarding hunting.

It may be difficult for the Mi’kmaq to identify or categorize issues of most concern to them. On the one hand, this conflicts with the direction of the courts in the Haida decision that said that the decision about the duty to consult must be considered on a case by case basis. On the other hand, qualifying what issues the Mi’kmaq may or may not be interested in might create a situation where they are implying that rights do not exist in certain cases, which could compromise their overall negotiation position.

And finally, there may be other processes more suitable to involving the Mi’kmaq in decision-making that are more collaborative, and less adversarial, than the ToR process.

### *Consultation with Aboriginal People in Nova Scotia without Indian Act status*

The term Aboriginal refers to First Nations, Inuit and Metis peoples. First Nations are those Aboriginal people with status under the federal *Indian Act*. As outlined above, there are 13 First Nations in Nova Scotia – comprised of 15,240 status Indians. 6,470 First Nations live on-reserve, and 8,770 live off-reserve (OAA, 2008). There are no Inuit communities in Nova Scotia. There is a Metis Association in Nova Scotia, but the Province does not officially recognize Metis people.

In addition, there are 8,935 persons in Nova Scotia that identify as Aboriginal, but do not have *Indian Act* status. The Native Council of Nova Scotia (associated with the national Congress of Aboriginal Peoples) represents non-status Aboriginal people in Nova Scotia. The Province's Interim Consultation Policy advises employees to meet with the Native Council to discuss their concerns about natural resource decisions. While the Native Council is not a party to the ToR, the policy advises employees to send a separate letter requesting comments on proposed decisions to the Native Council. The question and challenge is – is there a legal duty to consult and accommodate Aboriginal people with no *Indian Act* status in Nova Scotia?

### *Consultation on Activities on Private v Crown Land*

Questions often arise during a consultation risk assessment to determine if a duty to consult is triggered when private vs. crown land is involved. There is very little provincial Crown land available in Nova Scotia. At the current time, Crown land makes up only 25% of the land base. The rest is privately owned.

Courts have ruled on the exercising of Aboriginal and treaty rights on private land. In the *R v. Badger* (1996) case, the court said if private land is visibly occupied, or put to a use that is incompatible with the exercise of rights (for example, mining), Aboriginal people have no access to exercise their rights. However, if these conditions do not exist, then treaty and Aboriginal rights can likely be exercised on private land (Lexpert, 2008). Isaac states that the Crown “likely has no duty to consult respecting Aboriginal title on private land because title has already been infringed” (Lexpert, 2008). However, the duty to consult could be triggered regarding private lands where Aboriginal and/or Treaty rights are asserted, particularly if there could be downstream or adjacent impacts (ibid). This may prove problematic to Nova Scotia, as there are likely significant pieces of private land in the province, for example, land that has been sold or leased to forestry companies, where the land is neither visibly occupied, nor already put to a use that is incompatible with the exercise of rights. It is already clear that the Mi'kmaq of Nova Scotia regard the entire province as their traditional territory, and therefore, would consider rights exercisable on private or Crown land.

All decisions on consultation must be made on a case by case basis. However, when Crown land is involved in the decision the risk or need for consultation increases. When private land is involved, the risk or need for consultation decreases.

The next section builds on the findings and analysis and provides recommendations under each of the four key themes.

## RECOMMENDATIONS

“The best way for the Crown to obviate judicial scrutiny of its consultation process is to implement certain procedural safeguards consistent with the rules of natural justice and procedural fairness in administrative law and that will ultimately attract judicial deference. A defined and transparent system of approaching consultation will add further certainty to the entire process, which will likely result in more efficient use of Crown, and ultimately Aboriginal and business, resources in this area” (Isaac et al, 2005, 680).

There are four thematic areas that make up a long-term strategy where the Province should focus its efforts in the next three-to-five years (2010-15):

- Strengthen the institutional framework: policies, guidelines, legislation and regulations;
- Invest in, and improve capacity;
- Improve coordination between all levels of government; and
- Begin a dialogue to resolve some of the emerging policy questions.

Each of these broad areas contains a number of sub-themes with recommendations.

### **Strengthening the Institutional Framework: Policies, Guidelines, Legislation and Regulations**

#### *Interim Consultation Policy*

The Province’s Interim Consultation Policy was developed over a period of two years and was introduced in June 2007. The word “interim” implies that the policy is temporary or transitional, until more permanent measures are adopted.

Recommendations:

1. Review and revise the Interim Consultation Policy with the objective of ensuring it complies with current practices and reflects the Province’s other consultation initiatives, such as the ToR.
2. Since Mi’kmaq are the dominant Aboriginal group in the four Atlantic provinces, explore the possibility of an Atlantic-wide policy in collaboration with New Brunswick and PEI, and possibly Newfoundland.

#### *Mi’kmaq-Nova Scotia-Canada Consultation Terms of Reference*

The evaluation of the terms of reference in 2008 resulted in a number of recommendations. These recommendations and others are captured in this section, and form part of the long-term consultation strategy.

Recommendation:

1. The MINS main negotiation table is currently discussing and finalizing a revised ToR document to be adopted by all three governments in the fall 2009. This document is intended to be signed by Nova Scotia's Premier (also the Minister of Aboriginal Affairs), so a thorough review should be undertaken.

*Departmental Guidelines*

The Province's Interim Consultation Policy commits departments involved in natural resource decision-making to develop their own procedures and guidelines for consultation in accordance with the overall policy and the ToR, but focused on their own lines of business and decision-making.

To date, only the Departments of Energy, and Transportation and Infrastructure Renewal have produced a set of department specific guidelines, although work is progressing in this area in the Departments of Environment and Natural Resources.

Recommendations:

1. The following departments should finalize their own consultation guidelines and procedures in 2010: Natural Resources, Environment and Tourism, Culture and Heritage.
2. Sectors most involved in consultation should meet with the KMK to discuss streamlining consultation on multiple decisions.

*Legislative Review*

The issue of whether or not legislation meets the test of the honour of the Crown is being discussed in and across all jurisdictions. Does legislation as it is currently worded obstruct the Crown from dealing honourably with Aboriginal peoples?

Recommendations:

1. Obtain a legal opinion as to whether or not adding the duty to consult to natural resource legislation adds any value, if it is already law.
2. Conduct a legislative review to ensure there are no impediments to carry out the duty to consult (identify shortcomings and opportunities).

**Investing in, and Improving Capacity**

The need to improve capacity, including the need for funding, was identified under the ToR evaluation as a challenge, and is probably one of the biggest challenges across the country.

### *Province of Nova Scotia Capacity*

Currently, the Province of Nova Scotia provides the following funding to support consultation through the Office of Aboriginal Affairs:

#### *OAA Administration*

- A full-time Senior Strategist for the entire province
- .75 contracted Policy Analyst to support the Senior Strategist
- Discretionary spending of up to 50K (used for external and internal capacity-building, travel, small consultation grants)

#### *Administration – Other Departments*

There are four departments that are responsible for the majority of decisions that trigger consultation – the Departments of Energy, Environment, Natural Resources and Transportation and Infrastructure Renewal. OAA is responsible for leading, supporting and coordinating all consultation within the province.

- There are no designated provincial employees responsible for consultation with the Mi'kmaq of Nova Scotia in any other departments.

#### *Mi'kmaq Consultation Capacity Fund*

Mi'kmaq capacity, from a provincial government perspective, is linked to providing adequate funding to support the development of Mi'kmaq governance mechanisms for consultation. It is up to the Mi'kmaq to decide how their internal systems will function in order to participate in consultation. However, it is up to the Crown to ensure that the playing field is level in order to conduct meaningful consultation. This will require substantial resources, outlined below in the Funding section.

- Currently, the OAA provides 100-150K for Mi'kmaq participation and capacity in consultation.

Recommendations:

#### 1. OAA Administration

- A permanent, full-time Senior Strategist
- A permanent, full-time Policy Analyst to support the Senior Strategist

- Appropriate administrative support
- Annual operating budget to cover costs other than salaries, such as training, development, travel, consultation administration.

## 2. Other Departments: Administration

- Create 3 new full-time equivalent (FTE) positions to coordinate Aboriginal consultation for the Departments of Environment, Energy and Natural Resources. These positions would be coordinated through OAA's Consultation Unit.
- OAA's Consultation Policy Analyst would provide risk assessment and process advice to Transportation and Infrastructure Renewal, and departments that only occasionally require consultation advice, such as Tourism, Culture and Heritage, or Health Protection and Promotion.

## 3. Mi'kmaq Consultation Capacity Fund

(The KMK's projected consultation budget for 2008/09 is 500K, without a substantial budget to hire expertise either permanently or on contract).

- Identification of a stable, long-term funding source.
- Increase provincial contribution from 100K to 200K/year (maintain 100K from OAA, and request 25K each from Departments of Environment, Natural Resources, Energy and Transportation).
- Confirm joint long-term funding with the federal government (300-400K/yr)
- Create three-year funding mechanism.

### *Cultural Shift*

#### Recommendations:

1. The OAA has developed a two-day Aboriginal consultation training course for government employees that covers the historical relationship with Aboriginal peoples; the legal context; Nova Scotia's approach to consultation; and assessing and managing risk. As of July 2009, this training has been delivered to more than 200 employees. Delivery of this training is cost-neutral for OAA – training is delivered through cost-recovery. This report recommends:
  - a. Regular training sessions to be delivered every four months in the Halifax Regional Municipality and in a smaller centre.
  - b. Develop specialized training sessions targeting employees at all levels in individual departments that deal specifically with their lines of business.
  - c. Develop a "mini" training session for Deputy Ministers.

- d. Cost recovery revenues to stay within Consultation Division of OAA.
2. Increase awareness sessions with industry associations, stakeholder organizations, legal and academic community and professional consultants.
3. Identify consultation champions:
 

Corresponding opportunities to learn more about Mi'kmaq people, culture and history are provided through cultural awareness training, through Mi'kmaq History Month and Treaty Day. The OAA and other departments are involved in a number of initiatives to increase awareness. This report recommends:

  - a. Deputy Ministers champion the issue within their respective departments.
  - b. Publicize and provide more department-centred opportunities for Aboriginal Perceptions training and new on-line cultural training.
4. Through various consultations over the past year, it has become apparent that some issues that are of concern to the Mi'kmaq can be dealt with outside of consultation within the planning process. For example, issues over Crown land transfers and leases could be resolved or in the very least, identified, if Aboriginal interests were made part of the Integrated Resource Management (IRM) process that identifies all issues associated with a particular parcel of Crown land. This report recommends:
  - a. Departments examine their internal lines of business to determine whether or not they are considering Aboriginal interests in their planning processes. Integrate Aboriginal issues into planning and decision-making processes.
5. Designate consultation contacts in departments.

In addition to training and awareness to support consultation, there are a number of services and tools that are needed to support a strong consultation management regime.

#### Recommendations:

- OAA continues to provide policy direction and strategic advice to departments and to the province on consultation.
- OAA continues to provide risk assessment and facilitation services, as well as issue resolution advice (related to accommodation, monitoring).
- A number of tools have been identified that will assist government staff in consultation:
  - Templates: consultation letters and accommodation agreements
  - Risk analysis tool
  - Web-based mapping
  - Document tracking system

#### *Timing*

The length of time to hold initial meetings, between meetings, and correspondence to resolve issues takes on average four months.

Recommendations:

1. Plan and begin consultation early in the process
2. Provide clarity regarding requests for consultation, including project descriptions, all accompanying relevant project information, deadlines and decision dates.
3. Requests to the Assembly must be made at least 10 days prior to monthly meetings; and responses by the Assembly to requests by the Province will be received no later than 10 days after Assembly meetings.
4. First meeting will occur within 45 days of initiation of consultation by Crown.
5. Establish more thematic consultation tables to group similar issues (for example, mining, infrastructure, energy).
6. Mi'kmaq to consider a system of internal delegation for consultation meetings.

## **Coordination**

Some projects may have multiple departments and jurisdictions each with their own triggers – coordination is extremely important on complex projects such as these. A number of coordination mechanisms have been created since 2007 to ensure consultation is effective and efficient.

### *Bilateral*

- The OAA and KMK coordinators meet weekly, and in some instances, daily, to coordinate consultation activity and issue resolution.
- The OAA, KMK and Department of Environment EA Branch formed a working group in August 2008 to explore ways to improve inclusion of the Mi'kmaq in the EA process.
- The Province and the Assembly of Chiefs have formed a number of thematic consultation tables to address similar issues – for example, the Energy Consultation Table deals with all consultations related to energy, including oil and gas (offshore and onshore) and renewable energy. When required, there may be federal participation on specific issues at a consultation table.

### *Internal*

- OAA's Consultation Division is responsible for coordinating all provincial departments' consultation to ensure the Province is meeting its duty to consult, and to ensure a consistent, predictable and productive process.

- Key departments active in consultation each have a senior representative on an Inter-departmental Consultation Committee. This committee meets quarterly to consider cross-cutting policy issues – such as the ToR evaluation and the proponent’s guide.
- The Deputy Minister’s Advisory Committee on Negotiations and Consultation meets monthly to discuss issues related to both topics.

*Multi-jurisdictional*

- The ToR references the creation of a tripartite Consultation Table. This table has one member from Nova Scotia, the Mi’kmaq, and Canada. With implementation of the ToR, the Consultation Table has evolved into a steering committee that deals with broad policy issues, evaluation and issues that relate to the MINS process.
- Representatives of Transport Canada, Fisheries and Oceans Canada and OAA have formed a Federal-Provincial Consultation Coordination Committee that meets monthly on cross-cutting issues.
- Federal and provincial departments coordinate consultation on joint issues, including sending joint letters offering to consult; meeting as one group with the KMK to consult; joint correspondence, accommodation and monitoring.
- Federal and provincial practitioners in the Atlantic provinces (PEI, NS, NB, Nfld, Mi’kmaq, DFO, Transport Canada, Environment Canada, Major Projects Management Office, Heritage Canada, Parks, Canada, and Canadian Environmental Assessment Agency) met in June 2009 to discuss the formation of an ad-hoc Aboriginal Consultation Practitioners Network to share information and best practices.

Recommendation:

All three governments must utilize available resources to the best of their abilities, and should seek ways to share or minimize costs, where possible. The mechanisms described above need to be strengthened.

**Dialogue on Emerging Policy Questions**

A dialogue process should be initiated at regional levels across the country to tackle some of the unresolved policy questions outlined below.

*Unclear Role of the Proponent*

Previously, the Province had not provided clear guidance to proponents regarding expectations of proponent involvement in consultation. The Province has developed a proponent’s guide to engaging the Mi’kmaq of Nova Scotia. The guide was developed over the period of two years in consultation with the Mi’kmaq, proponents, and internal departments.

## Recommendation:

1. Finalize and distribute the proponent's guide. [note: finalized May 2009]
2. Review and revise all other guidelines to proponents (where appropriate) to include reference to the proponent's guide to engaging the Mi'kmaq.

## *Regulatory Processes*

Prescribed statutory timelines for public consultation have come into conflict with the ToR consultation timelines. In particular, the Environmental Assessment (EA) process in Nova Scotia has been a flashpoint between the Province and the Mi'kmaq regarding consultation. The 30-day public comment period does not fit with the ToR process, which is a minimum 60-day process. The Department of Environment and the OAA have been involved in discussions with the Mi'kmaq through the KMK since August 2008 to find creative solutions, outside the statutory process, that will meet the needs of the Mi'kmaq and the Province.

## Recommendations:

1. Establish and support a Mi'kmaq EA Technical Advisory Committee that will identify Mi'kmaq environmental concerns early in the process, before a project is officially registered for an EA, and prior to the public comment period. The process should be led internally by the Department of the Environment with support from OAA.
2. The proponent's guide is critical to the success of an EA process that is inclusive of the Mi'kmaq. All proponents conducting an EA should receive a copy of this guide in their information package.
3. Where no other provincial decisions are anticipated for a project other than the EA, the Department of Environment will use the ToR to consult with the Mi'kmaq. Where other provincial decisions are pending, another department will lead the consultations.
4. The Department of Environment must establish feedback and monitoring mechanisms to ensure commitments made by proponents to mitigate Mi'kmaq concerns or involve the Mi'kmaq are fulfilled.
5. The Mi'kmaq will use the EA public comment period to provide an official record of Mi'kmaq concerns with a specific project.
6. Review current legislation and regulations to ensure the process meets the legal tests of meaningful consultation and the honour of the Crown.

## *Differing views of the duty to consult*

Nova Scotia is in the challenging position of having the presence of the following variables: 1) historical treaties signed with First Nations by the Crown provide general rights to hunt, fish and gather for a moderate livelihood, and did not include the ceding of land or rights; 2) the presence of a small, relatively

homogenous and well-organized indigenous population; 3) the Province is currently engaged in negotiations with the Mi'kmaq of Nova Scotia and Canada to resolve issues related to Mi'kmaq treaty rights, Aboriginal rights, including Aboriginal title, and Mi'kmaq governance; and, 4) consulting on operational natural resource-related decisions as per duty to consult.

The underlying tension between the two different world views plays out in the recognition of rights. The Province does believe that the Mi'kmaq have rights in Nova Scotia, but perhaps not to the extent that the Mi'kmaq believe. This fundamental tension will pervade all interactions between the two parties and may make the issues difficult to resolve.

Recommendation:

1. It is important for the Province to acknowledge openly that they may not share the same views as the Mi'kmaq, and to discuss those differences with the Mi'kmaq. At the same time, the Province must remain firmly committed to advancing discussions with the Mi'kmaq from the leadership to the community level.

### *Consultation and Negotiation*

As the MINS negotiation process advances, it will be important to keep discussions regarding issues in consultation, and those in negotiation, separate.

The following recommendations are made:

1. Ensure that consultation issues that arise in negotiation are directed to the appropriate process.
2. Consultation and Negotiation Units must share information to ensure that issues of mutual interest are addressed, and that connections are drawn between accommodations in consultation and agreements in negotiation.

### **Emerging Policy Issues**

There are a number of specific policy and legal issues related to consultation that require further consideration and discussion by all parties. These issues arose from various consultation decisions by the courts – in these cases, the court decisions raised more questions than answers, and jurisdictions have been grappling with them in the absence of further court direction.

The following list outlines each issue briefly

- All parties need to give greater attention and consideration to accommodations made in consultation, and the linkages to impacts on

rights, negotiated settlements and interim arrangements, and the efforts of proponents;

- What is the duty of the Crown to consult on activities on private land? This is particularly relevant in Nova Scotia where most of the land mass of the province is in private hands (approximately 75%).
- Is there a legal duty to consult with the non-status Aboriginal peoples in Nova Scotia?
- When is consultation triggered, and consequently, at what stage do you initiate consultations?

Recommendation:

1. Discuss at all levels needs to occur on these difficult and substantive topics to seek and compare views, and reach some accord on their resolution.

## CONCLUSION

This report reviewed the progress of the government of Nova Scotia in developing and implementing a consultation management regime to respond to the 2004 *Haida* and *Taku* Supreme Court of Canada decisions. The court decisions stated that governments have a legal duty to consult with Aboriginal peoples when contemplating actions that have the potential to infringe on asserted Aboriginal rights, including Aboriginal title. This was extended one year later to treaty rights with the *Mikisew* case. The report outlined the key court decisions that provide the context for government action; compared policy and operational environments across Canada; assessed Nova Scotia government staff needs; and, reviewed and evaluated policies, tools and practices used by Nova Scotia to date. The report provided a number of recommendations to improve, strengthen and consolidate institutional mechanisms to support the duty to consult. Those recommendations included improvements to administration, policies and practices, capacity, funding and coordination mechanisms, as well as further examination of a number of emerging policy issues.

Clearly, conducting consultation with Aboriginal peoples is not a cost-neutral activity. While the Province should be seeking value for its investment, there must be an appropriate, sustainable level of ongoing support to help the Province meet its duty to consult.

The Province of Nova Scotia needs a clear and connected institutional framework to support meaningful dialogue with the Mi'kmaq of Nova Scotia that includes policies, guidelines, procedures, legislation and regulations. By institutionalizing the requirement to consult, through administrative, financial and legal mechanisms, it becomes an operational requirement and a routine part of daily business.

The results of adequate support for consultation, including a consultation capacity fund for the Mi'kmaq; sufficient internal funding; centralized advice and coordination; and, continuous training for staff should lead to more efficient, timely and productive consultations. Coordination mechanisms with all levels, jurisdictions and units within government should also improve efficiency and timeliness. Although this will be challenging due to different mandates, and in some cases, approaches to consultation, significant advances are already being seen in Nova Scotia.

The emerging policy issues raise a number of questions for discussion. Some of these questions may take years, even additional court cases to resolve. The MINS negotiation process will also take a number of years to resolve outstanding Aboriginal rights, including title, and treaty rights. In the absence of clear answers and direction, Aboriginal peoples will increasingly look to consultation to resolve outstanding rights issues.

Although this report did not evaluate outcomes of consultation, it is important to note that the Nova Scotia government has been successful in reaching mutually satisfactory conclusions to a number of consultations. Between May 2007 and July 2009, the Province has entered into 52 formal consultations under the ToR with the Mi'kmaq of Nova Scotia. Twelve of those consultations have concluded – most of them successfully. While there is no doubt that a number of improvements need to occur, Nova Scotia has had a number of successes in consultation and accommodation, and these should be evaluated and captured as best practices in the next phase of program development.

The outcomes of consultation vary according to the issue, the concerns and interests raised by the Mi'kmaq, and the level of impact a project/decision may have on asserted Aboriginal and treaty rights. The Province has reached a number of accommodations with the Mi'kmaq through consultation. Clearly, these actions would never have occurred had it not been for the ToR consultation process. Some examples of accommodation include:

- Mi'kmaq involvement in archaeological work (monitoring, collaboration);
- Mi'kmaq involvement in environmental monitoring (i.e. habitat restoration);
- Mi'kmaq collaboration on the design of highways and bridges;
- Changing the timing of a project to avoid impacts on a particular fishing season;
- Adjusting the location of a project to avoid sensitive areas;
- Providing funds for technical document review;
- Saying “no” to a project until the implications for First Nations are better understood;
- Assistance in linking First Nations with third parties or proponents to discuss potential economic benefits; and,
- Funding Mi'kmaq Ecological Knowledge Studies (MEKS) – studies which are undertaken by the Mi'kmaq to determine traditional and current use in a particular project area.

The following example provides an illustration of a well-coordinated consultation process with positive outcomes for the Mi'kmaq of Nova Scotia. This consultation involved a major development in coastal Nova Scotia where a private company requested a significant piece of Crown land in order to build its operations. The project also involved potentially significant disturbance of coastal foreshore. The Mi'kmaq asserted a claim of title to the area, as well as Aboriginal and treaty rights to hunt, fish and gather that may be negatively impacted by the project.

The proponent started its own engagement with the Mi'kmaq early in the process at the insistence of the provincial government. Their approach to the Mi'kmaq resulted in a small investment in the project by a First Nation, and the company hired an Aboriginal liaison to work with the Assembly of Nova Scotia Mi'kmaq

Chiefs and First Nation communities in close proximity to the project to develop an industrial benefits agreement.

The Crown initiated consultation after the concept was approved by Cabinet in 2007. Ideally, this should happen prior to Cabinet approval. Three federal and three provincial agencies participated in the consultation – all had decision-making authority at some point during the project development and approvals phases. The OAA coordinated the process. After initial meetings to provide information on the project and answer questions of clarification, and approximately one year for the Mi'kmaq to consider how the project may impact their rights, the Mi'kmaq provided a list of their concerns and interests with respect to the project to the Crown. All responsible Crown authorities met to review and discuss the concerns/interests of the Mi'kmaq in depth, and develop potential accommodation measures, where possible. With the exception of concerns that related to the broader negotiation process – for example, concerns about the loss of Crown land – the Crown was able to offer a number of accommodations to directly address the Mi'kmaq's concerns.

Throughout the consultation process, the Crown ensured it kept the proponent apprised of developments in consultation in writing, and obtained written commitments from the proponent to carry out some of the accommodations. This correspondence was shared with the Mi'kmaq. In the end, the Assembly of Nova Scotia Mi'kmaq Chiefs was satisfied with the process and the outcomes. The proponent thoroughly engaged the Mi'kmaq throughout the process and continues to do so, including the development of an industrial jobs and training package for the local First Nations. The Crown coordinated the involvement of six government departments and the proponent; considered all Mi'kmaq concerns carefully; and, agreed on a number of accommodations.

It is successful consultation and accommodation case examples like these that should be drawn upon for best practices and performance measures in the next phase of program development.

This report evaluates the administrative structures and processes put in place to support consultation. It is recommended that additional work be undertaken in the next phase of development to build a formal program for consultation. This would include a follow-up survey with staff who have taken Aboriginal consultation training to determine their level of knowledge and engagement with the issue, and whether or not departments are using the ToR to consult. In addition, an evaluation of the outcomes of consultation processes would assist in developing long-term performance measures for consultation that could be used for program evaluation, reporting and business planning purposes. Finally, a cost-benefit analysis of how much money is being saved by putting the recommendations in this report in place would be beneficial.

Implementing the recommendations in this report will provide a firm platform for meeting the duty to consult; contribute greatly to an enhanced relationship with First Nations; advance the process of reconciliation; help to create a more certain business climate; and, demonstrate the government's respect for the process and the Mi'kmaq as a government. The broader issues related to cultural and systemic change and agreement on rights will take time. However, a respectful consultation process that enhances reconciliation should create a space for dialogue to address these concerns over the long term.

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## **APPENDICES**

Appendix A: OAA Full Survey Results

Appendix B: Participant Letters

Appendix C: Sample Interview Guide

Appendix D: List of Participants

## **APPENDIX A: OAA Full Survey Results**

### **SURVEY – Email introductory text on voluntary consent**

**Thank you** for taking the time to participate in this survey. Your participation is, of course, completely voluntary. Your participation will contribute to a greater understanding of the best practices and challenges Nova Scotia government staff face when consulting (or considering consultation) with the Mi'kmaq. This information will be used to formulate recommendations to the Nova Scotia Cabinet to address the challenges you are facing. Your contribution is important and greatly appreciated. All responses will be kept confidential (i.e. surveys will not be shared with anyone outside the Office of Aboriginal Affairs). If you have concerns about this, please contact me directly: Jay Hartling, 902-424-4214.

## PROVINCIAL STAFF SURVEY: RESULTS

### CONSULTATION WITH ABORIGINAL PEOPLES

#### Overview:

The survey was sent as blanket e-mail to the following provincial government departments:

Economic Development (ED)  
Energy (DOE)  
Environment and Labour (DEL)  
Fisheries and Aquaculture (FA)  
Natural Resources (DNR)  
Transportation and Public Works (TPW)

OAA received 49 e-form responses and 2 e-mail responses for a total of 51. The breakdown of number of responses by department is:

ED	0
DEL	12
DNR	12
DOE	5
FA	8
TPW	14
<b>Total</b>	<b>51</b>

#### SECTION A: AWARENESS:

Using the following scale, respondents rated six statements to gauge their awareness:

- 1 = Strongly Agree
- 2 = Agree
- 3 = Neutral
- 4 = Disagree
- 5 = Strongly Disagree

**NOTE:** The Charts below reflect the 1-5 scale above, translated as:

1=a lot, 2=more, 3=some, 4=little, 5=none

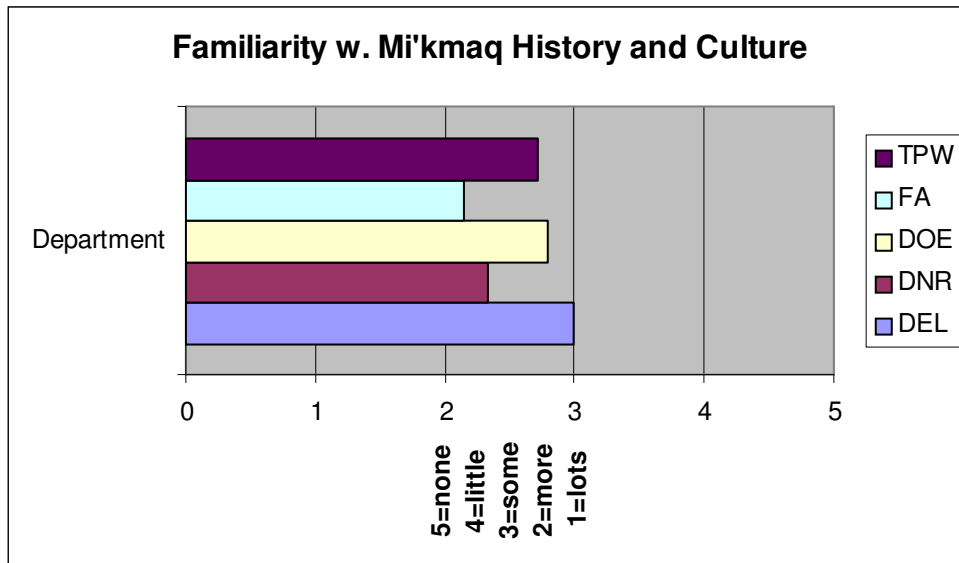
Therefore, an average of 3.5 is below, not above average.

**#1: I am familiar with Mi'kmaq culture and history.**

**Average: 2.6**

On average, respondents felt they were somewhat familiar with Mi'kmaq culture and history.

*Breakdown by Department:*

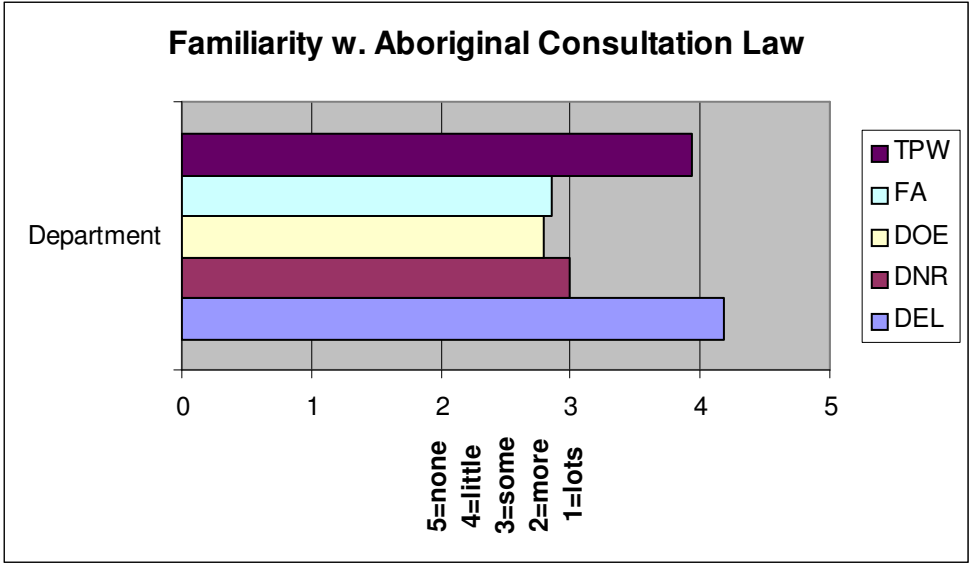


**#2: I am familiar with existing case law governing Aboriginal consultation.**

**Average: 3.5**

On average, respondents are not familiar with existing Aboriginal consultation case law.

*Breakdown by Department:*

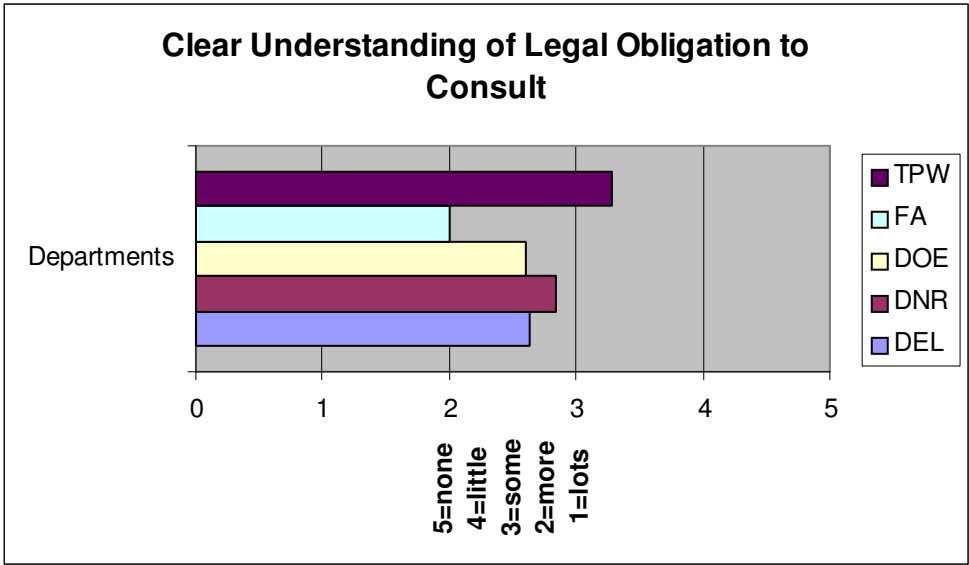


**#3: I clearly understand the government’s legal obligation to consult with Aboriginal peoples.**

**Average: 2.7**

On average, respondents somewhat understand the government’s legal obligation to consultation with Aboriginal peoples.

*Breakdown by Department:*

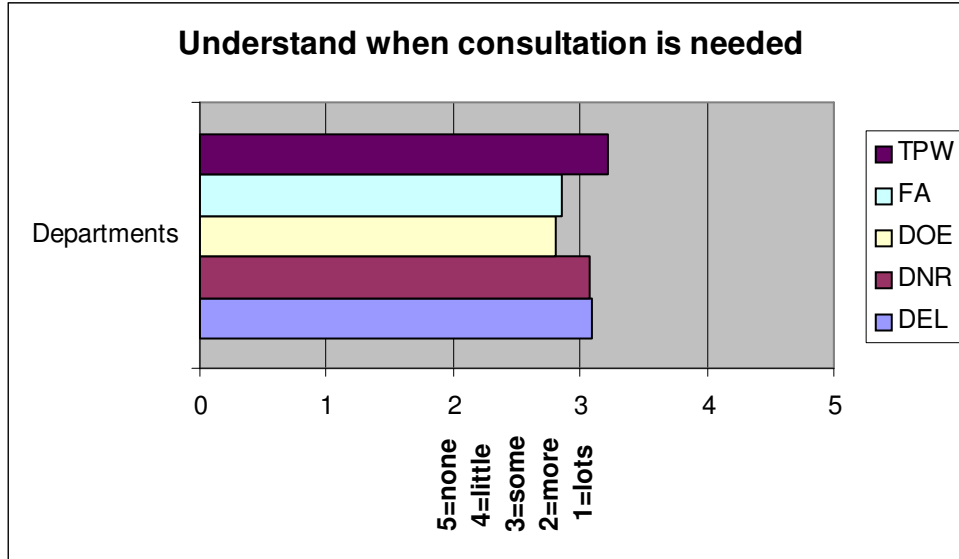


**#4: I understand when consultation with the Mi'kmaq is needed.**

**Average: 3**

On average, respondents somewhat understand when consultation is needed.

*Breakdown by Department:*

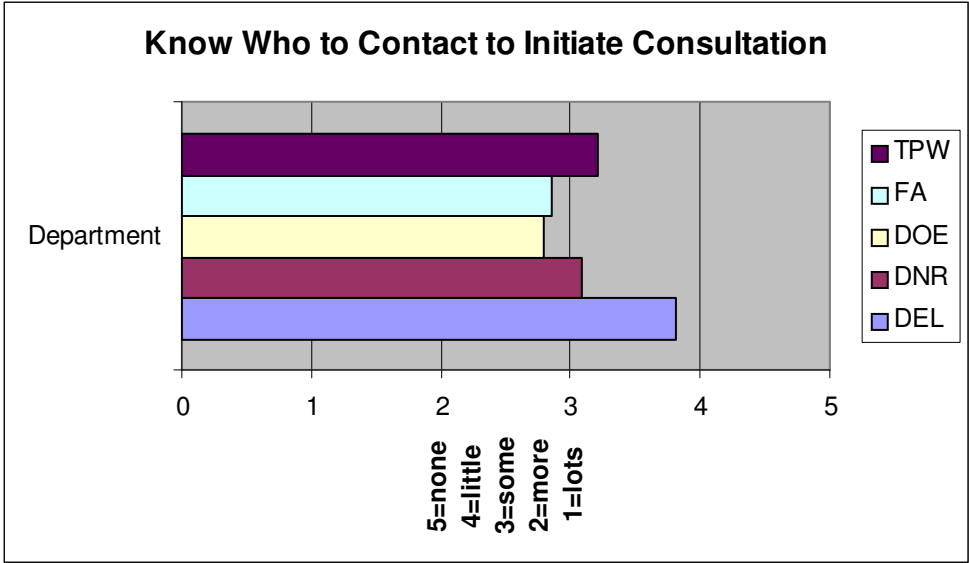


**#5: I know who to contact to initiate consultations with the Mi'kmaq.**

**Average: 3**

On average, respondents were somewhat unsure who to contact to initiate consultation.

*Breakdown by Department:*

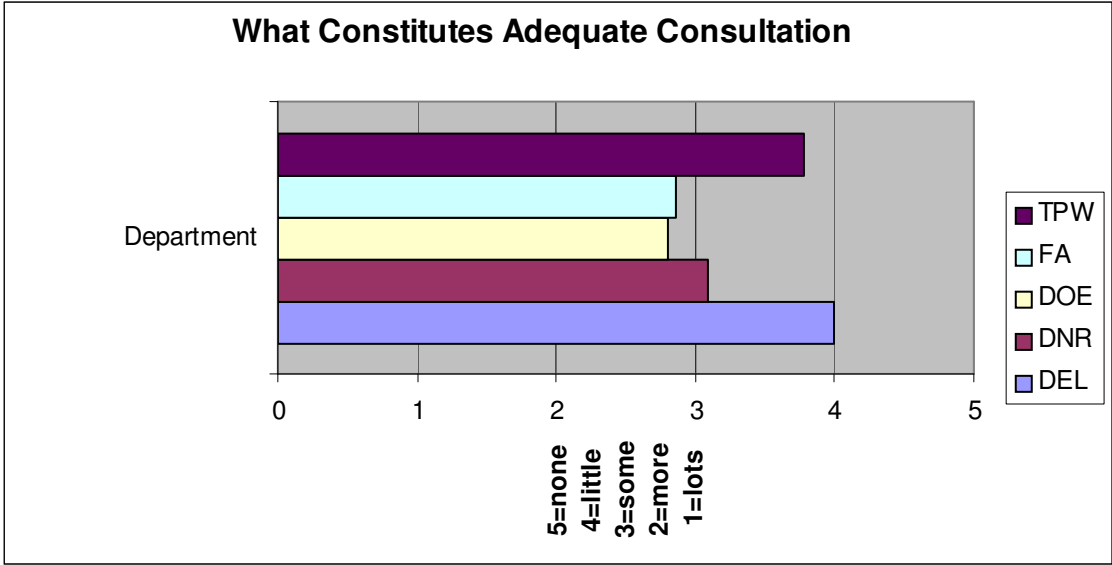


**#6: I understand what constitutes adequate consultation with the Mi'kmaq.**

**Average: 3.6**

On average, respondents did not understand what constitutes adequate consultation.

*Breakdown by Department:*



## **SECTION A: Level of Experience Working with the Mi'kmaq**

Respondents selected a variety of statements that reflected their experience working with the Mi'kmaq. They were instructed to select as many statements as applied to them.

**18%** (9 out of the 51) respondents had no experience or exposure to the Mi'kmaq.

**47%** (24 out of 51) occasionally handle files with Mi'kmaq issues.

**59%** (30 out of 51) have met with Mi'kmaq representatives on work-related matters.

**25%** (13 out of 51) participate on committees that have Mi'kmaq representatives.

**16%** (8 out of 51) have regular interactions with the Mi'kmaq on a variety of issues.

**6%** (3 out of 51) are the designated contact on Mi'kmaq issues within their department.

**10%** (5 out of 51) have the work they do with the Mi'kmaq included in their annual performance plan.

**14%** (7 out of 51) have a personal interest in Mi'kmaq issues.

**18%** (9 out of 51) have connections with the Mi'kmaq in their personal life.

**35%** (18 out of 51) have taken Aboriginal perceptions or cultural awareness training.\*

**59%** (30 out of 51) have visited a Mi'kmaq community.

**14%** (7 out of 51) have some experience with Aboriginal issues in other parts of Canada.

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\* NOTE: These numbers do not correspond with the Training question in Section B.

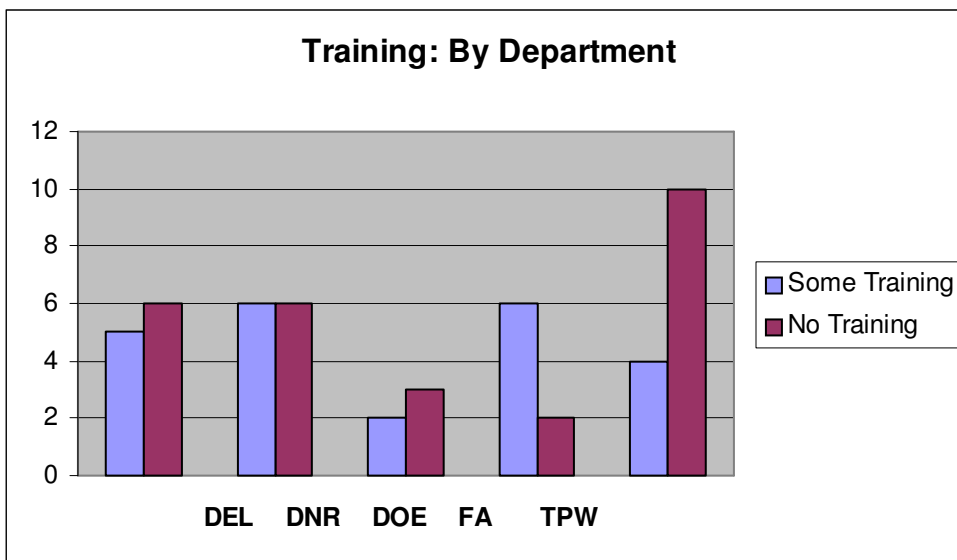
## SECTION B: Best Practices

### Training:



- The **majority** of respondents have **no training** in Aboriginal issues.
- **45%** have taken some kind of Aboriginal awareness training.
- **33%** have taken Aboriginal Perceptions training.
- Of the 23 that responded they had taken training, 17 have taken the Aboriginal Perceptions training offered by the Province, and 6 responded "other".

### *Breakdown by Department*



### Advice for Aboriginal Affairs (OAA):

- **41%** (21 out of 51) had no advice for the OAA.

Common themes of advice: (Note: There was a lot of overlap between this section and the section on what kind of resources do employees need to do a better job of consultation).

- Contact list, by issue
- Provide presentation on Aboriginal issues, cultures, laws, and related matters
- Provide information on KMK process
- Separate committee work from consultation
- Provide information sessions
- Formalize the consultation process
- Provide a guide, handbook, roadmap or best practices document
- Have representatives from the OAA do the consultation
- Training on consultation
- Assign a liaison officer to assist with consultations
- Need an understanding of how much impact consultation has on policy development
- Clearer understanding of when the duty to consult is triggered

## **SECTION C: CHALLENGES**

### **What challenges do you face when considering consultation with the Mi'kmaq?**

- **43%** (22 out of 51) did not answer this question – this can be interpreted in several ways:
  - Disinterest in the question
  - Not applicable to the respondent
  - Forgot to answer the question
  - Don't face any challenges

*Challenges:*

**\* = multiple responses**

- Not knowing who to contact / consult with \*
- Reluctance of Mi'kmaq to consult on a regional level
- Unsure of appropriate consultation protocols
- Guidance on when operational discussions may impact the Made-in-Nova Scotia negotiation process
- Interjurisdictional issues
- Workload

- Understanding how to use feedback from a consultation meeting
- What is a reasonable level of influence Aboriginal people should have on policy

**What resources do you require to handle consultation more effectively?**

- **50%** (25 of 51) of respondents did not answer this question. This can be interpreted in several ways:
  - Disinterest in the question
  - Not applicable to the respondent
  - Forgot to answer the question
  - Don't need any resources

*Resources:*

**\* = multiple responses**

- Appropriate Mi'kmaq contacts/list\*
- Clear, easily understood guidelines\*
- Education, knowledge, awareness\*
- Checklists
- Clear understanding of the role of the OAA
- Easy access to expertise/guidance\*
- Training\*
- Direction from senior management on official consultation policy
- Summary of Aboriginal consultation case law
- Departmental leads
- Case studies of successful consultations

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**Prepared by:**

Jay Hartling  
Office of Aboriginal Affairs  
August 2007

- 2 -

I hope you will support Jay in her efforts on this very important and timely project.

Sincerely,



Tom Soehl  
Director of Negotiations

c: Twila Gaudet  
Bruce Wildsmith  
Eric Zscheile

Sample Participation Letter to Nova Scotia and Government of Canada  
Employees

Dear xxxx,

I would like to invite you to participate in a study I am conducting entitled “Analysis of the implementation of Nova Scotia’s policy to address the Crown’s duty to consult with the Mi’kmaq of Nova Scotia”. This study is being undertaken for the thesis requirement for a Masters in Public Administration at the University of Victoria, British Columbia, Canada.

As the provincial government employee primarily responsible for ensuring the implementation of Nova Scotia’s Interim Consultation Policy and the Canada-Nova Scotia-Mi’kmaq Consultation Terms of Reference; and a student and practitioner of public participation for many years, I have a personal and professional interest in this exciting and evolving policy issue. In addition to understanding the reasons for implementing this process, I am also interested in the institutional mechanisms that support the process; and the successes and challenges you have encountered. I am also committed to moving the process forward and will therefore, be making recommendations on how the Province of Nova Scotia might address the challenges they face.

I am contacting you because you have been directly involved in consultation with the Mi’kmaq of Nova Scotia and will have valuable insights to share.

My intent is to conduct either in-person or telephone interviews with key participants in the implementation of Nova Scotia’s Interim Consultation Policy and the Consultation Terms of Reference during the months of April and May, 2008.

I am attaching a consent form that describes all of the conditions for participating in this study, as well as the expected outcomes. If you would like to participate in the study, please respond by e-mail to [jayh@uvic.ca](mailto:jayh@uvic.ca).

If you have any suggestions for other people that I might interview, I would greatly appreciate you providing their contact information to me.

Looking forward to connecting with you,

Jay Hartling  
University of Victoria

## **APPENDIX C: SAMPLE INTERVIEW GUIDE**

### **Section A:**

What is your understanding of why the Government of Nova Scotia created and implemented a policy to address the duty to consult?

What has your role been in the implementation of Nova Scotia's approach to the duty to consult?

What has been the response of your particular organization/department to the implementation of the policy?

### **Section B:**

Describe some of the successes, or positive aspects you have encountered over the past year, with respect to the implementation of the policy.

Describe the challenges that you have encountered.

What suggestions do you have for addressing those challenges?