

Memorandum of Understanding

Canada-Nova Scotia Memorandum of Understanding (MOU) on Cooperation Regarding Duty to Consult

1. Preamble

Between:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by the Minister of Aboriginal Affairs and Northern Development (herein referred to as "Canada"),

and

HER MAJESTY THE QUEEN IN RIGHT OF NOVA SCOTIA as represented by the Minister of the Nova Scotia Office of Aboriginal Affairs (herein referred to as "Nova Scotia").

Collectively referred to as "The Parties"

Whereas the Crown has a duty to consult Aboriginal peoples and, if appropriate, accommodate, when the Crown contemplates conduct that might adversely impact established or potential Aboriginal or treaty rights.

Whereas Canada and Nova Scotia have signed the Mi'kmaq-Nova Scotia-Canada Consultation Terms of Reference, which outlines a preferred protocol for conducting consultation with the Mi'kmaq in Nova Scotia.

Whereas third parties do not have a duty to consult, there may be circumstances where it is beneficial to include third parties in consultation-related activities and/or specific consultations.

Whereas Canada and Nova Scotia wish to co-operate to facilitate effective and efficient Aboriginal consultation and accommodation among the Province of Nova Scotia, Canada and the Mi'kmaq of Nova Scotia in accordance with the Mi'kmaq-Nova Scotia-Canada Consultation Terms of Reference.

Therefore the Parties to this MOU wish to build on existing relationships to strengthen effective and co-ordinated approaches to Aboriginal consultation activities and initiatives to the extent possible and to this end have agreed to the following provisions:

2. Purpose

This MOU is intended to promote co-operation, to the extent possible, between the Parties by outlining ways to:

- co-ordinate consultation processes;
- share information related to consultation processes; and
- strengthen collaborative efforts for training, and increasing knowledge related to consultation.

3. Definitions

3.1 *Aboriginal Peoples/Groups*: A community of Indian, Inuit or Métis people that holds or may hold Aboriginal or treaty rights under section 35 of the *Constitution Act, 1982*.

3.2 *Aboriginal Rights*: These rights are collective, based on the practices, traditions and customs integral to the distinctive culture of Aboriginal groups. Generally, these rights are fact and site specific.

3.3 *Crown*: Crown refers to all government departments, ministries, agencies, other Crown entities to the extent possible as prescribed by the mandating legislation for such entities, and includes all government employees that are doing the work of the Government.

3.4 *Legal Duty to Consult*: The common law duty to consult is based on judicial interpretation of the obligation of the Crown. In the *Haida, Taku River, Mikisew Cree* and *Little Salmon/Carmacks* decisions, the Supreme Court of Canada held that the Crown has a legal obligation to consult and, if appropriate, accommodate, when the Crown contemplates conduct that might adversely impact Aboriginal or treaty rights (established or potential) of the Aboriginal peoples of Canada, recognized in section 35 of the *Constitution Act 1982*.

3.6 *Third Party*: An entity (e.g. proponent, industry, business, municipalities and corporations) whose interactions with the Crown may result in the Crown's legal duty to consult Aboriginal groups whose rights may be adversely impacted by the third party's activities.

4. Co-ordination of Crown Consultation Processes:

The Parties will provide guidance and direction in conducting consultation and accommodation activities by:

- Building on existing relationships to strengthen mechanisms for aligning and streamlining activities related to Aboriginal consultation and accommodation where both jurisdictions have a decision-making role;
- Co-ordinating Aboriginal consultation and accommodation activities to the extent possible, including joint discussion of issues and approaches prior to, during, and following any joint consultation processes;
- Building upon and expanding harmonized tools and templates, where appropriate, for the purposes of joint Aboriginal consultation and accommodation;
- Engaging with Aboriginal peoples and third parties in the development of mechanisms to integrate activities and streamline processes. If appropriate, the Parties will include third parties in procedural aspects of joint consultation processes; and
- Working in co-operation to assess the adequacy of consultation in relation to the federal or provincial conduct within overall joint consultation processes and where positions diverge, the parties will continue to co-ordinate their consultation activities to the extent possible.

5. Information Sharing

The Parties recognize that the exchange of timely and relevant information between Canada and Nova Scotia on consultation and accommodation-related information and activities will foster greater transparency and understanding; avoid unnecessary delays; streamline complex, multi-party processes; and encourage a comprehensive approach. Two broad categories of information will be considered:

- **General/Contextual Data:**

The Parties will share data used to conduct general analysis regarding consultation. This may include, but is not limited to, archaeological information, land use studies, Traditional Ecological Knowledge Studies, specific claims, historical information and community profiles.

- **Data Relevant to Specific Consultations:**

The Parties will, when co-ordinating on a joint consultation process, determine, in advance, if consultation records held by one jurisdiction will be shared. Canada and Nova Scotia may share, where both parties agree:

- Information, subject to relevant provincial or federal legislation (e.g. Nova Scotia's *Freedom of Information and Protection of Privacy Act* and Canada's *Privacy Act* and *Access to Information Act*), as appropriate and relevant to the preparation of consultation, and in accordance with the Mi'kmaq-Nova Scotia-Canada Consultation Terms of Reference; and
- Consultation records including those gathered during joint consultation activities, such as correspondence, meeting records and procedures, statements of concerns, records of accommodation, etc.

6. Strengthening Capacity

6.1 Training

The Parties will align their education and training efforts so that a foundation of common knowledge exists among provincial and federal public employees which respects each party's privileged legal information and also limits the duplication within the two current training programs. The Parties agree to the following:

- The joint development and provision of a training course regarding the duty to consult that builds on existing provincial and federal training programs. This course will be offered, at minimum, bi-annually;
- The joint development and provision of a training program regarding regional issues in Aboriginal consultation, specific to Nova Scotia; and
- Sharing of department- or sector-specific guidelines and training, as may be required by either jurisdiction.

6.2 Engaging Third Parties

The Parties will jointly develop engagement opportunities for third parties, such as industry, and deliver information sessions for conferences, public presentations and events aimed at strengthening a third party's capacity around consultation and accommodation, where possible and appropriate.

6.3 Building Knowledge

The Parties will, where possible, exchange experiences, ideas and best practices in the field of Aboriginal consultation which contribute to innovative approaches and well-developed tools to assist in decision making. This MOU presents the opportunity to formally recognize and strengthen the existing mechanisms of dialogue and exchange among federal and provincial practitioners to better share information, tools and best practices. The Parties agree to the following:

- Identify emerging policy and process issues and co-ordinate joint responses, where appropriate;
- Share tools (i.e. guidelines, templates, etc.), as may be required by either jurisdiction; and
- Recognize existing mechanisms for co-operation (i.e.: TOR Steering Committee; Atlantic Aboriginal Consultation Practitioners' Network; Transport Canada-Fisheries and Oceans Canada-Nova Scotia Office of Aboriginal Affairs monthly update meetings) and build new mechanisms.

7. Roles and Responsibilities

The Parties, as represented through the Nova Scotia Office of Aboriginal Affairs Consultation Unit and Aboriginal Affairs and Northern Development Canada's Consultation and Accommodation Unit, will provide leadership, direction and support on consultation and accommodation on behalf of their respective governments. Joint roles and responsibilities include:

- demonstrate leadership and support the overall objectives of the MOU;
- provide strategic advice on joint consultation activities;
- support co-ordination and continuous dialogue across governments, Aboriginal groups and third parties; and
- facilitate contact with officials in respective jurisdictions.

8. Confidentiality Information

No Parties shall disclose any confidential information obtained from the other Party, without the written consent of the other, to any third parties, except as required by law or by regulatory authorities.

9. Implementation

9.1 The Parties commit to establish a joint working group which in turn will develop a joint work plan that outlines annual activities associated with the MOU. Provincial departments and federal departments/agencies will be asked for input on additional collaborative efforts that could be highlighted in the work plan. Leadership for the development of the work plan will be provided by the Nova Scotia Office of Aboriginal Affairs Consultation Unit and Aboriginal Affairs and Northern Development Canada's Consultation and Accommodation Unit. The work plan will be reviewed and approved by the Deputy Minister of the Nova Scotia Office of Aboriginal Affairs and the Deputy Minister of Aboriginal Affairs and Northern Development Canada.

9.2 Where appropriate, the Parties will work collaboratively within Nova Scotia on the implementation of the MOU and elements of the work plan.

10. Cost Sharing

Each Party is responsible for the costs of its respective consultation activities. However, where possible, the Parties agree to pursue reduced costs associated with meetings, travel, communication, etc. Additional costs associated with the implementation of the MOU will be identified in the work plan (i.e. joint research).

11. Evaluation and Review

The Parties will review this MOU every two years and at any time at the request of a Party.

12. Termination

This MOU may be terminated on a 90-days written notice of that intention from either Party to the other.