

Consulting with the Mi'kmaq in Nova Scotia

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**Jay Hartling, Senior Strategist, Provincial Consultation
NS Office of Aboriginal Affairs**



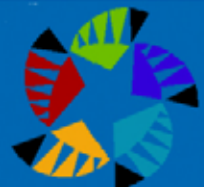
Aboriginal

First Nations
(status)

Off reserve/
non-status

Metis

Inuit




NOVA SCOTIA

Office of Aboriginal Affairs

Building mutual understanding, respect and a long-lasting relationship

- Created in 1998
- Coordinates the Province's approach to Aboriginal issues
- Leads negotiations on treaty rights with the Mi'kmaq of Nova Scotia and the federal government




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Marshall Decision (1999)

- Peace and Friendship Treaties of 1760-61 affirmed the right of Mi'kmaq to provide for their own sustenance by taking the products of their hunting, fishing and gathering activities, and trading them in the pursuit of a "moderate livelihood". This right is regulated by the federal govt.
- 2001 – long-term negotiation process launched to address *Marshall*



Umbrella Agreement 2002

- Formal **negotiations** to consider constitutionally protected rights of the Mi'kmaq of Nova Scotia;
- Renewed commitment to the existing Mi'kmaq-Nova Scotia-Canada **Tripartite Forum**; and
- Initiation of discussions regarding the requirement of governments to **consult** with the Mi'kmaq of Nova Scotia.



Constitution Act (1982)

- **Section 35(1)** The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.




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What are Aboriginal Rights?

- Activity which has an element of a practice, custom or tradition integral to the distinctive culture of aboriginal group claiming the right
- Right to exercise traditional activities, e.g. fishing, hunting, trapping, gathering, logging for domestic use
- Not necessarily related to a particular piece of land



What is Aboriginal Title?

- Subcategory of aboriginal rights - right to the land itself
- *Sui generis* land interest - held communally and inalienable (except to the Crown)
- Requires evidence of regular, exclusive use, continuity and effective control at the time of European occupation



What are Treaty Rights?

Three types of treaties:

- Pre-Confederation Treaties (Peace & Friendship Treaties, Province of Canada, Upper Canada and Douglas Treaties)
- Post-Confederation Treaties (Numbered Treaties, Williams Treaties)
- Modern treaties and land claims agreements




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Peace and Friendship Treaties

- Includes the right to fish for a moderate livelihood, hunt and gather in traditional hunting and fishing grounds; and trade in traditional products of forest resources used to make traditional products such as baskets, snowshoes or canoes (excludes commercial logging)




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Supreme Court of Canada decisions on consultation

2004 Haida, Taku, Mikisew decisions:

- Crown has a duty to consult and, where appropriate, accommodate aboriginal peoples where the interests of aboriginal peoples may be affected by a Crown action or decision.
- Interests = possible Aboriginal and/or Treaty rights.



What else did the Supreme Court say?

- Crown consultation should be undertaken in **good faith** (meaningful effort to understand concerns and address them)
- Consultation is a **two-way** street
- **No duty to agree and no Aboriginal consent is required**
- Aboriginal groups **do not have a veto**
- Governments, as final decision-makers, must **balance Aboriginal interests and broader societal interests.**

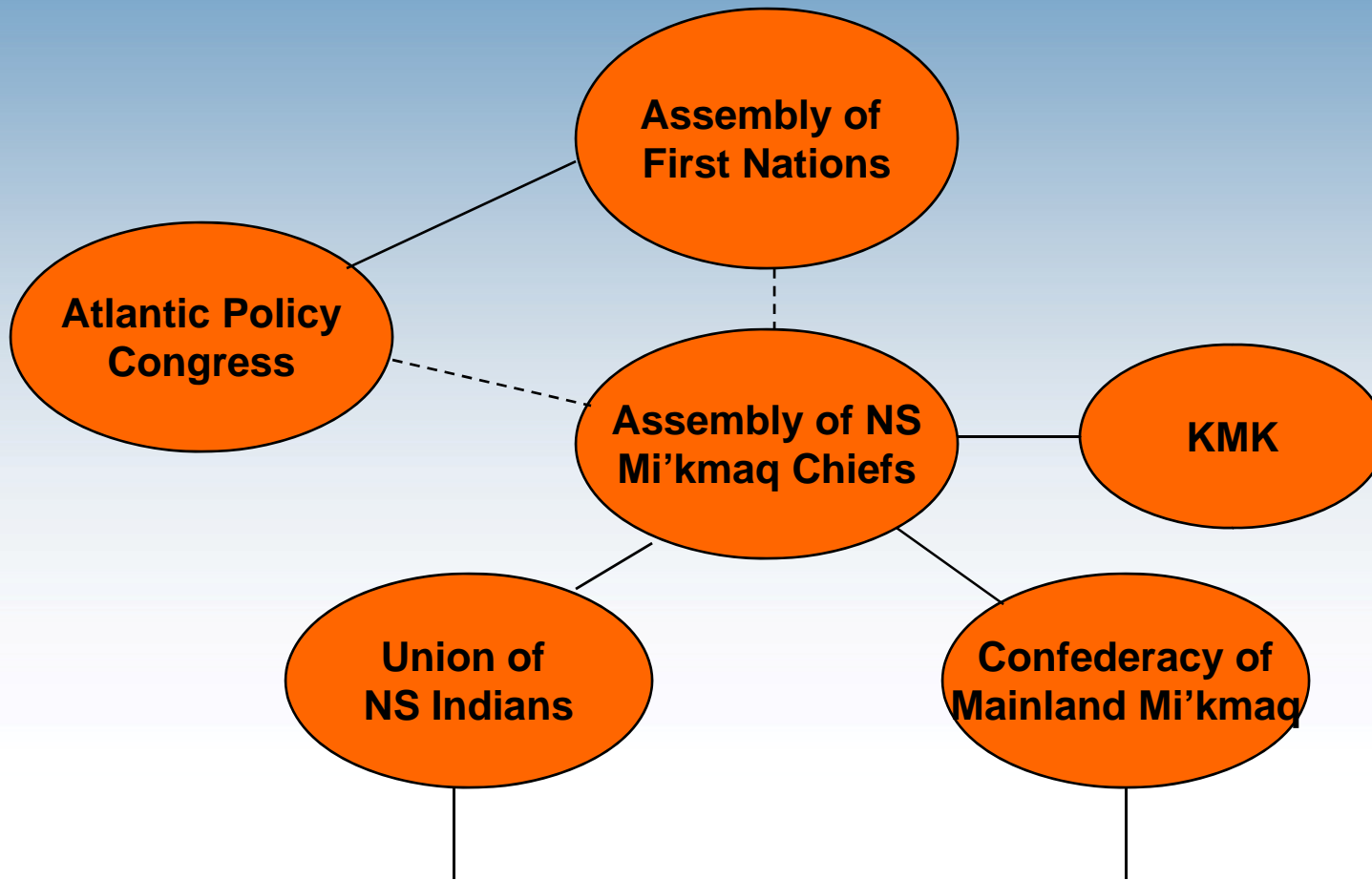


Consultation

Spectrum of Consultation



Who do you consult with?



7 First Nations (bands)

6 First Nations (bands)

	Acadia	Membertou	
	We'koqma'q	Wagmatcook	
	Indian Brook	Chapel Island	
	Eskasoni		

Who else to consult with?

- Native Council of Nova Scotia
- Confederacy of Mainland Mi'kmaq
- Union of Nova Scotia Indians
- Unama'ki Institute of Natural Resources



Privately owned lands and consultation

- Treaty and aboriginal rights can likely be exercised on private land unless land is occupied or put to use that is incompatible with exercise of rights – existence of rights will likely not prevent private property holder from putting land to reasonable and lawful use.
- Duty to consult may be triggered where Crown decisions are made regarding private lands, particularly regarding downstream or adjacent interests
- Depth of consultation will typically be lower on private lands than on Crown lands



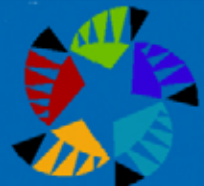
Role of 3rd parties

- Crown is legally responsible for consultation and accommodation – **cannot delegate this responsibility** to third parties (i.e. private industry)
- Crown may delegate **procedural** aspects of consultation to third parties.



What are the “*procedural aspects*” of consultation for proponents/third parties?

- Provide early notification to Mi’kmaq communities that are closest to the proposed project area (prior to submitting applications, etc.).
- Meet with those communities and make a proactive effort to provide information, listen to and try to resolve concerns.
- Determine whether or not a Mi’kmaq Ecological Knowledge Study (MEKS) is required.
- Identify strategies to avoid or address potential impacts.
- Provide a record of engagement and identify any strategies implemented to address potential impacts to the Province.
- Province is currently developing an engagement guide for proponents



Potential impacts of development

- Cultural (archaeology)
- Impacts on rights-based activities
- Impacts on “sacred” sites, traditional use sites



Best Practices

- Establish a communication process with the community
- Hire a qualified archaeologist
- Work with the Mi'kmaq to review plans, where appropriate
- Design joint contingencies
- Monitoring
- Notify the Province



What is Nova Scotia doing?

Provincial Consultation Management Regime:

- Interim Consultation Policy
- Mi'kmaq-Nova Scotia-Canada Consultation Terms of Reference
- OAA: centralized consultation advice, facilitation and coordination
- Consultation Capacity Fund
- Training and capacity-building (internal)
- Awareness (external)




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Jay Hartling

Senior Strategist, Provincial Consultation

Nova Scotia Office of Aboriginal Affairs

424-4214

hartlij@gov.ns.ca

