



Kwilmu'kw Maw-Klusuaqn Negotiation Office
Mi'kmaq Rights Initiative

Our Rights. Our Future.

75 Treaty Trail
Truro, NS B6L 1W3

Tel (902) 843 3880 Fax (902) 843 3882
Toll Free 1 888 803 3880
Email info@mikmaqrighs.com
www.mikmaqrighs.com

November 24, 2020

Luc S. Desroches
Crown Consultation Lead
Impact Assessment Agency of Canada
1801 Hollis Street, Suite 200
Halifax, NS B3J 3N4
Fax: (902) 422-1799
Email: luc.desroches@canada.ca

**Re: Draft Terms of Reference for the Regional Assessment of Offshore Oil and Gas
Exploratory Drilling East of Newfoundland and Labrador – Follow-up Program**

Mr. Desroches,

I write to acknowledge receipt of the Draft Terms of Reference for the Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador – Follow-up Program. Kwilmu'kw Maw-Klusuaqn Negotiation Office (KMKNO), on behalf of the Maw-lukutijik Saqmaq (Assembly of Nova Scotia Mi'kmaw Chiefs), has conducted an internal review and wish to provide you with the following concerns, comments and/or recommendations.

The Mi'kmaq depend on the lands, waters, and resources in Mi'kma'ki and have never surrendered, ceded, or sold title to any of its lands and waters. We are traditionally a people of the water and we continue to rely on fish for Food, Social and Ceremonial (FSC) purposes and to provide us with the moderate livelihood promised in the Treaties of 1760-1761 — as yet unimplemented almost 20 years after the decision in R. v. Marshall. Aboriginal fishing rights are guaranteed and protected by the Supreme Court of Canada and we engage in Food, Social and Ceremonial fisheries to feed our families and non-rights based commercial fisheries through Aboriginal communal commercial licenses. Consequently, any legislation, regulation, policy or guideline, or project which affects marine areas, fish, fish habitat, or the fisheries is of grave concern to us.

At p.5 of the TOR, the authors advise that the TOR “outlines the objectives, legislative authorities, governance structures, as well as the roles and responsibilities of the participants in the RA [Regional Assessment] Follow-up Program. This includes the requirements for the establishment of an advisory committee (RA Follow-up Advisory Committee).” Nowhere in the document are the Crown’s responsibilities for constitutionally mandated consultation outlined. Further, the document interchangeably used the words “consultation” and “engagement”. As the

Maw-lukutijik Saqmaq has repeatedly advised the IAAC and ECCC, the word “consultation” is now imbued with a constitutional duty. Therefore, the use of the word consultation should be reserved solely for describing constitutionally mandated consultation. Engagement may be used to describe all other relations with other non-rights holding entities.

On p.6 under “Objectives” of the Follow-up Program, bullet 3 states the Follow-up Program will be designed and implemented in order to

[e]valuate the implementation of the conditions in Schedule 2 of the Ministerial Regulation and provide advice on any areas where amendments or additions may be required to address identified issues or gaps.

Schedule 2 of the Ministerial Regulation outlines in s.1 which First Nation and Inuit Governments/Groups are to be consulted in relation to the east of Newfoundland Regional Assessment. In brief, all Atlantic Canada Bands, the Mi'kmaw and Innu communities of Québec, the Nunatsiavut Government and the NunatuKavut Community Council.

Section 3 of Schedule 2 of the Regulations states:

In this Schedule, consultation requires:

- a. providing a written notice of the opportunity for the party or parties being consulted to present their views and information on the subject of the consultation;
- b. providing information on the scope and the subject matter of the consultation in a period of time that allows the party being consulted to prepare their views and information;
- c. undertaking a consideration of all views and information presented by the party being consulted on the subject matter of the consultation;
- d. informing the party being consulted in a timely manner on how the views and information received have been considered; and
- e. in the case of consultation with an Indigenous group, also consulting with the group with respect to the way in which paragraph (a) to (d) will be satisfied with respect to that group.

If it is recognized that the Act and the Ministerial Regulation specifically recognize the constitutionally mandated duty to consult; and that the RA Follow-up Program is to be designed and implemented to meet all conditions of Schedule 2, including Section 3, then the draft TOR require revision. The Maw-lukutijik Saqmaq agrees that the Crown owes Indigenous Peoples an opportunity to meaningfully participate and provide input into the RA Follow-up Program but we argue that the opportunities and resources for Indigenous Peoples should be provided through a constitutionally mandated consultation process and that that process be clearly recognized and affirmed as a separate bullet point in the Follow-up Program’s TOR.

The final bullet under “Objectives”, found at pp.6-7 states that the Follow-up Program will provide “on-going and meaningful opportunities and resources for Indigenous and stakeholder

groups and the public to participate and provide input throughout the implementation of the RA Follow-up Program, as well as ensuring that the outputs of the RA Follow-up Program are made publicly available”. With great respect, as the Maw-lukutijik Saqmaq has reiterated time and again, the role and place of the Indigenous Peoples of Canada is separate from that of stakeholders and the public and the Crown’s duty to act honourably in relation to Indigenous Peoples and its duty to consult are not met by lumping Indigenous Peoples in with stakeholders and the general public. The duties owed to Indigenous Peoples are separate and distinct from any social policy/good governance obligation the government owes to non-s.35 rights holders.

Beginning at p.7, the RA Follow-up Advisory Committee’s duties are outlined. We submit that as the Advisory Committee is to provide the Steering Committee with advice about, *inter alia*, “Recommendations for the review and update of the conditions in Schedule 2 of the Ministerial Regulation”, then the Advisory Committee is obliged to ensure that someone fulfills the duty to consult as outlined in the Act and s.3 of the Ministerial Regulation.

At p.8 of the Draft TOR, the composition of the RA Follow-Up Advisory Committee is outlined. The Advisory Committee, which will advise all-government or CNLOSP member Steering Committee is to include “representatives of Indigenous groups, the fishing industry, oil and gas industry, non-government organizations, and academics.” In the second paragraph under the heading “Composition and Meetings”, the draft TOR state,

Committee membership terms will be of two to three years with the potential for reappointment for subsequent terms. Members, including the chair will be selected by the Agency, NRCan and the Government of Newfoundland and Labrador’s Department of Industry Energy and Technology.

The Maw-lukutijik Saqmaq objects to the Crown selecting Indigenous members of the Advisory Committee. In 2018, the Crown released its *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*. Principle 1 affirms that

[t]he Government of Canada recognizes that all relations with Indigenous peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government.¹

It is our position that the Indigenous Peoples of Atlantic Canada and Québec should together determine who or which people shall be the Indigenous members of the Advisory Committee. It is a violation of Principle 1 and contrary to the spirit of UNDRIP and Call to Action 44 of the TRC.² The First Nations and Inuit of Atlantic Canada and Québec are the rightful parties to select Indigenous members of the Advisory Committee.

¹ Canada, Department of Justice, *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*, (Ottawa: Department of Justice, 2018), p.5

² United Nations, *United Nations Declaration on the Rights of Indigenous Peoples*, (2007), fully accepted by Canada in 2016 and Truth and Reconciliation Commission of Canada, *Calls to Action* (Ottawa: TRC, 2012), p.4 which states: “We call upon the Government of Canada to develop a national action plan, strategies, and other concrete measures to achieve the goals of the *United Nations Declaration on the Rights of Indigenous Peoples*.”

Under the heading “Roles” at p.10 the proposed role of ‘Indigenous Groups’ on the Advisory Committee is set out. The ‘role’ of the “Indigenous Groups” includes “engagement” on the “Terms of Reference”, not constitutionally mandated consultation which is a breach of the duty to consult. Further, although under “Composition and Meetings” the TOR state that the RA Follow-up Committee will include “representatives of Indigenous groups” (p.8 “Roles and Responsibilities”), there is no mention under the heading of “Stakeholders” of the appointment of Indigenous peoples to the Advisory Board (p.10) despite clearly stating that “Stakeholders will also have an opportunity to apply to be a member of the RA Follow-up Program Advisory Committee”. (p.10)

Evidently, the Crown, ECCC, and the IAAC have no intention of meaningfully and fully consulting with or involving the First Nations and Inuit in the administration of the Regional Assessment Follow-up Program. Instead, the Crown, ECCC, and the IAAC intend to leave the decision-making power with the oil and gas industry.

The Maw-lukutijik Saqmaq object to the section “Engagement” found at pp.11-12. As we have stated above and have repeatedly pointed out to ECCC and the IAAC in the past, the Crown has a duty to consult with the Mi’kmaq of Nova Scotia, not a good governance obligation to ‘engage’ with us. The capacity funding promised by the Agency must be directed to supporting the Mi’kmaq of Nova Scotia in a constitutionally mandated consultation process, not an ‘engagement’ as though we are any other interested party. Our rights are paramount and must be separated out from engagement with interested parties.

The final bullet under the subheading Objectives at p.12 states that one of the objectives of the ‘engagement process’ [to which we continue to object], is to ensure that “comments received from Indigenous groups and stakeholders have been thoughtfully considered and taken into account. Responses to concerns will be provided.” This fails to meet the requirements of a constitutionally mandated consultation process and also fails to meet s.6(1)(g), *supra*, as it does not ensure that the constitutionally protected rights of Indigenous Peoples are respected in the course of the RA follow-up process.

Under “Engagement Methods” (to which we continue to object), in the 4th bullet the drafters of these TOR state that the IAAC will “work with Indigenous groups and stakeholders” in engagements including, *inter alia*, “following Indigenous community consultation protocols in engagement activities, to the extent possible”. This does not satisfy the constitutionally mandated duty to consult. Each community and Nation has its preferred manner of consultation that must be respected and followed to the fullest, not merely to a standard of “to the extent possible” as determined by a bureaucrat in Ottawa. We have a right to self-government and self-determination and part of the exercise of that right is to have *our* rules of consultation and engagement respected. In Nova Scotia we have an accepted process for consultation: The Terms of Reference for a Mi’kmaq-Nova Scotia-Canada Consultation Process, which have been in place for more than a decade and to which Canada is a signatory.

Finally, we are assuming that as the ‘comment’ (not consultation) period on the draft TOR extends until 12 December 2020, the timetable set out at p.12 is no longer applicable and the application period for the RA Follow-up Advisory Committee is no longer applicable.

In conclusion, the Maw-lukutijik Saqmaq is disappointed that the Crown has ignored the duty to consult on the RA Follow-Up Program. We urge the IAAC to withdraw these draft TOR and begin again, this time drafting Terms of Reference which recognize and implement the Crown's duty to consult.

Yours in Recognition of Mi'kmaw Rights and Title,

<Original signed by>

Twila Gaudet, B.A., LL. B.
Director of Consultation
Kwilmu'kw Maw-klusuaqn Negotiation Office

cc:

Joanna Tombs, CEAA

Joanna.tombs@canada.ca