



# Evaluation of CIRNAC's Negotiation of Treaties, Self-Government Agreements and Other Constructive Arrangements Program FY2013–14 to FY2020-21

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## List of Acronyms

CIRNAC	Crown-Indigenous Relations and Northern Affairs Canada
DFO	Fisheries and Oceans Canada
FOG	Federal Officials Group on Section 35 Rights
FSC	Federal Steering Committee on Section 35 Rights
GBA Plus	Gender-based Analysis Plus
GC	Government of Canada
ISC	Indigenous Services Canada
JUS	Justice Canada
LOU	Letter of Understanding
MOU	Memorandum of Understanding
NRP	Nation Rebuilding Program
NSU	Negotiations Support Unit
OGDs	Other Government Departments
PC	Parks Canada
PIP	Performance and Information Profile
RBIS	Results-Based Information System
RIRSD	Recognition of Rights and Self-Determination
TAG	Treaties and Aboriginal Government sector
TRC	Truth and Reconciliation Commission of Canada
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

# Executive Summary

## Overview

The Evaluation Branch of the Audit and Evaluation Sector of Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC) conducted an evaluation of the Negotiation of Treaties, Self-Government Agreements and Other Constructive Arrangements Program (also referred to herein as “the program” or the “Negotiations Program”). The evaluation was undertaken in accordance with CIRNAC’s Five-Year Evaluation Plan 2019–2020 to 2023–2024 and in compliance with the Treasury Board *Policy on Results* and *Section 42.1* of the *Financial Administration Act*.

A previous 2013 evaluation of the federal process for negotiating comprehensive land claims and self-government agreements identified pressures with existing federal policies, including the need for Indigenous groups to have alternatives to the negotiation of comprehensive modern treaties in order to obtain tangible benefits in a more timely manner.

Since 2015, Canada has shifted its approach to treaty negotiations, away from imposing unilaterally developed federal mandates with limited opportunities for agreements to evolve, towards a focus on co-developed paths forward and flexible solutions. Canada has been working in partnership with Indigenous groups to co-develop treaties, self-government agreements and other constructive arrangements, to explore ways to advance the implementation of rights and interests.

The Treaties and Aboriginal Government (TAG) Sector within CIRNAC administers the Negotiation Program. The Negotiations Program supports Canada’s commitment to the negotiation of treaties, self-government agreements and other constructive arrangements to reconcile Indigenous rights with the sovereignty of the Crown.

The current evaluation assessed the relevance, design and delivery, performance and efficiency of the Negotiations program for the period of April 1, 2013 to March 31, 2021.

Findings were triangulated across multiple lines of evidence, which included a review of program documents and literature, performance data, interviews with a total of 40 key informants and nine case studies to gain a detailed understanding of the negotiation process which included an in-depth review of eight negotiations tables from West, Central and East regions, and one case study of a recipient of the Nation Rebuilding Program.

Overall findings and conclusions and recommendations are summarized below.

## Relevance

On balance, the Negotiations Program was viewed as relevant and necessary. The negotiations program has been meeting the primary need of Indigenous parties, that is, to conclude treaties, self-government agreements, and other constructive arrangements. Other than litigation, it is the only avenue to practically address Aboriginal and treaty rights.

Addressing Aboriginal and treaty rights, which are recognized and affirmed under section 35 of the Constitution Act, 1982, remains an obligation of the Crown. This legal imperative to continue the negotiation of treaties, self-government agreements, and other constructive arrangements has only grown during the time period being evaluated, with Supreme Court rulings regarding

adherence to international laws (e.g., the UNDRIP) and furthering inherent rights; to meet the government's constitutional commitments, and meeting the legal obligations to Indigenous peoples; and, the Crown's values, goals and commitment to Indigenous reconciliation.

Prior to 2015, the negotiation process was viewed as unresponsive to the needs of Indigenous groups, and Canada struggled to conclude negotiations. Few agreements had been concluded since Canada re-established a policy of treaty-making in 1973, and most of the 75 claims in various stages of negotiation had been in the treaty process for over a decade, some for 20 years. This resulted in exorbitant costs to Indigenous parties, and loan indebtedness was a primary disincentive to negotiation.

Since 2015, Canada has successfully addressed many of the institutional barriers and process inefficiencies that have historically beset the Negotiations Program, largely attributable to a shift towards broadly participatory processes, with co-development a central feature, support for nation rebuilding, and removal of the financial burden enabling Indigenous groups to negotiate and finalize agreements. While the response to Canada's efforts to evolve these section 35 policy tools has been mixed, there remains a generally held view that mutually agreed arrangements between Indigenous groups and the Crown remain relevant and are in the collective interests of all Canadians.

The negotiation of treaties, self-government agreements and other constructive arrangements aligns strongly with federal priorities, particularly reconciliation and supporting nation-to-nation relationships. The negotiation of treaties, self-government agreements and other constructive arrangements was found to generally align with the TRC Calls to Action and the UNDRIP, although internal respondents tended to be more positive than external parties regarding the extent of this alignment.

While those interviewed for this evaluation expressed many different definitions and understandings of reconciliation, and views about the extent to which reconciliation has been advanced through the negotiations process are mixed, all parties recognize that the GC has made efforts in this regard. Among external respondents, reconciliation is seen as moving in the right direction, although without tangible results as yet. Among federal departments, CIRNAC is viewed as being at the forefront in terms of reconciliation efforts, with some OGDs viewed as lacking capacity and/or departmental commitment to engage in reconciliation.

While no issues of misalignment with CIRNAC's mandate were raised, respondents did observe that there is misalignment with the mandates of some OGDs, where the negotiation of treaties, self-government agreements and other constructive arrangements and advancing reconciliation are not viewed as priorities.

## **Design and Delivery**

Policy, program and process improvements introduced over the evaluation period have contributed to substantial improvements in the negotiations process. The negotiations program has evolved significantly to allow for a greater use of bilateral or tripartite incremental agreements, which has been supported significantly through the RIRSD approach. Development of incremental agreements has helped to build trust between negotiating parties, strengthen connections between communities and provincial governments and industry, and incentivized continuing with negotiations.

Many of the impediments historically impacting the negotiations process remain, however, and have affected the negotiations of non-treaty agreements and incremental treaty arrangements in much the same way as the negotiation of treaties. The duration required for federal mandating and approval processes continues to be a major factor. While the FOG-FSC process is intended to ensure collaboration across federal departments, in practice, coordination of OGDs and P/Ts at the negotiations table can be problematic.

There is uneven OGD commitment to the RIRSD co-development approach, the UNDRIP and reconciliation. This has introduced a wide range of issues which have impacted the Crown-Indigenous relationship and delayed negotiations. Improved commitment to a whole-of-government approach, with attendant oversight and greater OGD accountability is required.

Difficulties recruiting and retaining skilled and experienced negotiators, the lengthy period required to onboard negotiators, and high turnover of federal negotiators has caused destabilization at negotiations tables and introduced substantial delays in the negotiations process.

## Effectiveness

The Negotiations Program has introduced mechanisms to successfully co-develop solutions for the implementation of rights through discussions and negotiations, principally during the early stages of negotiation. The number of Indigenous groups that have co-developed and reached preliminary types of agreements has steadily risen over the evaluation period, and particularly since the introduction of the RIRSD policy in 2017.

The Negotiations Program has contributed to Canada and Indigenous peoples working together in establishing a new fiscal relationship. Progress has been made towards reforming the fiscal relationship between Indigenous groups and the government, including reforming funding processes through a co-development approach, the Collaborative Fiscal Policy Development Process, and there is a general view among external respondents that establishing a new fiscal relationship is on the right track.

The Nation Rebuilding Program has supported Indigenous groups to improve their capacity to govern and rebuild their nations and governments. The program is flexible and needs are being met, but to be more impactful, the NRP requires a more substantial budget, greater clarity about the eligibility of nation rebuilding activities, and a streamlined multiyear application process and associated reporting requirements. Some noted that CIRNAC has not provided the required NRP support for the reconstitution of their nations, a situation which has negatively impacted the relationship between federal negotiators and Indigenous parties at the negotiations table.

The extent the negotiation process has improved Nation-to-Nation, Government-to-Government, and Inuit-to-Crown relationships, however, is somewhat mixed. Internal and external respondents expressed a wide range of views and often quite diverging. Without an objective definition and measures of Nation-to-Nation and Government-to-Government relationships, it is difficult to assess if this outcome is being met. Differences between negotiations tables, and the stage in which negotiations are at, makes the impact on this outcome difficult to assess.

There was limited evidence demonstrating the extent to which the negotiations process has supported Indigenous peoples in advancing their jurisdiction over their affairs.

Empirical evidence demonstrating the extent the negotiation process has actively supported Indigenous peoples to determine their political, economic, social and cultural development is also limited.

## Efficiency and Economy

The Negotiations Program has introduced many improvements over the evaluation period that have successfully improved the efficiency and economy of the negotiations process, most notably, co-developed solutions during the early stages of negotiation. While these have required additional upfront effort and resources, there have been substantial downstream benefit. Most importantly, negotiations have been expedited and the conditions have been created for improved cost containment.

Lastly, while components of a results-based approach were found, a stable performance framework was found to be largely absent. Lack of a stable program performance measurement tool is a concern. There have been several different performance measurement frameworks over the course of the evaluation period. The most recent version on which this evaluation was based has yet to be finalized and approved. Development of the performance framework should not be the sole responsibility of TAG, but should take a horizontal approach, co-developed and informed by all stakeholders, including Indigenous groups and OGDs.

It is therefore recommended that CIRNAC:

1. Improve governance structures and processes by streamlining decision-making and mandating processes, considering devolving funding authorities, and:
  - provide advice and support to OGDs to further adherence to reconciliation principles;
  - expand FSC-Policy mandate, TOR and membership to include Indigenous representation to be actively involved in negotiations program decision-making.
2. Work with OGDs to improve coordination and help improve accountability:
  - expand FSC mandate and TOR to be more involved in the coordination of OGDs and foster accountability against clear requirements amongst OGDs; and
  - introduce practical principles to guide operational deliberations, and OGD coordination and accountability.
3. Modernize the policy framework to advance consistent approaches and pathways to timely resolution of repeat issues, and to assist Indigenous parties to better navigate the complex negotiations process and options available to them.
4. Establish a long-term plan to secure and retain skilled and experienced negotiators, address the lengthy onboarding process, and consider table succession planning.
5. Improve information sharing, subject to what is allowable, including with all parties at and across negotiations tables, and within CIRNAC, in order to provide updates on progress through the mandating process.
6. Improve the performance measurement process to allow it to be informed by all stakeholders, including Indigenous groups and OGDs, streamlining monitoring and reporting in order to improve central coordination, and maximize the use of RBIS to ensure data is readily available for program management.



# Management Response and Action Plan

**Project Title: Evaluation of CIRNAC's Negotiation of Treaties, Self-Government Agreements and Other Constructive Arrangements Program FY2013–14 to FY2020-21**

## 1. Management Response

The Treaties and Aboriginal Government (TAG) sector acknowledges the findings of the evaluation report and supports taking action on the recommendations as detailed in the following plan.

In summary, this program supports Canada's commitment to the negotiation of treaties, self-government agreements and other constructive arrangements to reconcile Indigenous rights with the sovereignty of the Crown. These negotiated agreements and arrangements advance the implementation of Indigenous rights, including those recognized and affirmed under section 35 of the *Constitution Act* (1982) and described in the United Nations Declaration on the Rights of Indigenous Peoples. The intent of the program is to co-create an enabling environment where Indigenous groups can exercise their inherent and treaty rights, and improve the political, cultural and socioeconomic conditions within their communities.

Discussions with Indigenous groups take place across Canada to advance shared priorities through collaboratively developed mandates for future agreements. The parties work to build a shared understanding of how rights are exercised in particular contexts, which in turn support healthier, more sustainable communities. Over time, it is expected that the socioeconomic gaps that these communities disproportionately experience will close.

The program advances a renewed fiscal relationship with Indigenous governments by providing negotiation support funding, nation rebuilding funding as well as other supports, negotiating fiscal financing agreements, developing fiscal policy aligned with these goals, and continuing work through the Collaborative Fiscal Process with Self-Governing Indigenous Governments.

Recognizing that under the *Department of Crown-Indigenous Relations and Northern Affairs Act*, the Minister of Crown-Indigenous Relations has a responsibility to exercise leadership within the Government of Canada in relation to the affirmation and implementation of the rights of Indigenous peoples recognized and affirmed by section 35 of the *Constitution Act*, 1982, the path of reconciliation is a whole of government pursuit for which coordination and collaboration are essential.

## 2. Action Plan

Recommendations	Actions	Responsible Manager (Title/Sector)	Planned Start and Completion Dates
<p>1. Improve governance structures and processes by streamlining decision-making and mandating processes, considering devolving funding authorities, and:</p> <ul style="list-style-type: none"> <li>• provide advice and support to OGDs to further adherence to reconciliation principles; and</li> <li>• expand FSC-Policy mandate, TOR and membership to include Indigenous representation to be actively involved in negotiations program decision-making.</li> </ul>	<p>a. The Treaties and Aboriginal Government sector will look for opportunities to improve collaboration in the policy development process, including exploring ways for Indigenous participation to help enhance decision-making within the sector's federal governance space.</p> <p>b. The sector will undertake a review of the mandate and activities of the Federal Steering Committee on section 35 Rights and approval processes related to mandating to identify opportunities to streamline processes, reduce barriers and help accelerate the settlement of agreements with Indigenous partners</p>	<p>Director General, Policy Development and Coordination Branch</p>	<p>a. <i>Start Date: April 2023</i> <i>End Date: April 2024</i></p> <p>b. <i>Start Date: April 2023</i> <i>End Date: June 2024</i></p>
<p>2. Work with OGDs to improve coordination and help improve accountability:</p> <ul style="list-style-type: none"> <li>• expand FSC mandate and TOR to be more involved in the coordination of OGDs and foster accountability against clear requirements amongst OGDs; and</li> </ul>	<p>a. The Treaties and Aboriginal Government sector will continue to engage the Federal Steering Committee on section 35 Rights to advance a coherent, whole-of-government approach across federal partners involved in section 35-related negotiations.</p>	<p>Director General, Policy Development and Coordination Branch</p>	<p>a. <i>Start Date: April 2023</i> <i>End Date: September 2024</i></p>

<ul style="list-style-type: none"> <li>introduce practical principles to guide operational deliberations, and OGD coordination and accountability.</li> </ul>	<p>b. The sector will continue to explore new strategies, such as protocols and principles to guide operational deliberations for working effectively with OGD partners, as we continue to implement a rights-based negotiation approach.</p> <p>c. The Collaborative Fiscal Policy Development Process is viewed as a successful model for co-development with Self-Governing Indigenous Governments and Modern Treaty Partners. Through this Policy, CIRNAC will continue to build on successes seen with key federal departments and provincial/territorial governments as applicable.</p>	<p>Director General, Fiscal Branch</p>	<p>b. <i>Start Date: April 2023</i> <i>End Date: June 2024</i></p> <p>c. <i>Start Date: December 2022</i> <i>End Date: March 2025</i></p>
<p>3. Modernize the policy framework to advance consistent approaches and pathways to timely resolution of repeat issues, and to assist Indigenous parties to better navigate the complex negotiations process and options available to them.</p>	<p>a. Consistent with commitments made as part of the UN Declaration Act draft Action Plan, co-develop approaches for the implementation of the right to self-determination through negotiated agreements, new policies and legislative mechanisms. The department will work with partners to develop specific actions in support of this action plan measure.</p> <p>b. The sector will continue to undertake regular monitoring and assessment of negotiation tables to identify common issues and opportunities for policy reform.</p>	<p>Director General, Policy Development and Coordination Branch</p>	<p>a. <i>Start Date: April 2023</i> <i>End Date: September 2025</i></p> <p>b. <i>Start date: April 2023</i> <i>End date: September 2024</i></p>

	<p>c. The sector will continue to support the implementation of the Recognition and Reconciliation of Rights Policy for treaty negotiations in British Columbia (RRR Policy), working collaboratively with British Columbia and representatives of participating Indigenous Nations. For example, the sector is initiating the development of a plan to support the effective implementation of the Reconciliation of Rights Policy for Treaty Negotiations in British Columbia within CIRNAC and across the federal system.</p> <p>d. Where there is interest, Canada is engaging using the approaches found in the Recognition and Reconciliation of Rights Policy for Treaty Negotiations in British Columbia with negotiation partners elsewhere in the country.</p> <p>e. Continue working on a governance funding continuum that builds from the co-developed approach for comprehensive self-government, providing federal negotiators with more flexible tools to adapt to various non-comprehensive self-government arrangements – core, sectoral, etc. – that match the priorities of Indigenous groups.</p>	<p>Director General, Fiscal Branch</p>	<p>c. <i>Start Date: April 2023</i> <i>End Date: December 2024</i></p> <p>d. <i>Star Date: April 2023</i> <i>End Date: March 2025</i></p> <p>e. <i>Start Date: April 2023</i> <i>End Date: December 2024</i></p>
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<p>4. Establish a long-term plan to secure and retain skilled and experienced negotiators, address the lengthy onboarding process, and consider table succession planning.</p>	<p>a. The Treaties and Aboriginal Government sector will continue to assess and enhance its recruitment, skills and knowledge development, and retention planning to ensure the long-term sustainability and implementation of the negotiations program.</p> <p>b. The sector will continue to promote itself as an employer of choice, supporting hybrid working arrangements (work-life balance), improve regional representation, and diversity in representation (e.g., Indigenous employees).</p> <p>c. The sector will continue to advance learning and development strategies. Based on employee feedback, a sector-specific Learning Strategy is under development to support training and career development, including specialized training to support and promote rights-based negotiations ensuring a consistent approach is applied to the negotiation process.</p>	<p>Director General, Policy Development and Coordination Branch</p> <p>Director General, Fiscal Branch</p> <p>Director General, Negotiations West Branch</p> <p>Director General, Negotiations East Branch</p> <p>Director General, Negotiations Central Branch</p>	<p>a. <i>Start Date: April 2023</i> <i>End Date: March 2024</i></p> <p>b. <i>Start Date: April 2023</i> <i>End Date: March 2024</i></p> <p>c. <i>Start Date: May 2023 (Portal Launch)</i> <i>End Date: Substantive Portal content uploaded by June 2023; Governance and Evaluation Structure established by: September 2023; Continued maintenance and development</i></p>
<p>5. Improve information sharing, subject to what is allowable, including with all parties at and across negotiations tables, and within CIRNAC, in order to provide updates on progress through the mandating process.</p>	<p>The Treaties and Aboriginal Government sector will continue to review and improve upon its information sharing practices:</p> <p>a. In collaboration with First Nations, Inuit and Métis partners, the sector will explore the development of a public statement of Canada's rights-based approach for the negotiation of treaties,</p>	<p>Director General, Policy Development and Coordination Branch</p>	<p>a. <i>Start Date: April 2023</i> <i>End Date: February 2024</i></p>

	<p>agreements and other constructive arrangements to replace the Comprehensive Land Claims and Inherent Right Policies;</p> <p>b. Improve information sharing by reviewing and updating related materials on CIRNAC's external website where applicable (e.g., including lists of ongoing negotiations);</p> <p>c. Review tools for sharing information with negotiation participants (e.g., negotiators, Indigenous partners, and Other Government Departments), such as orientation on new policies and/or changes to authorities; and key messages; and</p> <p>d. Continue to roll-out the implementation and use of the Results Based Information System (RBIS) within the sector and externally with Other Government Departments where applicable.</p>	<p>Director General, Policy Development and Coordination Branch</p> <p>Director General, Fiscal Branch</p> <p>Director General, Negotiations West Branch</p> <p>Director General, Negotiations East Branch</p> <p>Director General, Negotiations Central Branch</p>	<p>b. <i>Start Date: April 2023</i></p> <p><i>End Date: Review of related materials on CIRNAC's external website completed and areas for updating identified by: September 2023; Continued maintenance and updating of related materials on CIRNAC's external website</i></p> <p>c. <i>Start Date: April 2023</i></p> <p><i>End Date: June 2024</i></p> <p>d. <i>Start Date: June 2023</i></p> <p><i>End Date: Phase I: March 2024; Continued maintenance and updating of the database</i></p>
<p>6. Improve the performance measurement process to allow it to be informed by all stakeholders, including Indigenous groups and OGDs, streamlining monitoring and reporting in order to improve central coordination, and maximize the use of RBIS to ensure data is readily available for program management.</p>	<p>a. The Treaties and Aboriginal Government sector is revising and finalizing the Program Information Profile (PIP), the performance framework for the program in 2023-24. This includes the development of stable and meaningful indicators that speak specifically to program outcomes. Work undertaken on the 2023-24 Departmental Results Framework supports the results story and allows the</p>	<p>Director General, Policy Development and Coordination Branch</p>	<p>a. <i>Start Date: April 2023</i></p> <p><i>End Date: September 2023</i></p>

	<p>PIP to further progress towards completion.</p> <p>b. The sector will work to ensure that greater reflection on what is heard from Indigenous partners at negotiation tables is incorporated in the 2023-24 PIP and future iterations.</p> <p>c. The sector will continue to leverage existing internal tools, including table monitoring mechanisms, to assess progress at negotiation tables. These internal tools (e.g., RBIS) gather data on a regular basis and identify opportunities to improve decision-making and performance measurement frameworks.</p> <p>d. The sector will continue to explore options to improve RBIS, including enhancing the user experience.</p>	<p>Director General, Policy Development and Coordination Branch</p> <p>Director General, Fiscal Branch</p> <p>Director General, Negotiations West Branch</p> <p>Director General, Negotiations East Branch</p> <p>Director General, Negotiations Central Branch</p>	<p>b. <i>Start Date: April 2023</i>  <i>End Date: September 2024</i></p> <p>c. <i>Start Date: April 2023</i>  <i>End Date: September 2024</i></p> <p>d. <i>Start Date: April 2023</i>  <i>End Date: April 2024</i></p>
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# 1. Introduction

## 1.1 Overview

In the Government of Canada (GC, also referred to herein as “Canada”), evaluation is the systematic and neutral collection and analysis of evidence to judge merit, worth or value. Evaluation informs decision making, improvements, innovation and accountability. Evaluations typically focus on programs, policies and generally employ social science research methods.

An evaluation of the Negotiation of Treaties, Self-Government Agreements and Other Constructive Arrangements Program<sup>1</sup> (also referred to herein as “the program” or the “Negotiations Program”) was required in accordance with section 42.1 of the *Financial Administration Act* which stipulates that departments conduct a review every five years of the relevance and effectiveness of each ongoing program for which they are responsible. The Treasury Board of Canada’s *Policy on Results* (2016) defines such a review as an evaluation, and requires each department to develop and publish an annual five-year departmental evaluation plan. The evaluation of the Negotiations Program was conducted as outlined in CIRNAC’s Five-Year Evaluation Plan 2019–2020 to 2023–2024.

The Negotiations Program was evaluated to assess the relevance, design and delivery, performance and efficiency of the program for the period of April 1, 2013 to March 31, 2021. This program is delivered by the Treaties and Aboriginal Government sector (TAG) of Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC). The evaluation was initiated and conducted by the Evaluation Branch of CIRNAC.

## 1.2 Program Profile

### Background

The GC has had policies in place to address outstanding rights to land since 1973. The *Comprehensive Land Claims Policy* was put in place to respond to emerging jurisprudence on Indigenous rights and provide more predictability for the exercise of rights. In 1995, the GC also released its *Inherent Right Policy* to also address inherent rights to self-government.

Since the history and process of treaty-making in British Columbia is unique, in 1990, the governments of Canada and British Columbia and First Nations leaders jointly established a task force to explore the fair resolution of land claims in the absence of historic treaties in most of British Columbia. The result of the British Columbia Claims Task Force was the creation, in 1992, of the British Columbia Treaty Commission to oversee and facilitate treaty negotiations and

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<sup>1</sup> “Treaties” and “agreements” were a feature of former European settler colonies, especially in North America and the Pacific. European parties were aware that they were negotiating and entering into contractual relations with sovereign nations, with all the international legal implications of that term. “Legitimization” of their colonization and trade interests made it imperative for European powers to recognize Indigenous nations as sovereign entities, and today this remains true through State-promoted notions of Indigenous “self-government”, “autonomy”, “nationhood” and “partnership.” The quasi-juridical term “other constructive arrangements” is “any legal text or other documents that are evidence of consensual participation by all parties to a legal or quasi-legal relationship.” Source: United Nations, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study on treaties, agreements and other constructive arrangements between States and indigenous populations*, Final report by Miguel Alfonso Martínez, Special Rapporteur, 22 June 1999, <https://digitallibrary.un.org/record/276353>.



allocate negotiation support funding to First Nations in British Columbia to enable their participation in the treaty process.

The 2013 evaluation of the federal process for negotiating comprehensive land claims and self-government agreements identified pressures with existing federal policies, including the need for Indigenous groups to have alternatives to the negotiation of comprehensive modern treaties in order to obtain tangible benefits in a more timely manner. Indigenous partners expressed concern over the time consuming, costly, and cumbersome processes for negotiating under the *Comprehensive Land Claims* and *Inherent Right* policies. Further feedback highlighted the urgent need to reform these policies to effectively respond to the rights, needs, and interests of Indigenous communities; and to align with evolving jurisprudence, approaches, and the federal commitment to implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). To address some of the concerns with limited options for the types of agreements that could be negotiated, in 2014 the GC released an interim policy, *Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights*.

Since 2015, Canada has shifted its approach to treaty negotiations, away from imposing unilaterally developed federal mandates with limited opportunities for agreements to evolve, towards a focus on co-developed paths forward and flexible solutions. Canada has been working in partnership with Indigenous groups to co-develop treaties, self-government agreements and other constructive arrangements, to explore ways to advance the implementation of rights and interests. As of 2018, Canada funds negotiations through non-repayable contributions to support the participation of Indigenous groups in the negotiation of treaties, self-government agreements and other constructive arrangements where previously these were borne by Indigenous groups through repayable loans. This change was intended to remove the financial burden Indigenous groups faced to repay federal loans, and ultimately help them negotiate and finalize agreements and have the financial means to support the development of their nations.

Most recently, Canada enshrined the shift in negotiation approaches through the introduction of the co-developed *Recognition and Reconciliation of Rights Policy for Treaty Negotiations in British Columbia* in 2019. This policy is one of the first major policy documents that has been truly co-developed between governments and an Indigenous representative organization, the First Nations Summit, and replaces the *Comprehensive Land Claims* and *Inherent Rights* policies in British Columbia. A central feature of the policy is that negotiations recognize the continuation of rights without modification, surrender or extinguishment when a treaty is reached.

## Objectives and Expected Outcomes

The Negotiations Program is a key program under the Department's core responsibility area of Crown-Indigenous Relations. The program undertakes three primary activities<sup>2</sup>:

- Engaging in discussions and negotiations to recognize and address Indigenous Rights;
- Conducting policy development, co-ordination, research and claims assessment; and
- Providing negotiations support.

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<sup>2</sup> Over the evaluation period, there have been several unapproved working level draft versions of the program performance framework. This evaluation was based on the draft 2021 Performance and Information Profile, that has since been updated, but remains in draft form at the writing of this evaluation report.

These activities serve to achieve the output<sup>3</sup>:

- Discussions and negotiations with Indigenous groups on recognition of rights.

The program's activities and outputs are expected to contribute the following expected outcomes:

- Short-term outcomes:
  - Canada and Indigenous groups co-develop solutions regarding the implementation of rights through discussions and negotiations;
  - Canada and Indigenous peoples work together in establishing new fiscal relationships;
  - The recognition and implementation of Indigenous rights is supported by a whole of government approach; and
  - Indigenous groups rebuild their nations.
- Medium-term outcomes:
  - Improved Nation-to-Nation, Government-to-Government, and Inuit-to-Crown relationships; and
  - Indigenous peoples have jurisdiction over their affairs.

Together, these outcomes are expected to lead to the Departmental result<sup>4</sup> and long-term program outcome:

- Indigenous peoples determine their political, economic, social and cultural development.

## Program Management

Within the federal government, the Minister of CIRNAC has a mandate to enter into negotiations with First Nations, Inuit, and Métis groups. In addition, Ministers of other federal government departments have mandates to enter into negotiations in their respective areas of responsibility.

The Federal Steering Committee (FSC) on Section 35 Rights consists of the Federal Steering Committee for Transactional Items (FSC Transactional) and the Federal Steering Committee for Policy and Coordination (FSC Policy). These bodies serve as interdepartmental fora to review, oversee and make recommendations on section 35-related activities and related policy developments. Specifically, they provide a critical whole-of-government perspective and oversight prior to Ministerial and/or Cabinet consideration. Membership of FSC Transactional and FSC Policy consists of Assistant Deputy Ministers representing departments and agencies involved in section 35-related negotiations, discussions and implementation processes (called the "Executive" for FSC Policy). In practice, the FSC Transactional is supported by a working level sub-committee, the Federal Officials Group (FOG) on Section 35 Rights. Meanwhile the FSC Policy Executive is supported by a DG-level subcommittee.

While CIRNAC leads negotiations with Indigenous partners, TAG oversees and coordinates the cross-departmental federal role in these negotiations. Other federal government departments are

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<sup>3</sup> Further to this output, as per the draft 2021 Performance and Information Profile, the Negotiations Programs outputs also include: co-developed mandates, signed agreements, policy proposals, funding, and interdepartmental networks.

<sup>4</sup> Crown-Indigenous Relations and Northern Affairs Canada. Departmental Results Report 2020-2021. <https://www.rcaanc-cirnac.gc.ca/eng/1634049500493/1634049553120>.

called upon to participate in negotiations where discussions and agreements involve their areas of responsibility or jurisdiction.

Within CIRNAC, the Senior Assistant Deputy Minister of TAG has overall responsibility for the delivery and oversight of negotiations for treaties, self-government agreements, and other constructive arrangements. Negotiation work is undertaken through 5 Branches within TAG.

**The Policy Development and Coordination Branch** is the TAG focal point for developing policies aimed at addressing section 35 rights with particular emphasis on rights recognition and reconciliation. Their responsibilities include providing advice to the Senior Assistant Deputy Minister for TAG on a broad range of cross-cutting policy issues; providing policy support and advice to negotiators; providing section 35 rights related advice to Other Government Departments; managing federal mandating and approval processes for self-government and comprehensive claims negotiations. Furthermore, they are responsible for the coordination and oversight of all TAG-related litigation files and associated policy development. The Branch is comprised of 4 Directorates:

- Strategic Policy Development Directorate;
- Operational Policy Development Directorate;
- Assessment, Coordination and Engagement Directorate; and
- TAG-Litigation Management Unit.

**Fiscal Branch** leads fiscal-related discussions at tables, including the negotiation of fiscal chapters and arrangements. The branch is responsible for the development of fiscal policies, strategies and approaches, and for developing and managing financial mandates. The branch also provides contribution funding to Indigenous groups to support negotiations, discussions, and other initiatives and provides services to Specific Claims Branch with the administration of loans and research funding. Finally the branch supports internal financial management and reporting. The Branch is comprised of 4 Directorates:

- Fiscal Policy and Coordination Directorate;
- Fiscal Policy and Arrangements Directorate;
- Negotiations Support Directorate; and
- Financial Management, Analysis and Reporting Directorate.

**Negotiations West, Central and East** are responsible for the negotiation of section 35-related rights with Indigenous groups in their respective operating areas, from British Columbia and Yukon to the Atlantic provinces. Regional negotiation teams are responsible for negotiating treaties, self-government agreements, and other constructive arrangements, including transboundary claims. Unique to British Columbia, the treaty process is overseen by the British Columbia Treaty Commission.

## Program Participants and Beneficiaries

The primary participants involved in the negotiation of treaties, self-government agreements, and other constructive arrangements are:

- Indigenous groups;
- CIRNAC with other government departments (OGDs); and
- the relevant provincial/territorial government, where appropriate.

Indigenous groups that participate in the negotiation of treaties, self-government agreements, and other constructive arrangements include First Nations, Inuit and Métis groups. Although all Canadians, federal/provincial/territorial (FPT) governments, and business/industry benefit from the negotiation of treaties, self-government agreements and constructive arrangements, the primary beneficiaries are First Nations, Inuit and Métis communities as their rights are recognized and affirmed.

**First Nations** have expressed the desire to make their own choices regarding how to design and deliver programs and services to their communities. This includes making decisions about how to better protect their culture and language, and manage their own lands. Many First Nations seek to replace the outdated provisions of the *Indian Act* with a modern partnership that preserves their special historic relationship with the federal government. The GC believes that its approach to negotiating treaties, self-government agreements and other constructive arrangements allows for the establishment of respectful negotiation processes leading to agreements or other constructive arrangements that recognize the jurisdiction and authority of First Nations' governments.

**Inuit** land claim agreements have been signed in all four Inuit regions of Canada. Inuit communities are pursuing their vision of self-determination consistent with negotiated land claims agreements and in some cases through ongoing self-government negotiations. The GC is prepared to continue to work in partnership with Inuit groups and provincial/territorial governments to advance their vision of self-determination.

**Métis** communities have an interest in self-government that enables them to control and influence the important decisions that affect their lives. The GC is prepared to enter into negotiations with Métis groups residing south of the 60th parallel, and the relevant provincial government. The GC is also prepared to constitutionally-protect section 35 treaty rights in agreements. GC also recognizes that Métis communities seek their own vision of self-determination through ongoing engagement with their citizens and through flexible and open dialogue at Recognition of Rights and Self-Determination (RIRSD) discussion tables. Through these discussions, Canada and the Métis Nation of Alberta, the Métis Nation of Ontario, and the Métis Nation-Saskatchewan co-developed self-government agreements to affirm the Métis right of self-government. While Métis groups already have well-established governance structures, these co-developed agreements also set out approaches for negotiating additional areas of jurisdiction.

## Program Resources

The following table reflects the actual spending for Negotiation of Comprehensive Land Claims and Self-Government Agreements for FY2013-14 through FY2020-2021.

<b>Program's Actual Spending</b>									
		FY2013-14	FY2014-15	FY2015-16	FY2016-17	FY2017-18	FY2018-19	FY2019-20	FY2020-21
<b>Vote 1</b>	<b>Salary</b>	22,767,129	22,158,591	21,342,593	22,290,884	25,668,005	25,831,072	29,141,290	35,173,798
	<b>O&amp;M</b>	4,464,524	4,463,465	4,873,087	4,667,889	8,023,461	5,409,106	5,531,980	3,398,500
<b>Vote 1 – Total</b>		27,231,653	26,622,056	26,215,680	26,958,773	33,691,465	31,240,178	34,673,270	38,572,298
Vote 7 Forgiveness of Debts						523,804		914,022,919	
Employee Benefit Plan		3,415,069	3,399,866	3,244,826	3,234,416	3,394,824	4,210,447	3,621,783	5,003,865
<b>Vote 10 – Grant</b>									
Grants to reimburse treaty negotiation loans to Indigenous groups who have settled a comprehensive land claim <sup>5</sup>									0
Interim Measures and BC Treaty Related Measures		5,799,421							

<sup>5</sup> Although there was planned spending under this PIP, the actual expenditures have been realigned to the proper PIP and therefore no actual expenditures were incurred under the Negotiations of Claims and Self-Government Agreements' PIP.

<b>Vote 10 - Contributions</b>								
Contributions to promote social and political development in the North and for Northerners								0
Contributions to support the Indigenous Nation Rebuilding Initiatives						13,436,899	19,940,067	19,076,295
Contributions to supply public services in Indian Government Support and to build strong governance, administrative and accountability systems	9,910,954	7,613,224	6,373,566	8,133,070	9,000,076	9,693,925	10,588,299	7,786,643
Contributions to support the negotiation and implementation of Treaties, Claims and self-government agreements or initiatives	31,897,745	36,227,445	38,000,046	45,378,705	55,401,541	112,149,704	106,302,909	106,653,574
Contributions for the purpose of Consultation and Policy Development	258,650.00	140,000		230,033	211,000	146,232	900,000	1,009,274
<b>Vote 10 - Total</b>	<b>47,866,770</b>	<b>43,840,669</b>	<b>44,513,612</b>	<b>53,511,775</b>	<b>64,631,649</b>	<b>135,491,528</b>	<b>136,977,507</b>	<b>134,525,786</b>
<b>Grand Total</b>	<b>78,513,492</b>	<b>73,862,591</b>	<b>73,974,117</b>	<b>83,704,964</b>	<b>102,241,742</b>	<b>170,942,152</b>	<b>1,089,295,480</b>	<b>178,101,949</b>

## 2. Evaluation Approach

### 2.1 Evaluation Scope and Timing

The objective of the evaluation was to assess the relevance (continued need and responsiveness) and performance (effectiveness, efficiency and economy) of the Negotiations Program for the fiscal years FY2013-14 to FY2020-21. The evaluation is intended to serve as an evidence-based report to assist in informing policy and program improvements and renewals.

The evaluation's design and data collection methods were guided by Treasury Board's *Policy on Results* (2016), information identified in the Program's (Draft) Performance and Information Profile (PIP) (2021), and as per the FY2020-2021 Departmental Results Framework for CIRNAC.

The evaluation was conducted using principles of reconciliation and Gender-based Analysis Plus (GBA Plus). In the case of GBA Plus, the evaluation used guidelines established by the Treasury Board for implementing GBA Plus in evaluations and supporting department documents. The evaluation sought to adhere to the principles of the UNDRIP by including its principles in the process. Both GBA Plus and the UNDRIP were applied as lenses in the analysis of findings in order to describe the relevance, effectiveness, efficiency and economy of the Negotiations Program.

An Evaluation Working Group was convened to guide the evaluation process and to ensure diverse perspectives were reflected in the evaluation, with members from the evaluation team and program representatives. The Evaluation Working Group was closely involved at key stages in the evaluation, provided feedback on the evaluation issues and methods, and in the development of the evaluation key findings, conclusions and recommendations.

### 2.2 Evaluation Methodology

The following research methods were used to gather input to inform the evaluation issues and research questions:

- Review of published literature to examine and understand best practices in other jurisdictions. Sources included publications from academic, Indigenous, and community-based groups.
- Review of program documents and files, such as legislation, previous audits and evaluations, management plans, work plans, progress reports, presentations, government completed studies and reports, and briefing notes.
- Review of program data including financial, performance, monitoring and other data.
- Semi-structured key informant interviews conducted virtually and by written submission with 40 participants, representing groups in two respondents categories: respondents internal versus external to the Government of Canada. The groups interviewed within internal category were: CIRNAC Officials (n=15), and Other Government Departments (n=10). Indigenous Representatives (n=14), and Provincial/Territorial Governments (n=1) composed the external respondents category.
- Nine case studies to gain a detailed understanding of the negotiation process. Semi-structured interviews were conducted virtually and by written submission with 40 participants. This resulted in an in-depth review of eight negotiations tables from all three regions: West, Central and East. Out of the eight negotiations tables, three are from the

West region (British Columbia), three are from the Central region (Ontario and Manitoba), and two are from the East region (Quebec and Newfoundland and Labrador). In addition to these negotiations tables, one case study is a recipient of the Nation Rebuilding Program.

The use of multiple lines of evidence and triangulation in analysis increased the reliability and validity of the evaluation findings and conclusions.

### Considerations, Strengths and Limitations

Most evaluations face constraints that may affect the reliability of findings. Table 1 outlines the limitations encountered during this evaluation as well as the mitigation strategies put in place to increase the reliability of the evaluation findings.

Table 1. Limitations, impacts, and mitigation strategies.

Limitation	Impact	Mitigation Strategy
Over the evaluation period, there have been several unapproved working level draft versions of the program performance framework (in 2014, 2018, 2021 and 2022).	The introduction and retirement of some outcomes and many indicators over the evaluation period made the assessment of performance over the entire evaluation period difficult. Additionally, the PIP was being worked on during the evaluation period which also posed challenges.	This evaluation was based on the working level draft 2021 PIP.
As TAGs PIP was not final or approved, the evaluation could not comprehensively assess performance against expectations for five of the nine draft indicators because program performance targets were not set, or data was unavailable. There was also apparent misalignment between some outcomes and associated indicators.	The evaluation does not provide an exhaustive assessment of performance against five of the six outcomes.	Key informant interviews were used to supplement performance data.
The Evaluation Working Group established for this evaluation did not include external Indigenous representatives due to the size, scope and sensitivity of the program that would allow for a sufficient level of inclusiveness	There was no direct Indigenous consultation in the planning of the evaluation, the design of the evaluation methodology, or development of the evaluation key findings, conclusions and recommendations.	An oversampling of Indigenous key informant interviews was used to provide a greater Indigenous perspective of the program.



### 3. Evaluation Findings – Relevance

#### 3.1 To what extent is the negotiation process of treaties, self-government agreements and other constructive arrangements responsive to the diverse needs of the Indigenous groups they serve?

Canada re-established a policy of treaty-making in 1973, enacted through the *Comprehensive Land Claims Policy* and the *Inherent Right Policy*. In 2019, Canada introduced the *Recognition and Reconciliation of Rights Policy for Treaty Negotiations in British Columbia*, the most important advancement since 1973, resetting the framework for negotiations. While the response to Canada's efforts to evolve these Section 35 policy tools has been mixed, there remains a generally held view that mutually agreed arrangements between Indigenous groups and the Crown remain relevant and are in the collective interests of all Canadians.

In 1973, Canada re-established a policy of treaty-making in response to widespread claims of unextinguished Aboriginal rights to land,<sup>6</sup> enacted through a policy framework for the negotiation and implementation of Aboriginal title and rights comprised by the *Comprehensive Land Claims Policy* (1973) and the *Inherent Right Policy* (1995). With the exception of British Columbia, these remain Canada's primary section 35 policy tools for addressing First Nation, Inuit, and Métis rights and advancing reconciliation.

In the face of widespread and persistent criticism of the *Comprehensive Land Claims Policy*, Canada sought to modernize its policy framework through successive revisions to the *Comprehensive Land Claims Policy* in 1986, 1993 and 2014. In 2018, the GC committed to replace the *Comprehensive Land Claims* and *Inherent Right policies* with approaches based on the recognition of Indigenous rights. Building on this commitment, Canada co-developed the tripartite *Recognition and Reconciliation of Rights Policy for Treaty Negotiations in British Columbia* with the Government of British Columbia and First Nations Summit in 2019.

The *Recognition and Reconciliation of Rights Policy for Treaty Negotiations in British Columbia* is one of the first major policy documents that has been truly co-developed between governments and an Indigenous representative organization, the First Nations Summit, and replaces the *Comprehensive Land Claims* and *Inherent Right policies* in British Columbia treaty negotiations. A central feature of the policy is that negotiations recognize the continuation of rights without modification, surrender or extinguishment when a treaty is reached. Under this policy, future treaties, self-government agreements and other constructive arrangements will set out

<sup>6</sup> Eyford, Douglas, R. "A New Direction: Advancing Aboriginal and Treaty Rights." Crown-Indigenous Relations and Northern Affairs Canada, 2013. [https://www.rcaanc-cimac.gc.ca/eng/1426169199009/1529420750631?wbdisable=true#sec4\\_b](https://www.rcaanc-cimac.gc.ca/eng/1426169199009/1529420750631?wbdisable=true#sec4_b)

approaches for reconciling Crown and Indigenous rights based on co-existence that can evolve over time. It also provides greater flexibility to develop agreements incrementally. Where there is interest, Canada is ready to discuss using the approaches found in this policy.

Over the years, the response to Canada's efforts to evolve Section 35 policy tools has been mixed.<sup>7</sup> However, there remains a generally held view that mutually agreed arrangements between Indigenous groups and the Crown, such as treaties, self-government agreements and other constructive arrangements, remain relevant and are in the collective interests of all Canadians. Such arrangements provide a solid foundation for Indigenous groups to rebuild their nations, protect jurisdiction over their land, environment and resources, and build sustainable economies and societies. For example, empirical and anecdotal information demonstrate that modern treaties have promoted improved socio-economic outcomes for Indigenous beneficiaries.<sup>8</sup>

The GC acknowledges that its efforts to unlock opportunities for long-term success and economic prosperity of Indigenous peoples have not resulted in concrete and lasting results, and that to successfully do so Aboriginal and treaty rights, which are recognized and affirmed under Section 35, must first be addressed.<sup>9</sup> This obligation did not change during the time period being evaluated, and remains pertinent today.

**Prior to 2015, the negotiation process was viewed as unresponsive to the needs of Indigenous groups, and Canada struggled to conclude negotiations. Few agreements had been concluded since Canada re-established a policy of treaty-making in 1973, and most of the 75 claims in various stages of negotiation had been in the treaty process for over a decade, some for 20 years. This resulted in exorbitant costs to Indigenous parties, and loan indebtedness was a primary disincentive to negotiation.**

Prior to 2015, the negotiation process was viewed by some Indigenous groups as being unresponsive to their needs, and Canada struggled to conclude negotiations. As of 2015, only 26 agreements had been finalized since Canada re-established a policy of treaty-making in 1973, and another 75 claims were at various stages of negotiation, more than 80% having been in the treaty process for longer than ten years, and some for more than two decades.<sup>10</sup>

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<sup>7</sup> Assembly of First Nations. Discussion Paper: Comprehensive Land Claims Policy/Canada's Approach to Reform. 2019.

<sup>8</sup> Eyford, Douglas, R. A New Direction: Advancing Aboriginal and Treaty Rights. Crown-Indigenous Relations and Northern Affairs Canada, 2013. [https://www.rcaanc-cimac.gc.ca/eng/1426169199009/1529420750631?wbdisable=true#sec4\\_b](https://www.rcaanc-cimac.gc.ca/eng/1426169199009/1529420750631?wbdisable=true#sec4_b).

<sup>9</sup> Crown-Indigenous Relations and Northern Affairs Canada. Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights. 2018. <https://www.rcaanc-cimac.gc.ca/eng/1408631807053/1544123449934>.

<sup>10</sup> Eyford, Douglas, R. "A New Direction: Advancing Aboriginal and Treaty Rights." Crown-Indigenous Relations and Northern Affairs Canada, 2013. [https://www.rcaanc-cimac.gc.ca/eng/1426169199009/1529420750631?wbdisable=true#sec4\\_b](https://www.rcaanc-cimac.gc.ca/eng/1426169199009/1529420750631?wbdisable=true#sec4_b).

The Assembly of First Nations (AFN) described negotiations as focused on the policy of “certainty” established in the 1970s, with agreements seen by Canada as static and not evolving.<sup>11</sup> Mandating was regarded as predetermined and unilateral, and lacked the flexibility to address the diverse interests of Indigenous groups. Negotiations to reach final agreements were time-consuming, resulting in exorbitant costs to Indigenous parties. While Canada offered repayable loans to Indigenous groups to participate in negotiations, loan indebtedness and repayment terms were disincentives to negotiations.

**Since 2015, Canada has successfully addressed many of the institutional barriers and process inefficiencies that have historically beset the Negotiations Program, largely attributable to a shift towards broadly participatory processes, with co-development a central feature, support for nation rebuilding, and removal of the financial burden enabling Indigenous groups to negotiate and finalize agreements. These improvements have resulted in an acceleration of negotiations, with now more than 150 active discussion tables, involving approximately 486 First Nations, 44 Inuit groups, and 7 Métis groups, collectively representing 55% of Canada’s Indigenous population.**

Since 2015, Canada has successfully addressed many of the institutional barriers and process inefficiencies that have historically beset the Negotiations Program. The approach to treaty negotiation shifted away from a one-size-fits-all approach of imposing unilaterally developed federal mandates with limited opportunities for agreements to evolve, towards a focus on co-developed paths forward and flexible solutions grounded in the recognition of rights, respect, cooperation and partnership. Canada started to work in partnership with Indigenous groups to co-develop treaties, self-government agreements and other constructive arrangements, to explore ways to advance the implementation of rights and interests. These discussions have been intended to be community-driven and respond to the unique rights, needs and interests of First Nations, Inuit and Métis groups where federal policies had previously been unable to do so.

As of 2018, Canada has provided support, through the Nations Rebuilding Program, to Indigenous groups seeking to rebuild their nations in a manner that responds to their priorities and the unique needs of their communities. Canada also introduced non-repayable contributions to support the participation of Indigenous groups in the negotiation process, a change that removed the financial burden Indigenous groups faced to repay federal loans, enabling them to negotiate and finalize agreements and have the financial means to support the development of their nations.

These improvements have resulted in an acceleration of negotiations. There are now more than 185 active discussion tables, involving approximately 489 First Nations, 22 Inuit groups, and 8 Métis groups, collectively representing a population of nearly 1 million people or 55% of Canada’s Indigenous population.

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<sup>11</sup> Assembly of First Nations. Discussion Paper: Comprehensive Land Claims Policy/Canada’s Approach to Reform. 2019.

Notwithstanding the mixed response to GC efforts to modernize the policy framework for the negotiation and implementation of Aboriginal title and rights (comprised by the *Comprehensive Land Claims Policy* (1973) and the *Inherent Right Policy* (1995)), on balance, the Negotiations Program was viewed by all respondents interviewed for this evaluation as relevant and necessary. The negotiations program has been meeting the primary need of Indigenous parties, that is, to conclude treaties, self-government agreements, and other constructive arrangements, and, other than litigation, the only avenue to practically address Aboriginal and treaty rights. There are, however, ongoing issues with the pace of negotiations due to a number of factors related to delivery and governance as discussed later in this report.

### **3.2 To what extent have recent changes to the negotiation process (e.g. elimination of loan funding, and more flexible approaches to negotiations such as rights-based discussion tables) addressed these needs?**

Recent changes to the negotiations process through the shift towards co-developed paths forward and flexible solutions, working in partnership with Indigenous groups through alternative negotiations pathways, elimination of loan funding, and introduction of nation rebuilding support have made a significant impact in meeting the needs of Indigenous groups.

As noted above, Canada has shifted negotiations towards a focus on co-developed paths forward and flexible solutions, working in partnership with Indigenous groups through alternative negotiations pathways to co-develop treaties, self-government agreements and other constructive arrangements. The introduction of the RIRSD process, with the accompanying incremental and flexible approach, is generally supported by those interviewed for this evaluation, more so by internal than external respondents. The latter cited GC institutional inertia which has seen negotiations drift from interest-based to more positional negotiating, and the failure to substantively conclude agreements. However, the RIRSD process is recognized as being open to any Indigenous group to raise any issue of priority, and this has helped build relationships with the Crown in a less constricting treaty environment, and has discouraged litigation.

The flexibility introduced by the RIRSD approach has opened multiple pathways to allow the wide ranging interests of Indigenous parties to be addressed, not just at RIRSD tables but treaty tables as well. For example, common tables to discuss common issues collectively to arrive at a relevant and fair decision that the group agrees on (e.g., two Central region negotiations tables), trilateral tables with Indigenous, federal and provincial parties (e.g., a West region negotiations table), or bilateral tables with multiple federal departments and a single Indigenous party. There have also been multiple tables on a bilateral or trilateral basis in which circumstances have warranted, for example, breaking out from collective tables with multiple Indigenous parties into Nation specific tables, as was the case for a Central region negotiations table, or breaking into issue specific tables by federal department as is commonly the situation among many of the negotiation tables examined for this evaluation. Even the needs of Indigenous groups in atypical contexts have been addressed by the more flexible approaches to negotiations, for example a East region

negotiations table without a reserve, and a Central region negotiations table without a reserve or land base.

The elimination of loan funding was widely supported by internal, and more importantly, external respondents. Loan removal has provided Indigenous groups with the opportunity to close socio-economic gaps with greater independence and autonomy in exploring section 35 rights, and there has been an increase in the number of communities with Indigenous rights and self-determination agreements.

Support provided through the Nations Rebuilding Program was also supported by internal and external respondents. Recipients of Nations Rebuilding Program support reported that the program has helped them on the pathway to rebuild their nations, and that the program largely responds to their priorities and needs.

### **3.3 In the particular context of the negotiation of Indigenous rights, where the courts have instructed governments to advance reconciliation through negotiation, what factors and issues contribute to there being a continued need for the negotiation of treaties, self-government agreements and other constructive arrangements?**

Addressing Aboriginal and treaty rights, which are recognized and affirmed under section 35 of the *Constitution Act, 1982*, remains an obligation of the Crown. This legal imperative has only grown over the evaluation period.

Addressing Aboriginal and treaty rights, which are recognized and affirmed under section 35 of the *Constitution Act, 1982*, remains an obligation of the Crown. This legal imperative to continue the negotiation of treaties, self-government agreements, and other constructive arrangements has only grown during the time period being evaluated, with Supreme Court rulings regarding adherence to international laws (e.g., the UNDRIP) and furthering inherent rights; to meet the government's constitutional commitments, and meeting the legal obligations to Indigenous peoples; and, the Crown's values, goals and commitment to Indigenous reconciliation. Although the response to Canada's efforts to evolve section 35 policy tools has been mixed, there is general agreement that mutually agreed arrangements between Indigenous groups and the Crown are in the collective interests of all Canadians.

### 3.4 In what ways does the negotiation of treaties, self-government agreements and other constructive arrangements align with the priorities of the federal government and the specific mandate of CIRNAC?

The negotiation of treaties, self-government agreements and other constructive arrangements was found to generally align with the TRC Calls to Action and the UNDRIP, although internal respondents tended to be more positive than external parties regarding the extent of this alignment.

In 2015, the GC committed to achieve reconciliation with Indigenous peoples and to implement the Truth and Reconciliation Commission of Canada (TRC) *Calls to Action*. In 2016, the government endorsed the UNDRIP without qualification and committed to its full and effective implementation,<sup>12</sup> and in December 2020, *Bill C-15: The United Nations Declaration on the Rights of Indigenous Peoples Act*, was introduced, described as a key step in renewing the government's relationship with Indigenous peoples.<sup>13</sup>

Pursuing negotiations is an essential part of fulfilling Canada's international human rights commitments (i.e., the UNDRIP) as well as domestic legal commitments (i.e., the TRC Calls to Action), which are both within the government's priorities and mandate. Redress for past wrongs, such as dispossession of lands, territories and resources, is viewed as a fundamental human right by the UNDRIP and TRC Call to Action 45, and in this, the overall objective of the Negotiations Program is aligned.

TRC Call to Action 45 calls for Canada to repudiate concepts used to justify European sovereignty over Indigenous lands and peoples, adopt and implement the UNDRIP as the framework for reconciliation, and renew or establish Treaty relationships.<sup>14</sup>

The UNDRIP recognizes the unique status of Indigenous peoples and their right to self-determination, which has influenced the development of Canada's self-government policies,

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<sup>12</sup>United Nations, United Nations Declaration on the Rights of Indigenous Peoples. 2007.

<sup>13</sup>Department of Justice, *Bill C-15: United Nations Declaration on the Rights of Indigenous Peoples Act*, 2020.

<sup>14</sup> ROYAL PROCLAMATION AND COVENANT OF RECONCILIATION 45. We call upon the Government of Canada, on behalf of all Canadians, to jointly develop with Aboriginal peoples a Royal Proclamation of Reconciliation to be issued by the Crown. The proclamation would build on the Royal Proclamation of 1763 and the Treaty of Niagara of 1764, and reaffirm the nation-to-nation relationship between Aboriginal peoples and the Crown. The proclamation would include, but not be limited to, the following commitments: i. Repudiate concepts used to justify European sovereignty over Indigenous lands and peoples such as the Doctrine of Discovery and terra nullius. ii. Adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples as the framework for reconciliation. iii. Renew or establish Treaty relationships based on principles of mutual recognition, mutual respect, and shared responsibility for maintaining those relationships into the future. iv. Reconcile Aboriginal and Crown constitutional and legal orders to ensure that Aboriginal peoples are full partners in Confederation, including the recognition and integration of Indigenous laws and legal traditions in negotiation and implementation processes involving Treaties, land claims, and other constructive agreements.

particularly articles 3-4, 14, 23, 26.1, 27, 37.<sup>15</sup> These include the *Recognition and Reconciliation of Rights Policy for Treaty Negotiations in British Columbia* and the RIRSD framework, both of which emphasize flexibility in creating governing structures and capacity to govern, and rebuilding historic nations. Canada and British Columbia have endorsed and committed to fully implement the UNDRIP, to that end, British Columbia enacted the *Declaration on the Rights of Indigenous Peoples Act* (Declaration Act) in 2019 followed by a similar federal Act which received Royal Assent and came into force during 2021. As the backdrop to the negotiations program, the UNDRIP is particularly germane, recognizing traditional governance and traditional land ownership, challenging the negotiation policy and process to evolve.

Generally, internal respondents tended to be more positive than external parties regarding the extent the negotiations program aligns with the TRC Calls to Action and the UNDRIP.

The mandate letters of the Minister of Indigenous and Northern Affairs Canada (INAC) (2015)<sup>16</sup> and Minister of Crown-Indigenous Relations (2017)<sup>17</sup> refers to clarifying obligations and ensuring the implementation of pre-Confederation, historic, and modern treaties and agreements. The mandate letter of the Minister of Crown-Indigenous Relations (2019) states that there is “no more important relationship to me and to Canada than the one with Indigenous Peoples,” and that self-determination remains a key federal priority.<sup>18</sup> Federal efforts to transform negotiations in a collaborative manner with Indigenous parties is a clear example of alignment with the Prime Minister’s expectations expressed in these mandate letters.

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<sup>15</sup> ARTICLE 3 Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

ARTICLE 4 Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

ARTICLE 14 Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

ARTICLE 26 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

ARTICLE 27 States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

ARTICLE 37 1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

<sup>16</sup>Office of the Prime Minister, *Minister of Indigenous and Northern Affairs Mandate Letter*. Ottawa, 2015.

<https://pm.gc.ca/en/mandate-letters/2015/11/12/archived-minister-indigenous-and-northern-affairs-mandate-letter>

<sup>17</sup>Office of the Prime Minister, *Minister of Crown-Indigenous Relations and Northern Affairs Canada Mandate Letter*. Ottawa, 2017. <https://pm.gc.ca/en/mandate-letters/2017/10/04/archived-minister-crown-indigenous-relations-and-northern-affairs>

<sup>18</sup>Office of the Prime Minister, *Minister of Crown-Indigenous Relations Mandate Letter*. Ottawa, 2019.

<https://pm.gc.ca/en/mandate-letters/2019/12/13/minister-crown-indigenous-relations-mandate-letter>

**The negotiation of treaties, self-government agreements and other constructive arrangements aligns strongly with CIRNAC's mandate to renew nation-to-nation and government-to-government relationships between Canada and Indigenous groups.**

The negotiation of treaties, self-government agreements and other constructive arrangements aligns strongly with federal priorities, particularly reconciliation and supporting nation-to-nation relationships. Concluding agreements improves the lives of Indigenous communities and contributes to the advancement of reconciliation. For example, empirical and anecdotal information demonstrate that modern treaties have resulted in an improvement in the lives of Indigenous people,<sup>19</sup> and has also strengthened relations with Canada.

The government is committed to renewing its relationship with Indigenous peoples based on recognition of rights, respect, co-operation and partnership. Treaties between Indigenous groups and the Crown are of the utmost value in ensuring a strong and collaborative relationship between Canada and Indigenous groups. The Negotiations Program is one mechanism to do so.

While those interviewed for this evaluation expressed many different definitions and understandings of reconciliation, and views about the extent to which reconciliation has been advanced through the negotiations process are mixed, all parties recognize that the GC has made efforts in this regard. Among external respondents, reconciliation is seen as moving in the right direction, although without tangible results as yet. Among federal departments, CIRNAC is viewed as being at the forefront in terms of reconciliation efforts, with some OGDs viewed as lacking capacity and/or departmental commitment to engage in reconciliation.

Among CIRNAC's other results, as with the priority of reconciliation, these were generally viewed as on the right track but tangible results had yet to be realized. This was the case for the CIRNAC result as per the Departmental Results Framework 2020-2021:

- Indigenous peoples determine their political, economic, social, and cultural development

While no issues of misalignment with CIRNAC's mandate were raised, respondents did observe that there is misalignment with the mandates of some OGDs, where the negotiation of treaties, self-government agreements and other constructive arrangements and advancing reconciliation are not viewed as priorities.

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<sup>19</sup> Eyford, Douglas, R. "A New Direction: Advancing Aboriginal and Treaty Rights." Crown-Indigenous Relations and Northern Affairs Canada, 2013. [https://www.rcaanc-cirnac.gc.ca/eng/1426169199009/1529420750631?wbdisable=true#sec4\\_b](https://www.rcaanc-cirnac.gc.ca/eng/1426169199009/1529420750631?wbdisable=true#sec4_b).



## 4. Evaluation Findings – Design and Delivery

### 4.1 How effective are the current program delivery structures (e.g., rights-based discussion tables, negotiations support, and other relevant funding programs) in supporting the negotiation process?

Policy, program and process improvements introduced over the evaluation period have contributed to substantial improvements in the negotiations process. Many of the impediments historically impacting the negotiations process remain, however, and have affected the negotiations of non-treaty agreements and incremental treaty arrangements in much the same way as the negotiation of treaties, which suggests these are systemic issues.

RIRSD discussion tables, non-repayable contributions to support the participation of Indigenous groups in negotiations, the Nation Rebuilding Program, and the *Recognition and Reconciliation of Rights Policy for Treaty Negotiations in British Columbia* have together demonstrated Canada's commitment to working in partnership with Indigenous groups to co-develop treaties, self-government agreements and other constructive arrangements, and to explore ways to advance the implementation of rights and interests. Both internal and, more importantly, external respondents described the situation today as a substantial improvement over the past.

However, many of the impediments historically impacting the negotiations process remain<sup>20</sup>—such as the slow and cumbersome mandating and agreement approval processes, uneven coordination and collaboration of OGDs at the negotiation table, and availability of experienced negotiators. These have affected the negotiations of non-treaty agreements and incremental treaty arrangements in much the same way as the negotiation of treaties, which suggests these are systemic issues. While the impacts of these barriers, inefficiencies and accountability issues have, in some cases, been lessened through policy, program and process improvements introduced over the evaluation period, acknowledging and addressing those that remain will reduce the time and resources required to successfully conclude negotiations.

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<sup>20</sup> For example, see Assembly of First Nations. Discussion Paper: Comprehensive Land Claims Policy/Canada's Approach to Reform. 2019, and Eyford, Douglas, R. "A New Direction: Advancing Aboriginal and Treaty Rights." Crown-Indigenous Relations and Northern Affairs Canada, 2013. [https://www.rcaanc-cimac.gc.ca/eng/1426169199009/1529420750631?wbdisable=true#sec4\\_b](https://www.rcaanc-cimac.gc.ca/eng/1426169199009/1529420750631?wbdisable=true#sec4_b).

**The duration required for federal mandating and approval processes continues to be a major factor, impacting the entire negotiations process and the Crown-Indigenous relationship. Indigenous groups require more transparency about the mandating process to fulfil accountability requirements to their communities and leadership. Devolving select decision-making and funding approval authorities to the FSC and federal negotiators could accelerate the conclusion of negotiations and contain costs.**

Canada has shifted its approach away from imposing unilaterally developed federal mandates with limited opportunities for agreements to evolve, towards a focus on co-developed paths forward and flexible solutions, yet the time required for federal mandating and approval processes continues to be a major factor impacting the time to close negotiations and associated costs.

The process to seek a negotiation mandate or to secure funding through the section 35 Rights Funding Envelope is complex and time consuming. When a specific negotiation mandate is being sought or the Cabinet decision being sought implicates section 35 Rights, a Memorandum to Cabinet is brought forward to FSC Transactional. Often there is also substantial interest from OGDs, requiring their engagement.<sup>21</sup> To access the section 35 Rights Funding Envelope, a business case (or exchange of letters prepared for renewals and agreements already in effect) needs to be approved by the ADMs of the three Central Agencies in their capacity as FSC Transactional members. Following this approval, a Treasury Board submission is required, generally a lengthy process.

As external respondents from a Central region negotiations table noted, federal negotiators do not have the authority to take decisions and so do not have the discretion to substantively discuss and resolve issues at the negotiations table without seeking a mandate. However, it was widely reported by internal and external respondents that securing mandates, approvals and compensation does not occur in a timely manner. As respondents for a Central region negotiations table observed, this impacts the entire negotiations process and the Crown-Indigenous relationship.

External respondents for two Central region negotiations tables reported feeling pressure to accept offers because any changes would require a new mandate that could take several years to obtain Cabinet approval. External respondents for a West region negotiations table noted that, despite a detailed roadmap for the negotiations process, the mandating process introduced substantial delays. In this case, Fisheries and Oceans Canada (DFO) was reportedly particularly slow in obtaining mandates, which respondents attributed to internal resistance to the UNDRIP and reconciliation. External respondents for a West region negotiations table noted that mandates are a mechanism to ensure that Canada advances negotiations, but the presence of a mandate can constrain the breadth of discussions.

External respondents raised concerns about the transparency of the mandating process. Given mandating is a major factor impacting the duration of negotiations, external respondents expect clear communication about the progress of mandates through Canada's approval system.

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<sup>21</sup> FOG-FSC Secretariat Internal Standard Operating Procedures. 2021.

Mandating is viewed as a Cabinet confidence, subject to an indiscriminate blanket prohibition. For example, one internal respondent, in response to a question about the mandating process, provided an Indigenous group with information publicly available on the website of one of the central agencies, an action that was censured by officials from that same agency. As external respondents noted, Indigenous negotiators are accountable to their own communities and leadership, particularly as their participation in negotiations represent a substantial investment of resources and time, with potentially serious political consequences. There is a reasonable expectation that regular status updates of negotiations be provided, including the progress of mandating.

Respondents suggested greater empowerment of federal negotiators through devolved decision-making and funding authority approvals. To ensure continuity of negotiations and implementation, respondents suggested increased authorities (e.g., an umbrella mandate) and broadened scope to help reduce the need to go to Cabinet for all matters, and advance interdepartmental cohesion and coordination, coupled with a general decentralization of decision-making, and a discretionary funding envelope that can be managed by CIRNAC at negotiation tables. As noted in section 4.2, this could involve the FSC in a more substantial decision-making, oversight and accountability role.

**While the FOG-FSC process is intended to ensure collaboration across federal departments, in practice, coordination of OGDs and P/Ts at the negotiations table can be problematic in terms of attitude, approach and positioning. This has introduced a wide range of issues which have eroded the relationship between Canada and Indigenous groups, and delayed negotiations. Improved commitment to a whole-of-government approach, with better oversight and greater OGD accountability is required.**

Collaboration across federal departments and agencies occurs through the FSC processes. FSC Transactional and FSC Policy are interdepartmental fora to review, oversee and make recommendations on section 35-related activities and related policy developments.<sup>22</sup> These fora provide a critical whole-of-government perspective and oversight prior to Ministerial and/or Cabinet consideration. At the working level, federal negotiators are responsible for keeping FOG members updated and working closely with departments, particularly Central Agencies and those departments that may be implicated in negotiations, discussions and/or the implementation of an agreement, throughout the negotiation process. This process is intended to ensure a whole-of-government approach and awareness of upcoming activities.

In practice, coordination of OGDs (and P/Ts) at the negotiations table has in some cases been problematic in terms of attitude, approach and positioning. Both internal and external respondents reported a wide range of issues which have eroded the relationship between Canada and Indigenous groups, and delayed negotiations. For example, as OGDs are on boarded, they may bring with them a different understanding of co-development, what it means to co-develop

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<sup>22</sup> Federal Steering Committee on Section 35 Rights, Revised Terms of Reference – 2020.

mandates and adopt a “blank page” approach to negotiations, and are less comfortable with the RIRSD premise of automatic recognition of rights.

In contrast to CIRNAC, external respondents for a West and East region negotiations table described some OGDs (particularly DFO in contrast to Parks Canada (PC)) and negotiators as maintaining past beliefs of and attitudes towards Indigenous peoples, in spite of GC adoption of the reconciliation agenda and the UNDRIP. Respondents for a Central region negotiations table also described OGDs as unaware of the lived reality of Indigenous peoples. External respondents for a Central region negotiations described OGDs as risk averse, which these respondents attributed to CIRNAC failing to properly educate OGD partners. This feedback provides an opportunity for CIRNAC to continue to provide support and advice to OGD partners on reconciliation and section 35 rights.

Respondents for a East region negotiations table described friction between CIRNAC and OGDs when CIRNAC negotiators were negotiating topics OGDs felt were encroaching on their mandates. It was suggested that this situation was partially attributable to the RIRSD approach encouraging open-ended discussions with Indigenous communities on various areas outside of CIRNAC’s mandate.

Some internal respondents noted that OGDs and CIRNAC sectors with responsibility for the implementation of agreements are not provided the space for consultations to rigorously assess the feasibility of implementation. In contrast, external respondents for a West region negotiations table noted that during the negotiations with British Columbia, the implicated provincial agencies were brought into the negotiations process, to ensure their familiarity with the agreement, which enabled implementation to occur seamlessly.

In many cases, Provincial and Territorial involvement is important due to jurisdictional issues, and respondents noted that trilateral tables are often more efficient than successive bilateral tables. In some jurisdictions, there has been resistance to establishing trilateral tables. For example, in the case of Quebec, hesitation has been expressed by the provincial government and some First Nations in establishing trilateral tables.

Improving federal interdepartmental collaboration and commitment to a whole-of-government approach to negotiation, the RIRSD approach, and the UNDRIP and reconciliation could involve, as noted in section 4.3, FSC in a more substantial oversight and accountability role.

**Difficulties recruiting and retaining skilled and experienced negotiators, the lengthy period required to onboard negotiators, and high turnover of federal negotiators has caused destabilization at negotiations tables and introduced substantial delays in the negotiations process.**

Maintaining stable negotiation teams, on the part of Canada and Indigenous parties, is an important factor to create the conditions for effective negotiations, such as collegiality and trust.

Internal respondents described serious difficulties recruiting and retaining skilled and experienced negotiators, an issue across the federal government not only CIRNAC. Internal respondents report excessive workloads, with officials responsible for far more tables than in the past, and a difficult and high stress work environment. These factors have affected recruitment and retention. Some internal respondents also noted that in some regions, such as British Columbia, the high cost of living has also proven to be a challenge for recruitment. Even when federal negotiators can be recruited, the time required to onboard new negotiators, reportedly up to one year, was also raised as a concern.

This had led to the situation, widely reported by internal and external respondents to the Government of Canada, where there is a high turnover of federal negotiators, each bringing their own personal values, biases and style to the negotiations table, and the use of junior staff in roles more appropriate to seasoned negotiators. External respondents for a Central region negotiations table reported turnover of federal negotiators three to four times over the life of the negotiations table. External respondents for a West region negotiations table noted that the table had seen three CIRNAC chief negotiators since 2017, a situation described as demoralizing and frustrating. The impact of this, as described by external respondents for a East region negotiations table, was destabilization at the negotiations table and substantial delays in the negotiations process.

External respondents for a Central region negotiations table study described the federal negotiations team as understaffed. In contrast, external respondents for a Central region negotiations table faced an excessively large federal negotiations team of 10-15 officials (outnumbering their own team by 5:1), attributed in part to the split of the former Department of Indian Affairs and Northern Development.

**The RIRSD approach is a substantial departure from historical federal negotiations practices. Its relatively recent introduction at scale has, not unexpectedly, surfaced several issues attributable to institutional inertia. Some of these are related to behaviour of federal negotiators, commitment of OGDs to the co-development approach, the UNDRIP and reconciliation, and recruitment and retention practices.**

The introduction of the substantially more flexible, exploratory and innovative RIRSD approach has surfaced a number of related issues, not unexpected given this approach was introduced relatively recently and, generally successfully, implemented at scale.

Some external respondents raised the slow adaptation of supporting programs, and associated terms and conditions to the new reality. For example, some external respondents experienced issues with the eligibility of some activities proposed for Nation Rebuilding Program support. Internal respondents noted the lack of clear guidance on these types of activities, which in an environment of financial control, tended to lead to a more conservative interpretation of terms and conditions. In this respect, the program could benefit from a reassessment of program terms and conditions.

As noted earlier in this report, respondents described some OGDs and federal negotiators as maintaining past beliefs of and attitudes towards Indigenous peoples. Other respondents reported uneven OGD adoption of the RIRSD approach, and commitment to the UNDRIP and reconciliation. In this respect some departments, such as PC, were viewed as more effective than others, attributable in part to the former's widespread involvement with Indigenous groups due to its mandate.

Some respondents described a gap between the political vision and promise of the RIRSD co-development approach, with heightened expectations on the part of Indigenous groups, and its implementation by the federal bureaucracy, with some departments reverting back to past practices.

Finally, as noted earlier in this report, federal processes, such as mandating and approval, interdepartmental coordination, and recruitment and retention of federal negotiators, have not adapted to the more flexible, exploratory and innovative RIRSD approach, delaying progress of negotiations.

These issues would benefit from solutions that demonstrate the same flexibility and innovation as the RIRSD approach.

**Adaptation of some aspects of the negotiations policy framework has not kept pace with the speed and breadth of RIRSD implementation, particularly with respect to issues that have been, or likely will be, encountered by negotiators at more than one table. Recognition of the jurisdiction and authority of the Hereditary Chiefs and flexibility of the ratification process are two such issues that would benefit from standardized policy responses.**

Internal respondents noted the slow adaptation of the negotiations policy framework to the new reality, particularly with respect to issues that have been, or likely will be, encountered by negotiators at more than one table. External respondents report experiencing inconsistent, delayed or simply no response from Canada to these issues, while internal respondents raised the lack of a standardized policy response to some of these.

For example, recognition of the jurisdiction and authority of the Hereditary Chiefs have remained unresolved for some years. Respondents for a West region negotiations table reported that Justice Canada (JUS) headquarters has displayed a willingness to examine less conventional approaches in this regard but its regional staff had proven to be more intractable.

In contrast, respondents for a Central region negotiations table noted that the federal government's thinking has evolved to a more favourable position on traditional decision-making, with a flexible approach to ratification co-developed to enable each First Nation at the negotiations table to develop a ratification process based on their distinct culture and customs while meeting common Indigenous and federal interests of openness and transparency.

These types of issues would benefit from standardized policy responses, and would help advance negotiations more efficiently.

#### **4.2 To what extent are current flexibilities built into the program effective at enabling the negotiation of incremental agreements that demonstrate progress, and build capacity in Indigenous communities?**

The negotiations program has evolved significantly to allow for a greater use of bilateral or tripartite incremental agreements, which has been supported significantly through the RIRSD approach . Development of incremental agreements has helped to build trust between negotiating parties, strengthen connections between communities and provincial governments and industry, and incentivized continuing with negotiations.

The negotiations program has evolved significantly to allow for a greater use of bilateral or tripartite incremental agreements, which has been supported significantly by the use of RIRSD tables. Progress on incremental agreements has worked to build trust between negotiating parties, strengthen connections between communities and provincial governments and industry, and incentivize continuing with the negotiation process. Section 6.1 describes a number of tables in which incremental approaches were used.

The RIRSD process has been the most notable success over the evaluation period, with Canada's accompanying commitment to co-develop new policies and approaches to resolution of Aboriginal rights and title. External respondents interviewed for this evaluation held a general view that the RIRSD approach has been a positive development, described by one respondent as "ground breaking," and most described the negotiations process as more rapid and a positive experience, being more collaborative and interest-based. Despite the shortcomings described elsewhere in this report, Canada's incremental approach is generally preferred, with Indigenous parties seeing real change more rapidly. Although a more modest approach to negotiations, this approach is more realistic and aligns better with the interests of Indigenous groups.

The case studies undertaken for this evaluation have highlighted the value of the incremental approach, enabling focussed conversations with Canada on specific topics of interest to Indigenous groups.

Internal respondents for a Central region negotiations table noted that the RIRSD approach has made the negotiations process more efficient, providing the federal negotiations team with more authority to proceed, and overall is a more co-developed approach, contrasting favourably with the former "take it or leave it" approach. As noted elsewhere in this report, this innovative approach to negotiations did experience challenges because the federal government has historically been neither flexible nor innovative with negotiations.

A East region negotiations table's interests were well-suited to be advanced through multiple negotiation approaches, authorities, and timelines. While an internal respondent observed that this table is likely not a primary example of how incrementalism builds capacity in Indigenous communities, the negotiation of the self-government agreement could arguably be an example of enhancing capacity of the Nation. Incrementalism was adopted by this table by necessity and due to the province's lack of participation in a trilateral manner.

In the case of the Nation Rebuilding recipient, one internal respondent observed that the support received through the Nation Rebuilding Program could assist the Nation to become more organized, determine their structure and how to approach negotiations at the table, and so reduce the time required for negotiations.

#### **4.3 Are roles and responsibilities clearly defined and understood by all stakeholders of the current program delivery structures?**

The roles and responsibilities of parties to negotiations are clearly described through a variety of negotiation table documents. While good understanding about roles and responsibilities were reported, there were some exceptions to this, particularly among OGDs and, in some cases, within TAG. All parties would benefit from clearer guidance in this respect.

The roles and responsibilities of parties to negotiations are clearly described through the various negotiation table documents, such as the Memorandum of Understanding, Letter of Understanding and table plans. While internal and external respondents reported good understanding about their roles and responsibilities at the negotiations table, there were some exceptions to this, particularly among OGDs.

Internal respondents reported that as OGDs onboard to negotiations, they do not necessarily understand their roles and responsibilities, and as noted earlier in this report, may not have the same level of commitment to co-development, the flexible and innovative RIRSD approach, and the UNDRIP and reconciliation. Internal respondents for the Nation case study described CIRNAC as expending significant time and effort on internal consultations with OGDs to ensure that roles and responsibilities in terms of governance and program delivery were universally understood.

Some internal respondents raised issues with federal coordination as areas for improvement, important to ensure consistency of negotiation approach. This included coordination between TAG and OGDs, and within TAG itself. Misunderstanding of respective roles and responsibilities was identified as a likely reason. Fiscal Branch was identified as one organization that would particularly benefit from improved policy direction in this respect to help guide funding allocation decisions.

Some respondents suggested developing generic information to clearly outline expectations, roles and responsibilities for Indigenous groups considering moving into the negotiations process.



#### 4.4 To what extent do current internal federal approval and coordination processes (e.g., Federal Officials Group and Cabinet) and governance bodies (e.g. Federal Steering Committee) support a results-based approach to negotiating treaties, self-government agreements and other constructive arrangements?

Opportunities exist to better utilize the Federal Steering Committee by devolving some elements of Cabinet decision-making, which would streamline the negotiations process, accelerating the conclusion of negotiations and reducing the cost. Decentralizing decision-making to FSC could also result in improved interdepartmental cohesion and coordination, and adherence to reconciliation and UNDRIP.

The Federal Steering Committee for Transactional Items (FSC Transactional) and the Federal Steering Committee for Policy and Coordination (FSC Policy) are ADM-level interdepartmental fora to review, oversee and make recommendations on section 35-related activities and related policy developments (called the “Executive” for FSC Policy). They provide a critical whole-of-government perspective and oversight prior to Ministerial and/or Cabinet consideration.<sup>23</sup> FSC Transactional is supported by the Federal Officials Group (FOG) on Section 35 Rights. FSC Policy Executive is supported by a Director General level subcommittee. External respondents were generally unclear about the role of the FSC and so were not in a position to offer any comment, while internal respondents were generally supportive of the FSC. Given the challenge of OGD coordination, viewed by all respondents as a key area for improvement of the negotiations process, internal respondents suggested, that FSC Transactional could more substantively assist in this respect, as FSC Transactional is well-positioned to establish parameters for and hold OGDs accountable for their involvement of section 35 related negotiations, discussions and implementation processes.

FOG is a working-level forum that reviews, discusses and seeks to build consensus on section 35 related items. FOG members directly support FSC Transactional. Again, external respondents were unclear about the role of the FOG and so were not in a position to offer any comment. Internal respondents were less supportive of the FOG compared to FSC Policy. Internal respondents for a Central region negotiations table described the FOG as lacking in the required expertise, unnecessarily risk averse and offering little value.

Generally, internal respondents observed that FSC Transactional and FSC Policy could be more effectively used. For example, some respondents suggested that elements of Cabinet decision-making could be devolved to the FSC through increased authorities and broadened mandate. For example, since the FSC Transactional already provides advice to Cabinet about negotiating mandates, with support from FOG, there may be an opportunity for select mandates and funding

<sup>23</sup> Federal Steering Committee on Section 35 Rights: Revised Terms of Reference – 2020.

decisions to be approved at this level instead. Reducing the reliance on Cabinet for all matters would streamline the negotiations process, reducing the time and cost required to bring negotiations to a close. Decentralizing decision-making to FSC could also result in improved interdepartmental cohesion and coordination, and adherence to reconciliation and the UNDRIP.

**A results-based approach to negotiating treaties, self-government agreements and other constructive arrangements implies openness and transparency, with well-articulated expectations in terms of results, targets and timelines, clear responsibilities, and a well-thought out system of accountability. While components of a results-based approach were found, a stable performance framework at the program level, co-developed by all stakeholders, to clarify interests, expectations and results, including service standards, was found to be largely absent.**

Components of a results-based approach to negotiating treaties, self-government agreements and other constructive arrangements were found, but this was by no means system-wide. A results-based approach implies openness and transparency, with well-articulated expectations in terms of results, targets and timelines, clear responsibilities, and a well-thought out system of accountability.

There are many political, social, and economic factors that contribute to the negotiation process and conclusion of agreements, and many co-delivery partners are involved, including OGDs, Indigenous parties, and P/Ts. Identifying appropriate outcomes for the Negotiations Program, and associated indicators and targets, is consequently difficult. As noted later in this report, the program has struggled to maintain a stable performance framework that not only accurately reflects its expected results but can be also be used, not simply as a reporting instrument, but also as a tool for planning, to make decisions at the program level. A comprehensive, stable performance framework is, at the program level, the main mechanism to operationalize results-based management and a system of accountability.

Also as noted later in this report, there was a lack of readily available data to track and analyze the performance of the negotiation process at the program level. The program's performance framework saw the introduction and retirement of many indicators over the evaluation period, and difficulties were experienced obtaining performance data, making it difficult to determine the impact of the overall program.

At the negotiations table level, there are robust processes in place for table planning (e.g., multi-year table work plans), table budgeting, and associated monitoring and reporting (e.g. annual table review). These assist with the overall efficiency and effectiveness of the table negotiation process, and supports accountability at the table level.

Improvements in oversight and accountability across the entire negotiations system (F/P/T including Cabinet, Indigenous), not simply within CIRNAC, first requires a stable performance framework, to clarify interests, expectations and results, including service standards (e.g., timelines for mandating). Development of this framework should not be the sole responsibility of

TAG, but requires co-development by all stakeholders, including Indigenous groups. Taking a horizontal approach to its development should also help improve interdepartmental coordination, by identifying where interests and expectations overlap and where they do not.

Since FSC is mandated to review, oversee and make recommendations on section 35-related activities and related policy developments, and has a whole-of-government (i.e., system-wide) perspective, this body is the likely candidate to centralize responsibility for ensuring accountability.

## 5. Evaluation Findings – Effectiveness

### 5.1 To what extent has the negotiation process contributed to Canada and Indigenous groups co-developing solutions regarding the implementation of rights through discussions and negotiations? (short-term outcome)

The Negotiations Program has introduced mechanisms to successfully co-develop solutions for the implementation of rights through discussions and negotiations, principally during the early stages of negotiation. While instruments such as the Memorandum of Understanding and Letter of Understanding are not legally binding or guarantors of success, they do lay a sound foundation for successful negotiations to proceed.

In response to Indigenous calls for more flexible negotiations processes, evolving case law and Canada's renewed commitments to advance reconciliation, Canada has actively pursued RIRSD tables to explore innovative ways to support Indigenous self-determination in the treaty process. This has led to the introduction of mechanisms for co-developed solutions (e.g., Memorandum of Understanding (MOU) and Letter of Understanding (LOU)), which internal and external respondents confirmed to be valuable tools in this respect. For example, external respondents for a East region negotiations table described the RIRSD MOU as an accurate reflection of the Nation's interests for exploratory discussions and long-term strategic objective,<sup>24</sup> while those for a West region negotiations table stated that the LOU committed the parties to a time limited, focused discussion regarding the potential negotiation of a reconciliation agreement to renew and strengthen their nation-to-nation relationship, and negotiate in good faith to achieve lasting reconciliation. While respondents acknowledged that MOUs and LOUs were not legally binding and do not guarantee a successful outcome, tools such as these do lay a sound foundation for negotiations.

The extent to which the negotiations process has contributed to this outcome is supported by the following two draft 2021 PIP indicators.

<sup>24</sup> That is, to negotiate a bilateral self-government agreement, enhance current capital agreement funding on housing alongside Cabinet approval of the self-government agreement, advance multilateral discussions on changes to the regional governance scheme to enhance the Nation's decision-making over its traditional territory.

Indicator: Number of Indigenous groups that have co-developed and reached preliminary types of agreements

The number of Indigenous groups that have co-developed and reached preliminary types of agreements has steadily risen over the evaluation period, and particularly since the introduction of the RIRSD policy in 2017.

The evaluation team was unable to assess performance against expectations because targets were not set for this new indicator in the draft 2021 PIP.

The number of Indigenous groups that have co-developed and reached preliminary types of agreements has steadily risen since the introduction of the RIRSD policy in 2017, from 26 in 2017-18 to 73 in 2018-19, declining to 68 in 2019-20 and 12 in 2020-21.

Table 2: The number of Indigenous groups that have co-developed and reached preliminary types of agreements between the fiscal years 2013-14 to 2020-21.

Fiscal year	Number of Indigenous Groups
2013-14	Data not available. Preliminary-type agreements were created with the establishment of the RIRSD policy which was not published until 2017.
2014-15	Same as above
2015-16	Same as above
2016-17	26
2017-18	54
2018-19	73
2019-20	68
2020-21	12

Source: Departmental Results Report and internal data from the TAG Agreements Tracker.

Indicator: Number of Indigenous groups involved in treaties, self-government and other constructive arrangement tables

The number of Indigenous groups involved in treaties, self-government and other constructive arrangement tables has steadily risen over the evaluation period, and particularly since the introduction of the RIRSD policy in 2017.

Though the data is available, the evaluation team was unable to assess performance against expectations because targets were not set for this indicator in the draft 2021 PIP. Targets were not set because this was a new indicator in the draft 2021 PIP which has not yet been approved.

The number of Indigenous groups involved in treaties, self-government and other constructive arrangement tables has steadily risen from 228 in 2013-14 to 521 in 2020-21. There was a substantial increase in 2018-19, which is likely a reflection of the introduction of the RIRSD policy in 2017.

Table 3: The number of Indigenous groups involved in treaties, self-government and other constructive arrangement tables between the fiscal years 2013-14 to 2020-21.

Fiscal year	Number of Indigenous Groups
2013-14	228
2014-15	239
2015-16	294
2016-17	375
2017-18	307
2018-19	509
2019-20	531
2020-21	521

Source: Departmental Results Report and internal data from the TAG Agreements Tracker.

## 5.2 To what extent has the negotiation process contributed to Canada and Indigenous peoples working together in establishing a new fiscal relationship? (short-term outcome)

The Negotiations Program has contributed to Canada and Indigenous peoples working together in establishing a new fiscal relationship. Progress has been made towards reforming the fiscal relationship between Indigenous groups and the government, including reforming funding processes through a co-development approach, the Collaborative Fiscal Policy Development Process, and there is a general view among external respondents that establishing a new fiscal relationship is on the right track.

CIRNAC has been successfully working through a monthly forum with self-governing Indigenous governments, the Collaborative Fiscal Policy Development Process, to review and replace fiscal financing policies that apply specifically to them. Some \$8.2M in funding was provided by TAG to improve implementation of the Collaborative Self-Government Fiscal Policy. As a result, a co-

developed funding process was released, providing Indigenous partners with greater certainty for timely access to funds to support self-government and self-determination.

Over the last three years, progress has been achieved by the collaborative process in the co-development of agreed-upon methodologies for governance and interim lands and resource expenditure needs methodologies, as well as, in 2019, the complete renegotiation of fiscal transfer agreements with 25 Indigenous self-governments. Progress has also been made towards reforming the fiscal relationship between Indigenous groups and the GC, including reforming funding processes through a co-development approach. Additionally, 302 First Nations have opted into the *First Nations Fiscal Management Act*, allowing them to work with the fiscal institutions and to assert jurisdiction in the area of fiscal governance.

While external respondents described new fiscal relationships as an area of promise rather than of tangible results, several examples of positive steps forward were provided, such as forgiveness of loans. External respondents for a Central region negotiations table noted that funds were made available to support the transition from a corporation to government, and internal respondents further clarified that other Nations had also been given access to similar sustained and reliable funding. External respondents for a East region negotiations table raised the envisioned Fiscal Finance Agreement which would provide increased governance funding, and greater control by the Nation of the fiscal transfers from Canada enabling them to identify service delivery priorities and a reduced reporting burden.

The extent to which the negotiations process has contributed to this outcome is supported by the following draft 2021 PIP indicator.

Indicator: Percentage of Self-Governing Indigenous Governments participating in the Collaborative Fiscal Policy Development Process

**Participation of self-governing Indigenous governments in CIRNAC's monthly forum for the Collaborative Fiscal Policy Development Process was 57% in 2020-21, a slight shortfall from the 67% target attributable to the COVID-19 pandemic.**

The target for this indicator is 67% average attendance at monthly meetings of CIRNAC's collaborative forum with self-governing Indigenous governments to review and replace fiscal financing policies (baseline 64% in 2020). During 2020-21, the only year for which data was available since the indicator was introduced in 2020-21, 57% of self-governing Indigenous governments participated in the Collaborative Fiscal Policy Development Process, a slight shortfall due to the cancellation of meetings during 2020 due to the COVID-19 pandemic.

### 5.3 To what extent has the negotiation process contributed to Indigenous groups rebuilding their nations? (short-term outcome)

The Nation Rebuilding Program has supported Indigenous groups to improve their capacity to govern and rebuild their nations and governments. The program is flexible and needs are being met, but to be more impactful, the NRP requires a more substantial budget, greater clarity about the eligibility of nation rebuilding activities, and a streamlined multiyear application process and associated reporting requirements.

The Nation Rebuilding Program (NRP) was introduced to support Indigenous groups to build governance structures that are responsive to their diverse needs on the path to self-determination. The program has supported key inter-governmental work, with areas of impact including information sharing, forestry agreements and environmental monitoring. The program has also supported capacity building through nation-rebuilding activities, such as traditional cultural activities and community programs, and developing governance plans and drafting constitutions.

Through the NRP, eligibility of nation rebuilding activities is flexible and few external respondents interviewed noted misalignment with their needs. Some noted that CIRNAC has not provided the required NRP support for the reconstitution of their nations, a situation which has negatively impacted the relationship between federal negotiators and Indigenous parties at the negotiations table.

Where Indigenous parties received NRP support, external respondents stated that their capacity to govern and rebuilding their nations and governments had been improved as was the case for a East and West region negotiations table. Both internal and external respondents, however, stated that to be more impactful, the NRP requires a more substantial budget (a comment also made for the related Cultural Spaces and Land Guardians programs), greater clarity about the eligibility of nation rebuilding activities, and a streamlined multiyear application process and associated reporting requirements.

The extent to which the negotiations process contributed to this outcome is supported by the following two draft 2021 PIP indicators. These indicators do not specifically speak to “rebuilding nations and governments,” that is the characteristics (end state being sought) of a “rebuilt” nation and government. The NRP is a demand-based program, and while respondents report that nation rebuilding has been advanced, the extent to which nation rebuilding needs are being met across Canada is difficult to assess. Effectiveness assessment of the NRP is difficult because data appears to only be collected for activities and outputs only, rather than outcomes.

Indicator: Percentage of Indigenous groups in negotiations that received Nation Rebuilding Program funding<sup>25</sup>

**Between 2018-19 and 2020-21, 44% of Indigenous groups that received Nation Rebuilding Program funding were in active negotiations, meeting the established target of 40%.**

The target for this indicator is 40% of Indigenous groups that received NRP funding are in active negotiations annually until March 31, 2023 (baseline 0% as of April 1, 2018). This target was met. Between 2018-19 and 2020-21, 44% of Indigenous groups that received Nation Rebuilding funding were in active negotiations.

NRP funding was \$13M in 2018-19 and 2020-21, and \$20M in 2019-20. Ontario and British Columbia received the greatest share of funding, with British Columbia receiving just over \$5M in 2019-20, and Ontario receiving about \$4.8M in 2020-21. The territories, Alberta and the Atlantic provinces tended to receive the least amount, with total funding less than \$2M during 2018-19, 2019-20, and 2020-21.

Table 4: The number and percentage of Indigenous groups in negotiations that received Nation Rebuilding Program funding between the fiscal years 2018-19 to 2020-21.<sup>26</sup>

Fiscal year	Number of Indigenous groups receiving Nation Rebuilding Program funding	Number of Indigenous groups in negotiations that received Nation Rebuilding Program funding	Percentage of Indigenous groups in negotiations that received Nation Rebuilding Program funding
2018-19	60	24	40%
2019-20	48	19	40%
2020-21	48	25	52%

Source: Program data.

Indicator: Number of Indigenous groups that have entered or reinitiated active negotiations after having received Nation Rebuilding Program funding<sup>27</sup>

<sup>25</sup> The Negotiations Program indicated that this indicator has been retired.

<sup>26</sup> The NRP program was established in 2018-19.

<sup>27</sup> The Negotiations Program indicated that this indicator has been retired.



Between 2019-20 and 2020-21, 1 Indigenous group had entered or reinitiated active negotiations after receiving Nation Rebuilding Program funding, on track to meet the established target of 4 Indigenous groups by March 31, 2023.

The target for this indicator is 4 Indigenous groups have entered or reinitiated active negotiations after having received NRP funding by the end of the year 5 funding on March 31, 2023 (baseline 0 groups as of April 1, 2018). Between 2019-20 and 2020-21, 1 Indigenous group entered or reinitiated active negotiations after having received NRP funding.

Table 5: The number of Indigenous groups that have entered or reinitiated active negotiations after having received Nation Rebuilding Program funding between the fiscal years 2018-19 to 2020-21.<sup>28</sup>

Fiscal year	Number of Indigenous groups
2018-19	Not applicable first year of the Program
2019-20	0
2020-21	1

Source: Program data.

#### 5.4 To what extent has the negotiation process improved Nation-to-Nation, Government-to-Government, and Inuit-to-Crown relationships? (medium-term outcome)

The extent the negotiation process has improved Nation-to-Nation, Government-to-Government, and Inuit-to-Crown relationships is somewhat mixed. A number of authoritative sources point to a link between an improved negotiation process and improved relations with Indigenous groups. Without an objective definition and measures of Nation-to-Nation and Government-to-Government relationships, it is difficult to assess if this outcome is being met. Internal and external respondents expressed a wide range of views and often quite diverging.

Several authoritative sources, such as the 2016 Truth and Reconciliation Report, the 2014 Eyford Report and the 2013 joint INAC/Assembly of First Nations Senior Oversight Committee for Comprehensive Claims, point to a link between an improved negotiation process and improved relations with Indigenous groups. The negotiation process has enabled constructive dialogue about common understanding of historic treaties and provided a mechanism to strengthen the

<sup>28</sup> The NRP program was established in 2018-19.

relationship through contemporary approaches, specifically the RIRSD process. However, without an objective definition and measures of Nation-to-Nation and Government-to-Government relationships, it is difficult to assess if this outcome is being met. Differences between negotiations tables, and the stage in which negotiations are at, makes the impact on this outcome difficult to assess.

Internal and external respondents expressed a wide range of views, often quite diverging, about the extent to which the negotiation process has improved Nation-to-Nation, Government-to-Government, and Inuit-to-Crown relationships.

External respondents for a East region negotiations table described a positive nation-to-nation, government-to-government relationship, and compared to the past, vastly improved. External respondents for a Central region negotiations table described the working relationship with the federal government as positional with JUS particularly constraining federal negotiators, while internal respondents characterised the working relationship as collaborative, positive and productive.

External respondents for a Central region negotiations table noted that the GC had moved from the outdated language of extinguishment of rights, and is now framed in a more modern manner with Aboriginal title coexisting with Crown sovereignty. According to these respondents, the litmus test of reconciliation, however, would be future tangible action, for example, with revenue sharing agreements.

In the case of a West region negotiations table, internal respondents noted that a strong nation-to-nation relationship had long been the case, and reconciliation was being advanced through the negotiations process. External respondents described a visioning process between the Nation and British Columbia to understand the ten-year vision of the Nation, how the nations can coexist and share resources, and how to ensure that the formal territory of the Nation is embedded in provincial and federal law. Another West region negotiations table also undertook a similar visioning exercise, the outcome of which led to a comprehensive reconciliation agreement (with a 25-year timeframe, and significant immediate actions on the part of British Columbia to concretely demonstrate the transformation of the provincial relationship with the First Nation.

External respondents for a Central region negotiations table, observed that the conditions for a Nation-to-Nation and Government-to-Government relationship would only exist once a treaty was in place, but did add the phrase itself was more akin to a politicized slogan and few in the GC understand its meaning.

The extent to which the negotiations process has contributed to this outcome is supported by the following draft 2021 PIP indicator.

Indicator: Percentage of loans reimbursed

A total of \$470.68M will be reimbursed to 29 Indigenous groups eligible for reimbursement, with the first three of five equal payments being made in the amount of \$282.41M (60%) as of April 2022. The program is on track to meet the established target of 60% of loans reimbursed by March 31, 2023.

The target for this indicator is 60% of loans reimbursed by March 31, 2023, which the Negotiations Program is on track to achieve.

A total of 83 eligible Indigenous groups, some of which cover many Indigenous communities, had their outstanding comprehensive land claim negotiation loans forgiven in the amount of \$914.02M, effective March 31, 2020.

Some 29 Indigenous groups repaid comprehensive land claim negotiation loans to Canada and were eligible to be reimbursed. A total of \$470.68M will be reimbursed to these groups with the first three of five equal payments being made in the amount of \$282.41M (60%) as of April 2022. Two installments in the amount of \$94.14M annually remain (the remaining 40%) to be paid until fiscal year 2024-25.

## **5.5 To what extent has the negotiation process actively supported Indigenous peoples in advancing their jurisdiction over their affairs? (medium-term outcome)**

Evidence demonstrating the extent the negotiation process has actively supported Indigenous peoples in advancing jurisdiction over their affairs was limited. Respondents described this outcome as a work in progress. By definition, however, negotiated agreements are intended to advance Indigenous jurisdiction across social, political and economic affairs, and to enable decision-making over their communities and exercise rights. The Nation Rebuilding Program, and other supports provided such as loan forgiveness, create the foundation for advancing jurisdiction.

There was limited evidence demonstrating the extent to which the negotiations process has supported Indigenous peoples in advancing their jurisdiction over their affairs. By definition, however, negotiated agreements are intended to advance Indigenous jurisdiction across social, political and economic affairs, and to enable decision-making over their communities and exercise rights. The Nation Rebuilding Program, and other supports provided such as loan forgiveness, create the foundation for Indigenous peoples to advancing jurisdiction over their affairs.

The general view from respondents interviewed for this evaluation was that while it was too early to determine if this outcome had been achieved, progress was on track to do so. Internal

respondents for a Central region negotiations table noted that a specific accord speaks to that Nation's value and priority. In a Central region negotiations table, an external respondent stated that while it was too early to determine if negotiations were on the right track to secure Indigenous jurisdiction, the negotiations were going in the right direction. External respondents for a East region negotiations table described a sense of empowerment, with open discussions providing a sense of control to prepare with more confidence for subsequent agreements and next steps. The internal respondent for this case observed that the self-government agreement under negotiation with the East region negotiations table, while narrow in scope, provides for law-making jurisdiction as opposed to by-law powers.

The extent to which the negotiations process has contributed to this outcome is supported by the following draft 2021 PIP indicator.

Indicator: Number of treaties, self-government and other constructive arrangement tables (including number of Indigenous groups involved at these tables)

Table 6: The number of tables and the number of Indigenous groups involved at these tables for each year of the evaluation period.

Fiscal year	Number of Tables	Number of Indigenous groups
Pre-2014	54	447
2013-14	1	1
2014-15	2	3
2015-16	8	127
2016-17	25	25
2017-18	24	186
2018-19	30	112
2019-20	17	68
2020-21	6	6
2021-22	25	145

Source: Program data.

## 5.6 To what extent has the negotiation process supported Indigenous peoples to determine their political, economic, social and cultural development? (long-term outcome)

Empirical evidence demonstrating the extent the negotiation process has actively supported Indigenous peoples to determine their political, economic, social and cultural development is limited. Respondents described this outcome as a work in progress but on the right track. By definition, however, treaties, self-government or other constructive arrangements are intended to advance Indigenous political, economic, social and cultural development.

By design, treaties, self-government and other constructive arrangements are intended to advance Indigenous political, economic, social and cultural development. However, the empirical evidence attributing the improvement of community well-being to the conclusion of treaties, self-government and other constructive arrangements is limited and is a topic worthy of more comprehensive analysis:

- The 2013 Eyford Report stated that modern treaties improve community well-being, offering as an example the 11 Yukon treaty First Nations, with socio-economic outcomes improved over pre-treaty and exceeding those of the non-treaty First Nations in that region.<sup>29</sup>
- In a series of five reports published in 2016, the British Columbia Treaty Commission modelled the financial and economic benefits of modern treaties. Benefits were found for those First Nations during the treaty negotiation period through the implementation period, although this finding was described as “very preliminary” due to insufficient data. Other similar analyses have faced similar data limitations. Nevertheless, the conclusion from the British Columbia Treaty Commission report was that there is a significant net economic benefit to First Nations, British Columbia, and Canada resulting from the settlement of treaties with First Nations.<sup>30</sup>
- In 2021, CIRNAC reported that, since 1981, Community Well-Being (CWB) scores have improved for First Nations, Inuit and non-Indigenous communities. Growth was found to be more pronounced for First Nations communities with stand-alone Self-Governing Agreements, then First Nations with Modern Treaties, Non-Treaty First Nations, and Modern Treaty Inuit. CIRNAC noted difficulties in distinguishing the impact of treaties or number of opt in agreements on well-being from the impact of regional factors. However, the difference in performance between self-governing and non-self-governing communities were found to indicate that, following a self-government agreement,

<sup>29</sup> Eyford, Douglas, R. “A New Direction: Advancing Aboriginal and Treaty Rights.” Crown-Indigenous and Northern Affairs Canada, 2013. [https://www.rcaanc-cirnac.gc.ca/eng/1426169199009/1529420750631?wbdisable=true#sec4\\_b](https://www.rcaanc-cirnac.gc.ca/eng/1426169199009/1529420750631?wbdisable=true#sec4_b)

<sup>30</sup> Deloitte Report: Socio-economic Benefits of Modern Treaties in BC (2016) Deloitte (bctreaty.ca)

Indigenous peoples are able to make significant and impactful changes to various social, political, and economic factors in their community.<sup>31</sup>

- In 2020, CIRNAC stated that the return of all comprehensive land claims negotiation loans had enhanced the ability of communities to increase health and well-being for all community members and to pursue better economic development.<sup>32</sup>

Anecdotal evidence confirms a strong link between the conclusion of treaties, self-government and other constructive arrangements and Indigenous political, economic, social and cultural development. For example, First Nation leaders interviewed for the British Columbia Treaty Commission studies believed that social and societal benefits are progressively realized as First Nations establish government and laws; build the physical infrastructure supporting an expanded resident population; and increase economic and commercial activities.<sup>33</sup>

Respondents for this evaluation generally described this outcome viewed as a work in progress but on the right track. Internal respondents for a Central region negotiations table noted the benefits of an accord which supported rebuilding the Nation's language. In a East region negotiations table, external respondents noted that since the province is not at the table, the opportunities for economic development were limited. The internal respondent for this case study observed that the Fiscal Finance Agreement envisioned under the agreement enables the Nation to identify their own service delivery priorities with fewer reporting requirements. The development of a constitution for the self-government agreement has resulted in significant community reflection on the Nation's values and governance practices, further advancing the Nation's efforts to determine their political, social and cultural development.

The extent to which the negotiations process has contributed to this outcome is supported by the following draft 2021 PIP indicators:

Indicator: Percentage of communities with concluded arrangements demonstrating an increase, decrease or static Community Well-Being Index score

The CWB index is a composite index based on Statistics Canada's Census of Population (1981 to 2006, 2016) and the National Household Survey (2011). No data was provided because the Community Well-being Index is awaiting an update based on the 2021 Census data which has yet to be released by Statistics Canada. This indicator is being proposed in the draft 2021 PIP .

Indicator: Number of communities where treaties, self-government and other constructive arrangements that have been concluded

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<sup>31</sup> Crown-Indigenous Relations and Northern Affairs Canada (2021). "Modern Treaties and Opt-In Agreements and Measuring Socio-Economic Outcomes," February 2021.

<sup>32</sup> Crown-Indigenous and Northern Affairs Canada (2020). "Departmental Results Report 2019-2020," Last modified December 7, 2020. <https://www.rcaanc-cirnac.gc.ca/eng/1602010631022/1602010813619>

<sup>33</sup> Deloitte Report: Socio-economic Benefits of Modern Treaties in BC (2016) Deloitte (bctreaty.ca)

The number of communities where treaties, self-government and other constructive arrangements that have been concluded has steadily risen over the evaluation period.

The evaluation team was unable to assess performance against expectations because targets were not set for this indicator. The program did not provide a rationale for the lack of target.

The number of communities where treaties, self-government and other constructive arrangements that have been concluded has steadily risen from 113 in 2013-14 to 161 in 2019-20 and 159 in 2020-21.

Table 7: The number of communities where treaties, self-government and other constructive arrangements that have been concluded between the fiscal years 2013-14 to 2020-21.

Fiscal year	Number of Communities
2013-14	113
2014-15	114
2015-16	115
2016-17	117
2017-18	156
2018-19	54*
2019-20	161*
2020-21	159

Source: Departmental Results Report and internal data from the TAG Agreements Tracker/Negotiation Tracker.

\* The data in the Departmental Results Report for this year includes only agreements that were negotiated through the RIRSD process.

Indicator: Number of treaties, self-government and other constructive arrangements that have been concluded

The number treaties, self-government and other constructive arrangements that have been concluded has risen from 25 in 2013-14 to 39 in 2020-21. The established target of 41 concluded arrangements was not met.

The target for this indicator is 48 communities where treaties, self-government and other constructive arrangements that have been concluded during 2020-21 (baseline 38 as of December 2019). This target was not met and the rationale provided was that the number of projected agreements that should have been concluded was impacted by the pandemic.

The number of treaties, self-government and other constructive arrangements that have been concluded has risen from 25 in 2013-14 to 39 in 2020-21.

Table 8: The number of treaties, self-government and other constructive arrangements that have been concluded between the fiscal years 2013-14 to 2020-21.

Fiscal year	Number of treaties, self-government and other constructive arrangements
2013-14	25
2014-15	1
2015-16	1
2016-17	0
2017-18	2
2018-19	2
2019-20	8
2020-21	0
Total	39

Source: Departmental Results Report and internal data from the TAG Agreements Tracker.

## 5.7 To what extent are there opportunities or efforts being made to reflect GBA Plus principles in the negotiation process?

**TAG’s GBA Plus guidelines encourage negotiators to consider whether a provision proposed for an agreement contains elements that might adversely affect women, men or other community sub-groups. While there is some evidence that GBA Plus analysis is occurring in the negotiations program, internal and external respondents noted that GBA Plus is not a topic often raised at the table-level.**

TAG’s GBA Plus guidelines encourage negotiators to consider whether a provision proposed for an agreement contains elements that might adversely affect women, men or other community sub-groups (e.g., youth, elders, single-parents, people with disabilities, LGBTQ2) in comparison to others within the membership to be governed by the agreement under negotiation.<sup>34</sup> There is evidence that GBA Plus analysis is occurring. For example, in 2019–20, Canada undertook 8 GBA Plus analyses associated with section 35 rights discussions and negotiation tables.<sup>35</sup>

There are efforts being made to reflect GBA Plus principles in the negotiation process to the extent that negotiators consider whether a provision proposed for an agreement or self-government agreement contains elements that might adversely affect women or men or other community sub-groups. The TAG GBA Plus Guidelines provide both general and context-specific tips for

<sup>34</sup> GBA Plus TAG Guidelines

<sup>35</sup> Crown-Indigenous and Northern Affairs Canada, Departmental Results Report 2019-20. 2019.



incorporating an intersectional lens. Indigenous groups are encouraged to apply these principles, but they are not beholden to them.

In practice at the negotiations table, internal and external respondents noted that GBA Plus is not a topic often raised. This is in sharp contrast to the TAG GBA Plus Guidelines which states that Indigenous groups are encouraged to apply these principles. Internal respondents generally view GBA Plus as an area entirely within the purview of Indigenous parties as it is not a formal requirement as part of the negotiations process.

## **6. Evaluation Findings – Efficiency and Economy**

### **6.1 Has the negotiation process for treaties, self-government agreements, and other constructive arrangements been managed and carried out efficiently and economically?**

The Negotiations Program has introduced many improvements over the evaluation period that have successfully improved the efficiency and economy of the negotiations process. Notably, co-developed solutions during the early stages of negotiation, while requiring additional upfront effort and resources, have yielded downstream benefits, including expediting negotiations and creating the conditions for improved cost containment. Addressing the remaining limitations of the current program delivery and governance structures, will place the Negotiations Program, Canada and Indigenous groups in a much better position going forward.

The Negotiations Program has introduced many improvements over the evaluation period that have successfully improved the negotiation of treaties, self-government agreements, and other constructive arrangements. In particular, co-developed solutions during the early stages of negotiation, while requiring additional upfront effort and resources, have yielded downstream efficiencies and economies. GC upfront investment has seen negotiations concluded more rapidly, which, combined with a more predictable, interest-based negotiations process and plan, has created the conditions for improved cost containment. More importantly, the needs of Indigenous groups are being met in a more timely manner, establishing the conditions for them to exercise jurisdiction over their own affairs, rebuild their nations, and improve their socioeconomic development.

Sections 4.1 and 4.2 of this report describes limitations of the current program delivery and governance structures that have impacted the negotiations process, and will not be repeated here. In spite of these, there was a general view among internal and external parties that the negotiation process has, on balance, been managed and carried out efficiently and economically. Addressing the remaining limitations of the current program delivery and governance structures, such as mandating, decision-making and OGD coordination, will place the Negotiations Program, Canada and Indigenous groups in a much better position going forward.

The case studies conducted for this evaluation are replete with examples of adaptive, flexible, and innovative approaches to the negotiation of treaties, self-government agreements, and other constructive arrangements, a few of which are described below.

- A Central region negotiations table consisted of multiple communities. A final sectoral agreement was concluded and came into effect afterwards. The ratification process was particularly innovative as it was tailored to the needs of the communities.
- A West region negotiations table has experienced many unresolved issues, primarily related to Canada's recognition of hereditary styles of governance. Despite these issues, negotiations for a Governance Accord have proceeded. This process document is intended to ensure that the Hereditary Chiefs and Canada will come to an agreement regarding what hereditary governance and the nation-to-nation relationship will look like. This has renewed the relationship and has provided an avenue for further discussion. Today, there are several tables addressing various issues. The end result will be a series of smaller sectoral incremental agreements rather than a treaty per se.
- In the case of a West region negotiations table, a joint visioning exercise was undertaken with British Columbia, which led to the foundation agreement. The visioning exercise resulted in the idea of a comprehensive reconciliation agreement, with a 25-year timeframe and significant immediate measures that British Columbia was prepared to move forward with to indicate the province's commitment to a transformed relationship with the First Nation.
- In the case of a Central region negotiations table, the traditional approach of comprehensively listing every single item up for negotiation was not followed. Instead, a phased approach was used to first negotiate core government agreements. While these core government agreements had no legal standing, it was recognized that the Nation has core and self-government rights, extending jurisdiction on matters that are core to the creation of government, such as elections and citizenship. In parallel, interim measures aimed at building core governance were implemented as self-government negotiations advanced. Canada committed to continue negotiations towards a constitutionally protected Treaty, and negotiations are currently underway.
- In the case of a Central region negotiations table, involving several First Nations, common tables were used to discuss issues of collective interest, to arrive at a relevant and fair decision that the group agreed on, with subsequent bilateral and trilateral tables as circumstances warranted. The negotiations process saw a framework agreement for the main topics of interest. Mandates were co-developed to ensure agreement of all parties prior to formal approval processes. Guided by the framework agreement, negotiations shifted to individual First Nation bilateral and tripartite negotiations with Canada and the province.
- A East region negotiations table described a nimble, multi-pronged approach to address Indigenous needs. The Nation's interests were well-suited to be advanced through multiple negotiation approaches, authorities, and timelines, which characterizes this negotiations table. *Inherent Right Policy* authorities were used to advance certain elements of the Nation's self-determination, service delivery, housing and governance interests, by immediately commencing negotiations on a bilateral basis, bypassing the term sheet/negotiation mandate phase of an RIRSD table. The RIRSD table was used, however, as a venue for a multi-faceted discussion. Finally, the *Comprehensive Land Claims Policy* was used to advance the Nation's land claim. The Nation also leveraged

the RIRSD table, and its funding to establish a new forum to develop common positions and demonstrate how the program has helped improve Indigenous governance.

What is notable about these examples is the sheer variety of approaches used by Canada and Indigenous groups designed with the primary outcome to meet the needs of Indigenous groups by advancing negotiations efficiently and economically. This also demonstrates that if the right policy and program conditions are established, the federal system and the bureaucracy have the capacity to be adaptive, flexible, and innovative.

## 6.2 Are there appropriate performance measurement systems in place and readily available data to articulate and track progress and performance of the negotiation process?

Lack of a stable program performance measurement tool is a concern. A performance framework is a key tool to help clarify and communicate expected program results and targets, and is central to planning and decision-making, monitoring and reporting, and accountability, and underpins results-based management. There have been several different performance measurement frameworks over the course of the evaluation period. The most recent version on which this evaluation was based has yet to be finalized and approved. Development of the performance framework should not be the sole responsibility of TAG, but should take a horizontal approach, co-developed and informed by all stakeholders, including Indigenous groups and OGDs.

Results-based management has been central to the federal government's management practices since the introduction of *Results for Canadians: A Management Framework for the Government of Canada* in 2000, and has been upheld by each successive government since then. Delivering results for Canadians using a results-based approach has been a stated expectation of the Prime Minister and Cabinet in the mandate letters<sup>36</sup> of all Ministers, including the Minister of Crown-Indigenous Relations.<sup>37</sup>

Given the pace of sweeping changes to the program over the evaluation period, the PIP has had to undergo significant reform and remains an un-finalized document. Given this, it is a particular concern that the negotiations program performance framework, that is the PIP, remains in flux, and has yet to be completed, endorsed and approved. This evaluation was based on a draft 2021 PIP, that has since been updated but remains in draft form at the writing of this evaluation report.

<sup>36</sup> The practice of publicly released mandate letters, introduced by the GC in November 2015, is itself a central feature of the results and delivery approach.

<sup>37</sup> For example, see Office of the Prime Minister, *Minister of Crown-Indigenous Relations Mandate Letter*. Ottawa, 2019. <https://pm.gc.ca/en/mandate-letters/2019/12/13/minister-crown-indigenous-relations-mandate-letter>.

Over the evaluation period, there have been several unapproved working level draft versions of the program performance framework that mirror the evolution of the program over the span of the evaluation period itself:

- The 2014 performance framework identified five outcomes. These tended to have single indicators and relied heavily on the number of negotiations tables and the objectives reached in the negotiations action plans to track progress.
- The 2018 performance framework represented a significant departure in the discourse surrounding negotiations. It introduced outcomes with a new focus on promoting reconciliation and nation-to-nation relationships on a whole-of-government scale, with a broader focus on the well-being and rights of Indigenous communities.
- The 2021 and 2022 performance frameworks introduced a greater voice for Indigenous participants through co-development while maintaining a focus on well-being and nation building. This draft was never approved.
- There is little difference between the 2021 and 2022 performance frameworks. Some indicators were moved from one program outcome to another, or simply retired. The 2022 performance framework retired some indicators that referred to specific Indigenous nations given they were only meant to support particular objectives and not meant to serve as overall program indicators. Given the un-finalized state of the PIP, other indicators introduced new program specific indicators as new treasury board submissions were approved, such as Child and Family Services Coordination Agreements. The ultimate outcomes of the draft 2018 to 2022 performance frameworks focused on the meaningful outcomes of negotiations, determined through the Community Well-Being Index, rather than solely on the completion of agreements as had been the case in the past. The 2022 performance framework situates well-being within the context of Canadian society, which addresses the gap in well-being rather than improvement in well-being.

Also as noted later in this report, there was a lack of readily available data to track and analyze the performance of the negotiation process at the program level. The draft version of the performance framework used for this evaluation also had many indicators that did not specifically speak to the outcomes. As noted above, the program performance framework saw the introduction and retirement of many indicators over the evaluation period, also making the assessment of performance over the entire evaluation period difficult.

The instability and uncompleted state of the Negotiation Program's performance framework is a concern. A performance framework helps to clarify and communicate expected program results and targets. It is also an instrument for planning and decision-making, monitoring and reporting, and accountability. It underpins the results-based management approach, and should articulate expectations in terms of results, targets and timelines, clear responsibilities, and a well-thought out system of accountability.

There are many political, social, and economic factors that contribute to the negotiation process and conclusion of agreements, and many co-delivery partners are involved, including OGDs, Indigenous parties, and P/Ts. Identifying appropriate outcomes for the Negotiations Program, and associated indicators and targets, is consequently difficult. For example, respondents interviewed for this evaluation expressed different definitions of success. External respondents generally viewed success as concluded agreements, while internal respondents viewed success as concluded agreements, positive relationships with Indigenous parties, and progress against annual table management plans.

As noted earlier in this report, development of the program performance framework should not be the sole responsibility of TAG. It needs to be informed by all parties at negotiation tables, including Indigenous groups and OGDs.

**The availability of program performance data is a concern, and there was not any evident accountability for program performance monitoring and reporting. CIRNAC Departmental Plans and corresponding Departmental Results Reports were found not to be a reliable source of data. RBIS was expected to be an important source of performance data, but information in RBIS was found to be dated and incomplete.**

Availability of performance data is also a concern. Many challenges were experienced by the evaluation team in obtaining this information. As noted above, the performance framework used for this evaluation was still being developed, and so many of the indicators proposed were still draft. It was consequently difficult to obtain any data and to determine the impact of the overall program. Responsibilities for program performance monitoring are dispersed across several organizations, to be expected given the complexity of the negotiations process. However, there appears to be no central coordination of performance monitoring and reporting by a single entity, impacting decision-making, oversight and accountability.

The evaluation team consulted CIRNAC Departmental Plans and corresponding Departmental Results Reports as a potential source of program performance data. Departmental Plans prior to 2018-19, were found to lack targets for the negotiations program. However, corresponding Departmental Results Reports were found to include both targets and actuals. Departmental Plans should identify indicators and targets, as they do 2019-20 onwards, and the corresponding Departmental Results Report should provide the actuals for those targets, and explain any divergence from the target value. Many of CIRNAC's Departmental Plans released prior to 2018-19 state that more information is available about the Negotiations of Claims and Self-Government Agreements Sub-Program on GC InfoBase. However, GC InfoBase only presents data from 2018-19 to 2020-21.

The evaluation team expected the Results-Based Information System (RBIS) would be an important source of performance data. Developed in 2014 from an earlier pilot, the Federal Action Plan and Profile, RBIS was intended to be a negotiations case management system to support strategic planning, reporting and management at the individual table, regional and national level to better align resources with priorities. RBIS was examined by the evaluation team and found to be a comprehensive tool. However, the information in RBIS was found to be dated and incomplete, the latter attributable to inconsistent use of the platform according to program officials.

## 7. Conclusions and Recommendations

### 7.1 Conclusions

#### Relevance

There will be continued expectations that the negotiations policy framework and process will be consistent with, aligned to, and supportive of:

- the needs of Indigenous groups;
- Canada's constitutional obligations to address Aboriginal and treaty rights, which are recognized and affirmed under section 35 of the *Constitution Act*;
- the federal government's priorities for:
  - renewed, nation-to-nation, government-to-government relationships with Indigenous Peoples;
  - reconciliation;
  - commitments to implement the TRC *Calls to Action*;
  - compliance with the UNDRIP.

Legal imperative dictates a continued need for the negotiation of treaties, self-government agreements, and other constructive arrangements. Retaining a negotiations policy framework and process policy to address section 35 Aboriginal and treaty rights is as relevant today as it was when Canada re-established a policy of treaty-making in 1973, and will continue to be so in the future.

Since 2015, Canada has made substantial improvements to the Negotiation Program, and has increasingly been more responsive to and meeting the needs of Indigenous groups. This has occurred most notably through the introduction of the RIRSD incremental approach and the *Recognition and Reconciliation of Rights Policy for Treaty Negotiations in British Columbia*, one of the most important advancements since 1973. Canada has also successfully addressed many of the institutional barriers and process inefficiencies that have historically beset the program, largely attributable to a shift towards broadly participatory processes, with co-development a central feature, support for nation rebuilding, and removal of the financial burden enabling Indigenous groups to negotiate and finalize agreements. These improvements have resulted in a substantial acceleration of negotiations.

While Indigenous groups have expressed cautious optimism of Canada's reforms to the Negotiations Program, there is widespread concurrence that mutually agreed arrangements between Indigenous parties and the Crown remain relevant and are in the collective interests of all Canadians.

#### Design and Delivery

Policy, program and process improvements introduced over the evaluation period have contributed to substantially improve the negotiations process. The relatively recent introduction of the RIRSD approach at scale, a substantial departure from historical practices, has, not unexpectedly, surfaced many of the same, but some new, delivery and governance limitations that have historically impacted the negotiations process. These have affected the negotiations of

non-treaty agreements and incremental treaty arrangements in much the same way as the negotiation of treaties, which points to many of these being systemic issues.

The duration required for federal mandating and approval processes continues to be a major factor. This continues to be a major factor impacting the conclusion of negotiations and the Crown-Indigenous relationship. Indigenous groups require more transparency about the mandating process to fulfil accountability requirements to their communities and leadership.

While the FSC process, specifically FSC Transactional, is intended to ensure collaboration across federal departments, in practice, coordination of OGDs and P/Ts at the negotiations table has been problematic in terms of attitude, approach and positioning. There is uneven OGD commitment to the RIRSD co-development approach, the UNDRIP and reconciliation. This has introduced a wide range of issues which have impacted the Crown-Indigenous relationship and delayed negotiations. Improved commitment to a whole-of-government approach, with attendant oversight and greater OGD accountability is required.

Opportunities exist to better utilize FSC Transactional and FSC Policy by devolving some elements of Cabinet decision-making, which would streamline the negotiations process, accelerating the conclusion of negotiations and reducing the cost. Decentralizing decision-making to FSC could also result in improved interdepartmental cohesion and coordination, and adherence to reconciliation and the UNDRIP.

The federal government, and particularly CIRNAC, has experienced serious issues recruiting and retaining skilled and experienced negotiators. This coupled with the lengthy period required to onboard negotiators, workload increases and high turnover of federal negotiators has caused destabilization at negotiation tables, introduced substantial delays and affected the Crown-Indigenous relationship.

Adaptation of some aspects of the negotiations policy framework has not kept pace with the speed and breadth of exploratory discussions of RIRSD implementation, particularly with respect to issues that have been, or likely will be, encountered by negotiators at more than one table. Recognition of the jurisdiction and authority of the Hereditary Chiefs and flexibility of the ratification process are two such issues that would benefit from standardized policy responses.

Since 2015, Canada has demonstrated a clear commitment, through tangible action and partnership, to ensure the Negotiations Program is consistent with, aligned to, and supportive of the needs of Indigenous groups. Canada's reforms since 2015 have generally been successful, and have resulted in demonstrable improvement in the negotiation of treaties, self-government agreements, and other constructive arrangements, while improving the Crown-Indigenous Relationship. Since many of the remaining issues have historically beset the negotiations program, they are likely the most challenging to resolve. However, Canada's willingness to work through difficult issues in genuine partnership with Indigenous parties is a positive sign for optimism.

## Efficiency and Economy

As noted above, the Negotiations Program has introduced many improvements over the evaluation period that have successfully improved the efficiency and economy of the negotiations process, most notably, co-developed solutions during the early stages of negotiation. While these have required additional upfront effort and resources, there have been substantial downstream

benefits. Most importantly, negotiations have been expedited and the conditions created for improved cost containment.

The program has evolved significantly to allow for a greater use of bilateral or tripartite incremental agreements, which has been supported significantly through the RIRSD approach. Development of incremental agreements has helped to build trust between negotiating parties, strengthen connections between communities and provincial governments and industry, and incentivized continuing with negotiations.

## Results-Based Management

A results-based approach to negotiating treaties, self-government agreements and other constructive arrangements implies openness and transparency, with well-articulated expectations in terms of results, targets and timelines, clear responsibilities, and a well-thought out system of accountability. While components of a results-based approach were found, a stable performance framework at the program level, informed by stakeholders, to clarify interests, expectations and results, including service standards, was found to be largely absent.

The work to finalize the performance framework over the evaluation period, to bring focus to the contribution of the negotiations program, is on-going. There have been several quite different draft performance measurement frameworks introduced over the course of the evaluation period as the working level progressed in advancing the completion of the draft 2021 PIP. The most recent version on which this evaluation was based has yet to be finalized and has since seen significant revisions. The quality of the draft indicators and difficulty of readily obtaining associated performance data indicates that the draft performance framework is not currently used for program planning, investment decision-making, or learning and improvement.

The lack of readily available data to track and analyze the performance of the negotiation process at the program level is a concern. RBIS was expected to be an important data source, and although a well-designed tool, information in RBIS was found to be dated and incomplete indicating an underuse of the tool by the Sector. While responsibilities for program performance monitoring are dispersed across several organizations, central coordination of performance monitoring and reporting by a single entity was not evident.

The absence of a performance framework is particularly challenging for a program of this type. A performance framework is a key tool to help clarify and communicate expected program results and targets, and is central to planning and decision-making, monitoring and reporting, and accountability, and underpins results-based management.

Development of the performance framework should not be the sole responsibility of TAG. It needs to be informed by all stakeholders, including Indigenous groups and OGDs to better reflect what is being heard from all parties at negotiation tables.

## 7.2 Recommendations

It is recommended that CIRNAC:

1. Improve governance structures and processes by streamlining decision-making and mandating processes, considering devolving funding authorities, and:



- provide advice and support to OGDs to further adherence to reconciliation principles;
  - expand FSC-Policy mandate, TOR and membership to include Indigenous representation to be actively involved in negotiations program decision-making.
2. Work with OGDs to improve coordination and help improve accountability:
    - expand FSC mandate and TOR to be more involved in the coordination of OGDs and foster accountability against clear requirements amongst OGDs; and
    - introduce practical principles to guide operational deliberations, and OGD coordination and accountability.
  3. Modernize the policy framework to advance consistent approaches and pathways to timely resolution of repeat issues, and to assist Indigenous parties to better navigate the complex negotiations process and options available to them.
  4. Establish a long-term plan to secure and retain skilled and experienced negotiators, address the lengthy onboarding process, and consider table succession planning.
  5. Improve information sharing, subject to what is allowable, including with all parties at and across negotiations tables, and within CIRNAC, in order to provide updates on progress through the mandating process.
  6. Improve the performance measurement process to allow it to be informed by all stakeholders, including Indigenous groups and OGDs, streamlining monitoring and reporting in order to improve central coordination, and maximize the use of RBIS to ensure data is readily available for program management