



The Atlantic Aboriginal Economic Development  
Integrated Research Program, AAEDIRP

***Managing Land, Governing for the Future: Finding the Path  
Forward for Membertou***

September 2013

*Report prepared by Rachel Starks, with assistance from Janice Esther Tulk, Tamara Young, Mary Beth Doucette, and Trevor Bernard*



Atlantic Policy Congress  
Of First Nations Chiefs Secretariat  
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## THE ATLANTIC ABORIGINAL ECONOMIC DEVELOPMENT INTEGRATED RESEARCH PROGRAM (AAEDIRP)



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# Managing Land, Governing for the Future: Finding the Path Forward for Membertou

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Sliammon First Nation  
Whitecap Dakota First Nation  
Muskoday First Nation  
Nipissing First Nation  
Georgina Island First Nation  
Nunatsiavut Labrador Inuit Government

## Executive Summary

This in-depth, interview-based study was commissioned by Membertou Chief and Council and the Membertou Governance Committee, and funded by the Atlantic Aboriginal Economic Development Integrated Research Program to investigate methods by which Membertou First Nation can further increase its decision-making power over economic development. Membertou has made significant economic strides but increasingly struggles against the limits of Canada's *Indian Act*, especially in terms of land management. Without a well understood, reliable, and transactionally efficient land regime, the First Nation cannot achieve its community development goals. In fact, recent experiences with commercial and residential development have underscored the insufficiency of *Indian Act* protocols and the limits on "work-arounds" Membertou has used to avoid those protocols. A wholly new approach is needed.

Membertou's leadership has made the decision to participate in the Framework Agreement on First Nation Land Management as a means of opting out of the lands-relevant portions of the *Indian Act*. This project emerges from that decision and addresses the following questions: What more does the nation need to do at the level of band governance to implement the Framework Agreement? What institutional and legal infrastructure is needed to support First Nation-led land management? What might Membertou learn from other First Nations that are managing their own lands (under the Land Management Act or other arrangements such as self-governance agreements, treaty settlements, and comprehensive land claims)? What are the preferences of the Membertou community in terms of land management arrangements?

Embarking on this study, Membertou already had some understanding of the issues surrounding land management. Band leadership knew that:

- There is a divergence of community opinions on how land should be used.
- Community opinions are not easily addressed under *Indian Act* system – communities need to have more control to figure this out.
- Aboriginal communities have different reasons for taking over land management (location-specific issues, participation in the larger economy, a desire to better manage the reserve land base).
- Improved land management practices and procedures could strengthen and develop economic partnerships.
- There is diversity in land management models, and no one solution works for every First Nation.

Interviews with lands managers from ten Aboriginal governments<sup>†</sup> (representing four provinces) and two experts in First Nations lands management focused on the points to

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<sup>†</sup> Westbank First Nation (BC), Tzeachten First Nation (BC), Haida Gwaii, Council of the Haida Nation (BC), Tsawwassen First Nation (BC), Sliammon First Nation (BC), Whitecap Dakota First Nation (SK), Muskoday

consider when developing a lands management system. These key informants' points ranged from practical details of organizational structure and institutional capacity to cultural considerations, such as the importance of incorporating cultural practices and priorities into the land management code. Lands management experts advised Membertou to:

- Decide on the most appropriate organizational structure for a lands management office;
- Be aware of the First Nation's land tenure situation and the implications of current allotment practices;
- Build institutional capacity to both create and sustain the lands management system;
- Decide on an appropriate dispute resolution process;
- Keep the community involved in all aspects of the land code development process;
- Develop environmental standards and protocols; and
- Find ways to honor and incorporate tradition in the new lands management system.

Interviews with Membertou community members shed light on community priorities for the land, which are a key input for Governance Committee and Chief and Council decision-making. These land-management priorities, expressed as directions for leadership, are to:

- Keep the Mi'kmaw culture alive by maintaining connection with the natural environment;
- Save and conserve as many trees and medicinal plants as possible;
- Exceed current environmental standards and adhere to established protocols;
- Remember the larger Mi'kmaw territory (lakes, rivers, coastal areas, and wilderness areas) when making lands management decisions;
- Streamline the committee-based decision-making process;
- Keep the community involved in the land management development process through community gatherings and social media;
- Write the code in Mi'kmaq; and
- Maintain the separation between residential and commercial areas.

While Membertou will learn from the wisdom and experiences of land managers, Membertou must chart its own path to ensure that it responds to the needs of its community members. Key decisions for Membertou as it engages in this process are:

- *How should the land management be organized?* Land experts offered different models for land systems. Membertou needs to think carefully about how to

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First Nation (SK), Nipissing First Nation (ON), Georgina Island First Nation (ON), Nunatsiavut Labrador Inuit Government (NL)

structure a land management institutions and organizations, and create appropriate roles for elected leadership.

- *What is the right strategy with regard to allotments?* Land managers advised a First Nation community to carefully consider the types of land tenure and land transactions prevalent in the territory. The Membertou community recognized the importance of planning ahead to balance individual land allotments with communal ownership.
- *How can the nation build capacity?* Institutional capacity building was recommended by land managers. This is something that Membertou has worked hard on, and plans to continue.
- *How should disputes be resolved?* An area of concern for any government, Membertou needs to determine the best way to handle land disputes – both within the community and with other people and entities.
- *How should the community be involved?* Membertou needs to decide on appropriate ways of involving the community in land management planning and implementation
- *What environmental standards should the nation set?* First Nation governments have the opportunity to develop environmental standards; Membertou supports high standards, encouraging protection of the natural environment.

# Table of Contents

<b>THE ATLANTIC ABORIGINAL ECONOMIC DEVELOPMENT INTEGRATED RESEARCH PROGRAM (AAEDIRP)</b> .....	<b>2</b>
<b>MANAGING LAND, GOVERNING FOR THE FUTURE: FINDING THE PATH FORWARD FOR MEMBERTOU</b> .....	<b>3</b>
RESEARCH TEAM .....	3
ADVISORY COMMITTEE: MEMBERTOU GOVERNANCE COMMITTEE .....	3
AAEDIRP RESEARCH SUBCOMMITTEE .....	4
ACKNOWLEDGEMENTS .....	4
<b>EXECUTIVE SUMMARY</b> .....	<b>5</b>
<b>TABLE OF CONTENTS</b> .....	<b>8</b>
<b>LIST OF FIGURES/TABLES</b> .....	<b>11</b>
<b>LIST OF ABBREVIATIONS</b> .....	<b>11</b>
<b>CHAPTER ONE: INTRODUCTION</b> .....	<b>12</b>
MEMBERTOU ECONOMIC DEVELOPMENT .....	13
LAND MANAGEMENT ISSUES IN MEMBERTOU .....	15
THE INDIAN ACT .....	16
FRAMEWORK AGREEMENT ON FIRST NATIONS LAND MANAGEMENT .....	17
OVERVIEW OF RESEARCH PROJECT .....	17
KEY RESEARCH QUESTIONS.....	18
<b>CHAPTER TWO: METHODOLOGY</b> .....	<b>19</b>
WHAT IS QUALITATIVE RESEARCH?.....	19
METHODOLOGICAL COMPONENTS.....	20
<i>Advisory Board</i> .....	20
<i>Literature Review</i> .....	20
<i>Ethics</i> .....	20
<i>Interviews with Land Experts</i> .....	20
<i>Interviews at Membertou</i> .....	21
<i>Analysis of Data</i> .....	21
<i>Population and Recruitment</i> .....	21
<i>Confidentiality</i> .....	22
OVERVIEW: PHASE I .....	22
OVERVIEW: PHASE II .....	27
CHALLENGES .....	30
RESEARCH CAPACITY DEVELOPMENT.....	30
<b>CHAPTER THREE: LITERATURE REVIEW</b> .....	<b>32</b>
THE <i>INDIAN ACT</i> .....	32
<i>Governmental Structure: Chief and Council System</i> .....	33
<i>Citizenship</i> .....	34
<i>Matrimonial Real Property</i> .....	34
CRITIQUES OF THE <i>INDIAN ACT</i> .....	35
IMPACT OF TREATIES AND COURT CASES.....	37
ALTERNATIVES TO THE <i>INDIAN ACT</i> .....	39



<i>Self-government Arrangements</i> .....	39
<i>Land claims</i> .....	40
<i>First Nations Land Management Act and Framework Agreement on First Nation Land Management</i> .....	42
LAND TENURE .....	43
<i>Aboriginal Land Tenure Systems</i> .....	43
<i>A Proposed Indigenous Land Tenure Model</i> .....	44
CONCLUSION .....	46
<b>CHAPTER FOUR: REPORTING ON THE PRIMARY DATA .....</b>	<b>47</b>
LESSONS LEARNED FROM LAND MANAGERS .....	47
<i>We Would Never Go Back to the Indian Act</i> .....	47
<i>Community Involvement</i> .....	47
<i>Chief and Council Involvement</i> .....	48
<i>Capacity Building</i> .....	49
<i>Dispute Resolution</i> .....	50
<i>Interactions with Outside Parties</i> .....	51
<i>Land Transactions</i> .....	52
<i>Tradition</i> .....	52
<i>Impediments to Development &amp; Implementation</i> .....	53
<i>Other Things to Consider</i> .....	54
MEMBERTOU PRIORITIES .....	55
<i>A Note on Membertou Community Values</i> .....	55
<i>How was land traditionally governed?</i> .....	55
<i>What is Membertou land?</i> .....	57
<i>Land Use</i> .....	58
<i>Cultural Integrity Through Preservation</i> .....	60
SUMMARY .....	61
<b>CHAPTER FIVE: SYNTHESIS AND ANALYSIS OF INTERVIEWS .....</b>	<b>62</b>
MANAGING THE LAND: ORGANIZATION AND LEADERSHIP .....	62
<i>Organization</i> .....	62
<i>Chief and Council Involvement</i> .....	62
<i>Scope of Authority</i> .....	62
LAND HOLDINGS: BAND-CONTROLLED, CERTIFICATES OF POSSESSION (CPS) .....	63
<i>What if we allot all the land to individuals?</i> .....	64
INSTITUTIONAL CAPACITY .....	64
<i>Share Information Among Departments</i> .....	64
<i>Process</i> .....	65
<i>Data Management</i> .....	65
<i>Land Registry</i> .....	65
DISPUTE RESOLUTION.....	65
COMMUNITY INVOLVEMENT .....	66
<i>Popular Events</i> .....	66
<i>Social Media</i> .....	67
<i>Teleconferencing/Video Conferencing</i> .....	67
<i>Visit Door to Door</i> .....	67
<i>Sharing the Land Code with the Membertou Community</i> .....	67
ENVIRONMENTAL STANDARDS .....	68

<i>Established Protocol</i> .....	68
<i>Membertou Development Codes</i> .....	68
SUMMARY .....	69
<b>CHAPTER SIX: FINAL THOUGHTS</b> .....	<b>70</b>
SUMMARY .....	70
<i>Literature Review</i> .....	70
<i>Lessons Learned from Other Communities</i> .....	70
<i>Membertou Community Priorities</i> .....	71
<i>Synthesis – Learning from Land Experts and Membertou Community</i> .....	71
FUTURE RESEARCH.....	72
CONCLUSION .....	73
<b>REFERENCES</b> .....	<b>74</b>
<b>APPENDIX A – CONSENT FORM</b> .....	<b>80</b>
<b>PART II: FOCUS GROUP PARTICIPANT CONSENT</b> .....	<b>83</b>
<b>APPENDIX B – INTERVIEW QUESTIONS BY CATEGORY</b> .....	<b>86</b>
INTERVIEWS WITH LAND MANAGERS .....	86
MEMBERTOU FIRST NATION CHIEF AND COUNCIL MEETING .....	90
MEMBERTOU 55 PLUS SOCIETY .....	91
MEMBERTOU FIRST NATION.....	92
MEMBERTOU FIRST NATION STAFF INTERVIEWS .....	95

## List of Figures/Tables

<b>TABLE 1. PHASE I INTERVIEWS ON LAND MANAGEMENT. PARTICIPATING COMMUNITIES.</b>	<b>27</b>
<b>TABLE 2. MEMBERTOU INTERVIEWEES</b>	<b>29</b>

## List of Abbreviations

<b>AAEDIRP</b>	<b>Atlantic Aboriginal Economic Development Integrated Research Program</b>
<b>AANDC</b>	<b>Aboriginal Affairs and Northern Development Canada</b>
<b>CBU</b>	<b>Cape Breton University</b>
<b>DIO</b>	<b>Designated Inuit Organizations</b>
<b>FAFNLM</b>	<b>Framework Agreement on First Nation Land Management</b>
<b>FMB</b>	<b>First Nation Financial Management Board</b>
<b>FNFA</b>	<b>First Nation Finance Authority</b>
<b>FNLMA</b>	<b>First Nations Land Management Act</b>
<b>ISO</b>	<b>International Organization for Standardization</b>
<b>LABRC</b>	<b>Land Advisory Board Resources Centre</b>
<b>MEW</b>	<b>Mi'kmaw Ethics Watch</b>
<b>MRP</b>	<b>Matrimonial Real Property</b>
<b>NNI</b>	<b>Native Nations Institute</b>
<b>QA</b>	<b>Quality Assurance</b>

## Chapter One: Introduction

This study is part of a larger directive from the Membertou Chief and Council to investigate ways to increase autonomy in economic development and self-determination. Since the 1990s, Membertou has made strides, including obtaining ISO certification for governmental processes, to become a leader in economic and commercial development in Nova Scotia. Nevertheless, Membertou leadership has suggested that development has reached its limit under Canadian Indian legislation – the *Indian Act*. What are the options to move forward? Will Membertou forever be constrained by this legal framework? Membertou has directed various departments to investigate options to increase autonomy over lands and economic development.

The goal of the present project, titled *Managing Land, Governing for the Future: Finding the Path Forward for Membertou*, was to research land management models in use throughout Canada to determine their impact on economic development and provide Membertou with the information required to make a decision on the establishment of their own land code. It reviews issues related to the current land management regime under the *Indian Act*, compiles information on lessons learned regarding land management in other Aboriginal communities, and identifies the immediate and long-term concerns of Membertou community members. In summary, this document outlines important issues for Membertou to consider in determining whether to pursue the Framework Agreement on First Nation Land Management (FAFNLM or Framework Agreement) or some other form of land management, and suggests strategies that have worked in other communities. This document is meant to inform Membertou Chief and Council on decisions relating to land management, allowing them to draw their own conclusions based on the information provided; however, it is anticipated that the content will be a valuable resource to other First Nation communities.

In this chapter, we provide background on the community of Membertou and the land management issues that it has encountered during economic development initiatives. We then present a brief explanation of the *Indian Act* and the Framework Agreement on First Nations Land Management (FAFNLM) as context to the study before proceeding to an overview of the two-phase research plan that was created to respond to the community-identified need for research into land management.

Readers should be aware of the terminology used throughout this report. A variety of terms are used to describe the legal and cultural status of the First Peoples in North America: Aboriginal, Indigenous, Indian, band, tribe, First Nation, Inuit, and Métis.

- Aboriginal is a term used to refer to First Nations, Métis, and Inuit peoples in Canada, who inhabited North America prior to European exploration and contact. Outside of Canada, the term Indigenous is more commonly used. The term Indigenous is generally used in discussions of international rights.
- Indian is a legal designation in Canada. The *Indian Act* says, “A reference in this Act to an Indian does not include any person of the race of aborigines commonly

referred to as Inuit.”<sup>2</sup> An Indian must be registered with the Department of Aboriginal Affairs and Northern Development in order to claim the legal designation, “Status Indian.”<sup>3</sup> While Indian remains the legal term used by the government of Canada, increasingly First Nation is replacing the term Indian because it is considered pejorative.

- Inuit (inhabitants of the Arctic Circle) and Métis<sup>4</sup> (descendants of French and Aboriginal intermarriage) are culturally and legally distinct Aboriginal peoples, not included in the definition of Indian.
- Band refers to the government of Indian people. The most common form of government is an elected Chief and Council.
- Tribe refers to the government of Indigenous peoples in the United States. It is roughly synonymous with Band.

### **Membertou Economic Development<sup>5</sup>**

There are thirteen Mi’kmaq<sup>6</sup> communities within Nova Scotia. Membertou, situated 1.6 km south of downtown Sydney, is a thriving Mi’kmaq community. Membertou is accessed via exit 7 off Highway 125, also known as Peacekeeper’s Way. The community’s population is approximately 1,385 registered members. The Membertou Indian Reserve 28B has a land base of 95.1 hectares with an additional 219.3 hectares in Caribou Marsh Indian Reserve 29, 5.1 hectares in Sydney Indian Reserve 28a, and 132.36 hectares in Malagawatch Indian Reserve 4.<sup>7</sup>

Membertou was not always located on its current reserve lands. Until 1926, the people of Membertou lived on King’s Road along Sydney Harbour. The reserve was then called the King’s Road Indian Reserve. The non-Aboriginal people of this area did not want to live next to “Natives” and made numerous complaints to the mayor, who then took it up with the federal government to have the First Nation people removed from the King’s Road Reserve. Following many complaints to the government about Natives who were perceived as being nomadic and bringing down the land value of their property; the courts legally

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<sup>2</sup> Section 4.1 “Application of the Act.” *Indian Act*. R.S.C., 1985, c. I-5.

<sup>3</sup> Bands or First Nations can also determine their own citizenship or membership rules, which may differ from the official “Indian” definition. Thus, it is possible to be a band member, but not a Status Indian.

<sup>4</sup> The definition of Métis is contested, and the legal designation brings with it certain Aboriginal rights. See *R. v. Powley*. 2003 S.C.C 43; *R. v. Van der Peet*. 1996 2 S.C.R. 507.

<sup>5</sup> This section was prepared by Tamara Young and Mary Beth Doucette.

<sup>6</sup> In the Smith-Francis orthography, Mi’kmaq is the plural noun and the name of the language spoken, while Mi’kmaq is the singular noun and the adjectival form. As this orthography was adopted by the Grand Council in 1982, it is adhered to in this document unless a different form is used in a quoted source or proper noun. See: Smith, Doug and Bernard Francis. 1974. *Smith-Francis Orthography*. Mi’kmaq Association of Cultural Studies: Sydney, Nova Scotia.

<sup>7</sup> Aboriginal Affairs and Northern Development Canada. October 2012. “Membertou Band.” <http://www.aadnc-aandc.gc.ca/eng/1100100017130/1100100017131>. Retrieved July 17, 2013.

ordered the people of the King's Road Reserve to move in 1916 to a nearby swamp area that was undesirable to the neighbouring communities. By 1926, the majority of the residents were settled in the new reserve known as Membertou. The Membertou community suffered socially and economically in the new location.<sup>8</sup>

Membertou's current Chief, Terrence Paul (first elected in 1984), and fellow council members realized changing the community's economic situation would require they bring back some of their people who were already well educated and working elsewhere across the country. With the help of these Membertou professionals, they developed strategic plans that would situate Membertou as a strong business partner. They also made sure to consult with their Elders and to seek advice on how to incorporate Indigenous knowledge and culture into their plan of success.

As a part of its strategic plan, Membertou embraced transparency and accountability in the form of clearly defined and documented processes and procedures. By 2002, Membertou had become the first Aboriginal government in Canada to become ISO certified (International Organization for Standardization).<sup>9</sup> That status created a positive impression that in turn gained the respect of potential business partners and governments at the municipal, provincial, and federal levels. Within the organization, an elaborate quality assurance program emerged to maintain the ISO certification and to ensure continual improvement, objective setting, and customer service stay at the forefront of ongoing growth.

The Quality Assurance (QA) program provides Membertou staff in all areas with a consistent approach for addressing situations as they arise. Within the QA program, Membertou has established standards for how policies are created, approved, shared, and enforced. Each of the twenty departments maintains its own procedures and forms of information management; the QA program ensures that they are used consistently and reviewed regularly. Consequently, Chief, Council, and senior administrative staff can be confident that day to day operations are managed consistently and fairly, enabling them to focus on more strategic decisions.<sup>10</sup>

In 2012, helped in large part by the QA process already in place, Membertou was certified by the First Nation Financial Management Board (FMB). As Chief Terry Paul explained, "Certification by First Nations Financial Management Board validated our financial management practices and stewardship . . . This responds to the interests of many

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<sup>8</sup> Donnelly, Gabrielle. 2012. "Membertou Cape Breton." In *Indigenous Women In Community Leadership Case Studies*. Antigonish, NS: International Centre for Women's leadership. Coady International Institute. St. Francis Xavier University.

<sup>9</sup> Council for the Advancement of Native Development Officers (CANDO). 2012. "Membertou First Nation: Community Profile." CANDO 2012 Conference Host Community webpage. <http://www.edo.ca/downloads/membertou-first-nation-profile.pdf>. Retrieved July 17, 2013.

<sup>10</sup> For more in-depth review of Membertou's business approach to development and the importance of ISO, see Brown, Keith, Meghan Finney, Mary Beth Doucette, Janice Esther Tulk, Natasha Bernard, and Yu-Ting Isabella Yuan. 2012. "'Membertou Always Wanted to Succeed': The Membertou Business Model." *Journal of Aboriginal Economic Development* 8(1): 32-48.

stakeholders and allowed us access to FNFA [First Nation Finance Authority] financing.”<sup>11</sup> The FMB worked with a number of communities for many years to help them become FMB certified. Membertou was ready to be certified within a matter of months because the majority of the procedural requirements of the FMB were already in place through the QA program.

As a next economic step, Membertou is seeking greater control over their own lands, eliminating the need for federal approval for land-related transactions. To that end, Membertou is a signatory to the Framework Agreement on First Nation Land Management and is investigating the feasibility of creating a land code under the First Nation Land Management Act.<sup>12</sup> Until a Membertou land code is in place, Membertou lands remain governed by the relevant sections in the *Indian Act*.

### **Land Management Issues in Membertou<sup>13</sup>**

Membertou leadership have viewed for a long time the *Indian Act* as a hindrance to community development and, therefore, something best left ignored. The experiences of other communities who have gone forward with *Indian Act* processes, such as land designations, were relayed to Membertou. Stories such as two and three year waits for designations to finalize and significant waits for very basic land transactions to wind their way through the Aboriginal Affairs and Northern Development Canada (AANDC) bureaucracy convinced Membertou that, from a business point of view, ignoring the *Indian Act* was the only option if it truly wanted to be able to “move at the speed of business.” Development projects proceeded and tenants, both Aboriginal and non-Aboriginal, occupied commercial premises using so-called “buckshee leases,” which were rooted in a high degree of goodwill with significant reliance on Membertou’s good name. A buckshee lease is a lease between an Indian or Indian band with another entity, whether Indian or not, without the approval of Aboriginal Affairs and Northern Development Canada. They generally set out the terms of the relationship between the parties but, because they do not follow the procedures set out in the *Indian Act*, they are considered unenforceable in court.

With respect to the largest Membertou development project, the construction of the Membertou Hampton Inn and Suites, the decision was made to “work around” the *Indian Act* and construct the hotel on fee simple lands immediately adjacent to Membertou and in close proximity to the Membertou Trade and Convention Centre. The size of the project meant that Membertou and its business partners required long term financing, something that was not an option on undesignated reserve lands. The price of locating on fee simple land included the requirement to pay significant municipal property taxes and an inability

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<sup>11</sup> Author unknown. August 2012. “Membertou Cuts Debt Costs with Certification from FMB.” *Mi’kmaq Maliseet Nations News*. <http://www.mmnn.ca/2012/08/membertou-cuts-debt-costs-with-certification-from-fmb/>. Retrieved July 17, 2013.

<sup>12</sup> National Centre for First Nations Governance. March 2010. “Making the *Indian Act* Irrelevant’: Membertou’s Journey Toward Self-Government.” *Centre News*. [http://fngovernance.org/news/news\\_article/making\\_the\\_indian\\_act\\_irrelevant](http://fngovernance.org/news/news_article/making_the_indian_act_irrelevant). Retrieved August 2012.

<sup>13</sup> Summary provided by Trevor Bernard.

to offer tax-exempt accommodations to First Nations guests and tax exempt employment to prospective First Nations staff. Membertou was left with no choice since prospective business partners were unwilling to wait for a land designation.<sup>14</sup>

One of the key issues with ignoring the *Indian Act* is that banks are not willing to provide favourable terms for development projects that do not conform to *Indian Act* standards. In Membertou's case, multi-million dollar projects were financed at terms of five, seven and ten years, while other projects that occur off reserve are usually financed at terms of twenty and twenty-five years. While this meant that projects were paid for earlier, it also hindered Membertou's cash flow and its ability to pursue other business opportunities or grow existing ones. Another issue was Membertou's ability to expand its base of prospective tenants and business partners who wished to locate in Membertou. While some non-Aboriginal businesses were completely comfortable with proceeding based on buckshee lease arrangements, others wanted more certainty.

Membertou started exploring other options and were made aware of the Framework Agreement on First Nations Land Management (FAFNLM), a process that would allow bands to leave the land management provisions of the *Indian Act* and develop their own laws. The Council of Membertou then decided to assert its jurisdiction and, pursuant to its inherent right of self-government, started work on their Land Law. Membertou was then well-positioned when the FAFNLM process was opened to new applicants. They were accepted as signatories to the FAFNLM in April, 2012.

## **The Indian Act**

The *Indian Act*, enacted in 1876 by the Parliament of Canada, is the central – but not the only – legislation addressing Aboriginal peoples in Canada. Aboriginal peoples have inherent rights to self-governance that may be protected through treaties or Section 35 (1) of *Constitution Act*, 1982. Though some First Nations practice more customary governance, in a legislative manner, the *Indian Act* prescribes almost all aspects of the lives of Indians, including defining who is an Indian, property ownership and commerce, inheritance, and regulating reserve land and individual land possession.

First Nations struggle to attain self-determination when faced with the many restrictions set forth in the *Indian Act*—not only is it colonial policy, but it is colonial policy laden with regulations that reflect late 1800s' norms. Indigenous scholars and leaders have identified that the *Indian Act* is an outdated document that has not evolved along with Canadian law and development. An important counterpoint, however, is that many Aboriginal communities continue to govern under their inherent rights and through their customs, which provide them with more options and more effective operating principles than the *Indian Act*.

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<sup>14</sup> A land designation under the Indian Act requires community ratification; this is time consuming, with no guarantee that a land designation will even be approved by a community vote.



The *Indian Act* creates a framework in which a First Nation has very little room for self-administration or self-governance, in Parliament's view of the situation, stipulating that the Minister of Indian Affairs is responsible for most areas of First Nations governance.

Regarding land tenure, under the *Indian Act*, Indian reserves are considered Crown lands – the Crown holds title over unalienable reserve land. Under the *Act*, all matters of land tenure on reserve lands are meant to be controlled by the Minister of Aboriginal Affairs and Northern Development Canada (formerly Indian Affairs). The *Indian Act*<sup>15</sup> designates the minister authority to grant permissions to land occupancy, possession, transfer, and to generally oversee the management of land for the good of the Band.

### **Framework Agreement on First Nations Land Management**

First Nations have used multiple avenues to break away from the *Indian Act*. Some are opting out of the land management provisions of the *Indian Act*, meaning the First Nation will have the authority and jurisdiction over regulating and managing its own land. The Framework Agreement on First Nations Land Management (Framework Agreement or FAFNLM) creates one method to take over land management from the federal government. This Agreement, which was developed and initiated by the original First Nation signatories, provides a mechanism for a signatory First Nation to opt out of most of the provisions of the *Indian Act's* land restrictions and develop its own land management system. Under the Framework Agreement, the First Nation has two years to develop its own land code, get community ratification, enter into an Individual Agreement with the federal government, enact land code, and finally begin governing land use on reserve.

### **Overview of Research Project**

Since Membertou Chief and Council have chosen to develop their own land management laws, they have mandated a Governance Committee to review land management options, seek community input into the development of laws, and ultimately to recommend new land management laws for Chief and Council's final approval. This research project will support Membertou's initiative on the development of new land management laws for its community, which will in turn further enable economic development.

This research project employs a two-phased approach. The first phase focuses on a literature review centred on the *Indian Act* land management regime and why it is not conducive to Aboriginal economic development. This literature examination assisted the research team in identifying lessons learned and best practices for the community of Membertou to examine. Phase I also involves discussions and interviews with First Nations experts in land management, and land management advisors.

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<sup>15</sup> See Section 18, "Reserves." *Indian Act*. R.S.C., 1985, c. I-5.

Building on the information gathered in the first phase, Phase II incorporates the views of Membertou community members. With the experiences of other First Nations in hand, as well as feedback from community members, Membertou can identify its own land-related priorities. The second phase will be crucial to the development of Membertou land management law.

## **Key Research Questions**

### *Phase I*

1. What existing land management regimes and codes are available to First Nations and what are the positive and negative aspects of each? How do these practices impact economic and cultural development in First Nations communities?
2. How can the precedents of other First Nations' actions to break away from the *Indian Act* inform this progress? How has this shift in land management impacted economic and cultural development in these communities?

### *Phase II*

3. How do the findings from Phase I impact Membertou's situation? How can the data from the literature and interviews inform Membertou strategies?
4. What strategies could Membertou use to overcome obstacles, such as land use restrictions; difficulty in attracting businesses to their land; limits on Membertou law making? How might these strategies impact the economic development initiatives within the community?
5. What research and processes need to take place for Membertou to develop a Land Management Law? What economic benefits accrue from such a change in management?

In this Introduction, we have provided a brief overview of the project to help orient the reader. In Chapter 2, we will detail the methodological approach used in this study, followed by an in-depth explanations of the research project itself, and conclude the chapter with a note on research capacity building.

## Chapter Two: Methodology

The research team was tasked with identifying specific ways the *Indian Act* interferes with land management and economic development, and finding other options for Membertou. A participatory action research approach was utilized in the two-phase qualitative research project. Genuine research collaboration that promotes partnership within a framework of mutual trust and cooperation was developed between Membertou, the Native Nations Institute, and Cape Breton University. The research team, which included a number of Membertou personnel, worked under the guidance of the Membertou Governance Committee. The Governance Committee is a group of 30 community volunteers who are in the process of systematically engaging the community to develop a land management law for Membertou. They provided direction to the research team and reviewed the findings to ensure they were relevant and informative to Membertou's land management law development process.

This approach allowed for community participation while assuring shared power and decision-making between the community and the research team. Such partnerships help to ensure that research proceeds in a manner that is culturally sensitive, relevant, respectful, responsive, equitable, and reciprocal, with regard to the understandings and benefits shared between research partners and Aboriginal communities.

### What is Qualitative Research?

This project is qualitative in design. By qualitative, we mean that the research focuses on getting in-depth information, usually from a fairly small set of people, rather than gathering responses from a large group of people and reporting through statistical (quantitative) analysis. For this reason, our qualitative work does not lend itself to reporting correlations, percentages, or the results of statistical analysis. When relevant, we will report percentages and create tables to more clearly present our findings.

One of the characteristics of qualitative research is that it grows and changes with the project. The investigators will modify questions based on context, audience, or relevance. For that reason, no two interviewees answered exactly the same set of questions. Quantitative research, on the other hand, requires standardization (e.g., the same questionnaire would be used for every respondent).

Most information was gathered through interviews conducted by the research team. Because the literature on First Nation governance is limited, individual interviews are the best, and often only, way to learn about some of the innovative work being done by First Nations.

The study's first phase included a literature review of land management and economic development models to examine best practices. The background research reviewed published and unpublished documents from Membertou and other First Nations, academic journals, government reports, and internet data sources, (e.g., population and land bases of

reserves). In this phase, researchers also carried out telephone or in-person interviews with land managers and other experts in First Nations land management.

The second phase involved learning from the experiences of Membertou employees, board members, and community members. The focus was on Membertou priorities for land use and land management.

Below, we discuss specific methodological components of the research, before proceeding to an overview of the two phases of research in which we engaged. We conclude with review of capacity building in relation to this research project.

## **Methodological Components**

### **Advisory Board**

The Membertou Governance Committee served as an advisory board and oversaw the research process. The research team met periodically with the advisory board to obtain feedback and approval throughout the project. The Aboriginal Law expert, Dr. John Borrows, reviewed the findings of the project prior to sharing with the board. The advisory board also approved the final research document.

### **Literature Review**

Phase I involved a literature review and analysis of published and unpublished reports on First Nation land management, self-governance, and other aspects of the efforts by First Nations (including Membertou), and an Inuit community to control their affairs and build productive economies. Dr. Borrows also reviewed this document. The literature review can be found in Chapter 3 of this document.

### **Ethics**

Ethics applications were completed and submitted to review committees at University of Arizona, Cape Breton University, and Unama'ki College's Mi'kmaw Ethics Watch (MEW). Approval was received from each body prior to engaging in primary research. The consent form and research questions appear in Appendix A and B. Members of the research team who had not already received training in ethics completed the CITI program for Responsible Conduct of Research made accessible by the University of Arizona.<sup>16</sup>

### **Interviews with Land Experts**

In Phase I, the Membertou researchers contacted representatives from several First Nation and one Inuit community identified as successful at land management. Then the research team conducted interviews in land management policy. The preferred method of communication was face-to-face, but because of distance, timing, and other factors, the research team employed conference call technology where necessary.

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<sup>16</sup> The CITI program is a U.S.-based research ethics training program. Researchers must complete an online course to become certified in research ethics. The course includes a module on research with Indigenous peoples. For more information, see the company website, <https://www.citiprogram.org/index.cfm?pageID=1>. Retrieved August 2, 2013.

A guideline for the interviews was developed during the initial stages of the project and was employed throughout the research process. Membertou researchers were prepped by the academic partners at the Native Nations Institute and Cape Breton University. Prepping included interview etiquette, gaining comfort with the interview questions, succinctly explaining the purpose of the research, and informing the interviewees of their rights as research participants.

Audio recording of interviews was done with subject's consent to ensure accuracy of information. The audio recordings were transcribed to text for analysis. If the interviewee consented, the transcripts and audio recordings were submitted to Membertou to be archived for future use.

### **Interviews at Membertou**

The primary sources of information for Phase II of this project were Membertou community members, personnel, and elected leadership. Again, the preferred communication was face-to-face. Researchers from Cape Breton University and Native Nations Institute were on site in Membertou for one week (December 4-7, 2012) of interviews. Four additional interviews were conducted in the spring of 2013 by Membertou researchers.

Again, audio recording of interviews was done with subject's consent. The audio recordings were transcribed to text for analysis, and the audio files and transcripts were submitted to Membertou for archiving if the interviewee consented.

### **Analysis of Data**

Following completion of interviews in both Phases I and II, the interviewers from Membertou, Cape Breton University, and Native Nations Institute reviewed notes, transcripts, and audio, and discussed common concepts and points they gleaned from their interviews. For each phase, the team engaged in two iterations of this process. From these discussions, a preliminary set of themes developed.

Further analysis was done through the qualitative textual analysis software, NVivo 10. NVivo allows the investigator to create codes for concepts, ideas, and themes in the text, and the software helps to organize the ideas into more coherent patterns.<sup>17</sup>

### **Population and Recruitment**

The target population included 1) individuals involved with governance and economic development at Membertou and 2) people with land management expertise in other communities. We recruited individuals through their professional positions or membership within the organization and through snowball sampling (described below). Recruitment was based on knowledge of the *Indian Act*, economic development, institution building and knowledge of Membertou land issues and community priorities. All participants were adults (age 18 and over).

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<sup>17</sup> For further information on NVivo, see the company website, <http://download.qsrinternational.com/Resource/NVivo10/nvivo10-overview.pdf>. Retrieved August 2, 2013.

Potential participants were contacted by email, by telephone, or in person. When contacted by email, the email included a written summary of the project, its goals, methods, and anticipated outcomes, and a copy of the consent form. For those reached by telephone, we offered to email, fax, or mail the same documentation.

Some participants were recruited in-person, by professional contact, or through the weeklong research engagement during December 2012 in Membertou. Potential participants recruited in this way were given a copy of the same documentation described above (a written summary of the project, its goals, methods, and anticipated outcomes) at the first contact stage.

### **Confidentiality**

All interviewees (Phase I and Phase II) were informed in the contact stage and in the interview stage that:

- Their identity will be kept confidential unless they ask otherwise.
- Their participation is voluntary.
- They will be interviewed in a location and a time of their choosing.
- They may stop participating at any time.
- They may choose not to answer particular questions.
- They may keep any comments confidential. If they decide to keep comments confidential after the interview, they may tell us via telephone or email which information they do not want us to use in any publications resulting from this study. If they make this request, we will comply.
- They may choose to archive their interview in a community archive for future community use.

### **Overview: Phase I**

In the first phase, we studied the way the *Indian Act* controls Aboriginal lands, and investigated other economically successful First Nations' land laws and management systems. We studied written, public documents, and requested documents directly from First Nations. We completed a literature review on issues relating to the *Indian Act* and land management (see Chapter Three).

In Phase I, we created our list of lands managers using a “snowball” sample. We consulted a few knowledgeable people, who then recommended others to interview (the snowball grows with each new recommendation). This gave us the views of a particular network of lands management experts, but it is not necessarily representative of the entire field.

To get a broader understanding of land management systems, we talked to representatives from First Nations involved in the Framework Agreement on First Nations Land Management, self-governance relationships,<sup>18</sup> and modern treaties,<sup>19</sup> and experts at Land Advisory Board Resource Centre, and National Aboriginal Land Managers Association. We asked these representatives procedural questions about creating and implementing land laws, as well as motivations behind creating a land management system.

We conducted in-depth one- to two-hour interviews. During each interview, at least two members of the research team were present. Cheryl Knockwood was the lead interviewer wherever possible. All except two interviews were audio recorded and later transcribed.

Eight interviews with land managers were conducted via teleconference. The interview with Tsawwassen First Nation was not audio recorded due to circumstances beyond our control, but detailed notes were kept. The Whitecap Dakota First Nation interview took place face-to-face in the offices of Membertou. Nipissing First Nation answered the interview questions in writing and submitted the answers via email to the research team. A brief overview of the communities is provided below to provide context for the interview data reported in subsequent chapters. This information is then summarized in a table for quick reference for the reader.

### Community Profiles

To help orient the reader to the diversity of perspectives shared during this interview phase, we offer the following community profiles.

#### *Westbank First Nation*

Westbank First Nation territory comprises five reserves, totaling 2,161 hectares<sup>20</sup> of land situated near West Kelowna, BC along Okanagan Lake. Westbank is a very developed economic region; “between January 2006 and July 2012, Westbank First Nation issued more than \$335 million dollars in building permits”<sup>21</sup> for commercial, residential, and institutional development. Westbank was an original signatory to the FAFNLM and developed their land code under it; however, current land rules are codified in the Westbank First Nation Constitution (a result of the Westbank First Nation Self-Government Act).

#### *Tzeachten First Nation*

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<sup>18</sup>“Self-governance” refers to a negotiated agreement between and First Nation and the federal government. Each self-governance agreement is unique.

<sup>19</sup> In this list, “treaty” refers to the British Columbia treaty process. For instance, because Canada had never treated with Tsawwassen before, the First Nation has negotiated a modern treaty with the federal government, and with British Columbia.

<sup>20</sup> Land area reported by AANDC. “Reserve/Settlement/Village Detail. Westbank First Nation.” [http://pse5-esd5.ainc-inac.gc.ca/fnp/Main/Search/FNReserves.aspx?BAND\\_NUMBER=601&lang=eng](http://pse5-esd5.ainc-inac.gc.ca/fnp/Main/Search/FNReserves.aspx?BAND_NUMBER=601&lang=eng). Retrieved June 12, 2013.

<sup>21</sup> Westbank First Nation website. “Planning and Development.” <http://www.wfn.ca/bitterroot/commplan.htm>. Retrieved June 11, 2013.

Tzeachten First Nation territory comprises 283.8 hectares<sup>22</sup> of reserve land 6 kilometres south of Chilliwack, BC. The Tzeachten First Nation Land Code, established under the FAFNLM, applies to reserve land, much of which is held in CPs, and governs commercial and residential real estate leases. The lands office handles, among other things, leases, registers mortgages, transfers individual holdings among Tzeachten band members, and keeps a database of Tzeachten land holdings.

#### *Haida Gwaii, Council of the Haida Nation*

Haida Gwaii territory comprises the archipelago formerly known as the Queen Charlotte Islands, off the coast of northwest British Columbia. Under constitutional<sup>23</sup> self-governance, the Council of Haida Nation asserts Aboriginal and Hereditary title over approximately 250,000 hectares;<sup>24</sup> 1,518 hectares<sup>25</sup> are reserve land and the remaining lands are designated protected areas. Haida Gwaii and British Columbia have signed a reconciliation agreement to share decision-making on land use and to agree on natural resource revenue sharing<sup>26</sup> in the designated protected areas. Much of their land management focuses on cultural protection, natural resources, tourism, and vacation properties. Haida Gwaii used traditional territory mapping as a powerful tool to assert their rights to their land.

#### *Tsawwassen First Nation*

Tsawwassen treaty settlement lands consist of 724 hectares<sup>27</sup> of land on the Strait of Georgia, 25 kilometres south of Vancouver. Instead of opting out of only the land provisions of the *Indian Act*, Tsawwassen has entered into a treaty with Canada, negotiating the land settlement with Canada and British Columbia. As part of the treaty, Tsawwassen holds land in fee simple. Fee simple is not an option under the Framework Agreement on First Nations Land Management – land is still owned by the Crown.

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<sup>22</sup> Land area reported by AANDC. “Reserve/Settlement/Village Detail. Tzeachten 13.” [http://pse5-esd5.ainc-inac.gc.ca/fnp/Main/Search/RVDetail.aspx?RESERVE\\_NUMBER=08058&lang=eng](http://pse5-esd5.ainc-inac.gc.ca/fnp/Main/Search/RVDetail.aspx?RESERVE_NUMBER=08058&lang=eng). Retrieved June 12, 2013.

<sup>23</sup> The Council of the Haida First Nation negotiated a self-governance agreement that included writing and implemented a constitution.

<sup>24</sup> Land area reported by the Haida Nation. <http://www.haidanation.ca/Pages/Programs/Forests/Forest%20Guardians/Land%20Planning/HPA's.html>. Retrieved June 11, 2013.

<sup>25</sup> Land area reported by British Columbia Ministry of Aboriginal Relations and Reconciliation. [http://www.gov.bc.ca/arr/firstnation/haida\\_nation/default.html](http://www.gov.bc.ca/arr/firstnation/haida_nation/default.html). Retrieved June 12, 2013.

<sup>26</sup> See *Kunst'aa Guu – Kunst'aayah Reconciliation Protocol*. 2009. A Protocol Between the Haida Nation and Her Majesty the Queen in Right of British Columbia. [http://www.newrelationship.gov.bc.ca/shared/downloads/haida\\_reconciliation\\_protocol.pdf](http://www.newrelationship.gov.bc.ca/shared/downloads/haida_reconciliation_protocol.pdf). Retrieved June 11, 2013.

<sup>27</sup> Land area reported by AANDC. “Tsawwassen Final Agreement: Tsawwassen Lands.” <http://www.aadnc-aandc.gc.ca/eng/1100100022787/1100100022789>. Retrieved June 12, 2013.



### *Sliammon First Nation*

Sliammon territory comprises 1,907.2 hectares of reserve land and 6,405 hectares<sup>28</sup> of treaty land, 130 kilometres northwest of Vancouver on the Straight of Georgia. The First Nation holds treaty land in fee simple. Sliammon's land is zoned in various ways: community use zones, economic development zones, forest management zones, marine management zones, watershed management zones, and conservation zones for cultural and ecologically sensitive areas. Sliammon participated in the FAFNLM process as a step toward a self-governance arrangement, with a treaty currently in progress.

### *Whitecap Dakota First Nation*

Whitecap Dakota is part of the Saskatoon Tribal Council, with 1894.5 hectares<sup>29</sup> of reserve land, 26 kilometres from Saskatoon. Whitecap Dakota has used the FAFNLM as a means to create better business partnerships and process commercial, agricultural, and residential leases more effectively. All land is zoned, and a very small percentage of the land is held in CPs. Whitecap Dakota is in the process of self-government negotiations.

### *Muskoday First Nation*

Muskoday is part of the Saskatoon Tribal Council, with 9686.8 hectares<sup>30</sup> of reserve land, 20 kilometres from Prince Albert. The reserve is zoned, and much of Muskoday's land is agricultural. One of the major reasons for developing their own land management system was to increase business opportunities. Muskoday was an original signatory to the FAFNLM.

### *Nipissing First Nation*

Nipissing territory totals 21,007.3 hectares<sup>31</sup> of reserve land 38 kilometres from North Bay, ON, on the northern bank of Lake Nipissing. The lands office handles (among other things) residential, commercial, and industrial leasing; and keeps records on permits, membership, and estates. Nipissing is completing an environmental assessment that will eventually lead to an environmental management plan. Nipissing's land management began in the 1980s under delegated authority. Participation as an original signatory to the FAFNLM negotiation provided an avenue to take more control over the land.

### *Georgina Island First Nation*

The territory of the Chippewas of Georgina Island comprises 1353 hectares<sup>32</sup> of reserve land on three islands – Georgina Island, Snake Island, and Fox Island -- in Lake Simcoe,

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<sup>28</sup> Land area reported by British Columbia Ministry of Aboriginal Relations and Reconciliation. <http://www.gov.bc.ca/arr/firstnation/sliammon/>. Retrieved June 11, 2013.

<sup>29</sup> Land area reported by Saskatoon Tribal Council. <http://www.sktc.sk.ca/member-nations/whitecap-dakota-first-nation/>

<sup>30</sup> Land area reported by Saskatoon Tribal Council. <http://www.sktc.sk.ca/member-nations/muskoday-first-nation/>. Retrieved June 11, 2013.

<sup>31</sup> Land area reported by AANDC. "Reserve/Settlement/Village Detail. Nipissing First Nation." [http://pse5-esd5.ainc-inac.gc.ca/fnp/Main/Search/RVDetail.aspx?RESERVE\\_NUMBER=06152&lang=eng](http://pse5-esd5.ainc-inac.gc.ca/fnp/Main/Search/RVDetail.aspx?RESERVE_NUMBER=06152&lang=eng) Retrieved June 11, 2013.

<sup>32</sup> Land area reported by AANDC. "Reserve/Settlement/Village Detail. Chippewas of Georgina Island First Nation."

Ontario. Georgina Island's main concern for land use was leasing land. Cottage rental is a major income source to the First Nation; the First Nation land laws govern 491 leases on the three islands. Georgina Island was an original signatory to the FAFNLM.

#### *Nunatsiavut Labrador Inuit Government*

Labrador Inuit lands total 15,800 square kilometres<sup>33</sup> along the Atlantic coast of Labrador. The Labrador Inuit negotiated a land claims agreement with the Canadian government, leading to self-governing regional Inuit government, the Nunatsiavut Government. This is not a reserve, but fee simple land administered by the Nunatsiavut Government and local Inuit community governments.

#### **Land Management Experts**

Debra Campbell – Professional Development Manager and Master Instructor at National Aboriginal Land Managers Association (NALMA), and Musqueam Indian Band citizen

Meko Nicholas – Assistant Director of Land Advisory Board Resources Centre (LABRC), and Tobique First Nation citizen

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[http://pse5-esd5.ainc-inac.gc.ca/fnp/Main/Search/RVDetail.aspx?RESERVE\\_NUMBER=06198&lang=eng](http://pse5-esd5.ainc-inac.gc.ca/fnp/Main/Search/RVDetail.aspx?RESERVE_NUMBER=06198&lang=eng)  
Retrieved June 12, 2013.

<sup>33</sup> Land area reported by Nunatsiavut Government website. "Labrador Inuit Lands."  
<http://www.nunatsiavut.com/index.php/lands-and-natural-resources/labrador-inuit-lands>. Retrieved June 12, 2013.

**Table 1. Phase I Interviews on Land Management. Participating Communities.**

Community	Location	Population	Land Base	Land Regime
Georgina Island	3 Islands in Lake Simcoe, ON	725 - Rural	1353 hectares	FAFNLM (Original Signatory)
Haida Gwaii	Off the Coast of Northwest BC	5000 - Rural	250,000 HA total; 1,518 HA Reserve Lands	Treaty
Membertou*	Sydney, NS	1,386 - Urban	103.60 HA Reserve Lands, 885.7 HA Other Lands	Indian Act
Muskoday	20km from Prince Albert, SK	1634 - Rural	9686.8 hectares	FAFNLM (Original Signatory)
Nipissing	38km from North Bay, ON	2509 - Urban	21,007.3 hectares	FAFNLM (Original Signatory)
Nunatsiavut	Along the Atlantic coast of Labrador	2415 - Rural	15,800 Square Kilometres	Self-government
Tsawwassen	25km outh. of Vancouver, BC	328 - Urban	724 hectares	Treaty
Tzeachten	6km South of Chilliwack, BC	513 - Urban	283.8 hectares	FAFNLM
Sliammon	130km Northwest of Vancouver, BC	1100 - Urban	1,907.2 HA of Reserve Land, 6,405 HA of Treaty Land	FAFNLM - Treaty in Process
Westbank	West Kelowna, BC	9000 - Urban	2,161 hectares	Self-government; FAFNLM (Original Signatory)
Whitecap Dakota	26km from Saskatoon, SK	351 - Urban	1894.5 hectares	FAFNLM

\*Membertou is included for comparison purposes.

## Overview: Phase II

The purpose of Phase II was to build on the knowledge gained in Phase I. After learning what other Aboriginal communities have done, the research focus turned to what Membertou *wants*. How do Membertou community members think about the land? What are their priorities? What practices – current and future – need to be avoided? How can Membertou best govern its own land?

This is an important nation-building point for Membertou. This is a chance for Membertou to set out a clear plan for the future, and create a way to manage land effectively and strategically, thereby protecting and preserving it for future generations. Much like ISO certification for the First Nation government was a leap forward for business and economic development, land management is an opportunity for a self-governance leap. This creates

a whole new realm for law making, jurisdictional and territorial establishment, and community consensus-building.

In Phase II, we interviewed representatives from the majority of the Membertou departments (15 interviews), as well as three Council members. To get community input, an open invitation to participate in interviews was presented to the community. This yielded 8 interviews. We conducted in-depth one- to two-hour interviews. During each interview, at least two members of the research team were present. Interviews for Phase II were conducted in person at Membertou. Interviewees were either alone, or with one other person, participating in a joint interview with the researchers. One interview was conducted face-to-face and on the phone. That is, one community member was in the room with the researchers, and the other participated on speakerphone. To obtain input from the Elders, we conducted a focus group session at a meeting of the Membertou 55 Plus Society.

Because land management is such a complex issue, we asked complex questions, focusing not merely on business transactions or zoning priorities, but on tradition, governing practices, environmental management, traditional territory, housing, and generational wisdom. (See appendix B).

The results of the community interviews, coupled with the findings of Phase I are meant to help establish visioning and preparation for land management in Membertou's future. We interviewed representatives from the Membertou Chief and Council, Membertou staff, community members, and Elders.

**Table 2. Membertou Interviewees**

<b>Participant's Name</b>	<b>Role</b>	<b>Individual Interview</b>	<b>55+ Group Discussion</b>
Dan Christmas	Councilor	Yes	No
Darrell Bernard	Councilor	Yes	No
Lee Gould	Councilor	Yes	No
Bernie Francis	Elder	Yes	Yes
Donna Brown	Elder	Yes	Yes
Isabel Paul	Elder	No	Yes
Katy McEwan	Elder	No	Yes
Nelson Paul	Elder	Yes	Yes
Pauline Bernard	Elder	No	Yes
Peter Waldovogel	Elder	Yes	Yes
Shirley Tuplin	Elder	No	No
Sister Dorothy Moore	Elder	No	Yes
Alex Paul	Member	Yes	No
Alexandria Christmas	Member	Yes	No
Calvin Paul	Member	Yes	No
Cecelia Christmas	Member	Yes	No
Danny Paul	Member	Yes	No
Gloria Christmas	Member	Yes	Yes
Janine Christmas	Member	Yes	No
Joan Denny	Member	Yes	Yes
Keith Christmas	Member	Yes	No
Bill Bonner	Staff	Yes	No
Clifford Paul	Staff	Yes	No
Dave Moore	Staff	Yes	No
Eileen Paul	Staff	Yes	No
George Isador	Staff	Yes	No
Jason Googoo	Staff	Yes	No
Jeff Ward	Staff	Yes	No
Jennifer Martin	Staff	Yes	Yes
Kyanna Paul	Staff	Yes	No
Lance Paul	Staff	Yes	No
Mary Beth Doucette	Staff	Yes	Yes
Mike Isadore	Staff	Yes	No
Mike McIntyre	Staff	Yes	No

## Challenges

There were few challenges to this research project, though we did experience some delays and were hindered by the distance among the researchers. Obtaining ethics approval from the University of Arizona took longer than anticipated, and scheduling interviews was challenging because of changing schedules, time zones, and cancellations. Some interviews had to be rescheduled, delaying progress on the project. Since the research team members from the University of Arizona were so far away, that impacted the flow of work somewhat. We were unable to meet face-to-face, drop-in to the office, or chat about the project over lunch. We overcame this problem through frequent (at least monthly—usually more often) teleconferences, instant messaging, emails, and taking some time to laugh during our meetings.

## Research Capacity Development

This research project was conducted by Aboriginal and non-Aboriginal researchers and faculty from Membertou, the Native Nations Institute, and Cape Breton University. The research project was proposed to build the capacity of researchers from all three groups. In building capacity, individuals in these groups will be better attuned to the principles and processes of respectful decolonizing research.

One goal of this research program was to hire and mentor a Mi'kmaw student researcher to advance their specific research skills in relation to decolonizing research methodologies. The Purdy Crawford Chair in Aboriginal Business Studies facilitated the search for this student researcher, and supervised and mentored the student who worked in the Purdy Crawford Chair office in the community of Membertou.

The student researcher, along with community researchers, completed ethics training via online training from the CITI program for Responsible Conduct of Research and attended governance training provided by Membertou. The student researcher also completed a research training session at the Cape Breton University library where she learned academic search techniques and the best resources for economic development research. The student was provided multiple opportunities to develop skills in public speaking by presenting her research on a number of occasions at Cape Breton University. She also discussed her research in an interview for CBC Radio's Information Morning (Cape Breton).

Community co-researchers also received training and participated in all aspects of the research process: developing interview questions; literature review; obtaining ethics board approval; conducting interviews; obtaining informed consent; outlining, drafting, and finalizing a document; and presenting findings to a community audience.

Several of the Membertou co-researchers have practical knowledge of the field of law and policy in the Atlantic Region. Researchers from the Native Nations Institute and Cape Breton University benefitted greatly from the Membertou co-researcher expertise.

In the interview setting in the Membertou community, NNI and CBU researchers teamed up with community researchers to co-interview research participants. While community researchers gained coaching and experience in how to conduct a research interview, the researchers from NNI and CBU were mentored in community protocols and benefitted greatly from the community researchers' knowledge and experience of living and working in Membertou territory.

The research networks and knowledge base of all three groups – Membertou, NNI, and CBU – were strengthened through this research cooperation.

## Chapter Three: Literature Review

The purpose of this chapter is to provide some background on the issues surrounding Indigenous land management in Canada. Specifically, this overview of the literature supports a larger research project by Membertou to learn – from other First Nations, and from the wisdom of their own citizens – how to best manage their land. The project, *Managing Land, Governing for the Future: Finding the Path Forward for Membertou*, serves as a tool for Membertou community and leadership to carefully consider the complex issues surrounding land management, and to make an informed decision on how to move forward in a way that will best honour Membertou’s values and traditions, while continuing to move forward in economic self-determination.

To understand options for land management, we must consider the legal frameworks available to First Nations in Canada. The most obvious piece of legislation is the *Indian Act*. This chapter will address some of the critiques of the *Indian Act* to Indigenous governance broadly, and to the specific instance of land management. Further, this chapter will touch on options that other First Nations have implemented, or are being discussed in the literature.

The literature covered is diverse – commissioned papers, journal articles, book chapters, government agency reports, court cases, and legal analysis of existing legislation. For further reading, additional references are provided in footnotes and in the bibliography.

### **The *Indian Act***

The *Indian Act*, enacted in 1876 by the Parliament of Canada, is the central legislation addressing Aboriginal peoples in Canada. Though some First Nations practice more customary governance, the *Indian Act* officially prescribes almost all aspects of the lives of Indians, including defining who is an Indian, property ownership and commerce, inheritance, regulating reserve land and individual land possession, and prescribing First Nation governmental structure.

Regarding land tenure, under the *Indian Act*, Indian reserves are considered Crown lands – the Crown holds title over unalienable reserve land. Officially, all matters of land tenure on reserve lands are controlled by the Minister of Aboriginal Affairs and Northern Development. The *Indian Act*<sup>34</sup> designates the Minister authority to grant permissions to land occupancy, possession, transfer, and to generally oversee the management of land for the good of the Band.

Modern First Nations, as well as in earlier periods, struggle to attain self-determination when faced with the many restrictions set forth in the *Indian Act*; they are still governed by the norms of federal policy from the late 1800s. Numerous academic articles have

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<sup>34</sup> See Section 18, “Reserves.” *Indian Act*. R.S.C., 1985, c. I-5.



identified that the *Indian Act* is an outdated document that has not evolved along with Canadian law and development.

The *Indian Act* creates a framework in which a First Nation has very little room for self-administration or self-governance, stipulating that the Minister of Aboriginal Affairs and Northern Development Canada (AANDC)<sup>35</sup> is responsible for most areas of First Nations governance. Below is an overview of three key issues emerging from this imposed legislation: governmental structure, citizenship, and matrimonial real property.

### **Governmental Structure: Chief and Council System**

A core component of the *Indian Act* is its mandate that First Nations organize themselves under an elected Chief and Council – a single governmental form applied to all the First Nations in Canada. This arrangement ignores traditional Indigenous forms of government, and concentrates the governing authority to a small body elected every two years.<sup>36</sup> It ignores traditional methods of choosing leaders, and lends itself to frequent turnover of the Chief and Council.

The Minister has the power to determine when and how elections take place, and can decide if an elected official is unfit for duty. *Indian Act* elections are prescribed (though some First Nations practice more customary governance), but implementation has varied, especially in the case of off-reserve citizen participation. Provar<sup>37</sup> points out that Section 77 of the *Indian Act* constrained First Nation democratic participation by requiring that citizens are “ordinarily resident on the reserve” for band election participation. This was challenged in Canada’s Supreme Court in *Corbiere v. Canada*.<sup>38</sup> As a result, First Nations must include off-reserve citizens in band elections.<sup>39</sup>

To continue the critique, Abele<sup>40</sup> says, “The *Indian Act* has a powerful impact on the quality of democracy in Band governments. Having the force of law and backed by financial power, the *Act* mandates one particular set of institutions and practices to the exclusion of others. In this way it affects the abilities of First Nations to shape more accountable and democratic governments” (p. 3). The Minister can make rules about how meetings are held; any by-laws passed by the Chief and Council must be sent to the Minister.

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<sup>35</sup> The name of this ministry has changed several times in the last few decades. For simplicity, we use the current name, unless quoting the text of a document.

<sup>36</sup> A First Nation can create a custom election code, and can extend terms if desired.

<sup>37</sup> Provar, John. 2003. “Reforming the Indian Act: First Nations Governance and Aboriginal Policy in Canada.” *Indigenous Law Journal*. 2 (Fall 2003).

<sup>38</sup> *Corbiere v. Canada*. (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203

<sup>39</sup> See Provar p. 130.

<sup>40</sup> Abele, Frances. 2007. “Like an Ill-Fitting Boot: Governance, Governance and Management Systems in the Contemporary Indian Act. A Report Prepared for the National Centre on First Nations Governance.” West Vancouver, BC: National Centre on First Nations Governance.

## Citizenship

Citizenship<sup>41</sup> in a First Nation (also called Band membership) is controlled by the Canadian government. First Nations do have their own membership rules. Abele<sup>42</sup> points out that under the *Indian Act*, First Nations do not have control over deciding who is an “Indian” (a federal designation), but a First Nation can determine their own membership. To illustrate the problem of multiple levels of belonging to an Aboriginal society, Trevor Bernard (Membertou) shared in a phone conversation that this distinction between Band membership and Indian Status is creating a “second class” of Membertou citizens – those that are Band members, but not Status Indians.<sup>43</sup>

Though the land management regimes available to First Nations do not necessarily address the definition of citizenship, they do allow First Nations to define the rights of citizens and members in relation to land.

## Matrimonial Real Property

Matrimonial Real Property (MRP) has been a legislative lacuna on reserves, but First Nations have the opportunity to address issues of matrimonial real property in land law. The Framework Agreement on First Nations Land Management requires that some portion of a First Nation land code address MRP.<sup>44</sup>

Mary Hurley<sup>45</sup> nicely summarizes the issues relating to the *Indian Act*'s inadequacy regarding the division of marital property after relationship breakdown. An excerpt of her 2009 research paper follows.

A long-standing concern of First Nations women has been that the *Indian Act*, which governs real property on reserves, does not deal with the division of matrimonial real property (MRP) on relationship breakdown. In 2003, a report of the Standing Senate Committee on Human Rights recommended that the government proceed with immediate remedial amendments to the *Indian Act* to provide for the application of provincial and territorial matrimonial property laws on reserves. In 2005, the House of Commons Standing Committee on Aboriginal Affairs recommended similar action, as well as a longer-term legislative approach acknowledging First Nations law-making capacity in the area. In fall 2006, the appointed Ministerial Representative on MRP undertook a consultative process on the issue, in collaboration with the AFN and the Native Women's Association of Canada (NWAC). Her March 2007 report called for a two-part legislative framework involving recognition of First Nations communities' inherent

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<sup>41</sup> Membership is the most common term used to denote inclusion in an Indigenous society. We use the term citizenship to clarify that people are citizens under a (First Nation or Band) government.

<sup>42</sup> Abele. 2007. “Like an Ill-Fitting Boot.”

<sup>43</sup> Personal communication with the research team June 2012.

<sup>44</sup> See *Framework Agreement on First Nations Land Management*, Section 17.

<sup>45</sup> Hurley, Mary C. 2009. “The Indian Act.” Parliamentary Information and Research Service, Library of Parliament. PRB 09-12E.

jurisdiction over the issue, and the application of interim federal rules pending the adoption of community laws (Hurley 2009, pp. 4-5).

As Hurley has demonstrated, First Nations have had little agency in determining division of matrimonial property; a land management system is an opportunity to develop law-making capacity.

### **Critiques of the *Indian Act***

Increasingly, critiques of the legislation are revealing the paternalism embedded in the *Indian Act* and the impacts it has on governance in First Nations communities. The following are representative of the *Indian Act* criticism of the past fifteen years.

The *Indian Act* is the central legislation concerning Aboriginal governance (see Coates 2008, p. 3; Abele 2007). Frances Abele<sup>46</sup> gives a detailed critique of various provisions of the *Indian Act*. Specifically, she identifies four major areas where the *Indian Act* restricts First Nation governance:

It establishes the authority of the executive branch of the federal government over the core areas of reserve life, while spreading specific responsibilities among various federal officials; it defines the relationship between Indian individuals and the state; almost in passing, it creates a governance framework for Band administrations, by outlining the powers and responsibilities of Band Councils, and the limits to these; it sets in motion certain organizational patterns while remaining silent about most common facets of organizational design (for example, it defines lines of accountability but ignores policy research and human resource development) (Abele pp. 2-3).

Provart<sup>47</sup> describes the outdated nature of the *Indian Act*:

When it was enacted in 1876 by a young Dominion Parliament, the *Indian Act* was designed to consolidate and revise all existing statutes dealing with Indians and, consistent with the colonial norms of the day, regulate almost every significant aspect of First Nations life on reserve. The *Act* made no reference to existing treaties, and instead continued policies articulated in the 1869 *Gradual Enfranchisement Act*, the 1860 *Indian Lands Act* and the 1858 *Gradual Civilization Act*, including federal control and regulation of band government, status and membership determination, reserve land distribution, the management of Indian funds and enfranchisement, and the alienation of reserve lands (a protective feature subsequently watered down to facilitate the expropriation of reserves adjoining towns). Native

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<sup>46</sup> Abele, 2007. "Like an Ill-fitting Boot."

<sup>47</sup> Provart, 2003. "Reforming the Indian Act."

Canadians were viewed as wards of the state whom the federal government was responsible for protecting and ‘civilizing’ (Provar 2003, p. 123).

Though many are critical of the *Indian Act*, incremental movement has been made toward First Nation self-governance under the *Indian Act* legal regime. Coates<sup>48</sup> notes that though the *Indian Act* is inadequate, it codifies the federal government’s relationship with Indians and fiduciary responsibility to Indians. Further, powerful Indigenous governments under the present *Indian Act* structure wield substantial power in their communities, so outright *Indian Act* reform is threatening.

Shin Imai<sup>49</sup> identifies that *Indian Act* governments do not allow for transparency and accountability. Power flows in one direction: federal government – Chief and Council – community members. Power is concentrated with the Minister of Aboriginal Affairs and Northern Development, and for some instances, with the Chief and Council. The citizens have little recourse to actions of the Chief and Council; neither the citizens nor the Council have power over rulings of the Minister. In the few areas where Chief and Council have authority (allocating reserve lands, *Indian Act*-allowed bylaws, and custom elections), Imai suggests three areas that a community can impose to control the power of the Chief and Council:

- Accountability to community. The community needs mechanisms for meaningful participation in decision-making.
- Consistency with core principles. The community can identify core principles. To make them more formal, they can codify them in a constitution.
- An independent body to interpret laws. This is not a formal judiciary, but a body that watches over the Chief and Council to assure that they are not abusing their powers.

Eldon Yellowhorn<sup>50</sup> is concerned with preserving heritage sites on Aboriginal lands and looks to the *Indian Act* for provisions, of which it has none. While introducing new legislation is time consuming, the loss of sites is immediate. His critiques of *Indian Act* inadequacy include:

- How the *Indian Act* defines reserve lands. The fact that title to reserve lands is vested in the Crown in right of Canada means they are only reserved for the use

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<sup>48</sup> Coates, Ken. 2008. “The Indian Act And The Future of Aboriginal Governance in Canada.” Research Paper for the National Centre on First Nations Governance. West Vancouver, B.C.: National Centre on First Nations Governance.

<sup>49</sup> Imai, Shin. 2007. “The Structure of the Indian Act: Accountability in Governance.” Research Paper for the National Centre on First Nations Governance. West Vancouver, BC: National Centre on First Nations Governance.

<sup>50</sup> Yellowhorn, Eldon. 1999. “Heritage Protection on Indian Reserve Lands in Canada.” *The Plains Anthropologist*, Vol. 44, No. 170, MEMOIR 31: Native Americans and Historic Preservation, 1990-1993: 107-116

and benefit of affected Indians. In practice it means a communal-like arrangement<sup>51</sup> with no formal right to individual possession and feudal-like powers given to the Governor in Council. Through this Act, the minister can exercise broad, discretionary powers to direct possession and use of land. The rights of individual possession are limited to use or occupation of reserve lands.

- The *Indian Act* provides for the possibility of a band to assume management of the land it occupies. The means to accomplish this objective are described in the sections that deal with the management of reserve lands, including surrendered and designated lands. Administrative clauses govern transactions, assignments and registry of surrendered or designated lands, and include regulations regarding timber, mines and minerals, and agricultural land.
- Originally inserted in the 1951 amendments, Section 88 exempts “Indians from provincial legislation which restricts or contravenes the terms of any treaty.” This provision has been interpreted by the courts to mean that if no treaty exists between Canada and a group of Indians then provincial laws apply to their activities on Crown land.

## Impact of Treaties and Court Cases

The *Indian Act* is not the only document that governs Aboriginal peoples in Canada. Treaties and court cases have been used as a basis for asserting Aboriginal rights. Baxter and Trebilcock<sup>52</sup> point out that “In Canada today, First Nations’ land tenures on and off reserves are subject to multiple layers of oversight and to rapidly shifting common law interpretations of Aboriginal title. In turn, land tenure systems themselves may be premised on diverging—sometimes competing—traditions and world views within a wide diversity of communities” (p. 50).

In the case of Membertou, critical treaties are the Wabanaki<sup>53</sup> Compact of 1725 and the 1726 and 1749 ratification treaties, which created the Mi’kmaq Treaty of 1752. This 1752 treaty explicitly incorporated and continued the terms that reserved all Mi’kmaq lands, liberties and properties not conveyed or sold to British in 1693. Article 8 provided that Mi’kmaq were to be treated as equal to British subjects.<sup>54</sup> Following the French and Indian

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<sup>51</sup> Yellowhorn thinks that the communal-like arrangement is inadequate to address important land management issues.

<sup>52</sup> Baxter, Jamie and Michael Trebilcock. 2009. “Formalizing” Land Tenure in First Nations: Evaluating the Case for Reserve Tenure Reform.” *Indigenous Law Journal*. 7(2): 45-122.

<sup>53</sup> The Wabanaki Confederacy was a political alliance between the Mi’kmaq, Maliseet, Passamaquoddy, and Penobscot.

<sup>54</sup> Henderson, James (Sakej) Youngblood. 2000. “The Impact of Delgamuukw: Guidelines in Atlantic Canada.” In *Beyond the Nass Valley: National Implications of the Supreme Court's Delgamuukw Decision*, edited by O. Lippert. Vancouver, BC: The Fraser Institute.

War, the British Crown signed a Treaty of Peace and Friendship in 1760-61. Rights from earlier treaties were upheld.<sup>55</sup>

The Supreme Court has issued rulings that affect Aboriginal claims. Henderson (2000)<sup>56</sup> looks at how the guidelines from the 1997 *Delgamuukw v. British Columbia*<sup>57</sup> decision affect Atlantic region First Nations. He argues that applying *Delgamuukw* guidelines affirms that Aboriginal tenure is vested and reserved for Atlantic nations, tribes and peoples by compacts and treaties with the sovereign, and by “prerogative legislation” there is a prohibition for interference from colonial or individual bodies on these tenures.

The 1999 Canada Supreme Court decision of *R. v. Marshall*<sup>58</sup> upholds fishing rights established in treaty between the Mi’kmaq and Britain in 1760-61. The Wabanaki and Mi’kmaq compacts and treaties in Atlantic Canada (from the 17<sup>th</sup> century and onward) especially reserved Aboriginal tenure.<sup>59</sup>

Henderson (2000)<sup>60</sup> continues that in Atlantic Canada, colonial law has viewed Aboriginal tenure as part of the Crown tenure, not as distinct or *sui generis* land tenure system recognized and vested in Aboriginal nations recognized in treaties. But, the court’s insight from *Delgamuukw* that Aboriginal tenure is a separate tenure from common law affirms treaty reconciliation. No court (or archival evidence) has found an instance in which the Aboriginal peoples in Atlantic Canada sold or ceded their vested treaty lands to the Crown. Any provincial or federal infringement of the reserved Aboriginal tenure under prerogative laws requires fair compensation. Aboriginal and treaty tenure and rights do not cease because the Crown’s servants fail to secure them.

Since the mid-2000s, the Mi’kmaq have been pushing for Canada and Nova Scotia to recognize their Aboriginal rights acknowledged in the historic treaties. The Assembly of Nova Scotia Mi’kmaq Chiefs has negotiated first an Umbrella Agreement (2002), and then Framework Agreement (2007) with Canada and with Nova Scotia. These Agreements set up the Made-in-Nova Scotia Process for working through problems relating to Mi’kmaq and Aboriginal rights.<sup>61</sup>

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<sup>55</sup> Wicken, William C. 2005. “Maritime Treaties.” Paper written for the Department of Indian Affairs. <http://www.aadnc-aandc.gc.ca/eng/1100100028599/1100100028600>. Retrieved June 25, 2013.

See also Patterson, Stephen. 2009. “Eighteenth-Century Treaties: The Mi’kmaq, Maliseet, and Passamaquoddy Experience.” *Native Studies Review*. 18 (1): 25-52.

<sup>56</sup> Henderson. 2000. “The Impact of *Delgamuukw*.”

<sup>57</sup> *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010.

<sup>58</sup> *R. v. Marshall (No. 1)* [1999] 3 S.C.R. 456 and *R. v. Marshall (No. 2)* [1999] 3 S.C.R. 533.

<sup>59</sup> See: William C. Wicken. 2002. *Mi’kmaq Treaties on Trial: History, Land and Donald Marshall Junior*. Toronto: University of Toronto Press; Coates, Ken. 2000. *The Marshall Decision and Native Rights*. Quebec City: McGill-Queen’s University Press; Isaac, Thomas. 2001. *Aboriginal and Treaty Rights in the Maritimes: The Marshall Decision and Beyond*. Saskatoon Purich Publishing; Henderson, James (Sakej) Youngblood. 2000. “Constitutional Powers and Treaty Rights.” *Saskatchewan Law Review* 63(2): 719-750.

<sup>60</sup> Henderson. 2000. “Impact of *Delgamuukw*.”

<sup>61</sup> See Mi’kmaq-Nova Scotia-Canada Umbrella Agreement. 2002.

<http://www.aadnc-aandc.gc.ca/eng/1100100028635/1100100028636>; Mi’kmaq-Nova Scotia-Canada Framework Agreement. 2007. <http://www.gov.ns.ca/abor/docs/Framework-Agreement.pdf>.

## Alternatives to the *Indian Act*

### Self-government Arrangements

First Nations have taken several pathways toward self-government, one being a formal self-government agreement with government entities. Coates and Morrison<sup>62</sup> have identified several factors to keep in mind when negotiating self-governing agreements with the federal, provincial, and local governments. An excerpt of their findings is listed here.

- Self-government is a process, not a single act;
- Most agreements are aspirational rather than definitive and mandatory<sup>63</sup>;
- Each region, community, and cultural group has different needs, opportunities, and capabilities to address through reforms of governance systems.
- There is a shared and often urgent desire among Aboriginal communities to be free of the control of the Aboriginal Affairs and Northern Development and the *Indian Act*;
- The shape and nature of Aboriginal self-government reflects local circumstances, pressures from non-members, and the imperatives of senior governments;
- Finalizing agreements can be difficult, and controversial and promising developments at the local and regional level have often been reversed when final negotiations or implementation was attempted;
- Governments in Canada have been flexible in drafting and implementing self-government agreements (pp. 114-115).

How effective are self-governance agreements? To assess the success of self-government arrangements, Alcantara, Leone, and Spicer<sup>64</sup> focus on institutional forms that promote accountability between a First Nation government and the citizens. Looking at Aboriginal self-government models, the authors discuss three communities (Sechelt Indian Band, Westbank First Nation, and Nunatsiavut Inuit<sup>65</sup>) that have created governmental institutions apart from the *Indian Act*. To focus on government accountability, the authors summarize the powers of these Aboriginal governments and identify several institutional weaknesses of these non-*Indian Act* systems. They found that the following characteristics led to low accountability: lack of governing body outside of the Chief and Council (i.e., no

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<sup>62</sup> Coates, Ken S., and W.R. Morrison. 2008. "From Panacea to Reality: The Practicalities of Canadian Aboriginal Self-Government Agreements." In *Aboriginal Self-Government in Canada: Current Trends and Issues*, edited by Y. D. Belanger. Saskatoon: Purich Publishers.

<sup>63</sup> It appears that the authors are suggesting that the agreements set out guidelines and parameters for intergovernmental relationships.

<sup>64</sup> Alcantara, Christopher, Zachary Spicer, and Roberto Leone. 2012. "Institutional Design and the Accountability Paradox: A Case Study of Three Aboriginal Accountability Regimes in Canada." *Canadian Public Administration* 55 (1).

<sup>65</sup> To clarify, the Labrador Inuit were never under the *Indian Act*, but are considered here for comparison.

independent judicial body), no method for citizens to remove Chief or Council members (whether for specified wrongdoing, or voter dissatisfaction), and a heavy reliance on the federal government for funding. While a land code would be unlikely to address overall federal funding, and election and removal practices, this suggests that adjudication provisions are important to include in a land law.

Coates and Morrison<sup>66</sup> detail Westbank's self-governance agreement. This agreement is unique in that it was made outside of a comprehensive land claim, and it accounts for the interests of the sizeable non-Westbank population within the community. The First Nation created a constitution to establish a rule of law for the community, and made strides toward a transparent and accountable government. A National Centre on First Nations Governance (NCFNG) publication states that the First Nation has worked to improve its government, institute policies and procedures, and face (as of 2008) the challenge of enforcement.<sup>67</sup>

### Land claims

Land management regimes based on land claims are the result of decades of negotiation among a First Nation or Aboriginal peoples (e.g., Métis or Inuit), the province, and the Canadian government. Many comprehensive land claims are settled as a response to the Numbered Treaties of the late 1800s. In many cases, promised reserve land was not granted to the First Nations until recently, when several First Nations negotiated land claims with the federal and provincial governments. Because there are only a handful of historic treaties, First Nations in British Columbia are currently negotiating new treaties with the federal and provincial governments.

The Muskeg Lake urban reserve in Saskatoon was created when, through the federal Additions to Reserves<sup>68</sup> policy, the First Nation acquired "surplus" Crown land and obtained reserve status. Being immediate neighbours to the municipality, the First Nation had to negotiate agreements with the Saskatoon municipal government to cover service provision, such as water, sewer, roads, schools, and taxes. Since reserves have a different tax status than non-reserve lands, the municipality was concerned that the urban reserve would create an unfair advantage for First Nation owned businesses. The two parties agreed on fees that the First Nation would pay to the city for services, in lieu of taxes. Theresa Dust<sup>69</sup> identified issues that urban reserves and the province and municipality have to address:

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<sup>66</sup> Coates and Morrison. 2008. "From Panacea to Reality."

<sup>67</sup> National Centre on First Nations Governance. Year unknown. *Governance Toolkit: Best Practices. Principle: Transparency and Fairness. Government: Westbank First Nation*. West Vancouver, BC: National Centre on First Nations Governance.

[http://www.fngovernance.org/toolkit/best\\_practice/westbank\\_first\\_nation](http://www.fngovernance.org/toolkit/best_practice/westbank_first_nation) Retrieved 3 August 2012.

<sup>68</sup> AANDC website explains, "An addition to reserve (ATR) is a parcel of land that is added to the existing land base of a First Nation. The legal title is set apart for the use and benefit of the band having made the application. Land can be added to reserves in either rural or urban settings." See <http://www.aadnc-aandc.gc.ca/eng/1100100034816/1100100034817>. Retrieved July 25, 2013.

<sup>69</sup> Dust, Theresa M. 1997. "The impact of Aboriginal land claims and self-government on Canadian municipalities." *Canadian Public Administration* 40 (3):481-494.



The issues are: the application of laws (both provincial and municipal), the compatibility of those laws with Aboriginal laws within the urban boundaries, and the enforcement of laws, both Aboriginal and non-Aboriginal, on land claims land; taxation powers on land claims land for both Aboriginal and non-Aboriginal residents, compensation for any loss of tax revenue, and payment for the provision of municipal services to land claims land; and dispute resolution mechanisms, including effective procedures for enforcing Urban Council/First Nation agreements (Dust 1995, p. ix).

The Nisga'a in British Columbia are upheld as an example of wide-ranging First Nation powers established under a comprehensive land claim before the formal British Columbia treaty-making began. Coates and Morrison (2008)<sup>70</sup> describe Nisga'a's self-government arrangements:

They could establish their own government, adopting Nisga'a traditional authority, provided that the basic tenants of Canadian law were recognized. The Nisga'a managed their own membership lists and established principles of membership in the First Nation. The Nisga'a Lisims had the right to manage its resources, lands, and other assets, a marked departure from the original *Indian Act* systems which placed all such valuable items under federal control. The Nisga'a could pass laws and regulations governing language and culture and other matters relating to the oversight of their communities...the Nisga'a were authorized to assume responsibilities in such diverse areas as resource management, marriage, emergency protection, health, transportation, child welfare, and education (p. 110).

By 1985, the Sechelt Band, with land near Vancouver, had taken over control in as many areas as the *Indian Act* allowed. Through federal legislation in 1986 (Bill C-93: An Act Relating to the Establishment of Self-government for the Sechelt Band), the Band wrote a constitution to set up its own form of government. Since their goal was to participate in the leasing market in the Vancouver area, they developed a municipality-style government, with laws comparable to the neighbouring city. Additionally, they made agreements with the province to govern over a Sechelt Indian Government District (SIGD) where many provincial laws apply. The province insisted that the District would have an advisory council to give voice to non-Indians living in the district.<sup>71</sup> The SIGD Advisory Council Terms of Reference (2010) states that the Advisory Council does the planning and costing for servicing programs, and makes recommendations to the SIGD Chief and Council.<sup>72</sup>

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<sup>70</sup> Coates and Morrison. 2008. "From Panacea to Reality."

<sup>71</sup> Etkin, Carol E. 1988. "The Sechelt Indian Band: An Analysis of a New Form of Native Self Government." *The Canadian Journal of Native Studies*. 8 (1):73-105.

<sup>72</sup> Sechelt Indian Governing District. 2010. *Terms of Reference: Sechelt Indian Government District Advisory Council*. Sechelt, BC: Sechelt Indian Band.

The Nunatsiavut Government of the Labrador Inuit was created in 2005 as a result of the Labrador Inuit Land Claims Agreement. In contrast to land claim agreements negotiated by First Nations governments, the Nunatsiavut Government does not govern reserve land, but is a regional government that administers fee-simple lands owned by the Nunatsiavut Government, Inuit community councils, and Inuit individuals. An extensive document, the Labrador Inuit Land Claims Agreement<sup>73</sup> establishes the Labrador Inuit as an Aboriginal people with rights to land. The Agreement sets up the Nunatsiavut Government, establishes claims to natural resources and defines the Inuit territory. Further, the Agreement creates a management system over Inuit waters (including the ocean). Newfoundland and Labrador, and Canada are required to consult with the Nunatsiavut Government on such things as natural resource extraction or exploration, land use planning, environmental assessments, and economic development, among other provisions.

### **First Nations Land Management Act and Framework Agreement on First Nation Land Management**

The FNLMA is federal legislation that provides a mechanism for First Nations to opt out of most of the provisions of the *Indian Act*'s land restrictions. This is a formal process that First Nations apply to, sign the Framework Agreement on First Nation Land Management with the federal government, take two years to develop their own land code, get community ratification, enter into an Individual Agreement with the federal government, enact land code, and finally begin governing land use on reserve.

Signed in 1996, the Framework Agreement is the result of negotiations initiated by thirteen First Nations.<sup>74</sup> The Land Advisory Board Resource Centre reports that a total of sixty-nine First Nations are now signatories to the Framework Agreement.<sup>75</sup>

Under the Framework Agreement, First Nations manage their own land through a First Nations land code. The Minister of Aboriginal Affairs and Northern Development is no longer involved in land management. Isaacs (2005)<sup>76</sup> identifies that the provisions of the FNLMA change the relationship between First Nations and third parties (businesses, leaseholders, government agencies, etc.). Though a changed relationship is an obvious consequence of entering into a new land management framework, Isaacs points out that issues such as licensing, expropriation, taxation, and new laws will have practical implications for third parties. The implication, then, is that First Nations have a gamut of legal relationships to negotiate. With the FNLMA being in effect for fifteen years, there is now a history of praxis to consider.

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<sup>73</sup> *Labrador Inuit Land Claims Agreement*. 2005.

[http://www.exec.gov.nl.ca/exec/igas/land\\_claims/agreement.html](http://www.exec.gov.nl.ca/exec/igas/land_claims/agreement.html). Retrieved June 6, 2013.

<sup>74</sup> The original First Nation signatories were Westbank, Musqueam, Lheidlel T'enneh, N'quatqua, Squamish, Sikiska, Muskoday, Cowessess, Opaskwayak Cree, Nipissing, Mississaugas of Scugog Island, Chippewas of Mnjikaning, Chippewas of Georgina Island, and Saint Mary's.

<sup>75</sup> Land Advisory Board Resource Centre website. Member Communities. <http://www.labrc.com/Member-Communities.html>. Retrieved June 6, 2013.

<sup>76</sup> Isaac, Thomas. 2005. "First Nations Land Management Act and Third Party Interests." *Alberta Law Review* 42: 1047-60.

Christopher Alcantara (2007)<sup>77</sup>, a scholar engaged in work on individual property rights, uses the Framework Agreement's land management regimes as a tool to compare the economic and dispute resolution mechanisms of Muskoday First Nation and Missaussauga First Nation of Scugog Island. He used their land management codes for comparison. His analysis was that a First Nation land code helped in land development by removing approval and oversight at the federal level. He pointed out that dispute resolution processes and a formal mechanism for allowing land to be used as mortgage collateral were important. He found that Muskoday did little to protect customary land rights from expropriation by the band council, while Scugog Island guaranteed that the council would not extinguish customary land rights. This is an interesting distinction, something that First Nations need to consider. What is the best way to address customary land rights? Alcantara favours securing as much individual control over land as possible.

## Land Tenure

“Internationally, land tenure has attracted attention from among the legal institutions considered foundational for economic development.”<sup>78</sup>

### Aboriginal Land Tenure Systems

Aboriginal peoples in Canada function under several land tenure systems, some imposed and some chosen based on the Aboriginal peoples' interests. Aboriginal title is fundamental to land tenure, but it applies to the right to land use, or land claims, but does not accord exclusive control over the land. Aboriginal title is a complex topic, the subject of court cases, academic articles, books, and political rhetoric. A constitutionally protected right (*Constitution Act of 1982*, section 35(1)), Aboriginal title is a *sui generis* right, a right that exists beyond the scope of Canadian sovereignty. Aboriginal title is the established right to lands, and is the basis for Aboriginal land claims agreements.<sup>79</sup>

#### Reserves

Broadly, Aboriginal reserve lands are Crown lands held for use by a First Nation. The Crown manages and administers the land for the First Nation beneficiaries. Land is generally held communally by the First Nation. Individuals may hold Certificates of Possession granted by the First Nation, in which individual First Nation citizens may have control over the use of a delineated piece of land; this land is still Crown land, and cannot

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<sup>77</sup> Alcantara, C. 2007. “Reduce Transaction Costs? Yes. Strengthen Property Rights? Maybe: The First Nation Land Management Act and Economic Development on Canadian Indian Reserves.” *Public Choice*. Vol. 132, No. 3/4 pp. 421-432

<sup>78</sup> Baxter, Jamie and Michael Trebilcock. 2009. “Formalizing” Land Tenure in First Nations: Evaluating the Case for Reserve Tenure Reform.” *Indigenous Law Journal*. 7(2):49.

<sup>79</sup> Pienaar, Gerrit. 2008. “The Inclusivity of Communal Land Tenure: A Redefinition of Ownership in Canada and South Africa?” *Electronic Journal of Comparative Law*. 12(1). <http://www.ejcl.org/121/art121-18.pdf>. Retrieved June 6, 2013.

be owned outright (to the extent that outright ownership is allowed in the Canadian legal system).<sup>80</sup>

### *Fee Simple*

Through self-governance arrangements, some First Nations (e.g., Tsawwassen First Nation) govern and manage land held in fee simple. Land may be allotted to individual First Nations citizens. First Nations can restrict how fee simple lands can be transferred from one person to another, and whether or not land can be held by non-Aboriginals.

The Labrador Inuit Nunatsiavut Government (described above) is a regional Inuit government controlling fee simple land. Land is assigned to Inuit individuals based on the rules of the Nunatsiavut Government and local governments.

Métis settlements, established through the 1990 Métis Settlements Accord, in Alberta are examples of municipal-style governments over Métis-controlled fee simple lands. Settlement councils oversee the Métis land. Most physical infrastructure, such as water and roads, are financially dependent on the province.<sup>81</sup> The Métis Settlements are protected under the Alberta Constitution, and a democratic government oversees co-management of natural resources with the province.<sup>82</sup> A Métis Settlement Appeal Tribunal manages land-related and natural resource-related disputes that may be appealed to the Alberta Court of Appeals.<sup>83</sup>

Nunavut is a territorial public government (not exclusively Inuit) created out of Nunavut Land Claims agreement. Inuit land within the territory is held in fee simple with varying rights to subsurface resources, and collectively owned and controlled by Designated Inuit Organizations (DIO). These lands may only be transferred to another DIO or to the federal government.<sup>84</sup>

### **A Proposed Indigenous Land Tenure Model**

With the variance of land tenure systems that Aboriginal peoples use, and the restrictions imposed on reserve lands, Baxter and Trebilcock<sup>85</sup> consider other methods for understanding and implementing Aboriginal land ownership. They posit that any land tenure system should be relevant to different community systems and their economic priorities. Additionally, they indicated that predictability and security were major points in

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<sup>80</sup> Ballentyne, Brian, and James Dobbin. 2000. "Options for Land Registration and Survey systems on Aboriginal Lands in Canada." Prepared for Legal Surveys Division of Geomatics Canada. [http://www.acls-aaac.ca/files/english/Aboriginal/Ballentyne-Dobbin\\_report.pdf](http://www.acls-aaac.ca/files/english/Aboriginal/Ballentyne-Dobbin_report.pdf). Retrieved June 6, 2013.

<sup>81</sup> Wall, Denis. 1999. "Aboriginal Self-Government in Canada: the cases of Nunavut and the Alberta Métis Settlements." In *Visions of the Heart: Aboriginal Issues in Canada*. Ed. D. Long and O.P. Dickason. Toronto: HarcourtBrace.

<sup>82</sup> Métis Settlement General Council website. "Legislation." <http://www.msgc.ca/About+Us/Legislation/Default.ksi>. Retrieved July 25, 2013.

<sup>83</sup> Alberta Aboriginal Relations website. "Métis Settlement Appeals Tribunal." <http://www.Aboriginal.alberta.ca/987.cfm>. Retrieved July 25, 2013.

<sup>84</sup> Denis. 1999. "Aboriginal Self-Government in Canada."

<sup>85</sup> Baxter, Jamie and Michael Trebilcock. 2009. "'Formalizing'" Land Tenure in First Nations: Evaluating the Case for Reserve Tenure Reform." *Indigenous Law Journal*. 7(2): 45-122.

establishing an Aboriginal land tenure system, contrasting using land tenure systems for protecting the individual and for protecting the First Nation. In order for a First Nation to reach its goals, rules for the First Nation's behaviour, rights of individuals, outside parties, and communal land use must be very clear. If a First Nation seeks to increase economic opportunities, rules for all parties must be clear. For example, an individual entrepreneur would need to know her rights to her land and/or property were secure, however those are defined. If she knew that her land could be expropriated easily by the First Nation, her physical space would not be a secure place for a business.

In addition to having predictable internal laws and regulations, "when outside investment is a key source of capital for economic development, First Nations also have strong incentives to improve the legal linkages that allow them to tap into the flow of wealth and resources from the national and international economies."<sup>86</sup> Membertou has demonstrated the pay off of this type of linkages through ISO certification.<sup>87</sup>

Baxter and Trebilcock discuss the idea of creating an Indigenous land tenure system that involves some form of communal or collective interests vested in the community as a whole, alongside forms of private, individual interests in order to promote development initiatives such as large scale housing projects. Baxter and Trebilcock assert that under an Indigenous regime,<sup>88</sup>

- (1) The underlying allodial title in the reserve land passes from the Crown to a First Nation as a communal interest. The government of a First Nation has full jurisdiction under Canadian law to allocate property interests on the community's land to both community members and non-members if it chooses--including granting new interests and registering existing forms of private title such as CPs or allocations made under customary regimes.
- (2) Under this land tenure system, a First Nation could grant private, indefeasible title to reserve lands, transferable to parties off reserve. But a First Nation retains an underlying communal title interest to all land, even when individually titled tracts are transferred to outsiders. This implies that a First Nation always retains ultimate jurisdiction over titled lands, similar to the role of the Crown in lands off reserve. A First Nation retains an underlying communal interest to all land and this interest is non-transferable.
- (3) The title registry will be implemented nationally, rather than as a collection of separate provincial systems or individual registries at community level.
- (4) Adopting this land governance scheme is optional for a First Nation and is intended to exist simultaneously with other options for tenure reform on reserves as part of a menu for each community. But once a land tenure system is adopted, the First

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<sup>86</sup> *Ibid*, p. 51.

<sup>87</sup> See Brown et al 2012, Johnstone 2006, and Thayer Scott 2004.

<sup>88</sup> *Ibid*, pp. 89-90.

Nation is permanently released from the jurisdiction of the land governance provisions of the *Indian Act*.

## Conclusion

This review of the literature gives an overview of the complexity of the issues facing First Nations as they consider models for land management. This document has outlined a few major obstacles to effective First Nations governance, identified in the literature, that the *Indian Act* has created

- Centralized power in Chief and Council;
- Matrimonial property concerns;
- Unequal citizenship rules; and
- Complicated land tenure regulations.

This literature review offered some critiques, identified by authors such as Provar and Abele, of the antiquated and restrictive nature of the *Indian Act*. Finally, the literature review sets out a few models First Nations have used to move away from the *Indian Act*, and toward self-governance. These alternatives are:

- Self-governance arrangements through legislation, treaty, or other agreement with federal and provincial governments;
- Governance regimes created through land claims;
- Framework Agreement on First Nations Land Management; and
- Rethinking Indigenous land tenure.

A First Nation looking to increase its governmental capacities can pursue several models for self-governance, keeping in mind the deficiencies in regulation and land stewardship already in place because of the *Indian Act*.

In the next chapter, we will present the findings of the primary data collection and offer analysis and interpretation.

## Chapter Four: Reporting on the Primary Data

This chapter begins by reporting on the interviews conducted with Aboriginal lands managers. It synthesizes the data from interviews to highlight broad themes of significance. We then turn to the interviews conducted with Membertou community and council members and identify the priorities of the community as conveyed by research participants. Given the nature of responses, we provide representative quotations. We report themes that emerge from aggregate responses, rather than reporting on every interview.

In this process, several themes recur, such as the importance of understanding land tenure on the reserve; crucial points for institutional capacity building, community involvement, and sharing responsibilities; and authority among a lands office, Chief and Council, and other departments.

### Lessons Learned from Land Managers

First Nations have implemented their own lands management systems – through FAFNLM, land claims, treaty, or self-government arrangements. Though the pathways to land management varied, the set of best practices, or recommendations for other First Nations, was similar. The following pages detail the major themes that came from analysis of the interview data. For the list of questions asked during the interviews, see Appendix B.

#### We Would Never Go Back to the Indian Act

When designing the research project, Membertou identified that their own community might be apprehensive about changing land management systems away from *Indian Act* control to a First Nation-controlled system. To help understand whether or not this change was a positive one, we asked land management interviewees if the community would ever go back to the *Indian Act* land management regime.

We received a resounding, “No!” for several reasons. For some land managers, having a First Nation land management system just made everything easier. No approvals are needed from Aboriginal Affairs and Northern Development Canada, which speeds transactions. First Nations could set their own priorities for managing and using the land, including developing high environmental standards or making agreements with the province to share natural resource royalties (see, for example, the profile of Haida Gwaii in Chapter Two of this report). Finally, land managers told us that the community liked being in charge of their own land. The Muskoday interviewee explained, “Why would you go back to having somebody telling you what to do when you’ve been doing it yourself for a number of years? It’s a flat out no; I don’t think our community would ever even think of that.”

#### Community Involvement

Many of the questions the research team asked focused on the process of land code development and implementation. One of the queries dealt with the need for community involvement in each stage of the process. Is it necessary? Interviewees stressed that

community involvement is crucial in the land code development process. Specifically, they indicated three crucial points where community members must be engaged.

#### *Development of the Code*

The community involvement during this phase takes several forms, mainly community meetings and forming a well-functioning land committee. Interviewees emphasized the need to get a good representative cross section of the population to serve on the land committee. The Muskoday interviewee described their land committee composition this way: “We had a gentleman who worked in public works, we had a youth representative, we had an Elder’s representative, we had a person who came from the education side, so you know like I said there was a cross section of community members and they also did come from different community families as well.”

#### *Referendum*

One of the stages of developing a land management system is community ratification of the code. When the code gets to the point of referendum, the community (those who have not been involved in the development, per se) needs to be educated on what the code is, how it will help the First Nation, self-government, and why full support of this initiative is needed. Interviewees indicated that they involved the community through community meetings, surveys, community meals, door-to-door education, and word of mouth. Whitecap Dakota timed the referendum to take place at the time of Chief and Council elections, to maximize voter turnout.

#### *Enforcement*

Having community support for the land code leads to better cooperation once it goes into effect. This community involvement is a day-to-day respect for the First Nation’s laws, rather than focusing on meetings or events that was used for code development.

### **Chief and Council Involvement**

Land management experts told us that Chief and Council involvement in land law development was crucial. The nature of this involvement, however, depended on the community. For some communities, having strong Chief and Council guidance of the process is important, while other communities preferred to have greater community (versus Council) involvement in land management development. There were three periods of active involvement.

#### *Development of the Code*

Interviewees told us that land code development was usually a Chief and Council initiative. As a priority of the First Nation government, Chief and Council were involved in starting the process: negotiating with federal government, signing on to FAFNLM, hiring new staff, and reaching out to the community. When land committees were formed, there was usually a Council representative sitting on the committee.

#### *Referendum*

Again, since community involvement was so crucial to passing the First Nation law, Chief and Council in the different First Nations communities were very active in the community



education, often hosting the community meetings and going door-to-door to talk with people. Lands managers advised that it would be important for Membertou to determine whether Chief and Council would lead the community education and the degree of their involvement.

#### *Code Implementation and Decision-making Thresholds*

Once the land code is in place, Chief and Council involvement varied among the First Nations we interviewed. We characterize this involvement as “decision-making thresholds” – the Chief and Council became involved in lands decisions when they reached a certain level of community impact. Lands managers advised that Membertou will need to consider whether it is appropriate for Chief and Council to be involved in all lands decisions or whether some responsibilities could be delegated to a department.

- In some communities, all land transactions had to be approved by Chief and Council. In these situations, interviewees said that this was a simple process, and approvals were made quickly.
- For other First Nations, the Chief and Council were only involved in larger transactions: business leases, large land transfers. Individual leases, agricultural leases, in-home businesses, and construction were approved by the lands management office. Sliammon found that getting Chief and Council approval for “every little decision” was unnecessary and time consuming; in an amendment to their land code, they removed Chief and Council approval for “everyday” transactions.
- In most communities, land transactions that would greatly affect the community, such as large business development would have to be approved by the community.

#### **Capacity Building**

Capacity building for the First Nation is crucial. This development happens at two or more levels: staff knowledge and training; and building up institutional capacity through new land offices, specific laws and policies, and intergovernmental agreements.

#### *Lands Manager*

Interviewees recommended hiring a land manager early, and having the manager trained. Some managers came into their positions with experience from working at other First Nations or other lands management agencies (i.e., federal or provincial). That experience was crucial for establishing a functional office and knowing how to deal with disputes under the new code. For land managers without extensive experience, interviewees recommended training programs from the Lands Advisory Board Resource Centre (LABRC), National Aboriginal Land Managers Association (NALMA), University of Saskatchewan Indigenous Peoples Resource Management Program, and participating in First Nations land managers networks. The less experienced land managers indicated that they learned the most from other land managers. The ability to pick up the phone and call another manager to advise on a situation was very important.

To further build capacity, Westbank had experimented with bringing in students to work in the land office, and pushed the senior staff to think ahead about what needed to be done, and what the student could do to further the plan. The Tsawwassen representative recommended grooming a future land manager through job shadowing.

### *Setting Up a Lands Office*

Most offices were made up of a lands manager and a registrar. Some lands offices were part of larger First Nations administrative departments, and some stood alone. Sometimes the office comprised only one lands manager. These offices need the normal departmental infrastructure: equipment, telecommunications, space, desks, staff, etc. Depending on the volume of land transactions, more than one lands office may be needed. Georgina Island has three offices to handle large numbers of residential leases on vacation homes on islands in the First Nation's territory.

Legal counsel is also important for the lands office. Most contracted with outside lawyers specializing in lands law, and an interviewee from Tsawwassen stated that they spend \$40,000 a month on legal fees. Under Tsawwassen's treaty provisions, all land is fee simple. While the lands manager did not reveal the nature of the legal representation, the land tenure status (fee simple, as opposed to reserve land) may account for some of the need for legal counsel.<sup>89</sup>

### **Dispute Resolution**

One of the most interesting findings of these interviews was that most disputes under the land law were not adjudicated in court. Our interview questions were constructed with the assumption that there were numerous disputes, and we were interested in the specific arrangements that First Nations had made to deal with adjudication, namely arrangements for taking cases to provincial courts. From the interviews, we learned that there were either 1) no disputes to address, or they were addressed through 2) early engagement and intervention, 3) community methods of dispute resolution, or 4) adjudication in provincial court.

### *No Disputes & Community Respect for the Law*

Several interviewees stated that after all the community education on what the land code is, and why it is needed, as well as having regular input in the development process, community members respected the laws. There were few disputes in this situation.

### *Early Engagement & Intervention*

Land managers, especially those one reserves with smaller populations, would deal with infractions informally. They would go to the person who is not following the code, and explain what they were doing and ask for the situation to be corrected. Usually those informal mechanisms worked. The Muskoday representative mentioned that reminding

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<sup>89</sup> Tsawwassen has entered into a treaty with Canada. As part of the treaty, Tsawwassen holds land in fee simple. Fee simple is not an option under the Framework Agreement on First Nations Land Management – land is still owned by the Crown.

land users of the consequences of breaking the land law (e.g., fines, lease cancellation by Council) was enough to bring about compliance.

### *Community Dispute Resolutions Process*

#### *Formal Processes*

Some First Nations had developed a dispute-resolution process, such as Muskoday bringing code infractions before a land advisory board, or to Chief and Council; or a Solutions Table<sup>90</sup> (a First Nation-Provincial board that decides on land use) at Haida Gwaii. Again, cases have not had to go past this stage and on to court.

#### *Community Processes*

When asking one land manager how the First Nation would address a land code infraction, he told us that they would do what they do with any situation: take it to an Elder and use mediation techniques. The community is used to this process, and it would be appropriate for land code violations.

### *Adjudication in Provincial Court*

Court adjudication is rare, but is one possible means of dealing with disputes. A representative of the Land Advisory Board Resource Centre shared two examples of First Nation land disputes adjudicated in provincial courts. A case between Georgina Island Development, Inc., and a leaseholder was heard in Ontario Superior Court in 2008.<sup>91</sup> A dispute between a Westbank First Nation Certificate of Possession holder and a tenant was heard in the British Columbia Court of Appeals in 2006.<sup>92</sup>

## **Interactions with Outside Parties**

A First Nations land code introduces a new legal framework for interacting with governments, agencies, individuals, and businesses. Interviewees shared that in general, interaction with outside parties is easier under a First Nations land code.

### *Businesses*

Business relationships become smoother because land transactions can take place much more quickly under a First Nations code than under the Indian Act. Additionally, the Westbank representative pointed out that having clear procedures for a businessperson to follow helped ensure smoother business relationships. Since mainstream business relationships include guidelines and regulations, outside business are willing to follow a First Nation's transparent standards.

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<sup>90</sup> This Solutions Table was set up as part of a Reconciliation Protocol between Haida Gwaii and British Columbia. "The Solutions Table allows for shared decision-making between the Province and the Haida Nation, as they consider land and natural resource applications and make recommendations to their respective decision makers," (BC Ministry of Natural Resource Operations, 2012. P. 1). British Columbia Ministry of Natural Resource Operations. April 19, 2012. "FrontCounter BC Expands Services to Haida Gwaii." *Newsroom. BC Government Online News Source.* (<http://www.newsroom.gov.bc.ca/2012/04/frontcounter-bc-expands-service-to-haida-gwaii.html>).

<sup>91</sup> *Georgina Island Development Inc. v. Neale*, 2008 CanLII 30302 (ON SC).

<sup>92</sup> *Derrickson v. Kennedy*, 2006 BCCA 356 (CanLII).

### *Provinces*

This situation varies by province. Some First Nations have had good relationships with Provincial governments already, so moving to a First Nations land code is just another place for negotiation. In provinces where relationships are difficult, a new land code creates a situation where a First Nation has to assert its authority and jurisdiction and insist on compliance by the province.

### *Municipalities*

The situation was similar for municipalities. In situations where a First Nation works well with a neighbouring municipality, the land code facilitates further cooperation. On the other hand, if relationships with nearby cities were already strained, putting more power in the hands of the First Nation can lead to more conflict, as was the case with Tzeachten. The Tsawwassen representative advised Membertou to build strong relationships with Sydney.

### *People Who Enter First Nation Land*

With a land code in place, a First Nation can create permits, policies, and regulations for fishing, boating, research, outdoors activities, etc. The representative from Haida Gwaii said that telling people of the new regulations for using First Nations land was non-adversarial, and usually resulted in compliance. As Aboriginal communities move towards land management, they will need to determine where they stand on the issue of charging fees for permits, etc. to visitors (a common practice of US tribes).

## **Land Transactions**

Before starting research, the team had heard that functioning under a First Nation land code, rather than under *Indian Act* regulation, led to speedier land transactions. While the interviewee data on the speed of land transactions do not lend themselves to systematic analysis, interviewees did tell us that transactions are faster when they are not constrained by ministerial oversight. For example, the representative from Muskoday said that agricultural leases would take 6-8 months under the *Indian Act*, and now can be processed in fewer than 6 weeks under the Muskoday land code.

## **Tradition**

When asked how tradition influences code development or how tradition is incorporated into land law/codes, most interviewees stated that tradition did not play a big part. We found, however, that tradition did play a part in *how* the land was used.

### *Planning Stage*

Though most interviewees did not recognize it as incorporating tradition, most communities did solicit the input of Elders and other people with traditional knowledge during the code development phase. Sliammon, for example, teamed with treaty societies to collect community information through surveys when they prepared the land code.

### *Zoning*

Several interviewees stated that areas of the reserve were set aside for traditional use, including subsistence activities (such as trapping and fishing), ceremony, and community gatherings (such as powwows). Tsawwassen said that zoning was a foreign concept to the

First Nation, and it took a lot of time and communication with the community to bring about agreement to abide by zoning ordinances.

#### *Mapping Territory*

Haida Gwaii said that their most powerful tool for asserting their rights both within the First Nation and with outside entities was to map their traditional territory. This takes a large amount of traditional knowledge, and when the mapping project was done, the First Nation's capacity to retain traditional knowledge and use it for modern purposes was increased. It provides a foundation for claiming jurisdiction and asserting their rights to territory.

#### *Matrimonial Real Property & Inheritance*

Creating these laws establishes an avenue to incorporate customary practices into distribution of familial property. For example, Nippissing Elders participated in the law development, wanting to ensure that there were safeguards for children of divorcing parents.

#### *Customary Land Use*

Interviewees pointed out that their land holdings take many forms, including communal land, Certificates of Possession, and customary use land. The code needs to address customary practices.

#### *Land Transaction Approval*

The community governments of the Nunatsiavut Government each have their own community lands committees. Before leases, permits, or other types of land transactions can take place, community lands committees – made up of community members, including traditional hunters and gatherers – must evaluate the lands applications.

#### *Dispute Resolution*

Whitecap Dakota's response to dispute resolution mechanisms emphasized that community practices are alive and well. Anything from dealing with a teenager who is acting up in school to a potential land use infraction would be addressed the same way: mediation with an Elder.

### **Impediments to Development & Implementation**

We asked land managers and land management experts how they could have improved the code development and implementation process. Interviewees focused on clear, simple processes, and continuity across elected leadership.

#### *Elections & Council Turnover*

An interviewee mentioned that elections could impede the process. Initiatives sometimes die when they are not supported by a new Chief and Council's administration. This suggests that committees, procedures, and staff directives should be set in place so that work can continue even if elected leaders change.

#### *Creating Too Much "Red Tape"*

Several land managers said that some of the changes they made to their code involved simplifying procedures, such as removing Chief and Council approval for all lease renewals, or lowering the percentage of the population that needs to participate in community meetings for land transaction approvals.<sup>93</sup>

#### *Peer Review of Code*

The lands and natural resource deputy Minister at Nunatsiavut Government advised getting input from land managers from several different jurisdictions to see if the land code is practical. He noted that a land code can meet all the legal requirements, but may not be useable. The code needs to be checked by someone with land administration experience to identify key points in the code that will cause, confusion, difficulty, or will simply be unworkable or unenforceable.

#### **Other Things to Consider**

After reflecting on their experience with land codes, and considering what they would do differently, land managers offered several questions to keep in mind.

#### *Land Registry*

Many interviewees related that the First Nations Lands Registry, managed by AANDC, is hard to use. Other options include developing your own system (is creating a First Nations Torrens system feasible?), creating a regional registry, or using a provincial Torrens system.

#### *Type of Transactions*

Land management experts recommended evaluating the type of transactions a lands office would handle. What is your major type of land transaction? What are leases used for? Agriculture? Business? Housing?

#### *Type of Land Tenure*

Related to knowing the types of transactions that are likely, land managers also recommended evaluating land tenure types. How much of your reserve is CP? How much is communal land? Are there any protected areas? Are there areas of environmental co-management with the province? What other types of tenure exist on the reserve?

#### *Fees*

A First Nation government has the option to charge fees. Will the First Nation charge fees for land use? Will there be fees attached to leases, businesses, or permits? Will community members be subject to the fees?

#### *Mortgages*

Access to mortgages is a topic that comes up when considering reserve land. Will the land code be a tool for individuals to get mainstream mortgages? If so, how will it allow for some form of collateralization? According to the interviews, the land law, *per se*, did not establish a pathway for First Nation citizens to obtain mortgages from financial institutions.

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<sup>93</sup> No specific recommendation as to what the percentage should be was given.

## **Membertou Priorities**

We interviewed Membertou Councilors, staff, community members, and Elders to understand Membertou ideas and priorities relating to land management. The topics addressed ranged from caring for personal housing lots to broader understandings of what constitutes Mi'kmaw territory. The following pages detail the major themes that came from analysis of the interview data. For the list of questions asked during the interviews, see Appendix B.

Importantly, many Membertou interviewees have thought hard about many of these topics. For example, while community members like having individually-controlled housing plots (Certificates of Possession), they also recognize that allotting land to individuals will affect the communal nature of the reserve. Additionally, staff members know of the progress Membertou has made in standardizing procedures and becoming a good neighbour and partner to outside governments and organizations, but can still identify ways to improve Membertou governmental functions.

The concepts covered with the community interviews fit broadly into categories: respect for and continuation of traditions through preservation of the natural environment, and preferences for land use. Membertou community members were very passionate about protecting the land, water, plants, and animals. According to Bernie Francis, “it’s very, very important that the land is respected much like you would respect a sentient being; and that’s the way it is now still in the minds of the Elders ... who still talk to me today.” The traditions of the Mi'kmaq are so connected to the land, that destroying any natural habitat destroys the people. The Elders, gathered to speak with us during lunch, suggested that there should be a law or bylaw to respect the land, and that there should be heavy fines for cutting down trees.

### **A Note on Membertou Community Values**

The points discussed below should be understood in the context of Membertou community values, particularly in relation to preserving nature. Membertou community members stressed the importance of maintaining a connection with the natural environment. This is a way to keep culture and Mi'kmaq language fresh; it is a key part of Mi'kmaw spirituality. Clifford Paul pointed out that part of the Mi'kmaq language is lost when people do not personally participate in using traditional resources, like picking blueberries: “there was a language spoken and when you do certain things in nature, there is a language spoken and if you take that away, that part of that language is lost.”

In the group session with Membertou Elders, they told us very plainly that Membertou has to save the trees. They shared that trees shelter the community from wind, erosion, and dust, and provide some privacy. They also lamented the loss of blueberry patches. Blueberries are both food and medicine.

### **How was land traditionally governed?**

We asked this question of Membertou community members to get an understanding of important Mi'kmaw – or Membertou, specifically – ways of thinking of land. How were decisions made? How were disputes settled? Instead of trying to summarize and impose a

worldview on these traditions, they are revealed through a series of quotes. The description here does not do justice to the complexity of land management, but it reports salient themes identified by interviewees.

I guess the traditional governing way of that it was through our family systems and through Elders knowledgeable on certain species like if we wanted to pick berries, we'd ask the women what worked, like where we can get the berries and they will tell us where to go or we go with them. If we wanted to get salmon we ask people who are knowledgeable about salmon and they will tell us where to go and just how much we should harvest, same for eels or anything like that. So from my responsibility as a person who is providing for community, it is usually the Elders that give me the direction...So traditionally, Elders and families and people knowledgeable on their skill sets. – Clifford Paul.

Historically, [the land] was run by the clans.<sup>94</sup> How was it divided? Probably that was the Grand Council. – Female Elder.

If I had a problem or she had a problem about lands, we went to the Grand Council and they decided which was right. They were not...the lands I think that the main problem is to understand areas. Her territory was not strictly defined. There was...between her territory and my territory there was a big area...it was big all around. Now the problem was if one territory was low on animals they could go to somebody else beside them and tell them at the Grand Council meeting that they were having not as much luck with in that area where they were. And usually what happens is somebody around beside them had more wildlife, whatever you want to call it, and they would let them use part of their lands until their lands were repopulated with the wildlife or whatever. So it was decided that...there was no hard and fast rules or territories. So that's the old, old way. – Nelson Paul.

I think back about how our people used to migrate around our traditional territory and where they would live and how they would live. Well, it was done in a manner that was congruent to the environment because it had to take into account what abundance was going to be there, how long were you going to be able to sustain yourself for and it was done seasonally. So you don't take too much. Take what you need, no more no less. Take what you need and move on so that somebody else will have something when they come by. That's the kind of planning that we have to anticipate. – Danny Paul.

[If we misused the land], the violation is not a question of you paying a fine in the Mi'kmaw world. If that were the case, that would be easy, then we would be like the White man. It's violating a spiritual law. That takes some

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<sup>94</sup> The use of the word “clan” is debated. Some Elders prefer to designate groupings as “families.”



atoning for and it doesn't happen by just forking over your wallet and say, 'Here's my credit card. Take what you need and then leave me alone,' kind of thing. It doesn't work that way. So that's... I think that has to be revisited one more time and for our people to understand again how important it was to maintain that respectful relationship with other species of this planet and... because it's been important and without them, without those species like the fish and the animals, how could we have lived... you just didn't violate man's law, but you violated the Creator's law by doing something so incredibly stupid that it could affect your family members, and your entire village for that matter. – Bernie Francis.

### **What is Membertou land?**

Our interviews demonstrated that the understanding of “Membertou land” encompasses a broad area and incorporates Mi'kmaw worldview.

#### *Unama'ki*

Interviewees challenged the Membertou community to think about Membertou land more broadly, as Mi'kmaw territory. Mi'kmaw territory encompasses all of Cape Breton Island (*Unama'ki*). This means thinking beyond adding small parcels of land to the edges of the reserve, and thinking about the community's responsibility for protecting and properly using wilderness areas and obtaining reserve land that includes medicines, animals, and other traditional use opportunities. This will give Membertou citizens opportunity to reconnect with the land and culture.

Since Mi'kmaw territory encompasses all of Cape Breton Island, some interviewees shared that it made sense to write new land law such that it could apply beyond the reserve boundaries. The island is rich with wildlife, streams, springs, lakes, rivers, sea, forests, and recreational areas. Clifford Paul specified, “our traditional territory, you might as well say it, [is] the lakes, the rivers, the streams, shorelines, the hills, and the valleys.” Accordingly, Membertou should assert control over this aspect of Aboriginal territory.

#### *The Reserve*

As would be expected, the reserve was a focus of conversation with interviewees. Most people think about Membertou land as the area within the reserve boundaries.<sup>95</sup> This is a very small piece of land, and interviewees recognized the competing interests of finding room for housing and commercial development, and wanting to preserve the natural environment as much as possible. With this in mind, they brought up key concerns when planning for future growth. This will be explored further in the Land Use section below.

#### *Land by the Water*

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<sup>95</sup> While the focus was on the urban Membertou Indian Reserve 28B, Membertou also holds other reserve land (Caribou Marsh Indian Reserve 29, Sydney Indian Reserve 28B, and Malagawatch Indian Reserve 4 held in common by the five Mi'kmaw bands on Cape Breton Island).

See <http://www.aadnc-aandc.gc.ca/eng/1100100017130/1100100017131>. Retrieved April 11, 2013.

Since the Mi'kmaq are a maritime people, the culture is missing something essential because the reserve is not on the water. Bernie Francis emphasized that land by the water is essential to the Mi'kmaq. He explained, "I think that it's important that it's by water and ...there's a lake not too far from here [Front Lake] that's... if the leadership would make a case for it, I think we could probably get that land and it would serve to ground us one more time and to remind us that we are a spiritual people, that we are a people having a spiritual experience while they're on this planet."

Interviewees made the case for more land on the water, and wilderness areas for community use, camping, and temporary housing. This would help ground the community in tradition and encourage healthy lifestyles and eating habits.

Clifford Paul shared:

Membertou should invest in pockets of land in Cape Breton Highlands; we should have temporary camps or permanent camps along the Margaree Rivers, [and] areas of Bras d'Or [Lake]. Membertou should be buying up pockets of land as houses go for sale and use them for community, camps. I always say when I go moose hunting, and I'm fighting diabetes. I'm climbing mountains, bringing back good food to the community...because we don't have much here anymore for good quality food, Membertou should be...looking at pieces of land and access points for us to have greater access to the resources... That way we are able to pass on the traditions in a good way, that our young people who are hungry for that knowledge are able to participate in it not just for a day but for a period of time.

## Land Use

Membertou priorities surrounding land use emphasize several key areas of concern: housing, community spaces, zoning, and areas for future residential and commercial uses.

### *Housing*

The Elders, who supported quality housing on reserve, preferred that the buildings be "green."<sup>96</sup> To them, green means limiting petroleum-based products. They wanted regulations on where petroleum-run appliances were allowed – away from the water table – and shared that oil-based heating brings a higher environmental cost than electric heating.

Bernie Francis elaborated on weighing the costs when seeking new development:

"[I]f you're asking, 'Is it okay to build houses, is it okay to build businesses,' absolutely of course it is, of course it is. Always bearing in mind... whatever we're about to do let's say in the way of building a business... first of all, what kind of a benefit are the Mi'kmaw people going to experience by doing this... let's say someone says, 'Well, it's going to be a little benefit but cause a lot of pollution.'

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<sup>96</sup> Broadly, the Elders considered "green" to be energy efficient, made of sustainable products, and were built such that trees and vegetation like blueberry bushes were left intact.

Well, it makes no sense to go ahead with it because the benefits are not greater than the [costs]...but if it's a huge benefit then of course they say, 'Okay, we can go with this but let's address what it is this business is going to produce that might possibly harm Mother Earth.'

When it came to allocating housing lots, some community members were concerned that lots are getting smaller and smaller due to the scarcity of land. Though they understood the reason behind the smaller land parcels, they felt that people getting new lots would feel like they were not being treated fairly, because other people got bigger lots in the past. Other community members did not think that this would be a problem. They reasoned that people knew land was scarce, and would live with it. A smaller lot will still provide a quality living arrangement.

#### *Community Spaces*

One staff member shared that Membertou needs to plan for community spaces, and find ways to retain the Membertou character of the reserve. He said:

Our master plan, community plan is out of date so I think we have to re-look at it to make sure we don't lose focus on the kids, the community or certain area[s]...we gotta make sure all the activities related to kids and green spaces near the children [are not lost]. So we also gotta think twenty years, thirty years out because demographic within the community will change so I think we gotta have a long plan there but I think they're important because they identify Membertou from the city of Sydney. [We want to be] distinctly recognized as Membertou... I think we gotta tell the Membertou story a bit more and always be proud of our culture and it should be incorporated

#### *Separation of Residential & Commercial Areas*

A strong majority of Membertou community members preferred keeping residential and commercial areas separate. They shared that small businesses (a corner store, smoke shops) in residential areas are okay as long as they do not cause high traffic. Kyanne Paul thought that the separation was a safety issue: "when I was a child living in Massachusetts, we lived in a residential/commercial area and with the transfer trucks going by that's something you don't want the kids to be around; they could be backing up and your kid could be too small and accidents happen." Keith Christmas felt that mixing commercial development with residential areas would change the character of the neighbourhood, and was concerned that "[the commercial part [doesn't become] too big and doesn't have an effect on the residential lifestyle."

#### *Other Places to Build*

Since Membertou's land holdings are small, finding new places to build is a constant challenge. Interviewees mentioned a couple of reserve areas to consider.

- Caribou Marsh Indian Reserve 29 – A few interviewees indicated that housing could be built at Caribou Marsh; however, in the meeting with the Elders, they

shared that the land in Caribou Marsh is contaminated. Others said that this area is best used for recreation.

- Sydney Indian Reserve 28a – With its proximity to the city of Sydney, Lingan Reserve was mentioned as a place for business or commercial development.
- Malagawatch Indian Reserve 4 – The 20% of the Malagawatch Reserve that Membertou holds was identified as a place to build cabins for Membertou community members to stay when they hunt, fish, and generally use open areas.

### **Cultural Integrity Through Preservation**

Membertou interviewees emphasized ways in which land management is tied to culture and tradition. Indeed, they indicated that land management with its requisite land use planning would ensure the community's cultural integrity through preservation.

#### *Spirituality & the Natural Environment*

Bernie Francis shared how the natural environment and spirituality are related:

I've interviewed many, many Elders in that time about the language, about the spirituality and so on, and you can't help come to the conclusion that the Mi'kmaw people, especially the Elders, [have] tremendous respect for the land; they understand that this is the only land that was gifted to them and this is the only land that they wish to protect... it's very, very important that the land is respected much like you would respect a sentient being and that's the way it is now still in the minds of the elders who still exist today, who still talk to me today.

#### *Save the trees! (And the blueberries)*

As the Elders lamented the loss of trees and medicines, other members of the community commented on keeping vegetation intact. Lance Paul stated, "I think [it] is important prior to development, like if there's any medicines, plants or there's people using it for traditional methods... I would like to retain that or have it worked into the plan where it could be accommodated. Protected areas. Sensitive areas."

Kyanne Paul remembered sharing time with her grandmother while picking blueberries:

when I was younger... my gram used to take me up around the graveyard and in the back and go blueberry picking and stuff and just... that's what we used to do there. I don't know how many buckets of blueberries we used to take home but we used to just go blueberry picking and that's what she said, they grew the best blueberries like up there. If we haven't already developed over them it would be nice to keep them or at least replant them somewhere.

#### *Open Areas*

Interviewees mentioned that the community needed natural, open play areas, rather than just parks or playgrounds.

To reiterate, Membertou community members favoured keeping natural areas intact as much as possible. An interviewee shared that Aboriginal people are the guardians, stewards of the land, and that responsibility needs to be taken seriously. Additionally, interviewees mentioned that fish, plants (particularly medicines), and watercourses (including the swamps and buffer zones around the natural water) needed to be protected.

## **Summary**

In this chapter, we highlighted the key findings of primary research in Phases I and II of the project. Lessons learned from lands managers and land management experts ranged from community engagement and dispute resolution models to capacity development and land registry systems. We then shed light on Membertou's priorities in relation to land use and cultural preservation. In the next chapter, we synthesize the findings of the Phase I and Phase II research, placing the lessons learned from land managers into dialogue with Membertou priorities and addressing emerging themes in a Membertou-specific context.

## Chapter Five: Synthesis and Analysis of Interviews

In this section, we integrate the lessons learned from land managers with community priorities as identified by Membertou research participants. We highlight specific issues that Membertou will need to address in the development of its land management code.

### Managing the Land: Organization and Leadership

Lands Managers at other First Nations indicated that controlling land is a complex undertaking, and required careful organization and delegation of authority. With that, clear rules and procedures over what types of decisions are made in the lands management office, and what types of decisions are made at the council level, or community level.

#### Organization

This is a major decision point for Membertou. Where does a lands management office fit within the larger First Nation government structure? Is it under Chief and Council? Does this department hold Chief and Council accountable? What would be the authority of a lands management department? Who has the final say? Will disputes be handled here? Will this be a separate entity from the Membertou government? Jason Googoo commented, “The dream vision is to have a separate department that has full support of chief and council... If there’s a decision that’s being made [by the land department] for [land]...[decision-making] has to be on its own and completely supported [by Chief and Council], good and bad. That’s the ideal.”

#### Chief and Council Involvement

After analyzing interviews from the lands managers across Canada, we identified this question: Is it appropriate for Chief and Council to be involved in all lands decisions? Is this something that will be delegated to a department?

As mentioned in Chapter 4, Lands Managers told us that in some communities, all land transactions had to be approved by Chief and Council. In some cases, interviewees said that this was a simple process, and approvals were made quickly. For other First Nations, the Chief and Council were only involved in larger transactions such as business leases or large land transfers. The lands management office approved individual leases, agricultural leases, in-home businesses, and construction. For example, Sliammon found that getting Chief and Council approval for “every little decision” was unnecessary and time consuming; in an amendment to their land code, they removed Chief and Council approval for “everyday” transactions. In most communities, land transactions that would greatly affect the community, such as large business development would have to be approved by the community.

#### Scope of Authority

Keeping leadership accountable to the rest of the First Nation government and with the community is something that any government has to manage. Accordingly, accountability came up in interviews with Lands Managers, and with Membertou interviewees. The community, as well as Membertou leadership, will have differing views on how land

should be managed. Gleaning from information shared at Membertou, it seems that a lands office could serve as a voice of accountability to the Chief and Council.

According to community interviews, the Membertou community puts a lot of trust in Chief and Council, and in fact, elects them to do a job: make decisions on behalf of the community. Since land is such a large arena to govern, it may make sense to give the lands office a certain level of autonomy, fully supported by Chief and Council. As a semi-autonomous office, it could help to keep community views, environmental regulations, intergovernmental relations, and other important topics front and centre, and can remind Chief and Council of their importance.

Staff interviewees reminded us that Membertou has invested a lot of effort in developing policies and procedures, and that most departments have obtained ISO certification. Because of this investment, employees were comfortable with the chain of command that is followed when decisions are made. One Membertou department director put it this way: “there is a chain of command that [a problem or decision] has to go [through] and very seldom you actually see the Chief and Council interfering...they don’t; it’s almost to the point where they depend on the directors do their job... it shouldn’t even get to that point really where the Chief and Council has to deal with that everyday structure.” Darrell Bernard shared, “In the future, I think that the reporting to Chief and Council should be less and less and I think that policies and procedures – we are in the process of developing [them] – will take us to the point where a lot of the reporting to Chief and Council will, I don’t want to say eliminated, but I think a lot of the processes are [going to become] more automated and less hands-on for Chief and Council. And I think that’s where it should go.”

### **Land Holdings: Band-controlled, Certificates of Possession (CPs)<sup>97</sup>**

Lands managers said that the nature of land laws and codes reflect the type of land tenure on the reserve. The issues of a First Nation with a large proportion of band-controlled land are different from First Nations with a large number of CPs. At the time of this writing, Membertou has only 36 CPs (corresponding to 7.86% of Membertou land).<sup>98</sup> The vast majority of the reserve is band-controlled, but more CPs are being granted to individuals through housing programs.<sup>99</sup> The program (informally called “lease to CP”) allows a band

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<sup>97</sup> AANDC describes a Certificate of Possession: “Under the *Indian Act*, individual members of a First Nation may be given allotments. An allotment is the right to use and occupy a parcel of reserve land. Allotments must be approved by the Band Council and the Minister. Once approved, the individual allotment holder has ‘lawful possession’ of a parcel of land and may be issued a Certificate of Possession as evidence of their right. However, the legal title to the land remains with the Crown.” Aboriginal Affairs and Northern Development Canada website. “Land Management.” P. 1. <http://www.aadnc-aandc.gc.ca/eng/1100100034737/1100100034738>. Retrieved June 25, 2013.

<sup>98</sup> Power Point presentation by Membertou Executive Director to Membertou Chief and Council, fall 2012.

<sup>99</sup> Membertou has several methods for obtaining housing on reserve – Section 10 (Canada Mortgage and Housing’s Loan Insurance Program On-Reserve with Ministerial Loan Guarantee) housing program, Section 95 (Canada Mortgage and Housing’s On-Reserve Non-Profit Housing Program), Membertou-owned housing, and credit enhancement programs offered through First Nation Market Housing Fund.

member to obtain a CP for the housing lot after the mortgage has been paid. The housing department reported 175 CPs will be granted through this process.<sup>100</sup>

Darrell Bernard stressed that Membertou has to address the affect that current policies will have on future land holdings. If Membertou is going to continue with the housing program that awards CPs to individuals after paying for the mortgage on the house, Membertou has to address the potential consequences. On the other hand, stopping the “lease to CP” program will affect people who have invested in private ownership and have created a sense of pride and self-sufficiency. Membertou has to be prepared to answer community concerns about changing policy and make a clear path to address them.

### **What if we allot all the land to individuals?**

Members of the Membertou Governance Committee shared that, by talking to other First Nation communities, they learned that there are drawbacks to individual allotments. One issue to keep in mind is that allotting land to individuals decreases the communal land on reserve. Second, without clear rules about what can and cannot be done on CPs, there is a risk of individuals harming the rest of the community. For example (and this has happened on other reserves), an individual could set up a waste transfer station, or other hazardous or undesirable business. Third, CPs can be leased to people who are not Membertou citizens; non-community members can use reserve land. Interviewees suggested that they liked keeping the “Membertou” character of the reserve.

Incorporating more people into the community is not necessarily a bad thing, and is done on many reserves and US reservations, but it does impact the community. Membertou would have to consider the best ways to enforce rules on non-Membertou citizens, and what the appropriate legal avenues to take should there be a major dispute.<sup>101</sup>

## **Institutional Capacity**

First Nations lands managers throughout Canada spoke about the importance of building institutional capacity to develop, implement, and enforce land laws. After creating the land management code and ratifying it, the real work begins: using the law to govern. Lands managers said First Nations need several mechanisms in place to make land governance run smoothly: a lands management office with a trained lands manager, and a dispute resolution process (informal or formal).

### **Share Information Among Departments**

Membertou employees noted that land issues overlap among departments, and that a lands management office or department would need to carefully centralize or coordinate the departments to eliminate redundancies. This will require an assessment of current departments and setting goals for the lands management department.

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<sup>100</sup> Email communication with housing department staff, June 25, 2013.

<sup>101</sup> There might be a similar issue with commercial leases; the mechanism might already be in place.



Beyond coordinating tasks, different departments and organizations have gathered land-related data. For example, the Unama'ki Institute of Natural Resources has collected traditional knowledge on moose to create a comprehensive moose management plan; and Membertou Geomatics Solutions has collected data for Mi'kmaw Ecological Studies, both on behalf of Membertou, and for other projects in the larger Mi'kmaw territory.

Interviewees mentioned the following departments that can contribute to the lands management office: Membertou Geomatics Solutions, Membertou Research Department, Public Works and Housing, Heritage Park, ISO Compliance, Capital Planning Committee, Revenue Department, and Commercial Real Estate.

### **Process**

Membertou staff explained that many decisions related to project development take place in a committee. These committees conduct research and planning, and then recommend a course of action to Chief and Council. A few staff members questioned whether this is the most efficient way to manage projects, and suggested more structure to the committee process. The committee could take on more of a working group model that closely matches resources and expertise with a particular project. A drawback of the current committee model is that committees take on too great of a managerial role, and hampers the actual work of getting something done. All this suggests that the move toward establishing policies and procedures is important for land management, also.

### **Data Management**

Land managers said that keeping accurate records of land transactions, leases, CPs, infractions, fees, and other important pieces of data is a task to keep in mind. Membertou needs to address, is there already a data centre at Membertou? Who maintains and updates data? Who is in charge of oversight?

### **Land Registry**

As mentioned in Chapter 4, lands managers told us it was important to have a good land registry system. Many lands managers shared that the First Nations Lands Registry is hard to use. Other options include developing your own system, create a regional registry, create a First Nations Torrens system, or use a provincial Torrens system.

### **Dispute Resolution**

Lands managers revealed that land-related dispute resolution, though extremely important, took many forms. Some First Nations were comfortable with sending disputes to provincial court, while others preferred to handle them within the community, using more traditional methods of conflict management, such as talking circles or meeting with an Elder to talk through a problem. Still, other First Nations used a combination of traditional methods and western-style adjudication by sending cases to court if they could not be solved within the

community, or by deciding that certain cases, like the conflict between Georgina Island Development, Inc. and a non-Aboriginal leaseholder,<sup>102</sup> would always go to court.

Membertou views on this varied. Some thought that talking circles or taking a problem to an Elder would be effective. Jeff Ward described a successful program through Mi'kmaw Legal Support Network in which youth who were in the provincial legal system were assigned to talking circles. While this is a targeted program, this is an example of a successful problem solving through more traditional methods.

Other First Nations, such as Whitecap Dakota, use Elders as mediators in disputes. When asked about using an Elder as mediator, some Membertou interviewees thought that an Elder would easily face a conflict of interest; within a small community like Membertou, everyone is related to one another. Putting an Elder in a situation to make a decision concerning a family member did not seem proper to some interviewees. Because of this sensitivity to mediating family members, Lance Paul said, "I'd like to see...an independent or someone who's not related or [doesn't have] vested interest in anything...A judge."

## **Community Involvement**

According to the lands managers we interviewed, it is very important to get the community involved in all stages of the land code development and implementation process. Specifically, they indicated three crucial points where community members must be involved: development of the code, referendum, and enforcement (to review the recommendations from the land managers, please see Chapter Four). Membertou interviewees also noted how important community involvement is. Darrell Bernard said, "the biggest risk to a project is if it is not connected to the community."

Getting this community participation can be a challenge. Membertou already uses newsletters, emails, and community meetings to get the word out, and door prizes as incentives to participate. Membertou community members had a few more ideas:

### **Popular Events**

A Membertou interviewee suggested having land planning meetings attached to events that people are already attending (e.g., banquets and community awards ceremonies). Not only are these more relaxed settings to discuss important topics, but families have already made arrangements for rides, child care, etc. As long as the meeting did not go too late into the evening, this could be a good place to take advantage of a large community gathering. Kyanne Paul said, "you can get the talk going [because] they're all coming together for the awards night.... you can say, 'if you want to attend the land management stuff we'll be here for this time to this time with any input.'"

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<sup>102</sup> Georgina Island Development Inc. v. Neale, [2008] CanLII 30302 (ON SC).

## Social Media

In the Membertou interviews, people suggested using social media like Facebook and Twitter to get the word out that there is going to be an information session, and keep people updated throughout the meeting. Kyanne Paul shared, “If you’re having meetings you can tweet it too, right? And it’s constantly in everybody’s feed.”

## Teleconferencing/Video Conferencing

A community member suggested using technology to reach people who could not physically attend a community meeting. This could work for people who lived far away, were traveling, or otherwise were unable to get to the meeting place. Off-reserve citizens are easily left out of community conversations, so interviewees advised to use multiple methods to them involved long distance in any way you can.

## Visit Door to Door

Lance Paul thought that community meetings were a bit too formal, and it would be better to visit people in their homes, “I think you pretty well have to go visit door to door and talk to people. [Say], ‘Are you interested and can I sit down and talk to you for a minute?’ I think that would probably... get more people.”

## Sharing the Land Code with the Membertou Community

### *Write in Mi’kmaq*

Mi’kmaq speakers said that English leaves the door open for misinterpretation; words in Mi’kmaq have very specific meanings. A Mi’kmaw worldview is embedded in the language such that some concepts do not translate well into English. “That’s where language comes in – because our language is a direct means of communicating our intent,” Danny Paul stated.

### *Communicate Why a Land Code is Implemented*

Membertou interviewees recognized that if a new set of laws and regulations on land use was set up, they would need to know that this was not just an arbitrary rule imposed from above by the Chief and Council. The interviewees were adamant that this law had to come from the people. This had to be their law, rooted in Mi’kmaw values. Beyond that, community members need to understand that the land code is meant to make the community a better place; following the code means recognizing that individual actions have collective consequences. Bernie Francis said,

So we may have to at some point at least put the question into a document so that Mi’kmaw people can read...something like, ‘Is it a simple matter like the non-Native society of paying a fine to atone for what you did wrong, or is it deeper in the Mi’kmaw culture...you just didn’t violate man’s law, but you violated the Creator’s law by doing something...that it could affect your family members and your entire village...’ Maybe that question has to be written into any document to talk about land use.

## **Environmental Standards**

Lands managers noted that developing a First Nation land code provides the opportunity to develop environmental standards. This was an area where tradition comes into play; Traditional Ecological Knowledge is a powerful tool toward new community-relevant standards.

The need to protect the land came through loud and clear in Membertou community interviews. Almost all said that they wanted to keep trees, avoid dust in the air because ground cover has been torn up, and keep berry bushes. Membertou interviewees said that, in general, the community is proud of their development. They like the improvements that Membertou has made, but they are also concerned about damaging the small amount of land that they have. Importantly, the community needs high standards. As long as those standards are met, then development can continue. Lance Paul shared, "... as long as the environmental concerns are all protected and everything is done properly, I don't think there would be any type of area that would not be open for development. Areas around streams, wetlands, I think they should be protected, or they could be developed into like walking trails, parks or just green spaces in the community."

### **Established Protocol**

A few interviewees pointed out that Kwilmu'kw Maw-Klusuaqn (KMK) has done a lot of work in negotiating for treaty rights on behalf of the Mi'kmaq, and in the process, have developed guidelines for land use in Mi'kma'ki. One requirement of non-Mi'kmaw developers is to conduct a Mi'kmaw Ecological Knowledge study and an environmental impact study. There was frustration among the interviewees that Membertou does not require this of themselves. They are not holding themselves to the same standards that they have for everyone else. The corollary to this is that as a people that has an inherent Aboriginal right to this land, they have an even higher responsibility to take care of it. Danny Paul said it this way:

[M]y expectation was that we had to meet or exceed in our building practices code requirements, which is the same premise that we're looking at now with our development of our laws... And that's my expectation of it because it has to go beyond what Canada has in place. It has to go beyond it because what I have inside of me is beyond law. It's my connection to the earth.

### **Membertou Development Codes**

Another way to exceed standards is to set high standards that are specific to Membertou. Keith Christmas was concerned about the impact of development on the water supply, "we can possibly develop...codes on how we do our planning and constructing or developing our land so ... that we don't impact our water. That would probably be the most important thing that we don't want to impact on."

## **Summary**

In this chapter, we synthesized the lessons learned from lands managers with the priorities as identified by Membertou community, personnel, and council members. In so doing, we highlighted several key areas that will be decision points for Membertou as they pursue land management authority with the establishment of a land code and a land use plan for Membertou's future. In the concluding chapter, we identify key points from each chapter and provide suggestions for future research.

## Chapter Six: Final Thoughts

### Summary

This study offered viewpoints on land management systems from the literature, land managers and land management experts throughout Canada, and the Membertou community.

### Literature Review

The literature identified key problems and critiques of First Nation governance and land management resulting from the 1876 *Indian Act*. These problems included the

- Imposition of the Chief and Council governmental structure that might not be culturally-relevant to the community or creates too much concentrated power within the First Nation;
- A disconnect between the designation of “Status Indians” and First Nation citizens/band members;
- A gap in regulations over addressing matrimonial real property on reserve; and
- The outdated nature of the *Indian Act* – a piece of legislation written in the 19<sup>th</sup> century that still holds power over First Nations today.

We also present alternatives to First Nations governance – ways in which communities have moved out from the control of the *Indian Act*:

- Self-governance arrangements;
- Land claims;
- Treaty; and
- First Nations Land Management Act and the Framework Agreement on First Nation Land Management.

### Lessons Learned from Other Communities

Through interviews with land managers in Aboriginal communities throughout Canada and with other experts in First Nation land management, we learned:

- Once a community has taken over land management, they would never want to go back to the *Indian Act* system.
- Community involvement is essential to creating a land management system and writing a land code.
- Chief and Council involvement in land management varies across communities.

- When taking on land management, a community needs to strengthen its own institutions and train personnel to do the day-to-day management.
- Dispute resolution mechanisms vary across communities.
- Interactions with outside parties change when an Aboriginal community takes on land management.
- In general, land transactions are completed much more quickly than under the *Indian Act* system.
- The incorporation of tradition into land management varies across communities.

### **Membertou Community Priorities**

We had the privilege of learning from the wisdom and experience of the Membertou community. From interviews and focus groups, we were taught that:

- The community values the natural environment as cultural and spiritual components of being Mi'kmaw. Preservation will help keep the community and culture vibrant.
- Membertou community members challenged elected leadership to think about Membertou land more broadly, to include traditional Mi'kmaw territory, waterways, and wilderness areas.
- Elders shared their knowledge of traditional Mi'kmaw ways of governing the land.
- The community favours conscientious land development.

### **Synthesis – Learning from Land Experts and Membertou Community**

- Land experts offered different models for land systems. Membertou needs to think carefully about how to structure a land management system, and create appropriate roles for elected leadership.
- Land managers advised a First Nation community to carefully consider the types of land tenure and land transactions prevalent in the territory. The Membertou community recognized the importance of planning ahead to balance individual land allotments with communal ownership.
- Institutional capacity building was recommended by land managers. This is something that Membertou has worked hard on, and plans to continue.
- An area of concern for any government, Membertou needs to determine the best way to handle land disputes – both within the community and with other people and entities.

- Membertou needs to decide on appropriate ways of involving the community in land management planning and implementation.
- First Nation governments have the opportunity to develop environmental standards; Membertou supports high standards, encouraging protection of the natural environment.

It should be noted that we, the authors of this report, have identified themes and key issues for Membertou to consider as they move away from the *Indian Act* and towards their own land code and land use plan. We have not provided specific recommendations for how Membertou should proceed; rather, we have provided information drawn from the experiences of land managers in Aboriginal communities across Canada to help Membertou make an informed decision as it moves forward.

### **Future Research**

This study is rich in qualitative interview data. Membertou and other First Nations could benefit from an expanded study, focusing on obtaining land management system data from a wider range of geographies and regimes. For instance, we created our list of lands managers using a “snowball” sample. We consulted a few knowledgeable people, who then recommended others to interview (the snowball grows with each new recommendation). This gave us the views of a particular network of lands management experts, but it is not necessarily representative of the entire field.

To expand Phase I, we recommend taking a random sampling of lands managers, paying attention to get representation from all provinces. We also identified that we would like to learn from the experiences of First Nations that did *not* implement a lands management system. This would alert us to obstacles in the process, or conscious decisions to remain with the status quo. What obstructed a particular First Nation’s efforts to move forward with the process? Why did a particular First Nation decide *not* to develop a lands management regime? For this type of research question, a qualitative study would be more effective than a quantitative one.

For Phase II of the study, we recommend getting a wider array of viewpoints from the Membertou community. The sampling of staff members and elected leaders was fairly representative, but the community and Elders interviews could be expanded. Since the interview process is so time consuming, another avenue is to shorten the list of questions, so the interview would take 30 minutes, rather than 60-90 minutes. Or, the list of questions could be converted to a questionnaire/survey to be sent out to the entire community. This would create an opportunity for a more quantitative study, using a standardized data collection instrument.



## Conclusion

Starting from a point of economic and governmental stability, the Membertou Chief and Council, and the Membertou Governance Committee asked for an investigation into land management regimes. The leadership told us that they were unhappy with the legislative restrictions imposed on business development, and land management (among many other important issues) by the 1876 *Indian Act*. A step toward leaving behind those restrictions was to become a signatory to the Framework Agreement for First Nation Land Management (FAFNLM) in April 2012.

Since that time, Membertou has engaged in creating community-centric land use regulations, educated the community on land management issues, and participated in this research study. All these pieces allow the Membertou Chief and Council – with direction from the community – to make informed decisions on Membertou’s future. Land management is a complex undertaking that takes much preparation. The research team was fortunate to participate in that preparation with the support of AAEDIRP and looks forward to Membertou’s continued success.

To bring the discussion back to the literature, Baxter and Trebilcock remind us that “given that land tenure in reserve communities has been directly influenced by non-Indigenous governments for well over 350 years, traditional roots and non-Indigenous institutions have become inextricably intertwined. As a result, First Nations may find that current reserve tenures are mismatched to their own traditions, or to tenure off reserve, or both” (p. 51). The interviewees agreed. Land managers and Membertou community members identified that keeping tradition vibrant was important for Aboriginal cultures. As such, tradition needs to be embedded in law.

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## Appendix A – Consent Form

### Part I:

### Consent to Participate in Research Interview

<b>Study Title:</b>	Managing our Lands beyond the <i>Indian Act</i> : Membertou First Nation
<b>Principal Investigator:</b>	Stephen Cornell, University of Arizona (USA). In partnership with the Membertou First Nation and Cape Breton University (Nova Scotia).
<b>Sponsor:</b>	Atlantic Aboriginal Economic Development Integrated Research Program

### Why is this study being done?

We want to examine current First Nations land management systems in order to determine best practices and develop lessons learned. These will be shared with the community of Membertou in their discussions on the development of its land management law. This research project will further enable economic development (for example, giving Membertou the authority to determine the types of business that can be placed on reserve land). This project will produce publications that can be used in the development of land management law.

### Your participation

You were invited to participate in this study because of your knowledge of Aboriginal policy. About **20 other people will participate** in interviews like this. The interview will take **about 60 minutes** of your time. There will be **no monetary compensation** for your participation. The only cost to you is your time.

**Your participation is voluntary.** You may refuse to participate in this study. If you decide to take part in the study, you may leave the study at any time. **You may choose not to participate without penalty or loss of benefits to which you are otherwise entitled.**

### Will my study-related information be kept confidential?

This is up to you. If you request to keep some information confidential (i.e., “off the record”), notes and audio recordings of that portion will be deleted. You can make this request at any time during the interview, or after the interview via phone or email. If you request that any portion of the interview to be removed from the record *after* the interview, we will destroy the notes and erase the transcription on that section. Only members of the research team will have access to your interview materials.



## Will the public know I participated in this study?

**Part I – Quoting you by name:** Direct quotations may be used in publications based on this study. If you initial the line below, that gives us permission to **quote you by name**. If you would not like to be **quoted by name**, we will only use *information* (not your name) that you provided during your interview.

\_\_\_\_\_ I give my permission to be **quoted by name** in publications resulting from  
Initial this study.

\_\_\_\_\_ I DO NOT give my permission to be **quoted by name** in publications  
Initial resulting from this study.

**Part II – Membertou Research Archive:** In an effort to preserve ownership of community knowledge, we would like to return interview transcripts to the Membertou First Nation to be included in an archive of research material. If you initial the first line below, that gives permission to include your interview transcripts in a Membertou research archive. **This archive would be open to the public**. If you do not give permission to include your interview transcripts in the Membertou research archive, your transcripts will not be submitted to the First Nation, and they will only be available to members of the research team.

\_\_\_\_\_ My interview transcript may be included in a public Membertou  
Initial research archive, AND I give permission for my interview transcripts to  
**include identifying information (name, job title, etc.)**

\_\_\_\_\_ My interview transcript may be included a public Membertou research  
Initial archive, but you **MAY NOT include any identifying information** in the  
transcript. I would like my interview materials to remain **anonymous**.

\_\_\_\_\_ I **DO NOT** give my permission for my interview transcripts to be  
Initial included in a **Membertou research archive**.

## Audio, video, and photographs

If you agree, we will make an **audio recording** during the interview so that we can be certain that your responses are recorded accurately. We will transcribe the audio recordings into text. We will keep the text files. Then the audio files will be erased. But we will only make such a recording if you initial the line that gives permission below.

\_\_\_\_\_ I give my permission for **audio recordings** to be made of me during  
Initial participation in this research study.

\_\_\_\_\_ I **DO NOT** give my permission for **audio recordings** to be made of  
Initial me during my participation in this research study.

**Will video recordings be made of me during the study?** If you agree, we may make a video recording during a portion of the interview to be used for educational purposes. These videos may be made available to the public. You may withdraw from the video recording at any time, and if you decide you do not want your video

to be used, let us know by phone, email, or in-person, and we will erase your video file. But we will only make a video recording if you initial below.

\_\_\_\_\_ I give my permission for **video recordings** to be made of me during  
Initial my participation in this research study.

\_\_\_\_\_ I **DO NOT** give my permission for **video recordings** to be made of  
Initial me during my participation in this research study.

### **Will photographs be taken of me during this study?**

The researchers may take photographs during the study to document the site visit only if you give your permission to do so. Initial your decision below.

\_\_\_\_\_ I give my permission for **photographs** to be taken of me during my  
Initial participation in this research study.

\_\_\_\_\_ I **DO NOT** give my permission for **photographs** to be taken of me  
Initial during my participation in this research study.

An Institutional Review Board responsible for human subjects research at The University of Arizona reviewed this research project and found it to be acceptable, according to applicable state and federal regulations and University policies designed to protect the rights and welfare of participants in research. Mi'kmaw Ethics Watch from Unama'ki College, Cape Breton University has also approved this study.

### **Signing the consent form**

I have read (or someone has read to me) this form, and I am aware that I am being asked to participate in a research study. I have had the opportunity to ask questions and have had them answered to my satisfaction. I voluntarily agree to participate in this study.

I am not giving up any legal rights by signing this form. I will be given a copy of this form.

_____ Printed name of subject	_____ Signature of subject
	_____ Date and time
	AM/PM
_____ Printed name of person authorized to consent for subject (when applicable)	_____ Signature of person authorized to consent for subject (when applicable)
	_____ Date and time
	AM/PM
_____ Relationship to the subject	

### **Investigator/Research Staff**

I have explained the research to the participant or the participant's representative before requesting the signature(s) above. There are no blanks in this document. A copy of this form has been given to the participant or to the participant's representative.

\_\_\_\_\_  
Printed name of person obtaining consent

\_\_\_\_\_  
Signature of person obtaining consent

\_\_\_\_\_  
Date and time

AM/PM

### **Who can answer my questions about the study?**

For questions, concerns, or complaints about the study you may contact

University of Arizona	Membertou First Nation	Cape Breton University
Rachel Starks	Cheryl Knockwood	Keith Brown
520-626-5756	1-800-617-6466	(902)563-1859
<a href="mailto:rstarks@email.arizona.edu">rstarks@email.arizona.edu</a>	<a href="mailto:cherylnockwood@membertou.ca">cherylnockwood@membertou.ca</a>	<a href="mailto:keith_brown@cbu.ca">keith_brown@cbu.ca</a>

For questions about your rights as a participant in this study or to discuss other study-related concerns or complaints with someone who is not part of the research team, you may contact the Human Subjects Protection Program at 520-626-6721 or online at <http://orcr.vpr.arizona.edu/irb>.

## **Part II: Focus group participant consent**

### **The University of Arizona Disclosure Form – Research Study**

**Project Title:** Managing our Lands Beyond the Indian Act: Membertou First Nation

**Principal Investigator:** Stephen Cornell, University of Arizona (USA). In partnership with the Membertou First Nation and Cape Breton University (Nova Scotia).

**Sponsor:** Atlantic Aboriginal Economic Development Integrated Research Project

**Project Activity:** Group conversation – facilitated discussion

**This is a disclosure form for research participation.** It contains important information about this study and what to expect if you decide to participate in the facilitated discussion.

### **PURPOSE:**

We want to examine current First Nations land management systems in order to determine best practices and develop lessons learned. These will be shared with the community of

Membertou in their discussions on the development of its land management law. This research project will further enable economic development (for example, giving Membertou the authority to determine the types of business that can be placed on reserve land). This project will produce publications that can be used in the development of land management law.

During the facilitated conversation, participants will discuss developing land laws. Up to 50 individuals will take part in the facilitated conversations or participate in individual interviews discussing land law development. Each conversation will have up to ten participants. Participation in the facilitated conversation will require 60-90 minutes of your time.

**QUOTATIONS AND AUDIO RECORDING**

**We would like to keep an audio recording of this conversation for a Membertou Research Archive.** The archive will be available to the public. If you would not like your audio recording available to the public, please indicate this at the end of the form and we will make arrangements to delete your audio contribution from the recording of the larger conversation.

Additionally, we will create public documents relating to this research. If you do not want to be quoted by name, or do not want to be named in any publications, please indicate this at the end of this form, and your name will not be included in study-related publications.

Your participation is voluntary. If you choose to participate in the study, you may discontinue participation at any time without penalty or loss of benefits. By signing this form, you do not give up any personal legal rights you may have as a participant in this study. You may refuse to participate in this study without penalty or loss of benefits to which you are otherwise entitled.

An Institutional Review Board responsible for human subjects research at The University of Arizona reviewed this research project and found it to be acceptable, according to applicable state and federal regulations and University policies designed to protect the rights and welfare of participants in research.

For questions, concerns, or complaints about the study you may contact

University of Arizona	Membertou First Nation	Cape Breton University
Rachel Starks	Cheryl Knockwood	Keith Brown
520-626-5756	1-800-617-6466	(902)563-1859
<a href="mailto:rstarks@email.arizona.edu">rstarks@email.arizona.edu</a>	<a href="mailto:cherylknockwood@membertou.ca">cherylknockwood@membertou.ca</a>	<a href="mailto:keith_brown@cbu.ca">keith_brown@cbu.ca</a>

For questions about your rights as a participant in this study or to discuss other study-related concerns or complaints with someone who is not part of the research team, you may contact the Human Subjects Protection Program at 520-626-6721 or online at <http://orcr.vpr.arizona.edu/irb>.

**Use of Your Name in Future Publications**

I agree to allow the use of my name in future publications,

I agree to be quoted by name in future publications.

I allow transcripts of this conversation to be included in a Membertou Research Archive that will be available to the public.

I allow my audio recording of this conversation to be included in a Membertou Research Archive that will be available to the public.

\_\_\_\_\_  
**Printed name of subject**

\_\_\_\_\_  
**Signature of subject**

\_\_\_\_\_  
**Date and time** **AM/PM**

**Signing the consent form**

I have read (or someone has read to me) this form, and I am aware that I am being asked to participate in a research study. I have had the opportunity to ask questions and have had them answered to my satisfaction. I voluntarily agree to participate in this study.

I am not giving up any legal rights by signing this form. I will be given a copy of this form.

\_\_\_\_\_  
**Printed name of subject**

\_\_\_\_\_  
**Signature of subject**

\_\_\_\_\_  
**Date and time** **AM/PM**

**Investigator/Research Staff**

I have explained the research to the participant or the participant’s representative before requesting the signature(s) above. There are no blanks in this document. A copy of this form has been given to the participant or to the participant’s representative.

\_\_\_\_\_  
**Printed name of person obtaining consent**

\_\_\_\_\_  
**Signature of person obtaining consent**

\_\_\_\_\_  
**Date and time** **AM/PM**

## Appendix B – Interview Questions by Category

### Interviews with Land Managers

Conducted by Conference Call

Various Dates

Research Team:
Cheryl Knockwood, Membertou
Rachel Starks, Native Nations Institute
Miriam Jorgensen, Native Nations Institute
Janice Tulk, CBU
Tamara Young, CBU

#### *Introductory*

- What was your community's reason/motivation for developing its own code? How do you define community, in this context?
- What land management model did your community pursue in developing its own land code (Status quo, RLEMP, Sectoral Self Government, Comprehensive Self Government)? And why?
- How did the community proceed once the decision to pursue that land management model was made?
- How was the development process funded?
- Was there adequate funding provided to develop land laws prior to enacting a land code?
- To what extent have you been able to rely on the experience of other First Nations that have implemented land codes?

#### *Communication and Community engagement*

- What was the Chief and Council's involvement in the code development process?
- Did the Chief and council encourage community involvement in the code development process? If so, how?
- What role did the community's culture and traditions play in the Code's development?
- To what extent was the community able to codify traditional practices in its land code (i.e., linguistic/cultural concepts, laws, or protocols)? If this was possible, is it working well?
- How did you organize the group of people tasked with developing the land code? (e.g., by family representative, application, demographic cross section, etc.).
- What was the time commitment for those who participated?
- Were community members offered compensation/incentives for their participation?

- How did you keep the community informed?
- Are your laws/policies and procedures published on your community website?
- Are there any other ways you communicate laws/policies and procedures to community members?
- Was there significant opposition to the process? If yes, could you tell me about this?

#### *Process*

- How long did it take to prepare the first draft of the land code?
- How many revisions of the land code were there before the final revision? Did you encounter any delays? (i.e., legal issues, annual harvesting, elections, staff turnover, funding, etc.)
- How long did it take to ratify the code?
- Did you have a trained lands manager before the code took effect? If not, at what point in the process did you decide to hire a lands manager?
- Did AANDC help or hinder the developmental phase?
- Were you satisfied with process for the identification and rectification of outstanding land issues by AANDC prior to the adoption of the Code?
- How has your relationship changed with AANDC?
- Has AANDC continued to fulfill the obligations agreed to in the Individual Agreement? (i.e., legacy issues action, timely operational funding transfer, revenue account transfer, document transfer)
- Were there significant challenges presented by Indian Act legacy issues? (i.e., Internal/external Boundary issues, road issues, Estates, Environmental/Archaeological)
- If so, how were these challenges addressed?

#### *Administration*

- How has the land code changed relationships with 3<sup>rd</sup> parties? (i.e., municipalities, provinces, developers, other business, financial or industry partners)
- Has the land code provided a better atmosphere for business development? If so, please explain how.
- How quickly are land transactions completed following the establishment of your land code compared to your land transactions completed under the Indian Act?
- How did the transition from Indian Act management to the Land Code go? Were there any challenges and, if so, how did you overcome them?
- What resources did you access for help in your code development and operationalization?
- Has the Lands Advisory Board (LAB) and Resource Centre (RC) provided adequate political and technical assistance to your community? (Pre code and post code establishment)? Has NALMA?

- Do you feel there are sufficient Indigenous self government training/resources available to your community as related to land management?
- Does your community have a succession plan to help train and develop leadership/staff in the coming generation, specifically in relation to land management?
- Does your community have staff/directors insurance?
- Has the Land Code been of assistance to members with a lease wishing to obtain a mortgage?
- What Land registry system does your community currently use? Why?
- How many transactions a year does your community deal with?

#### *Enforcement*

- What laws have been legislated under your land code?
- How did you, or do you, plan the development of allotment law? Spousal property law? Commercial development law? Public lands law? Environmental assessment and protection laws or processes?
- Has any part of your new land code been challenged? By whom? Did it go to court? How was it settled?
- How did the Chief and council develop institutional capacity to implement and enforce its land code? Who carries out the enforcement?
- Were the laws developed prior to the enactment of the land code? If yes, how was the transitional period? If not, how is the land code able to govern on your land without laws authorized to do so?
- How are disputes under the community's new land code addressed?
- Did you have to negotiate with the provincial court to adjudicate your community's laws? If so, what is the nature of the agreement?
- Have the courts agreed to remit fees collected for fines back to the First Nation?
- Have you developed a First Nation dispute mechanism?
- Is there a cost associated with your chosen option? What kind of costs?
- Did the dispute mechanism change as a result of the land code?

#### *Conclusion*

- Did you use the code as a tool to protect or reinforce your Aboriginal and treaty rights? If so, how did you protect it? How did you reinforce it?
- Do you feel that the cost/benefit of having a Land Code works out in your favour?
- How has the land code changed governance/decision-making in your community?
- Does the community generally view the land code as positive step?
- If it were an option, would you consider going back to the Indian Act for land administration? Are there any Indian Act processes, procedures, or training that continues to be relevant in the day-to-day implementation of your land code?



- Knowing what you know now, would you (the community or Chief and council) do things differently? Why or why not?
- Is there anything that we didn't address that you think we should be aware of as we continue with our own land code development process?

## **Membertou First Nation Chief and Council Meeting**

Tuesday, December 4, 2012

Land Management and Land Use at Membertou

<b>Research Team:</b>
Cheryl Knockwood, Membertou
Trevor Bernard, Membertou
Mary Beth Doucette, Membertou/CBU
Rachel Starks, Native Nations Institute
Miriam Jorgensen, Native Nations Institute
Janice Tulk, CBU
Tamara Young, CBU

### Land Management and Land Use at Membertou

- What values, traditions or customs must be considered in the development of Membertou land laws? What links between Membertou culture and heritage must be taken into account in a land code or land use plan?
- What are the most important things to be considered as Membertou lands are developed – today and in the future? Do any of the really important community issues facing Membertou today have to do with land use?
- What are your priorities for land use? Why do you want to develop lands? What do you want to achieve? As Council, what level of control would you like over development?
- If Membertou adopts a land code, what entity should be responsible for managing land? That is, would you like to see (for example) the Chief and Council be directly responsible, or a department or division under the line authority of Chief and Council, or a separate non-political Membertou entity (like a land corporation) be responsible?
- If disputes arise (over land use, over a new code, etc.), what role might you imagine for Chief and Council?

## **Membertou 55 Plus Society**

Thursday, December 6, 2012

Land Management and Land Use at Membertou

<b>Research Team:</b>
Cheryl Knockwood, Membertou
Trevor Bernard, Membertou
Mary Beth Doucette, Membertou/CBU
Rachel Starks, Native Nations Institute
Miriam Jorgensen, Native Nations Institute
Janice Tulk, CBU
Tamara Young, CBU

Traditionally, how were lands ‘governed’? That is, who made decisions about land use?

- Could anyone use land or were particular clans, families, or other groups responsible for certain areas?
- What happened when someone misused land? Did the community take action on that? If so, how? And, how do all of these things differ from today?

What values, traditions or customs must be considered in the development of Membertou land laws?

- What links between Membertou culture and heritage must be taken into account in a land code or land use plan?

We would like to understand your views for new development.

- What is important to consider as and is developed? What concerns or hopes do you have with regard to land development?
- Are there areas of Membertou territory that should be protected from new development?

Are you in favour of Membertou First Nation’s activities to develop its own laws in relation to land management? What would you like to see changed to improve the current system? What do you foresee could go wrong?

Do people ever misuse Membertou land (both individual allotments and Band-controlled lands)?

- If so, how are people held accountable for what they do on the land? How should Membertou First Nation resolve potential disputes within the community over lands?

## **Membertou First Nation**

December 4-7, 2012

Community Interviews

Land Management and Land Use at Membertou

<b>Research Team:</b>
Cheryl Knockwood, Membertou
Trevor Bernard, Membertou
Mary Beth Doucette, Membertou/CBU
Rachel Starks, Native Nations Institute
Miriam Jorgensen, Native Nations Institute
Janice Tulk, CBU
Tamara Young, CBU

This is part of a project to better inform the Membertou leadership on land code development. I am asking you these questions in your capacity as a member of Membertou.

### **Tradition (Customs, Practices, Heritage)**

- Traditionally, how were lands ‘governed’? That is, who made decisions about land use?
  - Could anyone use land or were particular clans, families, or other groups responsible for certain areas?
  - What happened when someone misused land? Did the community take action on that? If so, how? And, how do all of these things differ from today?
- What values, traditions or customs must be considered in the development of Membertou land laws?
  - What links between Membertou culture and heritage must be taken into account in a land code or land use plan?
- Membertou’s population is growing by about 5%. Do you think that this will impact the current ways that people use land? (This can be about open space, housing, public buildings might become too small, overcrowding, etc.)
- Are you aware of a traditional way of allocating lands from generation to generation? For example, is it divided equally among the children? Does it all go to the oldest child? Does it remain communal?

### **Land Use (Use maps)**

- We would like to understand your views for new development (commercial, residential, community buildings, etc.).
  - What is important to consider as land is developed? What concerns or hopes do you have with regard to land development?

- Are there areas of Membertou territory that should be protected from new development?
- Where should new development be located?
- What types of development should be allowed/not allowed?
  
- We would like to understand your views about housing.
  - What do you think of the current housing situation in Membertou?
  - What type of housing should be developed in the future? Single family? Multiple family? Do you think the housing lots need to be larger or smaller?
  - Where do you think the next new housing development should be located?
  
- Sometimes small businesses operate in residential areas. What is your view on mixing small businesses in residential neighbourhoods?
  
- Now we would like to know about your views on community spaces like cultural, sport, and recreational developments in Membertou.
  - What do you think about facilities for cultural activities within Membertou? Are they adequate? What could be improved?
  - How do you feel about the current parks/playgrounds within Membertou? Are they adequate? What could be improved?
  - How do you feel about recreation services within Membertou? Are they adequate? What could be improved?
  
- We would like to understand your views on protecting the environment.
  - What land base areas in Membertou should be kept in their natural state? Why is that area important? What needs to be done to protect it?
  - Are there animals or plants or rivers, etc. that should have special protections?
  - What are the most important environmental issues? What concerns do you have?
  
- Do you think Membertou lands should continue to be parceled off into individual allotments/interests or kept in communal interest? If individual allotments are OK, then is there an area that should be kept in communal interest?

## **Jurisdiction**

- Are you in favour of Membertou First Nation's activities to develop its own laws in relation to land management?
  - What would you like to see changed to improve the current system? What do you foresee could go wrong?
  - How should Membertou make sure that people follow the laws?
  
- Do people ever misuse Membertou land (both individual allotments and Band-controlled lands)?

- If so, how are people held accountable for what they do on the land?
- How should Membertou resolve potential disputes within community over lands, in comparison to how land disputes are handled today?

### **Community engagement**

- Have you been involved in discussions about land development either in formal meetings or casually?
- What do you think is the best way to get community input? How can we better reach off-reserve members?
  - In your opinion, have the efforts to engage the community in land management issues been effective? For instance, have you seen the Governance Committee website or Governance newsletters? Are there other ways that may be more effective to engage the community?
- Do you know of an initiative that didn't get community support? What was it? Why wasn't it strongly supported?

### **Conclusion**

- Are there any recommendations you would like to make about Membertou land management?
- Would you like to be involved or engaged on future discussions on lands in the future? How would you like to be involved?
  - Have you received training in relation to land management or code development? Would you like to?
- Are there other people you could suggest we meet with?
- Are there any other questions we should have asked or anything else you would like us to know? Other comments?

## **Membertou First Nation Staff Interviews**

December 4-7, 2012

Land Management and Land Use at Membertou

<b>Research Team:</b>
Cheryl Knockwood, Membertou
Trevor Bernard, Membertou
Mary Beth Doucette, Membertou/CBU
Rachel Starks, Native Nations Institute
Miriam Jorgensen, Native Nations Institute
Janice Tulk, CBU
Tamara Young, CBU

This is part of a project to better inform the Membertou leadership on land code development. I am asking you these questions in your capacity as a Membertou employee.

### **Questions for staff:**

- What department do you work for? How long have you worked there?
- Can you briefly describe a Membertou economic development project that involved lands you worked on in the past?
- We want to understand how departments work together within the First Nation, and with outside entities. Can you describe the process you or your department followed to take the project from conception to completion? (Examples include the Entrepreneur Centre, the Hotel, the MTCC, or generally the building of any major construction?)
- Can you describe the process Membertou currently has in place when it wants to build a new residential area for housing?
- Can you describe the process Membertou follows once it decides to acquire new lands?
  - How could we improve any of the processes you just described above?
- What types of legal arrangements are made with businesses on reserve?
- What types of legal arrangements are made with band members on their housing units?
- Where are all the transactional documents you referred to above filed or stored (Leases etc.)?

- Who ensures the agreements are being followed? What happens if there is a dispute or non-compliance with the agreement?
- Which other Membertou departments do your department work with the most during project development (housing, business development etc.
- In what ways does Membertou cooperate with other governments (Federal, Provincial, municipal, or other First Nations) to attract business opportunities? To acquire more lands?
- Can you provide examples of when Membertou has been successful (or unsuccessful) in achieving important goals? What organizational characteristics helped or hindered achieving success?
- What kinds of interaction would you expect your department to have with a Land Management Department?
- In what way could a land management department work with other governments? What new partnerships will be needed? Think about roads, water use, fishing, planting, etc.
- If Membertou adopts a land code, what entity should be responsible for managing land? That is, would you like to see (for example) the Chief and Council be directly responsible, or a department or division under the line authority of Chief and Council, or a separate governmental entity with independent authority that isn't perceived to be political?

### **Jurisdiction**

- Are you in favour of Membertou's activities to develop its own laws in relation to land management?
  - What would you like to see changed to improve the current system? What do you foresee could go wrong?
  - How should Membertou make sure that people follow the laws?
- Do people ever misuse Membertou land (both individual allotments and Band-controlled lands)?
  - If so, how are people held accountable for what they do on the land?
  - How should Membertou resolve potential disputes within community over lands, in comparison to how land disputes are handled today?

### **Tradition (Customs, Practices, Heritage)**

- What values, traditions or customs need to be considered in the development of Membertou land laws?



- What would you like to see done to preserve culture and heritage in Membertou?
- Are any of the really important issues in Membertou related to land use?
- Membertou's population is growing by about 5%. Do you think that this will impact the current ways that people use land? (This can be about open space, housing, public buildings might become too small, overcrowding, etc.)
- How would you like to see Membertou lands governed today, and into the future?
- Are you aware of a traditional way for resolving disputes?
- Now we would like to know about your views on community spaces like cultural, sport, and recreational developments in Membertou.
  - What do you think about facilities for cultural activities within Membertou? Are they adequate? What could be improved?
  - How do you feel about the current parks/playgrounds within Membertou? Are they adequate? What could be improved?
  - How do you feel about recreation services within Membertou? Are they adequate? What could be improved?
- We would like to understand your views on protecting the environment.
  - What land base areas in Membertou should be kept in their natural state? Why is that area important? What needs to be done to protect it?
  - Are there animals or plants or rivers, etc. that should have special protections?
  - What are the most important environmental issues? What concerns do you have?

### **Land Use (Use maps)**

- Membertou has experienced significant development (commercial, residential, community buildings, etc.) over the past few years. How do you feel about new development?
  - Where should new development be located?
  - What types of development should be allowed/not allowed?
- We would like to understand your views on housing.
  - What do you think of the current housing situation in Membertou?
  - When Membertou thinks about creating housing lots, one of the things to consider is size. Do you think housing lots need to be larger? Smaller?
  - What type of housing should be developed in the future? Single family? Multiple family?
    - Where do you think the next new housing development should be located?
    - Are there some lands in Membertou that should be off limits to housing?

- Sometimes small businesses operate in residential areas. What is your view on mixing small businesses in residential neighbourhoods?
- Do you think Membertou lands should continue to be parceled off into individual allotments/interests or kept in communal interest? If individual allotments are OK, then is there an area that should be kept in communal interest?

### **Conclusion**

- Are there any recommendations you would like to make in relation to Membertou Land Management?
- Are there other people you could suggest we meet with?
- Are there any other questions we should have asked or anything else you would like us to know? Other comments?