RECEIVED
By Nova Scotia Aquaculture Review Board at 3:06 pm, Nov 21, 2025

2023 NSARB 2023-001

NOVA SCOTIA AQUACULTURE REVIEW BOARD

IN THE MATTER OF: *Fisheries and Coastal Resources Act*, SNS 1996, c 25

- and –

IN THE MATTER OF: An Application by KELLY COVE SALMON LTD for a boundary amendment and expansion for the cultivation of Atlantic salmon (*Salmo salar*) - AQ#1205x, in Liverpool Bay, Queens County (the "Application")

BETWEEN:

Kelly Cove Salmon Ltd. (KCS)

APPLICANT

and

Minister of Nova Scotia Department of Fisheries and Aquaculture (DFA)

PARTY

and

Kwilmu'kw Maw-klusuaqn Negotiation Office (KMKNO)

22 Fishermen of Liverpool Bay

Region of Queens Municipality (RQM)

Protect Liverpool Bay Association (PLBA)

INTERVENORS

CLOSING SUBMISSION ON BEHALF OF KWILMU'KW MAW-KLUSUAQN

November 21, 2025

Robert Grant, KC, Sara D. Nicholson, and David Barry
Stewart McKelvey
600-1741 Lower Water Street
Box 997 Halifax, NS B3J 0J2
Counsel on behalf of the Applicant, Kelly Cove Salmon Ltd.

Caitlin Menczel-O'Neill and Alison Campbell
Department of Justice Legal Services Division
1690 Hollis Street
Joe Howe Building
Halifax, NS B3J 1V7
Counsel on behalf of the Department of Fisheries and Aquaculture

Jessica Ginsburg
Kwilmu'kw Maw-klusuaqn
75 Treaty Trail
Truro, NS B6L 1W3
Counsel on behalf of Kwilmu'kw Maw-klusuaqn

Natasha Puka
McInnes Cooper
1969 Upper Water Street, Suite 1300 McInnes Cooper Tower - Purdy's Wharf Halifax NS B3J 2V1
Counsel on behalf of the Region of Queen's Municipality

Jamie Simpson
Juniper Law
PO Box 20116
Halifax RPO
Spryfield, NS B3R 2K9
Counsel of behalf of 22 Fishermen

James Gunvaldsen Klaassen, Kacie Oliver and Ella Johnson (Articled Clerk)
Ecojustice
520-1801 Hollis St
Halifax, NS B3J 3N4
Counsel on behalf of Protect Liverpool Bay Association

The Consultation and Accommodation Doctrine:

Why does the duty to consult exist? "The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown."[1] The Crown is under an obligation to act honourably in all of its dealings with Indigenous peoples, and consultation and accommodation is "part of a process of fair dealing and reconciliation."[2] Two of the leading cases in the duty to consult jurisprudence, *Haida Nation* v. *British Columbia (Minister of Forests)* in the Aboriginal rights context and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* in the treaty rights context, set out the tests for when the duty to consult and accommodate is triggered, and how to assess the scope or content of the consultation and accommodation owing. In those cases, the Supreme Court of Canada held that:

1) "[T]he duty to consult is triggered when the "Crown has knowledge, **real or constructive**, of the **potential existence of the Aboriginal right or title** and **contemplates conduct** that might **adversely affect** it."[3] [Emphasis added]
2) "The **scope** of the duty [to consult] is proportionate to a **preliminary assessment** of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed."[4] [Emphasis added]
3) Regardless of the scope or content of consultation owed, "[t]he common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised"[5]
4) At the stage of **accommodation**, "[w]here a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim."[6]
5) "Consultation that excludes from the outset any form of accommodation would be meaningless."[7]
6) "The Crown may **delegate procedural aspects of consultation** to industry proponents seeking a particular development…However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated."[8]

What is meant by some of these key terms?

"Real or constructive" Crown knowledge refers to situations where:

---

[1] *Haida Nation* v. *British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at 16 [hereinafter *Haida Nation*].
[2] *Ibid*. at 32.
[3] *Ibid*. at 35.
[4] *Ibid*. at 39.
[5] *Ibid*. at 42.
[6] *Ibid*. at 47.
[7] *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 at 54 [hereinafter *Mikisew Cree*].
[8] *Haida Nation*, *supra* note 1 at 53.

a) the Crown has **actual knowledge** of a claimed right, such as when a claim has been filed in court or when the right being impacted is a treaty right.[9] Since the Crown is a party to the treaties, it will always have notice of their contents;[10] or

b) where the Crown has **constructive knowledge** of a claimed right, which includes situations:

> [W]hen lands are known or reasonably suspected to have been traditionally occupied by an Aboriginal community or an impact on rights may reasonably be anticipated. While the existence of a potential claim is essential, proof that the claim will succeed is not.[11]

The federal government elaborates upon the interpretation of "constructive knowledge" in its "Guidelines for Federal Officials to Fulfill the Duty to Consult":

> **Constructive knowledge:** *Black's Law Dictionary (Eighth Edition)* states: "Knowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person". Therefore, <u>if one part of the Crown has knowledge of potential rights, other Crown entities will be deemed to know</u>.[12] [Emphasis added]

Potential existence of the Aboriginal right or title refers to asserted or established Aboriginal or treaty rights. Section 35(1) of the *Constitution Act, 1982* recognizes and affirms the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada. In order to trigger the duty to consult, such rights need only be credibly asserted, not proven: "[k]nowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate."[13] Similarly, "while the existence of a potential claim is essential, proof that the claim will succeed is not. What is required is a credible claim."[14] This is a low bar to meet. More tenuous claims may result in consultation being triggered but at a lower scope.

With respect to treaty rights, although there may be some debate as to the scope of the treaty rights, as a question of law there can be no question that the Crown has knowledge of the treaties' contents and that First Nations are entitled to those rights guaranteed to them by treaty:

> <u>In the case of a treaty the Crown, as a party, will always have notice of its contents</u>. The question in each case will therefore be to determine the degree to which conduct contemplated by the Crown would adversely affect those rights so as to trigger the duty to consult. *Haida Nation* and *Taku River Tlingit First Nation* set a low threshold.[15] [Emphasis added]

---

[9] *Rio Tinto Alcan Inc*. v. *Carrier Sekani Tribal Council*, [2010] 2 SCR 650 at 40 [hereinafter *Carrier Sekani*].
[10] *Mikisew Cree, supra* note 7 at 34.
[11] *Carrier Sekani, supra* note 9 at 40.
[12] Government of Canada, "Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult - March 2011," online: <www.rcaanc-cirnac.gc.ca/eng/1100100014664/1609421824729> [hereinafter "Federal Guidelines"].
[13] *Haida Nation, supra* note 1 at 37.
[14] *Carrier Sekani, supra* note 9 at 40.
[15] *Mikisew Cree, supra* note 7 at 34.

The job of a tribunal tasked with assessing the adequacy of consultation is not to "determine the validity of the claimed aboriginal right. The merits of the underlying right await the appropriate trial process: *Ktunaxa Nation*, *supra*, paras. 84-85."[16]

Contemplated Crown conduct refers to the types of Crown actions or decision making that can trigger the duty to consult. The honour of the Crown requires consultation "prior to making a decision that might adversely affect the claimed Aboriginal title and rights."[17] Courts often describe the relevant Crown conduct as being the "final decision" to approve a project that has the potential to adversely affect rights.[18]

Potential adverse effects of the proposed Crown conduct is a concept that involves both a measure of likelihood and a measure of severity of the adverse effect. In terms of likelihood, claimants are required to "show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights"[19] and "mere speculative impacts" will not suffice.[20] The adverse effects need not be a certainty; the potential that the adverse effect will transpire is sufficient as long as the possibility is more than speculative.

The adverse effects need not have an immediate physical impact on lands and resources, and can include "high-level management decisions or structural changes to the resource's management"[21]:

> This is because such structural changes to the resources management may set the stage for further decisions that will have a *direct* adverse impact on land and resources. For example, a contract that transfers power over a resource from the Crown to a private party may remove or reduce the Crown's power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown. The Aboriginal people would thus effectively lose or find diminished their constitutional right to have their interests considered in development decisions.[22]

The measure of severity or seriousness of the adverse impact is a factor in the consultation scoping analysis, as discussed under the "preliminary assessment" discussion below.

Accommodation is intended to "avoid, eliminate, or minimize the adverse impacts on potential or established Aboriginal or Treaty rights, and when this is not possible, to compensate the Aboriginal community for those adverse impacts. In some circumstances, appropriate accommodation may be a decision not to proceed with the proposed activity."[23] As the Supreme Court of Canada noted in *Mikisew Cree*, "[c]onsultation that excludes from the outset any form of accommodation would be meaningless."[24] The decision maker should enter the consultation exercise with an open mind, without presuming the proposal will proceed in its

---

[16] *Nova Scotia (Attorney General)* v. *Nova Scotia (Utility and Review Board)*, 2019 N.S.C.A. 66 at 37 [hereinafter *Nova Scotia (Utility and Review Board)*].
[17] *Haida Nation, supra* note 1 at 67.
[18] *Nova Scotia (Utility and Review Board)*, *supra* note 16 at 85.
[19] *Carrier Sekani, supra* note 9 at 45.
[20] *Ibid*. at 46.
[21] *Carrier Sekani, supra* note 9 at 47.
[22] *Ibid*.
[23] "Federal Guidelines," *supra* note 12.
[24] *Mikisew Cree*, *supra* note 7 at 54.

current configuration, or proceed at all. When impacts cannot be avoided entirely, efforts should be directed to changing the proposal to minimize or mitigate such impacts. Since proponents typically have the greatest awareness of the technical aspects of their project, they often play an integral role in informing the discussion of impacts and identifying potential changes that could mitigate impacts.

Reciprocal obligations: Given the heavy emphasis placed by the Nova Scotia Department of Fisheries and Aquaculture (DFA) on the reciprocal obligations of First Nations in consultations, it is worth addressing how this concept is dealt with by the Supreme Court in both *Haida Nation* and *Mikisew Cree*, in an Aboriginal rights and treaty rights context respectively.

In *Haida Nation*, the reciprocal obligation was characterized as follows in an Aboriginal rights context:

> To facilitate this determination, claimants should outline their claims with clarity, focussing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements.[25]
> […]
> As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1999] 4 C.N.L.R. 1 (B.C.C.A.), at p. 44; *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)* (2003), 19 B.C.L.R. (4th) 107 (B.C.S.C.). Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted.[26]

In the treaty rights case *Mikisew Cree*, the Court described it as follows:

> It is true, as the Minister argues, that there is some reciprocal onus on the Mikisew to carry their end of the consultation, to make their concerns known, to respond to the government's attempt to meet their concerns and suggestions, and to try to reach some mutually satisfactory solution. In this case, however, consultation never reached that stage. It never got off the ground.[27]

Both cases also spoke to the *Crown's* obligations in the consultation process. In *Haida Nation*:

> In all cases, the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances. In discharging this duty, regard may be had to the procedural safeguards of natural justice mandated by administrative law.
>
> At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised (*Delgamuukw*, *supra*, at para. 168), through a meaningful process of consultation.[28] [Emphasis added]

---

[25] *Haida Nation, supra* note 1 at 36.
[26] *Ibid*. at 42.
[27] *Mikisew Cree*, *supra* note 7 at 65.
[28] *Haida Nation, supra* note 1 at 41-42.

In *Mikisew Cree* [in respect of a *low-end of the spectrum* consultation process]:

> The Crown is nevertheless under an obligation to inform itself of the impact its project will have on the exercise by the Mikisew of their hunting and trapping rights, and to communicate its findings to the Mikisew. The Crown must then attempt to deal with the Mikisew "in good faith, and with the intention of substantially addressing" Mikisew concerns (*Delgamuukw*, at para. 168).[29] [Emphasis added]
> […]
> This [Crown] engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights. The Crown did not discharge this obligation when it unilaterally declared the road realignment would be shifted from the reserve itself to a track along its boundary. I agree on this point with what Finch J.A. (now C.J.B.C.) said in *Halfway River First Nation* at paras. 159-160.
>
> The fact that adequate notice of an intended decision may have been given does not mean that the requirement for adequate consultation has also been met.
> The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action. [Emphasis added.][30]

Delegation of procedural aspects of consult to a proponent can involve tasks such as meeting with First Nations, exchanging information about the proposed project and its impacts, conducting follow-up studies, and considering alterations to the project to avoid or minimize impacts. However, ultimate legal responsibility for consultation and accommodation rests with the Crown, including assessing the adequacy of consultation and the adequacy of accommodation measures.

A *preliminary assessment* is an assessment conducted by the Crown that takes place at the outset of consultations. The purpose of a preliminary assessment is to determine the correct *scope of consultation*. This assessment is based on two factors: a) the strength of the case supporting the asserted right (where the right is asserted and not already established), and b) the seriousness of the potential adverse effect of the Crown conduct or decision upon the right. In the case of established rights, the focus of the assessment is on this second factor. The province of Nova Scotia utilizes the terminology of “consultation screenings.” In the provincial guidelines entitled “Government of Nova Scotia Policy and Guidelines: Consultation with the Mi’kmaq of Nova Scotia,” it says “[b]efore undertaking any actions related to consultation, a consultation screening should be undertaken to determine whether or not consultation is necessary…[t]he consultation screening is focused on understanding if the contemplated action

[29] *Mikisew Cree, supra* note 7 at 55.
[30] *Ibid*. at 64.

or decision has the potential to adversely impact established and/or asserted Mi'kmaw Aboriginal and/or treaty rights."[31]

The *scope of the duty to consult*, in turn, refers to the extent or content of consultation required. The Supreme Court in *Haida Nation* described the scope of consultation as follows: the lower end of the spectrum applies "where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor"[32] and may require the Crown "to give notice, disclose information, and discuss any issues raised in response to the notice."[33] At the higher end of the spectrum, "where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high,"[34] consultation should be "aimed at finding a satisfactory interim solution"[35] and "may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision."[36] At all levels on the spectrum, "the common thread on the Crown's part must be 'the intention of substantially addressing [Aboriginal] concerns' as they are raised (*Delgamuukw*, *supra*, at para. 168), through a meaningful process of consultation"[37] and "[m]eaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations."[38]

The scope of the duty to consult is not set in stone following the preliminary assessment; the Crown should be open to revisiting the depth of consultation required as new information is gleaned during the consultation process.[39]

Summary argument

As will be demonstrated below, the province has not fulfilled its duty to consult with the Mi'kmaq for a number of reasons:

Preliminary Assessment

- Nova Scotia's preliminary screening assessment failed to take a "whole of government" approach to identifying the province's actual and constructive knowledge of the Mi'kmaq's asserted and established rights.
- Their preliminary screening assessment did not include either of the factors that are required, by law, in identifying the correct scope of consultation. Namely, the screening did not contain an assessment of: a) the strength of the case supporting the right (particularly when dealing with asserted rights), or b) the seriousness of the potential adverse effects of the Crown conduct or decision upon the right.

---

[31] Government of Nova Scotia, "Policy and Guidelines: Consultation with the Mi'kmaq of Nova Scotia," online: <novascotia.ca/abor/docs/April%202015_GNS%20Mi'kmaq%20Consultation%20Policy%20and%20Guidelines%20FINAL.pdf> at Pg 22 [hereinafter Provincial Guidelines].

[32] *Haida Nation, supra* note 1 at 43.

[33] *Haida Nation, supra* note 1 at 43.

[34] *Ibid*. at 44.

[35] *Ibid*.

[36] *Ibid*.

[37] *Ibid*. at 42.

[38] *Ibid*. at 46.

[39] *Clyde River (Hamlet)* v. *Petroleum Geo Services Inc*., [2017] 1 SCR 1069 at 20 [hereinafter *Clyde River*].

- The province did not even acknowledge or incorporate into its screening assessment those *established* Mi'kmaq rights that have been recognized by the Supreme Court of Canada and Nova Scotia Court of Appeal (see examples below in section entitled "Mi'kmaq established and asserted Treaty and Aboriginal rights").
- This resembles the inadequate consultation conducted in *Clyde River,* in which "[n]o consideration was given in the NEB's environmental assessment to the source — in a treaty — of the appellants' rights to harvest marine mammals, nor to the impact of the proposed testing on those rights."[40]
- As a result, the province has not introduced the requisite evidence to substantiate its position that the scope of the duty was properly assessed.

Provincial conduct during the course of consultations

- The Province therefore launched the consultation exercise without sharing any information with the Mi'kmaq regarding the Crown's knowledge of their rights or the Crown's understanding of the potential impacts to their rights posed by this highly technical proposal. Instead, they required the Mi'kmaq to start from square one by identifying "any asserted Aboriginal or Treaty rights that could be adversely impacted by this particular project"[41] within 60 days. The only information about the "particular project" provided in the letter was a link to the Development Plan prepared by Kelly Cove Salmon (KCS), which is a 1000+ page, highly complex document.
- There was no offer of financial assistance to allow the Mi'kmaq to retain their own technical experts to help distill the information or to compensate the First Nation representative for their time, despite the commitment in the *Terms of Reference for a Mi'kmaq-Nova Scotia-Canada Consultation Process* that "[e]ach of Canada and Nova Scotia will consider the funding requirements of consultation respecting each proposed decision or activity."[42]
- It is worth mentioning that there has been no evidence presented to suggest that procedural aspects of consultation were delegated to KCS. We agree that no delegation took place. The actions that KCS took, such as funding the Archaeological Resource Impact Assessment (ARIA), were not done in furtherance of delegated consultation responsibilities and were not part of the Crown's accommodations measures. The province does not suggest otherwise in its decision letter.[43] KCS confirmed in the affidavit of Mr. Nickerson that "the Province did not delegate any of the procedural aspects of the duty to consult to KCS."[44]
- During the course of the consultation process, DFA discounted the Mi'kmaq's rights, as communicated through correspondences and meetings, because the Mi'kmaq struggled to respond to questions that did not appear relevant to the duty to consult analysis and did not accord with the "community-held" (as opposed to individually-held) legal character of such rights (see specifics in section entitled "Mi'kmaq established and asserted Treaty and Aboriginal rights"). The Province already should have had awareness of many, if not all, of these rights through the Crown's actual and constructive knowledge.
- Information gathered prior to or during the consultation process that either strengthened the Mi'kmaq's claim to a particular right or reinforced the significance of a potential adverse impact was not: 1) incorporated into the province's assessment of whether its duty to consult had been fulfilled and whether accommodation measures were required, or 2) communicated to the Mi'kmaq. For instance, the province did not share Fisheries and

[40] *Ibid*. at 45.
[41] Affidavit of Robert Ceschiutti, Exhibit 54 at pg. 4, pdf pg. 9.
[42] Affidavit of Bruce Hancock, Exhibit 73 at pg. 13, s. 19.
[43] Affidavit of Robert Ceschiutti, Exhibit 54 at pg. 229, pdf pg. 234.
[44] Affidavit of Jeffrey Nickerson, Exhibit 44 at pg. 12, para. 53.

Oceans Canada's (DFO) Science Report with the Mi'kmaq or alert them to its contents, even when it directly related to impacts that had been identified by the Mi'kmaq.

- The province did not ask DFO for its feedback on potential impacts that fell squarely within DFO's mandate and areas of expertise. The province also did not bring DFO to the consultation table despite direct requests from the Mi'kmaq.
- Perhaps most egregiously, in its decision letter the Province repeatedly declined to recommend accommodation measures because it had determined the issues raised by the Mi'kmaq were:

> [G]eneral in nature and not specific to the proposed activities identified by the applicant. In addition, the Mi'kmaq of Nova Scotia did not clearly indicate how this issue is related to asserted and established aboriginal rights.[45]

This phrase was inflexibly repeated even when the connections between the Mi'kmaq's concerns and their rights and the KCS proposal were so apparent that any reasonable person would have had no trouble discerning them. This approach by the province, which bordered on willful blindness, erroneously eliminated the entire accommodation phase of the Crown's duty.

- In order to inform the accommodation phase, Nova Scotia was obliged to assess the Mi'kmaq's proven or credibly asserted Aboriginal and Treaty Rights. There is no evidence to suggest this assessment ever took place.
- Additionally, Nova Scotia was obliged to assess whether the project, as applied for, could have a material negative impact on those Aboriginal or Treaty Rights. There is no evidence to suggest this assessment took place, particularly since the province had not first assessed the rights being impacted.
- If Nova Scotia had determined, after proper assessments of rights and impacts, that there were established or credibly asserted Aboriginal or Treaty rights, and an unresolved concern about a material negative impact on those rights, it was required to turn its mind to options which could reduce or eliminate those negative impacts. This did not take place.
- For all of these reasons, the province failed to meet the standard set out in *Haida Nation*: "In all cases, the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances."[46] The province failed to meet its reciprocal obligations, including "informing itself of the impact"[47] the project would have on Mi'kmaq rights, communicating these findings to the Mi'kmaq, and demonstrating "the intention of substantially addressing [Aboriginal] concerns."[48]
- The province failed completely to engage in the accommodation phase, including the requirement "to ensure that their [First Nations] representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action"[49] and the requirement to attempt to minimize adverse impacts on the Mi'kmaq rights.
- By failing to fulfill its duty to consult prior to this point, the province has prolonged the process for KCS by placing before the Aquaculture Review Board (ARB) an application which it should not and cannot approve at this time.

---

[45] Repeated throughout DFA decision letter dated May 1, 2023 found at Affidavit of Robert Ceschiutti, Exhibit 54 at pg. 215, pdf pg. 220.

[46] *Haida Nation, supra* note 1 at 41.

[47] *Mikisew Cree, supra* note 7 at 55.

[48] *Haida Nation, supra* note 1 at 41-42.

[49] *Mikisew Cree, supra* note 7 at 64.

- The ARB has an obligation to assess the adequacy of consultation and cannot approve the KCS application unless it finds that the duty to consult has been fulfilled.
- We therefore submit that the ARB cannot approve the KCS application at this time. Rather, we respectfully request that the Board exercise its authority to deny the application or to adjourn the application for a period of time to allow for further consultation and accommodation to take place, while remaining seized with jurisdiction in this matter.
- The deficiency in the Crown's consultation should not be addressed through the imposition of conditions by ARB for a number of reasons. First, the Board can not and should be make a decision on the merits of the application prior to finding that the duty to consult has been fulfilled. Second, there should be no decision which presupposes any outcome of the consultation process, including a decision which presumes the applications will continue or will continue in their current form and location. The ARB simply is not in a position to presume what accommodation measures would address the Mi'kmaq's concerns at this time.

Role of tribunals in assessing adequacy of consultation:

We refer you to our correspondences to the ARB dated December 14, 2023, January 15, 2024, February 1, 2024, February 21, 2024, September 30, 2025, and October 1, 2025 regarding the role of the ARB in assessing the adequacy of consultation. In the interests of efficiency we shall not repeat our submissions on this issue here. We refer the ARB to one of the leading authorities on the issue: *Clyde River (Hamlet)* v. *Petroleum Geo-Services Inc.*[50] Also included in our book of authorities is *Rio Tinto Alcan Inc*. v. *Carrier Sekani Tribal Council.*[51]

Suffice to say, for our present purposes, the ARB has an obligation to assess the adequacy of consultation, at a minimum, and cannot approve the KCS application unless it finds that the duty to consult has been fulfilled. As with the National Energy Board (NEB) in *Clyde River*, it is our position that the ARB's decision with regard to the KCS application is itself Crown conduct that triggers the duty to consult.[52] The Nova Scotia Court of Appeal made a similar finding with respect to a decision of the Nova Scotia Utility and Review Board in *Nova Scotia (Attorney General)* v. *Nova Scotia (Utility and Review Board)*, where it held "there is direct and probable causation from the Board's decision under s. 35 of the *Public Utilities Act* to the potential adverse effect on the Mi'kmaq interests."[53] In that case, the Court of Appeal upheld the Board's decision to adjourn the application before it to allow additional time for consultation, in light of its finding that consultation had been inadequate.

Mi'kmaq established and asserted Treaty and Aboriginal rights:

Some Mi'kmaq rights are established, including those that have been proven in court. These include:

1. An Aboriginal right to fish: The case *R*. v. *Denny*[54] of the Nova Scotia Court of Appeal confirmed an existing Mi'kmaq Aboriginal right to fish for food, subject to the needs of conservation.

---

[50] *Clyde River, supra* note 39.
[51] *Carrier Sekani, supra* note 9.
[52] *Clyde River, supra* note 39 at 27, 29. See also *Nova Scotia (Utility and Review Board), supra* note 16 at 64.
[53] *Nova Scotia (Utility and Review Board)*, *ibid*. at 156. See also 130.
[54] *R*. v. *Denny*, [1990] 94 N.S.R. (2d) 253 (N.S.C.A.).

2. A Treaty right to harvest fish for the purpose of trade to obtain a moderate livelihood: In *R*. v. *Marshall*,[55] the Supreme Court of Canada found the Mi'kmaq held a treaty right to fish, which was not limited to fishing for food, social and ceremonial purposes but included an economic component – the right to fish for a moderate livelihood (sufficient for securing "necessaries"). It is worth noting that the *Marshall* case specifically involved (but is not limited in its application to) the fishing and selling of eels. Among its findings, the Court noted that:

> [T]he Mi'kmaq people have sustained themselves in part by harvesting and trading fish (including eels) since Europeans first visited the coasts of what is now Nova Scotia in the 16th century.[56]
> […]
> In my view, the 1760 treaty does affirm the right of the Mi'kmaq people to continue to provide for their own sustenance by taking the products of their hunting, fishing and other gathering activities, and trading for what in 1760 was termed "necessaries".[57]

3. An Aboriginal right to harvest wood for domestic uses: In the case *R*. v. *Sappier*,[58] the Supreme Court of Canada confirmed the right to harvest wood for domestic uses such as shelter, transportation, tools and fuel.

Other Mi'kmaq rights have been credibly asserted, some of which are being actively exercised in the area of this application. Many of those assertions are reflected in the documents attached to Mr. Ceschiutti's affidavit at Exhibit 54. For instance:

November 22, 2019 letter from Kwilmu'kw Maw-klusuaqn (KMK) to DFA:

- "The importance of protecting the wild stocks that enter the rivers where community members fish for Food Social and Ceremonial (FSC) purposes is a priority."[59]
- "The American eel has great cultural significance to the Mi'kmaq people."[60]

December 9, 2020 meeting:

- "Impacts on FSC fisheries around the expansion area are of concern to the Mi'kmaq on [*sic*] Nova Scotia."[61]

March 2, 2022 meeting:

- "KMKNO noted that the food fishery is not static, adding there is often movement."[62]
- "Acadia noted that the project as proposed would be taking away some areas where fishing could occur safely."[63]

---

[55] *R*. v. *Marshall*, [1999] 3 S.C.R. 456 [hereinafter *Marshall*].
[56] *Ibid*. at 2.
[57] *Ibid*. at 4.
[58] *R*. v. *Sappier; R*. v. *Gray* [2006] 2 S.C.R. 686.
[59] Affidavit of Robert Ceschiutti, Exhibit 54 at pg. 38, pdf pg. 43.
[60] *Ibid*.
[61] *Ibid*. at pg. 47, pdf pg. 52.
[62] *Ibid*. at pg. 154, pdf pg. 159.
[63] *Ibid*.

- "Acadia noted that lots of fishing occurs in Liverpool Bay itself - people fish all along the Bay and if they are not catching in one place, they move along to another."[64]
- "Acadia further explained that food fishery boats are small vessels with only 1 or 2 people on board, adding that any time a company takes up more ocean bottom, that is another area where community members can't fish."[65]
- "Acadia noted that the community has 1500 - 1600 Band members – in Queens County it has 300 or 400 members and that the membership list growing."[66]
- "Acadia explained that Coffin Island is an area of importance to the Mi'kmaq and that is has been for hundreds of years, adding that community members have fish shacks there."[67]
- "Acadia community members noted personal experience fishing in the area."[68]
- "Acadia underscored their perspective that the proposed expansion will impede the community's FSC and moderate livelihood fisheries "without question"."[69]
- "KMKNO stressed it may not be able to be communicated more clearly than what has already been said. KMKNO added that the Mi'kmaq have continued to move and change where they fish because of obstacles - fishers have been flexible - aquaculture in this area has already changed how they fish."[70]
- "Acadia noted that it provided some rough numbers at yesterday's meeting (approximately 30 community members participate in FSC fishery and those numbers are growing) - numbers of fish tags issued in area - that was minimum fishing in that area, adding that Acadia was describing the summer fishery in that example - when lobsters come inshore (not in winter when the larger commercial fishery is undertaken)."[71]
- "Acadia added that more fishing happens in skiffs - the Mi'kmaq employ a practice called "hooping" in the area - it may not be apparent to others that fishing has been in the area given that traps are not used…Acadia described a process whereby bait is applied to the hoop – the hoop is then dropped to the bottom of the ocean and then hauled back - explaining that they are not left overnight. Acadia explained they are handmade hoops - they are important to people and not left on site."[72]
- "Acadia noted that there are 10,000 years of recorded artifacts through Mersey corridor and that the area is of high importance to the Mi'kmaq."[73]
- "Acadia added that underwater archaeology would be important in that area given the area is of such high importance."[74]
- "KMKNO ARD flagged the high risk nature of the area in terms of archaeology - approximately one quarter of all known Mi'kmaw archaeological sites in Nova Scotia are on the Mersey River - the Mersey was an exceptionally important travel route for the Mi'kmaq."[75]

---

[64] *Ibid*.
[65] *Ibid*.
[66] *Ibid*.
[67] *Ibid*.
[68] *Ibid*.
[69] *Ibid*.
[70] *Ibid*. at pg. 155, pdf pg. 160.
[71] *Ibid*.
[72] *Ibid*.
[73] *Ibid*.
[74] *Ibid*.
[75] *Ibid*.

- "KMKNO ARD noted that there is archaeology on the river itself in addition to on the Island so in between wouldn't be a surprise if resources were located in and around the project site."[76]

June 1, 2022 meeting:

- "KMKNO expressed concern that the company is taking up such important real estate that could be used to fish."[77]
- "KMKNO noted that the number of community members fishing in the area isn't relevant, adding that the Mi'kmaq have continued to be displaced because of commercial fisheries and that the Mi'kmaq have continued to move along, using small vessels, close to shore. KMKNO stressed that it could be 5 members or 500 members - they still have a treaty right to fish."[78]
- "Acadia explained that this was discussed at the meeting with Kelly Cove, adding that in Queens County we have well over 300 Acadia Band members but that there are so many more beyond that. The Native Council of Nova Scotia (NCNS) also has a huge presence in that area."[79]
- "Acadia further explained that many band members engage in lobster fishing in area - for food fishing (3 tags each) plus moderate livelihood which is growing as it becomes sanctioned by DFO. Acadia noted that the area is very accessible and close to the shore for the small food fishery vessels."[80]
- "Acadia repeated serious concern for the displacement of fishers given the large project area which almost takes up the whole coastline of Coffin Island."[81]
- "Acadia noted there is a food fishery in the area around Coffin Island and that commercial fisheries are located there as well."[82]
- "Acadia described Coffin Island as a historic summer place for the Mi'kmaq, stressing the proposed aquaculture expansion could take up the whole shoreline area."[83]
- "Acadia explained there is a district approach to moderate livelihood fisheries – 3 other bands are involved. There will be access for Bear River, Annapolis and Gloosap [*sic*] in Area 33. Access in LFA 33 will grow to include other members of Mi'kmaw communities. Gaspereau and elver fisheries are also being expanded through moderate livelihood and the community anticipates more cooperation in this part of the province."[84]

June 16, 2022 letter from KMK to DFA:

- "The proximity of known archaeological sites, included one located within Liverpool Harbour, Mi'kmaw place names, and longstanding traditional use of the area validate the request for a proper underwater archaeological assessment in Liverpool Bay."[85]

---

[76] *Ibid*.
[77] *Ibid*. at pg. 195, pdf pg. 200.
[78] *Ibid*. at pg. 196, pdf pg. 201.
[79] *Ibid*.
[80] *Ibid*.
[81] *Ibid*.
[82] *Ibid*.
[83] *Ibid*. at pg. 197, pdf pg. 202.
[84] *Ibid*.
[85] *Ibid*. at pg. 200, pdf pg. 205.

- "Impacts to Mi'kmaw archaeological heritage, including loss, disturbance or a lack of detection have the potential to negatively impact Mi'kmaw Rights and Title."[86]

December 14, 2022 letter from KMK to DFA:

- "Providing Kelly Cove with more room to farm their fish, means less area for the Mi'kmaq to fish. This clearly impedes the Mi'kmaw right to fish for food, social and ceremonial purposes as well as for moderate livelihood."[87]

There is also evidence that the DFA was presented with information regarding the Mi'kmaq's rights in the area from other sources. Although DFO was not asked to provide information regarding the exercise of Mi'kmaq rights, they volunteered the following in their Science Review:

- "There are Food, Social, and Ceremonial (FSC) fisheries for Lobster and Eel in Liverpool Bay (DFO Resource Management). All three proposed sites were noted to overlap with identified glass eel (pre-elver) fishing and nursery areas through DFO's Coastal Fisheries Mapping Project (DFO Oceans and Coastal Management Division). Additional information on the size of the area or how specifically juveniles use the coastal habitat around the sites is lacking."[88]

It is unknown what other information DFO may have been able to share regarding the exercise of Aboriginal and treaty rights, had they been asked. The same can be said of the Office of L'Nu Affairs (OLA), and various other provincial and federal departments who were part of the network consultation.

KCS also shared information on Aboriginal fisheries in volume 1 of its application package:

> In 2011, there was an Aboriginal groundfish fishery within 5 km of the Liverpool (#1205) aquaculture site and within Liverpool Bay itself (C. Reynolds, pers. com.). Gillnets and longlines were used in this fishery. In 2015, no reports of an Aboriginal fishery exists in District 28 (C. O'Neil, pers. com.). In 2017, species caught by First Nations in Districts 23, 25, 28, 35 through 39 included cod, haddock, redfish, halibut, greysole/witch, winter flounder, pollock, white hake, monkfish, sculpin, herring, Bluefin tuna, alewives, soft shell clam, quahaug, scallop, lobster and Jonah crab. The First Nations landing data (species, landing weight, and value) is unavailable for specific districts "as it would violate the privacy policy" (A. Campbell pers. com.).[89]

Supporting information regarding rights was also provided in the affidavits of the three witnesses: Justin Martin, Charmaine Stevens, and Heather MacLeod-Leslie. Please see our correspondences dated September 30, 2025 and October 1, 2025 regarding the admissibility of this evidence, and in particular that of Mr. Martin, with respect to ARB's consideration of the adequacy of consultation. In assessing the adequacy of consultation, ARB should consider all the relevant information available at the time of making its decision.

Since it is ARB's decision that triggers the duty to consult, consultation can continue up until that decision has been made. Indeed, in its hearing on the Tusket Main Dam Refurbishment Project, the Nova Scotia Utility and Review Board adjourned the application to allow time for additional

---

[86] *Ibid*. at pg. 201, pdf pg. 206.
[87] *Ibid*. at pg. 212, pdf pg. 217.
[88] Report on Outcomes of Consultation, Exhibit 4 at pg. 285.
[89] Application Package Volume 1, Exhibit 5 at pg. 117.

consultation to take place, after finding that consultation efforts to date had been insufficient. It held that "[a]ny decision on the Application will be held in abeyance until the results of the consultation are known."[90] The Nova Scotia Court of Appeal upheld the Board's decision on appeal.

As is seen in the Supplementary Affidavit of Nathaniel Feidel, DFA continued consultation with some of its network partners (in that case, the Canadian Wildlife Service) into late January, 2024. This was after DFA referred the applications to the ARB in August 2023, and more than eight months after DFA unilaterally concluded its consultations with the Mi'kmaq on May 1, 2023. There is no principled reason why the province could not have continued consulting with the Mi'kmaq after receiving the affidavit of Mr. Martin nearly two years ago, if it felt that the information therein warranted additional consideration.

In Mr. Martin's affidavit, he spoke to the commercial fishing efforts around species such as Atlantic Herring, Blue Fin Tuna, Flounder, Halibut, Lobster, and Mackerel. With respect to the Moderate Livelihood Mi'kmaq lobster harvest[91], including from Acadia First Nation, he identified nine Mi'kmaq "moderate livelihood" fishers in LFA 33. As he noted, "[t]hese numbers only capture those fishing lobster under "Moderate Livelihood", and do not include those carrying out FSC fishing or communal commercial fishing."[92] Further, those numbers only represent a snapshot in time and would be expected to change in future. As discussed below, it is our position that such numbers are not necessary for the consultation analysis, but if DFA felt otherwise it was open to them to continue consulting the Mi'kmaq after receiving Mr. Martin's affidavit.

Mr. Martin also addressed the Mi'kmaq Moderate Livelihood elver (juvenile eel) harvest, and a proposal currently under consideration to "more adequately accommodate the Right to fish elvers for a moderate livelihood"[93] through increased access and allocations. In his affidavit, Mr. Hancock criticized this portion of Mr. Martin's evidence as raising "speculative impacts to *future rights* to fish elvers in the Mersey River watershed."[94] [Emphasis in original] This reveals Mr. Hancock's fundamental lack of understanding of Mi'kmaq rights. As discussed above, the Supreme Court of Canada has already recognized the Mi'kmaq's treaty right to fish for a moderate livelihood, in a case that was specifically about fishing eel. These are not "future" rights and they are not "speculative" impacts. These are rights that have existed since the treaty was signed in 1760. If DFA did not possess this basic understanding of the Mi'kmaq's treaty rights, the consultation process was based in an error of law and therefore could neither be reasonable nor correct.

Mr. Martin proceeded to reiterate the First Nation's feedback provided at the consultation meetings: the area of the KCS application is of importance for the exercise of Mi'kmaw fishing rights, including for American eel and elver. "This is demonstrated by its inclusion as an identified area required for Netukulimk [Moderate Livelihood] TRP [Treaty Right Protected] harvesting in

---

[90] *Tusket Main Dam Refurbishment Application*, 2018 NSUARB 154 at 176 [hereinafter *Tusket Main Dam Refurbishment*].

[91] Mr. Martin also explained the difference between the harvest based in the Moderate Livelihood fishing rights verses the harvest based in the Food, Social and Ceremonial (FSC) fishing rights.

[92] Affidavit of Justin Martin, Exhibit 34 at pg. 3.

[93] *Ibid*. at pg. 4.

[94] Affidavit of Bruce Hancock, Exhibit 73 at pg. 5.

the document "Kespukwitk District Netukulimk Livelihood Fisheries Species-Specific Katew Fisheries Management Plan."[95]

Lastly, he reconfirmed the earlier statements by Acadia First Nation that the KCS proposal "may impact the inshore fishing areas critical for smaller vessels used in Rights-based activities,"[96] and that these areas represent high value harvesting areas for Mi'kmaq fishing.

This point is also touched upon by Ms. Stevens in her affidavit:

> As I stated in the meetings, our members fishing for food are in small outboard boats and stay close to shore. They have three traps each and it would make no sense for them to go further from shore. The further away they fish from shore, the higher the fuel costs and increased risk for safety…Many of our women and younger fishermen are often alone in their boats and stay close to shore with someone watching from the shore for safety reasons. For example, non-Indigenous spouses/partners/parents are not permitted to assist and therefore for some it is necessary for them to go out in the boats alone. The proposed sites are significant and take up significant space at the mouth of the harbour and the area between the shore and Coffin Island. Based on my experience and knowledge of Acadia First Nation's fishing practices through my time as Councillor, and specifically as Councillor holding the fishing portfolio, it is my opinion that the new areas proposed in the applications along with the location of the existing operation are prime areas for those involved in food fishing.[97]

Analysis:

1. <u>The Mi'kmaq Aboriginal and Treaty Rights preliminary screening assessment</u>

A) What the Province should have done:

As noted above, the purpose of a preliminary assessment is for the Crown to determine the scope of consultation (this is also sometimes referred to as the "*Haida* spectrum"). This assessment is based on two factors: a) the strength of the case supporting the right (particularly when dealing with asserted rights), and b) the seriousness of the potential adverse effects of the Crown conduct or decision upon the right. It is this basic foundational understanding that informs the scope of consultation and the content of what consultation should address.

The Crown and the Mi'kmaq have been in a treaty relationship since the 1700s. As a party to the treaties, the Crown has notice of their contents, including the treaty rights enshrined therein. Additionally, Canadian courts have recognized the Crown's duty to consult (in its modern legal incarnation) with the Mi'kmaq for at least the last 30-40 years. It was in 1982 that Aboriginal and treaty rights were recognized and affirmed in the Canadian Constitution, and in 1990 that the Supreme Court affirmed a duty to consult in *R. v. Sparrow*, [1990] 1 S.C.R. 1075. In 2007, this province's consultation process was the subject of the *Terms of Reference for a Mi'kmaq-Nova Scotia-Canada Consultation Process*.[98]

Based on this long history of accrued experiences, the province should have at its disposal a large repository of knowledge concerning established and asserted Mi'kmaq rights across the portion of Mi'kma'ki (the traditional homeland of the Mi'kmaq people) that falls within the territory

---

[95] Affidavit of Justin Martin, Exhibit 34 at pg. 4.
[96] *Ibid*.
[97] Affidavit of Charmaine Stevens, Exhibit 35 at pg. 3.
[98] Affidavit of Bruce Hancock, Exhibit 73 at pg. 10.

now known as Nova Scotia. It should not be the responsibility of the Mi'kmaq to start from square one in educating the province about their rights at the outset of every new consultation process. Certainly, that is not how the courts have characterized their expectations of the Crown in the duty to consult jurisprudence.

In this case, DFA was the entity within the provincial Crown responsible for initiating, carrying out and concluding the consultation and accommodation process. Mr. Robert Ceschiutti, as Manager of Licensing and Leasing, was the individual who sent the consultation correspondences on behalf of the province, as seen in his affidavit.[99] As such, it was incumbent upon Mr. Ceschiutti and DFA to inform themselves of the actual and constructive knowledge held by the province regarding the asserted and established Mi'kmaq rights in the Liverpool Bay area. They also needed to understand at least the basics of this constitutional doctrine and how it worked, in order to be able to properly conduct and make decisions regarding the consultation exercise.

The OLA is responsible for coordinating consultations with the Mi'kmaq and the federal government, and so it was appropriate for DFA to request advice from OLA on the preliminary screening assessment. In responding to such requests, OLA should have engaged in a "whole of government" approach to identifying the Crown's actual and constructive knowledge about the Mi'kmaq's rights. As discussed above, these rights need not be proven in order to trigger the duty to consult *and accommodate*. They need only be credibly asserted. The OLA contact person (Ms. Claire Rillie) should have been able to demonstrate an accurate and comprehensive understanding of the duty to consult doctrine. Since the screening assessment was the one step for which OLA was assigned explicit responsibility, one would have expected Ms. Rillie to demonstrate a particular understanding of the required components of such assessments.

Even if OLA did not possess the requisite scientific and engineering knowledge to inform the second branch of the screening assessment (the seriousness of the potential adverse effect of the Crown conduct or decision upon the right), DFA should have been able to apply its expertise to identify potential impacts to the Mi'kmaq's rights. As the regulator of aquaculture, the technical expertise needed to complete this exercise should have been held by DFA staff, with access to other experts such as those working for KCS, other provincial departments, and federal bodies such as DFO.

After conducting this initial exercise to inform itself, the Crown should have communicated its baseline knowledge of Mi'kmaq rights and its technical understanding of potential impacts to the Mi'kmaq. A preliminary screening such as this would have satisfied the Crown's legal obligations at this initial phase, and provided a strong starting point upon which the Mi'kmaq could add particulars to their rights assertions, ask questions regarding the potential impacts that had been identified, and identify any other types of impacts that may have been overlooked. The Indigenous group is rarely an expert about the project and does not have access to nearly the same level of scientific expertise as the Crown or the proponent to be able to fully inform the potential adverse impacts. This is why it is so critical that the Crown either share its own collective expertise in a *balanced, unbiased and good faith* manner, or fund the First Nation to be able to retain its own third-party experts.

Unfortunately, none of these steps took place.

---

[99] Affidavit of Robert Ceschiutti, Exhibit 54.

B) What the Province actually did:

The province did not follow a whole-of-government approach to identifying the Crown's actual or constructive knowledge of the Mi'kmaq's asserted or established rights. Not only did DFA not actively seek out information from other government departments about Mi'kmaq rights, it seemed to disregard such information when it was voluntarily presented from sources such as DFO, KCS and even the First Nations themselves. Further, neither of the two provincial staffers in key roles (Mr. Ceschiutti, who led DFA's consultation, and Ms. Claire Rillie, who provided OLA's preliminary screening assessment) demonstrated the requisite knowledge or training to correctly carry out the Crown's role in the consultation process.

DFA assigned the preliminary screening assessment to OLA, which is not in itself objectionable. However, the assessment DFA received back from Ms. Rillie[100] failed to identify a single established right, asserted right, or potential impact to Mi'kmaq rights. Mr. Ceschiutti testified that this assessment by OLA informed DFA's Indigenous consultation moving forward, despite the complete absence of information required to inform or substantiate the Crown's scoping analysis.

Mr. Ceschiutti acknowledged in his testimony that, to the best of his knowledge, there are a large number of consultations with the Mi'kmaq each year and OLA would have information about Aboriginal and treaty rights. However, none of the Crown's actual or constructive knowledge about Aboriginal and treaty rights was communicated to DFA (or to the First Nation communities). Mr. Ceschiutti testified that DFA did not ask any follow-up questions of OLA regarding how they reached their "moderate" level scoping assessment, and to the best of his knowledge, DFA also did not request information about the exercise of Aboriginal or treaty rights in the Liverpool area from any other network partners.

DFA expected the First Nation representatives to shoulder the entire burden of identifying established and asserted rights and potential impacts to those rights, despite the Mi'kmaq having significantly less access to technical expertise, less information regarding the KCS proposal, and no funding with which to obtain independent scientific advice. To compound that error, neither OLA nor DFA informed the Mi'kmaq that this consultation process was essentially happening in a vacuum, or that DFA was making its decisions while completely in the dark regarding the Crown's actual or constructive knowledge about the Mi'kmaq's Aboriginal and treaty rights.

There is no evidence that Ms. Rillie had any legal training or training in the basics of what the duty to consult requires. To the contrary, her screening assessment failed to address a single marker of the consultation scoping analysis.

On the part of DFA, Mr. Ceschiutti admitted under oath that his understanding of the "levels" or scope of consultation was limited. He understood that the scope of consultation provided by Ms. Rillie related to the *Haida* spectrum. Beyond that, he could not confirm that he understood the scope of consultation as involving the strength of the claimed rights and the seriousness of the potentially adverse effect upon such rights. He did not know how OLA arrived at its scoping assessment. This is highly problematic, since it was Mr. Ceschiutti who sent the consultation letters which responded to the Mi'kmaq concerns, which identified what issues were in and out of scope, and which ultimately communicated the end of the consultation exercise. There is no

[100] Report on Outcomes of Consultation, Exhibit 4 at pg. 719.

evidence that any legal advice was sought by OLA or DFA in preparing the screening assessment or in carrying out of the consultation process.

2. Provincial conduct during the course of the consultation process

Information gathered prior to or during the consultation process that either strengthened the Mi'kmaq's claim to a particular right or reinforced the significance of a potential adverse impact should have been 1) incorporated into the province's assessment of whether its duty to consult had been fulfilled and whether accommodation measures would be warranted, and 2) communicated to the Mi'kmaq. However, DFA neither updated its consultation analysis with this new information, nor informed the Mi'kmaq of the information it received through its network consultations. To the contrary, DFA's responses consistently downplayed or dismissed the Mi'kmaq's concerns, while failing to share information at its disposal that would have substantiated their concerns and the need for accommodation. This led to the premature termination of the consultation exchange, with an explicit refusal by the province to recommend accommodations measures in response to the impacts on Mi'kmaq rights.

> In all cases, the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances.[101]

It is important to recall that rights need not be proven and adverse impacts need not be certainties in order to warrant accommodation measures.

Parasites, sea lice and antibiotic use

A) What the Province should have done:

The Mi'kmaq raised a concern about the possible spread of parasites and sea lice to wild fish stocks in the vicinity, and the potential harm to ground fish such as lobster that could result from the application of antibiotics.

In responding to this concern in good faith, the Province could have begun by acknowledging that the Mi'kmaq exercised rights-based fishing, including lobster fishing, in Liverpool Bay. As noted above, Mi'kmaq fishing rights have been confirmed by the Courts, repeatedly raised by the Mi'kmaq through correspondence and at meetings, and confirmed by DFO in its Science Report: "[t]here are Food, Social, and Ceremonial (FSC) fisheries for Lobster and Eel in Liverpool Bay (DFO Resource Management)."[102]

Additionally, the province should have acknowledged that KCS had indeed had an issue with sea lice in the Annapolis Basin, which required an in-feed treatment in 2014.[103] They could have updated their initial consultation response (dated February 6, 2020) with the information that since that time, KCS had been required to perform three additional sea lice treatments in the Annapolis Basin.[104] They could have relayed the information that New Brunswick salmon operations had been battling with sea lice since the early 2000s.[105]

---

[101] *Haida Nation, supra* note 1 at 41.
[102] Report on Outcomes of Consultation, Exhibit 4 at pg. 285.
[103] Affidavit of Jeffrey Nickerson, Exhibit 44 at pg. 17, para. 82.
[104] *Ibid*. at pg. 17, para. 83.
[105] Testimony of Michael Szemerda.

They could have shared with the First Nation representatives that Kelly Cove had, in fact, administered antibiotics at the Coffin Island farm.[106]

They could have shared further analysis which had been communicated in DFO's Draft Science Response, dated August 2021 (and repeated in its final Science Report, dated September, 2022), in which DFO provided the following statements with regard to these exact issues:

> In-feed anti-sea lice drugs, such as Emamectin Benzoate (EB), have been shown in lab studies to have lethal toxic effects to crustaceans and can induce sub-lethal effects, including premature moulting (Burridge et al. 2000, Waddy et al. 2002, Burridge et al. 2008). If sea lice becomes an issue and anti-sea lice drugs are used, this may be of particular concern given the presence of Lobster within the benthic-PEZs. Bivalves in the vicinity of net pens have also been shown to have measureable quantities of in-feed drugs such as EB. Currently, hazard information is primarily based on acute exposures; however, it does not indicate a high level of risk (Burridge et al. 2011).
>
> While the potential for exposures to organic matter and in-feed drugs (if used) already exist at the current #1205 Liverpool site, it is anticipated to increase as the individual and cumulative benthic-PEZs increase with the proposed expansion.[107]
>
> […]
>
> The proposed addition of 6 net pens at the existing site may increase exposure time to azamethiphos within the pelagic-PEZ if the entire site requires treatment. This is based on the number of tarped net pens that can be treated simultaneously (no more than two) according to PMRA restrictions.[108]
>
> […]
>
> Azamethiphos tarp bath treatments are reported to pose risk levels that are below the established Level of Concern (LOC) for marine fish, marine mammals, and algae, but they are above the LOC for pelagic and benthic invertebrates. While in the environment, azamethiphos is toxic to non-target crustaceans, including all life stages of Lobster (PMRA 2016b, 2017, Burridge 2013).[109]

A response such as this would have allowed for a productive conversation of the risks to Mi'kmaq fishing rights in the area and potential accommodation measures to address those risks.

B) What the Province actually did:

The Department's response to this concern can be seen in its decision letter sent May 1, 2023. DFA quoted the same response it had given on February 6, 2020 (prior to DFO's Science Report or any of the consultation meetings with the Mi'kmaq) which maintained that although "Salmon lice or Lepeophtheirus salmonis, can be an issue in some salmon growing locations in

---

[106] Affidavit of Jeffrey Nickerson, Exhibit 44 at pg. 19, para. 94.
[107] Report on Outcomes of Consultation, Exhibit 4 at pg. 205.
[108] *Ibid*. at pg. 207.
[109] *Ibid*.

the world, however, salmon lice have not been an issue in the Liverpool area."[110] Further, the two approved products for sea lice treatments (hydrogen peroxide and azamethiphos) "are unlikely to persist in the environment and, if used as per Health Canada's Pest Management regulatory guidelines, is unlikely to cause significant harm to any non-target populations."[111] Further, the "the use of antibiotics at marine salmon farms is not a common practice in Nova Scotia."[112]

Finally,

> The Department has determined that this issue raised is general in nature and not specific to the proposed activities identified by the applicant. In addition, the Mi'kmaq of Nova Scotia did not clearly indicate how this issue is related to asserted and established aboriginal rights. As such, no accommodation or mitigation measures will be recommended to the Aquaculture Review Board for this issue raised.[113]

It is highly counter-intuitive for DFA to claim that the application of products with the potential to harm lobsters is unrelated to the Mi'kmaq right to fish those very same lobsters. This conclusion is so illogical and contrary to common sense, it approaches the level of willful blindness. To say that the adverse impacts of these products is not specific to the "proposed activities identified by the applicant," when the applicant would be approved to apply those very same products if needed, is irrational. Saying that the products approved for sea lice treatments are "unlikely" to cause "significant" harm to non-target populations is not the relevant measure for the duty to consult. The threshold is whether there is "potential" for any material "adverse" impact.

Additionally, DFA's summary of the potential impacts failed to provide a balanced overview of the available data. Admitting that salmon lice can be an issue in some salmon farms "in the world" is not the same as acknowledging it has been a recent problem in the same province. Saying the use of antibiotics is not a common practice in Nova Scotia, while failing to highlight that KCS had previously administered antibiotics at the Coffin Island farm, is skewing the evidence. The province even provided a presentation on Aquatic Animal Health at one of the consultations meetings,[114] but neglected to share any of these facts as part of it.

When presented with the question of why DFA was unwilling to recognize the relationship between the potential harm to lobster and the Mi'kmaq right to harvest lobster, Mr. Ceschiutti testified: "the department requires that information to be received from the First Nations, to provide that as an explanation as to the connection, and in the absence of that information that is what our department concluded." Not only is this explanation inconsistent with the evidence that the First Nation representatives *did* identify their lobster fishing rights in the immediate area, it also runs contrary to the Crown's legal obligation to make its own assessment of both rights and impacts and bring it to bear in the consultation analysis.

The province did not fulfill its duty to consult, since it explicitly discounted the possibility of accommodation or mitigation measures on the erroneous belief that this topic was not related to Aboriginal or treaty rights, and thus could not engage the DFA's duty to accommodate.

---

[110] Affidavit of Robert Ceschiutti, Exhibit 54 at pg. 220, pdf pg. 225.
[111] *Ibid*.
[112] *Ibid*.
[113] *Ibid*.
[114] *Ibid*. at pg. 115, pdf pg. 120.

Fish escapes

A) What the Province should have done:

The Mi'kmaq raised a concern about escaped farmed fish competing with wild stocks for food, transmitting disease and weakening the gene pool.

The risk of fish escapes is neither remote nor unprecedented. The province should have responded to this concern with transparency and a balanced account of the potential impacts. For instance, they could have informed the Mi'kmaq that in June 2021, a hole was detected in one of the nets at the existing Coffin Island site,[115] which could have resulted in fish escapes.[116] The hole was presumed to have been caused by seal damage. As noted by Jennifer Hewitt, Compliance Manager for KCS, in her testimony with respect of this event: "when we do have a hole, I can't tell if 1 or 2 or 10 fish came out." She could not say whether fish escaped on that occasion.

As seen in Exhibit 80, Cooke Aquaculture has experienced numerous escapes from its North American aquaculture sites, "including a 2019 incident that led to the possible transference of infectious salmon anemia to wild salmon."[117] Cooke Aquaculture experienced a more significant fish escape due to seal damage in Maine in August, 2023. Following the seal damage, "more than 50,000 salmon escaped from two Cooke sites."[118] While this latter event occurred after the province unilaterally concluded its consultation with the Mi'kmaq in May, 2023, it is nonetheless indicative of the seriousness of the potential risk.

The DFO Science Report also spoke to this threat:

> The existing and proposed sites are both within the migration pathways and range of the Nova Scotia Southern Upland (SU) wild Atlantic Salmon population. The nearby Mersey and Medway rivers are known Atlantic Salmon rivers. The SU Salmon run in the Medway River in Port Medway Harbour, which is approximately 10–12 km from Liverpool Bay, while the Mersey River is thought to be extirpated. Aquaculture escapees have been found in rivers at distances of up to 200–300 km from the nearest aquaculture site (Morris et al. 2008) and, although the Mersey and Medway rivers are closest in proximity, the majority of salmon rivers in the SU region are within that range. The SU Salmon have been assessed as Endangered by COSEWIC since 2010 and are under consideration for *SARA*-listing.[119]
>
> […]
>
> Escapes have been identified as an ongoing threat to the genetic integrity and persistence of wild Atlantic Salmon populations (Forseth et al. 2017, Bradbury et al. 2020b, Glover et al. 2020). Escapes of Atlantic Salmon from finfish aquaculture sites occur regularly, including in Atlantic Canada (Glover et al. 2017, Keyser et al. 2018,

[115] Affidavit of Jeffrey Nickerson, Exhibit 44 at pg. 5, para. 17 (e).
[116] Testimony of Jennifer Hewitt.
[117] Article: Salmon Farms Under Fire on U.S. East Coast After Being Shuttered on West Coast, Exhibit 80 at pg. 3.
[118] *Ibid*. at pg. 2.
[119] Report on Outcomes of Consultation, Exhibit 4 at pg. 285.

> Diserud et al. 2019), and the true number of escapees are estimated to significantly exceed the number reported (Skilbrei et al. 2015, Mahlum et al. 2021, Føre and Thorvaldsen 2021). Escaped Atlantic Salmon have been found in rivers at distances of up to 200–300 km from the nearest aquaculture site (Morris et al. 2008), and escapees may continue to pose a threat to wild salmon for several years after escape (Aronsen et al. 2020).[120]

B) What the Province actually did:

The Department's response to this concern can be seen in its decision letter sent May 1, 2023. DFA repeated its response that had been provided by letter three years earlier, again, prior to the network consultation, DFO's Science report or its consultation meetings with the Mi'kmaq:

> The proponent has outlined their strategy to mitigate the risk of a site breach and has identified their containment management strategies in the Development Plan. Further requirements to safeguard against escapes must be outlined in the company's Farm Management Plan prior to stocking any new sites.[121]

DFA then repeated the same boilerplate language as it used for the topic above:

> The Department has determined that this issue raised is general in nature and not specific to the proposed activities identified by the applicant. In addition, the Mi'kmaq of Nova Scotia did not clearly indicate how this issue is related to asserted and established aboriginal rights. As such, no accommodation or mitigation measures will be recommended to the Aquaculture Review Board for this issue raised. [122]

Once again, DFA proceeded on the erroneous premise that these potential adverse impacts to wild fish were somehow unrelated to the Mi'kmaq's fishing rights. As with the Mi'kmaq's concerns regarding parasites, sea lice and antibiotic use, it is difficult to comprehend DFA's apparent inability to connect the dangers posed by farmed salmon escapees to wild salmon and other wild stocks with the Mi'kmaq right to fish these wild stocks. This confounding position made it impossible for the province to correctly fulfill its duty to consult, since it precluded any accommodation measures from being discussed.

Additionally, the province failed to share information at its disposal regarding the actual significance or likelihood of the risk. DFA cited "safeguard" requirements in the Farm Management Plan, which document is inaccessible to the public. The province did not alert the Mi'kmaq to instances of fish escape involving the same proponent, or revisit its consultation analysis as new information became available.

<u>American eel</u>

A) What the Province should have done:

The Mi'kmaq raised a concern about American eel, including juvenile eel (known as elvers or glass eel depending on their stage of development). In its letter dated November 22, 2019, KMK flagged that American eel is of great cultural significance and raised a concern about the

---

[120] *Ibid*. at pg. 297.

[121] Affidavit of Robert Ceschiutti, Exhibit 54 at pg. 222, pdf pg. 227.

[122] *Ibid*. at pg. 223, pdf pg. 228.

potential of eels to contract diseases and parasites as they migrate from freshwater to the ocean to spawn.[123] At the consultation meeting held on December 9, 2020, the First Nation representatives revisited the issue and expressed the additional concern that expanding the size of the operation could increase the likelihood of migrating elvers or glass eels having lethal interactions with the cages.[124] As discussed above, the province had actual knowledge of the Mi'kmaq's right to fish eel for a moderate livelihood, as confirmed by the Supreme Court of Canada in the *Marshall* case.

DFO's Science Report also spoke to the Mi'kmaq's rights-based fishery in the immediate area of the proposed KCS expansion:

> There are Food, Social, and Ceremonial (FSC) fisheries for Lobster and Eel in Liverpool Bay (DFO Resource Management). All three proposed sites were noted to overlap with identified glass eel (pre-elver) fishing and nursery areas through DFO's Coastal Fisheries Mapping Project (DFO Oceans and Coastal Management Division). Additional information on the size of the area or how specifically juveniles use the coastal habitat around the sites is lacking. Glass eels likely pass through these areas when migrating to streams further into bay and estuary such as the Mersey River, Herring Cove Brook, and Beach Meadows Brook. American Eel populations have been assessed as Threatened by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) since 2012 and are under consideration for listing under the SARA. Recreational fisheries for groundfish species and mackerel also occur in the area.[125]

DFO's mandate includes areas such as the death of fish by means other than fishing, harmful alteration of fish habitat, harming of SARA-listed species and the destruction of their critical habitat.[126] As noted by OLA at the consultation meetings, "OLA explained that in their experience with DFO, the department don't participate unless they are issuing an authorization or unless specific issues about fish and fish habitat are raised."[127] This topic would seem to fall squarely within DFO's area of expertise and certainly specific issues about fish and fish habitat were being raised. Indeed, at the consultation meetings KMK was explicitly requesting that DFO be brought to the consultation table.[128] At an absolute minimum, DFA should have acted as a conduit, relaying information to DFO about the First Nation's concerns regarding impacts to eel, and relaying DFO's analysis and responses back to the First Nations. It is clear that on its own, DFA did not possess the knowledge or expertise in this area required to address the Mi'kmaq's concerns. As conveyed by DFA to the Mi'kmaq at the consultation meeting on December 9, 2020:

> NSDFA shares concern related to impact of increased sizes of leases on the likelihood of migrating wild fish encountering cages. Limited literature on the subject is available, specifically as it applies to glass eels. It is thought that wild fish would avoid the obstacle presented by cages but if they did go inside it would likely lead to trauma or consumption. Aquaculture has been undertaken in NS since the late 70s-early 80s and the potential impacts are well understood. Regulations have been developed to mitigate potential

---

[123] *Ibid*.
[124] *Ibid*. at pg. 49, pdf pg. 54.
[125] Report on Outcomes of Consultation, Exhibit 4 at pg. 285.
[126] *Ibid*. at pgs. 253-254.
[127] Affidavit of Robert Ceschiutti, Exhibit 54 at pg. 197, pdf pg. 202.
[128] *Ibid*.

> impacts on wild species – NSDFA is not aware of any evidence that the eel population has declined because of salmon farming and the issue has not been flagged by DFO.[129]

Not only is this response internally contradictory ("limited literature is available" vs. "potential impacts are well understood"), it soon became factually inaccurate when DFO *did* flag the issue in its draft Science Report released in August, 2021.

Given that both DFA and DFO highlighted a lack of information in this area, an appropriate response would have been to conduct further study into the potential impacts to the threatened eel population (and, concurrently, the potential impacts to the Mi'kmaq's right to harvest eel) before proceeding with the application. Further, DFO's review of the application included consideration of whether or not to recommend additional mitigation measures for the areas within its mandate. This is precisely the type of exercise which should have included the Mi'kmaq, particularly when it so directly involved impacts to known Mi'kmaq Aboriginal and treaty rights.

B) What the Province actually did:

In its decision letter, DFA responded with its standard phrase:

> The Department has determined that, due to a lack of specificity, this issue raised is general in nature and not specific to the proposed activities identified by the applicant. As such, no accommodation or mitigation measures will be recommended to the Aquaculture Review Board for this issue raised.[130]

Conversely, and inexplicably, the DFA also admitted: "The Department assessed this issue and considered this to potentially threaten established and asserted Mi'kmaw Aboriginal and treaty rights."[131]

It also repeated its response from its letter dated February 6, 2020, which only responded to the potential threat from sea lice and said nothing about communicable pathogens, lethal encounters with the cages, adverse impacts to the Mi'kmaq's fishing rights, or DFO's feedback from its Science Report:

> Eels, like all species of fish, have certain pathogens and parasites that can affect their health. Most pathogens and parasites of one species do not affect another species, however some may. For example, sea lice specific to salmon, known by its scientific name as *Lepeophtherius salmonis*, do not affect eels. In general, growing conditions at fish farms are managed to decrease risk of pathogen and parasites and negative impacts to wild fish and vice versa, the impacts of pathogens from wild fish to farmed fish. These conditions are inherently beneficial to the farm and increase fish growth and survival. As well, maintenance of fish health is regulated through several federal and provincial Acts and Regulations including: the Canadian Food Inspection Agency's Health of Animal Act and Regulation, Fisheries and Oceans Fisheries General

---

[129] *Ibid*. at pg. 49, pdf pg. 54.
[130] *Ibid*. at pg. 223, pdf pg. 228.
[131] *Ibid*.

> Regulations and Aquaculture Activities Regulations and the Province's Fisheries and Coastal Resources Act and Aquaculture Management Regulations.[132]

There is no evidence to suggest DFA shared the Mi'kmaq's concerns about eel with DFO or solicited DFO's views on the Mi'kmaq's questions. DFA did not share DFO's analysis of the impacts with the Mi'kmaq or provide copies of DFO's draft or final Science Reports. The acknowledgement by DFA that this issue potentially threatened Mi'kmaq rights, followed by a statement that "due to a lack of specificity, this issue raised is general in nature and not specific to the proposed activities identified by the applicant" is not in keeping with the honour of the Crown. Both the Mi'kmaq and DFO had clearly linked the concern to the proposed aquaculture expansion. DFA's unwillingness to discuss any accommodation or mitigation measures indicates that they were closed to the possibility of making any changes to the proposal regardless of the Mi'kmaq's input. As the Mi'kmaq framed it at a consultation meeting, "the colonial government approach is in conflict with the Mi'kmaw perspective of having an open mind."[133] The Supreme Court in *Mikisew Cree* held that "[c]onsultation that excludes from the outset any form of accommodation would be meaningless."[134] In the case of DFA's consultation, it excluded *every* form of accommodation.

<u>Impacts on local FSC fisheries</u>

A) What the Province should have done:

The extensive statements made to DFA regarding impacts to local FSC fisheries is outlined above in the section entitled "Mi'kmaq established and asserted Treaty and Aboriginal rights." The types of impacts ranged from displacement of Mi'kmaq fishers, to impacts on the health of wild fish stocks, to harms to fish habitat.

If DFA's conduct was in keeping with its duty of honour, it might have worked to identify threats to rights rather than working to discount them. It might have shared the fact that DFO agreed that existing fisheries would be displaced:

> The continued presence and expansion of site 1205 will displace fisheries that might have otherwise occurred in the current lease or do occur within the expanded lease area…Fisheries that occur in the general vicinity and could potentially be displaced include American Lobster, groundfish, Sea Scallop, Atlantic Mackerel and Atlantic Herring. The lease area of site 1205, however, is small relative to the fishing grounds for each of these fished species."[135]

Had DFO been made aware of the Mi'kmaq's specific limitations regarding small vessel sizes and the need to remain close to shore, DFO may have revised its assessment of the significance of the proposed expansion site relative to the fishing grounds and been able to recommend modifications.

DFA should have been informing KCS of the Mi'kmaq's concerns and soliciting their assistance in formulating responses, as was the process when responding to concerns raised by Crown

---

[132] *Ibid*. at pg. 40, pdf pg. 45.
[133] *Ibid*. at pg. 198, pdf pg. 203.
[134] *Mikisew Cree, supra* note 7 at 54.
[135] Report on Outcomes of Consultation, Exhibit 4 at pg. 257.

departments in the network consultations. KCS would have been well positioned to inform the discussion of impacts and to identify potential changes to its operation to mitigate impacts.

Lastly, DFA should have engaged with the objective of substantially addressing the Mi'kmaq's concerns.[136] This would have involved turning its mind to options to avoid, eliminate or minimize those negative impacts, or if that was not possible, to compensate the First Nations for the adverse impacts to their rights-based fisheries. The option of not proceeding with the expansion should have been open to discussion, as should modifications to the project location, design and operation.

B) What the Province actually did:

Once again, in its decision letter the DFA conveyed that, with respect to this issue:

> The Department has determined that, due to a lack of specificity, this issue raised is general in nature and not specific to the proposed activities identified by the applicant. As such, no accommodation or mitigation measures will be recommended to the Aquaculture Review Board for this issue raised.[137]

Mr. Bruce Hancock, Executive Director of Aquaculture at DFA, summarized the province's response to the voluminous Mi'kmaq information regarding fishing rights in his affidavit:

> During consultation, we rely on the Mi'kmaq to explain to us what Aboriginal or Treaty rights are at play in the area, and how the Mi'kmaq believe those rights could be adversely affected by this project in addition to asking questions/raising general issues and concerns.
>
> The Department and OLA repeatedly requested specific information on:
>
> a. Species fished;
> b. Specific areas fished by the Mi'kmaq of Nova Scotia;
> c. Number of community members that would be impacted; and
> d. Number of and type of Mi'kmaq fishers.
>
> […]
>
> Although some general information was shared during the consultation meetings, Acadia First Nation refused to provide specific location information about where its community members fished.
>
> Similarly, during consultation the number of indigenous fishers operating in Liverpool Bay was not clearly stated. Acadia First Nation indicated that approximately 30 community members participated in a Food, Social, Ceremonial fishery (FSC) in Liverpool Bay, but no other information was provided regarding Moderate Livelihood Fisheries.[138]

This excerpt encapsulates many of the problems with DFA's approach. It reflects a refusal by DFA to acknowledge the information before it, a misunderstanding of the legal nature of treaty and Aboriginal rights, and an unwillingness to give any weight or understanding to what the

---

[136] *Haida Nation, supra* note 1 at 42.
[137] Affidavit of Robert Ceschiutti, Exhibit 54 at pg. 226, pdf pg. 231.
[138] Affidavit of Bruce Hancock, Exhibit 73 at pg. 4.

Mi'kmaq refer to as "two-eyed seeing", or in other words, seeing the world through an Indigenous viewpoint in addition to a Western one.

In terms of species, in the excerpts noted above in the section entitled "Mi'kmaq established and asserted Treaty and Aboriginal rights," it can be seen that the Mi'kmaq made special mention of gaspereau (another name for alewife and blueback or river herring), elver (eel) and lobster fisheries in Liverpool Bay. DFO also highlighted Indigenous eel and lobster fisheries. KCS listed additional species caught by the First Nations in the larger geography.

In terms of the specific area fished by the Mi'kmaq, the First Nation representatives made it very clear that they were fishing in the immediate vicinity of the existing Coffin Island operation, and would be displaced by its expansion. This was corroborated by several sources including DFA itself: "NSDFA noted that their staff had observed FSC fishing in areas surrounding the sites."[139] The First Nations also spoke to the particular importance of Coffin Island for their FSC fishery, and noted the importance of being able to fish close to shore for the small vessels used. Beyond that, insisting on "specific areas" made little sense, as KMK noted, since the fishers move when the fish move and when obstacles are built that displace fisheries. FSC fishing rights are not static and are not required to be exercised within a small static area, thus DFA's question regarding "specific areas fished by the Mi'kmaq" bore little relevance beyond determining that the rights were being exercised in the area of the proposal. For Mr. Hancock to say that "Acadia First Nation refused to provide specific location information about where its community members fished" is simply a false statement.

In terms of the questions regarding the number of community members who would be impacted and the number of Mi'kmaq fishers, again, the First Nation representatives attempted to answer these questions despite the fact they made little sense in a consultation context and DFA did not explain why or how they were relevant. Aboriginal and treaty rights are held by the community as a whole, and the number of community members exercising these rights is expected to fluctuate over time. Year by year, numbers may go up as band membership grows, as children grow old enough to join fishing boats, or as the need for fish grows among those who might not have relied on traditional food sources in the past. Accommodation measures are intended to address impacts to the right itself, and the right does not change depending on how many people are exercising it. It is not clear why DFA was so insistent on obtaining a set number, and whether DFA somehow felt that the accommodation measures would be different for 30 or 50 or 100 fishers. If so, was DFA prepared to adjust the accommodation measures in subsequent years if more Indigenous fishers began exercising the communities' fishing rights? Neither of these explanations would have made sense from a legal perspective.

Nonetheless, the Mi'kmaq representatives attempted to meet DFA's expectations in various ways. Acadia shared the size of its community membership list (again, the right belongs to the community as a whole), and identified the approximate number of members from *that* community who were *currently* exercising their FSC right to fish in the area. Acadia mentioned that other communities, not present at the consultation meetings, also fished in Area 33 under the moderate livelihood right, and that members of the Native Council of Nova Scotia also fished in the area. KMK questioned the relevance of the number of community members presently fishing: "it could

[139] Affidavit of Robert Ceschiutti, Exhibit 54 at pg. 155, pdf pg. 160.

be 5 members or 500 members - they still have a treaty right to fish."[140] There was no response provided by DFA.

While DFA was active in discounting the potential impacts identified by the Mi'kmaq, it was not active in helping to *identify* potential impacts, given its greater knowledge of the proposal and greater access to technical expertise. DFA was obliged to use that expertise to help identify and inform potential adverse impacts on Mi'kmaq rights and what possible accommodation measures may exist. There were dozens of affiants in this hearing, many of whom were employed by KCS or DFA and held degrees in areas such as engineering and marine biology. Many more scientific experts across the provincial and federal governments were engaged through the network consultation carried out by DFA. Despite this vast wealth of information and expertise, DFA seemed to be under the mistaken impression that the First Nations were on an "equal playing field" and equally able to apply the science to potential impacts on rights. As Mr. Hancock indicated in his affidavit, "[m]y understanding is that KMKNO supports its member communities to understand information of this type."[141] One questions whether Mr. Hancock genuinely believed that the "support" that could be offered by a small group such as KMK in any way rivalled the collective expertise of KCS and the provincial and federal governments. This issue arose in the hearing by the Nova Scotia Utility Board on the Tusket Main Dam Refurbishment, where Acadia First Nation highlighted the hundreds of consultation files handled each year by a small number of KMKNO staff.[142]

DFA "stressed that they rely heavily on advice from federal partners, adding that DFO's responsibility is to comment on impacts to fish and fish habitat and that they rely on DFO for advice on impacts to FSC, moderate livelihood and commercial fisheries in the area."[143] Despite this claim, DFA never asked DFO for its feedback regarding any of the fishing impacts being flagged by the Mi'kmaq, and the Mi'kmaq were not made aware of DFO's assessment regarding the displacement of existing fisheries. Nor were they given the opportunity to confer with DFO.

DFA also did not engage KCS in a discussion about impacts to Mi'kmaq fishing or options to alleviate impacts to Mi'kmaq fishing rights. The First Nation representatives assumed this communication was taking place, and was surprised to learn that it wasn't.[144] At the June 1, 2022 consultation meeting, NSDFA explained "they do not share information at consultation table with the applicant."[145] However, it was never made clear why that was their practice, considering the *Mi'kmaq-Nova Scotia-Canada Consultation Terms of Reference* explicitly specifies that information provided in consultations is not confidential unless so requested.[146] No such request was made in this case.

It is unsurprising that Acadia commented in one of the consultation meetings that "government appears to support the farm, adding that the Mi'kmaq are forced to put their case forward in opposition. Cooke doesn't have to fight on their own because government is doing it for them - considerable bias is observed, from Acadia perspective."[147] Acadia also highlighted their capacity

---

[140] *Ibid*. at pg. 196, pdf pg. 201.
[141] Affidavit of Bruce Hancock, Exhibit 73 at pg. 3.
[142] *Tusket Main Dam Refurbishment*, *supra* note 90 at 119.
[143] Affidavit of Robert Ceschiutti, Exhibit 54 at pg. 197, pdf pg. 202.
[144] *Ibid*. at pg. 194, pdf pg. 199.
[145] *Ibid*.
[146] Affidavit of Bruce Hancock, Exhibit 73 at pg. 12.
[147] Affidavit of Robert Ceschiutti, Exhibit 54 at pg. 157, pdf pg. 162.

concerns and emphasized how much time it took to review all the materials and understand the details.[148]

From a legal perspective, DFA had knowledge that the Mi'kmaq were exercising their Aboriginal and treaty rights to fish in Liverpool Bay, and that their fishing activities would be displaced by the proposed expansion (among other threats to fish health and their habitat). That should have been sufficient to move on to the next phase of the process, namely, considering accommodation measures to address the Mi'kmaq's concerns (such as creating a larger buffer around Coffin Island, or not proceeding with the expansion at all in an area of such significance from a rights perspective).

Needless to say, DFA made no attempts to explore accommodation measures, as they explicitly acknowledged in their decision letter.

Archaeology

Ms. Heather MacLeod-Leslie is the only affiant and qualified expert in this hearing with expertise in archaeology. Although Mr. Hancock introduced archaeological documents in his reply affidavit, there was no opportunity for Ms. MacLeod-Leslie to respond to that new evidence either through a reply affidavit or through direct examination. Further, the author of one of those documents entitled "A Summary of the Technical Information that Supports the SPP Approval of Permits and Reports for the Archaeological Work Conducted for the Liverpool Bay Lease Applications"[149] did not participate in the hearing as an affiant or as a witness, and so there was no ability to enquire into her qualifications or training, if any, in the field of underwater archaeology.

It is clear that this area possesses an incredible significance from an archaeological perspective for the Mi'kmaq. As noted by KMK at the March 2, 2022 consultation meeting, "approximately one quarter of all known Mi'kmaw archaeological sites in Nova Scotia are on the Mersey River - the Mersey was an exceptionally important travel route for the Mi'kmaq."[150] In her affidavit, Ms. MacLeod-Leslie highlights the existence of registered archaeological sites all around the existing Coffin Island operation, on Coffin Island, the shoreline of Liverpool Bay and in Liverpool Harbour.[151] Since "[t]he entirety of Liverpool Bay was once dry land that would have been used and occupied by Mi'kmaw ancestors"[152] the shortage of recorded submerged archaeological sites in Liverpool Bay is a function of a lack of archaeological work rather than an absence of artefacts.[153] This position was supported by Nova Scotia Communities, Culture, Tourism and Heritage (CCTH) in the consultation meetings.[154] CCTH also expressed an understanding of the Mi'kmaw connection to the area and indicated they were not surprised by KMK's request for an ARIA.[155]

The essential interrelationship of Mi'kmaq cultural heritage rights with title and self-government rights was highlighted by the Nova Scotia Utility and Review Board in the Tusket Main Dam Refurbishment hearing: "These cultural and historic sites can be tied, as gleaned from the ANSMC

---

[148] *Ibid*. at pg. 196, pdf pg. 201.
[149] Affidavit of Bruce Hancock, Exhibit 73 at pg. 16.
[150] Affidavit of Robert Ceschiutti, Exhibit 54 at pg. 156, pdf pg. 161.
[151] Affidavit of Heather MacLeod-Leslie, Exhibit 33 at pg. 2, para 2.
[152] *Ibid*. at pg. 3, para. 9.
[153] *Ibid*. at pg. 3, para. 10.
[154] Affidavit of Robert Ceschiutti, Exhibit 54 at pg. 195, pdf pg. 200.
[155] *Ibid*.

and Acadia First Nation submissions, to asserted rights of self-governance, ownership by the Mi'kmaq people of their own material culture and archaeological heritage, and potential land title claims."[156]

In light of the potential adverse impacts to these archaeological artefacts (as one example, "[t]he site design includes shovel anchors which penetrate the seabed"[157]), the province should have *required* that *full* Phase 1 and 2 ARIAs be completed, rather than leaving any archaeological initiatives to the goodwill of the proponent.[158] When the desk-based assessment (referred to as the Phase 1 ARIA Report) recommended that two areas of high archaeological potential *be avoided* (one of which is under the proposed Coffin Island expansion site), that recommendation should have received full and fair consideration by the province rather than being immediately discounted in favour of subsurface archaeological sampling.[159] KMK also did not support the decision to clear the remainder of the area from the need for additional archaeological investigation.[160] When the sampling report (referred to as the Phase 2 ARIA) was being developed, there should have been consultation with KMK regarding the proper sampling methodologies to be employed.[161] The intention of the sampling was to inform the "need for additional archaeological assessment or mitigation."[162] However, it was unable to achieve that objective, because, critically, "[n]o core penetrated the seabed deep enough to reach a layer / context that would have been dry land prior to sea level rise at Liverpool Bay."[163] In other words, the samples did not penetrate far enough to reach the layer which would have contained archaeological artefacts. As the KCS panel testified, the divers who conducted the sampling had no known archeological training.

Unfortunately, despite the good intentions of KCS to address this concern, the lack of direction, consultation and, particularly, accommodation by the province created serious deficiencies in the end result.

Relief sought:

As noted above, it is our submission that the ARB cannot approve the KCS application at this time. Rather, we respectfully request that the Board exercise its authority either to deny the application or to adjourn the application for a period of time to allow for adequate consultation to take place, while remaining seized with jurisdiction in this matter.

All of which is respectfully submitted,

[redacted]

Jessica Ginsburg

---

[156] *Tusket Main Dam Refurbishment, supra* note 90 at 127.
[157] Robert Grant "Issue List" submission to the ARB dated September 22, 2025 at pg. 5 and Affidavit of Adam Turner, Exhibit 38 at pdf pg. 51.
[158] Affidavit of Robert Ceschiutti, Exhibit 54 at pg. 212, pdf pg. 217.
[159] Affidavit of Jeffrey Nickerson, Exhibit 44 at pg. 14, paras. 65-66.
[160] Affidavit of Heather MacLeod-Leslie, Exhibit 33 at pg. 4-5, para. 25.
[161] *Ibid.* at pg. 5, para. 27.
[162] *Ibid.* at pg. 5, para. 24.
[163] *Ibid.* at pg. 5, para. 28.