Final Paper

Urban Aboriginal People and the Honour of the Crown – A Discussion Paper

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URBAN ABORIGINAL PEOPLE AND THE HONOUR OF THE CROWN - A DISCUSSION PAPER

Jula Hughes and Roy Stewart[1]*

INTRODUCTION

Aboriginal people in Canada are urbanizing along with other Canadians and, in fact, the global human population.[2] Empirical research suggests that Aboriginal people thrive in the urban environment. Despite this, a strong mythology persists that imagines the Aboriginal person as residing in rural settings, usually on a remote reserve. By contrast, the urban landscape is described as hostile and fundamentally unsuited to Aboriginal living.[3] The mythology persists because there is a lack of awareness about the needs, aspirations, contributions and social structures of urban Aboriginal populations in Canada. In this paper, we explore whether governmental mechanisms developed in the context of the constitutional duty to consult with Aboriginal peoples should be mobilized to improve awareness about urban Aboriginal populations and governmental responsiveness to their needs and aspirations. We discuss the legal framework of the duty to consult, the conceptual and practical challenges in making the duty to consult work for urban Aboriginal people and we point to areas where further research is required. The research is being conducted under the auspices of the Urban Aboriginal Knowledge Network Atlantic ("UAKN").

The UAKN promotes knowledge and research about urban Aboriginal populations in Canada. It challenges the prevailing mythology and emphasizes the lived reality of the majority of Aboriginal people in Canada, as people who live connected to their Aboriginal heritage and culture in the context of an urban setting. With the goal of contributing to a better quality of life for urban Aboriginal people.

This project brings together research on urban Aboriginal populations, institutions, and political structures with research on the legal doctrine of the duty to consult. It queries whether the duty to consult has application to urban, off-reserve populations and if so, how this duty should be conceptualized. The present paper attempts to lay the groundwork for this research by describing some of the organizations representing urban Aboriginal people and/or providing services to them in Atlantic Canada, setting out the existing case law, state of the jurisprudence and academic commentary, and by putting forth areas where further research will be required.

The research is community-driven. Organizations such as Friendship Centres and Native Councils across Canada recognize membership, provide services to, advocate for, and represent urban, off-reserve Aboriginals. In Atlantic Canada, there are seventeen organizations that are members of the UAKN. These organizations and others bridge many of the gaps left by a legal and social regime that is focused provincially on non-Aboriginal populations or federally on the on-reserve Aboriginal

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[1]*Dr. Jula Hughes is an Associate Professor of Law and Roy Stewart is an urban Aboriginal second-year law student at the University of New Brunswick. The authors wish to honour and acknowledge that the work presented in this discussion paper has been made possible by the support and advice of UAKN Atlantic community partner organizations and their representatives. We are profoundly grateful to Wendy Wetteland and Sacha Boies-Novak and the New Brunswick Aboriginal Peoples Council, Gary Gould and Skigin-Elnoog Housing Corporation, Jamie Thomas and Carolyn Taylor and the Native Council of PEI, Chris Sheppard and Brianna Tulk and the St. John's Native Friendship Centre, John Webster and the Aboriginal Community Career Employment Services Society (Vancouver), Chris George and the St. Thomas University First Nation Initiative, Patsy McKinney and Under One Sky Head Start, Monoqonuwicik-Neoteetjg Mosigisig Inc. , Amy Hudson and the Nunatukavut Community Council, David Newhouse, Chair of Indigenous Studies, Trent University, Joanne Marquis-Charron and the New Brunswick Department of Post-Secondary Education, Training and Labour, and Pam Glode-Desrochers and the Mi'kmaq Native Friendship Centre (Halifax). All quoted statements of community partners have been verified and authorized. Authorizations are on file with the authors. The authors gratefully acknowledge the funding support received by SSHRC, the UAKN Atlantic, the UNB Faculty of Law and the Office of Research Services at St. Thomas University. Without their support, this research would not have been possible. Thank you to Dr. Verlé Harrop, Prof. Vanessa MacDonnell and the anonymous peer reviewer for very helpful comments on earlier versions of this paper.

[2] David Newhouse and Evelyn Peters, eds. *Not Strangers in These Parts: Urban Aboriginal Peoples*. Ottawa: Policy Research Initiative, 2003 at 5.

[3] David Newhouse, "Against Lack: Urban Aboriginals in Cities and Towns" Public Lecture. Faculty of Law, UNB, Fredericton May 15, 2014.

populations. This research is driven and supported by community partners who identify particular research needs and who are intimately involved in the research projects. In the words of one community partner:

> We [Aboriginal people] have been studied from every possible angle imaginable. There is already a ton of literature that exists out there on us, however, I realize there is only a small portion of it that is actually authored by us. The Urban Aboriginal Knowledge Network has created legitimate research opportunities for us, to examine where we are, for us to explore issues from our own standpoint, and to stop being someone else's subject, and become the authors of our own data.[4]

The lack of government consultation in the design, maintenance and termination of social, educational, employment and housing programs has profound effects on the lives of urban Aboriginal people. For example, former chief of the New Brunswick Aboriginal Peoples Council and current general manager of the New Brunswick Aboriginal Housing Corporation Skigin-Elnoog, Gary Gould notes:

> Prior to Bill-C31 there used to be a federal housing program for status-Indians off reserve. Basically, it was very similar to the program we modelled for the 2006 Aboriginal housing trust; a locked interest rate, down payment assistance […] After Bill-C31 the federal government, along with the bands, determined that there was no future need for this because everybody was going to get their status and rush back to their communities. I think the evidence shows over the past thirty years that that has not been the trend at all. But the government ended it. They went and consulted with the Assembly of First Nations, they didn't consult with the urban Aboriginal communities at all.[5]

The demographic trend also suggests that Aboriginal people do not abandon their identity at the city gates. Urban Aboriginal people are not only here to stay, but are here to grow.[6] It is crucial that the law of the duty to consult and the broader law of Aboriginal and treaty rights be responsive to these demographic realities. At the same time as the demographic trend towards urbanization unfolds among Aboriginal Canadians, the law on the duty to consult is becoming more refined and developed. The existing jurisprudence relates almost exclusively to land and resources and in this context legal standards are being developed which may preclude applications outside of the land and resource parameters.

This paper proceeds in four parts. We begin by providing an overview of the duty to consult jurisprudence. In this part, we highlight that the existing jurisprudence has developed in a factual context of land and resource development and a doctrinal context of justifying additional rights deprivations. When the courts apply the duty to consult to the traditional territories of Aboriginal people, they have taken a predominantly property-based approach that is in tension with the sovereign and self-governance dimensions of Aboriginal rights. Doctrinally, the duty has been thought to be largely prospective. It arises when governments take new initiatives to further diminish the territorial claims of Aboriginal people. Again, this is in tension with the retrospective and remedial need to address historical rights deprivations in consultative processes. These observations apply to both on-reserve and off-reserve rights claimants.

The second part discusses the issue of identity. Not only is it difficult to fit Aboriginal rights outside of the property paradigm into the duty to consult jurisprudence, but it is an additional challenge to operationalize the duty to consult even assuming the first set of obstacles can be overcome. This is because some issues of identity remain contested. Many off-reserve, urban Aboriginals are status Indians. Their identity as Aboriginals is not in issue. However, there are also many urban Aboriginals who are non-status or Métis, including some who live outside of the traditional territories of their ancestors. For those groups, their aboriginality is frequently contested.

The third part addresses the question of who is recognized and authorized to speak for urban Aboriginal people. For both status and non-status Aboriginal people, there is also a question about who holds rights of representation. There is a clear link between the issues in this part and in the preceding part regarding the crucial issue of whether urban Aboriginal communities can effectively recognize individuals as Aboriginal. There has been a concern that the governance structures established under the

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4 Patsy McKinney, Executive Director Under One Sky Head Start, Monoqonuwicik-Neoteetjg Mosigisig Inc., Personal Communication, May 16, 2014.

5 Gary Gould, General Manager, Skigin-Elnoog Housing Corporation. Personal Communication May 16, 2014.

6 David Newhouse and Evelyn Peters, eds. *Not Strangers in These Parts: Urban Aboriginal Peoples*. Ottawa: Policy Research Initiative, 2003.

Indian Act are not well suited to meeting the representational needs and aspirations of off-reserve and non-status populations for a long time.[7]

In the fourth part, we discuss areas of concern. The issue of representation in government consultations is pressing. At present, the gap between governmental consultation policies engaging status and on-reserve populations and the majority of indigenous Canadians who live off-reserve and often do not have status is growing. We identify areas of urban Aboriginal organizations' current activity where we argue governmental consultations should occur. Furthermore, we note some areas where there presently exist gaps in services where urban Aboriginal organizations ought to be consulted on how best to address them. We then conclude by suggesting the mutual benefits of consultation in these areas for Aboriginal and non-Aboriginal Canadians.

1. The Duty to Consult: Source and Scope

The Crown's duty to consult with Aboriginal peoples was first recognized by the Supreme Court of Canada ("SCC") in 1990 in *R v Sparrow*.[8] In that case Ronald Sparrow was charged for fishing with a drift net that was longer than permitted under his Band's Indian fishing licence. Sparrow admitted to the facts, but justified his actions on the ground that he was exercising his Aboriginal right to fish under section 35(1) of the *Constitution Act, 1982*, which states that: "The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed."[9] The Court in *Sparrow* was asked to give meaning to Aboriginal rights following their entrenchment in the *Constitution Act, 1982*. The Supreme Court held that Aboriginal rights which were not extinguished prior to the enactment of section 35 continue to exist. However, these rights are not absolute and may be infringed by the Crown in specified circumstances. The Crown must justify rights limitations by demonstrating that its infringement serves a compelling and substantial objective and that the limit is justifiable in light of the special trust relationship and responsibility of the government vis-à-vis Aboriginal people.[10]

It is in the latter part of this test – related to the justification of infringements of Aboriginal rights – that the duty to consult is doctrinally located. Within the justification analysis, the Court explained that there are additional questions beyond the compelling and substantive objective element of the test which need to be addressed. Such questions include "whether the Aboriginal group in question has been consulted with respect to the conservation measures being implemented."[11] As the duty arises under section 35(1) of the *Constitution Act, 1982*, it is in the nature of a constitutional obligation.

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7 An early and high-level expression of this concern surfaced *in Native Women's Assn. of Canada v Canada*, [1994] 3 SCR 627.

8 *R v Sparrow,* 1 SCR 1075, 46 BCLR (2d) 1 ["*Sparrow*"].

9 *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

10 *Sparrow*, *supra* note 6 at paras 71 and 75.

11 *Ibid* at para 82.

In *Sparrow*, the Supreme Court held that the source of the government's duty to consult is found within the historical relationship between the government and Aboriginal peoples. This is based on the Crown's claim of sovereignty in the face of prior Aboriginal occupation of the land. And it requires the Crown to act with honour in its relationship with Aboriginal peoples. Thus, the source of the duty to consult is the assumption of sovereignty by the Canadian state in the face of pre-existing Aboriginal sovereignty over the same territory. This pre-existing Aboriginal sovereignty over a territory has recently been acknowledged and explained in *Tsilhqot'in Nation v British Columbia*: "The Aboriginal interest in land that burdens the Crown's underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown."[12]

The role of the duty consult in this context is to give effect to the resulting fiduciary obligations of the Crown. Invoking the honour of the Crown to impose a duty to consult serves to operationalize and give reality to this fiduciary obligation in situations where the claim to title or right is emergent. Once the right or title has been established, the Crown not only owes a procedural duty to consult and accommodate, but also a substantive duty not to infringe the title without compelling justification.[13]

Academic commentary posits that the duty to consult did not emerge fully formed.[14] Initially, courts were not clear on when the duty was owed. Indeed, the question of what triggers the duty continues to give rise to some difficulty. The question of the trigger is multifaceted. There are at least three issues:[15]

1. At what stage of the contemplated governmental activity does the duty arise?
2. How and to what extent must the Aboriginal group demonstrate the existence of a potential Aboriginal title or right to trigger the duty?
3. What kinds of governmental activities affecting Aboriginal rights or title have the potential to trigger the duty?

The first issue raises both theoretical and pragmatic issues. If governments consult early and broadly, the consultations may be more consistent with the emergent rights theory of the courts, i.e. the notion that the duty precedes formal judicial recognition of an Aboriginal right. However, consultative activities will likely outstrip the consultation capacity of Aboriginal organizations given their marginal funding situation.[16] On the other hand, if governments consult too late – e.g., only after an initiative has been fully formed – then potential rights may be irrevocably altered and subsequent consultation is unlikely to unseat plans that have already matured.

The second issue relates to demonstrating the existence of a potential right or title. As the evolving jurisprudence demonstrates, Aboriginal rights are not static. The evolving nature of Aboriginal rights and the emergence of more sophisticated understandings of Aboriginal title both serve to create uncertainty for Aboriginal groups and the Crown alike. This uncertainty makes it more difficult to define and operationalize the scope of the duty to consult. Clearly, there is some burden on Aboriginal communities to prove the existence of potential Aboriginal title or the right in order to attract the duty. For urban and off-reserve Aboriginal people, the underdeveloped stage of the jurisprudence on cultural and linguistic rights, and the close relationship of the existing jurisprudence with land-based or at least land-related rights leads to many open questions for urban Aboriginal representatives and service providers. The jurisprudence gives little guidance, and yet, these organizations are faced with raising potential Aboriginal rights or risking rights infringements. It is particularly pressing to resolve this issue through good faith negotiation as little litigation pressure is likely to be brought to bear in these contexts.

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12 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 69 ["*Tsilhqot'in Nation*].

13 *Ibid* at para 80.

14 Thomas Isaac & Anthony Knox. "*The Crown's Duty to Consult Aboriginal People*" (2003) 41 Alta L Rev 49 at 75.

15 Dwight Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon: Purich, 2014) ["*Revisiting*"].

16 Wendy Wetteland, President and Chief of the NBAPC and Breannah Tulk, Community Programs Coordinator, St. John's Native Friendship Centre, expressed their concerns over the lack of funding for off-reserve programs and services. Personal Communication, May 16, 2014.

On the third issue, once we start thinking about the duty to consult beyond the confines of land and resource rights, the scope of rights is potentially quite broad. Service organizations for urban and off-reserve populations provide services in a wide range of social spheres ranging from education and employment to health and social welfare. In the context of urban and off-reserve Aboriginal populations, the issue of governmental omissions warrants particular attention. But can the failure of government to provide services ever trigger the duty to consult?

One of the ways in which constitutional law routinely structures the scope of rights is through purposive interpretation. However, determining the purpose behind duty to consult has been contested. In the early jurisprudence, the purpose of the duty was anchored in the justification of limitations to previously recognized rights. However, Lawrence and Macklem argued that the purpose of the consultation process should be to preserve Aboriginal interests even before they crystallize as recognized rights, with the ultimate goal being that of reconciliation between the Crown and Aboriginal peoples.[17] The SCC adopted this view in *Haida Nation v British Columbia.*[18]

(A) The Consultation Trilogy

Dwight Newman, who currently holds the Canada Research Chair in Indigenous Rights in Constitutional and International Law, rightly suggests that any in-depth discussion of the duty to consult must include a description of the trilogy of cases that have transformed this area of law.[19] These cases are *Haida Nation*[20], *Taku River Tlingit First Nation v British Columbia*[21], and *Mikisew Cree First Nation v Canada*.[22] In *Haida Nation* the SCC expanded and provided some clarity to the duty to consult. At issue in that case was a tree farming licence that the provincial government granted to a forestry corporation without consulting with the Aboriginal group, Haida Nation, who had previously made a claim to the land in question. The Province took the position that it had no obligation to consult with or accommodate the Haida Nation because Haida Nation had not *yet* successfully proven their claim to Aboriginal title through the courts. The Supreme Court rejected this argument and held that a legal duty to consult "arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it."[23] As a result Dwight Newman states "[t]he modern duty to consult doctrine thus creates a proactive duty on governments in the face of uncertainty."[24] The Court then went on to clarify that the legal obligation of consultation rests solely with the Crown because its obligations flow from the honour of the Crown which cannot be delegated.[25]

The SCC explains in *Haida Nation* that the content of the duty to consult doctrine lies on a spectrum. At the lower end there are cases where the claim to an Aboriginal right or title is weak. In such cases, all that may be required of the government to fulfill its duty to consult is to give notice of a potential infringement of the Aboriginal right or title in question. At the opposite end of the spectrum – where there is a strong claim to an Aboriginal right or title – the duty to consult may require accommodation of the Aboriginal right or title claim by the government. This may require formal inclusion of the Aboriginal group in the decision making process, for example. However, even at the highest end the SCC made it clear that the duty to consult does not give Aboriginal groups veto power over final government decisions.[26]

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17 Sonia Lawrence & Patrick Macklem. "*From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult*" (2000) 79 Can Bar Rev 252.

18 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 at para 38 ["*Haida Nation*"].

19 *Revisiting*, *supra* note 14 at 16.

20 *Haida Nation*, *supra* note 18.

21 *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2003 SCC 74, [2004] 3 SCR 550 ["*Taku River*"].

22 *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 ["*Mikisew Cree*"].

23 *Haida Nation*, *supra* note 18 at para 35.

24 *Revisiting*, *supra* note 15 at 17.

25 *Haida Nation*, *supra* note 18 at para 53.

26 *Ibid* at paras 43-45.

Taku River is the sister case of *Haida Nation* as it was heard and decided at the same time. At issue in *Taku River* was the British Columbian government's approval of a mining project that included the building of an access road which would cross the traditional territory of the Taku River Tlingit First Nation ("TRTFN"). The TRTFN sought to have the government's decision quashed on the basis that the project would unjustifiably infringe their Aboriginal rights and claim to title. Prior to the approval of the project there was a three-and-a-half year environmental assessment carried out, to which the TRTFN were party. Throughout the environmental assessment process the TRTFN disagreed with the proposed project recommendations and later argued that they were not satisfied with the assessment process. The SCC held that:

> The TRTFN was part of the Project Committee, participating fully in the environmental review process. It was disappointed when, after three and a half years, the review was concluded at the direction of the Environmental Assessment Office. However, its views were put before the Ministers, and the final project approval contained measures designed to address both its immediate and long-term concerns. The Province was under a duty to consult. It did so, and proceeded to make accommodations. The Province was not under a duty to reach agreement with the TRTFN, and its failure to do so did not breach the obligations of good faith that it owed the TRTFN.[27]

The ruling in *Taku River* demonstrates that where the duty to consult arises the duty will be discharged so long as the consultation is done in a meaningful way. It clearly demonstrates that the duty to consult does not mean that the Crown has a duty to agree.

Interestingly, the SCC decided the third case of the consultation trilogy which applied the duty to consult doctrine to treaty rights one year after its ruling in *Haida Nation and Taku River*.[28] In *Mikisew Cree*, the Mikisew Cree First Nation ("MCFN") – a Treaty 8 Nation – challenged the federal government's approval of a plan to construct a road through a portion of its reserve land on the ground that the road would affect their traditional hunting and trapping. Additionally, the MCFN argued that they had not been adequately consulted and that the Crown had not made efforts to minimize the impact on their treaty rights. The Court held that even in the context of the "taking up" of lands, which the Crown has the right to do under the treaty, the Crown must act in accordance with its obligations flowing from the honour of the Crown. The SCC went on to hold:

> As stated at the outset, the honour of the Crown infuses every treaty and the performance of every treaty obligation. Treaty 8 therefore gives rise to Mikisew procedural rights (e.g. consultation) as well as substantive rights (e.g. hunting, fishing and trapping rights). Were the Crown to have barreled ahead with implementation of the winter road without adequate consultation, it would have been in violation of its *procedural* obligations, quite apart from whether or not the Mikisew could have established that the winter road breached the Crown's *substantive* treaty obligations as well.[29]

The *Mikisew Cree* decision tells us that in the context of treaty rights, the duty to consult must always be considered because "[i]n the case of a treaty the Crown, as a party, will always have notice of its contents."[30] Since the Crown will always have notice of the treaty rights the question the Crown will have to consider in those cases is: to what degree would the Aboriginal right potentially be adversely affected? The spectrum as described in *Haida Nation* will determine the level of consultation owed to the Aboriginal group holding the treaty right.[31]

As is apparent from the preceding discussion on the case law circumscribing the duty to consult, the duty has so far been explored in the context of land-based and land-related rights. It is an open question in the jurisprudence whether a duty to consult could extend to urban Aboriginal populations separately; or to situations where government is under an affirmative obligation to provide a service; or where government has historically provided service that it is now altering or abandoning.

(B) Urban Aboriginal Rights that may trigger the Duty to Consult

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27 *Taku River, supra* note 21 at para 22.

28 *Mikisew Cree, supra* note 22.

29 *Ibid* at para 57.

30 *Ibid* at para 34.

31 *Ibid*.

We had discussed that the existing jurisprudence has explored the scope and content of the duty to consult in the context of land and resources. These rights are important to urban Aboriginal people who continue to harvest, hunt, fish and live off the land at various times. However, other rights may be equally or more important to these populations in the long run including personal property, linguistic and cultural rights. Some existing case law suggests that courts have yet to grapple with these legal interests.

In *Sackaney v The Queen*,[32] two status-Indians claimed that the Crown had failed to carry out its legal duty to consult with Aboriginal leaders in respect of the application of section 87(1)(b) of the *Indian Act*.[33] At issue was whether off-reserve employment income was exempt from taxation. The Court ruled that the case of *Hester v The Queen,*[34] which dealt with the same issue, was correct in concluding that there was no breach of the duty to consult with the application of section 87(1)(b). In deciding that the duty to consult was not triggered the Court referred to a statement made by the Court in *Hester*:

> It is clear from *Haida* and the academic commentary…that the duty to consult and accommodate arises when there is contemplated Crown conduct to exploit resources that are the subject of potential, but as yet proved land or treaty claims. It is doubtful that any such duty arises in the context of personal property, but assuming it does, there can be no contemplated Crown conduct on the facts pleaded as the Crown exercises no discretion in its administration of tax exemption rights.[35]

This decision suggests that since off-reserve income taxation does not affect Indian land, treaty rights, or resources rights, the duty to consult which is owed by the Crown, is not likely to be triggered in a context outside of land, resources, or treaty rights.

In the recent case of *Manitoba Métis Federation Inc v Canada (Attorney General),*[36] involving land rights, the Manitoba Métis Federation sought a declaration that the lands the Métis people were promised in the *Manitoba Act, 1870,* were not provided in accordance with the government's obligation under the honour of the Crown. The Court took a fairly narrow view of the government's constitutional duty, cautioning that:

> Not every mistake or negligent act in implementing a constitutional obligation to an Aboriginal people brings dishonour to the Crown. Implementation, in the way of human affairs, may be imperfect. However, a persistent pattern of errors and indifference that substantially frustrates the purposes of a solemn promise may amount to a betrayal of the Crown's duty to act honourably in fulfilling its promise. Nor does the honour of the Crown constitute a guarantee that the purposes of the promise will be achieved, as circumstances and events may prevent fulfillment, despite the Crown's diligent efforts.[37]

The Supreme Court nevertheless went on to stipulate that the Crown must act diligently to fulfill its obligations to Aboriginal peoples and that it had not done so in the land grant procedures. The lands that were promised were not distributed in a timely manner. It took nearly ten years for the land allotments to be distributed, which ultimately resulted in many Métis selling their portion of land or receiving less than originally planned. The Court granted a declaration that the Crown did not act in accordance with the honour of the Crown.[38]

In another 2013 case, Métis harvesting rights were at issue. In *Enge v Mandeville,* the North Slave Métis Alliance (NSMA) claimed that the government breached their duty to consult and accommodate with the NSMA when the government reached an agreement with two different First Nation groups regarding the number of permitted caribou to be harvested.[39] The government argued that because Canada had not recognized the NSMA as an Aboriginal rights bearing organization, they were

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32 *Sackaney v The Queen,* 2013 TCC 303.

33 *Indian Act,* RSC 1985, c I-5, s 87.

34 *Hester v The Queen et al* (2007), OJ No 4719, 162 ACWS (3d) 552.

35 *Ibid.* at para 32.

36 *Manitoba Métis Federation Inc v Canada (Attorney General),* 2013 SCC 14.

37 *Ibid.* at para 82. This is interesting because it appears to be inconsistent with the fiduciary nature of the obligation.

38 *Manitoba Métis Federation Inc v Canada (Attorney General),* 2013 SCC 14 at para 154.

39 *Enge v Mandeville et al,* 2010 NWTSC 33.

not owed a duty to consult. Rejecting that argument, the Court ruled that the duty to consult and accommodate the interests of Aboriginal people applies both to proven and asserted rights. The Court went on to state:

> Meaningful, good faith consultation means that the Crown must be willing to make changes based upon information that is exchanged during the consultation process. Consultation must be intended to substantially address the concerns of Aboriginal people; otherwise it does not fulfill the obligations of the Crown.[40]

The Crown failed to perform a preliminary assessment of the NSMA's claim, which resulted in the Court ruling that the government could not have known whether a duty to consult was owed without such an assessment. Therefore, there was a breach of the duty to consult owed. The Court then addressed the duty to accommodate. The government told the NSMA they would have to negotiate with the two First Nation groups who were granted harvesting permits if the NSMA wanted permits to participate in the caribou harvest. The Court held that the duty to accommodate, where necessary, cannot be delegated to another organization because the duty lies with the Crown.

In a context outside of any of the previous mentioned Aboriginal rights, a recent Ontario case addressed the issue of child adoption.[41] The Society stated that they had to consider whether the children were status or non-status Indians as per the *Child and Family Services Act,* RSO 1990, because under the Act the Children's Aid Society had to notify the relevant First Nation Band prior to any adoption planning if the children were status-Indians. This demonstrated that in the sphere of adoption, a child having a status-Indian identity would have created a duty for the Children's Aid Society to inform the relevant First Nation Band. However, the Child and Family Services Review Board, following the recent *Daniels v Canada*[42] case, stated:

> [T]he consideration is not whether the sisters are status or not, or "how" Aboriginal they are, but rather, how their acknowledged Aboriginal background will be preserved and fostered in terms of their cultural identity.[43]

This statement hints at how the Crown approaches their obligations under the honour of the Crown differently, depending on whether the Aboriginal group is status or non-status. The divide between status, non-status, on or off-reserve, creates a fractured Aboriginal population that does not have their rights addressed equally by the Crown. Gary Gould provided an example:

> One of the problems the organization [NBAPC] faces, with particularly the province, is the province says we question your membership because they're [membership applicants] not all potentially Treaty beneficiaries […] The Crown still has an apartheid approach to Aboriginal people in this province. If you don't live on reserve or have a strong connection to a reserve, you're not considered Aboriginal enough. So the Aboriginal Peoples Council [NBAPC] has an enormous problem of trying to have the government respect their processes.[44]

The case law outlined here shows that Aboriginal rights that have been successfully argued to give rise to a duty to consult have been limited to the sphere of land, resource, and wildlife harvesting rights. It was the area of taxation that the Courts have ruled did not trigger the duty to consult.[45] The reasoning was that the contemplated Crown conduct did not involve Indian land, treaty claims or Crown conduct that was discretionary.

Despite the fairly narrow approach taken by the courts thus far, it seems warranted to explore three related areas in further research:

1. Many urban Aboriginal people have ancestral connections to First Nations communities. A subset is already recognized as treaty beneficiaries. When an issue arises with respect to these treaty rights, is there a duty to

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40 *Ibid* at para 149.

41 *AJ and WJ v Children's Aid Society of the United Counties of Stormont, Dundas and Glengarry,* 2013 CFSRB 47.

42 *Canada v Daniels*, 2014 FCA 101, leave to the SCC granted Nov. 20, 2014 ("*Daniels*").

43 *AJ and WJ v Children's Aid Society of the United Counties of Stormont, Dundas and Glengarry,* 2013 CFSRB 47 at para 41.

44 Gary Gould, General Manager, Skigin-Elnoog Housing Corporation. Personal Communication, May 16, 2014.

45 *Sackaney v The Queen,* 2013 TCC 303.

specifically consult with off-reserve populations separately from any First Nation community-based consultation process?

2. Federal and provincial governments currently provide services to off-reserve, urban Aboriginal populations. Many of these services are related to cultural and linguistic practices and, arguably rights with respect to these areas. For example, provincial and federal government funders may provide services to Aboriginal students including services for the revitalization of indigenous languages, and include off-reserve and non-status children. Is there a duty to consult with respect to these services?

3. Federal and provincial governments currently provide funding for services provided by urban Aboriginal organizations including the Congress of Aboriginal Peoples and its local affiliates as well as Native Friendship Centres. Funding streams are subject to changes, frequently without notice or consultation. Is there a duty to consult with respect to these funding streams?

Whether a constitutional duty to consult in any of these outlined areas or others is ultimately found, governmental consultation should be encouraged for reasons of reconciliation and because stakeholder consultation is an important element of good governance practice. Academic commentators agree that reconciliation goals will be elusive if the Crown relies on the courts to determine if Aboriginal groups have been properly consulted. Instead, a better approach to achieving reconciliation is by reaching a settlement through good faith negotiations by both parties, without resorting to litigation.[46] In a more recent analysis on the duty to consult, Dwight Newman states:

> Meaningful consultation, it bears noting, is a legal concept and a legal requirement on consultation processes under the duty to consult. A *good* consultation need not and arguably ought not to be limited to the elements prescribed by legal doctrine.[47]

(C) Provincial Consultation Policies

The leading case on the duty to consult, *Haida Nation*, referred to the value for provinces to implement their own consultation policies:

> It is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts […] It should be observed that, since October 2002, British Columbia has had a Provincial Policy for Consultation with First Nations to direct the terms of provincial ministries' and agencies' operational guidelines. Such a policy, while falling short of a regulatory scheme, may guard against unstructured discretion and provide a guide for decision-makers.[48]

Similarly to BC, every Atlantic province now has policies for s 35 consultations. We will now describe these policies in Atlantic Canada and ask whether the existing policies are appropriate for meeting the consultation needs and aspirations of urban Aboriginal populations and their representatives.

i. New Brunswick

The government of New Brunswick published its policy on the duty to consult with First Nations in November 2011.[49] The policy states that the government will consult with First Nations before any action is taken that may adversely impact Aboriginal or treaty rights of the Aboriginal group, such as hunting, trapping, fishing, gathering, or other traditional uses associated with ceremonial activities. The goal of this policy is to maintain a mutually beneficial relationship for all parties involved, including:

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46 Lawrence and Macklem, *supra* note 17 at 267; Isaac and Knox, *supra* note 14 at 75.

47 *Revisiting, supra* note 15 at 88.

48 *Haida Nation, supra* note 18 at para 51.

49 Aboriginal Affairs, "Government of New Brunswick Duty to Consult Policy": http://www2.gnb.ca/content/gnb/en/departments/Aboriginal_affairs/duty_to_consult.html.

the government of New Brunswick, industry stakeholders, and First Nations. To ensure this beneficial relationship, the guiding principles require that the government and First Nations to consult in good faith. The three stated objectives are:

1. To fulfill the Crown's obligation flowing from section 35, which is to consult with First Nations when their Aboriginal and/or treaty rights may be affected;

2. Balance the provinces mandate to manage resources and public lands for the public benefit with the constitutional rights of the Aboriginal people, and;

3. Provide an opportunity for all First Nations people to have a meaningful say in governmental decisions that may potentially affect their Aboriginal rights.

The policy's duty on First Nations to engage in good faith consultations has important implications for on-reserve and off-reserve populations alike, as does the inclusion of industry as a party to s 35 consultations.

It would be helpful to explore the past practice of the New Brunswick government under this policy and to document instances when urban Aboriginal organizations such as Under One Sky or NBAPC have been consulted under this policy.[50] Not all consultations between provincial governments and urban Aboriginal people need necessarily be conceptualized under the constitutional duty to consult, nor should provincial consultation with Aboriginal populations be limited to areas where the constitutional duty arises. An example of a recent citizen engagement that had a direct impact on First Nation people was a review of First Nations child welfare in the province.[51] The Minister of Social Development asked the Child and Youth Advocate to review the services provided to the First Nations communities and make recommendations for child welfare service changes. During the review of the services First Nations people were included in the discussion and encouraged to voice their opinions. Clearly, there are other citizen engagement initiatives that would seemingly affect all citizens in New Brunswick and Aboriginal populations in particular, such as the "Shale Gas Citizen Engagement Forum."[52] None of the public meetings were held in a First Nations community, nor were urban Aboriginal organizations specifically consulted.

ii. Nova Scotia

In 2010, the government of Nova Scotia, federal government, and Assembly of Nova Scotia Mi'kmaq Chiefs signed the *Terms of Reference for a Mi'kmaq –Nova Scotia-Canada Consultation Process*.[53] The document lays out the consultation process the parties are to follow when the government, provincial or federal, are making decisions that have the potential to adversely affect asserted Mi'kmaq, Aboriginal and treaty rights. Similar to the New Brunswick duty to consult policy which identifies on-reserve First Nations populations as Aboriginal people for consultations, the *Terms of Reference* in Nova Scotia stipulate that it is the Mi'kmaq Bands in the province that may potentially be involved in consultation processes. There is no policy expressly contemplating consultation with off-reserve and urban Aboriginal people and their organizations such as the Halifax Friendship Centre.

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50 The government of New Brunswick also has a Citizen Engagement Unit, which is in place to ensure that the people in the province of New Brunswick have a greater voice in decisions that will affect their lives. This engagement operates through information sharing, working directly with potentially affected citizens, obtaining public feedback on projects, and taking citizen advice into consideration before taking action on projects or development. The stated mandate of the Citizen Engagement Unit is: to coordinate citizen engagement across governmental departments and agencies; provide support and advice to different government departments on citizen engagement initiatives, and; train and educate government departments on best practices for engagement. Intergovernmental Affairs, "Citizen Engagement Unit": http://www2.gnb.ca/content/gnb/en/departments/intergovernmental_affairs/citizen_engagementunit.html.

51 Office of the Ombudsman and Child and Youth Advocate, "Hand-in-Hand: A Review of First Nations Child Welfare in New Brunswick": http://www.gnb.ca/0073/Review/PDF/handinhand-e.pdf.

52 Intergovernmental Affairs, "Citizen Engagement Unit": http://www2.gnb.ca/content/dam/gnb/Corporate/pdf/ShaleGas/en/PublicNoticeShale.pdf

53 Office of Aboriginal Affairs, "Terms of Reference for a Mi'kmaq –Nova Scotia-Canada Consultation Process": http://novascotia.ca/abor/docs/MK_NS_CAN_Consultation_TOR_Sept2010_English.pdf.

In 2012, the federal government and the province of Nova Scotia signed the *Memorandum of Understanding (MOU) on Cooperation Regarding Duty to Consult*.[54] The MOU states that it creates a cooperative working agreement between the province and the federal government regarding consultation with the Mi'kmaq of Nova Scotia. The MOU outlines its intended purposes which are: 1) coordinate the consultation process between the two levels of government; 2) share relevant and timely information on consultation processes, and; 3) improve the relationship between the two levels of government through training and exchanging experiences to build on best practices. Although one of the MOU's stated purposes is to coordinate the consultation processes between the federal and provincial government, the policy does not offer sufficient clarity with respect to consultations affecting the interests of urban Aboriginal populations.

iii. Prince Edward Island

The province of Prince Edward Island revealed their *Provincial Policy on Consultation with the Mi'kmaq* in 2009.[55] The purpose of this provincial policy is to provide clarity on the duty to consult to all government departments. The policy states that it is intended to be an initial step towards developing the provincial duty to consult with the Mi'kmaq people and that it is expected to evolve with future experiences and legal developments. In addition to identifying the Mi'kmaq First Nations that may be consulted with, the policy also stipulates that key groups for consultation may include "other Mi'kmaq organizations." No more detail is offered on who these other organizations may be, however, the policy advises that "the Aboriginal Affairs Secretariat can provide advice on groups likely to be affected or interested."[56]

In 2012, the federal government, the government of Prince Edward Island and the Mi'kmaq of the province signed the *Mi'kmaq-Prince Edward Island-Canada Consultation Agreement*.[57] This agreement lays out the general consultation process that each party to the agreement should follow. It states that the "Agreement is optional and does not preclude the Parties from engaging in consultation independent of this process or from concluding additional or alternative consultation agreements."[58] In this document, the Mi'kmaq that may be owed consultation are identified as the two First Nations communities in the province. Unlike the *Provincial Policy on Consultation with the Mi'kmaq* from 2009, no mention is made here to "other Mi'kmaq organizations." The omission may point to the problem of excluding urban Aboriginal organizations such as the PEI Native Council from threshold negotiations such as the ones leading to the tripartite policy.

iv. Newfoundland and Labrador

In 2013, the government of Newfoundland and Labrador published its *Aboriginal Consultation Policy on Land and Resource Development Decisions*.[59] The policy outlines the consultation guidelines the provincial government, third party project proponents, and Aboriginal organizations must abide by when there is contemplated action that may adversely impact the rights of Aboriginal groups. However, this consultation policy does not apply where there is a finalized land claim agreement. In those cases the province will consult with Aboriginal groups in accordance with the land claim agreement. The scope of application of the consultation policy is unique to this province.

> This Policy will also apply to consultations with Aboriginal organizations asserting land claims in Labrador which have not been accepted for negotiation by NL, namely the NunatuKavut Community Council, Naskapi Nation of Kawawachikamach, and the Innu communities of Matimekush-Lac John, Uashat mak Mani-Utenam, Ekuanitshit, Nutakuan, Unamen Shipu and Pakua Shipi.[60]

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54 Office of Aboriginal Affairs, "Memorandum of Understanding (MOU) on Cooperation Regarding Duty to Consult": http://novascotia.ca/abor/docs/Consultation/NOVASCOTIACANADAMOUFINAL.pdf.

55 Aboriginal Affairs Secretariat, "Provincial Policy on Consultation with the Mi'kmaq": http://www.gov.pe.ca/photos/original/hea_mikmaqconsu.pdf.

56 *Ibid* at 4-5.

57 Aboriginal Affairs Secretariat, "Mi'kmaq-Prince Edward Island-Canada Consultation Agreement": http://www.gov.pe.ca/photos/original/aas_consult.pdf.

58 Ibid at 3.

59 Labrador and Aboriginal Affairs Office, "The Government of Newfoundland and Labrador's Aboriginal Consultation Policy on Land and Resource Development Decisions": http://www.laa.gov.nl.ca/laa/publications/Aboriginal_consultation.pdf.

60 *Ibid* at 1.

This demonstrates that this provincial consultation policy applies to off-reserve Aboriginal organizations asserting land claims. Even though the policy is broader than the other provincial consultation policies we described, it still does not address issues outside of lands and resources. Ms. Tulk, from the St. John's Native Friendship Centre, explains that the urban Aboriginal population they serve were affected by a government decision to cut a program without consultation with the Friendship Centre:

> We held a successful employment program for seven years; last year that program was cut […] The provincial government now holds that program. I'll use the word 'crisis' again because what we see happening in our community is not accessing the employment program that's now held by the Department of Education and Skills (government), because what happens is our clients go into their (government) offices and they are referred to a website, when we know these clients have literacy issues.[61]

2. Membership and Community

The duty to consult is engaged when governments act in a way that has the potential to infringe Aboriginal title, Aboriginal rights and/or treaty rights. All three forms of rights may apply to urban Aboriginal populations.[62] The past practice of most governments in Canada appears to have been to primarily consult with representatives of communities established under the *Indian Act* and with self-governmental representatives in the North. However, there is also a history of sporadic consultation with other organizations, including those that represent urban and off-reserve populations. It appears, however, that governments in the Atlantic region do not typically view these consultations as exercises in compliance with s 35 obligations.

The failure to consistently consult and the failure to consider existing consultations with urban Aboriginal people as falling under s 35 are problematic for several reasons. The majority of Aboriginal people in Canada live off reserve[63] and their interests do not always align with the interests of on-reserve populations. Incomplete consultations may render the outcomes of consultations vulnerable in terms of community acceptance and legally unstable. Finally, the question about who resides on and off reserve and the question of membership both deeply implicate some of the discriminatory policies of the past, thus invoking the honour of the Crown. Governments have recognized these issues, particularly in the context of the deprivation of status for Aboriginal women.

The issues associated with Bill C-31 and, more broadly, with Indian status and band membership raise fundamental social and political questions about what it means to belong to a community and who has the right to determine membership. Conflicts between reinstated women and communities have highlighted these questions. Linked to status and membership are also practical issues regarding the provision of programs and services, and the additional costs created since those who attain status become eligible for federal programs and services.[64]

At the same time, it can be challenging for governments to identify and consult with populations that are more mobile, less regulated and for whom the representational structures are traditionally less well understood. It is therefore noteworthy that in granting standing to the Manitoba Métis Federation, the Supreme Court had little difficulty accepting that the Federation could speak for the collective interests of the Métis nation in Manitoba.[65] It may be helpful in this context to recall how the issue of membership is addressed under the *Indian Act* to discern how the present scheme creates representational gaps for urban Aboriginal people.

(A) How is membership dealt with under the Indian Act?

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61 Breannah Tulk, Community Programs Coordinator, St. John's Native Friendship Centre. Personal Communication, May 16, 2014.

62 The application of Aboriginal title beyond communities follows from the recent decision of the SCC in Tsilhqot'in Nation*, supra* note 11.

63 Statistics Canada.: http://www12.statcan.ca/census-recensement/2006/as-sa/97-558/p16-eng.cfm

64 Library of Parliament, Indian Status and Band Membership Issues (Political and Social Affairs Division: 2003) at 5.

65 Manitoba Métis Federation, *supra* note 36 at para 44.

Legal definitions of Indian status, band membership, and First Nation citizenship can impact Aboriginal identity at the individual level. Consequently, policy decisions reflected in laws respecting Indian status, band membership, and First Nation citizenship can affect the enjoyment of individual human rights. Collectively, federal and First Nation laws have created numerous different legal classes of people of First Nation descent. This complexity can result in arbitrariness with negative effects on human dignity, personal autonomy, and self-esteem.[66]

Section 91 (24) of the *Constitution Act, 1867* gives the federal government jurisdiction over "Indians, and Lands reserved for the Indians."[67] Pursuant to this power the federal government enacted legislation, the *Indian Act,*[68] which determines who is an Indian for the purposes of the Act and sets out the benefits for which a registered Indian may be eligible. One of the benefits that may result from being deemed an Indian for the purposes of the *Indian Act* is entitlement to membership in one's First Nation band: "Membership is very important, because it may bring rights to live on reserve, participate in band elections and referendums, own property on reserve, and share in band assets. It also provides individuals with the opportunity to live near their families, within their own culture."[69]

The *Indian Act* provides that the federal government will keep a band list including the name of each band member. Additionally, until a band formally takes control of their membership list, their membership list will be maintained by the government. If a band chooses to leave control of their membership code with the government, then a person who is a status-Indian has a right to band membership.[70] However, determining who is a status-Indian and therefore entitled to band membership is complex and subject to much criticism. The *Act* explains the various ways a person can be an Indian for the purpose of the *Act*:

1) Both parents were status-Indians, which would make a child of the two a section 6(1) Indian, and potential children of that child also section 6(1) Indians.

2) One parent was a section 6(1) Indian and the other parent not an Indian as per the Act, which would make any children of those two a section 6(2) Indian.

3) One parent was a section 6(2) Indian and the other a section 6(1) Indian, which would make any children of the two a section 6(1) Indian.

4) Both parents were section 6(2) Indians, which would make any children section 6(1) Indians.[71]

Pamela Palmater describes how these arbitrary criteria create different categories of Indians with different rights: "The difference between the two basic groups is that 6(I) Indians can transmit their status to their children in their own right, whereas 6(2) Indians have to partner with another registered Indian in order to transmit their Indian status to their children."[72] Douglas Sanderson explains that section 6(2) has what is informally called a "two generation rule".[73] This means that descent from a single status-Indian ancestor can be no more than two generations removed in order for a person to be recognized as an Indian for the purposes of the *Indian Act*; status would be terminated after two successive generations of intermarriage between non-Indians and Indians. So if a band has chosen not to take control of its own membership code, then a person who is descended from a single status-Indian of more than two generations will be unable to obtain membership to her band, simply because the *Indian Act* provisions would apply to that band's membership code: "Looking to the future, some fear that the general requirement for a child

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66 Wendy Cornet, "Indian Status, Band Membership, First Nation Citizenship, Kinship, Gender, and Race: Reconsidering the Role of Federal Law" in Dan Beavon et al, eds, Aboriginal Policy Research: moving forward, making a difference: Volume V (Toronto: Thompson Educational Publishing, 2007) at 145.

67 *Constitution Act, 1867* (UK), 30 & 31 Victoria. c 3, s 91.

68 *Indian Act,* RSC 1985, c I-5.

69 Library of Parliament, *Indian Status and Band Membership Issues* (Political and Social Affairs Division: 2003) at 7.

70 *Indian Act,* RSC 1985, c I-5, s 8-10.

71 *Indian Act,* RSC 1985, c I-5, s 6.

72 Pamela D Palmater, *Beyond Blood: Rethinking Indigenous Identity* (Saskatoon: Purich Publishing Ltd, 2011) at 43.

73 Douglas Sanderson, "*Overlapping Consensus, Legislative Reform and the Indian Act*" (2014) 39 Queen's LJ 538 at 538.

to have at least two grandparents who are entitled to be registered will lead to a decline in the status Indian population."[74] In short, the federal government considers band membership and membership in a First Nations community to be largely synonymous, the variations about particular kinds of status notwithstanding, though the *Indian Act* has long allowed for the maintenance of a general list of status Indians without community membership.

(B) How is membership determined by Bands?

Even if a person is not recognized as an Indian for the purposes of the *Indian Act* it is still possible for that person to be a member of their band. The 1985 amendments to the *Indian Act*, passing of Bill C-31, recognized the right of bands to determine their own membership codes. The *Indian Act* grants power for First Nations to do so provided that they follow principles outlined in section 10.[75] For First Nations that adopted membership rules on or after June 28, 1987 the principles to follow are:

(1) The majority of the band's electors must give consent to the band taking control of its own membership procedures,

(2) The membership rules must include a review mechanism, and

(3) The band membership rules may not deprive a person of membership who were previously entitled to be on the Indian registry.

First Nations that adopted their own membership codes prior to June 28, 1987 must abide by the same principles, however they may choose to exclude those registered as section 6(2) Indians, those who only have one or no parents eligible for membership with the band, or those who had lost their status prior to 1985 as a result of voluntary enfranchisement.[76] Despite the potential exclusionary rules that may be implemented, this amendment has provided the opportunity for bands to become more inclusive and accept a person as a member even if that person is not legally registered as an Indian within the Act. However, Palmater explains that: "[w]hile status under the Act is controlled solely by Canada, some bands have enacted their own membership codes that are just as exclusionary as the rules provided under the Act. They exclude people based on lack of Indian status, choice of spouse, lack of residency on a reserve, ill health, poor finances, and/or inadequate blood quantum."[77]

With the changes under Bill C-31, new powers given to bands allow them to regulate who may live on reserve, deny membership to a person even if they are a status-Indian under the *Indian Act*, or impose other membership requirements. For example, some band membership codes require potential members to know detailed information about the particular indigenous traditions or be required to speak the language. Palmater sees this as being peculiar, especially when many of those who have membership could not provide such information or speak the indigenous language.[78]

While there are bands that have opted to implement more stringent membership codes, the majority of bands in Canada either have chosen not to control their own membership codes, resulting in the *Indian Act* determining who can be a member, or have chosen membership codes that are patterned after the Act. It is apparent why First Nations may not choose to implement their own membership codes and be more inclusive than the *Indian Act*; bands that grant membership to non-status Indians receive no additional funding for those people, which would result in a community having to stretch its already limited resources to accommodate any new non-status members.[79]

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74 Library of Parliament, *Indian Status and Band Membership Issues* (Political and Social Affairs Division: 2003) at 6.

75 *Indian Act,* RSC 1985, c I-5, s 10.

76 Stewart Clatworthy, *Indian Registration, Membership and Population Change in First Nations Communities* (Ottawa: INAC, 2005) at 5: http://www.collectionscanada.gc.ca/webarchives/20071213104645/http://www.ainc-inac.gc.ca/pr/ra/rmp/rmp_e.pdf

77 Palmater, *supra* note 72 at 19.

78 *Ibid* at 158.

79 Sanderson, *supra* note 73 at 539.

As of 2002, of the 609 First Nation bands registered under the *Indian Act*, 377 First Nations had not assumed control of their membership, leaving the *Indian Act* provisions to apply as their membership code, i.e., section 6 registration provisions. In addition to these First Nations that opted not to implement their own membership codes, 58 other First Nations adopted their own codes under section 11 of the *Indian Act*, which are essentially the same as the *Indian Act* provisions set out in section 6. That means 71% of First Nations in Canada have their membership decided by, or rules essentially the same as, the section 6 provisions in the *Indian Act.* The remaining 174 First Nations that have implemented their own membership codes are applying rules that are different from the *Indian Act* provisions. As most First Nations adopted their own membership codes prior to the 1987 deadline previously mentioned, these First Nations have been able to implement codes that are more exclusionary than the *Indian Act* provisions. 26 of these 174 First Nations have a blood quantum rule in their membership code, where eligibility depends on a minimum level of "Indian blood". 64 First Nations have a two-parent rule, where eligibility for band membership requires that both parents of the applicant be members. The remaining 84 First Nations use a one-parent rule, where eligibility for membership requires that a person have at least one parent who is a member.[80]

Pamela Palmater addresses the restrictive band membership requirements that exist across the country, arguing that the rigid acceptance criteria may spell the end of many First Nations within the next few decades: "Fears of assimilation have led some bands to institute blood quantum codes that accelerate the extinction process for their communities."[81] In addition to the variety of membership rules that exist, membership to one's community or band is not granted upon birth, but similar to the *Indian Act*, may be granted upon application.[82] While a person born in Canada is granted Canadian citizenship upon birth,[83] a First Nation person born by a First Nation person still has to apply to become a member of her own community/band. Additionally, the *Indian Act* rules encourage First Nation bands to limit membership only to those who are already status-Indian. This means that an increasing number of Aboriginals are not recognized: "The federal government has created a whole class of persons – non-status Indians – who are by every appropriate measure First Nation people, but who can claim no legal recognition of their status, and for whom membership in a community is possible in theory, but not in practice."[84]

The 1985 amendments to the *Indian Act* in Bill C-31 that empowered First Nations to choose their own membership codes, also resulted in the reinstatement of many First Nation people as status-Indians by eliminating some of the past gender discriminatory modes of passing on aboriginality that had favoured the male line of descent. However, registration as a status-Indian is not automatically accompanied with band membership if a band has enacted their own membership codes that require more than being registered under the *Indian Act*. After being reinstated following the 1985 amendments and possibly being able to obtain membership to one's First Nation band, there were many 'new' status-Indians who chose not to move back to their First Nation communities or were not welcomed back by the community with whom they have a connection. There are thousands of status and non-status Indians who reside off-reserve, some because they are denied registration under the *Indian Act* and some others because they do not wish to identify as Indian due to fears of potential discrimination or differential treatment, as well as a variety of personal circumstances.[85]

(C) The emerging legal regime regarding Indian status

To further complicate matters, the term "Indian" is used in the *Constitution Act, 1867*, and the *Indian Act*, yet it is now clear that the meaning is not co-extensive under both. *Canada v Daniels* addresses the question who is included within the meaning of "Indian" under section 91 (24) of the *Constitution Act, 1867*, for the purpose of deciding whether or not the federal government

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80 Stewart Clatworthy, *Indian Registration, Membership and Population Change in First Nations Communities* (Ottawa: INAC, 2005) at 12: http://www.collectionscanada.gc.ca/webarchives/20071213104645/http://www.ainc-inac.gc.ca/pr/ra/rmp/rmp_e.pdf

81 Palmater, *supra* note 72 at 183.

82 *Ibid* at 148.

83 Government of Canada: http://www.cic.gc.ca/english/citizenship/rules/

84 Sanderson, *supra* note 73 at 540.

85 Palmater, *supra* note 72.

has jurisdiction over Métis and non-status Indian people.[86] The Federal Court of Appeal affirmed that the federal government is not merely responsible for "Indians" under the *Indian Act*, but also bears responsibility vis-à-vis the Métis and non-status Indians.

Although the case is not directly concerned with the *Indian Act* and who is or is not a status-Indian and therefore potentially entitled to band membership, the Federal Court of Appeal stipulated: "In order for Parliament to grant status under the *Indian Act*, the person receiving status must be an Indian under the Constitution. In that sense, the *Indian Act* does not exhaustively define who is an Indian for the purposes of the division of powers […]"[87]

Regarding non-status Indians, the Court ruled that to be such a person must: (1) be Indian, and (2) have no status under the *Indian Act*. To be considered an Indian a person must: (1) have ancestral connection to someone considered an Indian (not necessarily genetic), (2) self-identify as Indian, and (3) be accepted by the community with which that person wishes to be associated.[88] It would at first glance seem that the second part to being considered an "Indian" would be easily met, however, it has been demonstrated that self-identification is not that straightforward. In *R v Acker*,[89] Mr. Acker was charged for failing to produce a licence to hunt, even though he had provided his New Brunswick Aboriginal Peoples Council membership card and a deer permit under the Treaty Implementation Management and Beneficiary Entitlement Regime. The Court in that case found Mr. Acker guilty, questioning his self-identification:

> I must conclude therefore that I find Mr. Acker's self-identification as a Mi'kmaq to be hollow and unconvincing. He has presented no real evidence that he considers himself to be Mi'kmaq beyond his assertion in a courtroom and his application to the New Brunswick Aboriginal Peoples' Council. It is a bold assertion without factual support. There is absolutely no evidence that subsequent to his discovery of his Aboriginal heritage he adopted an Aboriginal lifestyle of way of life […][90]

This demonstrates that the self-identification requirement as applied by the lower courts is not as easily satisfied as one might imagine. It is not sufficient to say "I identify as an Indian." In our view, the approach of the Court in *Acker* conflates the self-identification and community acceptance elements of the *Powley* test and exaggerates the evidentiary burden appropriately placed on the rights claimant.

This suggests that the law must, as a threshold matter, recognize communities that have the capacity to in turn recognize and accept Aboriginal individuals as their members. The requirement would appear to be straightforward in situations where the individual seeks to be recognized by a community that is itself created or recognized by the *Indian Act*. However, if *Daniels* is correct that non-status Indians living off-reserve are Indians for the purposes of the *Constitution Act, 1867*, then it is at least open to question whether the only communities that have capacity to recognize members ought to be *Indian Act* communities.

The view that communities other than reserves should be recognized as being capable of recognizing Aboriginal identity is strengthened in the Atlantic region by the historical record which suggests that some Aboriginal people including the Passamaquoddy were simply 'forgotten' in the registration scheme, and by the existence of established organizations that already represent off-reserve urban Aboriginal populations, including in the context of treaty negotiations, such as the Manitoba Métis Federation mentioned above, and in the Maritime context, the New Brunswick Aboriginal Peoples Council and the Native Councils of Prince Edward Island and Nova Scotia. Further, there are service providers that specifically address the interests and needs of off-reserve and urban Aboriginal populations including Friendship Centres and early childhood education providers. It is worth considering therefore whether the members of these organizations can be communities with the power to recognize individuals as Aboriginal for the purpose of s 35 of the *Constitution Act, 1982*.

3. Recognition and Membership: How do urban Aboriginal organizations determine who is an urban Aboriginal and for what purposes?

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86 *Daniels*, *supra* note 42.

87 *Ibid* at para 76.

88 *Ibid* at para 22.

89 *R v Acker,* 2004 NBPC 24, 281 NBR (2d) 275.

90 *Ibid* at para 65.

The New Brunswick Aboriginal Peoples Council (NBAPC) is an organization that represents and provides services to Aboriginal people residing off-reserve in the Mi'kmaq/Maliseet/Passamaquoddy traditional territory of New Brunswick. The NBAPC is the Aboriginal voice, politically, for over 28,000 status and non-status Indians who reside in the province, off-reserve. A primary goal of the NBAPC is to improve the social and economic standards of the off-reserve Aboriginal people in New Brunswick. The NBAPC does not provide services to Aboriginal people residing on-reserve.[91]

Similar to some First Nation bands that have enacted their own membership codes, the NBAPC has enacted a membership code of their own.[92] As the NBAPC is an organization representing and providing services to status and non-status Indian people, it is clear that their membership criteria do not align with the *Indian Act.* However, to obtain full membership and be eligible to vote at Assemblies, hold office at the NBAPC, or access some services offered by the organization, the urban Aboriginal person applying for membership must show documentation that proves:

1. Ancestral connection to a verified and known Aboriginal person since July 1, 1867. This connection does not have to be genetic.

2. Community acceptance/recognition: The applicant has to be recognized by a local community first, before her application for membership will be sent to the membership committee.

3. That she has resided in the province of New Brunswick, off-reserve, for at least six months. The applicant does not have to be from New Brunswick.

Once Aboriginal ancestry has been proven, the file goes to a membership committee for approval. However, the membership committee is not the final step. If the committee approves the application, the committee may recommend that the application be sent to the board of directors, who then makes the final decision. The board of directors is made up of one elected representative from each of the seven zones in the province and the President & Chief, Vice Chief & Provincial Youth Representative.

Although the NBAPC offers different categories of membership, such as spousal, youth, honorary, life-time, supporting, and associate, the NBAPC only advocates on behalf of those who have full membership, meaning those who have proven Aboriginal ancestry and are rights holders. The "two generation rule" from the *Indian Act* does not apply to the NBAPC's membership code. An applicant only needs to prove descent from a person verified as an Aboriginal person after July 1, 1867, which allows for non-status Indians to be included as members, so long as they meet the other criteria. The services provided by NBAPC are more than competitive with on-reserve services; thus, the requirement of off-reserve residence is strictly enforced. Wendy Wetteland, President and Chief of the NBAPC, notes:

> We have a large population of people who are using an off-reserve address to access our program [ASETS], but they actually live on reserve. So there needs to be a very thorough process or reviewing their applications for funding and ensuring they live off reserve. The concern we have is that there is such limited funding and access to programs for off reserve, they shouldn't be getting used up by on-reserve people when they have access to funding for their own purposes.[93]

The Native Council of Prince Edward Island (NCPEI) is another off-reserve organization that is engaged in representation, as well as providing services and programs to urban Aboriginal people. To obtain a full membership to the NCPEI, similar to the NBAPC, one needs to prove ancestral connection. However, unlike the NBAPC, the NCPEI does not have a membership committee; the Board of Directors fulfills this function. The NCPEI does not serve the on-reserve Aboriginal

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91 Wendy Wetteland, President and Chief of New Brunswick Aboriginal Peoples Council. Personal Communication, May 16, 2014.

92 In her work on tribal constitutionalism, Kirsty Gover has highlighted the importance of inter-indigenous recognition for public policy, noting that commonly more indigenous people living in a territory are not members of a tribal group traditional to that territory. However, we would complicate her analysis by suggesting that not only territorial tribal groups and settler governments are capable of performing recognition functions, but that urban Aboriginal organizations are relevant communities for that purpose. Kirsty Gover, "Inter-Indigenous Recognition and the Cultural Production of Indigeneity in the Western Settler States" in Avigail Eisenberg et al, eds *Recognition Versus Self-determination: Dilemmas of Emancipatory Politics* (Vancouver: UBC Press 2014) Chapter 8.

93 Wendy Wetteland, President and Chief of New Brunswick Aboriginal Peoples Council. Personal Communication, May 16, 2014.

population, nor do they serve the non-Aboriginal population. However, the organization will provide some services, such as housing, to families where the children are Aboriginal and the parents are not.[94]

Friendship centres are very important organizations for urban Aboriginal populations. The St. John's Native Friendship Centre (SJNFC) is a non-profit organization located in the city of St. John's, Newfoundland and Labrador. The mission of the SJNFC is to provide services to the Aboriginal and broader community by celebrating and supporting Aboriginal cultures through the delivery of programs and services.[95] A key difference between the SJNFC and an organization such as the NBAPC lies in their membership codes. Chris Sheppard of the SJNFC explains that the SJNFC is truly a "status-blind" organization, meaning: Everyone is welcome, period. It doesn't matter who you are or what your background is.[96]

The SJNFC is inclusive of people regardless of Aboriginal ancestry. However, it is important to note that such inclusiveness has not been an issue for the SJNFC because the programs and services offered the Friendship Centre are not currently based on recognized Aboriginal rights. The focus is on being the best community organization, not an Aboriginal organization. Membership in the SJNFC requires only a nominal five dollar annual fee, which Chris Sheppard says is not strictly enforced on those who do not have the means to pay. Every card-holding member can attend the annual general meetings and may cast votes. However, there is one distinction between Aboriginal and non-Aboriginal members: "we ensure that Aboriginal people are given priority for services and programs at times when there is a seat restriction."[97]

The Mi'kmaq Native Friendship Centre (MNFC) in Halifax is another non-profit organization engaged in providing services to urban Aboriginals. The mission of the Mi'kmaq Native Friendship Centre is to provide structured, social-based programming for urban Aboriginal People while serving as a focal point for the urban Aboriginal community to gather for a variety of community functions and events.[98] The MNFC is also a status-blind organization; however, for programs and services offered that are Aboriginal-rights based, a member would have to be able to provide proof of Aboriginal ancestry to qualify.[99]

(A) Multiple Identities

Looking at the different legal requirements under the *Indian Act* and the membership practices adopted by First Nations and off-reserve organizations, it is easy to see that there is not a single way to determine that a person is a member of a band or off-reserve organization. A person can be a registered Indian under the *Indian Act* but be denied membership to her First Nation community, or vice versa, where a First Nation is inclusive of a non-status Indian person. Where a person resides on-reserve, whether status or non-status, the person would be denied membership to an off-reserve organization because that organization does not serve the on-reserve population. At the same time, the *Indian Act* regime is both rigid and clearly under-inclusive.

The combined effect of rigid, yet differing descent-based rules for Indian status and band membership, creates a complex legal and policy environment for federal, provincial, and First Nation governments. This complicates the planning and delivery of government services and programs on- and off-reserve.[100] In sum, the federal legislative scheme for recognition is neither comprehensive nor entirely coherent. The jurisprudence acknowledges a gap between Aboriginal people who are rights holders under s 35 and the *Indian Act* regime and has suggested that community recognition is an important component of giving effect to the constitutional Aboriginal rights guarantees. It appears that both the provincial affiliates of the Congress of Aboriginal Peoples and Friendship Centre organizations have the potential to be communities for the purposes of recognizing Aboriginal individuals.

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94 Jamie Gallant, Native Council of Prince Edward Island. Personal Communication, May 16, 2014.

95 Chris Sheppard, Special Projects Officer, St. John's Native Friendship Centre. Personal Communication, May 16, 2014.

96 *Ibid*.

97 *Ibid*.

98 Mi'kmaq Native Friendship Centre: http://www.mymnfc.com/our-mission

99 Pam Glode-Desrochers, Executive Director, Mi'kmaq Native Friendship Centre. Personal Communication, May 16, 2014.

100 Cornet, *supra* note 66 at 154.

(B) Representing urban Aboriginal people

The representational structures created under the *Indian Act* do not lead to adequate consideration of the interests of urban Aboriginal people, even those who are status Indians. Palmater explains: Many chiefs of First Nations claim to represent only their band members on reserve, which de facto leaves off-reserve political organizations to represent band members who live off-reserve, status Indians who are not band members (on the General list) and who live off reserve, and non-status Indians.[101]

This leaves urban Aboriginal people with a gap in representation. Since it is clear that s 35 rights are not limited to those who are subject to the governance provisions of the *Indian Act*, governments fall short in their duty to consult if the consultative processes fail to account for the various classes of urban Aboriginal people described by Palmater. This gap is acutely felt by community partners.

> Who speaks for urban Aboriginal people? We know who speaks for the Millbrook First Nation, we know who speaks for St. Mary's, we know who speaks for Six Nations…Those structures have been set up by government and they know how to deal with them, because they [government] set the rules.[102]

There is case law following *Haida Nation* that demonstrates that courts will give effect to consultation claims by off-reserve populations. Organizations and groups can be successful in claiming a failure or breach of the duty to consult with off-reserve Aboriginal people.[103] However, courts have had difficulty delineating some of the claims in terms of the populations affected and have rejected claims for evidentiary reasons.[104] Additionally, individuals claiming a breach without the support and authorization from a community will be unsuccessful as the duty to consult attaches to communities who hold Aboriginal rights as communal rights.[105] Addressing the duty to consult with off-reserve Aboriginal populations, Dwight Newman argues that "[i]f non-status communities do not formalize representative structures, they risk being further marginalized through ongoing development of a doctrine that was intended to realize reconciliation with Aboriginal peoples."[106]

In *Native Council of Nova Scotia v Canada (Attorney General)*[107] the Native Council of Nova Scotia (NCNS), a council representing Mi'kmaq and other Aboriginal persons living off-reserve in the Province of Nova Scotia, claimed that the Department of Fisheries and Oceans (DFO) had failed to properly consult and accommodate the NCNS when the DFO limited the number of permitted lobsters caught under a licence issued to the NCNS. The Department argued the standing of NCNS, an incorporated political organization, suggesting that it did not possess Aboriginal rights. The issue was left undecided as the Court concluded that there was no evidence presented by the NCNS regarding an Aboriginal right, either through treaty, practice, custom or tradition. The case suggests that there may have been some significant limits to the litigation capacity of organizations representing off-reserve and urban Aboriginal populations, at least at that time.[108]

The issue of standing was also at play in another 2007 case, *Newfoundland and Labrador v Labrador Métis Nation,*[109] which involved a claim that the government had failed in its duty to consult regarding land rights. The Labrador Métis Nation (LMN) claimed that the province had failed to consult the LMN regarding the construction of the Trans-Labrador Highway. The LMN, similar to the NCNS above, was authorized by approximately 6,000 individuals in 24 different communities to act as their agent to enforce their right to consultation. Addressing the issue of a corporate entity attempting to enforce the duty to consult the

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101 Ibid at 57.

102 David Newhouse, Chair of Indigenous Studies, Trent University. Personal Communication, May 16, 2014.

103 *Newfoundland and Labrador v Labrador Métis Nation,* 2007 NLCA 75.

104 *Native Council of Nova Scotia v Canada (Attorney General,* 2007 FC 45.

105 *Kane et al v Lac Pelletier (Rural Municipality),* 2009 SKQB 41.

106 *Revisiting, supra* note 15 at 69.

107 *Native Council of Nova Scotia, supra* note 104.

108 *Manitoba Métis Federation*, *supra* note 36 does not answer the issue altogether in that it grants public interest standing only to the Federation.

109 *Newfoundland and Labrador v Labrador Métis Nation,* supra note 103.

Court stated: "I reject the Crown's submission that a corporate plaintiff may not be the vehicle for enforcement of an Aboriginal right to consultation."[110]

Regarding the issue of membership, the members of the LMN had a credible claim to an Aboriginal right through either identifying as Inuit or Métis. The Court noted that in certain circumstances a claimant might be required to self-identify if the Aboriginal right asserted only flows from one Aboriginal culture. However, in that case the Court held that the claimants were not required to identify themselves as Métis or Inuit before triggering the duty to consult, provided that they were able to assert a credible claim that they belong to an Aboriginal group within the meaning of section 35 of the *Constitution Act, 1982*.

The above cases demonstrate that an organization may legally represent an off-reserve Aboriginal community when asserting that the government has a duty to consult, and they appear to imply that the membership recognition processes of these organizations may be capable of supporting a claim to Aboriginal rights in some situations. In *Nunatukavut Community Council Inc v Newfoundland and Labrador Hydro-Electric Corporation (Nalcor Energy)* the government developed a plan to construct a hydroelectric facility on unrecognized Inuit territory. While there was subsequent disagreement in the Newfoundland courts about the scope of an injunction, all levels of court agreed that Nunatukavut Community Council (NCC), a corporation representing the Inuit Aboriginal people of central and southern Labrador, was owed a duty to consult and accommodate.[111]

(C) Off-reserve populations without community

Post-*Haida Nation,* there have been a small number of cases involving individual claimants with no authority from or affiliation with Aboriginal groups that have claimed the government has failed in its duty to consult. These claims have been based on land, resource, fishing, hunting, trapping and taxation rights. Court decisions have demonstrated that it is possible for organizations or individuals to be successful when claiming the government has failed in its duty to consult, provided that the organization or individual were authorized representatives of the Aboriginal rights bearing group.

When the claimant is arguing a breach solely on his or her behalf, courts have dismissed the claims. This represents a challenge for urban Aboriginal people who may lack community structures that are cognizable as communal under the current legal framework or known to the relevant authorities. In 2009, an individual Métis claimant argued that a municipality had failed in its duty to consult with the local Métis people regarding the development of a resort near a lake where the claimant lived.[112] The claim failed for two reasons: first, the claimant was not representing an Aboriginal community, but was bringing the claim on her own behalf. Second, the municipality had no actual knowledge, real or constructive, that there were any asserted Aboriginal rights until months after the approval of construction was made. The claimant's argument was based solely on her affidavit that explained the history of the Métis people in the area. The Court held that asserted Aboriginal rights cannot be based upon vague historical connections, but required actual evidence. The significant evidentiary burden placed on potential rights-holders is potentially problematic for urban Aboriginal communities given the notorious dearth of resources and the lack of governmental support.

By contrast, individuals who meet the requirements of the *Powley* test may rely on their aboriginality to defend a quasi-criminal prosecution before the aboriginal right has been determined by the courts based on a duty of the Crown to consult and accommodate in good faith. The case of *R v Kelley* [113] involved a Métis person who had appealed a conviction for hunting without a licence. The accused relied on *Haida*, arguing that the Crown had a duty to consult with and accommodate in good faith the rights of the Métis Nation when implementing the Interim Métis Harvesting Agreement, and that the Interim Agreement should have provided a successful defence to the charge. The Crown argued *Haida* was not applicable because there was no duty to consult in the context of a quasi-criminal prosecution. Addressing the Crown's argument, the Court stated: "The Supreme Court in *Haida* explained that the government's duty to consult with Aboriginal peoples and accommodate their interests is

110 *Ibid.* at para 46.

111 *Newfoundland and Labrador v. Labrador Métis Nation*, 2007 NLCA 75; *NunatuKavut Community Council Inc. v. Nalcor Energy*, 2014 NLCA 46 overturning *Nalcor Energy v NunatuKavut Community Council Inc*, 2012 CanLII 73234 (NL SCTD).

112 *Kane et al v Lac Pelletier (Rural Municipality),* 2009 SKQB 41.

113 *R v Kelley,* 2007 ABQB 41.

grounded in the principle of the honour of the Crown, *which must be understood generously*."[114] As a result the Court held that the duty to consult and accommodate barred a prosecution contrary to the interim agreement as abusive.

(D) Representation Challenges: mobility between on- and off-reserve

Jamie Gallant, from of the Native Council of Prince Edward Island, explains that the biggest cause of changes in the population served by the Council is people moving to PEI from a reserve out of province, resulting in an influx of urban Aboriginal people from outside of PEI. Mobility of these Aboriginal people from territory to territory, Gallant explains, is often a result of those people seeking services that are not offered in their home territory.[115] Gary Gould suggests another possible mobility trigger:

> They want to escape the reality of the reserve. They want a better life for their family. Sometimes it's an overcrowded housing situation, sometimes it's an abusive relationship, and sometimes it's the fact that they want home ownership. On reserve you can get a certificate of possession, but you still don't have home ownership.[116]

We heard from a number of service providers and CAP affiliates that there is significant mobility between reserves and urban areas. This is consistent with the overall trend towards urbanization, but it also suggests that social issues arising on reserves or in urban communities trigger some mobility. Additionally, some mobility is not voluntary. Given the significant exposure of Aboriginal people to the threat of incarceration as well as threats of children being made wards of the state, the representational needs and preferences of these mobile off-reserve populations must be determined.

In the final part of the paper, we outline some areas of concern that we heard about from community partners that are susceptible to improvement by consultation. We make no claim that these areas are comprehensive, but they may present starting points for addressing the needs and meeting the aspirations of urban Aboriginal people.

4. Areas of Concern

(A) Lack of clarity over Representation and Consultation

The issues raised in this discussion paper are pressing. As long as there is a lack of clarity about the demographics and needs of urban Aboriginal populations, their community affiliations and their representational wishes, these Aboriginal people risk being left out of processes that directly affect their constitutional rights. At the same time, a lack of clarity can lead to government consultations that are incomplete or fail to meet the constitutional obligations.

In 2010, the Qikiqtani Inuit Association (QIA), a designated representative of Inuit people, brought a case involving an Inuit right to harvest marine animals. The QIA claimed that the Crown had not fulfilled its duty to consult when implementing a seismic testing project. The Court declined to rule on the duty to consult, leaving the issue to be decided at trial. However, the Court did stipulate that the Crown must be clear about what constitutes consultation. In that case the Nunavut Impact Review Board's (NIRB) task was the reviewing of project proposals that had potential impacts on Inuit rights. The NIRB recommended the Crown conduct public meetings to discuss the proposed testing. The Crown conducted the meetings and made changes to the project as a result of community concerns made at the meetings. While not ruling on the issue, the Court did hold that it was unclear whether the NIRB's process was a consultative process.[117] This case illustrates what we have also heard from UAKN community partners: governmental agencies are not always sufficiently transparent about what processes they consider to be consultations under s 35, nor are there consistently appropriate safeguards in place to ensure that the consultation engaged the right organizations. This is the cause of significant frustration for organizational representatives who rightly fear that any communication with government may be characterized as meeting consultative obligations after the fact.

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114 *Ibid* at para 66 [emphasis added].

115 Jamie Gallant, Native Council of Prince Edward Island. Personal Communication, May 16, 2014.

116 Gary Gould, General Manager, Skigin-Elnoog Housing Corporation. Personal Communication, May 16, 2014.

117 *Qikiqtani Inuit Association v Canada (Minister of Natural Resources),* 2010 NUCJ 12.

(B) Potential Policy Areas of Consultation

In addition to consultations on land, resource and treaty rights, there is a need for governmental consultation in areas where urban Aboriginal organizations provide services. More research is required to fully capture existing programs. What follows is a summary description of some of the programs with a view to providing an initial sense of areas of activities in which a duty to consult might be owed.

UAKN member organizations currently offer services to urban Aboriginal people in Atlantic Canada in a variety of areas. A common area of service is training and employment. The New Brunswick Aboriginal Peoples Council (NBAPC) and the Native Council of Prince Edward Island (NCPEI) both provide services through the Aboriginal Skills & Employment Training Strategy (ASETS).[118] This program focuses on both clients and employers to assist in providing clients with training programs that will lead to actual employment opportunities. A similar program is carried out by the NCPEI. The Strengthening and Mentoring Aboriginal People for Realistic Training (SMART) program for employment has the purpose of supporting urban Aboriginal people who want to pursue training in a trade identified as a need in PEI. Pam Glode-Desrochers, from the Mi'kmaq Native Friendship Centre in Halifax, explained how that Centre provides a service that is similar to the SMART program in PEI:

> We have an active partnership strategy that is actually networking with actual employers and government officials. We begin the dialogue and develop programs from the dialogue and networking that helps fill those gaps [in employment], instead of training for the sake of training.[119]

The ASETS program offered by the NBAPC and the NCPEI also serves as an education mechanism. Through this program, students who are enrolled in a post-secondary training course that is two years or less in duration may be eligible for funding. On a smaller scale, but no less important, is a partnership that the St. John's Native Friendship Centre has with the Royal Bank of Canada which provides schools supplies to students in the St. John's area.[120]

Cultural services are another area of service that was identified by each member organization as an area in which programs and services are offered. Member organizations explained that they provide teachings on Aboriginal cultural practices, such as drumming, sweats, throat singing and crafts, or simply provide the space for members to comfortably practice on their own. Pam Glode-Desrochers described how the Friendship Centre in Halifax acts as a physical drop-in centre that serves as a means to share in the Aboriginal culture. People come to the Centre to prepare food in the kitchen, seek advice, or simply to hang out with people with whom they feel comfortable.[121]

All member organizations indicated they are currently engaged in providing health and well-being services. The NCPEI provides two vital programs: "Walking the Red Road," which is an addiction prevention program aimed at those aged 18-30, and "Hepped up on Life" which is a Hepatitis C and HIV awareness program. The coordinator of that program goes into correctional facilities and works with social service providers to spread social awareness.[122] The Halifax Friendship Centre also has a Hepatitis C awareness program. In addition, the Halifax Friendship Centre is engaged in the "180 Program" which is a methadone program. Pam Glode-Desrochers described how the program has been a great success, yet more resources are always needed, because through the 180 Program the Friendship Centre services approximately 3000 people a year.[123]

Addressing the fact that Aboriginal people face higher rates of incarceration than the mainstream population, member organizations are engaged in providing services to ex-prisoners. The Mi'kmaq Native Friendship Centre in Halifax runs the "Seven Sparks Program" that provides a holistic way to aid in the transition of urban Aboriginal people coming out of

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118 Wendy Wetteland, President and Chief of New Brunswick Aboriginal Peoples Council; Carolyn Taylor, Former Director of Tripartite, Native Council of Prince Edward Island. Personal Communications, May 16, 2014.

119 Pam Glode-Desrochers, Executive Director, Mi'kmaq Native Friendship Centre. Personal Communication, May 16, 2014.

120 Chris Sheppard, Special Projects Officer, St. John's Native Friendship Centre. Personal Communication, May 16, 2014.

121 Pam Glode-Desrochers, Executive Director, Mi'kmaq Native Friendship Centre. Personal Communication, May 16, 2014.

122 Carolyn Taylor, Former Director of Tripartite, Native Council of Prince Edward Island. Personal Communication, May 16, 2014.

123 Pam Glode-Desrochers, Executive Director, Mi'kmaq Native Friendship Centre. Personal Communication, May 16, 2014.

correctional institutions.[124] Similarly, the St. John's Friendship Centre (SJFC) has an agreement with corrections to work with offenders coming out of the system, in which Elders meet with the offender weekly.[125]

Housing is another area where member organizations are engaged in providing services and programs. Gary Gould described how the Skigin-Elnoog Housing Corporation offers a program aimed at helping urban Aboriginal people achieve home owner status through assisted mortgages.[126] Two other member organizations are also engaged in some form of housing service. The Native Council of Prince Edward Island offers housing to elders and members of the Native Council through the Nenegkam Housing program and the SJFC has a homeless shelter. While it does not have any programs at the present time, the Mi'kmaq Friendship Centre in Nova Scotia is currently engaged in talks with the province regarding an Aboriginal housing authority to provide housing to urban Aboriginal people.[127]

In all of these areas of existing services, governments are already involved as funders and regulators. Imposing a duty to consult when changes to funding or policy in these areas are contemplated would likely have only modest impact on governmental operations. At the same time, the lack of consultation sometimes has devastating impacts when programs and services are altered or eliminated. These impacts are felt by the urban Aboriginal people the organizations serve.

Gaps in Service

Beyond desiring consultations on existing programs and potential changes, community partners also highlighted that there needs to be more consultation about currently unmet needs of urban Aboriginal people and about areas where there is significant community partner activity with inadequate funding. For example, Ms. Tulk from the St. John's Native Friendship Centre addressed a concern about youth programs in Friendship Centres across the country. She explained how the funding had stopped, and that they do not anticipate any funding in the near future. Ms. Tulk continued by stating that the services accessed by youth are important because it gives them a positive way to occupy their time. But when services get cut because of a lack of funding many youth then turn to drugs or criminal activity because they no longer have the support system in place.[128] Ms. Taylor, formerly with the Native Council of Prince Edward Island, mirrored Ms. Tulk's concern, explaining how there is very little funding for youth programs in the province and that it's up to the organization to use extra resources or to search for funding to provide such services. Ms. Taylor explained how the Native Council offers a two-night-a-week youth support group for things such as homework, dances, and cultural activities, but was clear that more programs and services are required for youths.[129] Similarly, in Newfoundland, Chris Sheppard of the St. John's Native Friendship Centre explained how the Cultural Connections for Aboriginal Youth program that existed for ten years was cancelled by the federal government: "With young people, once you make that connection…if you lose it or something stops, then it is almost impossible to get people back. So it's much easier to self-fund and keep a staff person going."[130]

This problem is not limited to youth programs. Employment programs and services are either not provided at an appropriate level of service or not provided at all. The St. John's Native Friendship Centre used to offer a wide range of employment services until the federal government canceled all programs. Chris Sheppard expressed his deep concern stating that "they [government] said that everyone was consulted, but nobody was."[131] Now, clients must go into a provincial government office to receive services. Even though the services are still offered, just not through the Friendship Centre, Chris Sheppard explained how members of the Friendship Centre will opt not to go into the provincial offices, due to cultural barriers, and would rather have the services offered once again by the Friendship Centre.

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124 *Ibid*.

125 Chris Sheppard, Special Projects Officer, St. John's Native Friendship Centre. Personal Communication, May 16, 2014.

126 Gary Gould, General Manager, Skigin-Elnoog Housing Corporation. Personal Communication, May 16, 2014.

127 Pam Glode-Desrochers, Executive Director, Mi'kmaq Native Friendship Centre. Personal Communication, May 16, 2014.

128 Breannah Tulk, Community Programs Coordinator, St. John's Native Friendship Centre.

129 Carolyn Taylor, Former Director of Tripartite, Native Council of Prince Edward Island. Personal Communication, May 16, 2014.

130 Chris Sheppard, Special Projects Officer, St. John's Native Friendship Centre.

131 *Ibid*.

Without the appropriate level of youth and employment services, member organizations have voiced the concern that people can easily turn to drugs and criminal activity.[132] Pam Glode-Desrochers described how there is also a shortcoming in services for Aboriginal offenders exiting institutions. The Seven Sparks Program had its funding cut about a year ago, however, the Friendship Centre has continued to offer it.[133] With government no longer funding the program, it is likely that the resources the Friendship Centre now expends on Seven Sparks is drawn from other areas of service also in need. If there were external funding for the program, it could likely free up the resources to direct at others in need, such as youth and employment services.

The situation is similar with respect to housing. Gary Gould, from Skigin-Elnoog Housing Corporation in New Brunswick, explained that the client base for off-reserve mortgages is growing, but the government is permitting fewer mortgages.[134] In Newfoundland, "right now St. John's is being majorly affected by the oil and gas industry, so housing costs are astronomical. We would consider it a crisis in the city right now."[135] It appears the housing situation is going to get even worse. Ms. Tulk explained that the government is about to cut funding for emergency housing services. Also, to compound the housing crisis, Ms. Tulk stated that there are landlords in the city who will not rent to Aboriginal peoples, and that there is nothing at the present time being done about this blatant discrimination.

CONCLUSION: THE PROMISE OF RECOGNITION AND CONSULTATION

The current doctrinal and factual framework of the duty to consult poses significant obstacles to applying it to urban Aboriginal populations and the organizations who represent them and who serve their needs. From a doctrinal perspective, the duty to consult is part of the justification analysis for rights limitations. Also, the jurisprudence has a property-rights focus. Because the duty to consult is thought to be triggered by a proposed land or resource use that has the potential to affect existing Aboriginal rights, the framework is underdeveloped for rights that attach to the sovereignty and self-governance dimensions of rights in a territory recognized under s 35 of the *Constitution Act, 1982* rather than to the property dimensions of land and resources. That said, the jurisprudence already recognizes that cultural and linguistic rights may well be protected under s 35. What the jurisprudence does not (yet) do is to give procedural effect to these potential rights. This has a disproportionate and detrimental effect on urban Aboriginal populations.

Further, governments have relied on settler society legal structures, particularly the registry and governance provisions under the *Indian Act*, to create representational structures and have tended to consult with Aboriginal populations through these structures. While the federal government has recognized groups other than the Assembly of First Nations for representational purposes, including the Métis National Council and the Congress of Aboriginal Peoples, provincial governments have been less consistent in their recognition of representatives of urban Aboriginal populations and neither level of government has consistently consulted with these organizations or their regional affiliates.

Finally, while on-reserve populations have been given the power to create their own membership codes and thus have authority to recognize people for the purpose of Aboriginal identity, a similar power has been slow to develop for the organizations that represent urban Aboriginal communities, such as Friendship Centres and Native Councils. Our research shows that these organizations have the capacity to anchor urban Aboriginal communities and that their membership processes may well be suitable for community recognition purposes.

The benefits of developing a jurisprudence that accounts for the demographic trends and the real needs of Aboriginal Canadians in the 21st century are significant. It is important to note that what organizations want first and foremost is to receive recognition for their work as being valuable to the urban Aboriginal community:

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132 Carolyn Taylor, Former Director of Tripartite, Native Council of Prince Edward Island; Pam Glode-Desrochers, Executive Director, Mi'kmaq Native Friendship Centre. Personal Communication, May 16, 2014.

133 Pam Glode-Desrochers, Executive Director, Mi'kmaq Native Friendship Centre. Personal Communication, May 16, 2014.

134 Gary Gould, General Manager, Skigin-Elnoog Housing Corporation. Personal Communication, May 16, 2014.

135 Breannah Tulk, Community Programs Coordinator, St. John's Native Friendship Centre. Personal Communication, May 16, 2014.

> I want the government to understand that what we are doing is important. That there is no other organization providing these programs and services to urban Aboriginal people anywhere near the St. John's Metro area. The government should realize based on our statistical data that we provide to them, that they need to support the work that we are doing, and understand its importance, instead of having no idea what we do, and us having to constantly explain why we are important to the population that we serve.[136]

A similar concern was voiced by Pam Glode-Desrochers from the Mi'kmaq Native Friendship Centre in Halifax: that the government needs to listen to the Friendship Centre and be aware of what it is currently doing. She states that "we are the community voice many times and they [government] need to be at least aware of what we are currently doing. Because 9 times out of 10 they don't know what we do."[137] Additionally, Pam Glode-Desrochers argues that the government needs to stop being concerned with whether members are status or non-status before acknowledging the value in the services the Friendship Centre provides.

These organizational aspirations are consistent with the legal framework of the duty to consult. They suggest that it is often not necessary for government to change its activity so much as it is necessary to engage with these organizations, to be aware of their work and to consult when changes are contemplated to ensure that the needs of urban Aboriginal people are met. We need an inventory of organizations representing and providing services to urban Aboriginal populations, including an inventory of services and funding streams. This would go a long way toward ensuring that consultation is carried out in accordance with the constitutional obligations arising from the honour of the Crown, and in accordance with sound federal and provincial policy. Research providing such an inventory should be a high priority in the Atlantic region for the UAKN Atlantic and across Canada through the other regional offices and the UAKN National.

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136 Chris Sheppard, Special Projects Officer, St. John's Native Friendship Centre. Personal Communication, May 16, 2014.

137 Pam Glode-Desrochers, Executive Director, Mi'kmaq Native Friendship Centre. Personal Communication, May 16, 2014.