

**TERMS OF REFERENCE FOR A
MI'KMAQ-NOVA SCOTIA-CANADA CONSULTATION PROCESS**

**(Approved at Main Table June 13, 2006.
Agreed to be implemented on a trial basis June 14, 2007.)**

BETWEEN:

The **MI'KMAQ OF NOVA SCOTIA** as represented by the Thirteen Mi'kmaq Saqmaq
(the "Mi'kmaq of Nova Scotia")

– and –

HER MAJESTY THE QUEEN IN RIGHT OF NOVA SCOTIA as represented by the
Minister of Aboriginal Affairs
(“Nova Scotia”)

– and –

HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by the Minister of
Indian Affairs and Northern Development
(“Canada”)

Collectively referred to as “the Parties”

THE PARTIES agree as follows:

CONSULTATION TABLE

1. The Parties shall establish a Consultation Table.
2. Each Party shall appoint one or more persons to represent them at the Consultation Table.
3. The Mi'kmaq of Nova Scotia intend to participate in the Consultation Table through a committee appointed by and reporting to the Assembly of Nova Scotia Mi'kmaq Chiefs (the “Assembly”) as a standing committee of the Assembly (the “Committee”). The composition of the Committee may change from time-to-time and from consultation-to-consultation, at the discretion of the Assembly.

4. (1) The Parties acknowledge that the Committee only has the authority delegated to it by the Assembly, and that the Assembly and the Committee have no authority to bind or make commitments on behalf of any of the thirteen (13) Mi'kmaq First Nations (Bands) affected by a particular consultation without the consent of the affected First Nation(s) (Band[s]).

(2) If a First Nation (Band) receives a notice under Article 9 a. and declines to delegate authority or be represented in respect of that matter by the Committee pursuant to these Terms of Reference, Government shall not conduct consultations respecting that First Nation (Band) through the Consultation Table provided for herein.
5. Each Party may invite additional representatives to participate at the Consultation Table as needed, depending on the issues under discussion.
6. If Canada or Nova Scotia does not give notice under Article 9 a., it may participate only as an observer in the consultation process established through these Terms of Reference.
7. The Consultation Table may agree, by consensus, upon procedures to be followed to implement the principles in Article 9.
8. Where notice has been given pursuant to Article 9 a., the Parties concerned may agree that, notwithstanding Article 7, specific procedures shall be followed in respect of that consultation.

PRINCIPLES OF CONSULTATION PROCESS

9. The consultation process shall operate on the following principles:
 - a. Notification in writing by a federal or provincial department or agency to any affected Mi'kmaq First Nation (Band) and the Assembly of Nova Scotia Mi'kmaq Chiefs ("Assembly") that formal, with prejudice consultation respecting a particular decision, activity or subject matter is intended;
 - b. An opportunity for the affected First Nations (Bands) and the Assembly to delegate authority to the Committee to respond on their behalf to the request for consultation;
 - c. Notification by the Committee to the Consultation Table that authority has been delegated as set out in b.;
 - d. Provision of sufficient information to the Committee regarding the proposed decision, activity or subject matter to permit the Mi'kmaq of Nova Scotia to assess the impact on lands, waters, natural resources or subject matters of significance to them;
 - e. Reasonable time to consider and discuss the information, having regard to any time constraints;
 - f. Opportunities for identifying the basis of the claim and any issues or concerns of the Mi'kmaq of Nova Scotia;

- g. Consultations in good faith with the substantive objective of addressing reasonable Mi'kmaq issues and concerns, identifying potential accommodations, if any, and, if agreed to by the Parties concerned, settling and resolving Mi'kmaq claims of infringement, including, if appropriate, providing financial consideration or other redress;
- h. Notification to the Committee of any decision or determination reached by Canada or Nova Scotia, including responses to the issues or concerns raised, and notification of specific accommodations, if any, as a result of the consultation; and
- i. The right of each First Nation (Band) at any time to terminate any delegation of authority it has made to the Committee and to conduct the consultation itself.

WHEN AVAILABLE

- 10. The consultation process under these Terms of Reference is available whenever Government wishes to consult with one or more Mi'kmaq First Nations (Bands), including with respect to decisions and activities concerning Crown lands, waters or natural resources, and the affected First Nation(s) (Band[s]) consent(s) to be represented by the Committee referred to in Article 3.
- 11. The Parties intend that the consultation process under these Terms of Reference be as efficient and effective as possible to help it become the preferred choice for consultations by Canada and Nova Scotia with the Mi'kmaq of Nova Scotia.
- 12. These Terms of Reference do not constitute a commitment by any Party to reach agreement or to undertake consultation in respect of any particular decision, activity or subject matter.

PROCESS OPTIONAL

- 13. The Parties acknowledge that the consultation process established through these Terms of Reference:
 - a. is optional; and
 - b. does not limit the ability of the Parties to engage in consultation independent of the consultation process set out in these Terms of Reference.
- 14.
 - a. Where notice has been given pursuant to Article 9 a., the Parties concerned may agree in writing that, notwithstanding Article 13, all consultations on the subject matter of the notice shall take place thereafter through the consultation process established by these Terms of Reference.
 - b. Where the Parties concerned so agree under subsection a., any other discussion, meeting or communication occurring after the agreement referred to in Article 14 a., and all records or information that disclose the content of any such discussion, meeting or communication, are not, and shall be construed and deemed not to be,

consultation for the purpose of justification by Canada or Nova Scotia for the infringement of any Mi'kmaq Aboriginal rights, including Aboriginal title, or treaty right, and the Parties concerned shall not seek admission of, or voluntarily tender evidence respecting those discussions in a court of law or in any administrative, adjudicative or regulatory tribunal or board, and such matters shall be deemed to be privileged.

15. Notwithstanding anything in these Terms of Reference, the Parties concerned may:
 - a. Terminate by written notice any consultation process conducted pursuant to these Terms of Reference;
 - b. Terminate by written notice any agreement made under Article 14 a.; and
 - c. Comply with any process required by statute or regulation.

CONFIDENTIALITY

16. This document is not confidential and may be made public and tendered as evidence in a court of law or other legal proceeding.
17. In respect of any consultation conducted pursuant to these Terms of Reference, records and information may be provided to the Consultation Table and received by it in confidence. In each case where information is intended to be provided, received and held in confidence, the Party providing the information shall so notify the other Party or Parties participating at the Consultation Table in respect of that consultation. The Parties concerned at the Consultation Table shall determine whether the record or information in question should be provided, received and held in confidence. If the Consultation Table determines the records or information should be provided and received in confidence, any such record or other record containing the information shall be marked to indicate it was provided and received in Confidence. It is the intention of the Parties that any such record and information be held in confidence and not disclosed publicly or pursuant to freedom of information legislation, unless such disclosure is required by law.
18. Notwithstanding Article 17, any Party may tender as evidence in a court of law or other legal proceeding records and information provided, received and held in confidence at the Consultation Table if the record or information is relevant to an issue of whether a duty to consult was or was not met or fulfilled through the consultation process conducted pursuant to these Terms of Reference.

PARTIES MAY PROCEED WITHOUT PREJUDICE

19. Notwithstanding any other provision of these Terms of Reference, the Parties have the option of determining that, at any time prior to or during consultations, discussions may be held and information exchanged, until further notice, on a without prejudice basis, in order to:

- a. Permit frank, cooperative and solution-oriented interaction without concern for the legal significance of admissions, concessions, positions and discussions for the period of time specified or agreed upon;
 - b. Develop recommendations to modify and improve process and structures;
 - c. Address priority issues identified by any Party, including processes for formal consultation that may be referred to in a court of law or in any administrative, adjudicative or regulatory tribunal or board, until the effective date of a Mi'kmaq of Nova Scotia Accord.
20. Where the Parties agree to proceed on a without prejudice basis pursuant to Article 19, the Parties agree that those discussions and all records, information or communications that disclose the content of those discussions are:
- a. Not required, are not intended and shall not be construed so as to discharge, in whole or in part, any fiduciary obligation owed by Canada and Nova Scotia to the Mi'kmaq of Nova Scotia;
 - b. Without prejudice to Mi'kmaq Aboriginal rights, including Aboriginal title, and treaty rights and the legal rights of, and positions taken by, any of the Parties in any legal proceeding, and shall not be construed as admissions of fact or liability;
 - c. Deemed not to recognize, deny, create, define, alter or affect Mi'kmaq Aboriginal rights, including Aboriginal title, and treaty rights and the legal rights or positions of any of the Parties; and
 - d. Construed not to be, and deemed not to be, consultation for the purpose of justification by Canada or Nova Scotia for the infringement of any Mi'kmaq Aboriginal right, including Aboriginal title, or treaty right.
21. Where the Parties agree to proceed on a without prejudice basis pursuant to Article 19, the Parties shall not seek admission of, or voluntarily tender, evidence respecting these discussions in a court of law or in any administrative, adjudicative or regulatory tribunal or board, and such matters shall be deemed to be privileged.
22. The Parties will cooperate to oppose the use or attempted use by anyone not a Party, in any court or other adjudicative forum, whether administrative, civil, prosecutorial or regulatory, of any evidence of the without prejudice discussions referred to in Article 19.
23. The benefit of Articles 19 - 23 shall accrue to, and the undertakings of the Parties shall apply in respect of, all thirteen (13) Mi'kmaq First Nations (Bands) in Nova Scotia, their governing Chiefs and Councils and their members, the Assembly of Nova Scotia Mi'kmaq Chiefs, The Confederacy of Mainland Mi'kmaq, the Union of Nova Scotia Indians, Nova Scotia and Canada.

POSITION OF THE MI'KMAQ OF NOVA SCOTIA RESPECTING CONSULTATIONS OUTSIDE THE TABLE AND PROCESS ESTABLISHED UNDER THESE TERMS OF REFERENCE

24. In respect of any discussions, meetings or other communications between either or both of Canada and Nova Scotia, and the Mi'kmaq of Nova Scotia or any entity referred to in Article 23, other than through the Consultation Table and consultation process referred to in Articles 1-23, the position of the Mi'kmaq of Nova Scotia is that all such discussions, meetings and other communications are not, and cannot be considered, consultation by Canada or Nova Scotia so as to justify possible infringement of Mi'kmaq Aboriginal rights, including Aboriginal title, or treaty rights, and that any evidence of such discussions, meetings or other communications should not be admitted or accepted as evidence of consultation with the Mi'kmaq of Nova Scotia, or any entity referred to in Article 23, in a court of law or other legal proceeding, unless such discussions, meetings or other communications were conducted in accordance with the following principles:
- a. Canada, Nova Scotia, or the relevant federal or provincial department or agency must give notice in writing that it or they, as the case may be, wish to consult with the Mi'kmaq in Nova Scotia;
 - b. The notice referred to in Article 24 a. must be given to the Chiefs and Councils of all thirteen (13) Mi'kmaq First Nations (Bands) in Nova Scotia, or as many of them as Canada or Nova Scotia determines may be any affected by the proposed decision or activity; and
 - c. The Chiefs and Councils of the Mi'kmaq First Nations (Bands) must be provided with sufficient time, resources (including funding), and information about the proposed decision or activity to permit them to prepare their views on the matter.
25. The further position of the Mi'kmaq of Nova Scotia is that Mi'kmaq Aboriginal rights, including Aboriginal title, and treaty rights in Nova Scotia are the rights of all Nova Scotia Mi'kmaq, and consider decisions and activities by Canada and Nova Scotia that might infringe those rights to be the communal concern of all Mi'kmaq First Nations and their Chiefs and Councils in Nova Scotia.
26. The further position of the Mi'kmaq of Nova Scotia is that the principles respecting consultation expressed in Articles 24 and 25 are not exhaustive, but rather are minimal principles applicable when Canada or Nova Scotia wish to engage in consultations respecting any decision or activity by them, or either of them, that might affect Mi'kmaq Aboriginal rights, including Aboriginal title, or treaty rights in Nova Scotia.
27. In formulating their respective approaches on consultation, Canada and Nova Scotia shall consider the views of the Mi'kmaq of Nova Scotia as expressed in Articles 24-26.

FUNDING

28. Certain contribution funding as determined by Canada and Nova Scotia will be provided to the Mi'kmaq of Nova Scotia to allow them to create and operate the Committee and to participate in the Consultation Table. Such funding will be provided based on consideration of an annual budget and subject to annual appropriations.

29. Each of Canada and Nova Scotia will consider how to fund the requirements of specific consultations respecting their proposed decisions or activities.

REVIEW OF TERMS OF REFERENCE

30. The Parties will jointly review, prior to the second anniversary of the signing of these Terms of Reference, the extent to which the Parties have utilized, and the operational experience with, the optional Consultation Table and process herein. The objectives of the review are to:
- 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.

TERMINATION OF AGREEMENT

31. The Terms of Reference of the Consultation Process shall come into force and effect on the date of its signature and shall continue in force and effect unless terminated by one or more of the Parties upon three (3) months written notice to the other Parties hereto.

AMENDMENT

32. These Terms of Reference may be amended with the written consent of the Parties.