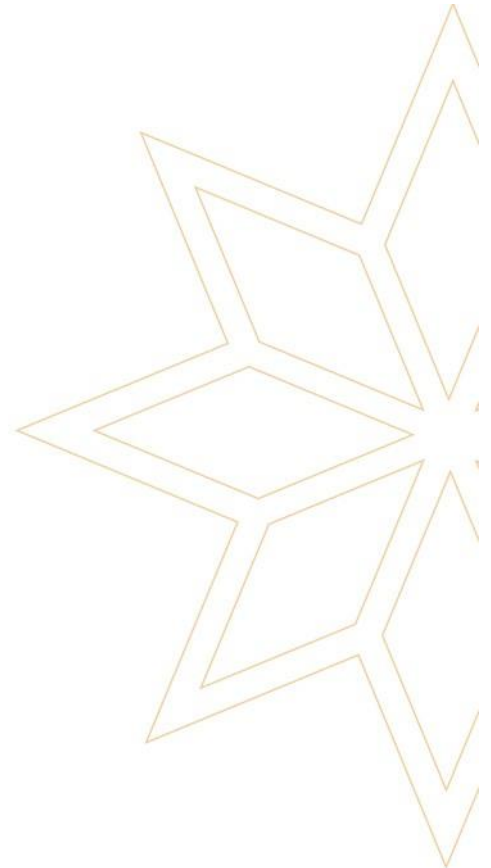


## **SIPEKNE’KATIK GOVERNANCE INTIATIVE PROTOCOL: Navigating A New Path Forward**

Committing to a meaningful and inclusive consultation process, conducted in good faith and with the proper rights holders. Enacted pursuant to the authority of the inherent right of Sipekne’katik, as represented by the duly elected Chief and Council.



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## 1. PROLOGUE

### 1.1 Mi'kmaw Worldview

Language guides us to the Indigenous consciousness and understandings of the world and the tribal knowledge of how the world works; it is where the epistemological foundations of tribal societies are held<sup>1</sup>. Language reveals the unique connection of the Mi'kmaw people to the landscape in *Mi'kma'ki*, their traditional homeland for at least the last 11,000 years<sup>2</sup>. There are several Mi'kmaw words that are central to telling this story.

*Kisu'lt melkiko'tin* is the Mi'kmaw word for the place of creation, an “ecological order or vantage point from which [the Mi'kmaq] construct their worldview, language, knowledge and order”<sup>3</sup>.

*Weji-sqalia'timk* translates to “where we sprouted or emerged from” and

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<sup>1</sup> Battiste, M. 1998. Enabling the autumn seed: Toward a decolonized approach to Aboriginal knowledge, language and education. *Canadian Journal of Native Education* 22(1): 16-27.  
—. 2000. Introduction: Unfolding the lessons of colonization. In *Reclaiming Indigenous voice and vision*, ed. M. Battiste. Vancouver, BC: UBC Press, xvi-xxx; Kovach, M. 2009. *Indigenous methodologies: Characteristics, conversations and contexts*. Toronto, ON: University of Toronto Press; Lewis, D., Castleden, H., Apostle, R., Francis, S. & Francis-Strickland, K. (In print). Linking land displacement and environmental dispossession to Mi'kmaw health and wellbeing: Culturally relevant place-based interpretative frameworks matter. *The Canadian Geographer*; Tuhiwai Smith, L. 2012. *Decolonizing methodologies: Research and Indigenous Peoples* (2<sup>nd</sup> ed.). London, UK; Zed Books.

<sup>2</sup> Sable, T., B. Francis, R. Lewis, and W. Jones. 2012. *The language of this land, Mi'kma'ki*. Sydney, NS: Cape Breton University Press.

<sup>3</sup> Battiste, M., and J. Youngblood Henderson. 2000. *Protecting Indigenous knowledge and heritage: A global challenge*. Saskatoon, SK: Purich Publishing, Ltd; Lewis, D., Castleden, H., Apostle, R., Francis, S. & Francis-Strickland, K. (In print). Linking land displacement and environmental dispossession to Mi'kmaw health and wellbeing: Culturally relevant place-based interpretative frameworks matter. *The Canadian Geographer*; Youngblood Henderson, J. 2000. Ayukpachi: Empowering aboriginal thought. In *Reclaiming Indigenous voice and vision*, ed. M. Battiste. Vancouver, BC: UBC Press, 248-278.

expresses the Mi'kmaw cultural understanding of the origin of people as rooted in the land<sup>4</sup>, which is integral to the cultural and spiritual psyche of the Mi'kmaq, to their language, to their social order, and to their way of being<sup>5</sup>. Cajete terms the relationship to the natural world as “ensoulment”, a metaphysical attachment at the deepest level of psychological involvement with the land<sup>6</sup>.

*Tlilnuo 'lti'k* reflects Mi'kmaw ontology and translates in several ways - to “how we maintain our consciousness”<sup>7</sup>, or “the process of maintaining the Mi'kmaw worldview”<sup>8</sup>. This is reflected in the relational and associative aspects of the Mi'kmaw language, which extend beyond the individual to the environment<sup>9</sup>.

*Netukulimk* reflects a value system that dictates the interaction between the Mi'kmaq and nature. As a set of rules and obligations, it embraces the cultural norms for being on the land and for the sustainable use of resources, and it embodies relational accountability which sanctions particular types of behavior, taking what you need, giving back, and offering thanks<sup>10</sup>.

*Ko'kmanaq* means ‘our relations’ and conveys a value system of how Mi'kmaq

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<sup>4</sup> Sable, T., B. Francis, R. Lewis, and W. Jones. 2012. *The language of this land, Mi'kma'ki*. Sydney, NS: Cape Breton University Press.

<sup>5</sup> Sable, T., B. Francis, R. Lewis, and W. Jones. 2012. *The language of this land, Mi'kma'ki*. Sydney, NS: Cape Breton University Press; Youngblood Henderson, J. 2000. Ayukpachi: Empowering aboriginal thought. In *Reclaiming Indigenous voice and vision*, ed. M. Battiste. Vancouver, BC: UBC Press, 248-278.

<sup>6</sup> Cajete, G. 2000. *Native science: Natural laws of interdependence*. Sante Fe, NM: Clear Light Publishers, p. 186.

<sup>7</sup> Battiste, M., and J. Youngblood Henderson. 2000. *Protecting Indigenous knowledge and heritage: A global challenge*. Saskatoon, SK: Purich Publishing, Ltd, p. 35.

<sup>8</sup> Battiste, M. 2000. Introduction: Unfolding the lessons of colonization. In *Reclaiming Indigenous voice and vision*, ed. M. Battiste. Vancouver, BC: UBC Press, xvi-xxx, p. 263.

<sup>9</sup> Sable, T., B. Francis, R. Lewis, and W. Jones. 2012. *The language of this land, Mi'kma'ki*. Sydney, NS: Cape Breton University Press.

<sup>10</sup> Prosper, K., L. J. McMillan, A. Davis, and M. Moffit. 2011. Returning to netukulimk: Mi'kmaq cultural and spiritual connections with resource stewardship and self-governance. *The International Indigenous Policy Journal* 2(4): 1-17.

extend a relationship to both animate and inanimate objects, creating a relationship of respect and kinship and a reciprocity that includes obligations<sup>11</sup>. Relationality, the way of being in sacred relationships, includes the inanimate and the spiritual<sup>12</sup>, while reciprocity ensures that all life is respected “as we are in reciprocal relations with all life<sup>13</sup>”. Nothing can exist outside of that relationship<sup>14</sup>.

## 1.2 Sipekne’katikowaq Health and Well-being

Any disassembly of Indigenous consciousness and understandings of the world and knowledge of how the world works has implications for the health and wellbeing of Indigenous people<sup>15</sup>.

The *Sipekne’katikowaq* identity flows from their place in *Sipekne’katik*. Any disruption of *Sipekne’katik* including that of the Sipekne’katik River System will impact the health and well-being of the *Sipekne’katikowaq*. Any disruption of the river disrupts how the *Sipekne’katikowaq*, orient to the world. Disrupting the river means that the *Sipekne’katikowaq* will have less opportunity to engage in the value system embraced by *Netukulimk* and to gain the knowledge and values of living within their traditional ecosystem.

The Sipekne’katik Governance Initiative: Navigating A New Path Forward is an expression of empowerment of the *Sipekne’katikowaq* Aboriginal and treaty right to be healthy and is enacted pursuant to the authority of the inherent right of Sipekne’katik, as represented for this purpose by the duly elected Sipekne’katik Chief and Council.

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<sup>11</sup> Sable et al. 2012.

<sup>12</sup> Wilson, S. 2008. *Research is ceremony: Indigenous research methods*. Halifax, NS: Fernwood Publishing.

<sup>13</sup> Hart, M. A. 2010. Indigenous worldviews, knowledge, and research: The development of an Indigenous research paradigm. *Journal of Indigenous Voices in Social Work* 1(1): 1-16.

<sup>14</sup> Sable et al. 2012.

<sup>15</sup> Lewis et al. 2020.



Societal practices that supported material sustenance and economic prosperity were hunting, fishing, trapping, gathering, artisanship, and the trade of the products of these activities. Activities were seasonal and the needs of the Mi'kmaq varied. These activities are still practiced and are integral to the Mi'kmaq, a distinctive original society.

The Covenant Chain of Treaties, including the Treaty of 1752, neither ceded nor sold any land in Mi'kma'ki. The absence of cession is explicitly recognized and affirmed by Western legal principles and further protected under the *Constitution Act* of 1982, section 35.

The implementation of the Centralization Policy resulted in dispersing, separating and amalgamating governance structures of the Mi'kmaq Nation to various reserve lands and into various Band entities. The purpose of the policy, coupled with the intentions of the *Indian Act*, was to settle the Mi'kmaq into a state of poverty so that control would be more easily.

The impacts of economically oppressive policies imposed on the Mi'kmaq Nation continue. The hold of disempowering policies is lessening and the Sipekne'katik Mi'kmaq are regaining strength through various channels of empowerment.

The Sipekne'katik Governance Initiative Protocol: Navigating A New Path Forward is an expression of empowerment and is enacted pursuant to the authority of the inherent right of Sipekne'katik, as represented for this purpose by the duly elected Sipekne'katik Chief and Council.

### **1.3 The Duty to Consult**

This Protocol is developed as a result of the legal obligations and arising from the Crown's duty to consult and, if necessary, accommodate, Indigenous People when their Aboriginal and treaty rights including title may be impacted by Proposed Activities.

The Crown's duty to consult and, if necessary, accommodate varies with the circumstances of the proposed activity that triggers the duty. The duty exists on a spectrum described in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at paras 43-45:

*... I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal*





*compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. “[C]onsultation’ in its least technical definition is talking together for mutual understanding”:* T. Isaac and A. Knox, “The Crown’s Duty to Consult Aboriginal People” (2003), 41 *Alta. L. Rev.* 49, at p. 61.

*At the other end of the spectrum lie cases where a strong prima facie case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.*

*Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.*

The Sipekne'katik Mi'kmaq have established treaty rights and continue to assert Aboriginal rights and title. As such, the duty to consult and accommodate is on the high end of the spectrum.

The duty to consult and, if necessary, accommodate is grounded in the honour of the Crown, is part of reconciliation, must be meaningful and is reciprocal. For consultation to achieve these objectives, it must be conducted with the proper rights holders. All parties must make a good faith effort to understand each other's concerns and move forward to address them in a meaningful process. All parties are required by law to be committed to that meaningful process and exhibit good faith throughout the process which must, at all times, be meaningful.

## **2. PURPOSES**

### **2.1 Empowering Relations Between Sipekne'katik, Government and Industry**

The purpose of the Sipekne'katik Governance Initiative Protocol is to empower and promote fair, transparent relations conducted in good faith between Sipekne'katik, Government and Industry.

### **2.2 Empowering Relations Internally Among Sipekne'katik and with Neighbours**

Further, the purpose of the Sipekne'katik Governance Initiative Protocol is to empower transparent relations, conducted in good faith, among the Mi'kmaq internally and in relation to their neighbours with whom interests are shared.

### **2.3 Setting Consultation Expectations**

Further, the purpose of the Sipekne'katik Governance Initiative Protocol is to set out how Sipekne'katik expects to be consulted by Government and Industry/ Proponents in regard to Proposed Activities taking place.

### **2.4 Establishing Internal Consultation Process**

Further, the purpose of the Sipekne'katik Governance Initiative Protocol is to meet the legal obligations the Band owes to its members as defined in Indigenous, Domestic, and International laws.

### **2.5 Establishment of Process, Not Outcome**

The Sipekne'katik Governance Initiative Protocol establishes the process for consultation. It does not presuppose or imply any

outcome or commit Sipekne'katik to any position, result, or agreement.

### 3. DEFINITIONS AND TERMINOLOGY

**Aboriginal Rights:** specific and may vary between Aboriginal peoples, generally they include rights to the land, resources, the right to self-determination and to self-govern, and the right to practice customs including language and religion.

**Aboriginal Title:** an inherent Aboriginal right to land or territory.

**Adverse impact:** Refers to a negative effect or impact on Aboriginal rights, title, and treaty rights.

**Centralization Policy:** officially imposed in 1942 by the federal government as an attempt to reduce administration costs by creating two central reserves in Nova Scotia (Eskasoni and Shubenacadie)<sup>16</sup>.

**Colonialism:** A policy or practice of a county extending control over other people, imposing religion, economics, and other cultural practices on Indigenous peoples<sup>17</sup>.

**Covenant Chain of Treaties:** The series of treaties signed between various representatives of the Mi'kmaq of Mi'kma'ki and of the Crown in the 1700s, establishing relations of equality and mutual benefit. This chain includes the Treaty of 1752, the continued validity of which was affirmed by the Supreme Court of Canada in *Simon v The Queen*, 1985 2 SCR 387.

**Consultation:** is commitment to a process, a meaningful discussion about something that is being decided, sharing information.

**Confidentiality:** keeping something private.

**Capacity:** the ability to do something.

**Crown or Government:** The government of Nova Scotia and the government of Canada including departments, agencies, Crown corporations, boards, commissions, Ministers, and government employees have the duty to consult. The actions of one level of government does not discharge the duty of the other level.

**Cumulative impact:** changes in the environment as a result from a combination of past,

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<sup>16</sup> <https://www.cbu.ca/indigenous-affairs/mikmaq-resource-centre/mikmaq-resource-guide/contemporary-mikmaq-kiskukewaq-mikmaq/#:~:text=The%20Centralization%20Policy%20was%20created.and%20the%20other%20in%20Shubenacadie.>

<sup>17</sup>

[https://www.google.com/search?q=colonialism&rlz=1C1SQJL\\_enCA841CA859&oq=colonialism&aqs=chrome..69i57j0l7.562ljl1j7&sourceid=chrome&ie=UTF-8](https://www.google.com/search?q=colonialism&rlz=1C1SQJL_enCA841CA859&oq=colonialism&aqs=chrome..69i57j0l7.562ljl1j7&sourceid=chrome&ie=UTF-8)

present, and future activities.

***Direct impact:*** impact to rights as a result of a project/activity.

***Duty to consult:*** the government has a legal duty to consult and accommodate on operational and strategic-level decisions to ensure fair consideration is given.

***Engagement:*** a meeting or other event used for purpose to share information.

***Honour of the Crown:*** is a term to describe the conduct expected of the Crown. Section 35 of the Consultation Act, 1982 requires government to determine, recognize, and respect Aboriginal and treaty rights. The Crown is required to act honourably in its consultations and when indicated to accommodate Aboriginal interests.

***Indirect impact:*** impact to rights as a result of a project/activity which is not a direct result of the project, can be produced outside of the defined project/activity area.

***Industry or Industry Proponent:*** any private or public corporate or partnership-based entity that seeks to exploit or is contemplating the exploitation of resources, natural or otherwise, within Mi'kma'ki.

***Lead:*** the individual appointed by the Sipekne'katik Governance Initiative to coordinate a consultation process on behalf of Sipekne'katik.

***Meaningful:*** having a serious, important, or useful quality of purpose. Sincere, honest, and forthcoming. Refers to quality of consultation and means listening to concerns. Discussing those concerns, and being prepared to accommodate those concerns.

***Mi'kma'ki:*** all lands and waterways commonly known as the Maritimes, including parts of Newfoundland and Quebec, and parts of the State of Maine in the United States of America.

***Nova Scotia Supreme Court (NSSC):*** the superior court in the province of Nova Scotia.

***Pre-confederation treaties:*** peace and neutrality treaties signed between 1701 to 1760.

***Peace and Friendship treaties:*** signed between 1725-1779.

***Proposed Activities:*** any and all activities contemplated or undertaken by an Industry Proponent, Government or related entity concerning the exploitation of resources in Mi'kma'ki, including those which are preparatory or exploratory. An activity contemplated or undertaken by Industry, Proponents, Government, or other entity concerning the exploitation of resources.

***Reconciliation:*** restoring friendly relations.

***Residential School System:*** the residential school in Shubenacadie was imposed from 1930 until 1966 with purpose of religious conversion by the church and assimilation by the federal



government. Children who attended lost their language, culture, and identity. Teachings were based on European concepts contrary to Mi'kmaq teaching styles. Many who attended the school refer to themselves as survivors<sup>18</sup>.

**Rightsholder:** a person/organization with a legal right to something.

**Royal Proclamation:** issued by King George III on October 7, 1763 which established the basis for governing the North American territories surrendered by France to Britain and set the structure for treaty negotiation and other matters.

**Self-Determination:** making own decisions for governance.

**Self-Governance:** exercising all functions of regulations without intervention from an outside entity.

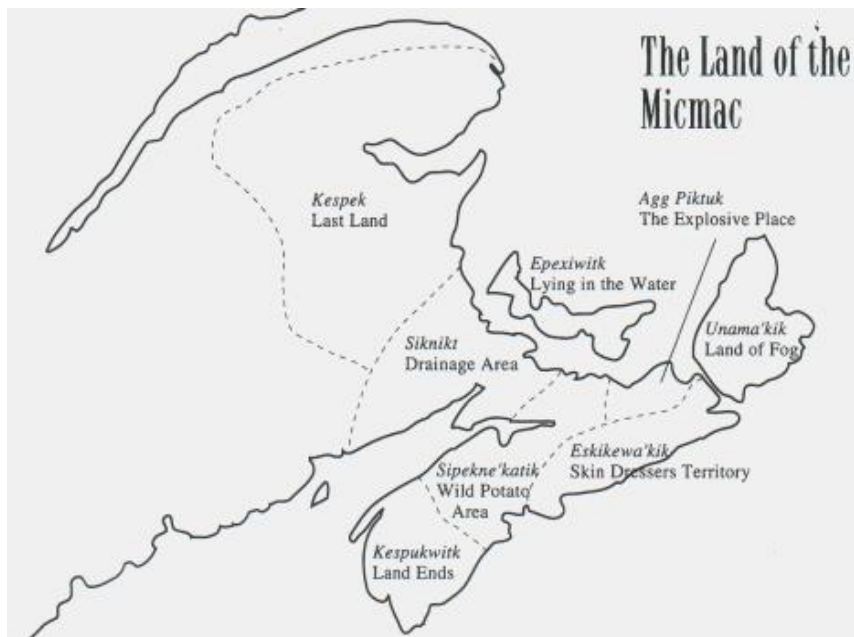
**Section 35 of the Constitution Act, 1982:** “The existing aboriginal and treaty rights of Aboriginal peoples of Canada are hereby recognized and affirmed”<sup>19</sup>. The Constitution protects rights however the extent of rights has not been fully defined which is why cases are brought to the courts when impacts to rights are not considered during Crown decisions.

**Sipekne'katik:** legal name of Band. Formerly known as “Shubenacadie Band”.

**Stakeholder:** a person/organization with an interest/concern.

**Supreme Court of Canada (SCC):** is the highest court in Canada and the final court of appeals in the Canadian justice system.

**Traditional Districts:** <http://www.danielpaul.com/Map-Mi'kmaqTerritory.html>



<sup>18</sup> <https://www.cbu.ca/indigenous-affairs/mikmaq-resource-centre/mikmaq-resource-guide/contemporary-mikmaq-kiskukewaq-mikmaq/#:~:text=The%20Centralization%20Policy%20was%20created,and%20the%20other%20in%20Shubenacadie.>

<sup>19</sup> Constitution Act, 1982.

***Truth and Reconciliation Commission (TRC):*** The TRC was the largest class action in Canadian history and resulted in the Residential School Settlement Agreement with a mandate to inform all Canadians what happened in residential schools. The TRC issued 94 Calls to Action to repair the legacy of harm caused by the Residential School System.

***Treaty:*** a formal agreement signed and ratified.

***Treaty of Utrecht:*** signed in 1713 and recognized Queen Anne of England as the legitimate sovereign of England and officially ended French claims to the British throne. This caused previously French claimed territories to be claimed by England.

***Treaty Rights:*** are rights conferred through the signature of a treaty.

***Two-Eyed Seeing:*** Elder Albert Marshall's<sup>20</sup> principle of looking at both Indigenous and Western perspectives equally.

***Without Prejudice:*** without any effect whatsoever on any existing or future right or claim. If so labeled, the provision of information, promulgation of positions and any and all statements cannot be used against either party in the context of any existing or future claim regarding rights and/or title.

***Western perspective:*** ideas associated with the United States, Canada, and Western, Northern and Southern Europe. Western science seeks to understand the natural world by studying individual parts<sup>21</sup>.

***Indigenous perspective:*** ideas associated with Indigenous people. Indigenous knowledge seeks to understand the natural world in a holistic way, observing connections.

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<sup>20</sup> Eskasoni First Nation, Nova Scotia.

<sup>21</sup> <https://combiningtwowaysofknowing.wordpress.com/comparingindigenousknowledge/>



## **4. INTERPRETATION AND LIMITATIONS**

### **4.1 Spirit and Intent**

All aspects of the Sipekne'katik Governance Initiative Protocol must be interpreted consistently with the spirit and intent of the Statement of Principles and Expectations.

### **4.2 Conflict**

In case of conflict between the Statement of Principles and Expectations and other parts of the Sipekne'katik Governance Initiative Protocol, the conflict shall be viewed in light of the Statement of Principles and the appropriate interpretation shall be the one that gives greatest effect to the Statement of Principles.

### **4.3 Without Prejudice**

The Sipekne'katik Governance Initiative Protocol does not prejudice Sipekne'katik's rights. Nothing in the Sipekne'katik Governance Initiative Protocol shall neither be construed to justify any infringement of Sipekne'katik's rights, nor to prevent or to limit the exercise of such rights. Further, the Sipekne'katik Governance Initiative Protocol shall not be construed as conferring consent or as providing approval of any past, existing, new, or ongoing activities within Mi'kma'ki.

Notices and information provided to Sipekne'katik reviewed pursuant to the Sipekne'katik Governance Initiative Protocol are reviewed on a without prejudice basis. Neither the consultation process nor any agreements concluded with Government or Industry Proponent(s) as a result of the participation of Sipekne'katik in the consultation process can be used to define or in any way limit Aboriginal and treaty rights. Further, the participation of Sipekne'katik in consultation is without prejudice to any position, past, present, or future that may be taken in negotiations, litigation or in any other process.



## **5. STATEMENT OF PRINCIPLES AND EXPECTATIONS**

### **5.1 Assertion of Title to Mi'kma'ki**

#### **5.1.1 Continuous Use and Occupation**

The Mi'kmaq Nation have used and occupied Mi'kma'ki, including the Sipekne'katik district territory, since time immemorial.

#### **5.1.2 Use and Occupation**

The Mi'kmaq Nation have used and occupied Mi'kma'ki before contact with Europeans in the 17<sup>th</sup> century, and continued to use and occupy these lands after contact, at some points exclusively.

#### **5.1.3 Title: A Right to the Land Itself**

Aboriginal title is a right to the land itself. Use and development of Aboriginal title lands must not be inconsistent with the preservation of such lands for the use and development of future generations.

### **5.2 The 18<sup>th</sup> Century Chain of Covenants is the Foundation of Mi'kmaq-Crown Relations**

#### **5.2.1 Perpetuity of the Treaty Relationship**

The series of Treaties signed in the 1700's are the foundational instruments grounding Sipekne'katik's relations with the Crown and its subjects and heirs, however variously composed over time, now and into the future.

#### **5.2.2 Contemporary Force and Effect**

Those Treaties are of as much force and effect today as they were at the time they were concluded<sup>22</sup>.

#### **5.2.3 Reciprocity of Treaty Rights and Obligations**

The Treaties create reciprocal rights and obligations for the Mi'kmaq Nation and its citizens, the Crown and its heirs and successors, however represented or composed, now and into the future.

#### **5.2.4 No Cession and No Delegation of Governing Authority**

The Treaties do not cede land<sup>23</sup> and they do not delegate any decision-making authority to other Peoples, the Crown or otherwise, with respect to activities that may take place in Mi'kma'ki. Rather, the Treaties themselves create the need for cooperative processes to establish and facilitate transparent governance for all parties.

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<sup>22</sup> *Simon v The Queen*, 1985 2 SCR 387, at para 36, regarding the Treaty of 1752.

<sup>23</sup> [*Simon v The Queen*, 1985 2 SCR 387, at para 50]

### **5.3 Expectation: Meaningful Processes**

Sipekne'katik is committed to and expects to be engaged in truly meaningful and reconciliatory consultation processes.

#### **5.3.1 Mutually Beneficial Outcomes**

Meaningful consultation processes reciprocally conducted in good faith with the proper rights holders will result in mutually beneficial outcomes for all involved.

#### **5.3.2 Commitment to Compliance With Indigenous, Domestic and International Law**

Sipekne'katik is committed to carrying out meaningful consultation, without prejudice, as set out by various decisions of the Supreme Court of Canada, Indigenous, domestic, and international laws.

### **5.4 Collaboration and Cooperation**

- a. Sipekne'katik may collaborate and cooperate with any other Band, Tribal organization or/and partners with whom it shares interests by entering into a Memorandum of Understanding (MOU) under the Sipekne'katik Governance Initiative Protocol which clearly outlines Sipekne'katik's roll and expected outcomes.
- b. Participation in other tables and processes without a formal MOU cannot bind the Band or community as legal consultations.



## **6. EXTERNAL CONSULTATION PROCESS**

### **6.1 GUIDING PRECEPTS**

#### **6.1.1 Intention to Reach Agreement**

All parties – the Government, Industry Proponent(s), and Sipekne’katik – shall engage with each other with the genuine intention to substantially address the interests and concerns of all parties and reach mutually beneficial agreement.

#### **6.1.2 Separate and Distinct from other Processes**

Sipekne’katik represents itself pursuant to the requirements of the Sipekne’katik Governance Initiative Protocol.

#### **6.1.3 Holistic View of Proposed Activities and Impacts**

The duty to consult is not met by addressing only the site-specific impacts of any Proposed Activities. The parties must also seriously consider and substantially address the potential indirect, derivative, induced and cumulative impacts of any Proposed Activities, including injurious affection and environmental degradation generally.

#### **6.1.4 Continuity of Negotiators and Consistency**

- a) The parties shall each appoint one key individual (Lead) for all consultation activities at the outset of a consultation process, in order to facilitate communication and to build and develop relationships and understanding over time. If that key individual (Lead) must change at any time after the appointment has been made, notice in writing will be provided to all other parties in a timely manner and knowledge and history of party relations will be transmitted to the new key individual (Lead) to the greatest extent possible.
- b) The Sipekne’katik Governance Initiative is responsible for carrying out the consultation process on behalf of Sipekne’katik.
- c) The Sipekne’katik Governance Initiative will identify a Lead to coordinate a consultation process. Any attempt to consult with any other person outside of this process will not constitute lawful consultation with Sipekne’katik.

#### **6.1.5 Full and Ongoing Disclosure**

- a) Industry Proponent(s) and Government shall provide Sipekne’katik with all available information about the impact of Proposed Activities during consultations under the Sipekne’katik Governance Initiative Protocol. Disclosure shall include all Industry and Government assessments of impacts and copies of applications and studies in the possession of the Government or Industry Proponent(s).

- b) Sipekne'katik shall be provided with a minimum of two copies of all information relevant to Proposed Activities, one hard copy and one in electronic form. Information shall be provided directly to Sipekne'katik by hand delivery, registered mail, or courier to the address below:

Sipekne'katik Governance Initiative  
Consultation Coordinator  
522 Church Street  
Indian Brook, Nova Scotia  
B0N 1W0  
Email: [consultation@sipeknekatik.ca](mailto:consultation@sipeknekatik.ca)

- c) Disclosure shall be ongoing. Information shall be updated or provided as it becomes available.

#### **6.1.6 Processing Fees**

- a) Sipekne'katik requires adequate resources to assess the potential impacts of any Proposed Activities on its rights and interests and to identify mitigation and accommodation opportunities.
- b) As such, Sipekne'katik will charge processing fees to consider Proposed Activities. These fees are non-refundable and shall pay for the consideration of a notice only; they do not guarantee a certain outcome or assessment. The Sipekne'katik Governance Initiative will set fees and publish them in a fee schedule.
- c) The parties shall also negotiate adequate funding that enables Sipekne'katik to carry out its consultation obligations in relation to any Proposed Activities.

#### **6.1.7 Honesty and Transparency**

Communication between all parties shall be clear and honest. Each side will communicate its interests openly and honestly and update the other parties on any changes in a timely manner.

#### **6.1.8 Ongoing Discussion and Negotiation**

- a) The parties shall meet early and regularly.
- b) Any consultation process commencing after Proposed Activities have already occurred and/or immediately prior to when a decision is to be made will be deemed and presumed to not be meaningful.
- c) All parties will make their best efforts to attend all of the meetings concerning their interests.



- d) All parties shall have the opportunity to speak freely and without interruption at meetings. When expressing a concern, a constructive solution will be offered.
- e) Industry Proponent(s) and Government, if required, will be available to attend community meetings and present information as requested by Sipekne'katik.
- f) Community meetings will members the chance to speak freely and be heard.

#### **6.1.9 Good Faith, Reasonableness and Cooperation**

- a) The parties shall meet and negotiate in good faith and treat each other as partners. They shall not withhold, willfully, neglectfully or through a lack of diligence appropriate to the subject matter, relevant information from the other parties. They shall update each other on changes to the Proposed Activities or their positions as soon as such changes are known.
- b) When a party voices concerns about or objections to the Proposed Activities, they will also offer constructive solutions to the concerns. They will provide reasons for objections and concerns that are rooted in science and/or Mi'kmaq knowledge. Such objections and concerns may be made in writing and supported with information, including documentation, western science, oral history and/or Mi'kmaq law.
- c) The parties shall not object to the validity of oral history and Mi'kmaq knowledge and laws as legitimate and helpful sources of information as established in *Delgamuukw*<sup>24</sup> and strongly affirmed in successive Supreme Court judgments.

#### **6.1.10 Flexibility**

The parties will demonstrate flexibility, including with respect to project timelines, in order to ensure consultation is full, meaningful, and adequate in the circumstances.

#### **6.1.11 Confidentiality**

- a) The complete exchange of all relevant information, including that of a confidential or proprietary nature, is essential for full engagement between the parties. The parties shall respect the confidentiality of each other's proprietary or sensitive information.
- b) Each party will mark its written confidential material as such, and declare information shared orally confidential prior to disclosure.

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<sup>24</sup> *Delgamuukw v British Columbia*, 1997 3 SCR 1010.

- c) All traditional, ecological and cultural information that Sipekne'katik provides to the Government and/or Industry Proponent(s) in relation to Proposed Activities shall be kept in strict confidence and any such information shall not be disclosed to any third party without the written consent of Sipekne'katik, unless disclosure of such information is required by law or unless that information is already in the public domain. The Sipekne'katik Governance Initiative Team will treat Government and Industry Proponent confidential information in the same manner, and will follow confidentiality protocols supplied by the disclosing party.

#### **6.1.12 Specificity of Consultation**

- a) Consultation under the Sipekne'katik Governance Initiative Protocol shall be specific to Sipekne'katik, specifically addressing its rights and interests.
- b) Consultation under the Sipekne'katik Governance Initiative Protocol is a separate and distinct process from any public consultations conducted by Government or Industry Proponent(s) and from any activities undertaken by other parties. Sipekne'katik's participation in public consultations neither discharges the Government's duty to consult nor displaces the applicability of the Sipekne'katik Governance Initiative.

#### **6.1.13 Protection of Aboriginal Rights**

If Proposed Activities have the potential to infringe any Aboriginal or treaty right, Sipekne'katik, supported by Indigenous, domestic, and international law, require that:

- a) Priority be given to Aboriginal and treaty rights versus those of non-Aboriginal stakeholders;
- b) Activities minimally impact rights;
- c) Mitigation measures are taken to avoid impacts and to ensure that any impact that does occur is "as little as possible" and to ensure that Aboriginal concerns are "demonstrably integrated" into any plan of action;
- d) Fair compensation is given for unavoidable infringements; and,
- e) Meaningful efforts are made to ensure sensitivity to and respect of Aboriginal and treaty rights.

## 6.2 PROCESS MECHANICS

### 6.2.1 Notice

#### 6.2.1.1 Notice Trigger

The Government or Industry Proponent(s) will provide notification of any Proposed Activities (“Notice”) that may:

- a) have an adverse environmental, health, social, or cultural impact;
- b) on Sipekne’katik or Mi’kma’ki waterways or lands;
- c) before or during the province of Nova Scotia’s “consultation screening” stage of its Consultation Policy; and,
- d) in advance of any application for a decision regarding such Proposed Activities is made and substantially before any decision regarding such Proposed Activities is made.

#### 6.2.1.2 Notice Content

The Notice of Proposed Activities shall include:

- a) Strength of claim assessment for Aboriginal and treaty rights including title;
- b) the nature and scope of Proposed Activities and related future contemplated conduct;
- c) the reasons for or purpose of the Proposed Activities;
- d) the applicable regulatory framework and an overview of the regulatory process;
- e) the timing of the Proposed Activities, including the timing for all approvals and decisions in the regulatory process;
- f) the location of the Proposed Activities;
- g) the duration of the Proposed Activities;
- h) the potential risks to Mi’kma’ki associated with the Proposed Activities, as understood at the time Notice is provided;
- i) proposed measures to ensure inclusion of Sipekne’katik’s traditional, ecological, and cultural knowledge;
- j) a plan for how Sipekne’katik will be consulted and included in the development of studies related to the Proposed Activities, including in the pre-application phase and in all aspects of the regulatory process;
- k) the identification of alternatives to the Proposed Activities;
- l) the identification of who will be involved in carrying out the Proposed Activities, including any agents or contractors;
- m) a list of documents available to be reviewed, including but not limited to:
  - i. applications, in the event an application has already been made before Notice is provided;
  - ii. studies;





- iii. reports, such as in respect of seismic or exploration phases of the Proposed Activities;
  - iv. any previous assessments, studies or reports in respect of any phase of the Proposed Activities, including the exploratory stage, or in the vicinity of the Proposed Activities that are known to or in the possession of the government or Industry Proponent(s); and,
  - v. information on applicable legislation, policies, guidelines, and regulations related to the Proposed Activities or which will guide decision making over the Proposed Activities by the Industry Proponent(s);
- n) the names, addresses, emails, and telephone numbers for the Government and Industry Proponent(s) contacts with whom the Sipekne'katik Lead will communicate and negotiate.

#### **6.2.1.3 Notice to be Updated**

If there is any change to the information provided in the Notice as outlined in the above section or if new and/or additional information becomes available during the regulatory review of the Proposed Activities, the Notice shall be amended to include the new or changed information. The amended Notice shall be delivered in accordance with the provisions of this section as soon as it is known, with all changes and/or additions flagged in a cover letter.

#### **6.2.1.4 Form of Notice**

- a) The Notice shall be drafted in accessible language, and all information will be organized in a logical manner that allows Sipekne'katik to easily locate specific information.
- b) The Notice shall include a detailed table of contents with clear and descriptive headings and references to page numbers. The Notice should index any documents it encloses and include the title, date of production and author of included documents.

#### **6.2.1.5 Processing Fee**

The Industry Proponent(s) or Government shall include with the Notice the processing fee for the review of the Notice in accordance with the Sipekne'katik Governance Initiative Protocol fee schedule in effect at the time the Notice is sent. Fees are subject to change from time to time.

### **6.2.1.6 Logistics of Notice**

- a) Notices shall be sent electronically to: [consultation@sipeknekati.ca](mailto:consultation@sipeknekati.ca)
- b) A hard copy will be delivered to:

Sipekne'katik Governance Initiative  
Consultation Coordinator  
522 Church Street  
Indian Brook, Nova Scotia  
B0N 1W0

## **6.2.2 Initial Assessment and Response**

### **6.2.2.1 Initial Assessment**

Upon the receipt of Notice satisfying the above section, the Sipekne'katik Governance Initiative Protocol will conduct an initial assessment of the impact to Sipekne'katik rights and interests and whether and what type of consultation is required. For clarity, this initial assessment is to be Sipekne'katik's equivalent to "Step 1: Consultation Screening" of the Province of Nova Scotia's April 2015 consultation policy. This will involve:

- a) Presenting the Proposed Activities at a Community Meeting as set out in the following section of this Protocol, the Internal Consultation Process, with industry participation if requested by Sipekne'katik;
- b) Seeking the views of elders and others with traditional knowledge, as required;
- c) Consideration of whether negotiation will be worthwhile for Sipekne'katik, both in terms of potential value in an agreement and the integrity and capacity of the Industry Proponent; and,
- d) Retaining other technical experts, as required.

### **6.2.2.2 Letter of Acknowledgment**

Sipekne'katik shall acknowledge receipt of the Notice in writing within 30 business days, stating when it plans to inform the Government and/or Industry Proponent(s) of the outcome of its initial assessment and requesting additional information, if required.

### **6.2.2.3 Outcome of Initial Assessment**

The outcome of the initial assessment will determine either that:

- a) The Proposed Activities do not have the potential to adversely affect its rights or interests or Sipekne'katik does not wish to be consulted at the present time. The parties must keep Sipekne'katik apprised of changes that



may change the initial assessment; or,

- b) The Proposed Activities do have the potential for adverse impacts and that Sipekne'katik wishes to be consulted. Sipekne'katik will draft a list and description of its preliminary concerns in respect of the Proposed Activities and identify the appropriate level of consultation.

#### **6.2.2.4 Response – Outcome of Initial Assessment**

As soon as practicable, and no longer than 90 business days from when Notice was received, Sipekne'katik shall provide the outcome of its Initial Assessment. This Response will:

- a) include a list and description of preliminary concerns and the level of consultation required;
- b) request a meeting to discuss next steps; and,
- c) identify the Lead for Government and Industry Proponent(s) engagement on the Proposed Activities.

### **6.2.3 External Consultation Plan**

#### **6.2.3.1 Initial Meeting**

If consultation is required, the parties will meet before any decisions are made on the Proposed Activities. The meeting will be guided by a jointly drafted formal agenda and address:

- a) the nature of the regulatory review process or other approval process contemplated for the Proposed Activities and timelines review of the Proposed Activities;
- b) information requirements, including the identification of information gaps, required to facilitate Sipekne'katik's ability to assess and ultimately determine the potential impacts of the Proposed Activities on its rights, title, and interests; and;
- c) a workplan and fee schedule for Sipekne'katik's review of the Proposed Activities to enable the Sipekne'katik Governance Initiative to engage fully and meaningfully, as required by law.

#### **6.2.3.2 Developing a Consultation Plan**

The parties will discuss and agree on a plan for consultation that meets the reciprocal obligations of good faith, the honour of the Crown, meaningfulness, and the promotion of reconciliation ("External Consultation Plan"). The External Consultation Plan will be presented to Chief and Council, as discussed in the next section, the Internal Consultation Process. The External Consultation Plan will include:

- a) a timeline of key dates and deadlines in the regulatory review process and when key studies and reports will be undertaken;
- b) a timeline of meetings and negotiations between the parties;
- c) a plan for presentations by Government and/or Industry Proponent(s) directly to the community;
- d) arrangements for the parties to cooperate on key studies and reports, or the commissioning of separate studies;
- e) the processing fees to be provided to the Sipekne'katik Governance Initiative to execute the plan;
- f) when Sipekne'katik will provide its Impact Analysis; and,
- g) when and at what stages community approval will be required.

#### **6.2.4 Processing Fees**

##### **6.2.4.1 Fees in the External Consultation Plan**

The reasonable cost of consultation shall be negotiated with the Crown by Sipekne'katik. The Government and Industry Proponent(s) shall pay processing fees to enable Sipekne'katik to implement the External Consultation Plan. The amount of resources required will depend on the complexity of the Proposed Activities and their impact, and the requirements of the External Consultation Plan.

##### **6.2.4.2 Purpose of Fees**

The fees provided to the Sipekne'katik in the External Consultation Plan will be used exclusively for consultation and managed by Sipekne'katik. Fees may be used for:

- a) technical/legal expertise and analysis;
- b) engagement costs with the parties or with Council and/or the community on the project;
- c) office space and capacity needs; and,
- d) administrative costs not to exceed 15% of the total fees.

## **6.2.5 Impact Analysis**

### **6.2.5.1 Sipekne'katik Governance Initiative Responsibility**

The Sipekne'katik Governance Initiative shall provide to the other parties an analysis in writing of the impact of Proposed Activities, as well as recommendations on how such concerns can be addressed, accommodated, or mitigated ("Impact Analysis"). This analysis will be undertaken as early as practicable in the process and provided at a time determined in the External Consultation Plan.

### **6.2.5.2 Consideration of Impact Analysis**

The Government and Industry Proponent(s) shall work with Sipekne'katik to reach agreement on how best to eliminate or minimize the potential impacts identified in the Impact Analysis. All applications and decision documents drafted by either the Government or Industry Proponent(s) shall directly address the Impact Analysis and discuss how impacts were addressed, mitigated, accommodated, or compensated.

## **6.2.6 Negotiation and Agreement in Principle**

### **6.2.6.1 Agreement in Principle**

Once the Impact Analysis is completed, the parties shall work towards an Agreement in Principle on how the impacts identified by Sipekne'katik will be addressed. The Agreement in Principle shall be approved by the parties through their respective approvals processes. The Agreement in Principle, if approved, will allow the Parties to proceed to negotiation and finalization of a legally binding Final Agreement.

### **6.2.6.2 Resources**

Sipekne'katik requires adequate resources to engage in negotiation. The External Consultation Plan and fee schedules will provide for these resources in most instances. However, when unanticipated costs are incurred or studies are undertaken, the parties must approach resourcing issues flexibly and with the aim of ensuring all parties are able to present their respective positions. Otherwise, consultation may become less meaningful and the integrity of the process may be compromised.

### **6.2.6.3 Collaboration**

The parties shall at all times approach this interest-based negotiation as a collaborative endeavour. Where it is possible and the parties agree, joint reports shall be commissioned. Negotiations shall be conducted focusing on solutions to parties' concerns. Obstructionist approaches shall be considered to run against the goal of collaboration and put good faith into question.

**6.2.6.4 Timelines**

- a) Timelines in the External Consultation Plan shall be respected and ensure sufficient time for the community to conduct its internal consultations where the approval mechanism in a process requires it.
  
- b) Parties shall not unreasonably refuse to extend timelines where circumstances justify it and are beyond the control of the party requiring an extension.

**6.2.6.5 Approvals**

- a) If internal community consultation is required under this Protocol, the Internal Consultation Plan shall determine the appropriate approval mechanism: either Band Council Resolution (BCR) or Community Referendum (CR).
  
- b) If Sipekne'katik departs from a "yes or no" vote on an Agreement in Principle, the wording of the question put to the community in a CR shall be subject to consultation with the Industry Proponent and the Government.

**6.2.6.6 Evaluation**

At the mutual agreement of the parties, and after negotiations have concluded and an Agreement in Principle has been reached, the parties shall each submit a report evaluating each other's conduct during negotiations and offering lessons learned and best practices going forward.

**6.2.7 Final Agreement**

**6.2.7.1 Final Agreement**

- a) The resolution of Sipekne'katik's concerns, as articulated in its Impact Analysis, will be documented in a formal, and duly executed, agreement on avoidance, accommodation, mitigation, benefits or compensation, or a combination thereof (the "Final Agreement").
  
- b) The Final Agreement may be substantially the same as the Agreement in Principle unless the Parties have agreed otherwise.
  
- c) The Agreement shall be endorsed and signed by the appropriate individuals who have the authority to bind their respective parties.

#### **6.2.7.2 Sipekne'katik Interests**

Sipekne'katik will be driven by the following interests in negotiating the Agreement in Principle and the Final Agreement:

- a) Ensuring that Sipekne'katik has and continues to have the meaningful ability to exercise its rights throughout Mi'kma'ki;
- b) Preserving Sipekne'katik cultural, spiritual, and economic relationship to its lands and waterways;
- c) Protecting the use and enjoyment of its lands, including its reserve lands, and waterways for present and future generations;
- d) Sharing in the wealth created by any industrial development on its lands, in terms of compensation and resource equity sharing or resource revenue sharing;
- e) Meaningfully participating in the management, including use and access, of its lands;
- f) Protecting its culture and way of life;
- g) Building and sustaining healthy communities;
- h) Developing the human and financial capacity of Sipekne'katik to participate in the economic and social benefits of development, maximizing the potential benefits of development while minimizing the adverse impacts of development;
- i) Developing the human and financial capacity to consult and address and manage impacts of Proposed Activities in Sipekne'katik lands and Mi'kma'ki as a whole; and,
- j) Protecting historical and culturally significant sites.

#### **6.2.7.3 Sipekne'katik Community Approval Process**

- a) If internal community consultation is required under this Protocol, the Internal Consultation Plan shall determine the appropriate approval mechanism for the Final Agreement.

#### **6.2.7.4 No Agreement**

Where no Final Agreement is approved, and consultation is meaningful, further consultation may be desired by the parties. The parties may agree to resume negotiations at any time by mutual consent in an attempt to produce a Final Agreement which would be subject to the appropriate approvals processes of the parties.



**6.2.7.5 Cancellation**

The Final Agreement shall contain a cancellation clause that either party can initiate at any time with cause, or without cause subject to mutually agreed upon notice periods. The cancellation clause shall contain, where practicable, provisions regarding the division of costs in the event of cancellation.

**6.2.7.6 Non-Derogation**

The Final Agreement shall include a non-derogation clause concerning Aboriginal rights and title.

**6.2.8 Government Oversight**

**6.2.8.1 Legal Duty**

The Government has ultimate responsibility for ensuring that the duty to consult is properly discharged.

**6.2.8.2 Government – Sipekne’katik Engagement**

a) Prior to making a decision on any Proposed Activities, if requested by Sipekne’katik, the government will engage with Sipekne’katik to discuss, among other things:

- i. the adequacy of the consultation process;
- ii. the basis upon which decisions will be made;
- iii. how Sipekne’katik’s concerns as outlined in its Impact Analysis were addressed, and, if those concerns have not been addressed, the reason(s) why those concerns have not been addressed.

b) The Government shall provide Sipekne’katik with any and all accounts or records of the consultation process provided by its officials or the Industry Proponent(s), and allow Sipekne’katik to formally comment on such documents and provide its own perspective.

**6.2.9 Dispute Resolution**

a) At any stage of the process, if the Parties are having difficulty reaching an agreement, the parties will discuss alternative methods of resolving disagreements, including Alternative Dispute Resolution (“ADR”). All parties must agree in order for ADR to occur.



- b) In the interests of time and cost, Sipekne'katik shall negotiate an ADR clause in the Final Agreement, where practicable, to address disputes that arise in its implementation.

**6.2.9.1 Reservation of Rights**

If Sipekne'katik's concerns are not resolved in any process set out under this Protocol or through ADR, Sipekne'katik retains its full right to participate in any regulatory proceedings related to the Proposed Activities and to raise its concerns in any court or other proceeding.

**6.2.10 Implementation and Monitoring**

**6.2.10.1 Monitoring Mechanisms**

The Final Agreement shall include fair and effective mechanisms to monitor the implementation of the terms and conditions contained in the Final Agreement on behalf of all parties and to assist the parties to ensure and report that all respective commitments are being fulfilled. At a minimum, reporting concerning financial benefits shall be undertaken by an independent accountant annually, as well as at milestones in the Proposed Activities.

**6.2.10.2 Ongoing Communication**

The Final Agreement shall include fair and effective mechanisms to ensure the parties continue to meaningfully engage in ongoing and meaningful communication processes about the Proposed Activities, including the opportunity to raise new concerns or propose changes to the Proposed Activities or amendments to the Final Agreement.

**6.2.10.3 Environmental Capacity**

The Final Agreement shall include provisions to ensure there is adequate environmental monitoring and rehabilitation capacity to fulfill agreed-upon environmental objectives during the implementation and monitoring stages.

## 7. INTERNAL CONSULTATION PROCESS

### 7.1 Adaptive Management Approach

**7.1.1** The Sipekne'katik internal consultation process is a complex system of Indigenous, Domestic, International, and environmental laws and, therefore, each project must be assessed based upon the existing conditions and impacts present with each project. Where legal duties and obligations are constantly evolving, some project may span multiple years, each project must be flexible and adaptive.

**7.1.2** According to section 6.2.2.1 an initial assessment of impact to rights will be undertaken for:

- i) Existing established Treaty rights of Sipekne'katik;
- ii) Aboriginal Rights; and
- iii) Asserted Aboriginal title.

**7.1.3** The results will direct the level of consultation needed. The initial assessment is subject review and amendments according to the best available knowledge. New information, developments in project, environment, law, or community input can trigger a deeper duty of community consultations needed to meet the legal and fiduciary duties of Sipekne'katik to its members.

**7.1.4** Each project will be assessed on a case by case basis.

### 7.2 Fiduciary Duties to Members

7.2.4 *Legal definition of "fiduciary": [The Dictionary of Canadian Law] "...[W]here by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, that party thus empowered becomes a fiduciary ..." Guerin v R, [1984] 2 SCR 335*

7.2.5 *"There can be no question that a chief and the members of the band council are fiduciaries as far as all other members of the band are concerned" Williams Lake Indian Band v Abbey (1992) BC SC*

7.2.6 For each project, a project specific workplan will be developed and included with community engagement, including the necessary schedule of events, timelines and community capacity budget. Where deep consultations are required and impact to rights may cause irreparable harm or extinguishment of a right, a process for plebiscite or referendum maybe triggered subject to Band capacity and legal fiduciary duties.

- 7.2.7 The level of consultation and approval required will be assessed based upon the Band’s legal duties owed to its members and impact to asserted and established rights.

**7.3 Reasonable Cost of Consultations**

- 7.3.1 The duty to consult and accommodate, carries with it the obligation to ensure adequate and sustained funding for First Nations to carry out the ongoing work of identifying and articulating their interests and to participate in decision-making processes.

- 7.3.2 In instances where deep consultation is required capacity funding has become a key part of consultation as there is typically limited or no ability of aboriginal communities to pay for needed expertise to respond to consultation requests. The Courts in *Clyde River v. Petroleum Geo-Services Inc.* considered the lack of capacity funding in their determination that the duty to consult had not been met.

“While these procedural safeguards (Public hearings and capacity funding) are not always necessary, their absence in this case significantly impaired the quality of consultation. Although the appellants had the opportunity to question the proponents about the project during the [NEB](#) meetings in the spring of 2013, the proponents were unable to answer many questions, including basic questions about the effect of the proposed testing on marine mammals. The proponents did eventually respond to these questions; however, they did so in a 3,926 page document which they submitted to the [NEB](#). This document was posted on the [NEB](#) website and delivered to the hamlet offices in Pond Inlet, Clyde River, Qikiqtajuak and Iqaluit. Internet speed is slow in Nunavut, however, and bandwidth is expensive. The former mayor of Clyde River deposed that he was unable to download this document because it was too large. Furthermore, only a fraction of this enormous document was translated into Inuktitut. To put it mildly, furnishing answers to questions that went to the heart of the treaty rights at stake in the form of a practically inaccessible document dump months after the questions were initially asked in person is not true consultation. “

- 7.3.3 Funding for capacity for the Sipekne’katik to participate in consultations will be addressed thru negotiations with the Provincial and Federal crown on a case by case basis. Any proponent funding will be thru crown negotiations as part of the “reasonable cost of consultations” and will not be contingent upon an outcome or impact benefit agreement.

**7.4 GUIDING PRECEPTS**

**7.4.1 Respectfulness and Reasonableness**

- a) Community interactions and dialogue on consultation and Proposed Activities shall be sincerely respectful of the views and positions of others.



- b) Dialogue shall be open and transparent. All relevant information shall be shared amongst all. All shall have the opportunity to speak.
- c) Solution based- When someone voices concerns about or objections to the Proposed Activities or to consultation, they shall offer a constructive solution to the issue raised. They shall provide reasons for objections to the Proposed Activities that are rooted in science, Indigenous laws, and values. They shall listen to responses and opposing viewpoints and engage constructively.

#### **7.4.2 Inclusiveness**

- a) All community meetings and other community-wide participation mechanisms in the consultation processes under this Protocol shall be open to members who have an interest in the Proposed Activities or their impacts or who are subject to any *ad hoc* or more formal Memorandum of Understanding or joint process.

#### **7.4.3 Timeliness and Publication of Timelines**

- a) The Sipekne'katik Governance Initiative shall provide important dates and timelines on Proposed Activities in a timely manner in accordance with deadlines established in the Internal Consultation Plan established under this Section.
- b) The Sipekne'katik Governance Initiative shall publicize relevant deadlines and provide reminders as necessary to ensure interested individuals and community are aware of milestones and the progress of the process.

#### **7.4.4 Confidentiality**

- a) Elders and other holders of traditional, ecological, and cultural knowledge and information must be able to share relevant information in the internal consultation processes without concern that the confidential, proprietary and/or sacred nature of the information will be jeopardized. The Sipekne'katik Governance Initiative shall institute appropriate protections for Sipekne'katik's confidential information, including the identification of the confidential nature of information prior to disclosure triggering subsection 6.1.11 of this Protocol.
- b) All participants in consultations shall respect the confidentiality of Government and Industry Proponent(s) confidential information, in accordance with subsection 6.1.11 of this Protocol. The Sipekne'katik Governance Initiative shall institute appropriate protections for confidential information disclosed to Sipekne'katik and inform and remind participants in consultation of their obligations, as necessary.

### **7.5 PROCESS MECHANICS**

#### **7.5.1 Community Consultation and Engagement**

Community Engagement is based upon the initial strength of claim assessment of existing and established treaty rights, Aboriginal rights and title lands.

#### **7.5.2 Development of Internal Consultation Workplan**

The Internal Consultation Workplan will determine what approval mechanism will be required for any agreement or public consultation under the preceding section according to the level of established or asserted rights and impacts. The initial assessments are based upon strength of rights and assertions. According to the adaptive management approach to ongoing consultations, the Internal Consultation Workplan must reflect unforeseen developments in either legal, social, environmental or project developments and maybe subject to amendments with notice and approval of Chief and Council.

##### **7.2.2.1 Monthly Updates**

The Sipekne'katik Governance Initiative shall convene monthly community updates via online publication, community newsletters or notices and may from time to time host ("Community Meetings") to provide updates and information to community members and obtain input



from the community regarding ongoing consultation processes. Notice of a Community Meeting shall be made at least 10 days in advance of the date set for the meeting. At such meetings:

- a) All new Notices will be presented in accessible language and input on the initial assessment of Proposed Activities will be invited;
- b) Internal Consultation Plans will be presented if applicable;
- c) Updates on all consultation processes will be delivered, in plain language;
- d) Industry Proponents may, upon request of the Sipekne'katik Governance Initiative, present on Proposed Activities as required under the External Consultation Plan;
- e) Experts retained by the Sipekne'katik Governance Initiative may attend and participate as required; and,
- f) Individual attendees shall have the opportunity to present their views and ask questions. Sipekne'katik may enter Memoranda of Understanding with any other band, tribal organization, governance structure(s) it sees fit to include, who may have common interest and impacts, and/or broaden the base of the consultation process. Sipekne'katik shall do this on its own initiative, upon invitation or upon recommendation, where it is of the view that the interests at stake require collaboration with otherwise excluded structures or interested collectivities.





### **7.2.1.2 Sipekne'katik Band Council Attendance**

Chief and Council, as duly elected and confirmed, may attend any or all Community Meetings at their own discretion and when they do so, they shall be provided time on the agenda to offer their informed opinions regarding the Proposed Activities when requested by participants.

## **7.5.3 Full Disclosure to Community**

### **7.2.2.1 Accessible Information Repository**

All information received about all Proposed Activities shall be available by the Sipekne'katik Governance Initiative and shall be available for review based upon reasonable notice to allow Sipekne'katik Governance Initiative sufficient time and resources to prepare.

### **7.2.2.2 Industry Availability**

Industry Proponents and experts shall be accessible to the community per the External Consultation Plan. They shall attend Community Meetings, as required, and be available, as appropriate and as necessary.

### **7.2.2.3 Experts**

Technical and scientific experts hired by the Sipekne'katik Governance Initiative for assistance in reviewing Proposed Activities shall be available to provide written and verbal reports and, if necessary, answer questions from the community at Community Meetings and upon request, if appropriate.

## **7.5.4 Internal Consultation Plan**

### **7.2.3.1 Drafting**

The Sipekne'katik Governance Initiative will propose a plan for community consultation (“Internal Consultation Workplan”) for each set of Proposed Activities in which Sipekne'katik has indicated it should be consulted in its Initial Assessment per subsection 6.2.2.3 of this Protocol. The Lead for a consultation process will present a proposed plan, and invite comment, feedback and revisions to Chief and Council. Further community distribution to be determined upon approval of Chief and Council.

### **7.2.3.2 Consultation Plan Components**

The Internal Consultation Plan will detail how the community will be consulted at the various stages of a regulatory review, as well as lay out the applicable community approval mechanism required for an Agreement in Principle and a Final Agreement. It shall be organized around the deadlines and key dates in the External Consultation Plan, and shall set out:

- a) Whether and when the Industry Proponent shall present directly to the community;
- b) How input will be solicited, including Community Meetings, special sessions, and awareness-raising measures;
- c) Measures for the targeted engagement of elders and other traditional knowledge holders, women, and youth;
- d) How interested parties will feed into the Impact Analysis described in subsection 6.2.5;
- e) Whether an Agreement will be put to the approval mechanism of a Community Referendum (“CR”), Band Council Resolution (“BCR”) and/or another mechanism; and
- f) Measures to facilitate community planning regarding the benefits and losses resulting from a Final Agreement.
- g) Cost of “reasonable consultation” activities, budget and financial report.

## **7.5.5 Impact Analysis**

### **7.2.4.1 Responsibility of Individuals**

The Mi’kmaq, as those with deep knowledge of their lands and waterways, shall identify impacts on their lands and waterways by the Proposed Activities and communicate those impacts, in detail, to the Sipekne’katik Governance Initiative. The success of the process is the responsibility of both individual members and the collective to feed into this process so that all impacts may be studied and addressed in any Agreement in Principle and Final Agreement.

## **7.5.6 Endorsement of Agreement**

### **7.2.5.1 Approval Mechanism**



- a) The Internal Consultation Workplan will determine how any Agreement shall be endorsed by the community.
- b) If the Proposed Activities will impact reserve lands, approval of the Chief and Council in the form of a Band Council Resolution (“BCR”) shall be required. A conditional surrender of the subject lands or a disposition of the subject lands further to a double majority referendum vote, conducted pursuant to the provisions of the *Indian Act*, may be required.
- c) If the Proposed Activities impact lands in Mi’kma’ki that are not reserve lands, a form of community approval shall be required, such as a community referendum or majority vote during a meeting called for that purpose.
- d) If the Proposed Activities impact reserve and non-reserve lands, a combination of a) and b) above may be required.

#### **7.2.5.2 Referenda**

- a) Any referendum will be defined on a case by case approach as set out in the internal consultation workplan.
- b) A public information package that contains the key points of the arguments in favour of and against the referendum issue, prepared by the Sipekne’katik Governance Initiative and approved by a quorum of the duly elected Chief and Council at a Band Council meeting duly convened for that purpose, shall be made available to members in advance of a Referendum.
- c) The Internal Consultation Plan will determine who is eligible to vote in a referendum: Sipekne’katik members, Sipekne’katik community members by community custom and practice, and/or members of other communities subject to a Memorandum of Understanding under section 5.4 for the purposes of consultation on specific Proposed Activities. Where the Proposed Activities affect Sipekne’katik reserve lands exclusively and the *Indian Act* governs a conditional surrender vote process, voter eligibility shall be restricted to members.



### **7.2.5.3 Majority Vote at a Special Meeting**

Any meeting held for the purposes of taking a vote on an Agreement in Principle or a Final Agreement is valid only when notice guidelines are followed.

### **7.2.5.4 Role of Band Council**

- a) Chief and Council shall confirm the results of any community approval mechanism of a Final Agreement in the form of a BCR.
- b) Failure to pass a BCR within the prescribed time period shall not nullify the results of the community approval process.
- c) Under the terms of this Protocol, Chief and Council shall not modify or overturn the results of any internal community approval process, except when it has a valid legal reason to appeal the result.

### **7.2.5.5 Role of Sipekne'katik Governance Initiative**

In addition to the tasks enumerated in this Protocol, the Sipekne'katik Governance Initiative shall:

- a) make available all information on the Proposed Activities to interested members, subject to confidentiality requirements;
- b) coordinate all Community Meetings;
- c) respond to requests for information from community members, Industry Proponents and the Government;
- d) manage all consultation processes;
- e) hire and liaise with experts and negotiators; and,
- f) maintain all formal records of all consultation processes.

## **8. REVIEW**

The Sipekne'katik Governance Initiative Team, in collaboration with the Sipekne'katik Chief and Council, shall undertake a formal review of the Sipekne'katik Governance Initiative Protocol effectiveness, success and structure no later than 18-24 months from its coming into force. The review process will cause to be produced a report which shall contain recommendations for amendments to the Sipekne'katik Governance Initiative, if any.

A review process shall be undertaken every five years thereafter.

The Sipekne'katik Governance Initiative Protocol is envisioned as a living document. This document will be updated as case law develops and evolves.

## **9. SCHEDULES AND POLICIES**

The Sipekne'katik Governance Initiative Protocol is complemented, augmented, implemented, and operationalized by schedules, policies and procedures. Such schedules, policies and procedures are subject to periodic review and amendment on the authority of the Sipekne'katik Governance Initiative further to its approval processes.

