

Aboriginal Consultation at the NS Department of Energy

October 14, 2008

This paper describes the Department of Energy's aboriginal consultation responsibilities and the associated policy guidance. This does not obligate the Department to consult with the Mi'kmaq in any specific instance. This is not an admission by the Province of the existence of a duty to consult with the Mi'kmaq in any particular situation.

Context

In some situations there may be a legal duty to consult. In others, departments may consult for policy reasons, regardless of whether or not a legal duty exists. As government and the Mi'kmaq begin to conduct consultations on a range of matters, much will be learned by both parties in this emerging area of the law.

From a legal perspective, a number of court cases (Haida, Taku River, Mikisew Cree) have found that governments have a duty to consult with the Mi'kmaq of Nova Scotia where their claimed rights may be impacted or infringed. The legal situation continues to evolve, but the current situation suggests:

- a. Governments may have a duty to consult the Mi'kmaq of Nova Scotia prior to making decisions that might adversely affect claimed treaty rights, Mi'kmaq rights or Mi'kmaq claims;
- b. There is a reciprocal obligation on the Mi'kmaq of Nova Scotia to participate in consultation initiated by the Crown;
- c. The extent of consultation and accommodation that may be required depends on the strength of the claim and the seriousness of the impact of the proposed activity. However, ultimate decision making authority remains with government.

Background

- Provincial Cabinet gave approval in principle to the current approach on consultation with the Mi'kmaq of Nova Scotia being led by the Office of Aboriginal Affairs.
- The Province released an Interim Consultation Policy in June 2007 to all departments. This was developed by an inter-provincial team, which included the Department of Energy, Department of Justice and Office of Aboriginal Affairs.
- In July 2007, Canada, Nova Scotia and the Mi'kmaq signed a Consultation Terms of Reference which is in its second year of a pilot phase. The Terms of Reference (ToR) lays out a process to be followed when departments make a decision to consult with the Mi'kmaq.

- The Department of Energy has established an Energy Consultation Table with the Mi'kmaq where provincial energy issues are discussed. The lead Chief is Chief Gerard Julian of Paq'tnekek First Nation.
- Departments meet with the Energy Consultation Committee to discuss issues and concerns that may impact the Mi'kmaq's treaty rights, Aboriginal rights or Aboriginal title claims.

Decision to Consult

The Department is responsible for deciding whether to consult with the Mi'kmaq on its actions and decisions. Departmental staff should discuss the options with the Consultation Coordinator within the Department. The Senior Strategist, Provincial Consultation, Office of Aboriginal Affairs is also available to provide further advice.

The decision to consult should be based on legal and policy considerations:

Legal:

Departments should consider whether there may, or may not, be a legal duty to consult, particularly for issues affecting provincially-owned resources, including land or water. This may require advice from the department's solicitor (Department of Justice) regarding:

- known or potential existence of claims of treaty rights, Aboriginal rights or Aboriginal title claims;
- the strength of the claims;
- the likelihood of litigation;
- the likely extent of consultation and accommodation, if any, required to meet the legal obligation.

Policy:

Departments may also choose to consult based on a policy rationale. Relevant policy considerations may include high levels of public or community interest, seeking information that may improve decisions, avoiding regulatory delays, business climate issues, federal requirements for areas with shared/overlapping responsibilities, etc.

Designated Contacts

1. Consultation Coordinator: This individual is designated by the Minister to be responsible for consultation issues in the Department of Energy. The Coordinator is required to be the primary contact on consultation matters.

The Consultation Coordinator functionally reports to the Director of Strategic Policy, Planning and Services on the broader policy issues of aboriginal consultation as well as energy policies, strategies and offshore energy activities.

Operationally, the Consultation Coordinator reports to the following Directors:

Director of Resource Assessment and Royalties- for onshore resources
Director of Energy Markets and Climate Change- for pipelines and renewable energy
Director of Business and Technology- for economic opportunities
Director of Communications- for communications issues

2. Office of Aboriginal Affairs (OAA):

The role of OAA on consultation issues includes the following:

- coordination of provincial policy issues for consultation, including development of longer term policies;
- lead discussions on behalf of the Province for the development of Terms of Reference for Consultation, under the June 2002 Umbrella Agreement;
- advice to departments on consultation approaches and the implementation of the interim policy guidance;
- provide information to departments about the nature of claims asserted by the Mi'kmaq;
- provide information to departments about Mi'kmaq processes, protocols and internal organization regarding consultation issues.

Aboriginal Contacts

The Consultation Coordinator identifies groups to be consulted.

Key groups include:

i) Bands

- Consultation should almost always include band councils since for most situations band councils are the appropriate entities with authority to speak on behalf of communities.
- Band councils may authorize other organizations or individuals to represent them for some issues.
- Departments should provide copies of requests for consultation to the Assembly of Nova Scotia Mi'kmaq Chiefs (the Assembly), c/o Kwilmuk Maw-klusuaqn Negotiation Office

ii) Native Council of Nova Scotia (NCNS)

- NCNS is an organization that advocates for non-status and off-reserve Mi'kmaq issues.

iii) Other Mi'kmaq organizations

- In addition to the above, departments may share information with and receive input from other Mi'kmaq organizations, including Confederacy of Mainland Mi'kmaq, Union of Nova Scotia Indians, Unama'ki Institute of Natural Resources. These organizations provide services to various groups of bands and have technical expertise and a good understanding of community issues.
- These organizations may provide a Mi'kmaq perspective on issues. However, unless specifically authorized by band councils or the Assembly, the views of these organizations may not represent the official positions of band councils or the Assembly.

OAA can provide advice on groups likely to be affected or interested. Refer to Appendix A for the current directory of Aboriginal Organizations and Leaders.

Department of Energy Consultation Guidelines

1. When staff have knowledge of proposed activities that might infringe on claimed or asserted treaty rights, Aboriginal rights or Aboriginal title claims:
 - Contact the Energy Consultation Coordinator
 - Contact Department solicitor for a legal opinion on the legal duty to consult.
2. The Coordinator, in consultation with the operational staff and the Senior Strategist, Provincial Consultation, OAA, will provide early notification and information on a proposed project (this could come from a proponent and/or Department).
3. The Coordinator sends a letter to all 13 Chiefs and Councils, with a carbon copy to the Mi'kmaq Rights Initiative (KMK) and the OAA requesting consultation.
4. The Assembly of Chiefs meets to consider consultation requests/delegates authority to consult (they may decide that consultation is not needed/desired).
5. If consultation is requested, the Coordinator organizes a consultation meeting with the Energy Consultation Table:
 - Agenda is planned carefully and circulated in advance of the meeting.
 - Key operational staff should attend along with Consultation Coordinator.
 - Coordination with other departments and jurisdictions is desirable where appropriate.
 - Consultation should be meaningful- discussion of concerns and consideration of mitigation, where necessary.
 - All meetings are “on the record”- Consultation Coordinator takes notes for the Department’s files and provides copy to the operational director, key staff and OAA.
 - Some exchanges may take place in writing only.

6. The Consultation Coordinator prepares a record of decisions taken and how concerns were addressed (mitigation/accommodation) to be shared with the Mi'kmaq.
7. Any new information that becomes available should be shared with the Consultation Coordinator to be communicated to the Mi'kmaq.

Role of Proponents

There is no legal duty on third parties (private industry) to consult with Aboriginal groups, however the Crown may delegate procedural aspects of consultation to third parties. The role of Proponents could be as follows:

- Provide early notification to Mi'kmaq communities that are closest to their proposed project area.
- Provide information (technical/other), listen to concerns, and attempt to mitigate issues of concern.
- Consider doing a Mi'kmaq Knowledge Study (MKS).
- Consider benefits/opportunities with Mi'kmaq communities.
- Provide a chronological record of engagement with Aboriginal communities to the Province.

The OAA is currently developing an engagement guide for proponents.

Questions or requests for further information can be directed to:

Sandra Farwell
Manager, Policy and Planning
Strategic Policy, Planning and Services
Nova Scotia Department of Energy
Farwelse@gov.ns.ca
Ph: 424-1700