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

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Abstract

This paper discusses some of the challenges associated with consulting with non-status Indians and Métis people in processes of resource co-management and self-government. In principle, the Crown may have a duty to consult with both groups, but the implementation of this doctrine is problematic because both the constitutional (section 35) rights and the political representation of Métis—and especially of non-status Indians—are contested. The duty to consult is more easily applied to First Nation groups and therefore risks reifying the significance of *Indian Act* status and marginalizing non-status Indians and Métis.

This research discusses the marginalized position of non-status Mi'kmaq, as represented by the Native Council of Nova Scotia (NCNS), in tripartite negotiations in Nova Scotia. It suggests that both First Nation groups and government agencies need to support the political participation of non-status Indians in order for negotiated agreements to achieve legal certainty and for all Aboriginal people to benefit from the duty to consult. Drawing from this case study and related case law, this paper indicates strategies to enhance the representativity of Aboriginal organizations and highlights research avenues that will inform supportive policy development.

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

Introduction

Because the *Indian Act* provides for the division between 'status Indians' and 'non-status Indians', non-status Indians have always existed on the margins of Canada's Aboriginal political landscape.[1] Since at least the 1950s, federal programs and services for reserve communities have contributed to tensions, within the same Aboriginal nation, between status and non-status Indians, as well as between reserve and off-reserve communities. Moreover, some discourses of Aboriginal identity suggest that only status Indians who live on reserves are 'real Indians'.[2] While these factors may exclude non-status Indians from their ancestral communities, neglect of their interests and rights by the Canadian federal government has perpetuated their marginalization.

The Métis are another marginalized group of non-First Nations Aboriginal people, whose identity and rights have been contested both within and outside Métis communities.[3] The 2003 Supreme Court of Canada (SCC) *Powley*[4] decision provided initial clarification, but also triggered much debate and a series of Métis rights claims, although the Supreme Court recommended—like many prior court rulings—that the Crown should seek to resolve conflicts over Aboriginal rights in negotiations rather than through litigation.[5]
The duty to consult is a nascent legal doctrine requiring the Crown to consult, at the community level, with all Aboriginal people who may be affected by a proposed project. To benefit from the duty to consult, Aboriginal communities need to: a) be able to assert or prove communally held section 35 rights; and b) mandate a representative entity as their consultation partner with the Crown. Both non-status Indian and Métis communities are less likely to meet both of these requirements than First Nation groups. Focusing on the position of non-status Indians, this paper will discuss in what way implementation of the duty to consult risks further marginalizing them, while also outlining briefly the position of Métis in this context.

The overarching aim of this research is to identify key considerations—as well as further research needs—for policy development regarding governmental consultation with non-status Indians. To this end, scholarly literature and case law regarding harvesting rights and representation of non-status Indians will be reviewed. The dynamics between non-status and status Mi`kmaq and the position of provincial and federal governments in the case of ongoing negotiations in Nova Scotia will be analyzed. This analysis will inform a discussion of policy

[1] The terms "non-status", "Indian" and "Band" are here used following federal conventions. See INAC. "Words First: An Evolving Terminology Relating to Aboriginal Peoples in Canada." Communications Branch, Indian and Northern Affairs Canada, http://www.ainc-inac.gc.ca/ap/pubs/wf/wf-eng.asp.
[2] Pamela D. Palmater, "An Empty Shell of a Treaty Promise: *R. v. Marshall* and the Rights of Non-Status Indians," *Dalhousie Law Journal* 23 (2000).
[3] Annette Chretien, "From the "Other Natives" to the "Other Métis"." *Canadian Journal of Native Studies* 28, no. 1 (2008). For an early attack on Métis rights, see: Thomas Flanagan, "The Case against Métis Aboriginal Rights," *Canadian Public Policy* 9, no. 3 (1983).
[4] *R. v. Powley (2003), 2 S.C.R. 207.*
[5] Brent Olthuis, "The Constitution's Peoples: Approaching Community in the Context of Section 35 of the Constitution Act, 1982," *McGill Law Journal* 54, no. 1 (2009).

strategies enabling both Aboriginal and government agents to enhance the participation of non-status Indians.

The paper is organized as follows. Setting the legal and political backdrop, Section I discusses the duty to consult as it applies to non-status Indians and Métis people. Section II moves to the particular case of Nova Scotia, providing some background on the Mi'kmaq Nation and the Native Council of Nova Scotia. In more depth, Section III discusses how rights and identity of non-status Mi'kmaq are contested; Section IV discusses the duty to consult and the representation of non-status Mi'kmaq in the Made-in Nova Scotia Process. Section V discusses some lessons learned from the Made-in-Nova Scotia Process for government and Aboriginal leadership and proposes some related research needs. The conclusion, finally, offers some more fundamental thoughts and critical remarks on fulfillment of the duty to consult.

The primary data for this research was collected through in-depth, semi-structured interviews with 17 individuals, including: Mi'kmaq and government resource managers and negotiators; Mi'kmaq elders and academics; as well as government and independent experts. The interviewees were targeted due to their professional position or political affiliation. In part, this paper also draws from a series of interviews conducted by the author between May and June 2007; these investigated political and cultural tensions surrounding two Mi'kmaq initiatives for resource management on Cape Breton Island.[6] Eight participants from 2007 were interviewed again specifically for this research. All interviewees signed Informed Consent Forms (following the requirements of Mi'kmaw Ethics Watch),[7] which included an optional waiver of anonymity. Secondary data for this research was gathered through an extensive review of academic and grey literature, as well as legal documents and government publications.

I. The Duty to Consult with Non-Status Indians and Métis

The duty to consult is emerging as a significant doctrine for Aboriginal policy development and jurisprudence. Since 2004, a series of decisions by the Supreme Court of Canada in favour of *Haida Nation,*[8] *Taiku River Tlingit First Nation,*[9] and *Mikisew Cree First Nation*[10] has outlined the scope of the Crown's duty to consult with and accommodate Aboriginal communities whose Section 35 rights will potentially be infringed by a proposed undertaking.[11] Applying to both the

[6] Bernard Huber, "Negotiating the Political Ecology of Aboriginal Resource Management: How Mi'kmaq Manage their Moose and Lobster Harvest in Unama'ki, Nova Scotia, Canada" (M.Sc. (Geography), Victoria University of Wellington, 2009).

[7] Since 1999, the Mi'kmaw Ethics Watch committee (*Mi'kmaw Eskinuapimk*) reviews all Mi`kmaq-related research. Ethical approval was obtained from Mi'kmaw Ethics Watch for the author's research conducted in 2007 and in June 2009 extended to cover the present research. See Mi'kmaw Ethics Watch. "Mi'kmaw Research Principles and Protocols: Conducting Research With and/or Among Mi'kmaq People." Mi'kmaw Ethics Watch (*Mi'kmaw Eskinuapimk*), Mi'kmaq College Institute, Cape Breton University (2007), http://mrc.cbu.ca/prinpro.html. Anonymous interviewees are identified in this paper with generic affiliations to ensure confidentiality. Interviews were conducted in the interviewee's work or home environment or over the phone and they lasted between 40 minutes and one-and-a-half hours. Where permission was granted, interviews were recorded to facilitate data analysis.

[8] *Haida Nation v. British Columbia (Minister of Forests),* (2004), 3 S.C.R. 511.

[9] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director),* (2004), 3 S.C.R. 550.

[10] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* (2005), 3 S.C.R. 388.

[11] Gordon Christie, "Developing Case Law; The Future of Consultation and Accommodation." *UBC Law Review* 39 (2006): 139-84.

provincial and federal Crown, the duty applies even if claims to those rights have not yet been established. However, the extent to which the Crown has to consult with and accommodate the Aboriginal stakeholders depends on how significant the claims (settled or unsettled) and potential infringement thereof are.[12] Arguably, the legal duty to consult does not further Aboriginal reconciliation, self-government or veto-power; but it has important implications for Aboriginal strategies and government policies in negotiations and litigation.[13]

Consequently, the duty to consult has been subject to much discussion by legal scholars and practitioners. Maria Morellato, for example, argues that the duty to consult needs to permeate all activities that affect Aboriginal stakeholders, especially the processes of negotiated agreements and resource allocations, where many governments have not honoured their duties sufficiently.[14] The ongoing case of *Little Salmon/Carmacks First Nation*[15] is seeking to clarify the Crown's duty to consult in modern land claim agreements. Further scholarly work has argued that the duty to consult is owed by both provincial and federal governments and is triggered by the potential infringement of Aboriginal rights, Aboriginal title, or treaty rights.[16]

As the duty to consult is largely defined by case law that pertains to First Nations communities, it is not immediately self-evident that it extends to Métis and non-status Indians. Isaac[17] shows that the establishment of the duty to consult in *Haida Nation*[18] rests on the "honour of the Crown" toward all Aboriginal people and that section 35 rights need to be recognized in the spirit of reconciliation, rather than "narrowly or technically."[19] He shows that the decision of *Haida Nation* is formulated to address all Aboriginal people and deduces from this inclusive language that the duty to consult is also owed to Métis.[20] This conclusion may also apply to non-status Indians. Yet much uncertainty revolves around two important prerequisites for the consideration of Métis, and especially non-status Indians, under the duty to consult. First, can they be beneficiaries of communally held section 35 rights? And second, given contestations around

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

[13] For a critical analysis of the extent to which the duty to consult allows for assimilation and reconciliation, see Christie, "Developing Case Law; The Future of Consultation and Accommodation."

[14] Maria Morellato. "The Crown's Constitutional Duty to Consult and Accommodate Aboriginal and Treaty Rights " National Centre for First Nations Governance (2009).

[15] *Little Salmon/Carmacks First Nation v. Yukon (Minister of Energy, Mines and Resources)*, (2008) YKCA 13. An appeal from this decision was heard by the Supreme Court of Canada on November 12, 2009 and is now under reserve.

[16] Keith B. Bergner, "Consultation Requirements in the Post-Treaty Context," in *Insight Aboriginal Law Forum* (Vancouver, BC: 2006); Heather L. Treacy, Tara. L. Campbell, and Jamie D. Dickson, "The Current State of the Law in Canada on Crown Obligations to Consult and Accommodate Aboriginal Interests in Resource Development," *Alberta Law Review* 44, no. 3 (2007).

[17] Thomas Isaac, *Métis Rights*, Contemporary themes in Aboriginal law. Monograph series 2 (Saskatoon, Sask.: Native Law Centre, University of Saskatchewan, 2008), 44.

[18] *Haida Nation v. British Columbia (Minister of Forests)*, (2004), 3 S.C.R. 511.

[19] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, (2004), 3 S.C.R. 550, at para.24. This "purposive" approach to recognizing Aboriginal rights was explicitly required by the Supreme Court in both *R. v. Sparrow* (1990) and *R. v. Powley* (2003).

[20] Thomas Isaac, *Métis Rights*, 44.

their identification and political representation, is there a representative entity that can serve as their consultation partner for the Crown? These prerequisites are better established for Métis people than for non-status Indians, although the remainder of this section will show that important aspects of their representation and rights are similarly uncertain and contested.

Firstly, there are a range of political organizations that claim to represent national, provincial or more local congregations of Métis and/or non-status Indians, but in both cases, these may not have the legal representativity to act as a consultation partner for (parts of) their constituencies. The political representation of and advocacy for Métis has been troubled by conflicting mandates and conceptions of Métis identity, identification criteria and representation amongst both provincial[21] and multiple smaller Métis organizations.[22] While these smaller Métis organizations may be less able to act as consultation partners, it remains unclear at what level of representation (community or provincial organizations) the duty to consult is owed.[23] The Congress of Aboriginal People (CAP) is an umbrella organization of ten affiliate organizations (eight provincial and two national) that aim to represent non-status Indians, while some also seek to represent Métis and other Aboriginal people. The representativity of these organizations for communities of non-status Indians is particularly uncertain, however, since there is no clarity around the identification and constitutional protection of non-status Indians.

Secondly, the SCC *Powley*[24] decision affirmed the constitutional protection of the customary harvesting rights of Métis communities and also established criteria for the identification of Métis people as *Powley* beneficiaries.[25] Nevertheless, several provincial jurisdictions have not fully implemented the *Powley* ruling and Métis organizations continue to fight for the recognition of Métis harvesting rights. In Ontario, the harvester cards of the Métis Nation of Ontario (MNO) are accepted by the provincial authorities, although only as a result of litigation.[26] The Manitoba Métis Federation has negotiated the acceptance of its harvester cards only in the northern parts of the province in a Métis Co-management Framework Agreement.[27] The provincial government of Saskatchewan had also tried to limit Métis harvesting rights to northern communities that have maintained a 'traditional lifestyle.' This was successfully challenged in court and the Métis Nation - Saskatchewan is currently conducting community consultation sessions to prepare for negotiations.[28] Similarly, the government of Alberta terminated the province-wide Interim Métis Harvesting Agreement in 2007 and has since implemented a policy to recognize the harvesting rights of only 17 Métis communities in the

[21] Namely, the Métis Nation of Ontario, Manitoba Métis Federation, Métis Nation—Saskatchewan, Métis Nation of Alberta, and the Métis Nation of British Colombia, all of which are affiliated with the Métis National Council (MNC).
[22] For a review of the dynamics between different Métis organizations in Ontario and categories of "real Métis" and "other Métis", see Chretien, "From the 'Other Natives' to the 'Other Metis"'.
[23] Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples*.
[24] *R. v. Powley (2003), 2 S.C.R. 207.*
[25] Robert K. Groves and Bradford W. Morse, "Constituting Aboriginal Collectivities: Avoiding New Peoples In Between," *Saskatchewan Law Review* 67 (2004). The three criteria central to the *Powley* test are self-identification, ancestral connection and community acceptance; see *R. v. Powley* (2003), 2 S.C.R. 207, at paras 31-33. See also Jean Teillet. "Métis Law Summary." Pape Salter Teillet, Barristers & Solicitors (2009).
[26] Teillet. "Métis Law Summary."
[27] Ibid; Interview with G4, Federal government employee.
[28] Métis National Council. "Métis Harvester's Guide." Métis Nation Multilateral Caucus, 2006.

north of the province.[29] The approximately 44,000 Métis people in British Columbia find themselves in a particularly difficult situation; the provincial government has refused to negotiate access to harvesting resources with the Métis Nation of British Columbia (MNBC) in a situation where British Columbia courts have not yet found any rights-bearing Métis communities to exist in that province.[30]

In her discussion of jurisprudential evidence that non-status Indians can be beneficiaries of section 35 rights, Palmater reviews the lower court decisions in favour of *Chevrier*[31] and *Fowler*,[32] which extended treaty-based harvesting rights to non-status Indians who could prove their ancestral connection to the community of treaty signatories.[33] She argues it is not within the spirit of an historic treaty to grant Treaty rights exclusively to status Indians, since neither party to the treaty originally had an interest in limiting the community of beneficiaries.[34] Newly affirmed harvesting rights of both Métis and non-status Indians have also been contested by First Nations groups, as the situations in Nova Scotia and Northern Alberta's Wood Buffalo National Park (WBNP) show.[35]

The emergence of *Powley* rights and the duty to consult with Métis people have triggered significant policy development regarding Métis resource access and consultation processes. Much uncertainty prevails over the implementation of *Powley* rights, the duty to consult, and other aspects of Métis rights. Undoubtedly, Métis communities remain in a less advantageous position to benefit from the duty to consult than status Indians, yet non-status Indians continue to exist at the very margins of the legal and political Aboriginal landscape. This paper will primarily address the position of non-status Indians in the context of the duty to consult – while also acknowledging that more research and policy development is required to adequately address the position of the approximately 390,000 self-identified Métis people in Canada.

[29] Teillet. "Métis Law Summary."
[30] Métis National Council. "Métis Harvester's Guide."
[31] R. v. *Chevrier* (1989), 1 C.N.L.R. 128
[32] R. v. *Fowler* (1993), 134 N.B.R. (2d) 361
[33] Palmater, "An Empty Shell of a Treaty Promise: *R. v. Marshall* and the Rights of Non-Status Indians." Although ancestral connection has developed as a central criterion—most importantly in *Powley*—to test an individual claimant's entitlement to Aboriginal rights, Olthuis argues that this neither honors the communal nature of Aboriginal rights, nor the intent of section 35. Olthuis, "The Constitution's Peoples: Approaching Community in the Context of Section 35 of the Constitution Act, 1982", 40.
[34] Ibid.
[35] Interview with G3, Federal government employee; Interview with Dwight Newman, Associate Professor of Law, University of Saskatchewan. There are seven First Nation groups and four Métis groups who live in the environs of WBNP and traditionally harvested within its boundaries without getting in each other's ways. The initial affirmation of harvesting rights exclusively for First Nation groups created some conflict. When the Métis groups asserted harvesting rights after the *Powley* decision, the First Nation groups tried to monopolize their rights and exclude the Métis. In 2005, Parks Canada received funding from the Office of the Federal Interlocutor for Métis and Non-status Indians (OFI) through its *Powley Initiative* to hold a series of workshops with both parties to help mediate their disputes. This has successfully resulted in the collaborative adaptation of harvesting legislation to suit both parties' needs.

II. The Politics of Indian Status in Nova Scotia: Background

Moving from general issues surrounding the duty to consult for Métis and non-status Indians to the specific case of non-status Indians in Nova Scotia, this section will provide some vital background information on the Mi'kmaq people in Nova Scotia, with specific attention to the non-status Mi'kmaq, in order to fully appreciate the significance of current relations and negotiations in Nova Scotia.

A. The Aboriginal Population of Nova Scotia

The traditional territory of the Mi'kmaq nation (*Mi'kma'ki*) covers all of today's provinces of Nova Scotia and Prince Edward Island, as well as parts of Québec, New Brunswick and Newfoundland (see Appendix A for map). Approximately 49% of all Mi'kmaq live in Nova Scotia,[36] where there are 13 reserve communities with 13,518 members.[37] On average, 33% of the Band members live off-reserve. This ratio is higher (51%) on mainland Nova Scotia, where many off-reserve Mi'kmaq live in urban areas, whereas on Cape Breton Island only 18% of Band members live off-reserve (see Appendix B). According to 2006 census data, there are 24,175 people living in Nova Scotia who self-identify as Aboriginal (2.7% of total population). Of these, 63%, 32% and 5% identify as American Indian, Métis or "other Aboriginal people" respectively (see Appendix C).[38] Of particular interest for this paper are the 4,535 off-reserve status and 2,855 non-status Indians; these form 19% of Nova Scotia's American Indian identity population, which is overwhelmingly of Mi'kmaq heritage.

Cape Breton Island (*Unama'ki* in Mi'kmaq language), north of peninsular Nova Scotia, is widely regarded as the heart of the Mi'kmaq nation and has been hosting the annual meeting of the Mi'kmaq Grand Council (*Sante'Mawio'mi*) since pre-colonial times.[39] Although the role of the Grand Council has been undermined by the *Indian Act*, it maintains a vital role in Mi'kmaq society. Especially in resource management decisions, its leadership role has become increasingly important in recent years.[40]

B. Mi'kmaq Resource Rights

Resource access for both status and non-status Mi'kmaq has been a highly politicized and fiercely debated topic in Nova Scotia since the 1980s. Affirming a Mi'kmaq treaty right to hunt in 1985, the *Simon*[41] decision preceded the '*Sparrow* doctrine'[42] establishing the Aboriginal

[36] Ken S. Coates, *The Marshall Decision and Native Rights* (Montreal and Kingston: McGill-Queen's University Press, 2000). Note that this figure is based on 1996 census data.
[37] Statistics Canada. "Aboriginal Peoples in Canada in 2006: Inuit, Métis and First Nations." 2006 Census, Catalogue no. 97-558-XIE (2007).
[38] Ibid.
[39] James (Sa'kei'j) Youngblood Henderson, *The Mi'kmaw Concordat* (Halifax: Fernwood, 1997).
[40] Marie Battiste, "Structural Unemployment: The Mi'kmaq Experience," in *The Mi'kmaq Anthology*, ed. Rita Joe and Lesley Choyce (East Lawrencetown, Nova Scotia: Pottersfield Press, 1997); William T. Hipwell, "Preventing ecological decline in the Bras d'Or bioregion: the state versus the Mi'kmaq 'metamorphosis machine'," *Canadian Journal of Native Studies* 24, no. 2 (2004); Huber, "Negotiating the Political Ecology of Aboriginal Resource Management: How Mi'kmaq Manage their Moose and Lobster Harvest in Unama'ki, Nova Scotia, Canada."
[41] *R. v. Simon* (1985), 2 S.C.R. 387
[42] *R. v. Sparrow* (1990), 1 S.C.R. 1075

right to harvest for food, social and ceremonial purposes.[43] To facilitate this, Aboriginal food fisheries are regulated through Aboriginal Fisheries Strategies (AFS) agreements.[44] In Nova Scotia, the Department of Fisheries and Oceans annually negotiates these agreements with all Mi'kmaq band councils, as well as with the Native Council of Nova Scotia (NCNS), which manages harvesting activities of non-status and off-reserve Mi`kmaq.

More significantly in Nova Scotia, the SCC 1999 *Marshall*[45] decision affirmed the Mi'kmaq treaty right to earn a "moderate livelihood" through commercial fishing.[46] To accommodate the Mi'kmaq in commercial fisheries, DFO was forced to buy back commercial fishing licenses from non-native businesses and distribute them to Mi'kmaq band councils, which fuelled cross-cultural tensions over Aboriginal rights in Nova Scotia.[47]

Mi'kmaq rights—especially those of non-status Mi'kmaq—are still contested in Nova Scotia and caught up in larger debates about Aboriginal rights and identity.

C. The Native Council of Nova Scotia (NCNS)

Although the constitutional protection of non-status Indians is not clarified, the NCNS has negotiated considerable resource access for non-status Mi'kmaq in Nova Scotia. The NCNS was incorporated under the provincial *Societies Act* in 1975 and is affiliated with the Congress of Aboriginal Peoples (CAP). It aims to represent the interests of off-reserve and non-status Indians, as well as Métis, in Nova Scotia and considers itself the "[s]elf-governing Authority for the large community of Mi'kmaq/Aboriginal Peoples Residing Off-Reserve in Nova Scotia throughout traditional Mi'kmaq Territory."[48] For the purposes of administration, the NCNS has divided Nova Scotia into 13 'zones', each of which maintains an executive committee and is equally represented on the NCNS board of directors. Interestingly, the NCNS also nominates a Mi'kmaq Grand Council representative to sit on its board of directors.[49] Although the NCNS receives only minimal funding from provincial and federal sources, it successfully provides programs for employment, housing, family, health and Mi'kmaq language to its constituency.[50]

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[43] Garth Nettheim, Gary D. Meyers, and Donna Craig, *Indigenous peoples and governance structures : a comparative analysis of land and resource management rights* (Canberra Aboriginal Studies Press, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2002); Peter J. Usher, "Some Implications of the Sparrow Judgement for Resource Conservation and Management," *Alternatives* 18, no. 2 (1991).

[44] With these agreements, DFO commits to supply funds, gear and training for Aboriginal communities to sustainably manage their food fisheries. These are regulated within the DFO framework, stipulating the species, fishing areas, seasons, catch limits, and fishing gear and prohibiting any commercial sale, trade or barter of the catch.

[45] *Marshall v. Canada* (1999), 3 S.C.R. 456 and 3 S.C.R. 533

[46] Gretchen Fox, "Mediating Resource Management in the Mi'kmaq Fisheries Canada," *Development* 49, no. 3 (2006); Margaret L. McCallum, "Rights in the Courts, on the Water, and in the Woods: The Aftermath of *R. v. Marshall* in New Brunswick," *Journal of Canadian Studies* 38, no. 3 (2004).

[47] Arguably, the entry of Mi'kmaq into commercial fisheries could have been facilitated in a more proactive way if DFO had negotiated commercial access with Mi'kmaq before being advised to do so by the court. Richard McGaw, "Aboriginal fisheries policy in Atlantic Canada," *Marine Policy* 27 (2003); McCallum, "Rights in the Courts, on the Water, and in the Woods: The Aftermath of *R. v. Marshall* in New Brunswick."; Interview with G2, Federal government employee. 10/06/07.

[48] NCNS. "Native Council of Nova Scotia Community Information Guide." Native Council of Nova Scotia (NCNS).

[49] Interview with Grace Conrad, NCNS Chief and President. 15/07/09.

[50] Ibid.

Of specific interest for this paper are the NCNS's systems of membership registry and management of members' harvesting activities. While the NCNS provides its services to anyone from its constituency, it also maintains a genealogical membership system and currently has between 3000 and 4000 members.[51] The NCNS membership consists of non-status Mi'kmaq as well as status Mi'kmaq living off-reserve who choose to affiliate with the NCNS. Only a small fraction of NCNS members are of non-Mi'kmaq heritage.[52] For non-status Mi'kmaq, the NCNS is the only representative body in Nova Scotia (since the Grand Council provides no political representation), while off-reserve status Mi'kmaq can be members of both their Band and the NCNS. This has important implications for resource access, as outlined below.

Applicants for membership in the NCNS need to provide documentary evidence of their Aboriginal ancestry to the board of directors of their local NCNS zone. They also have to participate in local NCNS activities and meetings for one year before their application is forwarded to the central NCNS board of directors for consideration. In case the application is refused, there is an appeal process in place. An outside expert considers the NCNS membership system as rigorous and effective, but possibly not as professional as some of the larger provincial Métis organizations.[53]

Approximately 600 registered NCNS members hold an Aboriginal and Treaty Rights Access (ATRA) Passport, which is necessary for non-status members to exercise Mi'kmaq harvesting rights. Both the federal Department of Fisheries and Oceans (DFO) and the provincial Department of Natural Resources (DNR) maintain a policy of recognizing the ATRA Passport in Nova Scotia as equivalent to the INAC status card. While this means that NCNS members, including non-status Mi'kmaq and the limited number of non-Mi'kmaq, can exercise Aboriginal and treaty resource rights, the DFO and DNR policies stipulate that these rights are extended without legal prejudice.[54] DNR and NCNS have collaboratively developed an enforcement manual,[55] which lets DNR officers verify ATRA passport holders.

The 'NCNS Natural Life Management Authority' *Netukulimkewe'l Commission* has managed the harvesting activities of ATRA passport holders since 1989 and annually issues separate

[51] More accurate data on the NCNS membership and its composition could unfortunately not be obtained. As only limited information on the NCNS and its systems for membership and resource management is publically available, this section relies heavily on insights from several interviews with the leadership of the NCNS.

[52] Interview with Grace Conrad, NCNS Chief and President.

[53] Especially since the *Powley* decision, Métis organizations have received considerable funding to improve their membership systems and identify beneficiaries of *Powley* rights within their constituencies. For the latter purpose, the NCNS received federal funding, but found that self-identified Métis from Nova Scotia, who are mostly of mixed French-Acadian and Aboriginal descent, do not meet the criteria of the *Powley* test. Interview with G4, Federal government employee. 06/10/09.

[54] Interview with G1, Provincial government employee. 05/06/07; Interview with Tim Martin, NCNS *Netukulimkewe'l* Commissioner. 09/10/09. This means that no resource rights for non-status Mi'kmaq can be deduced from the fact that ATRA passport holders are allowed to fish and hunt.

[55] DNR. "Regional Services Operations Manual: Mi'kmaq Aboriginal Peoples Harvesting" Nova Scotia Department of Natural Resources (2002).

Community Harvest Guidelines for terrestrial and aquatic wildlife.[56] These publications emphasize the traditional harvesting ethic of *Netukulimk*[57] and educate harvesters on biology, ecology and health and safety issues. They also lay out conservation guidelines and harvesting limits, which the Commission has developed in consultation with DNR and DFO. For all hunting, trapping and fishing activities, the Commission maintains an elaborate system of tags and report cards. The latter collect details on the harvest (including the number, sex and age of harvested animals) and observations regarding the condition of the habitat.[58] With this system, the Commission monitors the harvest, informs its harvesting management and also records the knowledge of experienced Mi'kmaq harvesters. The Commission voluntarily shares this data with DNR and DFO to inform their research and management activities.[59]

All parties interviewed agree that the working relationship between NCNS and government agencies is very effective.[60] Notwithstanding this, the NCNS has negotiated liberal resource access, within conservation limits, for all ATRA passport holders – despite the legal uncertainty surrounding the Section 35 rights of non-status Indians.[61] Paradoxically, NCNS members may enjoy more secure harvesting entitlements than Métis people whose *Powley* rights are constitutionally protected but not broadly implemented by some provincial jurisdictions. According to one observer, this reflects very positively on the leadership of the NCNS and the pro-active policies of both DNR and DFO.[62]

Most significantly, the NCNS has negotiated an AFS agreement with DFO that permits ATRA passport holders to fish for thirty species throughout Nova Scotia.[63] This stands in contrast to the AFS agreements with band councils in Nova Scotia, which limit members' fishing activities to local waters and a handful of species. Due to parallel systems of resource management and differing standards, status off-reserve NCNS members who hold both an ATRA passport and a status card from Indian and Northern Affairs Canada may harvest under both regimes. Although the NCNS explicitly prohibits ATRA passport holders from doing so, this can hardly be enforced and in some places is said to be common practice.[64] Interviewees referred to this practice as "double-dipping"[65] or "constitution-shopping."[66] It is, however, unknown to what extent this

[56] NCNS. "Community Harvesting Guidelines: Netukulimk of Land Based and Fowl Natural Life." Native Council of Nova Scotia (NCNS), Netukulimkewe'l Commission. and NCNS. "Community Harvesting Guidelines: Netukulimk of Aquatic Natural Life." Native Council of Nova Scotia (NCNS), Netukulimkewe'l Commission.
[57] Spiritual framework of traditional Mi'kmaq resource ethics.
[58] Interview with G1, Provincial government employee; Interview with Tim Martin, NCNS *Netukulimkewe'l* Commissioner. 04/06/07; Interview with Tim Martin, NCNS *Netukulimkewe'l* Commissioner; NCNS. "Community Harvesting Guidelines: Netukulimk of Land Based and Fowl Natural Life."
[59] Interview with G1, Provincial government employee. 15/07/09; Interview with G2, Federal government employee; Interview with Tim Martin, NCNS *Netukulimkewe'l* Commissioner.
[60] During interviews in both 2007 and 2009, this view was expressed by the leadership of the NCNS (Grace Conrad, NCNS Chief and President. Tim Martin, NCNS Netukulimkewe'l Commissioner), as well as a provincial and a federal governmental employer.
[61] For example, the NCNS challenged DFO's decision to halve the lobster quota of their AFS agreements in *Native Council of Nova Scotia v. Canada (Attorney General)* (2007), 2 C.N.L.R. 233. As discussed in Section 4, the NCNS lost this, as well as the appeal.
[62] Interview with G4, Federal government employee.
[63] DFO and NCNS. "Aboriginal Fisheries Arrangement " DFO (Department of Fisheries and Oceans); Native Council of Nova Scotia (NCNS) Netukulimkewe'l Commission.
[64] Interview with E2, independent expert in Aboriginal rights.
[65] Interview with Tim Martin, NCNS *Netukulimkewe'l* Commissioner.

opportunity attracts off-reserve Mi'kmaq to gain NCNS membership for more liberal resource access.

Neither the work of the NCNS nor the position of off-reserve and non-status Mi'kmaq in resource management has been independently researched and documented.[67] Nevertheless, it appears from the present research that the NCNS has earned itself a good reputation in the Maritimes and in Ottawa. Several interviewees from different parties specifically acknowledged the high standard of the NCNS's resource management capacity.[68]

Some respondents further highlighted a contrast between the resource management activities of the NCNS and a supposed lack of agency by Mi'kmaq band councils.[69] It is therefore noteworthy that Mi'kmaq band councils have been developing professional resource management capacities and effective collaborations with government agencies since the 1990s.[70] Much of this work is centered on Cape Breton Island and emanates from the Eskasoni Fish and Wildlife Commission (EFWC) and the Unama'ki Institute of Natural Resources (UINR). The former has been developing community-based fisheries management plans for Cape Breton Island to enhance AFS agreements and the latter has been playing a lead role in the development of the moose co-management plan, which will be discussed next.

III. The Politics of Mi'kmaq Resource Management

Non-native discourses and sensationalized media reports in Nova Scotia often frame Aboriginal resource rights as post-colonial privileges that allow for unsustainable Aboriginal hunting.[71] This is especially true for the traditional Mi'kmaq moose hunt in the highlands of Cape Breton Island,[72] which is very popular amongst both Mi`kmaq and non-native hunters.[73] While all

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[66] Interview with E2, independent expert in Aboriginal rights.

[67] The exceptional reference to this is provided by Doyle-Bedwell and Cohen, who indicate that "[o]ff-reserve Mi'kmaq people fall between the cracks" of competing claims of representation between the Mi'kmaq Chiefs and the NCNS and that this poses the question to governments with whom to consult on resource management decisions. By way of concluding a review of the position of Mi'kmaq in resource management in Nova Scotia, this is mentioned as an outstanding issue, but not discussed any further in their book chapter Patricia Doyle-Bedwell and Fay Cohen, "Aboriginal Peoples in Canada: Their Role in Shaping Environmental Trends in the Twenty-First Century," in *Governing the Environment: Persistent Challenges, Uncertain Innovations*, ed. Edward Parson (Toronto: University of Toronto Press, 2001).

[68] This was expressed in interviews with G1 and G6, Provincial government employees. G4, Federal government employee, as well as Lindsay Marshall, Associate Dean of the Mi'kmaq College Institute, Cape Breton University.

[69] Interview with G4, Federal government employee. Interview with Lindsay Marshall, Associate Dean of the Mi'kmaq College Institute, Cape Breton University.

[70] Suzanne Berneshawi, "Resource management and the Mi'kmaq nation," *Canadian Journal of Native Studies* 17, no. 1 (1997); Hipwell, "Preventing ecological decline in the Bras d'Or bioregion: the state versus the Mi'kmaq 'metamorphosis machine'."; Huber, "Negotiating the Political Ecology of Aboriginal Resource Management: How Mi'kmaq Manage their Moose and Lobster Harvest in Unama'ki, Nova Scotia, Canada".

[71] Huber, "Negotiating the Political Ecology of Aboriginal Resource Management: How Mi'kmaq Manage their Moose and Lobster Harvest in Unama'ki, Nova Scotia, Canada"; Palmater, "An Empty Shell of a Treaty Promise: *R. v. Marshall* and the Rights of Non-Status Indians."

[72] See for instance: Gourlay, Jim. 2006. A shameful slaughter. *Eastern Woods & Waters* 21 (6); Hamilton, Mark. 2007. Native Solutions. *Eastern Woods & Waters* 22 (1).

[73] DNR manages the moose hunt of non-native hunters and in 2008 10,071 hunters from all over Nova Scotia applied for 363 licenses for three week-long hunting periods in the fall DNR, "Moose Hunting License Draw," Department of Natural Resources, www.gov.ns.ca/natr/draws/moosedraw/default.asp.

hunting and fishing activities by ATRA passport holders are managed and monitored by the NCNS, the moose harvesting activities of other Mi'kmaq in Nova Scotia (13,518 band members) are neither regulated nor monitored. Incidental reports of commercial and night hunting by some of these Mi'kmaq individuals has led to ecological concerns and cross-cultural conflict.[74]

Consequently, a tripartite co-management working group has been operating since the summer of 2006.[75] Its aim has been to develop culturally appropriate harvesting guidelines and enforcement provisions that advance Mi'kmaq self-government of the Mi'kmaq moose harvest. This process has been conducted as a pilot project for the tripartite Made-in-Nova Scotia Process. Notably, as will be discussed in the next section, the NCNS was neither consulted nor invited to participate.

After over two years of extensive consultation with both reserve and off-reserve Mi'kmaq communities, as well as with the Grand Council, UINR issued voluntary hunting guidelines in August 2009. Published by the Assembly of Nova Scotia Mi'kmaq Chiefs, these guidelines claim to be "applicable to all Mi'kmaq in Nova Scotia as an exercise of Community Authority and Nationhood," although they only address status Mi'kmaq and make no reference to non-status Mi'kmaq or ATRA passport holders.[76] These guidelines note that they "shall not be used as interpretive aids in understanding the legal content of Mi'kmaq Rights and Title" and do not attempt to further specify who the "Mi'kmaq in Nova Scotia" are,[77] even though identifying to whom such regulations apply is essential for them to be ratified and enforceable by either provincial or Aboriginal jurisdictions.[78] According to one provincial government employee, the governmental parties place the onus for this task on the Mi'kmaq leadership: "Mi'kmaq know they have some issues to work on and are not in a position to have them legalized as they still have some more homework to do on that front."[79]

In the meantime, ATRA passport holders will likely continue to follow the NCNS guidelines and the two voluntary management systems will operate in parallel. In interviews, representatives of all parties suggested that a single harvesting regime for all Mi'kmaq is desirable. However, before resource management plans for all Mi'kmaq can be negotiated, the beneficiaries of Mi'kmaq Aboriginal and treaty rights need to be identified, which is a central objective of the Made-in-Nova Scotia Process.

The contestations surrounding the moose management initiative are due to tensions between the NCNS and Mi'kmaq chiefs, as well as underlying debates about Aboriginal rights and identity. All interviewees were aware that there is disconnect between the NCNS and the Mi'kmaq Chiefs, a relationship that has a history of its own and is now marked by a lack of communication and undertow of animosity. Notably, this had not always been the case. Throughout the 1980s, the NCNS and the Mi'kmaq Chiefs achieved collaborative progress within the Tripartite Forum on

[74] Interview with G1 and G6, Provincial government employees.
[75] The working group includes representatives of Mi'kmaq Chiefs, DNR, OAA (Office of Aboriginal Affairs of the government of Nova Scotia), Parks Canada, INAC and UINR.
[76] Assembly of Nova Scotia Mi'kmaq Chiefs. "Tia'muwe'l Netuklimkewe'l: Unama'ki Moose Harvesting According to Netukulimk." Mi'kmaq Rights Initiative; Unama'ki Institute of Natural Resources.
[77] Ibid.
[78] Interview with E2, independent expert in Aboriginal rights; Interview with G1, Provincial government employee.
[79] Interview with G1, Provincial government employee.

Aboriginal programs and services that did not necessitate the discussion of resource rights and access.[80] In terms of resource management, the division between status and non-status Indians was not significant at that time, precisely because Aboriginal rights had not yet been elaborated by the courts. The fact that some Mi'kmaq had status and others did not had little bearing with respect to natural resource management.[81]

However, there has always been competition over federal benefits and services between on- and off-reserve Mi'kmaq communities.[82] By the early 1990s, the return of some re-instated status Mi'kmaq[83] to the reserves accentuated this division, also highlighting the different socio-cultural experiences of reserve and off-reserve Mi'kmaq.[84] Concurrently, band councils became increasingly protective over emerging Aboriginal resource rights,[85] possibly assuming that status Indians would have priority access to limited resources.[86] The latent division between the on-reserve and off-reserve communities was thus entrenched by the significance of *Indian Act* status for resource access.[87]

The division extends to Aboriginal identity. Palmater argues that both non-status and off-reserve Indians are often excluded from their First Nation communities and effectively denied their Aboriginal identity.[88] Previous research by the author also encountered such discourses of Mi'kmaq identity, both on- and off-reserve.[89] One interviewee showed concern that some Mi'kmaq perpetuated the misconception that Aboriginal identities are tied to a life on the reserve: "[I]f they understand that you can leave a reserve and stay an Indian, you've won the battle, but if you think the only way you can be an Indian is to stay on reserve, then you are condemned to be on that reserve. … A reserve does not make an Indian!"[90] NCNS interviewees agreed that some reserve-based Mi'kmaq hold a "mentality of how the reserve, in their acceptance of the Indian Act, [is] the determination of their identity".[91] In turn, the NCNS holds that their

[80] Interview with E1, independent expert in Aboriginal rights. 28/07/09; Interview with Tim Martin, NCNS *Netukulimkewe'l* Commissioner. The Tripartite Forum is still in operation and manages program delivery to Mi'kmaq reserve communities in a range of different sectors. See http://www.tripartiteforum.com/.
[81] Interview with E1, independent expert in Aboriginal rights.
[82] Interview with E2, independent expert in Aboriginal rights.
[83] Following Bill C31 of 1985, which amended provisions for Indian Act status that discriminated against women.
[84] Interview with E1, independent expert in Aboriginal rights.
[85] Most significantly for early Mi'kmaq resource rights were the Supreme Court of Canada decisions of *R. v. Simon* (1985), 2 S.C.R. 387 and *R. v. Sparrow* (1990), 1 S.C.R. 1075.
[86] Interview with E1, independent expert in Aboriginal rights.
[87] See here Palmater, who argues that despite the jurisprudential evidence that non-status Indians can be beneficiaries of section 35 rights (such as the lower court cases of *Chevrier* and *Fowler*), non-status Mi'kmaq were still marginalized in the wake of the *Marshall* decision: "Non-status Indians in New Brunswick and Nova Scotia have been characterized as criminals in the media by the non-aboriginal fishers who condemn the *Treaties of 1760-61* outright. They are also discriminated against by some of the Chiefs and the status groups who fear sharing the resource." Palmater, "An Empty Shell of a Treaty Promise: *R. v. Marshall* and the Rights of Non-Status Indians," 128, emphasis original.
[88] *Corbiere v. Canada (Minister of Indian & Northern Affairs)* (1999), 2 S.C.R. 203, at para. 71
[89] Huber, "Negotiating the Political Ecology of Aboriginal Resource Management: How Mi'kmaq Manage their Moose and Lobster Harvest in Unama'ki, Nova Scotia, Canada".
[90] Interview with Lindsay Marshall, Associate Dean of the Mi'kmaq College Institute, Cape Breton University. 21/06/07.
[91] Interview with Roger Hunka, Director, Intergovernmental Affairs, Maritimes Aboriginal Peoples Council (MAPC). 04/06/07.

constituency are 'true Mi'kmaq' but choose not to subscribe to a life governed by the *Indian Act*, the band council and government social assistance. Well aware of the challenges and achievements of the NCNS, the former Mi'kmaq Chief Lindsay Marshall acknowledges its membership system: "This is maybe sacrilegious, but I think that's actually a better model to look at. These are our Palestinians, these are our people, who have moved away, but they are still functioning. And they still have their Mi'kmaq mentality, the Mi'kmaq belief system, so they are no less Mi'kmaq than I am, I think." [92]

Essentially, it is important to keep in mind that Aboriginal heritage and identity are not determined by *Indian Act* status. Since Aboriginal rights and the duty to consult are owed to all Aboriginal people, identifying non-status beneficiaries is essential. This, however, can be complicated by conflicts over Aboriginal identity, entitlements and political representation, as the case of the Mi'kmaq nation shows. The present research did not centre on the contested significance of reserve residence or Indian status, but it did find that the NCNS considers itself marginalized and excluded from both the moose management initiative and the larger Made-in-Nova Scotia Process, discussed below.

IV. The Duty to Consult and the Made-in- Nova Scotia Process

The ongoing Made-in-Nova Scotia Process will serve here as a point of reference to review the position of non-status Mi'kmaq people in Nova Scotia and to discuss how both government and Aboriginal agencies can respond to the apparent challenges.

The case law of *Chevrier*,[93] *Fowler*[94] and *Lavigne*[95] suggests that there may be non-status Mi'kmaq beneficiaries of constitutionally protected Mi'kmaq rights to whom the Crown would owe the duty to consult. Further certainty can be reached either through negotiation within the Made-in-Nova Scotia Process or through litigation by non-status Mi'kmaq asserting Aboriginal rights. The challenge of the Made-in-Nova Scotia Process is therefore to achieve legal certainty through guidelines for Mi'kmaq citizenship that are ratified by representatives of all parties. This paper will suggest that the participation of non-status Mi'kmaq in the Made-in-Nova Scotia Process will be crucial.

A. Mi'kmaq Representation in the Made-in-Nova Scotia Process

Essentially, the Made-in-Nova Scotia Process aims to lead to a negotiated agreement that establishes Mi'kmaq self-government in Nova Scotia, which will likely include guidelines for the identification of Mi'kmaq rights beneficiaries. Mi'kmaq respondents referred to this as 'Mi'kmaq citizenship.' A Framework Agreement was signed in February 2007 by the Minister of INAC, the Minister of the provincial Office of Aboriginal Affairs (OAA), 11 of the 13 Nova Scotia Mi'kmaq Chiefs, and the Grand Chief of the Grand Council as a witness.[96] The Mi'kmaq Rights Initiative, KMK (*Kwilmu'kw Maw-klusuaqn*), was established to coordinate the negotiations for the "Mi'kmaq of Nova Scotia." It is funded by INAC and directed by the Assembly of Nova

[92] Interview with Lindsay Marshall, Associate Dean of the Mi'kmaq College Institute, Cape Breton University.
[93] R. v. *Chevrier* (1989), 1 C.N.L.R. 128
[94] R. v. *Fowler* (1993), 134 N.B.R. (2d) 361
[95] *R. v. Lavigne* (2007), 319 N.B.R. (2d) 261, 4 C.N.L.R. 268
[96] Mi'kmaq Rights Initiative, "Negotiations," Mi'kmaq Rights Initiative (*Kwilmu'kw Maw-klusuaqn*), http://www.mikmaqrights.com/negotiations.php.

Scotia Mi'kmaq Chiefs. The parties anticipate signing a Memorandum of Understanding in 2011, which would lead to a Final Agreement in 2016—although to some observers this schedule already seems out of reach.[97]

The Framework Agreement states that the "'Mi'kmaq of Nova Scotia' include all members of the thirteen (13) Mi'kmaq First Nations (Bands) in Nova Scotia whether they reside on or off reserve and *other persons of Mi'kmaq heritage* who are beneficiaries of Mi'kmaq rights and title applicable in Nova Scotia,"[98] but stipulates that this latter group will also be represented by the 13 Mi'kmaq Chiefs of Nova Scotia. This raises two interrelated questions: Firstly, how can the "other" (essentially non-status) beneficiaries of Mi'kmaq rights be identified? And secondly, do governments have a duty to consult with them? If so, who can represent them in consultation? The general legal directives for these questions were discussed above; this section will outline political and practical considerations specific to the Made-in-Nova Scotia Process.

The thirteen Chiefs hold that they are the only legitimate representatives of the Mi'kmaq of Nova Scotia and will ensure that the Made-in-Nova Scotia Process addresses the needs of the entire Mi'kmaq nation. They can arguably claim to be mandated by both on- and off-reserve Band members, since the latter (since *Corbiere*[99]) can vote in band elections. The Chiefs do not, however, claim to represent non-status Mi'kmaq. So far, the position of both provincial and federal governments is that the Mi'kmaq Chiefs, as the elected leadership, are the only mandated consultation partners for the Mi'kmaq people. The NCNS—as a political organization that is neither legally representational nor possesses an explicit mandate for consultation—does not qualify to participate in tripartite negotiations unless the Chiefs bring the NCNS to the table.[100] Indeed, it is unclear if the NCNS, as the only representative body of non-status Mi'kmaq, could legally act as a consultation partner. To answer this question, two recent court cases in the Maritimes need to be carefully considered.

B. Can the NCNS Serve as a Consultation Partner?

Significantly, a court case concerning the infringement of Aboriginal rights due to highway construction in Newfoundland, *Labrador Métis Nation v. Newfoundland and Labrador*[101] established that an incorporated agent (in this case, the Labrador Métis Nation (LMN)) can be consulted on behalf of a community of Aboriginal people to whom the duty to consult is owed. The court held that Section 35 rights can indeed be "asserted and protected by an agent" and that the LMN had been mandated to do this by its member communities.[102] The preamble to the LMN's memorandum specifically refers to representation in consultation processes.

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[97] Interview with G1, Provincial government employee.

[98] The Thirteen Mi'kmaw Saqmaq [Chiefs], Minister of Aboriginal Affairs, and Minister of Indian Affairs and Northern Development. "Mi'kmaq - Nova Scotia - Canada Framework Agreement" http://www.gov.ns.ca/abor/officeofaboriginalaffairs/whatwedo/consultation. Emphasis added.

[99] *Corbiere v. Canada (Minister of Indian & Northern Affairs)* (1999), 2 S.C.R. 203

[100] Interview with G1, Provincial government employee.; Interview with G5, Federal government employee. 08/09/09.

[101] *Labrador Métis Nation v. Newfoundland and Labrador (Minister of Transportation and Works)* (2007), 288 D.L.R. (4th) 641

[102] Ibid. at para. 46

The representativity of the NCNS was in question in *Native Council of Nova Scotia v. Canada* (2007).[103] The NCNS claimed that DFO had not sufficiently honoured its duty to consult the NCNS before having halved the lobster quota of its AFS agreement in order to curtail overfishing. The court dismissed the claim because the NCNS could not sufficiently prove that it represents a community of Section 35 right-holders: "there is absolutely no evidence indicating the genesis of any aboriginal right to fish in relation to the NCNS membership".[104] The court, however, did "assume, without deciding" that "the NCNS has the requisite standing to mount a section 35 challenge"[105] and suggested that "[b]ecause the off-reserve aboriginal population of Nova Scotia chose the NCNS to represent them in their dealings with DFO, the NCNS (as an organization) holds the procedural right of consultation."[106] The Federal Court of Appeal upheld the decision, but decided not to comment on whether the NCNS was a valid consultation partner in the given context.[107]

C. Consultation Policies and Strategies in the Made-in-Nova Scotia Process

Both the federal and the Nova Scotia governments have published consultation policies that respond to the duty to consult. It is interesting to review how these documents propose to consult with non-status Indians (and Métis) and how this relates to the ongoing processes of the Made-in-Nova Scotia Process.

Following a guiding principle of inclusiveness, the 2008 federal "Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult" suggest that "Aboriginal groups who have an interest in or who may be affected by the decision" should be granted access to the consultation process, beyond those whose rights may be affected. In order to reach some consistency with consultation processes and protocols throughout the country, advice should be sought from the Office of the Federal Interlocutor for Métis and Non-status Indians (OFI) in cases where consultation with non-status Indians and Métis is warranted.[108]

In June 2007, the Province of Nova Scotia issued an "Interim Consultation Policy" for "consultation with the Mi'kmaq" briefing its departments on how to honour the duty to consult with Mi'kmaq stakeholders.[109] This policy states that "consultation should always include the Chief and Band Council. For most situations they are the appropriate entities with authority to speak on behalf of communities."[110] As a potential additional consultation partner, the policy lists the NCNS as "an organization that includes non-status and off-reserve status Mi'kmaq, and has an interest in a variety of natural resource matters."[111] Fundamentally, the provincial policy responds well to the scope and spirit of the duty to consult and stands out in comparison to other

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[103] *Native Council of Nova Scotia v. Canada (Attorney General)* (2007), 2 C.N.L.R. 233
[104] Ibid. at para. 45. The court was here likely referring to the fact that no rights can be derived from NCNS membership, which includes people of diverse Aboriginal identity who do not hold a communal fishing right.
[105] Ibid. at para. 42.
[106] Ibid. at para. 43.
[107] *Native Council of Nova Scotia v. Canada (Attorney General)* (2008), 3 C.N.L.R. 286
[108] Canada. "Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult.", 10, 20. http://www.ainc-inac.gc.ca/nr/iss/acp/intgui-eng.pdf.
[109] Province of Nova Scotia. "Consultation With The Mi'kmaq: Interim Consultation Policy." http://www.gov.ns.ca/abor/officeofaboriginalaffairs/whatwedo/consultation.
[110] Province of Nova Scotia. "Consultation with the Mi'kmaq: Interim Consultation Policy."
[111] Ibid.

provincial policies developed.[112] Specifically, it requires government agencies to minimize the infringement of both Aboriginal rights and title and further provides for joint decision-making, compensation and funding.[113] It is significant that this provincial policy reminds individual departments that consultation with Aboriginal people can be undertaken for policy reasons without being legally required.

Interestingly, this policy was published only five days after the official Terms of Reference for consultation in the Made-in-Nova Scotia Process.[114] This latter document implements the guidance from the Framework Agreement and specifies that a committee appointed by the Chiefs is the only Mi'kmaq consultation partner. Unlike in the Framework Agreement, no reference is made to non-status Mi'kmaq or how consultation with them may occur.[115]

Given the inclusive governmental consultation policies and the legal interpretations of the duty to consult, one must question why the Framework Agreement and the Terms of Reference for the Made-in-Nova Scotia Process insist that the Mi'kmaq Chiefs are the sole representative and consultation partner for all "Mi'kmaq in Nova Scotia." Since this may be read as the lead authorship of the Mi'kmaq Chiefs, it pays to interrogate how their agents from KMK have been addressing the interests of non-status Mi'kmaq.

In order to seek the input of both non-status and off-reserve Mi'kmaq during the development of the moose co-management initiative, KMK held community consultation sessions in urban Halifax and other off-reserve locations and plans to do likewise for the Made-in-Nova Scotia Process.[116] During this process, KMK has been building a database of off-reserve and non-status Mi'kmaq to identify this community and for future consultation processes.[117]

By consulting with the NCNS constituency, the Chiefs are in effect (although not necessarily by intent) circumventing direct collaboration with the NCNS. According to the NCNS, KMK has not formally consulted with the NCNS to provide input into the Made-in-Nova Scotia Process, but has rather consulted "through the back door" by informally enquiring about the NCNS's membership and ATRA passport guidelines.[118] While the NCNS considers itself excluded by the Chiefs, it does perceive the Chiefs' opposition to co-operating with the NCNS to be eroding.[119]

Two further issues of potential contention between the Chiefs and the NCNS should be considered. Present and previous research by the author encountered members of both reserve

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[112] Maria Morellato. "Crown Consultation Policies and Practices Across Canada." National Centre for First Nations Governance (2008).
[113] Ibid.
[114] The Thirteen Mi'kmaw Saqmaq [Chiefs], Minister of Aboriginal Affairs, and Minister of Indian Affairs and Northern Development. "Terms of Reference for a Mi'kmaq-Nova Scotia-Canada Consultation Process" http://www.gov.ns.ca/abor/officeofaboriginalaffairs/whatwedo/consultation.
[115] Ibid. The Framework Agreement had indicated that the "Mi'kmaq of Nova Scotia" for the purposes of the Made-in-Nova Scotia Process include status Mi'kmaq and "other persons of Mi'kmaq heritage who are beneficiaries of Mi'kmaq rights and title applicable in Nova Scotia".
[116] Interview with G6, Provincial government employee; Interview with Clifford Paul, UINR (*Unama'ki* Institute of Natural Resources) Moose Management Coordinator. 22/06/07.
[117] Interview with E2, Independent expert in Aboriginal rights.
[118] Interview with Tim Martin, NCNS *Netukulimkewe'l* Commissioner.
[119] Interview with Grace Conrad, NCNS Chief and President.

and NCNS communities who claim that their respective system of governance will prevail once Mi'kmaq self-government is established. According to their views, the NCNS expects that self-government will overcome the unfortunate system of reserve governance, whereas the Chiefs claim that, once the issue of Mi'kmaq citizenship is resolved, the category of non-status Mi'kmaq and thus the role of the NCNS in Mi'kmaq politics will cease to exist. Essentially, these positions provide incentives to both KMK and NCNS to resist the progress of the Made-in-Nova Scotia Process in order to maintain their legitimacy.

Apart from these competing claims for political legitimacy, the NCNS and the Chiefs may have opposing agendas for the Made-in-Nova Scotia Process. The NCNS suspects that the Chiefs aim to maximize the benefits to band members and therefore limit the community of beneficiaries of the Made-in-Nova Scotia Process.[120] Such a strategy would undermine an agenda prioritizing Mi'kmaq self-government and nation-building, favoured by the NCNS, which requires the Mi'kmaq community to be as populous and viable as possible.[121]

Despite these opposing positions, one interviewee suggested that KMK is well aware that the NCNS has a lot of expertise to bring to the table and is prepared to cooperate with the NCNS, provided it relinquishes its claims to being a governing authority for part of the Mi'kmaq nation.[122] Apparently, this has been a bone of contention, and correspondence between KMK and NCNS regarding the Made-in-Nova Scotia Process has not progressed beyond this pivotal issue.[123]

V. Lessons Learned and Future Considerations

A. Policy Considerations for the Made-in-Nova Scotia Process

This review of the position of non-status Mi'kmaq in Nova Scotia has highlighted a number of complicating factors that the parties have to address within the Made-in-Nova Scotia Process. This paper has so far suggested that non-status Mi'kmaq can potentially hold section 35 rights and that both federal and provincial governments have a duty to consult with them on the Made-in-Nova Scotia Process. Assessing possible consultation partners, it is clear that the Mi'kmaq Chiefs cannot represent non-status Mi'kmaq, but it is unclear whether the NCNS has the legal representativity to represent this undefined community.

Highlighting local Mi'kmaq politics, the Framework Agreement stipulates that the Mi'kmaq Chiefs are the only consultation partners. In principle, however, a political accord cannot override the legal duty to consult and prevent governmental consultation with the NCNS or its constituency.[124] Nevertheless, following the Framework Agreement may be essential to maintain the constructive working relationship that KMK and government negotiators have established over recent years. The current state of affairs potentially raises the question whether KMK's consultation with non-status Mi'kmaq either justifies the Chiefs being the only consultation

[120] Interview with Ibid; Interview with Tim Martin, NCNS *Netukulimkewe'l* Commissioner.
[121] Interview with Grace Conrad, NCNS Chief and President; Interview with E1, independent expert in Aboriginal rights.
[122] Interview with E2, independent expert in Aboriginal rights.
[123] Ibid.
[124] Interview with G3, Federal government employee.

partner or lessens the Crown's duty to consult in some way. However, given that the duty to consult rests with the Crown itself, the current government strategy of hoping that Mi'kmaq chiefs and NCNS agree on joint representation does not seem to fulfill any legal duty to consult with all Mi'kmaq.

A related question is if consultation with non-status Mi'kmaq needs to be conducted through the NCNS. Although the NCNS is so far the only candidate, there is arguably nothing to stop either party from establishing a new organization and provide it with the required representativity and mandate to act as a consultation partner for non-status Mi'kmaq. However, given the circumstances, the success of such an undertaking (including community support) is possibly more problematic than employing the well-established NCNS—or modifying its mandate and organizational structure (e.g. establishing a specific consultation committee; see below) to enhance its representativity.

There are further constraints that governments may face. A fundamental goal for negotiated agreements is to establish legal certainty by ensuring that all potential beneficiaries are identified and consulted to minimize the risk of future litigation. In Nova Scotia, therefore, governments have a policy incentive to consult with all Mi'kmaq, including off-reserve and non-status Mi'kmaq, even if there were no legal duty to consult.[125] On the other hand, provincial and especially federal government agencies operate within the confines of the *Indian Act*, which recognizes only Chiefs as legal Aboriginal representatives and does not relate to non-status Indians, who essentially become a provincial responsibility.[126]

Apart from these legal and political constraints, this research also found some encouraging aspects of the Made-in-Nova Scotia Process. The NCNS has established mutual working relationship with both provincial and federal governments and has negotiated resource access for non-status Mi'kmaq despite the lack of legal precedence. The relations between the NCNS and Mi'kmaq Chiefs seem likely to improve if both parties manage to put aside past conflicts and claims to governing authority and focus on mutual visions and collaboration for the Made-in-Nova Scotia Process. After all, there are no viable alternatives to the Made-in-Nova Scotia Process and failure to progress will likely result in litigation to clarify the rights of non-status Mi'kmaq and other key issues.

Consequently, this paper suggests that government agencies should further encourage exchange and cooperation between the status and non-status Mi'kmaq leadership and also further develop their own relationships with the NCNS, for which CAP may be able to provide additional guidance. As indicated in the federal policy on the duty to consult, the OFI, mandated to strengthen the connection between INAC and CAP, may be able to give advice on how to build rapport with both NCNS and CAP, given their experience working with both organizations.[127]

[125] As indicated above in reference to Canada. "Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult."
[126] Interview with G5, Federal government employee; Thomas Isaac, *Métis Rights*.
[127] Interview with G5, Federal government employee.

B. Enhancing Representativity

Beyond the Made-in-Nova Scotia Process, this paper has shown that the political organization and representation is particularly important for both non-status Indians and Métis to benefit from the duty to consult. The court cases investigating the ability of the NCNS and LMN to represent diverse Aboriginal communities show that certain requirements seem to improve an organization's representativity as a consultation partner. Firstly, an organization should have an explicit mandate from its membership to represent it in consultation. This may be more difficult to hold if an organisation represents people of different Aboriginal groups or with differing rights, as the court found in *Native Council of Nova Scotia v. Canada (Attorney General).*[128] In other circumstances, however, broad and large Aboriginal organizations may be more visible and influential.

A solution to this conundrum could be the establishment of specific consultation committees within a larger organization, which are mandated by a specific rights-holding community to represent it in consultation.[129] Accordingly, as the NCNS aims to represent non-status Mi'kmaq, some off-reserve status Mi'kmaq, as well as other off-reserve Aboriginal people, a specific committee mandated to represent non-status Mi'kmaq may provide the necessary representativity, while the NCNS can function as an advocacy organization for its entire constituency and wield broader political leverage.

A related requirement for Aboriginal organizations is a rigorous and transparent membership registry. This is essential to verify that all members are rights beneficiaries, for example by having an ancestral connection to a treaty signatory tribe, or fulfilling the *Powley* test. Documented membership data can also help assess the impact of a proposed rights infringement, especially as Métis and non-status communities are not well captured by governmental or independent databases. However, between the many organizations of non-status Indians and Métis, there is no consensus on criteria to identify non-status or Métis people.

These points suggest that Aboriginal organizations may need to assess and refine their structures to ensure that they can serve as a consultation partner with the Crown. Here, the Métis organizations are considered to be more advanced than organizations of non-status Indians, also because they have received considerable funding since the *Powley* decision (such as through OFI's Powley Initiative).[130] In any case, the Crown has a policy interest to fund the development of Aboriginal organizations to ensure they qualify as a consultation partner. In the context of the duty to consult, this goes both ways: the Aboriginal community can participate in the consultation process effectively and the government agencies have a consultation partner. In cases where a duty to consult exists but no consultation partner can be identified, it becomes impossible to achieve legal certainty of the proposed project, as it remains open to future legal challenges.

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[128] *Native Council of Nova Scotia v. Canada (Attorney General)*, (2007), 2 C.N.L.R. 233. And *Native Council of Nova Scotia v. Canada (Attorney General)*, (2008), 3 C.N.L.R. 286

[129] Interview with Dwight Newman, Associate Professor of Law, University of Saskatchewan.

[130] Interview with E2, independent expert in Aboriginal rights; Interview with G4, Federal government employee; Interview with Dwight Newman, Associate Professor of Law, University of Saskatchewan. For an evaluation of the Powley Initiative, see INAC. "Evaluation of the Federal Interlocutor's Contribution Program and Powley: Management of Métis Aboriginal Rights."

A different set of problems arises when First Nation groups challenge the representativity of non-status or Métis organisations and their authority to act as consultation partners. This paper has discussed the conflict between Mi'kmaq Chiefs and NCNS in Nova Scotia and it is noteworthy that this mirrors the competitive relationship between the CAP and the Assembly of First Nations (AFN). While CAP publicly declared the case of *Labrador Métis Nation v. Newfoundland*[131] as a precedent that other CAP affiliates may also qualify as consultation partners, the AFN has since issued a resolution to denounce the Crown consulting with CAP or its affiliates.[132]

In cases of such conflict, organizations of non-status Indians or Métis are likely to be marginalized by government agencies that have to maintain a relationship with the more influential First Nation group. The NCNS is marginalized partly due to such power relations, which Newman identifies as structural shortcomings of the duty to consult that are likely to disadvantage non-status Indians and Métis vis-à-vis First Nations actors: "Non-status Indians and Métis have already faced much neglect from governments, and *the structure of the duty to consult risks reinforcing this neglect because it is not clear with whom consultation is to occur.* The duty to consult may inadvertently enhance the power of already relatively advanced Aboriginal groups over more disadvantaged ones."[133]

C. Areas for Future Research

In order to mediate this potential shortcoming in fulfilling the duty to consult, the political organization of both non-status Indians and Métis has to be improved, as discussed above. To guide this development, more research is needed on how the representativity and transparency of Aboriginal organizations and their membership systems can be enhanced. Currently, the political representation and participation of both Métis and non-status Indians is hampered by differing criteria for identification and overlapping mandates amongst the diverse Métis and/or non-status organizations; the politics and dynamics in this landscape need to be better understood in order to direct necessary capacity building and institutional development. As a specific strategy, Newman's[134] proposal of establishing specific consultation committees within broader organizations seems effective, but the legal and socio-political feasibility needs to be carefully assessed on a case-by-case basis. Likewise, the establishment of new representative organizations specifically for consultation purposes would require substantial background research and careful discussion.

Before establishing new entities, the contemporary role and potential of traditional governance structures should also be assessed. Although they receive very limited attention in policy circles, they can potentially serve as consultation partners, but can also play an important role in mediating the conflicts between status and non-status, or reserve and off-reserve communities. However, the legal representativity of and community support for traditional governance structures needs to be carefully investigated in each case.

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[131] *Labrador Métis Nation v. Newfoundland and Labrador (Minister of Transportation and Works)* (2007), 288 D.L.R. (4th) 641

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

[133] Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples*, 71, emphasis added.

[134] Interview with Dwight Newman, Associate Professor of Law, University of Saskatchewan.

More generally, the Aboriginal identities and cultural relations amongst both Métis and non-status Indians are understudied and ethnographic case studies will likely provide much insight into the current aspirations and historical adaptations of these marginalized communities. A more nuanced understanding of different off-reserve experiences and relations to First Nations and non-native societies (as well as relations amongst different Métis communities) can make policy development and consultation processes more comprehensive and culturally appropriate.

These three areas of future research are representative of the uncertainty that surrounds non-status Indians and Métis in today's Aboriginal landscape. Both federal and provincial governments should pursue such research to advance structural debates about the future of Métis and non-status Indians, but also localized knowledge of community conflicts and developments.

Conclusion

The duty to consult builds on the Crown's duty to act honourably towards all Aboriginal peoples of Canada and promises to enhance the input of Aboriginal communities into local development. However, Christie argues that the duty to consult does not entail substantial concessions or reconciliation for Aboriginal people, but can rather assimilate them into a Western framework of litigation, which may represent the Crown's stronghold and preference over negotiations.[135] While this research found the government agencies in the Made-in-Nova Scotia Process to be comparatively proactive, Christie's concerns are important qualifications to keep in mind when contemplating the duty to consult in negotiations.

Both non-status Indians and Métis people exist on the margins of the Canadian Aboriginal landscape and live a different life than status Indians on reserves. These differences are in part due to the legacy of federal neglect and legal uncertainty and its effects are only gradually being addressed with the establishment of the OFI in the mid-1980s and the constitutional protection of Métis people in the 2003 *Powley*[136] decision.

The duty to consult emerges at a time when negotiated agreements seek to reconcile colonial legacies and forge new partnerships for self-government. While the development of First Nation groups may continue to require the bulk of public attention and funding, non-status and Métis groups require specific support and policy development to benefit from the duty to consult. Both First Nation groups and government agencies will have to support the political representation and consultation of non-status Indians and Métis people for the Crown to fulfill its duty to consult and act honourably toward all Aboriginal peoples of Canada.

[135] Christie, "Developing Case Law; The Future of Consultation and Accommodation."
[136] *R. v. Powley* (2003), 2 S.C.R. 207

Appendix A: Map of traditional Mi'kmaq territory

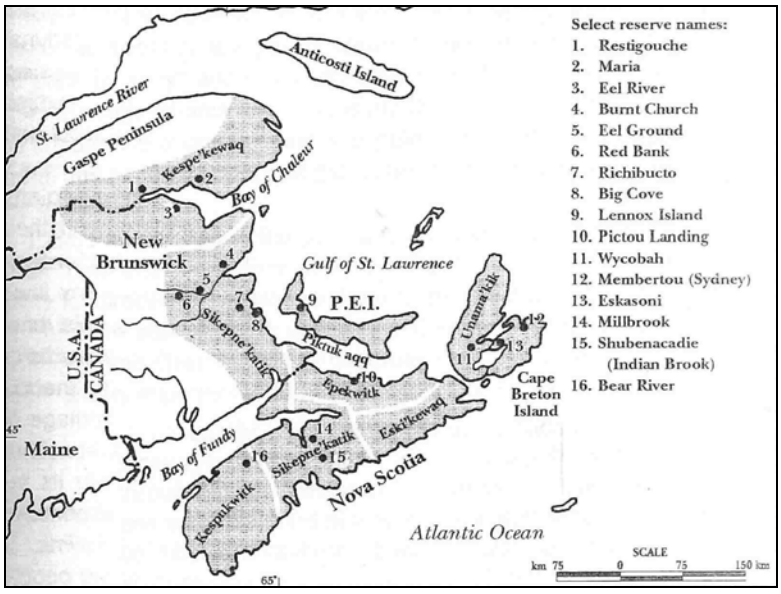

Figure 1: Map of traditional Mi'kmaq territory (shaded area) with location of selected reserves.[137]

[137] Source: Berneshawi, "Resource management and the Mi'kmaq nation."

Appendix B: Population data of the 13 Mi'kmaq First Nation Bands

Table 1: Population data of the 13 Mi'kmaq First Nation Bands of Nova Scotia. Source: http://www.gov.ns.ca/abor/aboriginalpeopleinns/demographics

First Nation	Total Population	Total on Reserve	Total off Reserve	% off-reserve
Acadia	1,046	184	862	82
Annapolis Valley	233	96	137	59
Bear River	278	101	177	64
Glooscap	304	82	222	73
Millbrook	1,345	747	598	44
Paq'tnkek (Afton)	500	357	143	29
Pictou Landing	565	432	133	24
Shubenacadie	2,204	1,173	1,031	47
Total mainland Nova Scotia	**6,475**	**3,172**	**3,303**	**51**
Chapel Island	596	493	103	17
Eskasoni	3,807	3,238	569	15
Membertou	1,131	757	374	33
Wagmatcook	662	540	122	18
We'koqma'q (Waycobah)	847	763	84	10
Total Cape Breton Island	**7,043**	**5,791**	**1,252**	**18**
Total Nova Scotia	**13,518**	**8,963**	**4,555**	**34**

Appendix C: Nova Scotia Aboriginal Population

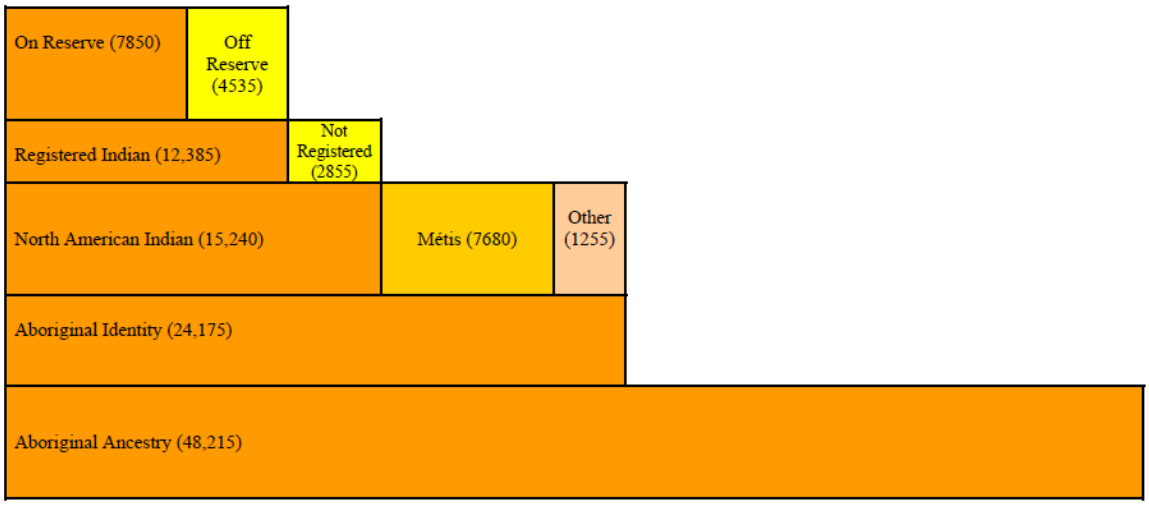

Figure 2: Nova Scotia Aboriginal Population by self-identification, Indian Act status (registration) and residence (2006 Census data) Source: http://www.gov.ns.ca/abor/aboriginalpeopleinns/demographics

Appendix D: List of Acronyms

AFS:	Aboriginal Fisheries Strategy
ATRA:	Aboriginal and Treaty Rights Access
CAP:	Congress of Aboriginal Peoples
DFO:	Department of Fisheries and Oceans
DNR:	Department of Natural Resources
INAC:	Indian and Northern Affairs Canada
KMK:	*Kwilmu'kw Maw-klusuaqn* (Mi'kmaq Rights Initiative)
LMN:	Labrador Métis Nation
MNC:	Métis National Council
OAA:	Office of Aboriginal Affairs of the Government of Nova Scotia
OFI:	Office of the Federal Interlocutor for Métis and Non-status Indians
NCNS:	Native Council of Nova Scotia
WBNP:	Wood Buffalo National Park

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