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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

REPLY SUBMISSIONS ON BEHALF OF
KWILMU'KW MAW-KLUSUAQN

December 19, 2025

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Kwilmu'kw Maw-klusuaqn (KMK) submits the following in reply to the submissions by the Department of Fisheries and Aquaculture (DFA) dated December 4, 2025 and by Kelly Cove Salmon Ltd. (KCS) dated December 5, 2025 regarding the duty to consult and accommodate.

1. Standard of Review

a. Correctness standard

In its submission, DFA characterized the question to be answered by the Aquaculture Review Board (ARB) as: "Was DFA's consultation with the Mi'kmaq of Nova Scotia adequate?"[1] as measured against a reasonableness standard.[2] We disagree with this statement. The question before the ARB is whether DFA's consultation with the Mi'kmaq was adequate, *including all of the sub-issues which that issue entails*, some of which are measured against a correctness standard and some of which are measured against a reasonableness standard.

In support of its position that the applicable standard of review is reasonableness, DFA relied upon an excerpt from paragraph 62 of *Haida Nation*: "the government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty"[3]. However, DFA neglected to cite the following paragraph in *Haida Nation* which clarified that the applicable standard of review includes the correctness standard for questions of law:

> **Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness**. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.[4] [emphasis added]

Accordingly, the Supreme Court in *Haida Nation* recognized that the applicable standard of review in consultation analyses is both correctness (for questions of law) and reasonableness (for questions of fact or mixed questions of law and fact).

Counsel for DFA also relied upon the case *Canada (Minister of Citizenship and Immigration)* v. *Vavilov,* 2019 S.C.C. 65 ("*Vavilov")*, but neglected to mention its significance in reframing the standard of review analysis. *Vavilov* established reasonableness as the presumptive standard of review *except in certain circumstances, including when the legislature provided an appeal from an administrative decision (when appellate standards of review should apply) and for constitutional*

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[1] DFA closing submission at para. 68.
[2] *Ibid.* at para.72.
[3] *Ibid.* at para. 73.
[4] *Haida Nation* v. *British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at 63 [hereinafter *Haida Nation*].

questions (when a correctness standard should apply).[5] In describing the content of "constitutional questions," *Vavilov* explicitly included "the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*" as an issue to which the standard of correctness must apply, along with "other constitutional matters [that] require a final and determinate answer from the courts."[6]

Consequently, it would be legally incorrect to suggest that DFA's consultation with the Mi'kmaq of Nova Scotia was to be measured only against a reasonableness standard.

b. Reasonableness standard

In describing the reasonableness standard, counsel for DFA referred to the Supreme Court of Canada case *Vavilov*. In addition to the excerpt selected by DFA, the Court provided other instructive references with respect to the reasonableness standard:

> In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is **transparent, intelligible and justified**.[7] [emphasis added]
>
> [...]
>
> [A] reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision.
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> In short, it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.[8]

Furthermore,

> Central to the necessity of adequate justification is the perspective of the individual or party over whom authority is being exercised.[9]

KMK's initial submission clearly demonstrated the multitude of areas in which the province's *process and reasoning* failed to meet a reasonableness standard. DFA criticized KMK's submission for indicating what DFA *should have* done, however, applying a reasonableness standard does not mean that the province is free to follow whatever process it pleases. There is still a standard to be

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[5] *Canada (Minister of Citizenship and Immigration)* v. *Vavilov,* [2019] 4 S.C.R. 653 at 17 [hereinafter *Vavilov*].
[6] *Ibid*. at 55.
[7] *Ibid*. at 15.
[8] *Ibid*. at 85-86.
[9] *Ibid*. at 133.

met. We did not measure the province's conduct against an idealized, hypothetical standard. Our analysis was based on the province's actual actions and communications in *this* file, as measured against the expectations that have been established by the courts, ranging up to the Supreme Court, for what governments' consultation processes should entail.

We submit that DFA's consultation process was so at odds with the factual and legal context that it cannot be supported by intelligible and rational reasoning. DFA completely failed to ground its analysis in an assessment of rights, and demonstrated an erroneous and inadequate knowledge of both established and asserted rights. It similarly failed to assess or share information at its disposal regarding potential impacts to those rights, and it left the highly technical exercise of flagging potential impacts up to the Mi'kmaq alone. It refused the Mi'kmaq's requested accommodation measures without substantiation. Further, DFA seemed to be unwilling to continue consultations or contemplate accommodations because of its position that the Mi'kmaq were not responding to its "clarifying" questions in a way it deemed satisfactory. However, DFA failed to justify the necessity, relevance or legal basis for its clarifying questions, and failed to explain why the information provided by the Mi'kmaq regarding their rights and potential impacts was insufficient. Lastly, DFA refused to acknowledge obvious connections between impacts and rights in its decision letter. We submit that DFA's reasons as reflected in their May 1, 2023 decision letter were neither intelligible nor justified in relation to the facts and the law that constrained them.

We outline below in greater detail the province's legal errors and areas which lacked "transparency, intelligibility and justification."

2. Scope of consultation: absence of any preliminary (or subsequent) assessment of rights and impacts

Counsel for DFA included a section on preliminary assessments beginning at paragraph 151 of their closing submission. They began by questioning whether KMK properly raised the issue of "scope of consultation" before the ARB. To clarify, assessing the scope of consultation is a sub-issue in assessing the adequacy of consultation, just as the standard of review and the adequacy of accommodations are sub-issues. As is seen in cases pertaining to the adequacy of consultation, the courts typically begin with an analysis of the consultation scope. By raising the issue of adequacy of consultation, by logical implication, KMK invoked all the component parts of that analysis.

It is not possible to assess the adequacy of consultation without first determining the scope. The scope sets one of the standards against which adequacy is to be measured. Further, the information on rights and impacts which determines the scope also informs the rest of the

consultation and accommodation analysis. The point of the scoping assessment is not just to arrive at a label of "low," "moderate" or "deep" consultation. The exercise is intended to assess the asserted and established Aboriginal and treaty rights, including the strength of asserted rights and the seriousness of potential adverse effect upon those rights. The identification of Mi'kmaq rights and potential impacts to such rights is an integral part of the adequacy of consultation analysis. As acknowledged by the Nova Scotia Supreme Court in *Sipekne'katik* v. *Alton Natural Gas Storage LP*:

> The Crown is required to complete a preliminary assessment because "one cannot meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope." *Haida Nation, supra* at para. 36.[10]

KMK's issues list made this connection clear by identifying "potential adverse impacts of the proposed aquaculture development on the Mi'kmaq's asserted and established Aboriginal, treaty and title rights"[11] as a sub-issue of the adequacy of Crown consultation.

Counsel for DFA noted that "[n]owhere in their submissions, nor throughout consultation, have the KMK stated that the "moderate" level of consultation was incorrectly selected as the scope of consultation." To be clear, we are stating that the scoping exercise was fundamentally flawed and "incorrect" at its very core, in that the government completely failed to engage in the necessary analysis. As discussed in KMK's initial submission on the duty to consult, "[t]he 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."[12] There is evidence indicating that the province failed to inform itself of, and consequently misconceived, the scope of the Mi'kmaq's asserted and established rights, and never turned its mind to the adverse impacts upon those rights. Testimony by Robert Ceschiutti confirmed that DFA did not inform itself of the province's *constructive knowledge* of such rights prior to launching the consultation.

The Office of L'Nu Affairs' (OLA) preliminary screening did not include any information or analysis of either the Mi'kmaq's asserted or established rights, or the seriousness of the potential adverse effects upon those rights. Neither was this analysis communicated anywhere else in the province's consultation record. This legal error persisted in DFA's closing submission, where counsel stated: "DFA commenced consultation at the moderate level because it recognized that the proposed expansion had the potential to adversely affect Aboriginal and Treaty rights."[13] This is simply not the relevant test. Having the "potential to adversely affect Aboriginal and Treaty rights" is the test of

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[10] *Sipekne'katik* v. *Alton Natural Gas Storage LP,* 2020 N.S.S.C. 111 at 146.
[11] KMK letter to ARB dated September 22, 2025.
[12] *Haida Nation, supra* note 4 at 39.
[13] DFA closing submission at para. 93.

whether the duty to consult is triggered, but it does not answer the question of what scope of consultation is correct.

A further error is evident in the province's failure to reassess the scope of consultation as new information was received. Canada's "Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult - March 2011" include this as an explicit factor to be considered in evaluating the adequacy of the consultation process: "In the event of new information, was the scope of the consultations reassessed? Specifically, does the new information affect the strength of the claim or the significance of the adverse impact?"[14] While these guidelines are not binding on the province, they are reflective of the federal Crown's understanding of its obligations.

Counsel for DFA also suggested that the wording of OLA's screening letter, which failed to reference any rights or impacts to rights, was good enough. On the one hand, DFA counsel argued that by merely noting the presence of Aboriginal fisheries in Liverpool Bay, OLA's screening letter was recognizing an established treaty right to fish.[15] Conversely, counsel for DFA argued that by noting the presence of Indigenous archaeological sites in Liverpool Bay, OLA was *not* recognizing the asserted archaeological right but rather acknowledging "that the surrounding area is important to the Mi'kmaq."[16] Counsel for DFA appeared confused on their position of whether the screening letter was an implicit acknowledgement of rights or not, but the fact remains that the text of the screening letter did not acknowledge (or even mention) specific rights, nor did it assess the strength of any rights assertions. Moreover, the province's subsequent conduct did not remedy this shortcoming.

This is not just a matter of semantics. This point was emphasized in *Sipekne'katik* v. *Alton Natural Gas Storage LP*, where the Nova Scotia Supreme Court considered what the Minister of Environment *should have said* in respect of the Mi'kmaq's asserted title right in her decision:

> The choice of words is telling. The Minister's balancing involved the "*concerns and interests*" of Sipekne'katik and other aggrieved persons..." Her balancing ought to have involved "asserted Aboriginal title and treaty rights" not mere "concerns and interests". The former are in a separate category from, and superior to, the concerns and interests of "other aggrieved persons" if that reference is to non-Aboriginal persons. The interests of other

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[14] 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> at pg. 346, pdf pg. 349 of KMK Book of Authorities [hereinafter "Federal Guidelines"].
[15] DFA closing submission at para. 153.
[16] *Ibid*. at para. 155.

> aggrieved persons should not be considered in conjunction with Sipekne'katik's asserted rights.
>
> In summary, the Minister's approach ought to have reflected the following: "The asserted Aboriginal title and treaty rights of Sipkne'katik have been balanced with broader societal interests..." This is not a matter of semantics. Framing the issue as I have indicated would have been a recognition by the Minister of the importance of the rights issue and that it deserved special consideration in her deliberations.[17]

(Note that the Court engaged in a comparison of what the province of Nova Scotia *should have done* versus what it did do, down to the very words the Minister should have used, contrary to DFA's assertion that this same approach was improper in our initial submissions).

The importance of specifically referencing *rights* and considering impacts to *rights* was also addressed by the Supreme Court in *Clyde River*, a case that involved the Inuit's treaty right to harvest marine mammals. The Supreme Court concluded:

> [T]he consultation that occurred here fell short in several respects. First, the inquiry was misdirected. While the NEB found that the proposed testing was not likely to cause significant adverse environmental effects, and that any effects on **traditional resource use** could be addressed by mitigation measures, the consultative inquiry is not properly into environmental effects *per se*. Rather, it inquires into the impact on the *right*. **No 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**.[18] [emphasis added]

In this passage, the Court found it was not sufficient to merely consider environmental impacts and impacts to traditional resource uses. Rather, the Crown (and the NEB as its delegate) should have specifically considered the impacts on *rights*, and the source of those rights as deriving from a treaty. The Court went on to discuss the Crown's accommodation measures:

> **None of these putative concessions, nor the NEB's reasons themselves, gave the Inuit any reasonable assurance that their constitutionally protected treaty rights were considered as *rights***, rather than as an afterthought to the assessment of environmental concerns.
>
> The consultation process here was, in view of the Inuit's established treaty rights and the risk posed by the proposed testing to those rights, significantly flawed. Had the appellants had the resources to submit their own scientific evidence, and the opportunity to test the evidence of the proponents, the result of the environmental assessment could have been very different. Nor were the Inuit given meaningful responses to their questions regarding the impact of the testing on marine life. While the NEB considered potential impacts of the project on marine mammals and on Inuit traditional resource use, **its report does not**

[17] *Sipekne'katik, supra* note 10 at 92-93.
[18] *Clyde River (Hamlet)* v. *Petroleum Geo Services Inc*., [2017] 1 SCR 1069 at 45 [hereinafter *Clyde River*].

> **acknowledge, or even mention, the Inuit treaty rights to harvest wildlife in the Nunavut Settlement Area, or that deep consultation was required**.[19] [emphasis added]

There are several lessons to be gleaned from *Clyde River*. First, the consultation was seen as insufficient in part because the Crown delegate had failed to acknowledge these rights and consider the impacts of the proposed seismic testing on those rights. Second, this shortcoming then affected the adequacy of the accommodation measures, which similarly failed to consider the Inuit's treaty rights as rights.

This is analogous to our present circumstances except that DFA has not delegated any of its consultation responsibilities in this case. The province never acknowledged or set out its understanding of the Mi'kmaq's *rights*, as opposed to OLA's generic references to Indigenous activities in or connections to the area. Beginning with the screening letter and continuing throughout the consultation record, DFA failed to flag or inform potential impacts to *rights*, and it was left to the Mi'kmaq representatives to research topics such as the spread of disease and sea lice, the risks of therapeutants, the threats posed by escapees, the possibility for lethal interactions with the cages, and potential damage to archaeological artefacts through the construction activities. When the Mi'kmaq had specific questions about impacts to their rights, such as their harvest of American eel, DFA only pointed to information gaps but did not offer to investigate the issue further or to seek out DFO's expertise. These shortcomings then impacted the aborted accommodation discussions, in which DFA not only failed to acknowledge but *denied* the interrelationship between the impacts being flagged and the Mi'kmaq's rights.

Again, the Federal Guidelines are instructive. They identify part of the Crown's role in the consultation process as including the following steps:

- Make sure that your officials gather all relevant information about their anticipated activities and related assessments as to how these activities may adversely impact potential or established Aboriginal or Treaty rights and related interests.
  [...]
- The information gathered by your officials from relevant sources such as others in the federal government, provincial and territorial governments, affected Aboriginal groups will allow them to 1) identify if their activities may adversely impact any potential or established Aboriginal or Treaty rights; 2) assess the severity of the potential adverse impact and the nature and/or strength of claims; 3) determine the appropriate approach and scope of consultation required; and 4) develop a reasonable approach to consultation.[20]

The evidence supports the conclusion that DFA simply did not perform these steps.

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[19] *Ibid.* at 51-52.
[20] *Federal Guidelines, supra* note 14 at pg. 315, pdf pg. 318 of KMK's Book of Authorities.

3. Scope of asserted and established Aboriginal and treaty rights: erroneous knowledge of nature and scope

It is our position that, in addition to failing to acknowledge or assess the Mi'kmaq's rights, through its conduct and questions the province demonstrated an incorrect knowledge of the nature and scope of Aboriginal and treaty rights on multiple occasions.

The province did not just fail to reference the Mi'kmaq's *rights* in its screening assessment. It continued to demonstrate confusion, inconsistency and a lack of understanding of the Mi'kmaq's asserted and established rights throughout the consultation process and the hearing before this Board.

DFA persistently displayed a lack of awareness of the Mi'kmaq's fishing rights by asking "clarifying" questions without explaining why such information was needed or justified, an issue which is discussed at greater length below.

When questioned about why DFA could not discern a connection between the Mi'kmaq's lobster fishing right and the application of antibiotics that could harm the lobster, Robert Ceschiutti replied: "As the manager of licensing and leasing, I cannot provide comment on the Aboriginal and treaty rights that are exercised. 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." In other words, not only did DFA not enter into the consultation with an understanding of the Mi'kmaq's *established* fishing rights, but even after all of the information was shared by the First Nation and other parties such as DFO regarding the Mi'kmaq's fishing rights during the consultation process, DFA still did not acknowledge or identify the Mi'kmaq's fishing rights.[21]

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[21] A brief note on this point: counsel for DFA argued that by pointing out gaps in the knowledge of certain provincial employees, KMK was personally insulting those individuals. Further, counsel emphasized that "government decisions regarding consultation are made collectively, and at a high level. Simply because one individual's name signs a letter does not mean that person was the only one with input into the decision or information it contains." (DFA closing submission at para. 166) We both disagree and agree with parts of DFA's argument. We disagree that there is anything personally insulting about pointing out the lack of knowledge held by the individuals who represented the province in this consultation. There is nothing to suggest that they were anything other than hardworking employees, faithfully carrying out the instructions they'd been given. Their lack of knowledge is not a personal reflection at all, rather, it is indicative of the broader provincial system which failed to provide them with proper direction and training in carrying out their consultation roles. The importance of training employees who carry out consultation responsibilities is set out in the Federal Guidelines at pg. 313, pdf pg. 316 of KMK's Book of Authorities.
We do agree that government decisions regarding consultation are undoubtedly made by a broader group, however, it is only through the individual spokespersons that we gain access to the broader group's thinking. We can only base conclusions on the evidence available to us, and the province selected these individuals to

At paragraph 154, counsel for DFA claimed that "the proponent's mitigation measures regarding fish escapes and avoidance of wildlife interaction are also noted. While the connection is not made explicit, the obvious implication is that impacts to the Mi'kmaq's right to fish, through fish escapes and wildlife interaction, may still be impacted despite the mitigation measures already in place."[22] Again, this so-called "obvious" implication is disputed by the actual evidence. Under the "fish escape" heading of DFA's decision letter, the province's response to the Mi'kmaq's concern regarding fish escapes was to say "[t]he Department assessed this issue and considered this to be a general concern regarding the aquaculture process where a connection between the contemplated decision and a potential negative impact to an established or asserted Aboriginal or Treaty right was not clear."[23] While DFA may have possessed *some* knowledge or understanding that fishing rights existed, this knowledge was never expressed. The province avoided explicitly acknowledging established or credibly asserted rights, while operating under a legal doctrine that required it to do so.

With respect to the First Nation's other primary area of concern, archaeology, the province seemed to clearly understand the assertion and the basis for the assertion in the consultation exchanges, and did not persist in asking "clarifying" questions, unlike its approach with the Mi'kmaq's established fishing rights. DFA's affiants did not question the content or legitimacy of this assertion, nor did the province's representatives during the consultation process. However, counsel for DFA questioned the content of the asserted right (for the first time) in its closing submission, demonstrating once again the province's inconsistency in its position on, and understanding of, the Mi'kmaq's asserted and established rights.

Counsel for DFA cited *Van der Peet* as part of this discussion,[24] a case which set out the required elements to be met in *establishing* an Aboriginal right. Their reference to this case is misleading, since *asserted* Aboriginal rights are not governed by the *Van der Peet* test, contrary to DFA's statement. The Mi'kmaq are not required to establish an Aboriginal right in relation to archaeology as part of the consultation process, only to credibly assert such a right:

> In assessing consultation, the reviewing Court "does not determine the validity of the claimed Aboriginal right", as the "merits of the underlying right await the appropriate trial process." All that is required in the context of Crown consultation is that Sipekne'katik

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lead the consultation exercise and to submit the consultation evidence. It is indeed fair to assume that the flaws evident in OLA's screening assessment and in DFA's responses to the Mi'kmaq were systemic departmental failings, as opposed to personal shortcomings.

[22] DFA closing submission at para 154.

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

[24] DFA closing submission at para. 144.

> "advances a factually credible claim to aboriginal rights", as the initial threshold "informed by the need to maintain the honour of the Crown, is not high.[25]

Further,

> [At the stage of the preliminary assessment] If the Province's position is that the Band's claim is not strong, then it should say so and articulate the reasons for its position. In any event, the Province must share its evaluation of how strong the Band's claim is. The chances of meaningful consultation are remote unless the parties have this discussion.[26]

The province did not articulate a position that any of the Mi'kmaq's asserted rights, including those in respect of archaeology, were not strong or were not credibly asserted. Quite the contrary.

At paragraphs 100-103 and 139-150 of its closing submission, counsel for DFA addressed the issue of archaeology and claimed that: "DFA asked for clarification on how the issue of submerged archaeology was connected to an asserted or established Aboriginal or treaty right. Apart from noting that archaeology is sometimes used as evidence in Aboriginal title cases, the connection was never explained."[27] We challenge the factual accuracy of this statement. Their citation for this statement was Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 201 (it is not known whether counsel for DFA intended this to be a reference to pg. 201 or pdf pg. 201, but since pg. 201 is a letter from KMK we presume it was a reference to pg. 196, pdf pg. 201). The only place on this page where a government representative made reference to archaeology is in the following bullet:

> OLA voiced view that specificity around the practice of rights is crucial to consultation - from a project planning perspective, looking at immediate area around project - adding that archaeology is being worked through but for fishing or the practice of other rights that could be impacted by these expansions, it would be helpful to know what species being fished, how many community members be impacted.[28]

If anything, this bullet suggests the opposite of what counsel for DFA purported, namely, that archaeology was already in the process of being "worked through" but that further specifics were still being sought around the exercise of established fishing rights. Other excerpts from the consultation record further support the conclusion that the province was well aware of the Mi'kmaq's asserted rights in relation to archaeology and understood the correlation between impacts to archaeology and impacts to asserted title rights. For instance, CCTH stated that the "Mi'kmaq have been clear on direction re: archaeology….the department understands the Mi'kmaw connection to the Mersey system…CCTH explained they are not surprised that an ARIA was

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[25] *Sipekne'katik, supra* note 10 at 85.
[26] *Ibid*. at 128.
[27] DFA closing submission at para. 100.
[28] Affidavit of Robert Ceschiutti, Exhibit 54 at pg. 196, pdf pg. 201.

requested and suggested a 2-phase approach may be warranted."[29] In its final decision letter, archaeology was the only topic for which the province did *not* repeat one of its standard responses that the issue was considered to be a "general concern regarding the aquaculture process where a connection between the contemplated decision and a potential negative impact to an established or asserted Aboriginal or Treaty right was not clear" or "due to a lack of specificity, this issue raised is general in nature and not specific to the proposed activities identified by the applicant."[30] Rather, the province indicated that the background information provided by KMK "was helpful."[31] Additionally, if there was any doubt whatsoever regarding the credibility of the Mi'kmaq's archaeological connection to the area, the detailed and extensive information in Boreas Heritage's two archaeological reports should have more than sufficed to quell such doubt. All of these points contradict DFA's claim that it did not receive evidence during the consultation process in support of such a right.[32]

Further, as noted in our initial submission, the province should have had *constructive knowledge* of the Mi'kmaq's asserted rights in relation to archaeology and title from the many prior archaeology-related consultations with the Mi'kmaq. Additionally, it should have had constructive knowledge of previous Nova Scotia cases in which the same rights had been at issue, including cases to which the province itself had been a party. In the *Tusket Main Dam Refurbishment* decision, the Nova Scotia Utility and Review Board noted that "the possible disturbance of recognized historic or cultural sites forms part of an assessment relating to the level of consultation required"[33] and went on to explicitly discuss the connection between archaeological sites and the Mi'kmaq's "asserted rights of self-governance," including ownership of their own material culture and archaeological heritage, as well as providing evidence of occupation and use in potential title claims.[34] It is clear from these passages that asserted rights in relation to archaeology are inclusive of rights to artifacts as part of the culture of the Nation, as well as their connection to asserted title rights.

At paragraph 141 of its closing submission, counsel for DFA claimed that "[i]t was not until this hearing before the ARB that the connection [between archaeological heritage and title rights] was made explicit,"[35] however, the province was a party to the Tusket Main Dam Refurbishment case

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[29] *Ibid.* at pg. 195, pdf pg. 200.
[30] *Ibid.*, throughout DFA's decision letter beginning at pg. 215, pdf pg. 220.
[31] *Ibid.* at pg. 227, pdf pg. 232.
[32] DFA closing submission at para. 144.
[33] *Tusket Main Dam Refurbishment Application*, 2018 NSUARB 154 at 126 [hereinafter *Tusket Main Dam Refurbishment*].
[34] *Ibid.* at 127.
[35] DFA closing submission at para. 141.

where precisely the same connection was discussed by both the tribunal and the same First Nation (Acadia) who was involved in this consultation.[36]

Although we have not located any evidence to this effect, if DFA was truly confused (as suggested by its counsel) about how damage or destruction of archaeological resources would adversely affect asserted rights in relation to archaeology and title, it would simply bolster our position that DFA had not conducted any due diligence in terms of informing itself of matters that should fall within its *constructive knowledge*.[37]

However, as noted, the evidence supports the contrary conclusion that DFA was *not* confused about the Mi'kmaq's asserted rights in relation to archaeology and title. The fact that they had knowledge of these asserted rights leads us to two conclusions. First, although DFA possessed information regarding potential impacts to the Mi'kmaq's archaeological resources (i.e. shovel anchors which would penetrate the seabed), they did not reveal this information to the Mi'kmaq and then criticized the Mi'kmaq for taking so long to identify the potential impacts themselves.[38] Second, although DFA had knowledge of the asserted rights and had knowledge of the potential impacts, it did not grant the Mi'kmaq's sought-after accommodation requests. These requests are discussed at greater length below.

4. Failure to acknowledge logical connections to rights

DFA maintained that "[t]he Consultation Record in this case shows that DFA approached consultation in good faith and with an open mind. Unfortunately, these efforts were not reciprocated."[39] We would vigorously dispute this assertion. From the outset of consultation, DFA's conduct demonstrated quite the contrary. The First Nation representatives repeatedly voiced concerns about DFA bias and DFA appearing to operate as advocate for the proponent.[40]

In response to virtually every concern raised by the Mi'kmaq, the province responded 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" or "the Mi'kmaq of Nova Scotia did not clearly indicate how this issue is

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[36] At paragraph 145 of its submissions, counsel for DFA sought to distinguish the *Tusket Main Dam Refurbishment* case from the current fact scenario by suggesting the potential impacts were more severe in that case. Since we have raised the *Tusket Main Dam Refurbishment* case as evidence of the province's constructive knowledge of the Mi'kmaq's asserted rights in relation to archaeology and title, it does not seem relevant to respond to the points raised by DFA regarding severity of impacts.

[37] For an explanation of this term, please see pg. 2 of KMK's initial submission on the duty to consult, dated November 21, 2025.

[38] DFA closing submission at para. 100; Affidavit of Robert Ceschiutti, Exhibit 54 at pg. 207, pdf pg. 212.

[39] DFA closing submission at para. 6.

[40] Affidavit of Robert Ceschiutti, Exhibit 54 at pg. 157, pdf pg. 162; Affidavit of Charmaine Stevens, Exhibit 35 at pdf pg. 2, para. 10.

related to asserted and established aboriginal rights."[41] They repeated these stock phrases regardless of how clearly and obviously the issues pertained to the KCS proposal and its potential to cause adverse impacts to Mi'kmaq rights.

Counsel for DFA claimed it was evidence of *good faith and an open mind* that DFA was willing "to hear the concerns of the KMK and Acadia First Nation even when the connection to established or asserted Aboriginal and treaty rights was not clear."[42] We call it *unreasonable* and an error in law, when DFA evaded addressing or accommodating Indigenous concerns by labelling them "general in nature," "not specific to the proposed activity," or unconnected to rights.

It is difficult to imagine how the Mi'kmaq could have explained the connections any more clearly. Their concerns related to aspects of the proposal that could harm or kill lobster, harm or kill wild salmon (and other) stocks, harm or kill American eel, displace Indigenous fisheries, or destroy archaeological artefacts. A reasonable person would be capable of connecting these concerns to the Mi'kmaq's fishing rights for lobster, salmon and eel in Liverpool Bay, and their asserted rights in relation to archaeology and title.

The case *Vavilov* provided instruction with respect to decisions that are based on unreasonable, irrational or illogical chains of analysis:

> Where, even if the reasons given by an administrative decision maker for a decision are read with sensitivity to the institutional setting and in light of the record, they contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision.[43]
>
> [...]
>
> To be reasonable, a decision must be based on reasoning that is both rational and logical. It follows that a failure in this respect may lead a reviewing court to conclude that a decision must be set aside.[44]

We submit that DFA failed to demonstrate reasonable, rational and logical analysis by refusing to acknowledge the connections between the impacts identified by the Mi'kmaq and the Mi'kmaq's rights.

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[41] *Ibid.*, throughout DFA's decision letter beginning at pg. 215, pdf pg. 220.
[42] DFA closing submission at para. 94.
[43] *Vavilov, supra* note 5 at 96.
[44] *Ibid.* at 102.

5. DFA assertion of Mi'kmaq failure to meet reciprocal obligations

In trying to justify its own consultation shortcomings, counsel for DFA tried to lay blame at the feet of the First Nation's representatives. Their criticisms of the Mi'kmaq's conduct focused on:

a. The passage of time between consultation meetings, correspondences, etc.
b. Failing to provide sufficient information when "DFA repeatedly asked for details on how the Mi'kmaq fishers exercised their right to fish in Liverpool Bay."[45]
c. Having "no interest in having the possible impacts on their rights accommodated. The only result that was acceptable was a rejection of the proposed expansion."[46]

a. Passage of time

First, the province did not mention in its submission that consultation on this file was initiated immediately prior to the Covid-19 pandemic. Covid disrupted even the largest corporate operations worldwide, and it is common knowledge that more vulnerable populations, such as those living on First Nation reserves, were disproportionately impacted during this time. By necessity, resources had to be focused on maintaining the safety of those living within these communities. The years 2020 and 2021 marked the height of the pandemic, and by 2022 it is clear from the consultation record that more regular communications were resuming.

Second, it would have been equally apparent to the province that this file, in particular, was highly technical and incredibly difficult to navigate without access to scientific and engineering expertise which the Mi'kmaq did not possess. Rather than critiquing the First Nation's slow response times, the province had several options at its disposal to bolster the Mi'kmaq's capacity to participate on a more level playing field. It could (and was legally obligated to) have helped identify potential impacts to Mi'kmaq rights, rather than offering generic presentations on the application review process and aquatic animal health programs. It criticized the Mi'kmaq for failing to flag potential impacts to archaeology until later in the process, but DFA never alerted them to the potential impacts that it had knowledge of. For example, CCTH provided DFA with its initial advice as early as September 11, 2019 and February 18, 2020: "CCTH recognized that there was a concern for impacts to submerged archaeological resources when large anchors are placed on the sea floor."[47] This information was not shared with the Mi'kmaq, despite the province's knowledge of the Mi'kmaq's deep archaeological connection to the area. To then criticize the Mi'kmaq for failing to raise archaeological concerns sooner is, frankly, highly hypocritical. The province's failure to

[45] DFA closing submission at para. 107.
[46] *Ibid.* at para. 7.
[47] Affidavit of Bruce Hancock, Exhibit 73 at pg. 6, para. 46.

assess or share information on impacts to *rights* created an impossible burden on the Mi'kmaq to single-handedly research potential impacts based on the 1000+ page Development Plan, without the requisite scientific or technical expertise. It is no wonder that this was a lengthy exercise.

Next, the province could have offered funding support to enable the Mi'kmaq to retain their own technical experts to help identify potential impacts to rights. While funding is not mandatory in all consultations, it is certainly a factor in the courts' analysis of the adequacy of consultation.[48] It is also a requirement under s.19 of 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**."[49] [emphasis added] There is no evidence that any such consideration took place by Nova Scotia. If there had been a concern about the Mi'kmaq's capacity to respond, the province should have considered whether funding was needed.

Third, it is evident from the consultation record and from DFA's closing submission that a portion of the "delay" was due to the province's own persistence in requesting "specifics" about the First Nation fisheries, such as where the fishing occurred and how many community members would be impacted.[50] This topic is addressed in the following section.

b. <u>Failing to provide sufficient information in response to DFA's requests for details on how the Mi'kmaq fishers exercised their right to fish in Liverpool Bay</u>

This issue was raised repeatedly by counsel and was summarized succinctly by Mr. Hancock 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…
>
> 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.[51]

What information is "reasonable" to ask in understanding the scope and nature of the Mi'kmaq's *established* treaty and Aboriginal rights to fish?

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[48] *Clyde River, supra* note 18 at 47
[49] Affidavit of Bruce Hancock, Exhibit 73 at pg. 13, s. 19.
[50] DFA closing submission at para. 52. Also at paras. 39, 42, 50, 51, 55, 58, 93, and 98.
[51] Affidavit of Bruce Hancock, Exhibit 73 at pg. 4, para. 26-27.

The First Nation representatives did not "refuse" to provide information regarding their fishing rights. As noted at pages 10-15 of our initial submission, they tried to provide specifics when asked, going so far as to describe the type of "hooping" fishing practice utilized. However, they were confused by the request for details regarding the individual exercise of these communal rights, and reluctant to be seen as limiting the community's rights to those activities being carried out by specific individuals at that specific time.

Seeking to characterize the scope and nature of Mi'kmaq's rights through their individual exercise would be an error of law because:

1. The rights are comprehensive and communal in nature, and not rights of specific individuals doing specific activities at specific times. Even when the exercise of these communal rights is displaced or suppressed by the actions of western society, it does not diminish the scope and nature of the communal rights themselves.
2. The fishing rights can be exercised in a flexible and evolving manner. The content of the right is not determined by the numbers or focus or location of the fishery in any particular year. Where the fish were in harvestable numbers in any particular year does not dictate where that population might be in future years.
3. There can be no doubt that the Mi'kmaq have proven (as well as credibly asserted) rights to harvest in marine areas such as Liverpool Bay, and for a broad range of species.

Any characterization of the scope and nature of the First Nation's fishing rights that is limited to a frozen-in-time rendition would be based on a legal misapprehension of what those rights entail.

When the Supreme Court addressed the reciprocal obligations of First Nations in *Haida Nation,* it asked First Nations to outline "the scope and nature of the Aboriginal rights they assert."[52] As this excerpt reflects, *Haida Nation* was a case involving asserted rights. In our case, the fishing rights at issue are not species-specific and are well established. These rights already have been confirmed and defined by the courts and by the treaties. DFA's questions about the current number of fishers and areas being fished are *not* questions regarding the scope and nature of these established fishing rights. The fishing rights are held by the community and may be exercised within the territory covered by those rights, which includes Liverpool Bay. For all of these reasons, it was appropriate that the Mi'kmaq resisted engaging in an exchange with DFA which would be directed only towards the most recent fishing activities, by the most recent Mi'kmaq fishers.

KMK expressed these concerns at the consultation meetings, noting that the number of community members fishing wasn't relevant, "it could be 5 members or 500 members - they still have a treaty

[52] *Haida Nation, supra* note 4 at 36.

right to fish,"[53] and that the food fishery moved and wasn't static.[54] Further, KMK "stressed it may not be able to be communicated more clearly than what has already been said."[55]

These were not the responses of a party who was trying to be obstructionist. These were the responses of a party who was struggling to understand and respond to a request which made no sense. DFA never explained why this information was necessary, how it would be used, or how it was justified in a legal sense. DFA also never explained why all of the information which the Mi'kmaq already had shared regarding their fishing (including the key species, approximate number of FSC fishers and details of why access to the shoreline was so critical), failed to meet DFA's self-defined standards.

Counsel for DFA pointed to no legal authority in support of their position: a) that it was reasonable to expect the Mi'kmaq to provide this information as part of their reciprocal obligations, b) how these details were necessary for, or relevant to, the broad range of accommodation measures available to DFA, or c) that it was legally defensible for DFA to halt the consultation process if it felt not enough of these details had been provided. DFA counsel referred to a *quid pro quo* approach being followed by the First Nation, but in fact it was DFA who refused to proceed unless the Mi'kmaq satisfied their seemingly unattainable requirements for greater "specifics".

There are many precedents that support the proposition that such information was *not* reasonable or necessary for the process of consultation and accommodation. If we look to the caselaw, there are many examples of cases in which consultation and accommodation was triggered by potential impacts to fishing rights. Our book of authorities already contains two such examples: *Clyde River (Hamlet)* v. *Petroleum Geo Services Inc*., [2017] 1 S.C.R. 1069 and *Tusket Main Dam Refurbishment Application*, 2018 NSUARB 154. In neither case was the court or board concerned with questions of how many Indigenous fishers were exercising their harvesting rights or precisely where within their territory the rights were being exercised.

Clyde River was a case that involved an Inuit treaty right to harvest marine mammals. The Supreme Court emphasized the significance of this treaty right for the appellants' economic, cultural and spiritual wellbeing.[56] The potential impacts at issue were from offshore seismic testing for oil and gas, an activity which required authorization from the National Energy Board (NEB). In terms of potential impacts, "the testing could change the migration routes of marine mammals and increase their risk of mortality, thereby affecting traditional harvesting of marine mammals including

[53] Affidavit of Robert Ceschiutti, Exhibit 54 at pg. 196, pdf pg. 201.
[54] *Ibid*. at pg. 154, pdf pg. 159.
[55] *Ibid*. at pg. 155, pdf pg. 160.
[56] *Clyde River, supra* note 18 at 43.

bowhead whales and narwhals, which are both identified as being of "Special Concern" by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC)."[57] These potential adverse impacts were also seen as being significant.

The scope of consultation was assessed as falling at the deep end of the spectrum. In assessing the scope, the Supreme Court considered both the rights and the impacts to such rights. The Court concluded: "[g]iven the importance of the rights at stake, the significance of the potential impact, and the risk of non-compensable damage, the duty owed in this case falls at the highest end of the spectrum."[58] After determining the appropriate scope, the Court went on to assess whether the consultation that took place met the depth of consultation required and found that it did not, despite several accommodation measures that had been offered such as a commitment to ongoing consultations, community liaison officers, an Inuit traditional knowledge study and additional acoustic monitoring to avoid collisions with marine mammals.

It was sufficient for the Court's analysis that the Inuit had a treaty right to harvest marine mammals that could be adversely affected by the proposal. There was no reliance on the precise locations where this treaty right had been recently practiced or the current number of community members doing the harvesting. The focus of the Court's inquiry was on the significance of the adverse impacts to the Inuit's established treaty rights.

The two primary issues in the *Tusket Main Dam Refurbishment* consultation were impacts to areas of known archaeological significance and impacts to the First Nation fishery.[59] In assessing the adequacy of consultation, the Board noted as follows:

> The Aboriginal fishery is an existing one, and it is clear that dewatering and fish ladder alterations, together with construction itself, could have significant impacts on this fishery.
>
> The number of known and potential archaeological sites are extensive. It is clear that as part of the consultation arising pursuant to Step 1 of the *Policy,* the possible disturbance of recognized historic or cultural sites forms part of an assessment relating to the level of consultation required.[60]
>
> [...]
>
> Given the potential negative impacts of the Project on the Aboriginal fishery, and the archaeological sites, as discussed in the evidence, the level of consultation would be relatively deep. An assessment of the potential impact, an opportunity to make

[57] *Ibid*. at 15.
[58] *Ibid*. at 44.
[59] *Tusket Main Dam Refurbishment, supra* note 33 at 30, 31 and 124.
[60] *Ibid*. at 125-126.

> submissions, and participation in the decision-making process, which could lead to negotiations and accommodations, would be required in the circumstances of this case.[61]

The Board concluded that the province's consultation had been insufficient, again without any need to turn to the number of fishers or the precise locations being fished at any given time. These are but two examples of a long list of consultation cases in which the adequacy of consultation and accommodation measures is assessed by courts and tribunals without any reliance on such details.

c. Having "no interest in having the possible impacts on their rights accommodated. The only result that was acceptable was a rejection of the proposed expansion"

Before entering into the accommodation analysis, and regardless of the scope or content of consultation owed, it must be recalled that "[t]he common thread on the Crown's part must be 'the intention of substantially addressing [Aboriginal] concerns' as they are raised."[62] It is hard to identify *any* Mi'kmaq concerns which DFA exhibited the intention to substantially address.

Counsel for DFA claimed that "[a] review of the Consultation Record suggests that the KMK and Acadia First Nation were not open to accommodation on this project, rather the goal appears to have been rejection of KCS' application."[63]

Opposition to the application

Their first basis for this opinion was the fact that Acadia First Nation was opposed to the application.[64] This is in no way improper. Given that Acadia First Nation in no way stood to benefit from the proposed expansion and could point to a multitude of ways in which they would be adversely impacted, it would be unusual if they *weren't* opposed to it. It also would be surprising if their opposition shifted to support by the conclusion of consultation, given that the province had done nothing to address their concerns.

Additionally, "[c]onsultation that excludes from the outset any form of accommodation would be meaningless."[65] One valid accommodation option for consideration should have been not proceeding with the proposed expansion. As noted in the Federal Guidelines, "In some circumstances, appropriate accommodation may be a decision not to proceed with the proposed activity."[66] It was not inappropriate that the Mi'kmaq raised this option, but it was inappropriate that

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[61] *Ibid.* at 130.
[62] *Haida Nation, supra* note 4 at 42.
[63] DFA closing submission at para. 114.
[64] *Ibid.* at para. 115.
[65] *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 at 54 [hereinafter *Mikisew Cree*].
[66] *Federal Guidelines, supra* note 14 at pg. 340, pdf pg. 343 of KMK Book of Authorities.

the province never gave it any due consideration or any mention whatsoever. DFA excluded from the outset any form of accommodation that would have seen the expansion not proceed.

Not responding to "clarifying" questions

DFA's second basis for claiming the First Nation representatives were not open to accommodation was their:

> [R]efusal to fulfill the reciprocal obligation of information sharing regarding the quantification of any adverse impacts, suggests an unwillingness to have the fishing right accommodated. During one consultation meeting, the KMK said that it didn't matter if 5 or 500 Mi'kmaq fishers are displaced. Quantifying the impact on a right only matters if accommodation is the goal. The refusal to provide information on fishing demonstrates an unwillingness to have the right accommodated.[67]

We have addressed this point above. As set out on pgs. 10-11 of our initial submission on the duty to consult, much information was provided by the First Nation about their fishing rights, including the fact that fishing happened in the vicinity of the proposed expansion, that the food fishery was mobile and not static, that accessing the shoreline areas (including the Coffin Island shoreline) were particularly critical for reasons of safety, that the community size was currently 1500-1600, that approximately 30 community members participated in the FSC fishery and those numbers were growing, the "hooping" method of fishing, and the particular importance of the wild salmon, lobster, eel/elver, gaspereau, cod, and mackerel fisheries (among others).[68] KMK's statement that "it didn't matter if 5 or 500 Mi'kmaq fishers are displaced" *was* a description of the First Nation's fishing right, namely, that it was a right held by the entire community and thus the number of fishers was allowed and expected to change over time. The First Nation representatives more than upheld their reciprocal obligations in the consultation process. DFA continued to insist on a granularity of information without providing an explanation of why the existing information was insufficient or towards what ends the additional details were being sought. To then use their own inflexible insistence on this information as evidence of the First Nation's unwillingness to discuss accommodations is unfair and unreasonable.

Not proposing accommodation measures

Third, counsel for DFA supported their position with the assertion that "neither the KMK, nor Acadia First Nation, pursued the topic of accommodation, when it was raised."[69]

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[67] DFA closing submission at para. 116.
[68] Affidavit of Robert Ceschiutti, Exhibit 54 at pg. 200, pdf pg. 205; KMK's initial submission on the duty to consult, dated November 21, 2025 at pgs. 10-11.
[69] DFA closing submission at para. 99.

It is factually inaccurate to say that neither KMK nor Acadia First Nation pursued accommodation measures. For instance, KMK requested the province order a full Archaeological Resource Impact Assessment (ARIA) for Liverpool Bay.[70] This request was not granted; the province did not order an ARIA. Further, contrary to KCS counsel's assertion that "phase 1 and 2 ARIAs were conducted,"[71] the archaeological study that was undertaken voluntarily by KCS was *not* a full ARIA. In its decision letter, DFA referred to this study as a "Phase I ARIA (desktop exercise),"[72] which is essentially a partial ARIA. As explained by KMK in their letter dated December 14, 2022:

> The ARD's primary concern with respect to the archaeological report, as submitted, is with its titling as an ARIA. An ARIA should properly consist of both a desktop assessment (background screening) and field reconnaissance. According to the Nova Scotia Department of Communities, Culture, Tourism and Heritage's ARIA (Category C) Guidelines, "In designing an [ARIA], the following components should be addressed: 1. Background research…2. Field strategy". The Liverpool Bay report acknowledges this deficiency, on more than one occasion, by describing the desktop assessment as "the first phase of the ARIA" (Boreas 2022: 1,5). The report further states that the assessment was restricted to a desk-based screening "so that an appropriate field component strategy can be devised" (Boreas 2022: 1). However, the submission of the report as an ARIA, to both the Proponent and the provincial regulator, risks setting the precedent that underwater archaeological assessments need not be held to the same standard as terrestrial ARIAs. As such, **the ARD disagrees with the recommendation that portions of the assessment area "be cleared of any requirement for further archaeological investigation [and that] development within these areas may proceed as planned" (Boreas 2022, 42), without some form of prior visual reconnaissance**, as a primary data tool, such as remote sensing or direct diver survey.[73] [emphasis added]

Thus, KMK confirmed that the first report was not a complete ARIA, while expressing a second accommodation request, namely, that the *full* area receive some form of visual reconnaissance as part of the archaeological investigation. Once again, DFA did not order or instruct KCS to provide any follow-up visual reconnaissance work, nor did it provide a rationale as to why it was not imposing this requirement.

The archaeological consultant, Boreas Heritage Consulting, recommended a third accommodation measure in its report: it recommended that two high potential areas be avoided, one of which falls underneath the proposed Coffin Island expansion site. CCTH supported this recommendation, and *if avoidance was not possible,* CCTH supported the alternative option of having the high potential areas subjected to subsurface archaeological sampling probes.[74] There was no rationale provided

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[70] Affidavit of Robert Ceschiutti, Exhibit 54 at pg. 201, pdf pg. 206.
[71] KCS closing submission at para. 33.
[72] Affidavit of Robert Ceschiutti, Exhibit 54 at pg. pg. 227, pdf pg. 232.
[73] *Ibid.* at pg. 213, pdf pg. 218.
[74] Affidavit of Bruce Hancock, Exhibit 73 at pg. 16.

as to why the high potential areas could not be avoided, other than Cook Aquaculture saying "no" (with no reasons of its own). The province did not appear to give that recommendation any further consideration.[75] If the province had been upholding its duty to consult and accommodate on this issue rather than leaving it to Cooke Aquaculture's discretion, it might have pursued the option of avoiding high potential areas. Instead, the province left the decision-making up to Cooke Aquaculture, who bore no constitutional duties of honor to the Mi'kmaq whatsoever.

KCS then proceeded with a second archaeological investigation, also of its own volition. For this phase II investigation, CCTH "approved probing/coring not geotechnical testing with heavy equipment,"[76] but the Mi'kmaq were not consulted on this methodology. Nor were the Mi'kmaq consulted on either of the permit applications. Thus, KMK was not given an opportunity prior to the termination of consultations to express its next accommodation request, namely, that core samples be taken from a sufficient depth to reach the layer which would have contained archaeological artefacts. This recommendation was expressed by Heather MacLeod-Leslie in her affidavit.[77] As she noted, the intention of the sampling was to inform the "need for additional archaeological assessment or mitigation."[78] However, due to the methodology adopted, the sampling failed to achieve that objective, and so through its inaction and failure to consult, the province foreclosed on any additional mitigation or accommodation options that could have been informed by proper sampling.

It was therefore far from accurate for DFA counsel to suggest that, for the Mi'kmaq, "the only acceptable form of accommodation was a rejection of the project."[79]

DFA counsel further claimed that:

> [T]he first and only time the Mi'kmaq have even suggested any accommodation, short of rejection of the project, may have been possible is in the KMK's closing submissions in a parenthetical reference to 'creating a larger buffer around Coffin Island.' It is revealing that this proposal is only mentioned now, in submissions to the Board, and was never raised by the Mi'kmaq at the consultation table.[80]

Again, this statement is not supported by the evidence. During the consultation exercise, the Mi'kmaq repeatedly voiced the need for their small fishing vessels to have unimpeded access to the shoreline, and especially the Coffin Island shoreline. It was DFA who insisted that this level of clarity was insufficient. The Mi'kmaq also sought additional information regarding impacts to eel,

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[75] Affidavit of Jeffrey Nickerson, Exhibit 44 at pg. 14, paras. 65-66.
[76] Affidavit of Bruce Hancock, Exhibit 73 at pg. 17.
[77] Affidavit of Heather MacLeod-Leslie, Exhibit 33 at pgs. 4-5, para. 28.
[78] *Ibid*. at pg. 5, para. 24.
[79] DFA closing submission at para. 117.
[80] DFA closing submission at para. 118.

which the province did not pursue or supply. Since the Mi'kmaq were unable to access DFO, and since DFA failed to act as an effective conduit of information between the two, the Mi'kmaq were effectively cut-off from DFO's deliberations around mitigation and accommodation measures for eels/elvers. The Mi'kmaq had zero opportunity to engage in consultation and accommodation discussions with the entity responsible for identifying the mitigation measures, namely, DFO.

DFA's statement above also seems to suggest that the Mi'kmaq were meant to identify potential accommodation measures irrespective of the province's failings leading up to that point in the process. As noted by the Nova Scotia Supreme Court,

> The Province should therefore provide a tentative assessment of the potential adverse effects of the Project on the title claim. A necessary aspect of that impact assessment should be a discussion of the possible, if unlikely, worst case scenarios. **Such a discussion will better inform the content of the consultation and, in particular, what further accommodations (if any) may be required**.[81] [emphasis added]

Here, the ability of the Mi'kmaq to partake in accommodation discussions was greatly impeded by the province's failure to inform that discussion through an initial assessment of potential adverse effects.

The inter-relationship between the identification of adverse impacts and the identification of potential accommodation measures was also raised in the Federal Guidelines. It is clear that this responsibility is not meant to be borne alone by the Indigenous communities:

> [B]y assessing, in advance, what might be the adverse impacts of their activities, departments and agencies can determine how these impacts could be avoided or mitigated and what related measures may be taken by the federal, provincial and territorial governments and/or industry.
>
> Departmental and agency officials should anticipate the types of accommodation measures that may be needed to address the kinds of adverse impacts that their activities may have on potential or established Aboriginal or Treaty rights and related interests.[82]
>
> [...]
>
> After determining that accommodation is appropriate in the circumstances, the next step is to assess the range of possible accommodation measures and discuss these measures with Aboriginal groups. In identifying possible accommodation measures, officials may take into account:
>
> - options identified by Aboriginal groups or the proponents to eliminate or reduce the adverse impacts of the proposed project (e.g. changes to the design or approach to the project);
> - the extent to which any proposed accommodation measures may reduce the adverse impacts of the proposed activity on potential or established Aboriginal or Treaty rights;

[81] *Sipekne'katik, supra* note 10 at 162.
[82] *Federal Guidelines, supra* note 14 at pg. 301, pdf pg. 304 of KMK Book of Authorities.

- whether the adverse impacts of the proposed activity on potential or established Aboriginal or Treaty rights can be eliminated or reduced, and if not, whether some sort of compensation may be appropriate;

[…]

- what other departments and agencies can offer in terms of accommodation, having regard to their mandates, financial authorities and legislation. For example, Human Resources and Social Development Canada – job training; Public Works Government Services Canada – sale or purchase of lands; Parks Canada – commemoration of Aboriginal sacred sites; such measures may meet the concerns and interests without requiring new resources.

This assessment allows the Crown to identify accommodation options for discussion with rights holders.[83]

The Provincial Guidelines similarly describe accommodation as a "collaborative approach" for which "joint efforts" are needed:

> Accommodation can take many forms, including placing terms and conditions in permits, licences, or authorizations, as well as other avoidance, minimizing, or mitigation measures. Mitigation measures may be as varied as, for example, requiring the carrying out of a plan to protect heritage resources, re-routing a pipeline, or adjusting the proposed construction schedule. Depending on the circumstances, where avoidance or mitigation is not possible, compensation (financial and/or nonfinancial) may also be considered.
>
> Since the Government of Nova Scotia takes a collaborative approach to consultation, the same approach should be taken for accommodation. If accommodation measures are needed, joint efforts should be made by all parties (provincial and federal departments and agencies, proponents and other third parties, and the Mi'kmaq of Nova Scotia) to negotiate appropriate avoidance, mitigation, or compensation measures. During discussions about potential accommodation measures, parties should take a strategic approach and attempt to arrive at agreement.[84]

At no point did the province make joint efforts with other provincial and federal departments, KCS or the Mi'kmaq to collaboratively negotiate accommodation measures.

Further, when communicating the selected accommodation measures, it is important that the Crown official convey "[t]he reasons for selecting the chosen accommodation measure(s)…[and] How Aboriginal concerns and suggestions for accommodation measures were addressed or the reasons why the accommodation options suggested by Aboriginal groups were not selected."[85]

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[83] *Ibid.* at pg. 341-342, pdf pg. 343-344 of KMK Book of Authorities.
[84] 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. 25 [hereinafter Provincial Guidelines].
[85] *Federal Guidelines, supra* note 14 at pg. 343, pdf pg. 346 of KMK Book of Authorities.

It is clear from the record that DFA never carried out any of these steps. Nor did it engage in a proper discussion of accommodation measures with the Mi'kmaq. It also did not provide an explanation of why none of the requested accommodation measures were even considered, let alone adopted, or how its single "accommodation" measure was expected to protect the Mi'kmaq's asserted rights. Counsel for DFA claimed that DFA "agreed to effectively accommodate this [archaeology] issue by making it mandatory in the operator's Farm Management Plan that any artifacts found by KCS be immediately reported to the Coordinator of Special Places."[86] However, there is no evidence in support of the proposition that this generic measure "effectively" accommodates the Mi'kmaq's concerns. KCS staff are not trained in the proper identification and detection of underwater archaeological artefacts, nor would any such underwater investigation be taking place at the time when adverse impacts are most likely to occur (i.e. as the anchors penetrate the seabed).

6. Unilateral Closing of Consultation

At paragraphs 162-164 of their closing submission, counsel for DFA addressed the issue of DFA unilaterally ending the consultation process. They provided a helpful excerpt from the case *Mi'kmaq of P.E.I. v. Province of P.E.I. et al.,* 2018 P.E.S.C. 20, which included the statement:

> There was a clear and ample process of communication between the Province and the Mi'kmaq Confederacy. The Province did not ignore any information provided by the Mi'kmaq…Each party's position was evident to the other. The consultations proceeded to the point where there was no new information coming forward.[87]

It was when those conditions were reached that the Court confirmed it was appropriate to end the consultation process. Those conditions were not reached here. The province ignored much of the information provided by the Mi'kmaq, and if the province had bothered to consult on the second archaeological report, the evidence strongly supports the proposition that new information would have been received from the Mi'kmaq regarding the inadequacy of its methodology and additional sought-after accommodation measures.

The chronology of the archaeological consultation is set out in the affidavits of Mr. Hancock and Mr. Nickerson. Counsel for KCS maintained that KMK was provided an opportunity to engage in the ARIA process,[88] and noted that "KMK did not raise an issue with the sampling methodology utilized

[86] DFA closing submission at para. 149.
[87] *Mi'kmaq of P.E.I.* v. *Province of P.E.I. et al.,* 2018 P.E.S.C. 20 at 184 [hereinafter *Mi'kmaq of P.E.I.*].
[88] KCS closing submission at para. 36.

in Phase 2 until it filed its intervenor application in September 2023 despite being notified in advance of the sampling."[89] We dispute this characterization.

If we examine the chronology, we see from Mr. Nickerson's affidavit that on July 6, 2022 a meeting was held between KCS, Acadia First Nation, two KMK representatives, and Ms. Beanlands from Boreas Heritage.[90] This meeting was prior to the *first* archaeology report, dated October 2022, and so the second report and its specific methodology were not discussed at this time. It is clear from the meeting minutes that the first report was expected to include archaeological reconnaissance, which did not happen and was subsequently the subject of KMK's letter of concern.[91] The first archaeological report was shared with Acadia First Nation on October 19, 2022. On November 2, 2022, KCS confirmed that Acadia was allowed to share the first report with KMK and noted that they would be proceeding with the "core samples". There was no detail provided regarding the proposed methodology and no indication that KCS was open to, or looking for, feedback in advance of this second phase of work taking place. There is no further communication on the record between KCS and the Mi'kmaq until after the second report is complete.

The consultation record set out in Mr. Ceschiutti's affidavit included a letter from KMK to DFA dated December 14, 2022 in which Ms. Gaudet identified concerns with the first archaeological report, and in particular its recommendation that portions of the assessment area be cleared of any requirement for further archaeological investigation without some form of prior visual reconnaissance.[92] The province did not respond and did not communicate with the Mi'kmaq at all until its decision letter dated May 1, 2023.

The second archaeological report was provided to the province on March 15, 2023.[93] CCTH informed Boreas Heritage that the report was acceptable only seven days later, on March 22, 2023, without any prior communication with the Mi'kmaq.[94] There is no record of the province contacting the Mi'kmaq to seek their feedback on the second archaeological report prior to issuing its decision letter on May 1, 2023.

We know that KMK and Acadia First Nation received a copy of the second archaeological report from KCS on March 15, 2023, but KCS did not include an offer to discuss the report or a request for

[89] *Ibid*. at para. 41.
[90] Affidavit of Jeffrey Nickerson, Exhibit 44 at pg. 13, para. 57.
[91] *Ibid*. at pg. 120.
[92] Affidavit of Robert Ceschiutti, Exhibit 54 at pg. 213, pdf pg. 218.
[93] Affidavit of Bruce Hancock, Exhibit 73 at pg. 7.
[94] *Ibid*.

comments.[95] Only two weeks later, on March 30, 2023, KCS also sent KMK and Acadia First Nation the approval letter issued by CCTH. The province did not share this letter with the Mi'kmaq itself.

At no point did the province respond to the Mi'kmaq's concerns regarding the first archaeological report. Nor were the Mi'kmaq afforded any opportunity for consultation on the methodology or findings of the second archaeological report. In fact, when the Mi'kmaq received CCTH's approval letter for the second report via KCS on March 30 (only fifteen days after the second report was provided) it would have been logical for them to conclude that providing comments to the province would be of no avail since CCTH had already issued its approval. There was no invitation by the province to solicit the Mi'kmaq's views on the second report, and no advance notice that the consultation process would be ending on May 1, 2023 with the issuance of DFA's decision letter. In fact, the decision letter would have come as a surprise to the Mi'kmaq, since they believed the intention of the sampling was to inform the "need for additional archaeological assessment or mitigation."[96] The province never allowed time for this additional discussion to take place.

Contrary to KCS' assertion, there is no evidence of either CCTH or KCS attempting to discuss the second archaeological report, and in particular its sampling methodology, with the Mi'kmaq in advance of the work taking place. Nor was KMK given an opportunity to provide feedback on the adequacy of the methodology *after* the second report was completed, since CCTH issued its approval only two weeks after receiving the report with no advance notice or any communication whatsoever with the Mi'kmaq.

This record, therefore, in no way accords with the Court's description of when it is appropriate to conclude a consultation process, as described in *Mi'kmaq of P.E.I. v. Province of P.E.I.* If DFA wanted to take credit for "granting KMK an opportunity to come forward with any issues"[97] on the second archaeological report, it should have informed KMK that such an opportunity existed and the timeframe within which comments could be submitted.

7. Department of Fisheries and Oceans (DFO)

Counsel for DFA briefly addressed DFO's lack of involvement in the consultation process:

> With respect, both parties, DFA and the KMK, kept DFO informed on the status of consultation. Senior officials with DFO were copied on all consultation correspondence by both parties. DFO opted not to participate. DF A has no authority to compel DFO to attend consultation meetings or otherwise engage in consultation.[98]

[95] Affidavit of Jeffrey Nickerson, Exhibit 44 at pg. 191.
[96] Affidavit of Heather MacLeod-Leslie, Exhibit 33 at pg. 5, para. 24.
[97] DFA closing submission at para. 148.
[98] *Ibid*. at para. 123.

With due respect, copying DFO on correspondences was not sufficient. KMK is not suggesting that DFA could or should have "compelled" DFO to attend meetings. KMK submits that DFA should have:

- Specifically raised with DFO the request by KMK for DFO to attend the consultation meetings;
- Specifically flagged for DFO the concerns and potential impacts on rights being raised by the Mi'kmaq that fell within DFO's area of jurisdiction;
- Requested additional studies or follow-up information from DFO, both: a) at the outset of consultation, in order to better understand the Mi'kmaq's fishing rights and potential impacts to those rights, and b) during the consultation process, when the Mi'kmaq raised concerns in areas (such as eel/elver) for which DFO held greater expertise; and
- Shared information with the Mi'kmaq from DFO's Science Report which directly pertained to the concerns being raised by the Mi'kmaq.

8. Eels/Elvers

Counsel for DFA raised the issue of eels at paragraphs 124-131 of their submission. They stated that:

> DFO uses a precautionary approach in its Letter of Advice to examine "residual effects" after accounting for the proponent's mitigation measures and the regulatory requirements of DFO and other federal and provincial regulators, to determine whether or not to recommend additional mitigation measures.[99]

They went on to note that DFO did not advise of any additional mitigation and found that the lease area of site 1205 "is small relative to the fishing grounds for each of these fished species."[100]

Counsel for KCS asserted that "[t]here is no evidence before the Board that the current Farm or the proposed expansion impacts the American eel and elver population in Liverpool Bay,"[101] whereas counsel for DFA admitted that "DFA's statement during consultation **acknowledges the possibility of harm to eels**, but simultaneously notes that there is no evidence of a probability of harm."[102] [emphasis added]

We maintain the position that once the potential for an adverse impact has been established, which DFA conceded was the case and which is supported by DFO's Science Report, the appropriate government response cannot be to do nothing. The legal test is not that the adverse

[99] *Ibid*. at para. 127.
[100] *Ibid*. at para. 129.
[101] KCS closing submission at para. 25.
[102] DFA closing submission at para. 131.

impact *will* occur, only that it has the *potential* to occur. The reason there is no evidence of a probability of harm is that no one investigated this issue after it was raised by the Mi'kmaq. No studies were conducted. No collaboration took place between DFA and DFO, the subject-matter expert. DFA did not flag the Mi'kmaq's concerns with DFO or ask for any follow-up information. As noted by counsel for DFA, in preparing its Letter of Advice, DFO accounted for the proponent's mitigation measures and the regulatory requirements. Absent from this description is an accounting of the Mi'kmaq's concerns and potential impacts to their established treaty rights. Had DFO been asked to respond to the Mi'kmaq's concerns or had DFA highlighted the Mi'kmaq's specific need to fish close to shore, DFO's recommended mitigation measures might have looked different. DFO also may have reached a different conclusion regarding the size of the lease area relative to the size of the accessible fishing grounds.

9. Funding

Counsel for DFA raised the issue of funding at paragraphs 137-138 of their final submission. We agree that the issue of funding is not explicitly raised in the consultation record, however, the issue of capacity is. As discussed above, the time needed for the Mi'kmaq to research the scientific complexities of the proposal, as laypeople, was a major issue for DFA, and capacity issues were raised by the Mi'kmaq representatives as well. A well-known authority on the issue of funding is *Platinex Inc*. v. *Kitchenuhmaykoosib Inninuwug First Nation*, in which the Ontario Superior Court of Justice held that: "[t]he issue of appropriate funding is essential to a fair and balanced consultation process, to ensure a "level playing field"."[103] Additionally, the Supreme Court in *Clyde River* was critical of the lack of participant funding being made available for consultation, and pointed to *Taku River* as a positive example of financial assistance being made available at the *midrange of the consultation spectrum*.[104]

Counsel for DFA cited section 18 of the *Terms of Reference for a Mi'kmaq-Nova Scotia-Canada Consultation Process*, which relates to contribution funding to the Assembly of Nova Scotia Mi'kmaq Chiefs for participation in the Consultation Committees and Consultation Advisory Group. This section is not relevant for our present purposes. The consultation on KCS' application did not involve the Consultation Committees or Consultation Advisory Group. The relevant section of the *Terms of Reference* is section 19, which states: "[e]ach of Canada and Nova Scotia will consider the funding requirements of consultation respecting each proposed decision or activity."[105] The *Terms of Reference* are clear that the province is intended to contemplate funding requirements in respect

[103] *Platinex Inc*. v. *Kitchenuhmaykoosib Inninuwug First Nation* (2007), 29 C.E.L.R. (3d) 191 (Ont.S.C.J.) at 27.
[104] *Clyde River, supra* note 18 at 47-48.
[105] Affidavit of Bruce Hancock, Exhibit 73 at pg. 13, s. 19.

of *each* project-specific consultation, so that KMK and the First Nations are not required to absorb consultations costs from their general resources. The cumulative financial impact on the Mi'kmaq from hundreds of provincial and federal consultations is significant. However, it is the proponent and the Crown who stand to benefit from the projects being consulted upon.

It is clear that the province never contemplated the funding requirements of this consultation, despite the capacity concerns and highly-technical nature of the file, contrary to the *Terms of Reference*.

10. Affidavit of Justin Martin

Counsel for DFA continued to focus on the affidavit of Justin Martin at paragraphs 132-136 of their submission. They repeated their objection to Mr. Martin's evidence being considered by the ARB in its assessment of the adequacy of consultation. KMK already responded to the admissibility issue in its letter to the ARB dated September 30, 2025.

DFA counsel based their objection on the fact that Mr. Martin's affidavit contained specifics that were not shared during consultation, but then noted at paragraph 133 that "there is very little new specific information actually contained in the affidavit."[106] It is therefore unclear what point DFA was trying to make. It is also telling that despite the provision of this information in Mr. Martin's affidavit, DFA still insisted that its self-identified standard for sufficient "specifics" has not been met.

As noted in our letter, Mr. Martin's evidence is relevant and admissible in the ARB's assessment of the adequacy of consultation. It is the ARB's decision with respect to the proposed expansion that triggers the duty to consult. The ARB has not yet made its decision, thus the window for fulfilling the Crown's duty to consult has not yet closed. All relevant evidence before the ARB must be considered when making its determination.

All of which is respectfully submitted,

[redacted]

Jessica Ginsburg

[106] DFA closing submission at para. 133.