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Off-Reserve Aboriginal Representation in New Brunswick: Speaking For Treaty and Claims Beneficiaries

A Report for Discussion

With the Governments of Canada and New Brunswick

&

Reserve-Based First Nation Band Councils & Members

June 2015

Précis

This report was prepared by Dr. Jula Hughes, Roy Stewart and Anthea Plummer at the University of New Brunswick under the auspices of the Urban Aboriginal Knowledge Network Atlantic Research Centre. Thank you to Chief Wendy Wetteland, Elder Gary Gould, Dr. Elizabeth Blaney and Sacha Boies-Novak for lending their guidance, support and expertise to this project. Funding from the UAKN Atlantic and NBAPC is gratefully acknowledged. Thank you to Siobhan Hanratty from the Harriet Irving Library at UNB for her support of this project. The report revises and builds on a revised and updated report by consultant Robert Groves, Principal of *The Aboriginal Affairs Group, Inc*., Ottawa. It was in turn based on the Beneficiary Study prepared with funding from Aboriginal Affairs and Northern Development Canada (AANDC) in March 2013.

The Consultant report was prepared for the parties to the 2011 "Umbrella Accord" on Aboriginal and Treaty rights in New Brunswick and the New Brunswick Aboriginal Peoples Council and was intended to assist these and any additional parties in their discussions towards a comprehensive claims and treaty process.

Neither the Consultant report nor this report constitutes legal advice.

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Executive Summary

This report considers the representation of non-Status and off-reserve Aboriginal populations in New Brunswick in governmental negotiations. Its purpose is to facilitate discussions between the New Brunswick Aboriginal Peoples Council, federal and provincial governments and band councils representing on-reserve populations in negotiations.

In order to promote a common understanding of the historical background of today's non-Status and off-reserve populations, the report outlines the history of Aboriginal populations in New Brunswick from the pre-contact period through British and colonial and confederation times to the present with particular attention to non-Status and off-reserve populations since the inception of the *Indian Act*, drawing predominantly on historical accounts in case law and the scholarly literature.

The report goes on to describe the organizational structure, representational capacity and track record of advocacy of the NBAPC. In particular, the report documents the membership recognition process of NBAPC and its experience in representing non-Status and off-reserve Aboriginal populations through the administration of programming, in litigation and in policy development.

The final part of the report analyzes the demographics and representational options and wishes of four constituencies that make up the non-Status and off-reserve Aboriginal population in New Brunswick. The four groups under consideration are Status Indians residing off reserve; non-Status Indians; General List Indians of the Harquail Clan (Sickadomec); and never-registered populations.

The first group, Status Indians residing off-reserve, have historically faced serious and often gender discriminatory legal obstacles to participation in the political life of their bands. Some of the legal obstacles have been removed as a result of Charter litigation, but the legislative history continues to cast a long shadow over their effective participation. Survey evidence, NBAPC membership and an analysis of continuing legal differentiations all support that this group is not being engaged by on-reserve political and consultative processes. They express a clear preference for joint representation by on-reserve Chiefs and NBAPC, a format originally supported by Canada. **The report recommends that NBAPC and its governmental and on-reserve leadership partners engage in discussions towards ensuring joint representation.**

The second group, non-Status Indians, constitute the historical core constituency of NBAPC. They have been represented by NBAPC as treaty and constitutional rights-holders for many years and desire to continue to be so represented. **The report recommends that NBAPC be included as representative for this constituency in any treaty and land claims negotiations.**

The third group, General List Indians of the Harquail Clan (Sickadomec) have Status under the Indian Act, but because they are not recognized as a band and do not have land set aside for them as a reserve, they do not have access to the representational mechanisms of the Indian Act. Survey data and a series of resolutions of successive Annual General Meetings of NBAPC indicate a preference to participate in treaty and land claims negotiations representing themselves as a band. They wish for NBAPC to advocate for their inclusion at the treaty table. **The report**

recommends that NBAPC and its governmental and on-reserve leadership partners engage in discussions towards ensuring the participation of this group. NBAPC should advocate for the inclusion of Sickadomec at the treaty table in their own right.

The fourth group, never registered populations, considers five Aboriginal communities for which there is historical evidence and who appear to have survived to the present day. They have been the subject of some research, predominantly of historical and governmental records, but more work is required to determine their current demographics and representational wishes. **The report recommends that NBAPC apply for research funding to conduct successive field research to engage with members of each of these never recognized communities.**

Introduction

The 2011 Statistics Canada National Household Survey accounts for 22,620 individuals of Aboriginal identity in New Brunswick. The same survey describes 10,275 individuals as registered and/or treaty Indians.[1] These figures are widely thought to be undercounting the Aboriginal population in New Brunswick, but presently represent the only available official data. The Indian Register counted 8,931 individuals as living on reserve, with an additional 5,017 registered Indians living off reserve.[2] These figures, even acknowledging methodological problems resulting in likely undercounting of the off-reserve population, make it clear that what is true for Canada as a whole is true in the Province of New Brunswick: the majority of Aboriginal people reside off reserve and only a minority have status as registered Indians.

The Constitution Act, 1982 expressly protects, in section 35, existing Aboriginal and treaty rights not only for registered Indian populations, but also for other Aboriginal populations, including Inuit, Metis, and as developed in the jurisprudence, non-Status Indians.[3] For this reason, it is clear that negotiations affecting Aboriginal and treaty rights between federal and provincial governments and Aboriginal people in Canada have to avert to rights holders that fall outside the regime instituted by consecutive *Indian Acts*.

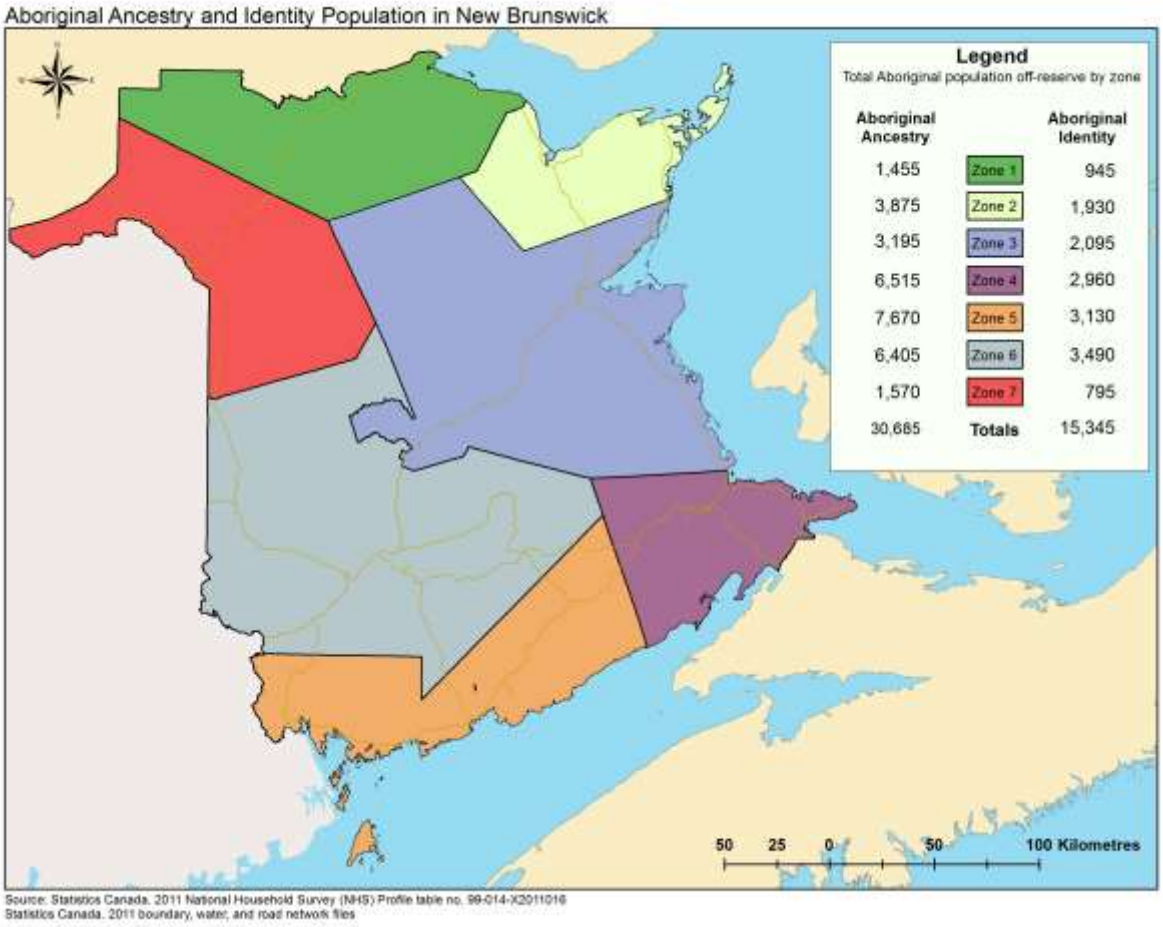
NBAPC is the Aboriginal voice for approximately 30,000 Status and Non-Status Aboriginal People who reside off reserve in New Brunswick. Members are widely dispersed throughout the province in villages, towns, cities, and rural areas. They are people of Aboriginal ancestry for whom the NBAPC provides services, programs, and a political voice for their concerns. NBAPC has been formally recognized by Aboriginal Affairs and Northern Development Canada (AANDC) since 1991 as being a fully representative body in relation to unextinguished rights and titles of Mi'kmaq and Maliseet in New Brunswick.

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[1] Statistics Canada, "National Household Survey 2011: Aboriginal Population Profile, New Brunswick" (Ottawa: Statistics Canada, 2011)

[2] Figures as reproduced by Aboriginal Affairs New Brunswick, available online at http://www2.gnb.ca/content/gnb/en/departments/aboriginal_affairs/fnc.html

[3] *Harry Daniels, et al. v. Her Majesty the Queen as represented by The Minister of Indian Affairs and Northern Development, et al.* [2014] 4 F.C.R. 97, leave to appeal granted [2014] S.C.C.A. No. 272; [2014] C.S.C.R. no 272, SCC File # 35945. See also: Palmater, Pamela D. "An Empty Shell of a Treaty Promise: R. v. Marshall and the Rights of Non-Status Indians." *Dalhousie Law Journal* 23 (2000): 102.



Governments have a tradition of consulting and negotiating with a number of organizations nationally and provincially that represent off-reserve and non-Status populations. These include the Congress of Aboriginal Peoples (CAP) and its affiliates including, provincially, the New Brunswick Aboriginal Peoples Council (NBAPC).

In 1996 the federal Minister of Indian Affairs, the Honourable Ron Irwin informed the leadership of NBAPC and the Union of New Brunswick Indians that he would require cooperation between them to consider funding the completion of land claims research or if he were to offer to start comprehensive land claim and self-government talks.

> "The claim has now reached the stage where a co-ordinated effort is required on the part of all parties to the claim, namely the MAWIW Council, the UNBI and NBAPC….In order for the claim to proceed, my department now requires confirmation in writing that the MAWIW Council is prepared to work in a co-ordinated effort with UNBI and NBAPC…"[4]

Minister Irwin formally and explicitly acknowledged NBAPC along with UNBI and MAWIW as a full party to a joint Comprehensive Land Claim for Mi'kmaq and Maliseet in New

[4] Letter from the Honourable Ron Irwin to Ms. Sandra Splude.

Brunswick. As a result, NBAPC, UNBI and the newly formed MAWIW signed a Political Accord affirming that they would jointly research and negotiate any land claim. This Accord committed them to work together and in cooperation to negotiate any comprehensive settlement of outstanding Aboriginal rights and titles.

In 2011, NBAPC began discussions with federal and provincial officials to explore the beneficiary entitlement questions facing the NBAPC membership. The New Brunswick Aboriginal Affairs Secretariat (AAS) encouraged this exploration.

In 2012-13 NBAPC engaged The Aboriginal Affairs Group Inc. to conduct a study that would examine the beneficiary entitlement status and representational wishes of the Mi'kmaq, Maliseet, and Passamaquoddy populations in New Brunswick outside of current Indian Act reserves. The study produced a report titled Accessing Accountability: Treaty and Claims Beneficiary Report which provided a first step towards responding to the questions posed by AAS to the NBAPC in 2012:

1) Who are the Aboriginal and Treaty Beneficiaries in New Brunswick?
2) Who represents them for legal purposes, e.g., treaty negotiations?

On February 11, 2014 NBAPC provided AAS with a copy of the consultant report. AAS has yet to respond to the consultant report and has indicated that a reply would have to await a response from the federal government. Nonetheless, AAS representative Mr. John Adams stated that they had 'problems' with the consultant report including its methodology. The nature of these problems was not further elaborated.

On April 10, 2014 NBAPC met with AANDC to discuss the federal government response to the study report. NBAPC was told informally that 1) Canada recognizes that the Aboriginal people who are represented by NBAPC are treaty beneficiaries and that 2) NBAPC represents them. NBAPC has yet to receive written confirmation of the results of our discussion from AANDC.

NBAPC also identified some methodological concerns about the report and its suitability for entering into further dialogue with the provincial and federal government. The report needed to include research to ensure that all claims made in the report are sufficiently documented and framed to respond to the applicable legal framework. Further, the format of the report needed to be aligned more closely with the objectives that the NBAPC seeks to advance in its dialogue with federal and provincial government partners.

The following report enables NPAPC to build on the research document that it received from the consultants to document the demographic makeup of off reserve populations in New Brunswick, to demonstrate their entitlement to benefits under existing treaties, and to facilitate ongoing and future negotiations between NBAPC and the federal and provincial governments by grounding negotiations in a shared understanding of the populations in question, their associational connections and the representational rights and capacity of NBAPC.

The Consultant Report

The Consultant Report pursued two objectives: It sought to describe the socio-demographics of the Mi'kmaq, Maliseet and Passamaquoddy populations in New Brunswick who do not reside on one of the *Indian Act* reserves. It also sought to ascertain their communal associations and representational wishes. These populations make up the core constituency of the New Brunswick Aboriginal Peoples Council (NBAPC), which has served as the sole established and democratically accountable organization representing these populations since 1971.

Between 1993 and 2005, the federal government urged NBAPC to participate in a joint process involving Canada, NBAPC and the representatives of the *Indian Act* Chiefs of the province in developing a joint land claims process. NBAPC supported and acceded to this federal wish and, with considerable federal encouragement, entered into a Political Accord with the two political representative organizations for on-reserve First Nation people, the Union of New Brunswick Indians (UNBI) and MAWIW Council, in 1999 (Annex 1). Comprehensive land claims documentation was accordingly submitted later that same year, much of it prepared under financial contribution agreements with NBAPC.

Despite positive efforts and progress made up to early 2006 in relation to the potential establishment of a new Treaty-based process in New Brunswick, including continuous engagement funding arrangements with NBAPC from 2001 onwards, Canada chose in April of 2006 to halt all inclusive negotiations or consultations on Aboriginal and treaty rights in the province. It chose instead, for reasons not known to NBAPC, to enter into a process that, by 2011, led to an "Umbrella Agreement" with *Indian Act* Chiefs that excluded NBAPC and its constituents.

Until 2006, the Province of New Brunswick maintained the view that it would only recognize federally recognized *Indian Act* Band membership card holders of "Status cards" as being eligible to exercise Aboriginal and Treaty rights in the province. This stance appeared somewhat inconsistent with the views of the New Brunswick courts at the time and difficult to reconcile with the subsequent views expressed by the New Brunswick Court of Appeal in *Hopper*[5] citing with approval the adoption of the *Powley* test for demonstrating Aboriginality for non-status Indians in *R v Acker* [6] and *R v Lavigne.*[7]

In 2011 discussions began between NBAPC and federal and provincial officials to explore the beneficiary entitlement questions facing NBAPC's constituency. The Deputy Minister of Aboriginal Affairs for the Province encouraged such analysis, prompted in particular by the circumstance faced by the significant number of status Mi'kmaq in the province with registered Indian status but no affiliation or representation by any of the 15 *Indian Act* Bands involved in the Umbrella Agreement process. As a result, the Groves study was conducted.

[5] *Hopper v R*, 2008 NBCA 42.
[6] *R v Acker* (2004), 281 NBR (2d) 275 (QB).
[7] *R v Lavigne* (2007), 319 NBR (2d) 261 (QB).

Methodology of the Consultant Report

Data was collected through secondary documentation, historical material and academic literature with respect to the history and demographics of the Aboriginal off-reserve population in New Brunswick. Representational wishes were sought to be ascertained through a series of surveys, face to face interviews, telephone interviews, focus groups and a web-survey.

The Revised Report

As indicated, after some initial consultations with both federal and provincial governments, NBAPC felt that a further revision of the report was desirable. The revision was prepared by Dr. Jula Hughes of the Faculty of Law at the University of New Brunswick and two student researchers, Roy Stewart (law) and Anthea Plummer (sociology/interdisciplinary).

As was the case for the consultant report, this report seeks to address two related questions: who are Aboriginal people in New Brunswick beyond those who hold Indian status living on reserve; and does the NBAPC have the mandate to engage in negotiations with governments for these populations? While it is straightforward to ask these questions, answers are rendered more complex by the fact that New Brunswick has never comprehensively registered Aboriginal people.

Further, from an Aboriginal governance perspective, it is clear that Aboriginal peoples reserve the rights of recognition to themselves and have consistently resisted any exclusive claim by Canadian governments to that power. Also, Canadian law has recognized that registration under the *Indian Act* is not an exclusive means for recognition and has instead adopted a test for Aboriginality that is comprised of self-identification, ancestral connection and community recognition.

The community recognition requirement in turn raises the question of what communities hold powers of recognition. It is readily apparent from the jurisprudence that the power of recognition is not limited to on-reserve communities, but as will be seen, the law on recognition powers is in an emergent state. At the margins, this will likely mean that the Aboriginal population of New Brunswick ultimately recognized will be larger than the population addressed in this report. In this sense, the report is preliminary.

As regards the question of representation, the consultant report included a survey on the representational wishes of these populations. The survey was originally designed to assist in determining the representational wishes of the Harquail Clan and it has considerable strength in that regard. The survey was later extended to the broader constituency of NBAPC, but in our view, there is no real need to rely on a point-in-time evaluation of representational wishes for the historical core constituency of NBAPC. The organization has a long track record of representing this population, is affiliated with the Congress of Aboriginal Peoples (CAP), the national organization representing equivalent populations across the country, has represented these populations in a wide variety of circumstances in negotiation and litigation, and has a sturdy democratic governance structure. For all of these reasons, we are of the view that it is not necessary to reconsider the representation issue through point-in-time population surveys. The

revised report adds a description and analysis of the governance structure of the NBAPC and its membership process to document this longitudinal and democratic basis for representation.

The revised Report addresses its subject matter in three parts:

I. **History**: This part includes pre-contact history as described and recognized in the jurisprudence and a review of the historical recognition and land reserve practices in New Brunswick;
II. **Governance and representation**: This part includes a description and analysis of NBAPC governance and membership processes as well as an account of the functions and powers of NBAPC has they have been recognized in the courts; and
III. **Constituencies**: This part distinguishes four groups of people with Aboriginal ancestry currently eligible for membership in the NBAPC and discusses their demographics, their historical origins, their legal status and their representational preferences as far as they can be ascertained at this moment in time. For the latter question, the results of the various survey instruments in the consultant report were relied upon, but only for selected questions. New analysis of the data was provided.

I. History

The history of Aboriginal Peoples in New Brunswick before the arrival of Europeans has been the subject of recent extensive litigation. While it appears unlikely that these litigated histories provide the most nuanced account, and while we recognize that indigenous and settler historical scholarship is expanding and deepening apace, we advance it here because for the purposes of negotiations, the court-recognized history will at least serve to provide a legally secure basis as Aboriginal people, scholars, governments and courts come to incrementally understand this history better.[8] Canadian courts including the Supreme Court of Canada have already made extensive findings with respect to the lives, history and practices of Aboriginal people in the Maritimes in the pre-contact period. The Supreme Court of Canada in *Sappier and Gray* found that:

> The way of life of the Maliseet and of the Mi'kmaq during the pre-contact period is that of a migratory people who lived from fishing and hunting and who used the rivers and lakes of Eastern Canada for transportation.[9]

Similarly, the New Brunswick Provincial Court found that

> the way of life of the Mi'kmaq during pre-contact period was that of a migratory people who lived from fishing and hunting and who used the rivers and lakes of eastern Canada for transportation. Thus hunting of large animals such as deer can be characterized as directly associated with that particular way of life.[10]

In the same case, the Court accepted the evidence of Dr. Wicken who:

> offered as evidence the pattern of resource exploitation which included seasonal movement within and use of the entire watershed and the system of assigned family hunting and trapping territories. The Mi'kmaq's historical reliance for their sustenance on the resources found on their lands and in their forests and rivers is proof of the central significance of the lands to their aboriginal community as well as their relationship to those lands. On the basis of this evidence, Dr. Wicken offered his opinion that the Miramichi Mi'kmaq would have used and occupied the Sevogle area as an extension of their territory over a long period of time from pre-contact and pre-sovereignty period up to the time of British sovereignty in 1759.[11]

It should be noted that the Court subsequently recognized that for migratory people,

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[8] Promislow, Janna. "Treaties in History and Law." UBCL Rev. 47 (2014): 1085; Patterson, Stephen. "Eighteenth-Century Treaties: The Mi'kmaq, Maliseet, and Passamaquoddy Experience." Native Studies Review 18, no. 1 (2009): 25-52.
[9] *R. v. Sappier; R. v. Gray*, [2006] 2 SCR 686, 2006 SCC 54 at para 2.
[10] *R v Bernard* [2010] NBJ No 277 (QL) (PC) at para 34.
[11] *Ibid* at para 116.

Aboriginal title may well extend to the area covered by the migratory practice rather than being site specific.[12]

The New Brunswick courts have found that the "Mi'kmaq people have lived in the Miramichi River watershed for at least the last 500 years." In *Bernard*, the Crown conceded that "the Mi'kmaq are indigenous to the Miramichi, meaning that they were the original occupants when contact was first made with Europeans in about 1500." The Court went beyond that concession to conclude that "on the uncontested evidence of significant archeological finds in the Miramichi River basin, the Mi'kmaq have been on the Miramichi continuously for the last 2500 years."[13]

In *R v Marshall*, the Nova Scotia Provincial Court made extensive findings about early Mi'kmaq history:

> From the time of recorded history Mi'kmaq have lived in what we now know as the Bay of Chaleur area, northeastern New Brunswick, Prince Edward Island and Nova Scotia, including Cape Breton. Although the boundaries between Mi'kmaq territory and that of other native peoples living to the west of them may have been imprecise, there is no evidence that any other aboriginal group challenged or even questioned the Mi'kmaq claim to live in that territory.
>
> When Jacques Cartier landed on the shores of the Bay of Chaleur in 1534, he was met by 300 Mi'kmaq. The Mi'kmaq wanted to trade skins for European goods, a clear sign they were already familiar with Europeans and what they had to offer, for better or for worse. A few years before Cartier arrived, the Mi'kmaq had even adopted some words into their own language from a small group of Portuguese who had settled briefly in Cape Breton. By no later than 1575 trading between Mi'kmaq and Europeans was taking place on the coast of mainland Nova Scotia.
>
> Archaeologists in Nova Scotia have traced the Mi'kmaq culture back from known Mi'kmaq sites in the period following European contact into the time before Europeans arrived. William Christianson, Curator of Archaeology at the Nova Scotia Museum, testified about sites in Nova Scotia where archaeological work has been done. He said 480 of those sites are from what archaeologists call the Ceramic Period, mostly from the middle or later part of that period. The Ceramic Period began about 2,500 years ago when pottery appeared. It continued until the time of European contact about 500 years ago. Mr. Christianson said he and most archaeologists who had studied the subject considered all the identified Ceramic Period sites in Nova Scotia as Mi'kmaq.
>
> Dr. Alexander von Gernet, an anthropologist called by the prosecution, did not entirely agree with Mr. Christianson. According to Dr. von Gernet, only the sites from the centuries immediately preceding contact could be said with certainty to

[12] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at paras 42-44.
[13] *R v Bernard* [2003] NBJ No. 320 (QL) (QB) at para 8.

> be ancestral Mi'kmaq sites. He did not think the record was clear enough before that point.
>
> There was little dispute among the witnesses about the general way of life of the Mi'kmaq before European contact. They got much of their food from the water. They spent much of their time on the coast or on rivers near it. They had ocean-going canoes. They had lightweight birch-bark canoes they used to travel the rivers and lakes. They spent less time inland than at or near the coast. The Mi'kmaq did not have permanent homes or permanent settlements. They moved from time to time during the year and did not necessarily return to the same places each year. Where they went and where they stayed depended on the availability of resources.
>
> The first European reached Mi'kmaq territory about 1500. We have no direct evidence of how many Mi'kmaq there were at that time. Dr. von Gernet for the prosecution and Dr. William Wicken, an ethno-historian called by the defence, both estimated a pre-contact Mi'kmaq population of 10,000-12,000.[14]

The Supreme Court has also commented on the historical background of the Maritime treaties. In *Marshall*, the Court had interpreted the 1760 and 1761 peace and friendship treaties as supporting a commercial fishing right. In *Marshall and Bernard*[15] the Court had rejected a similar commercial right in the area of logging, but affirmed its view on the treaties:

> In 1760 and 1761, the British Crown concluded "Peace and Friendship" treaties with the Mi'kmaq peoples of the former colony of Nova Scotia, now the Provinces of Nova Scotia and New Brunswick. The British had succeeded in driving the French from the area. The Mi'kmaq and French had been allies and trading partners for almost 250 years. The British, having defeated the French, wanted peace with the Mi'kmaq. To this end, they entered into negotiations, which resulted in the Peace and Friendship treaties. The existence of a treaty and a right to claim under it are questions of fact to be determined in each case. Although different treaties were made with different groups, for the purposes of this case we assume that the main terms were the same, similar to those in *R. v. Marshall*, [1999] 3 S.C.R. 456 ("Marshall 1").

Even though the Treaties were mostly entered into in the 18th century, their implementation was much delayed. As will be explored further in Part III of this report, dealing with Group 4, the Never-Recognized, in Atlantic Canada there had been no measures to implement Aboriginal or Treaty rights, nor any major Supreme Court decisions in these matters, until the 1970s. While Canada did pass a number of *Indian Acts*, none directly or explicitly involved recognizing and implementing either the pre-Confederation Treaties in the Maritimes or the un-surrendered Aboriginal rights and titles of its First Nation Peoples.

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[14] *R v Marshall*, 2001 NSPC 2 paras 7-12.
[15] *R v Marshall; R v Bernard* [2005] 2 SCR 220, 2005 SCC 43.

Beyond the Treaty history, the most significant legal developments were driven by the adoption of successive Colonial and later federal *Indian Acts*. These ultimately lead to the currently 15 bands under the present-day *Indian Act* in New Brunswick. Note, however, that there are more than 15 First Nations communities in the province, only some of which have reserve status; additionally, there are also Aboriginal people living dispersed in the general population, with varying ties to Aboriginal communities on- and off-reserve. It bears noting that status as a band under the *Indian Act* after World War I was primarily concerned with the administration of Crown land set aside for specific groups of Indians rather than with governance. The Act is silent on and does not purport to administer Aboriginal or Treaty rights. The modern successors to the Mi'kmaq, Maliseet, and Passamaquoddy communities in New Brunswick who hold treaty rights go beyond the 15 registered bands.

It is useful to consider the history of Aboriginal-settler relations under treaty in New Brunswick in three periods. In the century after the Royal Proclamation, Aboriginal people largely retained self-governance. As Milloy pointed out in his seminal paper on the early *Indian Acts*:

> In the period in which the British Imperial government was responsible for Indian affairs, from 1763 until 1860 when that responsibility was transferred to the government of the United Canadas, Indian tribes were, de facto, self-governing. They had exclusive control of the population, land, and finances.[16]

Secondly, this arrangement came increasingly under threat as settlers intruded on Indian land. Renowned historian and former Lieutenant-Governor of New Brunswick George Stanley remarked of the provincial history in the period between the Treaties and the Indian Acts:

> The New Brunswick story is no more cheerful. Inertia seems to have been the rule in all matters relating to Indian affairs. Unauthorized settlers occupied Indian lands; others stole Indian timber. Occasionally, members of the executive council uttered bleats of protest but did nothing. Nor could they do anything in the face of the pro-settler, anti-Indian lobby and the inadequate funds provided by the government for Indian affairs. When, by mid-century, the provincial authorities did get around to dealing with the Indian problem, they found it convenient to conclude that since the natives were a dying race, Indian lands might as well be put up for auction to the highest white bidders. On 12 April, 1947, the assembly agreed that "in all cases where portions of the Indian Reserves in any parts of the Province may be advantageously sold, they should be disposed of for actual settlement so soon as practicable." When, in 1867, Indian affairs became a federal rather than a provincial responsibility, the new masters of the Indians' fate

[16] Milloy, John S. "The early Indian Acts: Developmental strategy and constitutional change" in Ian Getty and Antoine Lussier (eds.) As long as the sun shines and water flows: A reader in Canadian Native Studies 1 (1983): 56 at 57.

> discovered that not only had the provincial governments pretty much ignored the Indians, but also that there were no Indian treaties and no body of provincial jurisprudence dealing with aboriginal rights.[17]

Thirdly, successive legislation, initially colonial and later federal, operated to curtail self-governance and shrunk territories. It is easy, if erroneous, to imagine that the present connection between Indian status and reserve lands is of long standing. In fact, the federal jurisdiction over Indians on the one had and over lands reserved for Indians on the other developed somewhat independently and not simultaneously. Early legislation dealing with Indian lands did not in any way attempt to regulate Aboriginal identity.[18] Prior to the 1870s there were no statutory "bands" in the modern sense, and prior to 1951, there were no "registered" Indians. The first *Indian Act* of 1876 recognized expressly the existence of Aboriginal communities living without land grants or treaties.[19]

Canada's approach to the recognition of First Nation people was therefore practical and itinerant at best up until the early 20th century. In the mid to late 1700s, reference was made to communal groupings as the "bands, tribes or nations" with which the British Crown claimed a connection. The *Royal Proclamation of 1763* called for open and public treaties to be made with the Indian subjects or allies of the Crown and protection of the lands reserved for them.[20]

However, the British Crown as early as 1763 had acknowledged that they knew little of the organization of Indian Tribes within the realm newly conquered from France. Accordingly, the British over time introduced a quite flexible regime of accommodation for the various groups they might encounter.[21]

In an effort to understand the evolution of how the First Nation communities in New Brunswick were organized and recognized by Colonial and federal authorities, the consultant reviewed the Colonial census data and a sample of federal reports on New Brunswick Indians between Confederation and the modern era (here: 1945). The

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[17] George F G Stanley, "As long as the Sun Shines and Water Flows: An Historical Comment" in Getty and Lussier, *supra* note 14, 1 at 6-7 [footnotes omitted].
[18] Bartlett, Richard H. "The Indian Act of Canada." Buffalo Law Review 27 (1978): 581.
[19] Groves, Robert K. "The Curious Instance of the Irregular Band: a Case Study of Canada's Missing Recognition Policy." Saskatchewan Law Review 70 (2007): 153 at 159.
[20] The Proclamation's reference to "lands reserved" has been found by the Supreme Court to include both specifically set-apart lands or "reserves" and lands to which Aboriginal title has not been surrendered. (*R. v. Sioui*,, [1990] 1 S.C.R. 1025) Both types of reserves are now included with section 91(24)'s definition of "Lands reserved for the Indians" and thus under exclusive federal jurisdiction, at least in respect of Aboriginal land rights, even for otherwise provincial Crown lands as defined under section 109 of the *Constitution Act, 1867*. (*Tsilhqot'in Nation v. British Columbia,* [2014] 2 SCR 256 at para. 129).
[21] Groves, *supra* note 19 at 157-158.

following table summarizes these reports.[22]

Era/Date	*Population*	*Communities & Reserves*	*Comment*
French 1657	1,500	St. John River Indians; Mi'kmaq of Richibucto reserves.	An estimate only
British 18 century to 1779	No estimates	St. John River Indians; Passamaquoddy Tribe; Mi'kmaq of Richibucto; Mi'kmaq of Restigouche; Mi'kmaq of the Mirimichi; sometimes reference to traditional District as an organizing principle (Si'knik; Gespeg, etc.) No reserves.	The Restigouche Mi'kmaq conventionally included all communities in the Bay de Chaleur.
Colonial New Brunswick 1841 (Moses Perley Report)	1,652	Mi'kmaq of the Mirimichi; Mi'kmaq of the Richibucto; Maliseet of particular settlements and sites: "the village" (across from Fredericton); Meductuc (near Woodstock) Tobique River; Madawaska River. Several reserves; at Tobique, Madawaska, Saint Mary's, Big Cove, Buctouche, Burnt Church, Indian Island, Eel Ground, Eel River Bar and Pabineau Falls (1841) and Indian Island (Bathurst)	The census numbers excluded the Bay de Chaleur Mi'kmaq. A large council of Maliseet from communities Perley met across from Fredericton, and noted their political alliance with "their Chief at Cagnawaga" in reference to fears of continuing land losses to squatters.
1868-1873	1,386 (1873)	Up to 1873 simply "the Indians of New Brunswick" for lack of provincial reports. In 1869: 6 county-based groups (all Mi'kmaq) and four site-specific ones (all Maliseet). This migrated back and forth from a purely county-based system to a mixed county and site-specific (all Maliseet) one.	New Brunswick failed to report on either communities or, until 1883, on reserves; having not kept accounts after the 1841 Perley Census and a partial one done in 1851.
1874	1,500	3 Superintendents reported 21 reserves noted, organized by county and parish; with 17 communities listed, mostly by county.	This was based on early reporting by the province of reserve lands, coupled with the 1871 census and reports from Indian agents. It included "Canouse River", one at New Shediac, one in King's County near Kingston and one in Bathurst Parish on the Nepisiguit.

[22] The census data came from Statistics Canada, *Census of Canada 1665 to 1871: Aboriginal Peoples*, http://www.statcan.gc.ca/pub/98-187-x/4151278-eng.htm and was supplemented by the Government of Canada Library and Archives *Indian Affairs Annual Reports, 1864-1990*, http://www.bac-lac.gc.ca/eng/discover/aboriginal-heritage/first-nations/indian-affairs-annual-reports/Pages/introduction.aspx#a.

Era/Date	*Population*	*Communities & Reserves*	*Comment*
1875	1,561	2 Superintendents reported; the North-Eastern Superintendent reporting that the province still had not provided boundary information on reserves. The South-Western Superintendent reported most Indians were still on Crown Land or on private plots.	The reports included mention of the Maliseet at St. Croix. Efforts to centralize both Mi'kmaq and Maliseet were recorded as being 'rebuffed'.
1880	1,691	2 Superintendents reported on Tobique, "Little Falls" as a band, Buctouche, Richibucto, Shediac, Westmorland County Indians, Moncton Indians, Bathurst Indians and Indians of York county.	The "Apohaqui" Mi'kmaq were specifically mentioned.
1883	1,509	1 Superintendent and two Districts reported. 11 county or multi-county groups reported.	Seed grain was withheld in Carleton County for non-reserve Indians in an effort to have them locate on reserve.
1886	1,576	3 Divisions reporting; including for Kingsclear, Tobique, Edmunston, Saint Mary's, the "Carleton County Band", "scattered groups in Charlotte County", the "Indians of St. John, King's, Queen's and 'Lunenburg Counties"; and in the North-East Division, Eel River; Bathurst/Pabineau; Red Bank; Eel Ground; Burnt Church; Big Cove; Indian Island (as a settlement, not a reserve); Buctouche, Shediac and Fort Folly.	These returns suggest an effort by Ottawa to discover the nature of Indian organization for the first time post the provision of reserve-based information in 1874.
1891	1,521	1 Superintendent, one Division and one District reporting: 14 reporting areas by Maliseet communities and, for the Mi'kmaq, by county, with York, Sunbury, King's and Queen's amalgamated.	The Northern Division reported nobody living on reserve.
1895	1,668	3 Divisions reporting: 16 communities noted, including site-specific ones along the St. John and county-based ones for the Mi'kmaq, but including "Apohaquis", "Milford", "St. Andrews" and "Upper Gagetown".	Of the three reporting agencies, the Northern Division reported "no Indians on reserve".
1915	1,862	No reporting other than the income level was second lowest in the Dominion, with real property values at only $127.50.	Based on 1906 reports
1925	1,606	3 agencies reporting by county	Note the impact of influenza on the population.

Era/Date	*Population*	*Communities & Reserves*	*Comment*
1935	1,734	3 divisions reporting; 15 reserve based groups listed.	"No nomads reported"; 5 council houses; 10 schools and 6 churches
1945	2,047	3 Agencies reporting with no details	Reporting was very limited given the war effort.

In 1963, the Department published a summary of historical population data from the previous Indian census period:

Province	1949	1954	1959	1960	1961	1962	Increase 1962	% Increase 1962
New Brunswick	2,139	2,629	3,183	3,280	3,397	3,524	127	3.7
TOTAL	136,407	151,558	179,126	185,169	191,709	198,220	6,511	3.4

The historical review of the census data shows that the reporting of data about Aboriginal populations was neither methodologically consistent nor comprehensive. Even the census data in the post-World War II period shows considerable change. Also, it appears unlikely that the change from reporting by county to reporting by reserve produced reliable numbers either before or after the change.

II. The New Brunswick Aboriginal Peoples Council (NBAPC)

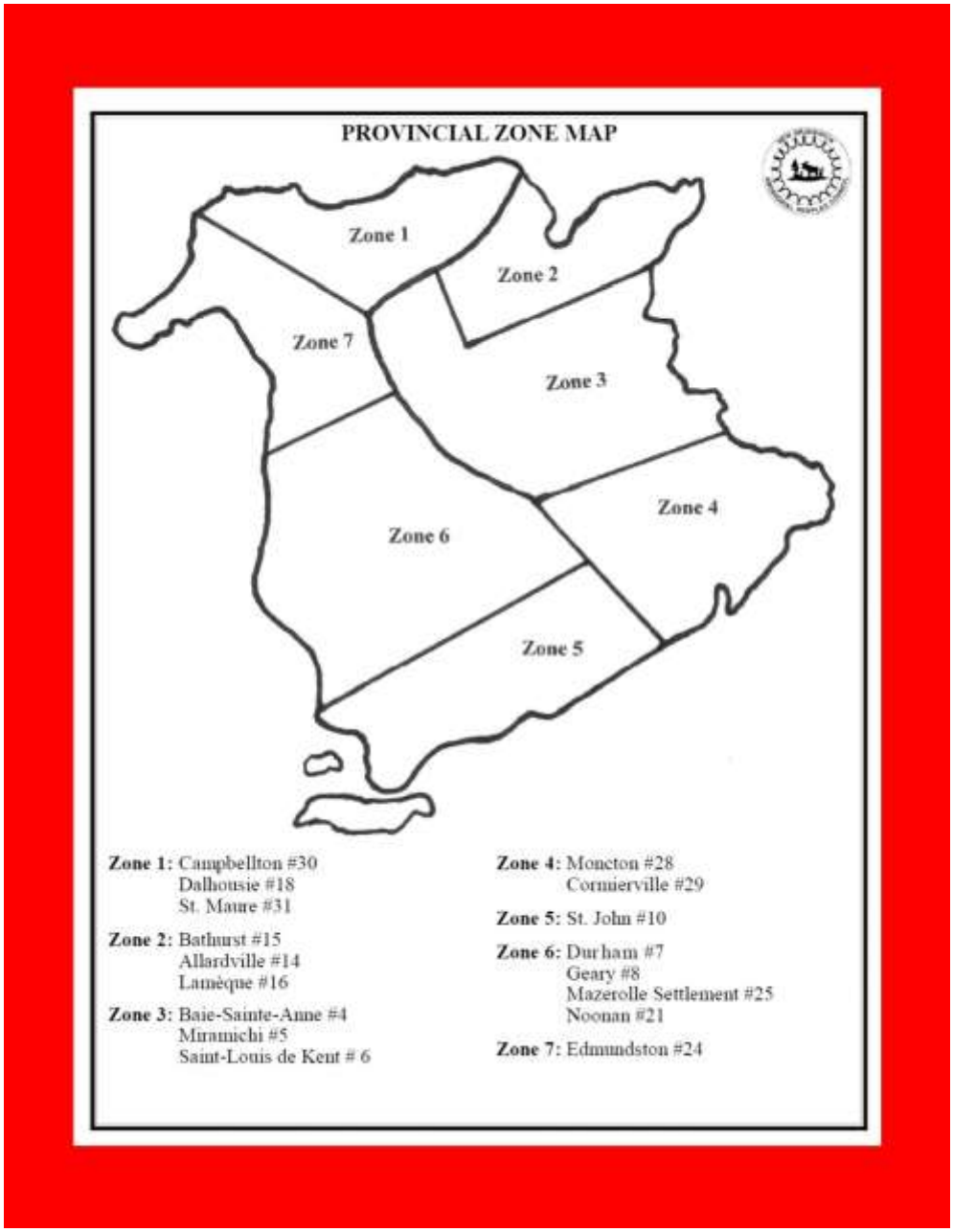
The New Brunswick Aboriginal Peoples Council is a non-profit organization that represents and provides services to Aboriginal people residing off-reserve in the Mi'kmaq / Maliseet / Passamaquoddy traditional territory of New Brunswick. The organization was founded in 1972 as the New Brunswick Association of Non-Status Indians. The NBAPC serves as the Aboriginal political voice in the Province for approximately 30,655 Status and non-Status Indians who reside off-reserve. The NBAPC is affiliated with the Congress of Aboriginal People (CAP), which represents over a million off-reserve Aboriginal people across Canada. Aboriginal organizations, governments and courts have long acknowledged that Aboriginal Peoples in Canada are not comprehensively recognized through the *Indian Act*. As a result, there are significant Aboriginal populations in New Brunswick and elsewhere that do not have Indian status under the *Act* or who do not reside on reserves despite having status. NPAPC represents these populations. "Biologically and culturally, we are Aboriginal

People." The NBAPC receives federal funding under the "Basic Organizational Capacity of Representative Aboriginal Organizations Program". The goals of the NBAPC are set out in the Constitution as follows:

> A. To provide an organization for off-reserve Aboriginal People in New Brunswick for the purpose of advancing their cultural, traditional, economic and general living conditions.
>
> B. To work together toward reaffirmation, protection and implementation of our Aboriginal, Treaty and Land Claim Rights as Aboriginal People of New Brunswick.
>
> C. To work with all levels of government, public and private agencies and private industry to improve social, educational and employment opportunities for people of Aboriginal Ancestry of New Brunswick.
>
> D. To foster and strengthen cultural identity and pride among people of Aboriginal Ancestry in New Brunswick.
>
> E. To inform the general public of the special needs and rights of the people of Aboriginal Ancestry of New Brunswick and of their efforts to achieve full participation in the economic, social and political life of the Province.
>
> F. To co-operate with all other Aboriginal Organizations whose aims are similar to those of this society.

For the purposes of this report, it is important to emphasize that governmental relations was a primary goal of the organization which members endorsed as central to the NBAPC by adopting the Constitution at its founding meeting on August 26, 1972. The Constitution was later amplified to include what is now paragraph B, above. The NBAPC is a democratically governed organization with a Constitution and By-laws (see Appendix A). It is organized into seven zones for the purposes of representation and local governance.

This organizational structure is similar to the county approach taken by the New Brunswick government before 1935, as discussed above. There are seven zones in the



province and a Director is elected from each of the zones. The Board of Directors includes these regional Directors and the Council's Executive (Chief and Vice-Chief) and one Youth Director who is appointed by the NBAPC Youth Council. The Board meets biannually to review all decisions made by the Executive between Board meetings and directs the work of the Executive.

The Annual General Meeting (AGM) of the NBAPC is the ultimate decision maker of the organization; it can overturn or endorse previous decisions made by the Board of

Directors. The AGM is comprised of representatives of each of the Locals. The AGM is the only place and time where the NBAPC Constitution and By-Laws[23] may be amended.

The NBAPC Constitution provides for governing principles that guide the direction of the organization:

> [T]he Mi'kmaq, Maliseet and Passamaquoddy peoples have never surrendered our ancestral lands or our Aboriginal and Treaty rights, all of which are now protected and preserved in the Constitution of Canada…Some members of our nations live on reserves created and set apart by the Government of Canada. Others of our nations continue to live throughout the Province of New Brunswick, undisplaced to Indian Act reserves.[24]

As a result of never surrendering their ancestral lands, the NBAPC stands committed to their inherent right to self-government. An aspect of this self-governance is to have the off-reserve Aboriginal population in the province exercise their right to self-identification and community acceptance. Also included in this right of self-government is the right of off-reserve Aboriginal peoples to choose who they wish to represent them regarding their Aboriginal and Treaty rights. In the Constitution, the NBAPC is mandated to protect these rights of its members by representing them when engaging with government.

The NBAPC only accepts people of Aboriginal identity as full members and does not provide services to Aboriginal people residing on-reserve. Membership in the NBAPC is governed in its by-laws. The membership process is rigorous and seeks to ensure that only Aboriginal individuals meeting the legal test for membership are admitted as full members. Aboriginal persons applying for full membership, which enables them to vote at meetings and hold elective office, must show documentation that proves:

- Ancestral connection to a verified and known aboriginal person since July 1, 1867. This connection does not have to be genetic.
- Community acceptance/recognition: The applicant has to be recognized by a local community first, before her or his application for membership will be sent to the membership committee.
- Residence: That she or he has resided in the province of New Brunswick, off-reserve, for at least six months.

Once documentation of aboriginal ancestry and local community recognition has been received, the applicant file goes to a membership committee for review. The committee may approve the application or recommend that the application be sent to the Board of Directors, who then may make the final decision.

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[23] The NBAPC Constitution and By-Laws can be found in Appendix A and also in electronic format in their entirety at: http://www.nbapc.org/page_images/b344ac87f8947a83321ca8d438faf309.pdf

[24] *Ibid* at 14 and *infra* at 56.

Membership in the NBAPC is not a requirement for an off-reserve Aboriginal person to be a beneficiary of Aboriginal or Treaty rights or Land Claims. However, membership is required before an Aboriginal person in the province can be politically active in the NBAPC and have access to certain benefits, services and programs provided by the organization.

There are various forms of membership within the NBAPC. Beyond full membership, there are several other types of membership: spousal, associate, youth membership, non-resident, lifetime, honorary, and supporting memberships are contemplated in the by-laws, but only full membership confers recognition of a person as an (adult) Aboriginal. A spousal membership is open to the spouse of a full member. No application is required for this type of membership and these members are not eligible to vote or hold office. Associate memberships are open to people who wish to support the NBAPC but are not eligible for full membership.

The NBAPC only advocates on behalf of those who have full membership, meaning those who have proven aboriginal ancestry and who are rights holders.

The executive officers and Board of Directors must be full members and are selected through a democratic voting process. The position of the President & Chief is a full-time paid position with a term of office of two years. The other elected members of the Board of Directors are unpaid positions and also are for a duration of two years. To vote for someone in office a member, in addition to having to be a full member, a potential voter must apply to be on a voter list.

Currently, the NBAPC has approximately 1,800 full members. Separate lists are maintained for full members and for treaty beneficiaries since a person may be of Aboriginal ancestry in a community that does not hold treaty rights in New Brunswick. The number of members is worthy of comment. To put the figure in perspective, at any given time, between 1% and 2% of Canadians are members of political parties, even though the membership process for party membership is relatively simply and quick. By contrast, becoming a member of NBAPC requires extensive documentation and can take more than six months to complete. Despite this, nearly 6% of people represented by NBAPC and over 13% of eligible (off-reserve) Aboriginal people on official government lists are members of NBAPC. This high level of membership participation taken together with the rigorous membership processes and well established democratic procedures of representation will provide any negotiating government with considerable comfort that treaty negotiations are proceeding in an appropriately mandated environment.

The NBAPC administers various programs for the benefit of its members. Importantly, this includes the administration of the Aboriginal Fisheries Strategy. It also administers the federally funded Aboriginal Skills & Employment Training Strategy. The NBAPC supports members and their children in furthering their education through bursaries and awards, and receives funding from the Province of New Brunswick and Aboriginal Seafood Network Inc. for this purpose.

Similarly, Canadian and New Brunswick courts have recognized the NBAPC. It must be cautioned that the approach of the courts has been influenced by various litigation contexts. Most of the case law arises in situations where defendants charged with regulatory offences related to hunting or harvesting timber seek to prove aboriginal rights for the purpose of defending against the charge. However, there are also cases where the role of NBAPC is more direct, for example acting as an employer or bringing a civil action against the Province.

The first discussion of the role of the NBAPC in the New Brunswick courts was in 1998 in response to a motion to intervene in a criminal trial involving hunting rights. In *R v Peter Paul*,[25] the New Brunswick Court of Appeal held that the NBAPC did not have a sufficient legal interest to warrant intervener status. There is no analysis provided for this conclusion. The Court of Appeal granted intervener status to the NBAPC in *R v Bernard*, emphasizing the significance of the legal issues being supported by the intervention.[26] Similarly, the Supreme Court of Canada granted the NBAPC intervener status in two cases.[27]

The law determining membership for purposes of s. 35 was clarified by the SCC in the *Powley* case.[28] In a decision preceding *Powley*, the *New Brunswick Aboriginal Peoples*

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[25] *R v Peter Paul*, [1998] NBJ No 20, 195 NBR (2d) 294, 499 APR 294.
[26] *R v Bernard*, 2003 NBCA 55, 2003 CarswellNB 399.
[27] *R v Sappier* 2006 SCC 54, [2006] 2 SCR 686; *R v Daniels* (SCC Court File No. 35945).
[28] In *Powley*, the accused, two Métis persons, shot and killed a bull moose in the area of Sault Ste. Marie. Moose hunting in Ontario was subject to strict regulation, which involved the issuing of validation tags authorizing the bearer to hunt adult moose. The restrictions were not enforced against Status Indians. The accused were charged with unlawfully hunting moose and knowingly possessing game hunted in contravention of the Game and Fish Act. The accused pleaded not guilty, arguing that, as Métis, they had an aboriginal right to hunt for food. The accused argued that subjecting them to the moose hunting provisions of the Game and Fish Act violated their rights under s. 35(1) of the Constitution Act, 1982, without justification, because the Ontario government denied the existence of any special Métis right to hunt for food. The accused were acquitted, and the Crown's appeals to the Superior Court and to the Court of Appeal were both dismissed. The Court of Appeal granted the Crown's request for a stay of its judgment for one year to allow the Crown to consult with stakeholders and develop a new moose-hunting regime that was consistent with s. 35 of the Constitution Act, 1982. The Crown appealed the judgment, and the accused cross-appealed with respect to the order for a stay. Both the appeal and the cross-appeal were dismissed and the Supreme Court held that ss. 46 and 47(1) of the Game and Fish Act, as they read on October 22, 1993, were of no force or effect with respect to the accused, being Métis, in the circumstances of the present case by reason of their aboriginal rights under s. 35 of the Constitution Act, 1982. In the course of its reasons, the SCC established the three-part Powley test for membership.

Council v New Brunswick (Minister of Natural Resources and Energy)[29] the NBAPC was subject to an application for judicial review. The Minister sought to have the case dismissed summarily, arguing that the NBAPC did not have standing. The NBAPC had claimed that some of its members had been harassed by enforcement officials of the Minister of Natural Resources and Energy (Minister). The harassment was in relation to the alleged demarcation line between Mi'kmaq and Maliseet territory. The NBAPC argued that it had never been given the chance to be heard or consulted by the province regarding the demarcation line. The Court refused to dismiss the NBAPC as organization without standing, as the Court stated:

> I must add that the Respondents have put the Applicants in a difficult position. In effect the Respondents are saying, do something wrong, we'll prosecute you and once the Court decides then you will know what you can do and what you can not do and where you can do it and where you can not. This does not seem to be a fair or reasonable.[30]

The Court went on hold that the matter be directed to trial. This 2001 decision demonstrated that in the Court was conscious of the NBAPC being an organization that possibly required government consultation regarding such things as demarcation lines and the rights that are linked to each territory. Two years later, the Federal Court was asked to determine whether the NBAPC fell within federal or provincial jurisdiction. In that case, *Brown v New Brunswick Aboriginal Peoples Council*,[31] counsel for the NBAPC argued that the case did not fall within federal jurisdiction and that the case should be heard in a provincial superior court. The argument was that the NBAPC was not created under the *Indian Act* or any other federal legislation, and that the NBAPC is a provincially incorporated organization. Therefore, counsel for the NBAPC said it should fall within provincial jurisdiction. However, the Federal Court upheld the ruling of the labour arbitrator, who stated:

> In the present case NBAPC addresses the needs of aboriginals whether they have status under the *Indian Act* or not. Betty Ann Lavallee, the Chief of the NBAPC, acknowledged, however, in her evidence that one of the primary functions of the Council is to fight for the treaty rights and status for those currently disenfranchised under the *Indian Act*. Their original and continuing goal is that aboriginal descendants should be treated in a consistent manner to those who are members of Indian bands. Although its functions include accessing provincial government programs for the benefit of its members, the majority of its core funding comes from the federal government and as noted its primary position is that the aboriginal ancestry of its members entitle them to similar benefits to those with status under the Indian Act. In fact, some of its members do have status. As

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[29] *New Brunswick Aboriginal Peoples Council v. New Brunswick (Minister of Natural Resources and Energy*), [2001] NBJ No 95, 236 NBR (2d) 204.
[30] *Ibid* at para 24.
[31] *Brown v New Brunswick Aboriginal Peoples Council*, 2003 FC 1181, 126 ACWS (3d) 259.

> such, its primary function must be seen as falling under the federal jurisdiction over "Indians, and lands reserved for Indians" even though some of its members may not have status under the Indian Act.[32]

The Federal Court accepted this statement as true and upheld the adjudicator's decision, ruling that the primary functions of the NBAPC falls under federal jurisdiction, section 91 (24) of the *Constitution Act, 1867.* Additionally, this decision demonstrates that the Federal Court recognized the NBAPC as an organization that represents and fights for the treaty and status rights of disenfranchised Aboriginal people.

The issue of NBAPC's representation rights next arose in a 2004 case[33] involving Mr. Acker, who attempted to prove that he had an Aboriginal right to hunt after he was charged for hunting without a valid license by relying on his NBAPC membership. When Mr. Acker was asked by a game warden for his hunting license, Mr. Acker produced his membership card to the NBAPC and a second document entitled "Treaty Implementation Management and Beneficiary Entitlement Regime - Deer Permit 01218." The Court reminded that Aboriginal rights are communal in nature and that the defendant would have to show that he was a member of a recognized rights bearing community. Regarding this community requirement the Court stated:

> These issues are more easily dealt with in the context of a clearly identifiable group forming part of an identifiable community. For example, in *Van der Peet*, the defendant was an aboriginal, a member of the British Columbia Stolo tribe. In *Sparrow*, the defendant was an aboriginal, a member of the British Columbia Musqueam Indian Band. In *R v Bernard* 2003 NBCA 55, the defendant was a Mi'kmaq and member of the Eel Ground Band and a resident of the Eel Ground Reserve. In this case, the defendant is not part of an easily identifiable group and the only community upon which he can rely is his membership in the New Brunswick Aboriginal Peoples Council.[34]

The Court held that even though Mr. Acker was a member of an Aboriginal community, that being the New Brunswick Aboriginal Peoples Council, that this was not enough to provide Mr. Acker with the Aboriginal right to hunt. The issue the Court had was with the self-identification portion of establishing that one has an Aboriginal right. The Court ruled that Mr. Acker had provided no real evidence that he self-identifies as a Mi'kmaq beyond his membership to the NBAPC. Because Mr. Acker had provided no evidence that he adopted an Aboriginal way of life after discovering his Aboriginal heritage, the Court held that he was not really associated with any Aboriginal community. Even after Ms. Labillois, on behalf of the NBAPC, stated that the NBAPC considered Mr. Acker to be a Mi'kmaq person, the Court still rejected the self-identification aspect:

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[32] *Ibid* at para 15.
[33] *R v Acker, supra* note 6.
[34] *Ibid.* at para 60.

> It is to be noted that the requirements for membership in the New Brunswick Aboriginal Peoples' Council do not correspond to the legal requirements for recognition of an individual as an "Indian." Recognition by the Council of who is an Indian does not equate with recognition by the courts. The standards are different.[35]

A similar conclusion was reached by the Provincial Court in the earlier case of *R v Castonguay*[36] with respect to E.C.F.P.A., an organization with less rigorous membership criteria than the NBAPC. However, in contrast to the court in *Acker*, the Court in *Castonguay* describes the NBAPC as a "recognized" organization:

> Mrs. Splude explained that the E.C.F.P.A. came into being to provide a forum for those whose ancestry did not qualify them for inclusion into other existing and recognized native organizations such as the New Brunswick Aboriginal People's Council (for off-reserve Status Indians), and the Union of New Brunswick Indians (for Status Indians under the Indian Act) [emphasis added].

Acker demonstrated that membership to the NBAPC did not automatically equate to an Aboriginal right to hunt for that member. Rather, that membership holder would have to be able to prove that she or he has altered their way of life to something that the Court considers to be an 'Aboriginal way of life.' Nearly a decade later the same Court considered a similar case[37] and upheld the reasoning and conclusion as that in *R v Acker*.

One year later another New Brunswick case[38] dealt with the issue of hunting rights and membership to the NBAPC. Describing the NBAPC, the Court stated:

> This council, by the way, receives funding from the Province of New Brunswick and meets with various government departments and officials. One would think that such a fact confers some legitimacy on this body even in the eyes of the government of the province. I do not mean that the province has to sign off on all the positions advocated by the council but one should see it as a legitimate intervener. It comprises 600 active members throughout the province, 1200 inactive members and currently has 300 applications for membership to deal with. The council considers itself the off-reserve voice for the status and non-status Indians who live off reserve […][39]

Unlike the 2004 *Acker* case, in which Mr. Acker was held not to have an Aboriginal right because he lacked an Aboriginal lifestyle, Mr. Lavigne participated in many Aboriginal

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[35] *Ibid.* at para 70.
[36] R. v. Castonguay 2002 CarswellNB 531, 2002 NBPC 31, [2002] N.B.J. No. 447, 257 N.B.R. (2d) 67, 674 A.P.R. 67
[37] *R v Chiasson,* 2012 NBPC 14, 393 N.B.R. (2d) 326.
[38] *R v Lavigne,* 2005 NBPC 8, [2005] 3 CNLR 176.
[39] *Ibid.* at para 44.

cultural activities and was frequently in contact with other Aboriginal people. As a result, the Court stated that:

> Clearly, therefore, we do know that the recognized body, which the council [NBAPC] is, considers and accepts that both Gerald Lavignes, father and son, are of the Aboriginal Peoples of New Brunswick.[40]

This statement demonstrates that the New Brunswick Provincial Court, in 2005, accepted that the NBAPC is a recognized body for representing off-reserve Aboriginal people in the province of New Brunswick. To support this, there is a reference made early in the Federal Court case of *Native Council of Nova Scotia v Canada (Attorney General),*[41] in which Justice Zinn identifies the NBAPC as a self-governing organization that exists to represent off-reserve Aboriginal people in the province of New Brunswick.

Most recently, the NBQB affirmed a decision of the NBPC holding that two brothers did not meet the community acceptance requirements under the third branch of the *Powley* test despite their membership in the NBAPC. The Court emphasized that the membership was relatively recent.[42] All of these cases make it clear that community acceptance is a highly fact-specific matter.

In addition to consideration by the courts, the NBAPC has also been a party in administrative tribunals. Two results were found, one from the Human Rights Tribunal and one from a National Energy Board decision. In *London v New Brunswick Aboriginal Peoples Council,*[43] the tribunal described the NBAPC as an organization representing off-reserve *or* non-status Aboriginal and Métis people in the province. The Aboriginal people included in whom the organization represents are said to be: Micmac, Maliseet, Ojibway, Passamaquoddy and Cree.

In the other decision, *New Brunswick Power Corp. (Re),*[44] the New Brunswick Power Corporation was seeking to construct an international power line that would stretch across a part of New Brunswick. To obtain approval for the project NB Power Corporation had to meet certain guidelines set out by the National Energy Board: informing the public about the project, identify issues and concerns of those potentially affected by the project, and resolve any issues arising from those potentially affected. NB Power identified numerous stakeholders who would potentially be affect by the project, one of which was the Aboriginal people in New Brunswick. As a result, NB Power submitted that it had contacted numerous First Nations and other Aboriginal groups about the construction project. The NBAPC was one of those groups contacted, demonstrating the NBAPC to be an Aboriginal organization that at least NB Power views as an Aboriginal organization that should be consulted with regarding such projects.

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[40] *Ibid.* at para 47.
[41] *Native Council of Nova Scotia v Canada (Attorney General),* 2011 FC 72 at para 2.
[42] *Vienneau and Vienneau v R,* 2014 NBQB 092.
[43] *London v New Brunswick Aboriginal Peoples Council*, 2008 CHRT 49.
[44] *New Brunswick Power Corp (Re)*, 2003 LNCNEB, CA.

It is evident that the NBAPC has been recognized by the courts as an entity with sufficient status to speak on behalf of its members as an intervener including in the SCC, has been recognized as a federal entity engaged in work related to s 91(24) of the Constitution Act, 1867 and has been marginally recognized for the purposes of s 35 consultations. At the same time, membership in the NBAPC has been held to be insufficient for claiming treaty beneficiary status, though the case law is somewhat ambiguous on this point and seems to be moving towards greater recognition.

In sum, the integrity of the NBAPC's democratic processes, the rigour of its membership process, the longstanding track record of administering governmental programs and monies and the experience in representing the interests of off-reserve and non-Status Aboriginal populations in negotiations and litigation all serve to support the conclusion that NBAPC has the necessary capacity, organizational stability and democratic support to effectively represent its members in treaty and land claims negotiations.

III. Constituencies

The NBAPC represents Aboriginal populations not residing on reserves. It is one of the inheritances of the *Indian Act* that these populations have been variously classified under federal legislation, carving out somewhat arbitrary and often discriminatory categories, sometimes retrospectively adjusted to partially eliminate past discriminatory practices. It seems useful to describe four groups or constituencies that make up Aboriginal people eligible for NBAPC membership. In describing these constituencies, the intent is not to further arbitrarily divide Aboriginal people in New Brunswick. Indeed, the constituencies are separate only vis-à-vis the legislative scheme, and not in any manner inherent to the identities of these individuals and groups.

The Supreme Court of Canada held in the *Powley* decision that the power of recognition for purposes of section 35 of the *Constitution Act, 1982* rests with Aboriginal communities. Despite this, the federal government continues to hold exclusive legislative power to grant status to groups of individuals as Indians under the *Indian Act*. Therefore, there is a tension between the legislative power of recognition and the constitutional right of Aboriginal communities. This tension plays out in the constituencies of NBAPC.

5927 status-Indians are currently reported by AANDC to live off-reserve (May 2015). Together with the non-Status population in the province (reported at 5,845 in the National Household Survey or NHS in 2011) a majority of approximately 55% of First Nations people from New Brunswick live off-reserve. Note that this does not represent all Aboriginal people in New Brunswick. There is a large population reporting First Nations ancestry (the NHS reported 32,365 in New Brunswick, suggesting that in addition to the 21199, there are over 11,000 individuals claiming First Nation ancestry and there are additionally populations of Inuit and Metis amounting to about 6000 individuals.) AANDC has identified the growing number of people of Aboriginal ancestry self-

identifying as a significant source of population growth.[45]

The four groups considered in the study are limited to people self-identifying as Aboriginal with links to treaties applicable to the traditional territories now located in the Province of New Brunswick. They are:

- Group 1: Status Indians residing off reserve with membership in one of the recognized First Nations communities in New Brunswick. Some class members regained status as a result of Bill C-31 or Bill C-3. The aboriginality of the members of this group is not in dispute. Federal legislation acknowledges their status as Indians. What may be in dispute is whether they should be represented by the NBAPC or by chiefs of First Nations communities where they have membership.

- Group 2: Non-status Indians with ancestral connections to recognized First Nations communities in the province. This group is the numerically largest part of the NBAPC's membership. It includes individuals who lost status as a result of enfranchisement or intermarriage with non-Aboriginal people who were subsequently not eligible to regain status under Bill C-31 or Bill C-3. The Aboriginality of the members of this class may not be in dispute since they clearly meet the first two branches of the *Powley* test. Whether they meet the third branch, community acceptance, may in some cases depend on whether NBAPC or its locals are considered Aboriginal communities with powers of recognition. Since they are not band members, they are clearly not represented by the chiefs.

- Group 3: Members of the Harquail clan. This is a group of individuals erroneously allocated to another First Nations community. The error has been corrected, but there has been no reserve grant and their representation is unclear. For members of this group, their Aboriginality is not in dispute. They have status under the *Indian Act* as General List Indians. However, because they are not subject to a grant of reserve land nor has a landless reserve been created, they do not have access to the representational mechanisms of the *Indian Act*. They have indicated a clear preference for being represented by the NBAPC.

- Group 4: Members of Aboriginal communities that were not displaced to reserves by federal government and who were never recognized by either the federal or the provincial government. While the historical record clearly demonstrates the existence of a 'never recognized' class of Aboriginal individuals in New Brunswick, Aboriginality may be in dispute for some individuals because they neither hold status under the *Indian Act*

[45] AANDC, "Aboriginal Demographics from the 2011 National Household Survey" available online at https://www.aadnc-aandc.gc.ca/eng/1370438978311/1370439050610#chp2.

nor is there a recognized First Nations community to which they may claim an ancestral connection. This group includes the Passamaquoddy. Like for Group 2, the NBAPC may play an important role in membership recognition for this group.

1. Group 1 (Status Indians residing off-reserve)

Demographics

The Status-Indian off-reserve population of New Brunswick should be relatively simple to describe, as the federal government seeks to provide precise and up-to-date demographics for this class. Note, however, that the numbers generated by AANDC for purposes of the Indian Register do not accord entirely with the numbers published by the same federal department when sourced from the National Household Survey in 2011.

According to the latter, there are 10,275 registered Indians residing in New Brunswick, of which 68.8% are reported to reside on reserve and 31.3% off-reserve. The same survey also reports 5,845 non-Status First Nations people. Because of general methodological concerns about the now voluntary National Household Survey and because of the consistency in methodology afforded by the Indian Register, the more conservative view is to rely on the latter. Disagreement between the two may exist because of error, but also because of different methodologies. The Register forms the basis of the following analysis.

Registered Indian Population - New Brunswick First Nations Communities (2006 - 2015)										
Year	2015		2011		2008		2006		2001	
Residing	*ON*	*OFF*	*ON*	*OFF*	*ON*	*OFF*	*ON*	*OFF*	*ON*	*OFF*
Registered First Nation Community										
Buctouche	75	43	76	26	73	27	78	20	71	21
Eel Ground	568	450	545	349	533	359	523	350	498	321
Eel River Bar	358	362	341	312	332	284	322	280	313	251
Elsipogtog/ Big Cove	2549	711	2390	679	2242	678	2169	657	2041	470
Esgenoopetitj / Burnt Church	1341	511	1250	463	1190	439	1140	421	1150	213
Fort Folly	36	94	34	84	30	81	30	78	33	64
Indian Island	104	79	98	66	89	64	84	66	93	60
Kingsclear	710	298	658	266	636	250	604	246	585	188
Madawaska	155	209	143	1132	122	115	116	111	98	127
Metapenagiag	456	211	423	163	410	141	385	143	377	131
Oromocto	314	346	291	286	261	252	256	248	226	234

Registered Indian Population - New Brunswick First Nations Communities (2006 - 2015)										
Pabineau	102	198	102	142	101	138	89	140	90	121
Saint Mary's	881	960	847	783	754	679	715	635	715	472
Tobique	1490	760	1443	601	1398	550	1361	536	1329	446
Woodstock	288	695	290	609	284	562	266	547	238	522
Totals	***9427***	***5927***	***8931***	***5961***	***8455***	***4619***	***8138***	***4478***	***7857***	***3641***
Percentage Off-Reserve		**38%**		**40%**		**35%**		**35%**		**32%**

As can be seen, the percentage of off-reserve Status Indians with membership in New Brunswick bands remained relatively constant between 2001 and 2006 at about 35% but has recently edged up to between 38% and 40%. The shift from on-reserve status to General List status in Group 4 is contributing to the slight downward trend between 2011 and 2015. Given the slightly higher birth rates for on-reserve status Indians in the province, the numbers suggest that mobility off-reserve occurs at a sufficient rate to outpace population growth of the on-reserve population or at best maintain the relative balance in numbers on-reserve and off-reserve populations.

At 38% of the total status population of the province (excluding the General List), and almost 6,000 individuals at present, this is a very significant population needing engagement in any Aboriginal and Treaty rights process, if only because unlike their Non-Status and General List cousins, they can directly affect a band-based vote on any proposed settlement, as may seem to be implied in the nature of the 2011 Umbrella Agreement.[46]

Representation

A key question is whether individuals in this group are appropriately represented by the chiefs and band councils of the First Nations communities with which they have an ancestral connection. The answer to this question may be partially attitudinal. The consultant survey indicated that survey respondents had little involvement in the governance structures of reserve communities, were not consulted about matters of interest to them and did not feel that the chiefs and councils represented them. The response rate for the survey was modest, but answers tended to be very clear on matters of representation.

Regarding engagement in the Umbrella Process, the respondents indicated the following

[46] The issue of how any ratification votes on in-principle or final agreements are to be conducted remains entirely uncertain, though Canada's formal position is that at the least, all Band members involved, on, or off-reserve, must have a vote. However, that raises the question of how off-reserve members are to be involved in mandating negotiations if, as at present, none of the Bands involved have sought such formal mandates directly.

about the level of consultation:

Have you been invited to a General Band Meeting or asked to vote on a Negotiation Mandate?		
	Number	Percentage
Yes	5	15.6%
No	27	84.4%
Total	32	100%
Have you received any information, newsletters or bulletins on the Negotiations from your Band or from the Assembly of New Brunswick Chiefs?		
	Number	Percentage
Yes	8	25%
No	24	75%
Total	32	100%
Have you been engaged in any other way in consultations with your Band on the negotiations related to the Umbrella Agreement?		
	Number	Percentage
Yes	2	6.1%
No	31	93.9%
Total	33	100%

Even accounting for the modest response rate, these numbers are sufficiently low that they seem to warrant requesting from the *Indian Act* chiefs information about if and how they are engaging their off-reserve membership. In the absence of countervailing information, we are of the view that the survey provides solid evidence that the chiefs have not engaged their off-reserve membership. We would further suggest that the respondents to the survey are more likely to be attentive to communications about the process given that the survey was voluntary and would likely have recruited differentially among people who are interested in the negotiations. The answers are furthermore consistent with other questions in the survey. For example, support for representation by the chiefs alone was very low.

How would you prefer to be represented in negotiations on the implementation of Aboriginal or Treaty rights in New Brunswick?		
	Number	Percentage
I am satisfied with being represented by one of the *Indian Act* bands involved in the current (2011) Umbrella Accord	2	6.3%
I wish to be represented by NBAPC	7	21.9%
Through a joint body or Council of NBAPC and the Band Chiefs	17	53.1%
I want to be involved in a different way, such as through a traditional council or clan	6	18.8%
Total	32	100%

Again, the level of support for representation by the *Indian Act* chiefs is so low as to warrant further research. In the absence of evidence produced by the Province or the *Indian Act c*hiefs that the responses in the consultant report are not representative, the results should be taken to indicate low support for the *Indian Act* mode of representation for this population.

By whom would you like to be consulted through a general meeting in which you have a voice and vote? (Multiple responses permitted)	
By Bands or Band Organizations	17
By NBAPC	27
By governments (Canada and/or the province)	12
Other (Please Describe)	5
Total Responses	61
Who would you like to receive information newsletters or bulletins from informing you of the status of talks and what issues are being discussed? (Multiple responses permitted)	
By Bands or Band Organizations	18
By NBAPC	29
By governments (Canada and/or the province)	15
Other (Please Describe)	3
Total Responses	65

As will be seen for Group 2, Aboriginal people with Indian status residing off reserve would also prefer to be informed comprehensively from a variety of sources. This indicates a strong desire to be put into a position where people can make up their own minds and a willingness to process multiple data sources in order to achieve this outcome. These responses show that on average, respondents chose approximately two options, demonstrating a desire to be broadly informed. The survey is further instructive on the issue of personal engagement. The vast majority of respondents had a desire to vote on interim agreements (87.9%) or be involved in their approval (84.8%).

The consultant also conducted four focus groups. These groups were selected to be representative in terms of gender and age ranges, as well as a distribution of Band membership. Band diversity was operationally defined by the recruiters as having persons with membership in different bands in each Focus Group. However, it was re-defined during the course of the focus groups by many participants as reflecting larger and smaller reserve communities, multiple community origins as well as a broader regional or district perspective.

The focus groups explored three issues: awareness of the Umbrella Agreement process and interim Agreement; the relationship focus group members had with the band in which they held membership; and views on treaty beneficiary rights.

In two focus groups, members indicated no awareness or awareness only after the fact, while the other two focus groups had awareness of the process, but expressed concerns about the process such as a lack of formal involvement or the speed with which negotiations were proceeding. Respondents from Mi'kmaq and mixed focus groups indicated that they had not been engaged in meetings, while some members from Maliseet communities had been engaged. Two focus groups indicated that they were aware of elements of the Umbrella Agreement process through NBAPC, the other two professed no awareness beyond rumours, dated information or information obtained through private channels. None of the focus groups indicated that they had been made aware or kept informed of the Umbrella Agreement process through their bands.

The second area of discussion was the relationship with the band in which participants were members. Three focus groups expressed that mobility to the reserve was either undesirable, difficult or both. Again, the exception was the Maliseet group which indicated that mobility in both directions had been largely painless. Despite this, all focus groups reported voting activity in band elections, but noted that involvement was limited outside the election cycle. One focus group noted active hostility towards involvement after 2006. Three groups expressed concerns about the capacity of *Indian Act* chiefs to engage in intergovernmental negotiations. One group expressed a similar concern about limited capacity within NBAPC.

The third area of discussion related to treaty beneficiaries. The discussions appear to have been wide-ranging. Most relevant for the issues under discussion in this report, there was general agreement that government is in a poor position to make decisions about membership and treaty beneficiary status, but some also noted that Aboriginal

communities on and off reserve are insufficiently engaged.

The focus group discussions generally support the conclusions from the survey that Group 1 members feel insufficiently informed and engaged by band councils and chiefs and that they have little involvement in the current process. The focus groups do not support exclusive representation by NBAPC, but do support representation by joint or specially created representative bodies that include NBAPC.

What may be equally and broadly informative is membership in NBAPC. There are approximately 240 members of NBAPC who are status Indians. Since it is a core mandate of the organization to represent its members in treaty and land claims negotiations and these individuals would otherwise be represented by *Indian Act* chiefs, it is reasonable to presume that at least one reason for seeking membership for a status Indian residing off-reserve is a desire to be represented by NBAPC in negotiations.

Finally, it is important to consider the level of democratic engagement for status Indians residing off-reserve created by the *Indian Act*. The legislative scheme was variously considered by the Supreme Court of Canada in the *Corbiere* decision and in federal courts in *Sawridge, Goodswimmer* and others.[47] Since then, the constitutional infirmity identified by the Court in *Corbiere* has been partially addressed through legislative and regulatory amendment and in some cases by conferring on First Nations communities the power to enact their own (custom) election codes. However, the democratic representation of band members residing off reserve remains spotty, band lists no longer necessarily accord with *Indian Act* status and over a century of disenfranchisement has cultivated complex representational allegiances.

For all of these reasons, it is problematic to assume that *Indian Act* chiefs are democratically authorized to represent all status Indians residing off reserve. In fact, the solution originally favoured by the Canadian government in the negotiations leading to the Umbrella Accord, i.e. representation by a joint body including NBAPC and *Indian Act* chiefs found considerable support among survey respondents and focus group members alike. In order to ensure appropriate representation for members of Group 1, some participation by NBAPC will be important, be that as part of a joint body or as an additional voice at the table.

RECOMMENDATION 1

We recommend that NBAPC and its governmental and on-reserve leadership partners engage in discussions towards ensuring joint representation.

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[47] *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203; *Sawridge Band v R*, [1997] 3 FC 580 (CA); *Goodswimmer v. Canada (Attorney General)*, [1995] 2 FCR 389 (CA).

2. Group 2 (Non-status with ancestral links to registered New Brunswick First Nations)

The second and historically largest membership group within the NBAPC is non-Status people connected by descent to the 15 bands registered under the *Indian Act*. Though not a formally defined category in statute law, this group is conventionally understood to be comprised of those who are descended from persons who are or were members of *Indian Act* bands and who do not have registered status under the current *Act*. A very small portion of this population may also be "deemed Indian" for purposes of section 4.1 of the Act, which provides "Status" for persons who are not registered but who are members of bands exercising control under section 10.[48] The case of the Passamaquoddy people is distinct. Persons often see themselves as "Non-Status" whether because there is no recognized Passamaquoddy Band through which to gain registered Indian entitlements, or because of past intermarriage between Passamaquoddy and (predominately) Maliseet, which may have led to individuals losing membership or "Status" entitlements.[49]

Demographics

By definition, non-Status populations are not counted in the Indian Register. As a result, the number of individuals has to be based on a different data source. Prior to the abolition of the mandatory long-form census, the best source of information came from census data. Currently, the best source of information on the non-Status population in New Brunswick is the National Household Survey in its voluntary form, though it is even more likely to undercount than the census. As indicated, the 2011 NHS reports 5,845 self-identified non-Status First Nation or American Indian population for New Brunswick.

The following census data provides an overview of the number of persons who, in 2001 and 2006, indicated their origin (2001) / ancestry (2006, 2011) or identity as being Aboriginal in New Brunswick, together with the totals for those that stated they held registered status. The fourth column provides Indian Register information for New Brunswick (i.e., tied to New Brunswick Bands) in those two years. The final row reports NHS data from 2011.

[48] Indian Act, Statutes of Canada 1985, c.1-5. http://laws-lois.justice.gc.ca/eng/acts/i-5/page-1.html

[49] Groves, *supra* note 19 at 155 and 180.

Year	Census Aboriginal Population		Census Indian Status	Indian Register Data
	Origin/ Ancestry	Identity	Status	
2001	28,470	16,990	9,755	11,498
2006	35,240	17,650	10,860	12,616
2011	37,900	22,620	10,275	14,892

There is a methodological question about whether for census purposes, the non-Status population should be described as those self-identifying as having Aboriginal ancestry minus those who have status (either in the Province or elsewhere) or those who claim Aboriginal identity minus those who have status. It is likely that discrimination and adverse treatment would negatively affect the self-identification of individuals in either column and conversely, AANDC assumes that the significant growth in the Aboriginal identity population is partially attributable to more people of Aboriginal ancestry reclaiming their Aboriginal identity. For treaty negotiation purposes, these demographic shifts are important. The relationship is likely going to be dynamic as treaty negotiations may engage individuals and cause them to reconnect with their Aboriginal ancestry and culture.

Mobility between Groups 1 and 2

As was the case with Bill C-31, the *Gender Equity in Indian Registration Act* (Bill C-3 or GEIRA) triggered status applications and these are being considered. AANDC originally anticipated that (nationally) approximately 45,000 persons would become newly entitled to registration under the legislation.[50] The Department has since revised its projection downwards to about 33,000 individuals expected by the end of 2012.[51] In New Brunswick, 650 new registrations were reported. Further, the "Exploratory Process on Indian Registration, Band Membership and Citizenship" concluded in 2012 and a more general revision of registration is promised. As a result, the future demographics of Group 2 remain somewhat uncertain as some will likely become members of Group 1.

In sum, the demographics of Group 2, particularly as projected, remain somewhat

[50] AANDC, "Gender Equity in Indian Registration Act" available online at https://www.aadnc-aandc.gc.ca/eng/1308068336912/1308068535844.
[51] AANDC, "Report to Parliament - Gender Equity in Indian Registration Act" available online at https://www.aadnc-aandc.gc.ca/eng/1360010156151/1360010230864

uncertain as governments and Aboriginal communities grapple with the arbitrary and discriminatory inheritances of the *Indian Act*, and the complex consequences of legislative and self-governance attempts at addressing them.

It has been suggested that the best, if not a perfect solution to the byzantine identity and membership provisions of the *Indian Act* may be to rely on the *Powley* approach.[52] Whatever else the merits of that suggestion, it would have the benefit of bringing constitutional and statutory entitlements into alignment.[53] Also, we may know more about the contours of a constitutionally sound solution once the Supreme Court of Canada rules in the Daniels case.[54]

The membership process of NBAPC essentially replicates the requirements of the *Powley* test and is therefore well suited for ensuring constitutionally responsive community recognition.

Representation

Given that the legal relationship between Group 2 members and the band with which they have an ancestral connection is very different from those in Group 1, it is not surprising that the level of engagement is low. What is perhaps more surprising, and what bolsters the view that the Chiefs may not appropriately represent Group 1 individuals is that the engagement numbers for Group 2 are not very different. In other words, despite the changes brought about by Bills C-31 and C-3, band members living off reserve are not significantly more engaged than non-Status members.

Have you been invited to a General Band Meeting or asked to vote on a Negotiation Mandate?

	Number	Percentage
Yes	10	7.9%
No	116	92.1%
Total	126	100%

Have you received any information, newsletters or bulletins on the Negotiations from your Band or from the Assembly of New Brunswick Chiefs?

	Number	Percentage
Yes	13	10.5%
No	111	89.5%

[52] Peach, Ian. "Section 15 of the Canadian Charter of Rights and Freedoms and the Future of Federal Regulation of Indian Status." UBC L Rev 45 (2012): 103–44.
[53] This approach forms the basis of registration under the Qalipu Mi'kmaq First Nation Enrolment Process. See: AANDC, "Qalipu Mi'kmaq First Nation Enrolment Process" available online at https://www.aadnc-aandc.gc.ca/eng/1319805325971/1319805372507.
[54] *Daniels, supra* note 3.

Total	32	100%

Have you been engaged in any other way in consultations with your Band on the negotiations related to the Umbrella Agreement?		
	Number	Percentage
Yes	3	2.4%
No	124	97.6%
Total	127	100%

The similarities carry over into representational preferences: The consultant survey data bears out that respondents overwhelmingly support being represented by NBAPC or by NBAPC as part of a joint body.

How would you prefer to be represented in negotiations on the implementation of Aboriginal or Treaty rights in New Brunswick?		
	Number	Percentage
I am satisfied with being represented by one of the *Indian Act* bands involved in the current (2011) Umbrella Accord	7	5.5%
I wish to be represented by NBAPC	66	52.0%
Through a joint body or Council of NBAPC and the Band Chiefs	40	31.5%
I want to be involved in a different way, such as through a traditional council or clan	14	11.0%
Total	127	100%

Finally, like their Group 1 counterparts, Group 2 members clearly want to be involved in interim decision-making (84.9%).

Since *Indian Act* chiefs have no legal mandate to represent non-Status Aboriginal people, and since NBAPC has been the voice of this population since its inception, it appears entirely appropriate that NBAPC should be invited to represent this population for purposes of treaty and land claims negotiations, recalling once more that constitutional obligations with respect to treaty rights attach to them rather than being limited to status Indians.

RECOMMENDATION 2

We recommend that NBAPC be included as representative for non-Status off-reserve Aboriginal people in New Brunswick in any treaty and land claims negotiations.

3. Group 3: Members of the Harquail Clan (Sickadomec)

This is a group of individuals erroneously allocated to another First Nations community. The error has been corrected, but there has been no reserve grant and their representation is unclear. For members of this group, their Aboriginality is not in dispute. They have status under the *Indian Act* as General List Indians. However, because they are not subject to a grant of reserve land nor has a landless reserve been created, they do not have access to the representational mechanisms of the *Indian Act*. They have indicated a clear preference for self-representation and have endorsed representation by the NBAPC in that regard.

History of the General List

The "General List" is an administrative construct. There is no statutory reference in the *Indian Act* to a "General List". Historically, its administrative utility was to account for orphaned children whose parents had held membership in different bands and who were allocated to the General List until they reached the age of majority and could then choose between two Bands with which to associate as members, sometimes subject to consent of the Band involved.

Until 1985, the General List held less than 100 names. Since then, the General List has more expansively been used as a device to account for individuals who were status Indians without association to a recognized reserve. Note however, that despite a need for such a device created by the Bill C-31 amendments to the *Indian Act* permitting Bands to exclude persons otherwise entitled to be both registered as Indians and members of their Band, the General List has not officially been used for this group.[55]

Use of the General List in the Atlantic Region

Considering regional General List population data for 2001 and 2009,[56] it was found that the ratio of General List to other registered Indians in each region for both years

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[55] Some 96 Bands have acted to limit membership entitlements by adopting their own rules. Stewart Clatworthy, *Indian Registration, Membership and Population Change in First Nations Communities:* Four Directions Project Consultants, 2005.

[56] AANDC, "Registered Indian Population by Sex and Residence (2001) and (2009) available online from Statistics and Measurement Directorate at http://www.aadnc-aandc.gc.ca/eng/1319048867974/1319048912085.

remained largely the same, at about one tenth of 1 percent. The exceptions in 2001 and in 2009 were the Atlantic Region (presently reporting some .6%)[57] and Alberta, with .7%. The Alberta anomaly can easily be normalized by accounting for the establishment of the Peerless-Trout Lake First Nation out of this nominal general list in the following year. Peerless-Trout Lake had previously been associated for administrative convenience with the Bigstone Cree First Nation.[58]

The Atlantic Region data cannot be as readily normalized. There was a gradual and normal rise in the overall Atlantic Registered Indian population until 2010, when it jumped considerably as a result of the addition of the Qalipu First Nation. The General List did not track this gradual rise, but rather jumped from its earlier trend in 2007 and again in 2011 and 2012.[59]

Year	General List Atlantic
2006	56
2007	93
2008	107
2009	117
2010	121
2011	179
2012	243
2013	269
2014	279

This statistical anomaly forms an important point of departure for inquiring into a new

[57] The 2009 Atlantic Regional total registered population was used to avoid the distortion caused by the huge relative addition of a new population to which the historic General List is not applicable: Qalipu Mi'kmaq First Nation. The 2009 data were adjusted for normal annual average growth rates to permit a calculation using the mid- 2012 General List numbers (215).

[58] The Peerless-Trout community is likely best described as an irregular band with no reserves but acknowledged (or at least administratively preferred treaty #8 relationships with the Crown) and having them on the General List reduced the complexity of forming the community into a Band, since persons on the General List can be ordered a Band under the Act by the Minister acting alone, rather than (as in the case of the Qalipu First Nation) having to have an Order-in-Council.

[59] AANDC, "Registered Indian Population by Sex and Residence"Available online at http://www.aadnc-aandc.gc.ca/eng/1319048867974/1319048912085.

constituency of off-reserve Status Indians in New Brunswick. It appears that starting in 2006 or 2007, it was an entire family group or community that was being shifted from known Band associations to the General List as related to "no known Band". At the time of the study, the consultant predicted that based on the information provided them by the Harquails, the 2012-13 period will show yet another atypical rise as the Registrar continues to work through the files of Harquail clan/band members who remain on the Big Cove list. The prediction is in fact borne out by the most recent data as set out in the table above.

The people identified on the General List are united by a common characteristic: that they are recognized as Indians, but have no currently recognized Band under Indian Act system. They are, or, more precisely, they have become unattached to a recognized reserve set aside for them. At the same time, they are undoubtedly a community, and united by strong ties of inter-marriage and descent from the first Mi'kmaq to have occupied the shores of the upper Chaleur Bay and Sickadomec territories.

According to the Office of the Indian Registrar, at the time of the consultant study in mid-2012, there were 215 persons on the General List in the entire Atlantic region. Of these, 83 bore the name of Harquail, and an additional 95 were entitled to Status by virtue of being a descendent of a Harquail. Therefore, some 178 individuals on the General List (83%) were affiliated with the Harquails, a single family group or band of Mi'kmaq in New Brunswick. None of them were minors fitting the normal description of "orphans" for which the General List was created.

The Harquail "clan" (as many of its members refer to it) or band (in the anthropological sense and as meant by the *Indian Act*'s reference to "irregular bands" from 1876-1951) is comprised of several hundred individuals commonly associated with genealogical lines via Joseph Harquail and Susan McCurdy. The latter were recognized Indians for purposes of the 1868 *Act for the Organization of the Secretary of State and the Administration of Indian and Ordnance Lands* and were, in 1868 and after, associated with the Big Cove Band (Elsipogtog), whether by virtue of connection or administrative convenience.[60] Some of their descendants were listed on that Band list or added to it after Bills C-31 Bill C-3 began reinstatement or first-time registration entitlement processes.

By 2005, the number of Harquail/associated persons on the Big Cove list amounted to as many as 300 or more.[61] Then, beginning in 2006, many of the Harquail and other

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[60] The circumstances surrounding the Harquail/McCurdy addition to the Big Cove/Elsipogtog list remains to be fully researched, but it is noted that this was at a time when the Big Cove Band was seen by Ottawa as a "concentration point" for the re-organizing of otherwise quite disparate and mostly off-reserve Mi'kmaq people. Only a relatively few of the Harquail/McCurdy descendants were or have been associated with the core of the Big Cove Band's membership by intermarriage or residence.

[61] This is according to information provided by Harquail members on the Big Cove list and those more recently removed, to the consultant in January, 2013.

descendants of the Harquail/McCurdy group were deemed by the Registrar as being entitled to be Indians by virtue of being associated with the Big Cove Band in 1868, but that they were not entitled to be "members" of Big Cove as that was a distinct category in the 1868 *Act* (a distinction that disappeared in the 1876 *Indian Act*, to be replaced by a new category, that of the "irregular band").

In 2007, the Registrar of Indian Affairs notified additional Harquails that they too were being reassigned to the "General List" as they had been determined to have been associated with the Big Cove Reserve via their ancestors in 1868, but were not found to be members of that band. Since 2007, additional Harquail descendants have been moved onto the General List, and at the time of the study, the consultant was informed that this process continued through 2012-2013, such that the total number on the General List at present associated with the Harquail clan may number well in excess of 200.

Representation

The situation is legally anomalous and requires to be addressed. First, there needs to be clarification about the legal basis for the transfer of members of the Harquail clan from the Elsipogtog band list. Second, there needs to be consultation about their future status, through band recognition either with or without reserve land, through reallocation to the Elsipogtog band list or through allocation to a different band list. In the meantime, what is relevant for the purposes of this report is that the Harquail clan are status Indians without access to the representation mechanisms of the *Indian Act*. Thus, they are clearly entitled to be represented in any treaty or land claims negotiations and they are not represented by any Chief or Band Council. In order to ensure that they can meaningfully exercise their constitutional rights, a representational mechanism will have to be devised.

The consultant surveyed members of the Harquail clan on their representational wishes. The participation rate was extremely high and is thus even more reliable than for the first two groups. Of an estimated 178 members on the General List, 89 responded to the survey. Additionally, 81 individuals who were members of the Elsipogtog band list at the beginning of the study, some of whom were transitioned out during the course of the study and some others of which expected to be transitioned out, responded to the survey for a total response rate of 170. Overwhelmingly, members on and off the General List preferred to be represented by themselves as a band. The consultant study noted correctly that there was currently no legal mechanism for achieving that result. Regrettably, the study did not report any 'second choice' indications (though there is some evidence that the raw data may indeed contain such information). Out of the reported first choice options, the only other option that attracted support was to have NBAPC continue to represent their interests provincially and nationally. Indeed, NBAPC is currently the only body legally capable of carrying out representation for this group. *(The report data is found in Appendix B on page 62).*

The NBAPC 42nd and 43rd Annual General Meetings voted to represent members of

the Harquail Clan (Sickadomec).[62]

RECOMMENDATION 3

We recommend that NBAPC and its governmental and on-reserve leadership partners engage in discussions towards ensuring the participation of this group. NBAPC should advocate for the inclusion of Sickadomec at the treaty table in their own right.

4. Group 4: The Never Recognized

Group 4: Members of Aboriginal communities that were not displaced to reserves by the federal government and who were never recognized by either the federal or the provincial government.

The historical record clearly demonstrates the existence of a number of 'never recognized' Aboriginal communities in New Brunswick. Contemporary statistics inadequately capture the size, location or nature of never-registered or irregular bands in New Brunswick, whether prior to, at, or subsequent to Confederation. Resort must therefore be had to historical sources suggesting unrecognized or under-recognized groups, coupled with data available today on population growth.

Claims research conducted by NBAPC, together with Colonial and federal documentation, disclose that at least three and possibly as many as five anthropological "bands" fall into the category of "never recognized" First Nations communities. These include the Passamaquoddy, which federally sponsored research has as confirmed as a treaty-signatory group based near St. Stephen.[63] They never had any specific reserve lands set apart for them by Colonial or Canadian authorities. In addition, two reserves set apart for "Indians of the district" along the border area of Maine likely create a second and third communal association of relevance, the St. Croix and Canouse communities or reserves. References also point to a variety of other Indian groupings. These are all indicative of what would now be described as un-recognized Indian communities, and what the *Indian Act* up to 1951 formally recognized as "irregular bands". In the Northwest, these include the Mi'kmaq of the Restigouche area, which includes those residing along the major tributaries of upper Restigouche and further North, the Mi'kmaq of the Gaspé, and those of the Dalhousie district (including Eel River), the Gespég community and the outer Chaleur Bay regions, including Gespégégiaq in the north and the Nepisiguit valley and Bathurst Bay area in the South.

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[62] Resolution 7 (2013) Minutes of NBAPC 42nd Annual General Meeting and Resolution 2 (2014) Draft Minutes of NBAPC 43rd Annual General Meeting.

[63] J. Holmes, Passamaquoddy Research Project. Joan Holmes & Associates Inc., Congress of Aboriginal Peoples, Department of Indian Affairs and Northern Development Canada, 2003 at 10-12.

Thus, five communities in particular stand out as likely candidates under the "irregular" band or non-recognized community headings:

1. The Maliseet/Passamaquoddy of St. Croix, for which reserve lands were set aside;
2. The Maliseet/Passamaquoddy of Canous/Canoose, who also held reserve lands;
3. The Passamaquoddy of St. Stephen;
4. The Mi'kmaq of the Nepisiguit; and
5. The Mi'kmaq of Sickadomec or Dalhousie.

Of these five communities, the first and second were researched by NBAPC in the 1990s in association with the Congress of Aboriginal Peoples.

The third community involved – the Passamaquoddy at St. Stephen – is the subject of Holmes' (2003) report to INAC for the Congress of Aboriginal Affairs. It documents an uncertain history of continuance and survival by the Passamaquoddy that merits further attention.

The Nepisiguit case represents a quite distinct set of features. This community or sub-tribal group of Mi'kmaq adhered to the pre-confederation British Treaties, at least as early as 1761 and as late as 1779. From the late 18th to late 19th century this group of Mi'kmaq was referred to as the "Bathurst Tribe, Band or body of Mi'kmaq". Three distinct land allotments or reserves appear to have been requested and/or set aside for this group in the Nepisiguit valley during and shortly after the late treaty period, including at Indian Island in the Bathurst or Nepisiguit Bay and northwest of Bathurst Bay between what is now the Millstream and Nigadoo Rivers in the late 1700s, and at Pabineau Falls.

At present, there is only one reserve recognized by Canada – at Pabineau Falls. The Indian Island reserve was recognized earlier and surrendered in the late 19th century. It remains unclear what transpired after the original land grant request was made for the Millstream-Nigadoo tract in the 1780s as it appeared to have been concurred in, but it may have been caught up in the confusion of both the Napoleonic Wars and the War of 1812. Canada now accepts that there is one "Band" along the Nepisiguit, which is the group of Indians holding common rights in the Pabineau Reserve upstream from Nepisiguit or Bathurst Bay.

The Nepisiguit Band currently has a Chief and Council and a membership approximating that of the Pabineau Band recognized by the *Indian Act*. Its membership includes entitlements of all Mi'kmaq in the valley, including the Pabineau Band membership, which has occasioned a series of contesting letters from the Chiefs involved.

The Sickadomec Band is similarly structured, though more closely associated with persons genealogically tied to the "Harquail Clan" and its unique "General List" core of members as discussed for Group 3. In 1779, in the last of the ratifications of the 1760

Treaty, the northern New Brunswick Mi'kmaq, particularly along the Baye de Chaleur, were included in ratification, including the "Mi'kmaq of the Restigouche and Chaleur Bay".

Historical Development

In Part I of the Report, we had already seen that recognition of Aboriginal communities in New Brunswick was neither systematic nor comprehensive and that land grants and recognition processes operated somewhat independently of each other. We had also discussed that there had been no sustained effort at treaty implementation between the treaty-making period in the18th century and the 1970s.[64] Despite this, the treaty-making period is important for determining the scope of never-recognized Maliseet and Mi'kmaq populations in New Brunswick.

The treaty source is the first and most obvious source for the potential Colonial and post-Confederation organization of Maliseet and Mi'kmaq affairs. Between 1725 and 1779 there were six major Treaties signed by New Brunswick Aboriginal peoples. Not all groups that signed treaties with the British are recognized today by the federal government under the *Indian Act*. There are at least two Maliseet groups or Bands that were amongst those that entered into a treaty, but are not now recognized as *Indian Act* Bands – those associated with the St. John area (and for whom the St. Croix reserve may have been set aside), and those in the intervening area between today's Oromocto reserve and St. John, and along the Maine border (the Canoose reserve).

After the treaty-making period, the influx of loyalist settlers stood in the way of early treaty implementation. By 1785, Colonial land settlements within New Brunswick, triggered by the American Revolutionary War, occurred with such rapidity and to such an extent along the St. John River valley and the lower Miramichi valley that earlier commitments, laws and proclamations regarding Aboriginal rights became almost entirely disregarded. This fate was only partially redressed with occasional and often haphazard grants of "Indian lands" (as licences of occupation or outright grants), though the only legislative framework established by the Colonial authority was in fact to dispose of such lands for settler purposes.[65] This general lack of attention to or concern for First Nation interests largely persisted to Confederation.

In 1841, Moses Perley recorded in the first census of Indians in the province a total of 1,377 persons associated with an uncertain number of locales (some were county-wide and some village specific). This excluded all of the Chaleur Bay communities of Mi'kmaq, as at the time it was assumed by Perley, if not by the Legislature of New

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[64] As shown by Foster; Borrows; Steckley and Cummins.

[65] Robert Fellow, "The Loyalists And Land Settlement in New Brunswick, 1783-1790, A Study in Colonial Administration," Provincial Archives of New Brunswick. Accessed on February 5, 2015. http://journals.sfu.ca/archivar/index.php/ca/article/viewFile/13044/14283 See Pages 6-9.

Brunswick, that these (notably the Mi'kmaq of the Bathurst Bay, Eel River estuary and Dalhousie area) were a part of the Gaspé district and therefore part of Québec. Up to 1858, Perley recorded a decline in the First Nation population to as low as under 1,000, but otherwise did not disclose locales or reserve-associations.

In 1868, upon the transfer of Indian administration from New Brunswick to the Dominion, Canada inquired how many reserves had been set aside and how they accounted for the number of Indians, but no information was received despite multiple inquiries. In 1873, Canada reported that there had been a transfer of some 21 "reserves" or location tickets or licenses or occupancy for Indians, for some 17 distinct groupings.[66] In 1874, the Province reported that there were 21 reserves set apart for Indians, and it listed its last-recorded census of the populations from 1851, which were mostly organized by county, and partly by site or reserve-specific data. This included approximately 10 recognized groupings, organized into 7 counties and 3 site-specific groups, associated with 21 reserves.

Canada's records in 1869 (the first date for which any federal records exist) show nine Mi'kmaq and four specific or county-based "Amalicite" communities listed by Colonial reports. In 1870, this number grew to 10 organized groups (mostly organized by county), and a year later, to 14, according finally with the number of counties in the Province. Canada decided to reorganize through the appointment of two regional Superintendents (one for the west or Maliseet area, and one for the East or Mi'kmaq area, as well as at least 14 – mostly part-time – agents, one each for the counties involved).[67] This migration of recognized groups to administrative categories suggests that there was no agreed-to regime for organizing Mi'kmaq or Maliseet communities by reserve association. Instead, a county-based system was adopted. The association of these 14 county-based reporting lines (including population, expenditures, etc.) with the 21 reserves was never clear until the early 20th century. There was no evidence of reserve-based association. This feature was subsequently entrenched in the *Indian Act* with Western treaty-based bands in mind.[68]

After Confederation, Canada passed a series of *Indian Acts* to deal with "the Indian Question" without, however, addressing treaty implementation.[69] As a consequence, *Indian Act* Bands in the Maritimes and in the adjacent regions of Quebec have, at least

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[66] Indian Affairs Annual Reports, Secretary of State: Queens Printer: 1874.
[67] Statistics Canada. *Census of Canada 1665 to 1871: Aboriginal Peoples*. Accessed on February 5, 2015. http://www.statcan.gc.ca/pub/98-187-x/4151278-eng.htm
[68] See the Government of Canada's *A History of Treaty-Making in Canada*; Leslie; and Hurley for further context.
[69] Indian and Northern Affairs, "A Historical Development of the Indian Act," August 1976. Accessed on February 5, 2015. http://www.kitselas.com/images/uploads/docs/The_Historical_Development_of_the_Indian_Act_Aug_1978.pdf See Page 13.

until the 1970s, been of two kinds.[70] Some were family-based or broader groups of Indians for whom specific plots of land had been set aside. These lands, unless sold off before Confederation, were transferred from the colonial government to Canada for administration under its new legislation. The legislation tended to do nothing more than administer reserves set apart for such groups of Indians. The second kind amounted to historical recognition as a group of Indians (often simply denoted the "Indians of" a particular locality or country). Some of these latter groups would eventually receive reserve-like lands, while others did not.

In 1883, the total population was noted as "1,509 on reserve" though this figure did include the two recognized Chaleur Bay groups. This was the first time that reference was made to reserve locations as a basis for reporting Indian census figures.

The pattern of historical reckoning of how Mi'kmaq and Maliseet and the Passamaquoddy (who were only referenced once in the data as regards their presence in St. Andrews in reports maintained by the Department of Aboriginal Affairs and Northern Development) were organized is of importance to the study of never-registered groups, as no statistics on this category have been maintained over time prior to or since Confederation. Yet the statistics that have been maintained may be indicative.

In 1949, by which time only the current 15 Bands were recognized, the on-reserve population had increased marginally. For this time, it is unknown how many non-reserve Mi'kmaq and Maliseet there were as there were no estimates provided and the Census, from 1941 to 1981, did not report on Aboriginal origins or identities. However, it is likely that the population only began to increase markedly after World War II.

Outlook for never-recognized populations

For the most part, AANDC has focused on Bands or groups of Indians for whom reserves were created or who lived on those reserves at important times in relation to the maintenance of official "band lists". However, according to AANDC records, there are some 20 bands nationally with no reserves. The Assembly of First Nations has suggested there are double that number – though the AFN has included non-Band communities in their list (e.g., Peerless and Trout Lake in Alberta, for example, which like the Sickadomec Band were added to the "General List" but not accorded Band status because of the lack of a reserve until 2010).

It is useful to compare the experience of others within the Atlantic Provinces. No reserves were recognized as having been set apart for Indians in Newfoundland, but

[70] Gary P. Gould and A. J. Semple, *Our Land: The Maritimes*. [Fredericton: Saint Annes Point Press, 1980]. See Section on Assimilation.

today there are 3 reserves (all created since the 1980s) and 4 Bands (one, the Qalipu First Nation, with no reserves). Before 1982 and the recognition of Aboriginal rights and Treaty rights, there were no Bands as such, under the *Indian Act*, within the province.[71] Did that mean that there were no rights-bearing communities? In fact only two of the Bands now established under the *Indian Act* are held by either Canada or the province as having recognized Aboriginal rights or titles, which again emphasizes the independence of the issue of "Band status" and collective existence in relation to Aboriginal or Treaty rights.

It was not until 1973 that La Nation Micmac de Gespeg was officially recognized as an *Indian Act* Band. Until that time, it was technically an "irregular band" under the *Indian Act* system. The Native Alliance of Quebec was in the process of organizing the band for un-related program purposes and noted its pre-1951 "irregular band" relationship with Canada, and acted to promote its recognition, based in part on records maintained before 1951 of its acknowledged existence.[72] The latter proved of importance to the government, which established the band in law (though without, to date, a reserve).[73] This shows that claims that all Indians in the Atlantic region have already been recognized, are incorrect.[74]

Demographics

The consultant estimated the population of never-recognized First Nation people in the province not to exceed 1,000 in total. The consultant further noted that 1,000 or so persons, perhaps organized into 3-5 communities, is considerable, especially since at least four Bands in the province number under 250 and the modal average of the Band population in the province of 15 bands is just over 1,200, with an average of 680 or so living on reserve. We have not been able to independently confirm this estimate, though it seems not unreasonable.

NBAPC has conducted preliminary historical claims research beyond that filed in 1999, and an assessment of the Holmes' materials, together with the original submissions by

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[71] David MacKenzie, "The Indian Act and the Aboriginal Peoples of Newfoundland at the Time of Confederation," *Newfoundland and Labrador Studies* 25, 2(2010). Accessed on February 5, 2015. http://journals.hil.unb.ca/index.php/nflds/article/view/18351/19794

[72] Groves, *supra* note 19 at 154 & 168.

[73] The Quebec Government opposes any new reserve creations within its territories.

[74] The most prominent examples of this attestation being undermined includes four: the Conne River Band (Miawpukek First Nation), established in 1984, the two Innu bands established as such, with reserves, in 2002, and the Qalipu First Nation in Newfoundland, which had sought recognition in the late 1970s and then entered into out-of-court negotiations in the early 2000s, and was recognized by an Order in Council in 2011, and now forms the largest by population Band in the country, but without any reserve lands.

NBAPC/UNBI and MAWIW Council, suggests that the Passamaquoddy community of St. Stephen – in part represented by Chief Akaji and in part by NBAPC – should be recognized as a modern day 1760/1812 treaty community. That does not mean they have to be accepted as or indeed even wish to be a "Band" under the *Indian Act*. But it does mean they, and the Passamaquoddy constituents, are entitled to be included in the current Treaty and Aboriginal Rights process with Canada and New Brunswick.

In summary, there are at least three and perhaps five surviving, viable Mi'kmaq, Maliseet, or Passamaquoddy communities in the Province. Two of those are Mi'kmaq, one is Passamaquoddy, and two others are Maliseet or a mix of Maliseet and Passamaquoddy. These are the surviving irregular bands or "never-registered" Indian groups in the Province.

Representation

The consultant attempted to conduct a survey of representational wishes for the populations in Group 4, but found it impossible to do so in the available timeframe. It appears to us that the documentary record should be amplified through field work in the five communities to obtain a more holistic picture of the communities. Group 4 shows that the process of recognition and representation are not separate, but are in fact dynamic and interrelated. Without organizational structures, it is not possible for communities to gather the information that would permit for their recognition as an Aboriginal community, and absent consultation, it is not possible for individuals to self-identify and be recognized. We therefore recommend that NBAPC, AANDC and the Province continue their research efforts for these populations and in particular we would suggest that field work be conducted in each community.

RECOMMENDATION 4

We recommend that NBAPC apply for research funding to conduct successive field research to engage with members of each of these never recognized communities.

Glossary of Terms

AANDC	Aboriginal Affairs and Northern Development Canada (previously DIAND, INAC)
Aboriginal	Canadian indigenous person as referenced in s. 35 of the Constitution Act, 1982
Band	Indigenous group recognized by Canada under the Indian Act; may have one or more reserve lands set aside for them
First Nation	Synonym for “Indian”
First Nations Community	Synonym for “reserve”
Maliseet	Wolastoqiyik; Aboriginal people of the Wolastoq (St. John) river valley; Malecite, Amalecite are historical transliterations
Mi’kmaq	Aboriginal people of Mi’kma’ki territory, other transliterations include Micmac and
NBAPC	New Brunswick Aboriginal Peoples Council
Non-status Indian	A person who self-identifies as Aboriginal (but not as Inuit or Metis), who has an ancestral connection to one or more of the First Peoples and who is recognized by an Aboriginal community, but who is not a registered Indian
North American Indian	A person who self-identifies as a North American Indian on Statistics Canada surveys
Reserve	Land set aside for an indigenous community under s. 91(24) of the Constitution Act, 1867
Status Indian	A person who is registered or who is eligible to be registered under the Indian Act
Wolastoqiyik	Synonym for “Maliseet”

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Appendix A - NBAPC Constitution and By-laws

Constitution

STATEMENT OF GOVERNANCE PRINCIPLES

From time immemorial, Mi'kmaq, Maliseet and Passamaquoddy peoples occupied territory including what is now known as the Province of New Brunswick. Bound together through nation-to-nation relationships, kinship connections and friendships, our Aboriginal nations lived together harmoniously, sharing freely the bounty and lands that the Creator provided for us. We were self-governing and self-sufficient.

In the 17th and 18th centuries, we welcomed to our land newcomers from Europe and entered into Treaties of Peace and Friendship with them, agreeing to live together in harmony, but preserving for ourselves our lands, cultures, traditions and rights. Our Aboriginal nations remained internally self-governing and the European settlers promised to respect us, our rights and our lands. In turn, we allowed them to share some portion of our land and its bounty and respected their right to govern themselves. We agreed to work together in a spirit of peace and friendship to resolve any issues of conflict or shared management.

Over time the European settlers forgot their promises, treating our land as their own and failing to respect the covenant chain of Peace and Friendship between our nations. However, the Mi'kmaq, Maliseet and Passamaquoddy peoples have never surrendered our ancestral lands or our Aboriginal and Treaty rights, all of which are now protected and preserved in the Constitution of Canada.

Some members of our nations live on reserves created and set apart by the Government of Canada. Others of our nations continue to live throughout the Province of New Brunswick, undisplaced to Indian Act reserves. These off-reserve Aboriginal people live in communities throughout the Province of New Brunswick, exercising their rights of self-identification and community acceptance.

Our off-reserve Aboriginal communities are organized by Zones. In recognition of our traditional leadership roles, each Zone has a leader respected as the Sakomahsis or Sagamawjij. The principal leader of the Council is the Sakom or Sagamaw. Please see the glossary of terms attached for a fuller explanation of these and other terms.

Off-reserve Aboriginal people, whether status Indians under the Indian Act or not, are the beneficiaries and holders of the Aboriginal and Treaty rights, and Land Claims, of their nations. The nations of Mi'kmaq, Maliseet and Passamaquoddy peoples remain self-governing within the context of the Constitution of Canada. These off-reserve Aboriginal people are represented by and have combined together within the New Brunswick Aboriginal Peoples Council.

The New Brunswick Aboriginal Peoples Council constitutes a community of off-reserve Aboriginal people in New Brunswick. The Council provides programs and services, including advocacy services, on behalf of off-reserve Aboriginal people in New Brunswick. The federal Indian Act is irrelevant to issues of membership, community participation or beneficiary entitlement.

The Council is duly mandated to represent to all other levels of government, and to protect and preserve forever, the Aboriginal and Treaty rights, including Land Claim rights, of the Off-reserve Mi'kmaq, Maliseet and Passamaquoddy people of New Brunswick. These rights have existed from time immemorial and must continue to exist for our children and their children's children forever. The Council is also mandated to protect the right of off-reserve Aboriginal people to have direct representation to government through the Council.

Membership is required before an Aboriginal person in New Brunswick can be active politically in the Council and for certain programs, services and benefits. However, membership in the Council is not necessary for an off-reserve Aboriginal person in New Brunswick to be a beneficiary of Aboriginal or Treaty Rights or Land Claims or to be a member of an off-reserve Aboriginal community in the Province.

The Council recognizes that the off-reserve Aboriginal people are a vital constituent part of the Mi'kmaq, Maliseet and Passamaquoddy nations of New Brunswick and pledges to work with other organizations to promote equality and fairness in the treatment of all members of the nations.

Without limiting our Constitution and its governance principles, for the purpose of the legal requirements of the Societies Act of the Province of New Brunswick, we make the following bylaws:

1. The name of the society is: THE NEW BRUNSWICK ABORIGINAL PEOPLES COUNCIL (hereinafter called: the Council).

2. The aims, goals and objectives of the society are:

    A. To provide an organization for off-reserve Aboriginal People in New Brunswick for the purpose of advancing their cultural, traditional, economic and general living conditions.

    B. To work together toward reaffirmation, protection and implementation of our Aboriginal, Treaty and Land Claim Rights as Aboriginal People of New Brunswick.

    C. To work with all levels of government, public and private agencies and private industry to improve social, educational and employment opportunities for people of Aboriginal Ancestry of New Brunswick.

D. To foster and strengthen cultural identity and pride among people of Aboriginal Ancestry in New Brunswick.

E. To inform the general public of the special needs and rights of the people of Aboriginal Ancestry of New Brunswick and of their efforts to achieve full participation in the economic, social and political life of the Province.

F. To co-operate with all other Aboriginal Organizations whose aims are similar to those of this society.

The By-laws

1. MEMBERSHIP:

A. FULL MEMBERSHIP: In the Council shall be open to persons of Aboriginal Ancestry 16 years of age and older and who ordinarily reside in New Brunswick and not on a Reserve. Only a Full Member shall be eligible to vote at Assemblies or Special Meetings or to hold elective office at the Executive or Board of Director level of the Council. To be eligible for Full Membership, the Aboriginal person must

i) Application for Full Membership must be made at the community local level and forwarded to the Membership Clerk at Head Office with recommendation for approval.

ii) Be ordinarily resident in New Brunswick, off a Reserve, for six (6) months prior to applying for Membership;

iii) Meet the requirements of Membership and must fill out and have approved a Membership form prescribed for such purposes;

iv) Be a descendant of a verified and known Aboriginal person since July 1st, 1867.

v) Documents to support Aboriginal Ancestry must be certified. Photocopies of the certified documents shall be made by the Membership Committee and certified documents returned thereafter to the applicants.

vi) Requests for new membership to be acted within a 90-day period. Withdrawing memberships to be processed within a 90-day period.

B. SPOUSAL MEMBERSHIP: Shall be open to the spouse of a Full Member. No formal Membership Application is required for Spousal Membership but Spouse is name shall be included in the Annual Charter list from Community Locals. Spousal members shall not be eligible to vote at Assemblies or Special Meetings or to hold elective office at the Executive or Board of Director level of the Council.

C. MEMBERSHIP IN GOOD STANDING: A Member in Good Standing is any Aboriginal person eligible for Full Membership in the Council and who subscribes to the aims, goals and objectives of the Council. A Member in Good Standing is also required to pay their annual membership fees as provided for in section 1.K. of Council's Constitution and By-Laws. The annual membership fee for each membership category must be submitted on or before April 1st of each year. Members in Good Standing include Full members, Non-Resident Members and Lifetime Members which all carry the full range of participatory and voting rights allowed under this Constitution and By-Laws for Members in Good Standing.

D. MEMBERSHIP LIST: Each member in good standing shall have their name added to an annual membership list that shall be maintained and prepared by the Council by the 15th day of April each year. Such lists shall be sent to all Chartered Locals by the 30th day of April of each year.

E. ASSOCIATE MEMBERSHIP: Shall be open to those persons who wish to support the Council but who are not eligible for full membership. Associate Members shall not be entitled to vote and hold elective office at the Executive Committee or Local Level of the Council or on the Board of Directors. Associate Members shall not be entitled to vote at the Annual Assembly.

F. YOUTH MEMBERSHIP: Shall be open to those persons who are the children of the Full Members but cannot apply because of the age limit. Youth members will be entitled to membership cards and shall not be entitled to vote or hold office at the community local level, zone level or at the provincial level of NBAPC.

G. NON-RESIDENT MEMBERS: Shall be open to those who were Full Members of the Council, but have since moved out of the Province of New Brunswick. Non-Resident Members will be required to pay an annual membership fee of $5.00 directly to their Locals on or before April 1st of each year. Non-Resident Members will be considered members in good standing and entitled to the same constitutional rights as regular members, except where specifically provided in this section. Non-Resident Members shall be entitled to vote and run for elected office at the provincial level (President and Chief and Vice-Chief), vote at AGM's, vote in the universal suffrage process and any special meetings or referendums.

For Clarification, Non-Resident Members may also put forward Notices of Motion and Resolutions for the AGMs as well as attend AGMs as delegates. Each year, the Board of Directors shall determine whether and to what extent any financial assistance can be provided to Non-Resident Members in order to attend the AGM, referendums or special meetings of the Council. Should limited or no funding be available for Non-Resident Members to attend these meetings, they will still hold their constitutional rights to attend, vote, bring forward resolutions, etc., but will be responsible for their own travel and other-related expenses. In the event that a Non-resident member runs for and is elected as President and Chief or Vice Chief, they will be required to relocate to the general locality of the Head Office of the NBAPC (for the position of President and Chief) or to the

province of New Brunswick (for the position of Vice-Chief) and will be responsible for their own relocation expenses.

H. LIFETIME MEMBERSHIP: May, at the discretion of an Annual General Meeting by way of a motion, be granted to Full Members whose efforts on behalf of the People of Aboriginal Ancestry warrant such recognition. Lifetime members shall be voting delegates at each special or Annual General Meeting of the Membership or in the Universal Suffrage process or referendums. Lifetime Membership can only be removed by way of a motion at an Annual General Meeting.

I. HONORARY MEMBERSHIP: May, at the discretion of the Council, be granted to any persons whose efforts on behalf of the People of Aboriginal Ancestry warrant such recognition.

J. SUPPORTING MEMBERSHIP: Individual people, churches, businesses and other organizations who wish to support our work may obtain a Supporting Membership upon payment of an Annual Fee of $25.00, but such members will have no voting rights. It is a direct membership in the Council rather than in our Locals.

K. ANNUAL FEES: Each Community locals must pay an annual charter fee of $25.00 per local. Each individual member of a community local, as well as youth members must also submit an annual membership fee of $1.00 to their local executive for submission to the Council. Each Non-Resident member must submit their $5.00 annual membership fee directly to their Locals. Supporting members must pay an annual membership fee of $25.00 (Twenty-five dollars) directly to the Head Office of the Council. Lifetime members are not required to pay annual membership fees, nor are Spousal, Associate or Honorary members. All fees must be submitted on or before April 1st of each year.

L. Membership Cards: All Full Members of the Council shall be entitled to a membership card.

2. COMMUNITY LOCALS:

A. Any five or more persons residing in the same locality and who are eligible for Full Membership in the Council may form a Community Local.

B. Every Community Local shall have the right to levy an Annual Membership Fee.

C. Every Community Local shall have the right to send up to 10 delegates and where possible include one youth and one elder, to Annual Meetings and Special Meetings of the Council, provided that only Full Members shall have the right to vote at such meetings.

D. Every Community Local shall maintain accurate lists of its members and shall make such information available to the Head Office.

E. All Community Locals are required to hold an Annual Local Meeting in the First Quarter (January, February or March) of each calendar year to elect its Officers, including a Community Local Youth Representative (who may or may not have to be a youth). Minutes and attendance of this Annual Meeting shall be sent to the Head Office at least a week before the annual general meeting. Any Community Local that does not comply with this By-Law will have revoked their right to send delegates to the Council's Annual Assembly or Special Meetings.

F. No Member shall belong to more than one Community Local.

G. A new Community Local cannot be formed within a ten (10) mile radius of an existing community local and members should, except where otherwise authorized by the Board of Directors, belong to the Community Local in the area of their residence.

3. OFFICERS OF THE COUNCIL:

A. The Executive Officers of the Council shall consist of a President and Chief and Vice-Chief. The Executive Officers shall be elected through a universal suffrage process. The President and Chief and Vice-Chief shall constitute the Executive Committee of the Council.

B. The Executive Officers and Board of Directors must be Full members of NBAPC and be at least nineteen years of age on or before the date of the election.

C. The position of President and Chief shall be a full-time paid position. The position of Vice-Chief will be a non-salaried position.

D. The term of office for the President and Chief shall be for a period of two (2) years. The term of office for the Vice-Chief is two (2) years.

E. Any person that runs for any executive position, within the Council, cannot have a criminal record involving a conviction for fraud, embezzlement or theft or any indictable offence, unless that person received an absolute discharge or conditional discharge of their sentence or has been pardoned or unless the conviction resulted from conduct in the line or duty for the Council as a result of formally sanctioned activity authorized by Board motion for the protection or assertion of Aboriginal rights, such as a protest activity. Any person running for an Executive position must provide the Chief Electoral Officer with a current (dated within 60 days before nomination deadline) abstract of their criminal record along with their nomination papers.

F. All nominees must be present at the Annual General Assembly.

G. In the event of a vacancy in the office of the Vice-Chief caused by the resignation, illness, death or lack of capacity for any reason of the Vice-Chief, including his/her removal from office by reason of disciplinary action pursuant to the Constitution and By-Laws, and/or his/her inability, failure or refusal to perform his/her duties, the Board of Directors shall, by way of motion, decide whether to fill the vacancy immediately or wait until the next regular election. Should the remainder of the Vice-Chief's term be no more than 6 months, then the Board of Directors may, by way of motion, decide to immediately fill the position of Vice- Chief through appointment or vote. Should the remaining term of the Vice-Chief be greater than 6 months, then the Board of Directors shall, by way of motion, direct the immediate commencement of the Electoral Process as set out in section 4 of this Constitution and By-Laws in order to fill the vacancy of the Vice-Chief's position until the next regular election.

4. ELECTORAL PROCESS

A. An Electoral Commission of three persons shall be chosen by the Assembly prior to each election year to administer the Councils Electoral Process. The Board of Directors shall, at the fall board meeting of that same year, establish a budget for the operation of the Electoral Commission.

B. The Electoral Commission shall have the responsibility and authority for the administration of the election of the President and Chief and the Vice-Chief of the Council through a process of universal suffrage.

C. The Electoral Commission shall appoint the Chief Electoral Officer who shall be responsible to the Electoral Commission and shall file a report to the Annual General Assembly and release the results of the election.

D. The election of the President and Chief shall be carried out during the first quarter of every second fiscal year, sixty (60) days prior to the end date of the AGM for that year. The election of the Vice-Chief shall be carried out during the first quarter of every second fiscal year, sixty (60) days prior to the end date of the AGM beginning in 2010.

E. In the event of a vacancy in the office of the President and Chief caused by the resignation, illness, death or lack of capacity for any reason of the President and Chief, including his/her removal from office by reason of disciplinary action pursuant to this Constitution and By-Laws, and/or his/her failure, refusal or inability to perform his/her duties for a period of time exceeding 3 months (except in the case of resignation, death, removal from office, etc., where immediate action would be taken) the Board of Directors shall, by way of motion, direct the immediate commencement of the Electoral Process as set out in section 4 of this Constitution and By-Laws. During the time in which there is a vacancy in the position of President and Chief, the Vice-Chief will act only until such time as a proper election has been held. It is expected that any temporary absences (such as illnesses) by the President and Chief, which are less than 3 months in duration, would be filled by the Vice-Chief as per section 6.D. of this Constitution and By- Laws.

F. Formal intention and nomination papers shall be filed by all those seeking election, no later than to sixty (60) days prior to the end date of AGM. The election process shall end at the Annual General Assembly and the results be announced by the end of the meeting. It would still remain Sixty (60) days in total.

G. The Electoral Commission shall ensure that each eligible voter has a ballot and return stamped addressed envelope available to them and shall establish rules and regulations for the conduction of the election, shall ensure that the electoral roll is maintained and shall count all votes cast and report the results to the Community Locals.

Eligible voters:

i) All off-reserve Aboriginal people who would meet the Membership criteria and who have applied to be on the voter's list at least thirty days prior to the Annual General Assembly.
ii) All Full Members are entitled to vote, whether or not they are in good standing and should receive a ballot automatically for election of President and chief and Vice-Chief. These members of the New Brunswick Aboriginal Peoples Council will have their names placed on the voter's list, and that any other off-reserve Aboriginal people who apply to be on the voter's list must show proof of address to the Chief Electoral Officer.

H. The Electoral Commission members shall receive no salary but shall have any expenses covered by the Commission.

I. Any member of the Electoral Commission who decides to run as a candidate shall resign from the Electoral Commission and the Board of Directors shall appoint a replacement.

5. BOARD OF DIRECTORS:

A. The Board of Directors shall consist of:

i. The Executive Officers of the Council.

ii. Seven (7) Zone Directors and 1 Youth Member: The seven (7) Zone Directors shall be elected in their respective zones during the first quarter of the fiscal year (April, May or June) and for this purpose the Province shall be divided into seven (7) Zones with a Director elected from each Zone. (See attached map). The youth Director shall be elected at an Aboriginal Youth Annual General Assembly.

iii. In the event that no Director is elected from a Zone or from the NBAPC-YC, the Annual General Assembly shall have the power to elect a Director at Large to fill any vacancy on the Board including youth director at large.

B. The term of office of Directors is for two years after the conclusion of the Annual General Meeting. Directors shall be elected for rotating terms so that 2 of the Board will

be replaced each year.
(In the even years, i.e. 2004, 2006, the even numbered zones, 2, 4 & 6 would elect their representatives and in odd years the odd numbered zones, 1, 3 & 5 would elect their representatives.)

C. Any person who is elected to a Board of Director's position cannot have a criminal record involving a conviction for fraud, embezzlement or theft or any indictable offence, unless that person received an absolute discharge or conditional discharge or has been pardoned has 30days after the Annual General Meeting to provide an abstract of their current criminal record check this is no older than 30 days in order to accept the position they are elected to as Board of Director.

D. Directors are to submit written reports to:

1. The Annual General Assembly;

2. To all Community Locals in their respective Zones following each and every Board Meeting.

E. Upon the President and Chief of the Council receiving a formal written complaint from the majority of Community Locals in the affected Zone, any Director failing to comply with these requirements shall lose their status as a Board of Director.

F. In the event that a vacancy occurs on the board, the Executive of the Council shall within 30 days of the vacancy occurring schedule a Zone meeting for the purpose of electing a Director to fill any vacancy. All Community Locals in that Zone shall be notified by registered mail of any Zone meeting called for the above purpose.

F. For purposes of transacting business, a quorum of the Board of Directors shall be 50% + 1 of the members of the Board.

G. Any director missing more than two consecutive Board Meetings, without sufficient reasons, will be asked to resign as Director.

H. The Executive Committee will notify all Community Local Presidents by Registered Mail of any major decisions that the Board of Directors shall be asked to deal with between Annual General Meetings that will affect the Community Locals, Members or the financial status of the Council.

I. No Member may be a Board of Director if he/she is not of proven aboriginal ancestry, under the age of nineteen or if he/she is of unsound mind and has been found so by a court in Canada or elsewhere.

6. DUTIES OF OFFICERS AND BOARD OF DIRECTORS:

A. The Board of Directors shall be responsible for determining the overall policy of the Council and for such purpose shall meet at least twice a year at such time and such

place as a majority of its members determine. Meetings of the Board of Directors may be held by conference call. The Board shall review all major decisions of the Executive Committee and shall have final authority on all matters affecting the Council between Annual Meetings. The Board shall appoint legal counsel, auditors and make all other arrangements for conducting the financial transactions of the Council. Cheques of the Council shall be signed by any two of the President and Chief, Vice-Chief or, the Financial Officer.

B. The Zone Directors are to attend meetings, on request, in their respective Zones. Each Zone Director shall reside in the area, which he or she represents throughout his/her term of office or shall be deemed to have resigned. Zone Directors must call a Zone Meeting 30 days prior to a Board of Directors Meeting.

C. President and Chief: The President and Chief of the Council shall be the Chief Executive Officer and is responsible for the day to day management of the affairs and operations of the Council. He or she shall preside as Chairperson at the Board of Directors, Executive Committee and any other meetings of the Council. The President and Chief shall be an ex-officio member of all Committees or Boards of the Council. The President and Chief shall report to the Council through the Annual Assembly and between Assemblies to the Board of Directors. The Chairperson of a meeting shall not have a vote except in the case of a tie.

D. Vice-Chief: The Vice-Chief of the Council shall be authorized to perform all the duties and functions of the President and Chief whenever the President and Chief is out of the Province, is on vacation, or is incapacitated, and shall do so until such time as the President and Chief returns or is capable of assuming his/her duties again. The Vice-Chief shall serve as the main communication link with the Community Locals, Zones and Membership of the NBAPC and will be responsible for attending Community Local and Zone Meetings, for publication of the Mal-I-Mic News, for maintaining and monitoring the membership process, the Planning Committee for the Annual Assembly and for the Annual Children's Summer Camp. The Vice-Chief, along with the President and Chief, shall be one of the signing officers for the Council. The Vice-Chief shall report to the President and Chief and Board of Directors of the Council.

E. Financial Officer, a full time paid position, hired through policy and procedure, shall give or cause to be given, all notices required to be given to the general membership of the Council, Directors, Auditors and legal counsel.
The Financial Officer shall attend all meetings of the Directors and of the general membership and shall enter, or cause to be entered, in the books kept at the Head Office of the Council for that purpose, minutes of all proceedings at such meetings.
The Financial Officer shall be the custodian of the stamp or mechanical device generally used for affixing the corporate seal of the Council and of all books, papers, records, documents and other instruments belonging to the Council.
The Financial Officer shall further keep, or cause to be kept, at the Head Office of the Council, full and accurate books of account in which shall be records of all receipts and disbursements of the funds of the Council.

The Financial Officer shall render, or cause to be rendered, to the Board at the meetings thereof, or whenever required, an accounting of all financial transactions undertaken by the Council.
The Financial Officer shall be one of the signing officers of the Council.
The Financial Officer shall be responsible for the administration of NBAPC's Education Program

F. No Director or Officer of the Council shall be liable for the acts, neglects or defaults of any other Directors or Officers, or for the insufficiency or deficiency of any security, in or upon which any of the monies of the Council shall be invested, or for any loss or damage arising from the bankruptcy, insolvency or tortuous act of any person which whom any of the monies, securities or effects of the Council shall be deposited, or for any loss occasioned by error or judgment or oversight on his part, or for any other loss, damage or misfortune what ever which shall happen in the execution of the duties of his/her office or in relation thereto unless the same shall happen through his own dishonesty.

7. DISCIPLINE OF OFFICERS:

A. Executive Officers and the Board of Directors shall, upon assumption of office, sign a declaration of office as set out in Schedule A of the Constitution and By- Laws.
B. Any Member of the Board of Directors found not to be fulfilling their role as a board member and action outside of the mandate given by the AGM without just cause is held accountable at the Zone, by way of motion and vote of non- confidence. This motion may come from the floor at any zone meeting and where 50% plus one of all zone members are present. 50% plus 1 of the members present must vote in favour of the motion in order for it to pass.

1. VOTE OF NON-CONFIDENCE:

A. Notwithstanding any other provision of the Constitution and By-Laws of the NBAPC, the Membership of the NBAPC has the power to remove the President/ Vice-President and/ or the Vice-President/ Vice-Chief of the NBAPC at an Annual General Meeting (AGM) of the NBAPC by way of a vote of non-confidence, triggered by duly moved and seconded resolution at the AGM. At minimum of two-thirds (2/3) of the delegates registered to vote at the AGM must vote in favor of the resolution in order to effectively remove the named individual from his/ her position as President/ Chief and/ or Vice-President/ Vice-Chief prior to the expiration of their term of office.
B. In the event of the removal of the President/ Chief and/ or Vice-President/ Vice-Chief from their term of office, the President/ Chief and/or Vice-President/ Vice-Chief shall be entitled to be reimbursed for any legitimate outstanding travel claims submitted within 7 days of their removal and will also be provided with one month's worth of salary. No further claims for salary, benefits, overtime, sick leave or otherwise will be permitted.

C. Any person removed from the position of President/ Chief and/ or Vice-President/ Vice-Chief prior their term of office pursuant to this section will not have any right whatsoever to bring any legal and/ or other claims as against the NBAPC, its Board of Directors and/ or the Membership of the NBAPC arising from their removal from office pursuant to this section.
D. Immediately upon the removal of the President/ chief and/ or Vice-President/ Vice-Chief, the position(s) will be considered vacant and the relevant sections of the Constitution and By-Laws of the NBAPC dealing with vacancies and elections will be triggered.
E. Should a President/ Chief and/ or Vice-President// Vice-Chief be removed from their position prior to the expiration of their term of office pursuant to this section, that individual will not be permitted to offer their candidacy for the positions of President/ Chief and/ or Vice-President/ Vice-Chief for a minimum of four (4) years from the date removal.

8. DISCIPLINE OR PROHIBITED ACTS:

Every member of the Council is guilty of an offence against the Constitution and By-Laws of the Council who:

A. Makes allegations and accusations against the Council that are found not to be true.
B. Requests or solicits Government agencies to withdraw financial support to the Council.
C. Fails to account for any funds in his or her care or commits theft or fraud against the Council.
D. Does anything to harm the Council.
E. Behaves in a way harmful to the interest of his or her fellow members.
F. Fails to uphold the Constitution and By-Laws of the Council.

9. OBLIGATIONS, SUSPENSIONS AND EXPULSION OF MEMBERS:

A. Acceptance of membership in the Council shall bind the member to accept and abide by the provisions of the Constitution and By-Laws of the Council.
B. A member of the Council may be charged with any violation of the Constitution and By-Laws of the Council. Charges shall be made in writing and delivered to the Chairman of the Membership Committee.
C. The Executive Officers shall investigate each charge and in the cases of minor offenses may take disciplinary action by reprimand or caution. In cases that might warrant suspension or expulsion from the Council, the Executive Officers shall submit their findings and recommendations to the Board of Directors.
D. The Vice-Chief shall give immediate notice in writing to any member against whom a charge has been preferred, of the particulars of such charge and also shall give reasonable notice to the member concerned, of the date, time and place at which the hearing of the charge shall take place, together with such further notices as may be necessary to dispose of the charge completely.

E. If a member against whom a charge has been laid does not attend the hearing as required, the hearing may proceed in his absence.
F. The Board of Directors may, by a majority vote of those present, suspend the member for a stated period or indefinitely. The Board of Directors may, by a two-third (2/3) vote of those present, expel a member.
G. The member so charged shall forthwith be notified by registered mail of the decision of the Board of Directors.
H. The member suspended or expelled shall have the right to appeal the decision of the Board of Directors to the membership at an Annual Assembly by giving 30 days notice in writing of such appeal prior to the Annual Meeting of the Membership.
I. The general membership may, by a two-third (2/3) vote of those members present at the Annual Meeting, reinstate the member.

10. REINSTATEMENT OF MEMBER:

The Board of Directors may, by a majority vote of those present, reinstate a member who has been suspended on the following terms and conditions:

i) The member gives a formal public apology to the membership at an Annual Assembly; and
ii) If applicable, give a written apology to any affected private and/or government agencies.

11. ANNUAL ASSEMBLY:

A. An Annual General Meeting (AGM) of the Council shall be held every year, at such time and place as determined by the Council's Board of Directors. Written Notice of the time and place for the AGM shall be given to all Members in Good standing no later than 60 calendar days prior to the AGM. For the purposes of transacting business at the AGM, a quorum shall consist of 50% + 1 of the delegates registered for the AGM.

B. All Community Locals entitled to send delegates to each Annual Assembly or Special Meeting shall submit to the Council a list of its delegates and alternates (including one youth and one elder), 30 days prior to each Annual or Special Meeting of the Membership, on such forms as may be required from time to time. Any Community Local failing to submit its list of delegates and alternates shall not be entitled to send voting delegates to the Council's Annual or Special Meeting of the Membership but may send delegates as non-voting observers. The Board of Directors are voting delegates, over and above the allotted ten per community local delegates.

C. Any delegate to the Annual Assembly or Special Meeting of the Membership must be a member of the Council 30 days prior to such meetings.

D. Delegates must bring an AGM docket back to the community local for information purposes. The community local executive shall keep these dockets.

12. AMENDMENTS:

Amendments of the Constitution and By-Laws of the Council can only be made at an Annual Assembly with a 2/3 majority vote of the registered delegates and only after a 30-day written notice has been given to all Community Locals.

13. NON-PROFIT CHARITABLE COUNCIL:

A. The Council shall be a non-profit charitable organization.

B. In the event that the affairs of the Council are terminated, all remaining assets after dissolution and after paying all liabilities shall be distributed to one or more recognized charitable organizations in Canada with objects and purposes similar to the Council.

C. The affairs of the Council shall only be terminated with the approval of the membership at a meeting called for such purpose.

D. The fiscal year of the Council shall be April 1st to March 31st of the following year.

E. The Council may borrow for purposes of carrying out its operations, but only upon a special resolution authorizing same approved by the Board of Directors, having consulted in writing with the Community Locals in their respective Zones, and having received authority to do so from the Community Locals in their Zone.

F. At no time shall the Board of Directors authorize or approve deficit budget planning for any of the Council's programs.

14. HEAD OFFICE:

A. The Head Office of the Council is at 320 St. Mary's Street in Fredericton, New Brunswick.

B. The Head Office is the home of the Council and one of the most important assets owned by the Council.

C. The Executive Officers, Board of Directors, or Community Locals of the Council shall not mortgage, lien, change, encumber, sell, dispose or in any way deal with the Head Office property, located at 320 St. Mary's Street, Fredericton, New Brunswick, unless proper approval for such action has been obtained by passage of a motion by a majority of the eligible voting members present at an Annual Assembly, which notice shall be given at least 30 days prior to the Annual Assembly.

Appendix B

Survey results on representational wishes for members of the Harquail Clan (Sickadomec)

Option	**Number**	**Percent**
I am satisfied with being represented by one of the *Indian Act* bands involved in the current (2011) umbrella accord	4	2.4%
I wish to be represented by NBAPC	16	9.4%
Through a joint body or Council of NBAPC and the Band Chiefs	11	6.5%
I want to be involved in a different way, such as through a traditional council or clan (in all cases, the Harquail clan)	139	81.8%
Total	170	100%