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# Policy Brief

## ***The Duty to Consult with Non-Status Indians: Mi'kmaq Politics and Crown Responsibilities in Nova Scotia***

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*by*

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## Introduction

While the duty to consult is emerging as a significant doctrine for Aboriginal policy development from recent jurisprudence, its implementation remains challenging. There are particular legal uncertainties surrounding its application to Métis and non-status Indians, which can constrain consultation processes and require specific policy attention. Focussing on the position of non-status Indians, the aim of this policy brief is to identify key considerations for both government and Aboriginal negotiators to ensure the participation of non-status Indians in consultation processes. The policy brief is a condensed version of a more substantial research paper, which draws from a discussion of the non-status Mi'kmaq in ongoing tripartite negotiations in Nova Scotia.<sup>1</sup> The context and findings from this study will be outlined briefly here to indicate its conclusions and their relevance for policy development. In more detail, the policy brief will discuss the duty to consult and its implementation with non-status Indians and Métis, as well as some considerations on how to facilitate this.

## The Duty to Consult with Non-Status Indians and Métis

Since 2004, three decisions by the Supreme Court of Canada (SCC) -- (*Haida Nation*,<sup>2</sup> *Taku River Tlingit First Nation*,<sup>3</sup> and *Mikisew Cree First Nation*<sup>4</sup>) have outlined the scope of the Crown's duty to consult with and accommodate Aboriginal communities whose constitutional rights<sup>5</sup> will potentially be infringed by a proposed undertaking. Notably, the duty applies even if claims to those rights have not yet been

settled.<sup>6</sup> However, the extent to which the Crown has to consult with and accommodate Aboriginal stakeholders depends on the significance of the claims (settled or unsettled) and the potential infringement thereof.<sup>7</sup> Therefore, the legal duty to consult – while arguably not furthering reconciliation, self-government or veto power<sup>8</sup> of Aboriginal peoples – has important implications for both government policies and Aboriginal strategies in negotiations and litigation. The case law cited above pertains to First Nations communities, but it is formulated to extend to all Aboriginal people, including Métis<sup>9</sup> and potentially also non-status Indians. However, much uncertainty revolves around two important prerequisites for the consideration of these groups under the duty to consult: First, can Métis and non-status Indians be beneficiaries of communally held section 35 rights? And second, is there a representative entity for the affected community that can serve as its consultation partner for the Crown?

The political representation of and advocacy for Métis has been troubled by contestations surrounding Métis identity, identification criteria and representation amongst both the provincial and multiple smaller Métis organizations.<sup>10</sup> The

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<sup>1</sup> Bernard Huber, "The Duty to Consult with Non-Status Indians: Mi'kmaq Politics and Federal Responsibilities in Nova Scotia," Institute on Governance (IOG), Ottawa (2010).

<sup>2</sup> *Haida Nation v. British Columbia (Minister of Forests)*, (2004), 3 S.C.R. 511.

<sup>3</sup> *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, (2004), 3 S.C.R. 550.

<sup>4</sup> *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, (2005), 3 S.C.R. 388.

<sup>5</sup> Constitutional rights are protected under section 35 of the *Constitution Act*, 1982.

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<sup>6</sup> Gordon Christie, "Developing Case Law; The Future of Consultation and Accommodation." *UBC Law Review* 39 (2006): 139-84.

<sup>7</sup> The spectrum of action required by the Crown to fulfill the duty to consult thus ranges from merely giving notice and considering Aboriginal responses to engaging in "deep consultation" and substantial accommodation (changing proposed activities to minimize rights infringement). *Haida Nation v. British Columbia (Minister of Forests)*, (2004), 3 S.C.R. 511 at paras. 43-45. See also Dwight Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich, 2009).

<sup>8</sup> For a critical analysis to what extent the duty to consult perpetuates assimilation and reconciliation, see Christie, "Developing Case Law; The Future of Consultation and Accommodation."

<sup>9</sup> Thomas Isaac, *Métis Rights*, Contemporary themes in Aboriginal law. Monograph series 2 (Saskatoon, Sask.: Native Law Centre, University of Saskatchewan, 2008), 44.

<sup>10</sup> For a review of the dynamics between different Métis organizations in Ontario and categories of "real

political representation of non-status Indians is even less certain, since there is no clarity surrounding the constitutional status and rights of non-status Indians. Nevertheless, some lower court decisions (notably for this context: *Chevrier*,<sup>11</sup> *Fowler*<sup>12</sup> and *Lavigne*<sup>13</sup>) have affirmed treaty-based harvesting rights to non-status Indians who could prove their ancestral connection to the community of treaty signatories.<sup>14</sup>

Initial certainty for the existence of Métis Section 35 rights was provided by the SCC *Powley*<sup>15</sup> decision, which established the constitutional protection of Métis people, their customary harvesting rights, as well as criteria for the identification of *Powley* beneficiaries amongst Métis people.<sup>16</sup> The emergence of *Powley* rights and the duty to consult with Métis people have triggered significant policy development regarding Métis resource access and consultation processes. However, much uncertainty remains over the implementation of *Powley* rights, the representation of Métis in consultation processes, and other aspects of Métis rights.

Métis and non-status Indians share a marginalized position within the Aboriginal landscape, as both their Aboriginal rights and

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Métis” and “other Métis”, see Annette Chretien, “From the ‘Other Natives’ to the ‘Other Métis.’” *Canadian Journal of Native Studies* 28, no. 1 (2008).

<sup>11</sup> *R. v. Chevrier* (1989), 1 C.N.L.R. 128

<sup>12</sup> *R. v. Fowler* (1993), 134 N.B.R. (2d) 361

<sup>13</sup> *R. v. Lavigne* (2007), 319 N.B.R. (2d) 261, 4 C.N.L.R. 268

<sup>14</sup> Pamela D. Palmater, “An Empty Shell of a Treaty Promise: *R. v. Marshall* and the Rights of Non-Status Indians,” *Dalhousie Law Journal* 23 (2000).

<sup>15</sup> *R. v. Powley* (2003), 2 S.C.R. 207.

<sup>16</sup> Robert K. Groves and Bradford W. Morse, “Constituting Aboriginal Collectivities: Avoiding New Peoples In Between,” *Saskatchewan Law Review* 67 (2004). The three criteria central to the *Powley* test are self-identification, ancestral connection and community acceptance. Although ancestral connection has developed as a central criterion to test an individual claimant’s entitlement to Aboriginal rights, Olthuis argues that this neither honors the communal nature of Aboriginal rights, nor the intent of section 35. Olthuis, “The Constitution’s Peoples: Approaching Community in the Context of Section 35 of the Constitution Act, 1982”, 40.

identities have been contested by First Nations groups and non-native people. Given the jurisprudential and scholarly arguments that Aboriginal rights and the duty to consult are owed to all Aboriginal people,<sup>17</sup> identifying potential non-status beneficiaries is essential. Yet such identification can be subject to conflicts over Aboriginal identity, entitlements and political representation, as the case of the Mi’kmaq nation shows.

### **The Duty to Consult and the Made-in-Nova Scotia Process**

The Made-in-Nova Scotia Process aims to negotiate a tripartite agreement that establishes Mi’kmaq self-government in Nova Scotia. To this end, a central element is the establishment of a “Mi’kmaq citizenship” for all people identified as beneficiaries of Mi’kmaq rights – which would likely include some non-status Mi’kmaq.

According to the Framework Agreement of the Made-in-Nova Scotia Process, the “‘Mi’kmaq of Nova Scotia’ include all members of the thirteen (13) Mi’kmaq First Nations (Bands) in Nova Scotia, whether they reside on or off-reserve, and *other persons of Mi’kmaq heritage* who are beneficiaries of Mi’kmaq rights and title applicable in Nova Scotia”.<sup>18</sup> The Framework Agreement and its Terms of Reference<sup>19</sup> further stipulate that a committee appointed by the Chiefs is the only consultation partner to represent all Mi’kmaq in Nova Scotia.

First Nation Chiefs can claim to represent both on- and off-reserve Band members, but not non-

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<sup>17</sup> These arguments are presented at greater length in the full length paper associated with this policy brief.

<sup>18</sup> The Thirteen Mi’kmaq Saqmaq [Chiefs], Minister of Aboriginal Affairs, and Minister of Indian Affairs and Northern Development. “Mi’kmaq - Nova Scotia - Canada Framework Agreement” <http://www.gov.ns.ca/abor/officeofaboriginalaffairs/whatwedo/consultation>. Emphasis added.

<sup>19</sup> The Thirteen Mi’kmaq Saqmaq [Chiefs], Minister of Aboriginal Affairs, and Minister of Indian Affairs and Northern Development. “Terms of Reference for a Mi’kmaq-Nova Scotia-Canada Consultation Process” <http://www.gov.ns.ca/abor/officeofaboriginalaffairs/whatwedo/consultation>.

status Indians. In Nova Scotia, the Native Council of Nova Scotia (NCNS) aims to represent off-reserve and non-status Mi'kmaq as well as Métis, but its representativity as a consultation partner has been contested both in the courts<sup>20</sup> and by Mi'kmaq Chiefs. So far, the NCNS has not been consulted in regards to the Made-in-Nova Scotia Process and considers itself excluded by the Chiefs.

Both provincial and federal governments face certain barriers in attempting to consult with non-status Mi'kmaq and are therefore relying on the Mi'kmaq chiefs to bring the NCNS to the table and agree on joint representation in the Made-in-Nova Scotia Process. First, it is unclear how the governments could consult with non-status Mi'kmaq directly, as it is uncertain that the NCNS (the only potential consultation partner) can legally represent this undefined community.<sup>21</sup> Second, there is a legal and historical bias for provincial, and especially federal, government agencies to operate according to the constraints of the *Indian Act* and recognize solely elected First Nations Chiefs and Councils as legal representatives and consultation partners. Third, honouring the Framework Agreement may be essential to maintaining the constructive working relationship that the Chiefs and government negotiators have established over recent years.

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<sup>20</sup> *Native Council of Nova Scotia v. Canada (Attorney General)* (2007), 2 C.N.L.R. 233. The NCNS claimed that the federal Department of Fisheries and Oceans (DFO) had not sufficiently honoured its duty to consult with the NCNS before halving the lobster quota of NCNS's fishing agreement in order to curtail overfishing. The court dismissed the claim, because the NCNS could not sufficiently prove that it represents a community of section 35 rights-holders. The Federal Court of Appeal confirmed the decision and decided not to comment on whether the NCNS was a valid consultation partner in the given context. *Native Council of Nova Scotia v. Canada (Attorney General)* (2008), 3 C.N.L.R. 286

<sup>21</sup> See footnote 21. Nevertheless, E1, independent expert in Aboriginal rights, suggests that courts may acknowledge the NCNS's representativity of its *active* members, which constitute a community of interest, mandate the NCNS to represent them and to whom the NCNS is accountable. These three elements of representativity, E1 suggests, need not be established in writing but can be fulfilled *de facto*.

However, the Framework Agreement cannot override the legal duty to consult with all Mi'kmaq – a duty the current government strategy may not fulfill.<sup>22</sup> This strategy is also not necessarily in line with the consultation policies that both governments have developed in response to the duty to consult. For example, the 2008 federal “Interim Guidelines” suggest that “Aboriginal groups who have an interest in or who may be affected by the decision” should be granted access to the consultation process beyond those whose rights may be affected.<sup>23</sup> Similarly inclusive, the 2007 “Interim Consultation Policy” of the Province of Nova Scotia lists the NCNS as a possible consultation partner in addition to the Mi'kmaq Chiefs.<sup>24</sup> This policy also reminds its departments that consultation with Aboriginal people can be undertaken for policy reasons without being legally required. Although their consultation policies seem to allow for more direct consultation with non-status Indians—as required by the duty to consult—political and legal barriers limit both governments to consulting with the non-status Mi'kmaq in the Made-in-Nova Scotia Process.

### **Lessons from the Made-in-Nova Scotia Process:**

The case of the Made-in-Nova Scotia Process shows that government negotiators may find themselves in a difficult position if there is legal uncertainty or political contestation over the representativity of a potential consultation partner. The fact that the NCNS maintains mutual working relationships with both provincial and federal government departments

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<sup>22</sup> Interview with G3, Federal government employee.

<sup>23</sup> Canada. “Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult.”

<http://www.ainc-inac.gc.ca/nr/iss/acp/intgui-eng.pdf>.

<sup>24</sup> Province of Nova Scotia. “Consultation With The Mi'kmaq: Interim Consultation Policy.”

<http://www.gov.ns.ca/abor/officeofaboriginalaffairs/whatwedo/consultation>.

In her review of consultation policies, Morellato finds that the Nova Scotian policy responds well to the scope and spirit of the duty to consult and stands out in comparison to other provincial policies developed; Maria Morellato. “Crown Consultation Policies and Practices Across Canada.” National Centre for First Nations Governance (2008).

does not facilitate its participation in tripartite consultation processes, in which the Mi'kmaq Chiefs direct the representation of the Mi'kmaq nation.<sup>25</sup>

The relationship between Mi'kmaq Chiefs and NCNS in Nova Scotia mirrors the nation-scale conflict between the Congress of Aboriginal People (CAP), an umbrella organization for organizations that represent primarily non-status Indians, and the Assembly of First Nations (AFN). While CAP publicly declared the case of *Labrador Métis Nation v. Newfoundland*<sup>26</sup> as a precedent that other CAP affiliates may also qualify as consultation partners, the AFN has since issued a resolution to denounce the Crown consulting with CAP or its affiliates.<sup>27</sup>

More broadly, the case study indicates how the requirements of Aboriginal organizations to participate in consultation processes risks heightening the marginalization of non-status Indians and Métis people, as well as the competition between First Nation and other Aboriginal groups. Newman identifies this as a structural shortcoming of the duty to consult: “Non-status Indians and Métis have already faced much neglect from governments, and *the structure of the duty to consult risks reinforcing this neglect because it is not clear with whom consultation is to occur*. The duty to consult may inadvertently enhance the power of already relatively advanced Aboriginal groups over more disadvantaged ones.”<sup>28</sup>

### Recommendation: Ensure Representativity for the Purposes of Consultation

The lack of representative consultation partner for non-status Mi'kmaq in the Made-in- Nova Scotia Process, as well as case law assessing the representativity of the NCNS<sup>29</sup> and the Labrador Métis Nation (LMN),<sup>30</sup> suggest that Aboriginal organizations may need to adapt their organizational structures to ensure that they can serve as a consultation partner for the Crown. The LMN, for example, represents a specific Aboriginal community in consultation and this is central to its legal representativity. This may not be possible for organizations that represent people of different Aboriginal groups or with differing rights, as the NCNS and many provincial organizations do. An adaptive solution to the requirements of the duty to consult could be the establishment of specific consultation committees within existing organizations that are mandated by rights-holding communities to represent them in consultation.<sup>31</sup>

A related prerequisite for Aboriginal organizations are rigorous and transparent systems of membership registry, especially as Métis and non-status communities are not well captured by governmental or independent databases. Documented membership data can help facilitate consultation and ratification processes, as well as the evaluation of a potential rights infringement.

<sup>25</sup> The full research paper under the same title discusses at length the NCNS's relationships with both government departments and Mi'kmaq Chiefs.

<sup>26</sup> *Labrador Métis Nation v. Newfoundland and Labrador (Minister of Transportation and Works)* (2007), 288 D.L.R. (4th) 641.

<sup>27</sup> AFN, "Resolution No. 42/2007: Denunciation of the Congress of Aboriginal Peoples," Assembly of First Nations <http://www.afn.ca/article.asp?id=4071>. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples*.

<sup>28</sup> Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples*, 71, emphasis added.

<sup>29</sup> *Native Council of Nova Scotia v. Canada (Attorney General)*, (2007), 2 C.N.L.R. 233. And *Native Council of Nova Scotia v. Canada (Attorney General)*, (2008), 3 C.N.L.R. 286. See footnote 20.

<sup>30</sup> *Labrador Métis Nation v. Newfoundland and Labrador (Minister of Transportation and Works)* (2007), 288 D.L.R. (4th) 641. This case established that, in principle, an incorporated agent (such as the LMN or the NCNS) can be consulted on behalf of a community of Aboriginal people to whom the duty to consult is owed. Importantly, the memorandum of the LMN also includes a specific mandate to act as a consultation partner for the Labrador Métis community.

<sup>31</sup> Interview with Dwight Newman, Associate Professor of Law, University of Saskatchewan.

Significantly, the Crown has a policy interest to fund the development of both Métis and non-status Indian organizations to ensure that they can serve as consultation partners. In the context of the duty to consult, this goes both ways: affected Aboriginal communities can participate in the consultation process effectively and government agencies can engage with a legally representative consultation partner. In cases where a community needs to be consulted but no consultation partner can be identified, the proposed project remains open to legal challenges by stakeholders with whom no consultation has taken place.

### **Conclusion**

The duty to consult emerges at a time when negotiated agreements seek to reconcile colonial legacies and forge new partnerships for self-government. While the development of First Nation groups may continue to require the bulk of public attention and funding, non-status and Métis groups require more comprehensive organizational representation and specific policy attention to benefit from the duty to consult.

Both government agencies and First Nation groups will have to support the political representation and consultation of non-status Indians and Métis people for the Crown to fulfill its duty to consult and act honourably toward all Aboriginal peoples of Canada.