RECEIVED
By NSARB at 2:11 pm, Dec 04, 2025

2023 **NSARB-2023-001**

Nova Scotia Aquaculture Review Board

IN THE MATTER OF: Applications made by **KELLY COVE SALMON LTD.** for a **BOUNDARY AMENDMENT** and **TWO NEW MARINE FINFISH AQUACULTURE LICENSES** and **LEASES** for the cultivation of **ATLANTIC SALMON (Salmo salar) - AQ#1205x, AQ#1432, AQ#1433** in **LIVERPOOL BAY, QUEENS COUNTY.**

Kelly Cove Salmon Ltd.

APPLICANT

-and-

Minister of Fisheries and Aquaculture

PARTY

-and-

Kwilmu'kw Maw-Klusuaqn Negotiation Office (KMKNO)

FIRST INTERVENOR

-and-

Queens Recreational Boating Association (Brooklyn Marina)

SECOND INTERVENOR

22 Fishermen of Liverpool Bay

THIRD INTERVENOR

Region of Queens Municipality

FOURTH INTERVENOR

Protect Liverpool Bay Association

FIFTH INTERVENOR

WRITTEN SUBMISSIONS
ON BEHALF OF
THE MINISTER OF FISHERIES AND AQUACULTURE

Robert Grant KC, Sarah D. Nicholson
and David Barry
Stewart McKelvey
Queen's Marque
600-1741 Lower Water Street
Halifax, N.S. B3J 0J2
Counsel for Kelly Cove Salmon

Peter M. Rogers, KC and
Natasha Puka
McInnes Cooper
1300-1969 Upper Water St.
Purdy's Wharf
Halifax, NS B3J 2V1
Counsel for the Region of Queen's Municipality

Alison Campbell and
Caitlin Menczel-O'Neil
Department of Justice (NS)
1690 Hollis Street
Halifax, NS BJ3 1V7
Counsel for the Department of Fisheries and Aquaculture

James Gunvaldsen Klaassen,
Kacie Oliver and Ella Johnson
Ecojustice
520-1801 Hollis Street, Halifax
NS B3J 3N4
Counsel for Protect Liverpool Bay Association

Jessica Ginsburg
Mi'kmaq Rights Initiative
75 Treaty Trail
Truro, NS B6L 1W3
Counsel for Kwilmu'kw Maw-Klusuaqn

Jamie Simpson
Juniper Law
PO Box 20116,
Spryfield, NS B3R 2K9
Counsel for the 23 Fishermen

INDEX

1) Overview

1. These submissions will address the adequacy of the Department of Fisheries and Aquaculture's (DFA) consultation with the Mi'kmaq of Nova Scotia regarding Kelly Cove Salmon's application to expand its operations in Liverpool Bay.

2. The duty to consult is triggered when a government decision may adversely impact established or asserted Aboriginal or Treaty rights. The Province of Nova Scotia is committed to the process of consultation, which is part of upholding the honour of the Crown and a necessary component of reconciliation with indigenous people.

3. The Province satisfied its duty to consult in this case. DFA initiated consultation at the moderate level. Although there is no checklist in the caselaw on what moderate consultation should entail, the caselaw contains sufficient guidance for assessing when consultation is adequate.

4. From a legal perspective, a critical point that the Kwilmu'kw Maw-klusuaqn Negotiation Office ("KMK") did not address in their submissions is *how* this Board must assess the adequacy of DFA's consultation. The Board must look at the detailed Consultation Record to understand the efforts at consultation actually undertaken by DFA. If the Board were to adopt the KMK's analysis of beginning with an idealized, hypothetical and retroactively created consultation process, it would be committing the legal error of applying the incorrect standard of review. As will be explained later in this Brief, DFA's consultation must be assessed on the reasonableness standard of review.

5. Both parties must approach consultation in good faith. The government must make reasonable efforts to inform and consult with the relevant Aboriginal group about rights and potential adverse impacts. However, the duty to consult is not a duty to agree. The goal of consultation is to effect reconciliation between the Crown and Aboriginal peoples. Reconciliation is relationship building that requires reciprocity.

6. The Consultation Record in this case shows that DFA approached consultation in good faith and with an open mind. Unfortunately, these efforts were not reciprocated. After the first consultation meeting, a year passed with no meaningful attempts by the KMK or Acadian First Nation to take part in consultation. After being notified that consultations would be closed in the absence of their participation, the Mi'kmaq representatives came back to the consultation table. Even after re-engaging with the process there was an unwillingness to share information that could have led to a discussion about potential accommodation.

7. This pattern of conduct reveals that the Mi'kmaq representatives had no interest in having the possible impacts on their rights accommodated. The only result that was acceptable was a rejection of the proposed expansion.

8. Given the lack of reciprocity throughout this process, DFA's consultation went above and beyond what was required to maintain the honour of the Crown. The KMK have not demonstrated that DFA's consultation was inadequate.

2) Factual Background

9. Kelly Cove Salmon Ltd ("KCS" or "Kelly Cove") submitted the boundary amendment application for AQ#1205 to the Department of Fisheries and Aquaculture ("DFA") on March 6, 2019.

Exhibit 5, Application Package, p. 8

10. On June 27, 2019, DFA forwarded the application to Nova Scotia's Office of L'Nu Affairs (OLA, formerly called the Office of Aboriginal Affairs) for advice on consultation with the First Nations communities of Nova Scotia. OLA replied on July 15, 2019 advising that consultation proceed at the moderate level with all 11 Assembly communities.

Exhibit 4, Report on Outcomes of Consultation, p. 716

11. On September 25, 2019, DFA initiated consultation with the Mi'kmaq of Nova Scotia at the moderate level.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 5

12. Two months later, on November 22, 2019, Ms. Twila Gaudet from the Kwilmu'kw Maw-klusuaqn Negotiation Office ("KMK"), "), the negotiation office of the Assembly of First Nations, advised that the Mi'kmaq of Nova Scotia wished to proceed with consultation. The KMK raised a number of concerns with the proposed expansion and expressed that the local Mi'kmaq communities were opposed to it. Notably, no concerns were expressed regarding the selection of a moderate scope of consultation.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 5

13. A month and a half later, on February 6, 2020, DFA sent a letter to the KMK to continue consultation. DFA acknowledged that a number of concerns had been raised by the KMK in their previous letter; however, DFA went on to note that only two of those issues appeared to threaten established and asserted Mi'kmaq Aboriginal and Treaty rights. Both issues involved potential negative impacts to fish health/right to fish. DFA noted that other concerns raised by the KMK appeared to be more general in nature and the impact on an Aboriginal or Treaty right was not clear. DFA requested details of adverse impacts to established or asserted Aboriginal or Treaty rights. DFA offered to meet in person to further consultation.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 39-41

14. On March 5, 2020, the KMK wrote advising they would like to proceed with an in person meeting to further consultation.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 45

a. Consultation Meeting #1 – December 9, 2020

15. The first consultation meeting took place, virtually, on December 9, 2020. DFA gave three presentations:

a. a presentation on the adjudicative application review process;

b. a presentation on the proposed aquaculture expansion in Liverpool Bay; and

c. a presentation on the lobster telemetry study in Liverpool Bay.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 46, 52, 68

b. Unwillingness to Engage in Consultation - 2021

16. The meeting minutes were circulated on April 12, 2021

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 85

17. On May 3, 2021, DFA reached out to the KMK to continue consultation by offering two specific meetings on issues raised during consultation. One meeting would discuss concerns regarding environmental impact from the proposed project. The other meeting would respond to concerns raised regarding fish health and disease.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 85

18. The KMK did not respond to this letter.

19. On July 16, 2021, DFA sent a reminder email to the KMK with more details on the proposed meetings. Three dates in August were proposed.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 87

20. The KMK did not respond to this email.

21. On August 25, 2021, DFA wrote to OLA to ask if they would follow up with the KMK during their next regular directors consultation process.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 88

22. On August 30, 2021, OLA sent an email to the KMK asking for them to suggest dates in September/October.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 89

23. On the same day, the KMK responded acknowledging receipt and stated they would provide a range of available dates.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 90

24. However, the KMK did not send a range of available dates.

25. On September, 24, 2021, nearly a month later, OLA again reached out to follow up on scheduling the next consultation meetings.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 91

26. The KMK responded on October 1, 2021 stating Acadia First Nation, the Mi'kmaq community located nearest to the proposed aquaculture operation, would like to set something up for early October.

27. Several days later, on October 4, 2021, OLA responded noting that early October would be difficult as it was already early October. OLA proposed early November.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 93

28. On the same date, the KMK requested specific dates to provide to Acadia First Nation.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 94

29. On October 13, 2021, OLA proposed 3 different times on November 24 and 26, 2021.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 95

30. The KMK did not respond to this email.

31. On November 23, 2021, nearly a year after the first Consultation Meeting, OLA wrote to the KMK to say that DFA had an obligation to proceed with decision making in the continued absence of engagement.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 96

32. The following day, November 24, 2021, the KMK re-engaged and asked whether meetings could take place the following week.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 97

33. On November 29, 2021, the KMK asked whether it was possible to meet that week.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 98

34. The same day, OLA wrote to say they would check with DFA.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 99

35. The KMK responded that day, November 29, 2021, indicating their availability the following week. Further correspondence was exchanged in an effort to find a mutually acceptable date.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 100

36. On January 18, 2022, DFA sent a letter to the KMK. The letter advised that DFA was ready to send the application to the Aquaculture Review Board, as DFA had completed its internal review process and received advice from its network partners. DFA also noted that since the December 9, 2020 meeting, the KMK and Acadia First Nation had not reciprocated DFA's efforts to re-engage in consultation. DFA stated that this letter was a final offer to continue consultation with two virtual meetings between Feb 28 and Marach 11, 2022. DFA requested a response by February 4, 2022, stating that if no

response was received, it would consider consultations to be concluded.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 102-104

37. That same day the KMK confirmed they and Acadia First Nation were available to meet on March 1 and March 2, 2022.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 111

c. Consultation Meeting #2 – March 1, 2022

38. On March 1, 2022, the second Consultation meeting took place virtually. The focus of this meeting was fish health impacts and mitigation measures. One of DFA's veterinarians, Dr. Anthony Snyder, gave a presentation reviewing the aquatic animal health programs required by the provincial and federal regulatory regimes. Representatives from the KMK and Acadia First Nation asked questions and Dr. Snyder answered them.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 115-152, 113-114

39. During this meeting, DFA stressed that given the amount of time that had passed, they were getting close to submitting KCS' application to the Board. At the same time, DFA stated that they needed to hear from the Mi'kmaq about fisheries undertaken in the project area.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 113

d. Consultation Meeting #3 – March 2, 2022

40. The following day, March 2, 2022, the third consultation meeting took place. This meeting was intended to address concerns regarding potential environmental impacts and mitigation measures. The meeting began with a request by OLA to use a map of Liverpool Bay to assist Acadia First Nation in the discussion around the location of fishing activities. The following traditional use information was shared:

a. Food fishery is not static;

b. People fish along the Bay, but may move if they are not catching;

c. Food fishery boats are small vessels / skiffs with only 1 or 2 people on board;

d. Acadia First Nation shared that it has approximately 300-400 members in Queens County, but the membership is growing;

e. Community members have fish shacks on Coffin Island;

f. Acadia First Nation described a practice called "hooping" that is used instead of traps. This technique involves baiting a hoop and dropping to the bottom of the ocean and hauling it back up. The hoops are important handmade tools that are not left overnight; and

g. Acadia First Nation further noted that NCNS also gives out food fishing tags in the Liverpool area as well.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 153-155

41. It is evident from the Meeting minutes that Acadia First Nation is explicitly opposed to the expansion of the project footprint and any expansion was described as impeding the Food Social and Ceremonial (FSC) and moderate livelihood fisheries.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 154-155

42. DFA asked for specifics on how the site impacted the First Nation fisheries. The KMK stated that more clarity may not be possible. They stated that the Mi'kmaq have already been displaced and been required to change how they fish in Liverpool Bay due to the existing aquaculture site.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 155

43. Jessica Feindel, the DFA manager who oversees the Environmental Monitoring Program, gave a presentation describing the program and the historical performance of AQ#1205, and the collection of baseline data.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 160-192

44. Action Items from the December 9, 2020 meeting were reviewed including Acadia First Nation's commitment to discussing with Chief and Council the prospect of meeting with the proponent.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 156-157

45. The KMK raised a new concern at this meeting: potential impact on underwater archaeology in Liverpool Bay. The KMK explained that the Mersey River corridor contains approximately one quarter of all known Mi'kmaq archaeology sites in Nova Scotia. As a result, the KMK asserted that the project area is extremely high risk and recommended an ARIA be completed. The KMK stated that archeology needed to be discussed at the next consultation meeting.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 156

e. Consultation Meeting #4 – June 1, 2022

46. The primary focus of this consultation meeting was the concern raised by the KMK and Acadia First Nation regarding potential impacts to submerged archaeology. Potential impacts on fishing rights were also discussed.

47. The meeting began with Acadia First Nation and the KMK providing an update on engagement with the proponent. They reported meeting with KCS on April 15, 2022. They reported that KCS was not aware of the archeology issue. DFA explained that information shared by First Nations groups during consultation is not shared with

proponents, which is why DFA repeatedly urged Acadia First Nation to meet with the KCS.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 194

48. Staff from the Department of Communities, Culture, Tourism and Heritage (CCTH) were present at the meeting to discuss the KMK's suggestion that an archeological resource impact assessment (ARIA) needed to be done. CCTH's initial advice to DFA regarding the proposed AQ#1205 expansion was that they had no concerns, but noted that if in the course of operation any artifacts are encountered, the proponent should report the finding to the Coordinator of Special Places at CCTH.

Exhibit 4, Report on Outcomes of Consultation, p. 523

49. At the meeting on June 1, 2022, CCTH explained that they considered the project area as having a high energy subsurface environment and sandy floors. The KMK stated that there was a tendency to ignore high energy environments, but noted there had been archaeological discoveries in similar areas. DFA agreed to consider the KMK's request that an ARIA be completed for the project area. This was recorded as an action item.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 195-196
Exhibit 73, Affidavit of Bruce Hancocks, p. 18

50. This meeting also included a lengthy discussion about potential impacts to Mi'kmaq fishing rights. OLA stated that specificity around the practice of rights is crucial to consultation, including, in this case, information such as species fished, and number of community members impacted. The KMK took the position that the number of community members fishing was not relevant and the displacement of Mi'kmaq fishers has already occurred to the existing site and commercial fisheries. The meeting minutes record the KMK as saying that it could be 5 members or 500 members, they still have a right to fish.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 196

51. Acadia First Nation repeated their concern that the proposed expansion would take up the whole coastline of Coffin Island. DFA explained that the site footprints shown on the maps do not reflect the actual space occupied by pens and gear. DFA again noted that fishing can still take place within the lease site right up to the cages. DFA asked for clarity on how the expansion would prevent fishers from accessing the resource. DFA also stated the importance of knowing where the best/most productive fishing is done, suggesting that perhaps one of the other proposed sites would be preferable for expansion. DFA stressed the need to balance interests with other groups.

52. Throughout consultation, DFA and OLA had been asking for specific information on the scale and scope of fishing done by the Mi'kmaq in Liverpool Bay as part of their right to fish. At this meeting, the KMK finally appeared to agree to provide this information by

agreeing to a new action item (action item #4) which stated they would provide the following information:

a. species fished,

b. where fishing occurs,

c. how many community members would be impacted,

d. how the project would prevent fishers from accessing the resource, and

e. if reasonable accommodation can be developed to mitigate any potential loss within the immediate area of the project.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 196-7

f. KMK's Letter of June 16, 2022

53. Approximately two weeks after the fourth consultation meeting, on June 16, 2022, the KMK wrote to DFA to reiterate its concern regarding the potential damage to submerged archaeology, stating:

> Archaeological sites are a non-renewable resource and physical impacts have the potential to damage or disturb buried cultural remains. 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. Therefore, the KMK strongly recommends that a full Archaeological Resource Impact Assessment (ARIA) be carried out prior to any decision by the Aquaculture Review Board (ARB) and that any such investigation be developed collaboratively with the Mi'kmaq.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 201

g. DFA's Letter of November 23, 2022

54. On November 23, 2022, DFA wrote to the KMK to continue consultation. DFA stated that the next step was to submit the application to the ARB for a decision. DFA noted the action item that it would consider whether to require an ARIA, but went on to state that KCS had taken the initiative to proceed with an ARIA, with the final report expected to be shared soon.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 202-203

55. DFA noted that in the 5 months since the fourth consultation meeting, it had not received any follow up from the KMK regarding the other action items. A response was requested within 30 days. DFA noted that it had significant timing concerns associated with advancing the application to the ARB.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 202-203

56. The KMK responded on November 30, 2022 requesting more time to review the ARIA

report and provide feedback.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 211

h. KMK's Letter of December 14, 2022

57. The KMK responded on December 14, 2022. The first issue addressed is Action item #4 from the fourth consultation meeting. For convenience that action item stated:

> Kwilmu'kw Maw-Klusuaqn Negotiation Office (KMKNO) to provide Nova Scotia Department of Fisheries and Aquaculture (NSDFA) with information on what species are being fished, where fishing occurs and how many community members would be impacted, how the project would prevent fishers from accessing the resource and if reasonable accommodation can be developed to mitigate any potential loss, within the immediate area of the project.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 212

58. The KMK refused to provide the requested information stating: "We reiterate that there remains concerns in providing that information. This is an ongoing exercise."

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 212

59. With respect to Action item #5, which addressed illustrating specific adverse impacts to Mi'kmaw Aboriginal and Treaty rights from the proposed expansion, the KMK stated that "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. Displacement has been brought up numerous times during our meetings and the loss of an archaeological site or artifact is an irreversible loss to Mi'kmaw history and culture."

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 212

60. The KMK then addresses the fact that the ARIA was a desk-based screening undertaken by KCS on their own initiative, rather than at the direction of the DFA. The KMK indicated that they agreed with some recommendations of the ARIA, specifically, that subsurface sampling be conducted in the high potential areas identified. However, the KMK disagreed that the other areas, which were not considered high potential for archaeological remains, could be cleared for a requirement for any further archaeological investigation.

61. The KMK closes the letter by stating that they "stand firm" that a full ARIA should be completed and the results reviewed by their archaeological staff prior to the conclusion of consultation. The KMK then states the following:

> Recognition from the Province of the cultural significance of the submerged landscape of Liverpool Bay to the Mi'kmaw would be a step towards building the trust required for sharing information on fishing activities in the area.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 212

i. Conclusion of Consultation – Decision Letter – May 1, 2023

62. DFA sent its decision letter closing consultation to the KMK on May 1, 2023. The letter provides a chronology of consultation and DFA's assessment of each of the concerns raised by the KMK and Acadia First Nation during consultation.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 215

63. DFA found many of the concerns raised during consultation to be general in nature and not specific to the proposed site, nor clearly arising from an asserted or established aboriginal right. DFA took this position regarding the following issues:

a. Aquaculture facility waste;

b. Parasites and sea lice, antibiotics;

c. Oxygen; and

d. Fish escapes;

64. DFA recognized the right to fish for FSC and moderate livelihood as established Aboriginal and Treaty rights, and that the KMK and Acadia First Nation had raised concerns with potential negative impacts on these rights. These concerns were:

a. Protection of wild stocks from sea lice;

b. American eels; and

c. Impacts to local FSC fisheries.

65. However, DFA ultimately found that these concerns were general in nature and not shown to be specific to the proposed site. Due to a lack of specificity in how the exercise of fishing rights would be adversely impacted, DFA found that no accommodation or mitigation measures could be applied.

66. Regarding the issue of submerged archaeology, DFA notes that KCS provided the Phase II ARIA report on March 15, 2023. KCS advised DFA that the report had been provided to the KMK and Acadia First Nation. The Report advised that no cultural remains had been discovered in the subsurface sampling conducted and development in the area could proceed without further investigation. DFA concluded, as with the other concerns raised, that the concern regarding archaeology was speculative in nature.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 229
Exhibit 4, Report on Outcomes of Consultation, p. 608

67. However, despite finding the concern regarding impacts to submerged archaeology was speculative, DFA went on to state that it would accommodate this concern by asking the ARB to impose a condition on KCS' license, if approved, requiring KCS to contact CCTH's Coordinator of Special Places in the event that any artifacts are encountered by the operators at the site. DFA also described a working group project, in collaboration

with the KMK, CCTH, OLA and others to develop an archaeological procedure and educational materials that will be provided to licence holders and form part of their Farm Management Plan, thus making compliance with it mandatory.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 229

3) Issues

68. DFA states the Board must decide the following issue:

    a. Was DFA's consultation with the Mi'kmaq of Nova Scotia adequate?

4) Standard of Review

69. The standard of review is critical for any decisionmaker assessing a government decision. The standard of review tells the Court, or tribunal, how to conduct the assessment of the decision under review. There are two relevant standards or review: correctness and reasonableness.

70. When applying the Correctness standard, a tribunal simply undertakes its own analysis of the issue. This standard was described by the Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 ("*Dunsmuir*") as follows:

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct. [Emphasis added]

Dunsmuir, para 50

71. In contrast, the reasonableness standard of review requires the tribunal to focus on the decision under review and assess whether it falls within a range of possible reasonable outcomes. It is *not* open to a tribunal, applying a reasonableness standard, to simply substitute its own view on what it believes is the preferable outcome. This was explained by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*"):

> What distinguishes reasonableness review from correctness review is that the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place. [Emphasis added]

Vavilov, para 15

72. The caselaw from the Supreme Court of Canada is clear that the adequacy of consultation is to be assessed using the reasonableness standard of review.

Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resources), 2017 SCC 54, para 77

73. In *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73, the Supreme Court held that "what is required is not perfection, but reasonableness." The Court went on to note that: "the government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty"

Haida Nation, para 62

74. The KMK's submissions make it clear that it expects the Board to review the adequacy of consultation on the correctness standard, rather than the reasonableness standard, despite the Supreme Court of Canada clearly stating that that would be an error. The very structure of the KMK's brief is misconceived, and has the potential to mislead the Board. The KMK's approach starts with a hypothetical gold standard of consultation, and then states that DFA's consultation fell short of perfection. This approach is reflected in the way the KMK does its own fresh analysis of each topic of consultation by first listing "what the Province should have done" followed by a section describing "what the Province actually did."

75. As noted above, the deferential reasonableness standard expressly forbids this type of assessment. Furthermore, there is no prescribed checklist for what constitutes adequate consultation. The focus must be on what the Province actually did, in context. As the Supreme Court noted in *Haida Nation* – the standard is one of reasonableness not perfection.

Haida Nation, paras 44 and 62

5) Argument

Issue A: Was DFA's consultation with the Mi'kmaq of Nova Scotia adequate?

a. Key Principles

76. In Canada, all governments have a duty to consult with Aboriginal groups when making decisions which may adversely impact established or asserted Aboriginal and Treaty rights. The carrying out of consultation by governments is a key component of furthering the goal of reconciliation and balancing Canadian sovereignty with the pre-contact presence of Aboriginal peoples and, by extension, the rights and related interests of Aboriginal peoples with those of non-Aboriginal peoples.

Haida Nation, para 20

77. In *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, the Supreme Court set out the following three part test for determining when the duty to consult is triggered:

> (1) the Crown must have had knowledge, actual or constructive, of a potential Aboriginal claim or right;
>
> (2) there must have been contemplated Crown conduct; and

> (3) there must have been potential for the contemplated Crown conduct to adversely affect an Aboriginal claim or right.

Each of the three parts in this test must be proven to determine that the First Nations group claiming a right to consultation was in fact owed a duty to consult by the government organization. Whether the duty to consult was triggered is not at issue in this proceeding, as DFA recognized it was and initiated consultation accordingly.

Carrier Sekani at paras. 31 and 39.

78. The Supreme Court of Canada has been clear that adverse impacts must be more than "speculative":

> Mere speculative impacts, however, will not suffice. As stated in *R. v. Douglas*, 2007 BCCA 265, 278 D.L.R. (4th) 653 (B.C. C.A.), at para. 44, there must an "appreciable adverse effect on the First Nations' ability to exercise their aboriginal right". The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice. [Emphasis added]

Carrier Sekani, para 46

79. Furthermore, consultation is not engaged by past wrongs, historical grievances, or previous breaches of section 35 rights. The reasoning behind this principle is that consultation is a forward-looking constitutional duty that is about mitigating, and hopefully preventing, adverse effects on clearly defined rights as stemming from a current proposed government action.

Carrier Sekani at paras 45 and 46

80. Consultation does not mean the same thing in every situation. When the duty to consult is triggered, Government actors must select and apply the correct level, or "scope" of consultation.

Haida Nation at para 61
Beckman v. Little Salmon/Carmacks First Nation, 2010 SCC 53 ("*Little Salmon/Carmacks*") at para 48
Vavilov, at para 55

81. In *Haida Nation,* the Supreme Court of Canada established that the scope of consultation required to satisfy the honour of Crown exists on a spectrum proportionate to the context. Determining the right level of consultation includes a preliminary assessment of whether there is a strong case that a right exists, and how seriously the right might be adversely affected.

Haida Nation at para 39

82. The duty to consult has been compared to the administrative law concept of procedural fairness. Consultation does not need to be perfect, nor does it require parties to the

consultation to agree. To be adequate, there must have been a meaningful two-way dialogue.

Haida Nation, para 41

83. The Supreme Court has said that in defining reasonable and meaningful consultation, the "controlling question" is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. What is required will vary with the circumstances of each individual case.

Haida Nation, para 45

84. The Supreme Court has stated that both sides to consultation have a duty to act in good faith:

> 42 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. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. 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. Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted. [Emphasis added] [Citations omitted]

Haida Nation, para 42

85. The Federal Court of Appeal recently highlighted the reciprocal nature of consultation in *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34 and then went on to describe reconciliation as a relationship:

> 56 Reconciliation as relationship can only be advanced through consultation when the respective parties commit to the process, avoid counterproductive tactics, get to the substance of the issues of concern and exercise good faith — Indigenous peoples by communicating their concerns in the clearest possible way and the Crown by listening to, understanding and considering the Indigenous peoples' points with genuine concern and an open mind throughout. Only then can the process lead to accommodations that respond to the concerns of the Indigenous peoples. [Emphasis added]

Coldwater, para 50 and 56

86. The Supreme Court of Canada has confirmed that Aboriginal groups possess a reciprocal obligation during consultation to:

a. Facilitate consultation and accommodation by setting out its claims clearly and as early as possible;

Ktunaxa Nation, para. 79

b. Show the causal relationship between the Crown action and a right;

Carrier Sekani, para. 45

c. Respond to government's attempts to meet their concerns and to try to reach a mutually satisfactory solution; and

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2005 SCC 69, para 65

d. Act in good faith in all instances when carrying out these consultation responsibilities.

Haida Nation, para 42
Carrier Sekani, para. 83

87. While there are bright and clear directions in the caselaw for how both parties must *approach* consultation, when it comes to setting an agenda for consultation "it is impossible to provide a prospective checklist of the level of consultation required".

Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), 2004 SCC 74 at para 32

88. To date, there is specifically no definition at law for what activities will satisfy the Crown's duty to consult at the moderate level. However, in *Haida Nation,* the Supreme Court of Canada *did* provide helpful description of what may suffice in the context of both low and high level consultation:

> 43 [...] the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 Alta. L. Rev. 49, at p. 61.
>
> 44 At the other end of the spectrum lie cases 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. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage 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. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.
>
> 45 Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to

> maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the **Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns.** Balance and compromise will then be necessary. [Emphasis added]
>
> *Haida Nation* at paras 43-45

89. Clearly, the most important consideration for assessing adequacy of consultation at the moderate level, and every level, is the context before the decision maker. The ability to be flexible and adjust the consultation process based on the information that arises is also essential.

90. The outcome of consultation may include a determination of what can be done to accommodate the rights and title of the claims at issue. The duty to accommodate Indigenous parties at the conclusion of moderate-level consultation is also tied to the context-driven, two-way dialogue achieved through the consultation process. Consultation itself, in the form of meaningful discussion and/or negotiation may be accommodation enough. In *Haida Nation,* the Supreme Court of Canada explained:

> 47 When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation ***may*** be to reveal a duty to accommodate. Where 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. **Accommodation is achieved through consultation, as this Court recognized in Marshall v. Canada, [1999] 3 S.C.R. 533 (S.C.C.), at para. 22: "...the process of accommodation of the treaty right may best be resolved by consultation and negotiation"**. (Emphasis added)
>
> *Haida Nation* at para 47

91. The fact that a duty to consult is engaged, even at a moderate level, does not mean that there is a free-standing obligation to accommodations in the form of project amendments – or project cancellation – in every case. Section 35 of the *Constitution Act, 1982* and the common law interpreting this provision, do not support such an absolute approach. The duty to accommodate *may* arise out of meaningful consultation where it is evident that accommodation measures are what is required to satisfy the honour of the Crown.

> *Little Salmon/Carmacks* at para 81

92. Once again, the Federal Court of Appeal's recent reasons in *Coldwater* are helpful for understanding the true purpose of the accommodation process and how the Crown is expected to satisfy its section 35 duty to accommodate, when such a duty arises:

> [57] When adequate consultation has taken place but Indigenous groups maintain that a project should not proceed, **their concerns can be balanced against "competing societal interests". This is the role of accommodation**.

> [58] Like consultation, **accommodation does not guarantee outcomes**. It is an **ongoing "give and take" process**. One way to accommodate is to **impose conditions on a project proponent**, such as ongoing participation of Indigenous groups (see, e.g., Chippewas of the Thames, paragraph 57; TWN 2018, paragraph 637). Canada must act in good faith, but at the same time **accommodation cannot be dictated by Indigenous groups**. [Emphasis added] [Citations omitted]

Coldwater at paras 57-58

b. DFA Approached Consultation with Open Mind

93. DFA commenced consultation at the moderate level because it recognized that the proposed expansion had the potential to adversely affect Aboriginal and Treaty rights. As reflected in the consultation record, DFA attempted to substantively engage the Mi'kmaq in order to better understand the scale and scope of fishing done by the Mi'kmaq in Liverpool Bay as part of their fishing rights and to inform any potential accommodation of adverse impacts on these rights as stemming from the proposed expansion.

94. DFA approached consultation in good faith and with an open mind which is demonstrated by its willingness 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.

95. In early correspondence, DFA noted that it did not see a connection between some of the general concerns raised and specific Aboriginal Rights and asked for more detail and suggested the parties meet to discuss the issues.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 39-41

96. DFA staff prepared a chart providing information in response to some of the general concerns raised in the KMK's initial consultation letter.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 40, 42-44

97. DFA heard the concern about potential impacts to fishing rights and organized presentations by the Department's internal subject matter experts to explain DFA's regulatory regime that is designed to mitigate potential negative impacts on fishing rights. These included presentations on the Environmental Monitoring Program, the various Aquatic Animal Health programs. DFA staff also gave a presentation on its collaboration with DFO and other scientists on the lobster telemetry study in Liverpool Bay.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 77, 115, 160

98. DFA heard and understood the KMK and Acadia First Nation's concern regarding displacement of fishers in Liverpool Bay. Repeatedly, DFA requested details on how rights are exercised in the Bay such as the number of fishers, species fished, where best fishing occurred, etc. As will be discussed further below, responsive information was not forthcoming.

99. At one point, DFA suggested that if the best/most productive fishing is done in one area, perhaps one of the other locations KCS proposed in Liverpool Bay would be preferable for expansion. However, the KMK and Acadia First Nation chose not to share the type of information that could have led to such an accommodation. Moreover, neither the KMK, nor Acadia First Nation, pursued the topic of accommodation, when it was raised.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 196-197

100. Although the concern regarding submerged archaeology was raised over 2 years after consultation had commenced, and at a time when DFA was looking to conclude consultation and submit the application to the Board, DFA agreed to hold another consultation meeting to hear the concerns regarding this issue. 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.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 201

101. Ultimately, DFA did not order KCS to conduct an ARIA. However, DFA did abide by the KMK's request, in their letter of December 14, 2022, to hold off on submitting the application to the Board until after the results of KCS' self-initiated ARIA report had been completed and the KMK had an opportunity to review it.

102. The Phase II ARIA was completed and provided by KCS to DFA, the KMK and Acadia First Nation on March 15, 2023. DFA waited until May 1, 2023, a month and a half, to close consultation. Given the extensive amount of time that had passed since consultation was initiated on September 25, 2019, this was not unreasonable.

103. In addition, DFA has stated it would ask this Board to impose a condition on KCS' license, if approved, requiring KCS to contact CCTH's Coordinator of Special Places in the event that any artifacts are encountered by the operators at the site.

c. Fishing Rights – Consultation Adequate

104. As mentioned above, DFA recognized that Mi'kmaq fishing rights could potentially be negatively impacted by the expansion of AQ#1205 and solicited information about how these rights are practiced with an open mind.

Refusal to provide information

105. The goal of the duty to consult is to further reconciliation. One of the ways consultation furthers this goal is by creating a space for governments to learn about how proposed projects/actions may adversely affect a First Nations groups' rights or related interests, and if possible, address those risks.

106. In addition to the Crown keeping an open mind at consultation, there is again a reciprocal duty on Aboriginal groups, as articulated above, to not act in a manner that frustrates "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."

Haida Nation, para. 42

107. In this case, DFA repeatedly asked for details on how the Mi'kmaq fishers exercised their right to fish in Liverpool Bay. OLA and DFA went so far as to create a list of information they felt was necessary (Action Item #4 from Consultation meeting #4). The KMK suggests that DFA's insistence on details that would quantify the Mi'kmaq's use of the area for exercising their right to fish in Liverpool Bay is somehow inappropriate or misunderstands the legal requirements of consultation.

KMK Closing Submissions, p. 26-27

108. With respect, it is the KMK's submissions which appear to be based on a misunderstanding of the purpose of consultation. Consultation is intended to be a forum for sharing information – in both directions. Only when information on the scope and scale of the fishing right is known can the Province undertake the exercise of balancing the rights and interests of the Mi'kmaq and KCS via potential accommodation.

109. The KMK submission would suggest that any impact on a right automatically gives the Mi'kmaq a right to veto a project. That is not the law. Any impact may *trigger* the duty to consult. Once engaged, though, the extent of the adverse impact on a section 35 right must be understood in order to ascertain whether accommodation is required, and, if yes, what is the best means of accommodating that potential adverse impact. DFA and OLA already knew there were Mi'kmaq fishers in Liverpool Bay. That is why government recognized a duty to consult at the moderate level, and why they spent close to 4 years engaging in consultation. What DFA and OLA did not know was the scope and scale of Mi'kmaq fishing in the area around Coffin Island. That information is *only known* by the Mi'kmaq. That is why DFA and OLA kept requesting information about how many people were fishing in the area, what specific areas, and the species being fished. While DFA and OLA had general information, they *did not know* the details. It was the Mi'kmaq's reciprocal obligation to share those details if it expected government to make informed decisions about any accommodations required.

110. The KMK and Acadia First Nation refused to provide the details sought. In the KMK's letter of December 14, 2022, in response to the action item to provide details about the exercise of fishing rights in Liverpool Bay, the KMK stated: "We reiterate that there remains concerns in providing that information. This is an ongoing exercise." At the end of the same letter, the KMK suggests that they will only share the information on fishing activities if the Province recognizes the cultural significance of the submerged landscape of Liverpool Bay. This appears to be a refusal to provide the information sought unless the Province complies with the KMK's request for a full ARIA.

111. This *quid pro quo* offer attempts to leverage details about fishing practices (an established right) in exchange for recognition of a Mi'kmaq interest in archaeology (vaguely asserted right). While hard bargaining is permitted at consultation, it is respectfully submitted that this refusal to share information unless the Province complied

with the ARIA request was a deliberate position to frustrate DFA's good faith attempts to consult and potentially accommodate the fishing rights.

112. Consultation cannot take place in a vacuum. The KMK and Acadia First Nation failed to fulfill their reciprocal obligations during consultations to clearly articulate how the project would adversely impact their right to fishing, beyond the repeated assertions that any displacement of fishers was not acceptable. In these circumstances, where engagement was not forthcoming, DFA's consultation was more than adequate.

Effectively Seeking Veto / No Interest in Accommodation

113. There is no requirement for the parties to consultation to reach agreement. The failure to agree does not mean that consultation was not adequate. The caselaw is clear that Aboriginal groups do not have a "veto" in consultation: "The Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take."

Haida Nation, para 48

114. 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. There are a number of facts that support this conclusion.

115. First, the Record is rife with statements by Acadia First Nation that they are opposed to the application. On its own, stalwart opposition does not indicate a party is seeking a veto, however, when stalwart opposition is combined with other actions, the bigger picture is more indicative.

116. Second, the refusal 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.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 196

117. The Mi'kmaq's consultation strategy was effectively that the only acceptable form of accommodation was a rejection of the project. This approach is tantamount to seeking a veto.

118. Third, the 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.

KMK's Closing Submissions, p. 29

119. In fact, during the fourth Consultation Meeting, on June 1, 2022, DFA repeatedly asked for specificity on how the site prevented the Mi'kmaq fishers from accessing fishing resources and whether potential accommodation could be developed. DFA even suggested that if they knew where the Mi'kmaq's most productive sites were, perhaps one of the other sites would be better for expansion. The Mi'kmaq did not accept this invitation to discuss potential accommodation.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschuitti, p. 196-197

120. Finally, at the June 1, 2022 meeting, Action Item #4 was agreed to by the Mi'kmaq. This action item was an undertaking by the Mi'kmaq to provide information including whether "reasonable accommodation can be developed to mitigate any potential loss within the immediate area of the project." The Mi'kmaq refused to provide any potential accommodation suggestions.

121. It strains credulity for the KMK to now suggest that they were ever open to any accommodation other than rejection of the project.

d. Department of Fisheries and Oceans (DFO)

122. The KMK takes issue with DFA's failure to engage DFO in the consultation process. The KMK argues that DFA should have "acted as a conduit" by relaying information to DFO about the First Nations concerns and in turn sharing the response from DFO with the First Nations.

KMK's Closing Submission, p. 23

123. 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. DFA has no authority to compel DFO to attend consultation meetings or otherwise engage in consultation.

e. Eels/Elvers – Consultation Adequate

124. The KMK argues that DFA's response to the concern regarding eels/elvers was inadequate. In support of this argument, the KMK cites meeting notes from Consultation Meeting #1 and the alleged "contradictory" statement made by DFA:

> 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 the 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 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.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschuitti, p. 49

125. The KMK further argues that DFO *did* flag the issue in its Science Response.

126. First, as with other network partners, DFO provides advice to DFA on potential impacts to matters within DFO's legislative mandate as part of DFA's Network Partner consultation. Typically, DFO provides two documents: the Science Response and a separate Letter of Advice. Nathaniel Feindel attempted to explain this difference in his testimony at the hearing.

127. The Science Response is a technical document that provides information on a variety of topics. However, it is the Letter of Advice that actually contains DFO's risk-based advice to DFA. 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.

Exhibit 4, Report on Outcomes of Consultation, p. 254

128. In DFO's Letter of Advice, American Eel is noted as a species in the area assessed as "threatened" under the Committee on the Status of Endangered Wildlife in Canada (COSEWIC). However, DFO does not advise any additional mitigations in regard to the presence of eels.

Exhibit 4, Report on Outcomes of Consultation, p. 254

129. Likewise, although DFO notes that 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," the paragraph concludes by noting that the lease area of site 1205 "is small relative to the fishing grounds for each of these fished species."

Exhibit 4, Report on Outcomes of Consultation, p. 257

130. DFA's statement that the Eel/elver fishery wasn't "flagged" by DFO, refers to the fact that DFO's risk-based Letter of Advice did not recommend any mitigation measures in response to the potential occasional presence of the COSEWIC threatened eels in the area around the site.

131. 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. The lack of any specific advice from DFO on this issue supports DFA's view.

f. Affidavit of Justin P. Martin

132. DFA repeats and relies on its previous submissions that Mr. Martin's affidavit ought not to be considered by this Board in its assessment of the adequacy of consultation as it contains information the Mi'kmaq could have shared, but refused to share, during consultation.

DFA Letters to the ARB dated September 22, 2025 and October 1, 2025

133. The KMK argues that if DFA was unaware of the information before, it could have re-opened consultation to address it. With respect, and if this Board decides to consider the

Affidavit of Mr. Martin, there is very little new *specific* information actually contained in the affidavit.

KMK's Closing Submissions, p. 14

134. Mr. Martin notes that there are nine Moderate Livelihood fishers in LFA 33, which stretches from Halifax to Shelburne County. Mr. Martin does not indicate that these nine fishers harvest specifically around Coffin Island.

Exhibit 63, Affidavit of Peter Norsworthy, p. 8

135. Mr. Martin's affidavit provides no additional information about the extent, and scope of the FSC fishing and how the presence of 6 additional cages would prevent those fishers from accessing the resource.

136. DFA does not object to Mr. Martin's affidavit because it reveals information that strengthens the KMK's argument that consultation was not adequate. The objection is based on the fact that the information presented, limited as it is, was not shared during consultation.

g. Funding

137. The KMK argue that funding should have been provided to assist the Mi'kmaq in retaining independent scientific advice. Bruce Hancock addressed this argument in his affidavit where he noted that the necessity of financial assistance was not raised by the KMK or Acadia First Nation during consultation.

KMK's Closing Submissions, p. 7 and 17
Exhibit 73, Affidavit of Bruce Hancock, para 24

138. Moreover, as noted in the *Terms of Reference for a Mi'kmaq-Nova Scotia-Canada Consultation Process*, both Nova Scotia and Canada provide funding to the Assembly on an annual basis for the purpose of allowing the Assembly to create and operate their consultation committees and advisory group.

Exhibit 73, Affidavit of Bruce Hancock, Exhibit A, p. 13

h. Submerged Archaeology Concern – Consultation Adequate

139. The Supreme Court of Canada has stated in order to facilitate the assessment of when the duty to consult and accommodate is engaged, First Nations groups "should outline their claims with clarity, focusing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements." The Court has also stated that the identification of the relevant rights and adverse impacts should be done as early in the consultation process as possible.

Haida Nation, para 36
Ktunaxa Nation, para 79

140. The right connected to submerged archaeology has not been clearly articulated, nor is this an established right. During consultation the closest connection made to a right were the following statements:

> "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."
>
> Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 201

> "..the loss of an archaeological site or artifact is an irreversible loss to Mi'kmaq history and culture."
>
> Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 212

141. It was not until this hearing before the ARB that the connection was made explicit:

> Archaeological heritage is a regularly-cited source of evidence in the legal determination of rights and title. Consequently, any impact to Mi'kmaw archaeological heritage, including lack of detection, loss, or disturbance, has the potential to negatively impact Mi'kmaw rights and title.
>
> Exhibit 33, Affidavit of Heather MacLeod-Leslie, para. 17

142. Prior to receiving the KMK's written closing submissions, DFA understood this passage to mean that the KMK is not stating that there is a right to archeology. The KMK's argument is that archeological artifacts are often *evidence in proving* Aboriginal Rights and Title.

143. However, the KMK's written closing submissions now assert that "cultural heritage rights" are linked to self-government rights. Again, the Mi'kmaq could have, but refused, to share this assertion during consultation. Although the KMK cites the decision of the Nova Scotia Utility and Review Board in the Tusket Main Dam Refurbishment case as support for this claim, it remains an *asserted* right, not an established right.

Closing Submission of KMK, p. 29-30

144. The Supreme Court of Canada has stated that confirmation of section 35 rights is the proper subject of a civil trial. Asserted Aboriginal rights are governed by the constitutional *Van der Peet* Test. The KMK have not only neglected to state the source and scope of this right with any clarity, they have also not provided any evidence during this consultation process in support of such a right.

R. v. Van der Peet, [1996] 2 S.C.R. 507

145. Furthermore, the Tusket Main Dam Refurbishment case is distinguishable from this case in a number of respects. First, the implicated watercourse involved in that case was an inland river, the Vaughan Lake, not an oceanside bay with three centuries' history as a landing/anchoring location for transport and trade vessels. Second, Tusket involved "extensive" evidence of known archeological sites (over 70 registered pre-contact First Nations archeology sites, within the path of the watercourse and the contemplated project

work. Finally, the work contemplated involved dewatering (draining) the lake and construction on the lakebed after the dewatering. In summary, the scope of work was much more significant than the placement of shovel anchors in a historical ship-landing bay, it also would have resulted in the complete elimination of a fishery and there was a high risk of excavation of the known archaeological sites.

Tusket Main Dam Refurbishment case, 2018 NSUARB 154, paras 31, 51, 101, 125, 126, and 130
Nova Scotia (Attorney General) v Nova Scotia (Utility and Review Board), 2019 NSCA 66, para 79

146. Regardless, whether there is an Aboriginal Right to archeological heritage is a legal question that is not before this Board.

147. The question for this Board, in this hearing, is whether DFA's consultation on the issue was adequate. The Supreme Court has suggested that, as a best practice in circumstances where a novel right is claimed, a government actor ought to consider the duty to consult as triggered. If the claim is tenuous, that can be taken into account in defining what kind of consultation is necessary. In *Haida Nation*, the Court said:

> 37 There is a distinction between knowledge sufficient to trigger a duty to consult and, if appropriate, accommodate, and the content or scope of the duty in a particular case. Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate. The content of the duty, however, varies with the circumstances, as discussed more fully below. A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. The law is capable of differentiating between tenuous claims, claims possessing a strong *prima facie* case, and established claims. Parties can assess these matters, and if they cannot agree, tribunals and courts can assist. Difficulties associated with the absence of proof and definition of claims are addressed by assigning appropriate content to the duty, not by denying the existence of a duty.
>
> 38 I conclude that consultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed is an essential corollary to the honourable process of reconciliation that s. 35 demands. It preserves the Aboriginal interest pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation: see S. Lawrence and P. Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000), 79 *Can. Bar Rev.* 252, at p. 262. Precisely what is required of the government may vary with the strength of the claim and the circumstances. But at a minimum, it must be consistent with the honour of the Crown. [Emphasis added]

148. Here, despite the failure on the part of the KMK and Acadia First Nation to provide a clear articulation of the right supporting their request for an ARIA, during consultation, DFA still devoted significant time during two consultation meetings to discussing the issue in accordance with this best practice. DFA did not mandate that an ARIA be completed by the proponent, but it held off on submitting the application to the ARB, as requested, until six weeks after the final report was delivered, thereby granting the KMK an opportunity to come forward with any issues. The Province did not receive any response until this application was initiated before the ARB.

149. Moreover, despite the lack of a clear articulation of a Mi'kmaq right in relation to archaeology and potential adverse effect on it, the DFA nonetheless agreed to effectively accommodate this 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. Finally, DFA, in collaboration with other parties including the KMK, is also in the process of finalizing a procedure document containing educational materials for operators with additional guidance on what to do if artifacts are encountered.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 229

150. It is respectfully submitted that these actions are consistent with the honour of the Crown. In the circumstances of the KMK's vague position around archaeology as raised so far into the consultation process, DFA's response was adequate.

i. Preliminary Assessment

151. As there is no concise statement of the issues contained in the KMK's Closing Submissions, it is not clear what issues the KMK believes are before the Board for consideration. Throughout this hearing process, DFA had understood that the only issue being raised by the KMK was the adequacy of consultation. However, the KMK has made some submissions regarding alleged flaws in OLA's "consultation screening" letter to DFA.

KMK's Closing Submissions, p 6

152. Nowhere in their submissions, nor throughout consultation, have the KMK stated that the "moderate" level of consultation was incorrectly selected as the scope of consultation.

153. The KMK's argument that neither OLA nor DFA ever identified the Mi'kmaq's established rights, is patently without merit. This submission is a deliberate misreading of the correspondence. While the language in OLA's consultation screening letter could have been clearer, and the exact phrase "established treaty right to fish" is not used, the presence of Aboriginal fisheries in Liverpool Bay is expressly noted.

Exhibit 4, Report on Outcomes of Consultation, p. 719

154. Further, 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.

Exhibit 4, Report on Outcomes of Consultation, p. 719

155. Similarly, OLA's consultation screening letter also notes several Mi'kmaq archaeological sites, albeit on land, in the area. While the reference appears to be more an acknowledgement that the surrounding area is important to the Mi'kmaq, than an expectation that submerged archaeology would be raised as an issue, it demonstrates that OLA was alive to the Mi'kmaq interests in the area.

156. DFA accepted the advice that consultation should proceed at the moderate level. Importantly, the decision to consult at the moderate level was communicated to the Mi'kmaq in the letters initiating consultation that were sent to the 11 Chiefs that were part of the Assembly of First Nations at the time. The letter, signed by Robert Ceschiutti, states:

> Based on the information available at this time, the Province has screened Aquaculture Licence and Lease Application No. AQ#1432, AQ#1433 and AQ#1205 and considers them to potentially have impacts to Aboriginal and Treaty Rights at the moderate level.

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 5

157. DFA's letter goes on to repeat the aspects of OLA's letter noted above, (i/e. the presence of Aboriginal fisheries in the area and the mitigation steps taken by KCS to minimize fish escapes and farmed fish/wildlife interactions).

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 5

158. DFA's letter then goes on to state:

> The Province welcomes receiving *additional information* from you that may better inform our understanding of your *Aboriginal and Treaty Rights*. [Emphasis added]

Exhibit 54, Consultation Record, Affidavit of Robert Ceschiutti, p. 5

159. As reflected in the Consultation Record, DFA clearly understood that established fishing rights were possibly impacted and as a result decided to initiate consultation at the moderate level. This was communicated to all 11 Chiefs, including Acadia First Nation's, as well as the KMK.

160. At no time during consultation, did the KMK, or Acadia First Nation, indicate that consultation at the moderate level was not correct or was otherwise unacceptable.

161. The KMK's suggestion that Nova Scotia did not know that established fishing rights existed, and required the Mi'kmaq to start at square one, is a deliberate mischaracterization of the letters and the almost four years that DFA spent consulting at the moderate level.

KMK's Closing Submission, p. 16

j. Unilateral Closing of Consultation

162. Throughout the hearing, the KMK repeatedly alluded to the fact that DFA unilaterally closed consultation, suggesting that this was somehow improper. With respect, the caselaw is clear that consultation cannot last forever and the government body conducting consultation must bring the process to an end.

KMK's Closing Submission, p. 14 and 21

163. In the *Mi'kmaq of P.E.I. v. Province of P.E.I. et al.*, 2018 PESC 20 (affirmed 2019 PECA 26) the PEI Court found that it was appropriate for the Province to conclude consultation once it was clear that no new information was forthcoming:

> [154] At some point in the consultation process, the decision-maker will conclude enough consultation has occurred, and that a decision can be made. The court's assessment of the degree of consultation required is always a retrospective exercise undertaken after the decision-making body has made its decision.
>
> ...
>
> [184] 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. Neither party responded to the other in a manner which fully satisfied the other party. However, each party requested and provided information, and was given the opportunity to request or provide further information. Each party's position was evident to the other. The consultations proceeded to the point where there was no new information coming forward. As was stated in *Little Salmon/Carmacks First Nation v. Yukon (Director, Agricultural Branch, Department of Energy, Mines & Resources)* 2010 SCC 53 (Also cited as *Beckman v. Little Salmon, et al.*), at para. 84, "Somebody has to bring consultation to an end and to weigh up the respective interests... . The purpose of the consultation was to ensure that the Director's decision was properly informed." [Emphasis added]

164. The suggestion that the Province in this case acted improperly, or in bad faith, by closing consultations, is without merit.

k. Provincial Personnel

165. There is one additional aspect of the KMK's Closing Submissions that requires a response: the disparaging comments about the qualifications of provincial employees. It is common, and expected, that decisions made by government will be criticized. It happens in media and in courts every day. Typically, as the ultimate decision makers, it is the people who hold the most senior positions that bear the brunt of this criticism. This is the way it should be.

KMK's Closing Submissions, p. 17

166. It should be eminently clear, and was explained by Mr. Ceschiutti in his oral testimony, 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.

Hearing Recording, October 9, 2025, 1:40:50-1:41:05

167. These types of insulting personal criticisms are wholly inappropriate and unnecessary.

168. In a similar manner, the KMK's speculation as to whether OLA or DFA staff sought legal advice is not only irrelevant, but also deeply inappropriate. Legal advice is privileged.

KMK's Closing Submissions, p. 17

6) Relief Sought

169. The decision before the Board is whether to approve KCS' application to expand its operation at AQ #1205 for an additional 10-20 years. DFA takes no position on the Board's decision based on the factors enumerated in section 3 of the *Regulations*.

Aquaculture Licence and Lease Regulations, NS Reg 347/2015 s. 3, 52(1) and (2)

170. DFA requests the Board dismiss the KMK's arguments that consultation was inadequate in this case. As outlined above, DFA went above and beyond in its efforts to conduct consultation with the Mi'kmaq of Nova Scotia, but were persistently met with an unwillingness to share information about the scope and scale of any appreciable impacts on their ability to exercise their fishing rights.

171. There is no obligation to continue consultation forever. DFA spent years trying to conduct effective consultation with the Mi'kmaq on this project. The KMK and Acadia First Nation failed to fulfill their reciprocal obligations to share information and not frustrate the Province's attempts to find reasonable accommodation. Consultation is now closed.

172. With respect, DFA asks this Board to find that its consultation was adequate, and not accept the KMK's request to adjourn the matter to allow further consultation.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

[redacted]

Caitlin Menczel-O'Neill
Counsel for The Minister of Fisheries and Aquaculture
Halifax, Nova Scotia

[redacted]

Alison W. Campbell
Counsel for The Minister of Fisheries and Aquaculture
Halifax, Nova Scotia

Authorities

Cases:	**Tab**
Beckman v. Little Salmon/Carmacks First Nation, 2010 SCC 53	1
Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65	2
Coldwater First Nation v Canada (Attorney General), 2020 FCA 34	3
Dunsmuir v New Brunswick, 2008 SCC 9	4
Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73 *See KMK's Book of Authorities at Tab A*	-
Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resources), 2017 SCC 54	5
Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2005 SCC 69 *See KMK's Book of Authorities at Tab B*	-
Mi'kmaq of P.E.I. v. Province of P.E.I. et al., 2018 PESC 20	6
Nova Scotia (Attorney General) v Nova Scotia (Utility and Review Board), 2019 NSCA 66 *See KMK's Book of Authorities at Tab D*	-
Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, 2010 SCC 43 *See KMK's Book of Authorities at Tab C*	-
R. v. Van der Peet, [1996] 2 S.C.R. 507	7
Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), 2004 SCC 74 at para 32	8
Tusket Main Dam Refurbishment case, 2018 NSUARB 154 *See KMK's Book of Authorities at Tab I*	-
Regulations:	
Aquaculture Licence and Lease Regulations, NS Reg 347/2015 s. 3, 52(1) and (2)	9