



Evaluation of the Exceptional Contracting Limits Authority 2015-2016 to 2019-2020

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List of Acronyms

| | |
|----------|---|
| BIPOC | Black, Indigenous and People of Colour |
| CD | Crown Deponents |
| CFN | Contract Federal Negotiator |
| CIRNAC | Crown-Indigenous Relations and Northern Affairs Canada |
| ECLA | Exceptional Contracting Limits Authority |
| EW | Expert Witness |
| GBA Plus | Gender-Based Analysis Plus |
| INAC | Indigenous and Northern Affairs Canada |
| ISC | Indigenous Services Canada |
| LMOD | Litigation Management Oversight Directorate |
| MSR | Ministerial Special Representative |
| NAO | Northern Affairs Organization |
| OGD | Other Government Departments |
| PSD | Policy & Strategic Direction |
| RIRSD | Recognition of Indigenous Rights and Self-Determination |
| RPS | Resolution and Partnerships Sector (Formerly Resolution and Individuals Affairs Unit) |
| TAG | Treaties and Aboriginal Governance |
| TB | Treasury Board |
| TRC | Truth and Reconciliation Commission of Canada |
| UNDRIP | United Nations Declaration on the Rights of Indigenous Peoples |



Summary

Exceptional Contracting Limits Authority

Authority Profile

The Exceptional Contracting Limits Authority (ECLA) allows the Minister of Crown-Indigenous Relations to enter into and renew non-competitive contracts with Contract Federal Negotiators (CFNs) for negotiations with Indigenous parties, and Crown Deponents (CDs) and Expert Witnesses (EWs) required for litigation. The authority to use the ECLA is presently assigned to the Minister of Crown-Indigenous Relations who can delegate this authority to the Minister of Northern Affairs for CFNs hired under their purview. In January 2020, Treasury Board (TB) clarified that, through an interdepartmental service memorandum of understanding, Indigenous Services Canada (ISC) can access the authority until its renewal in 2022. There are four categories of authority limits for the department, renewed and amended in February 2017 (valid until July 31, 2021).

Evaluation Scope and Methodology

The purpose of this evaluation was to examine Crown-Indigenous Relations and Northern Affairs Canada's (CIRNAC) implementation of the ECLA from April 1, 2015 to March 31, 2020. Over the evaluation period, the Authority was not the only contracting enabler used for CFNs, CDs and EWs, however, the analysis of the objectives, roles and responsibilities of those other contracts were not within the scope of the evaluation.

The evaluation employed multiple lines of evidence and methods including a review of documents and files, a review of performance and financial data, and key informant interviews.

Key Findings

Relevance

There is a continued need for negotiations and litigation activities. CIRNAC has led the whole-of-government approach to the renewal of nation-to-nation, Inuit-Crown, and government-to-government relationships with Indigenous peoples, and advancing reconciliation, clear priorities for Canada. This responsibility is not expected to change, and negotiations and litigation have and will continue to play an important role, including contributing to departmental results.

CIRNAC's policy landscape shifted substantially over the evaluation period (e.g., Recognition of Indigenous Rights and Self-Determination (RIRSD) tables, Truth and Reconciliation Commission (TRC) of Canada *Calls to Action*, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), *Bill C-15: The United Nations Declaration on the Rights of Indigenous Peoples Act*). This policy shift has had impacts on the manner in which CFNs, CDs, and EWs have been used, and the need for these types of contractors continued throughout the evaluation period and is expected to continue.



There remains a need for the department to have set flexible procurement tools and as an enabling authority, the ECLA serves as a key mechanism to appoint external negotiation and litigation resources. There has been a continued need to supplement CIRNAC's capacity with these types of external resources, a need that is expected to continue.

Design and Delivery

The ECLA is managed in a similar fashion as a program, with robust governance, management, and financial management structures, an important factor facilitating the achievement towards the ECLA outcomes.

The limited pool of appropriately qualified and diverse CFNs, CDs, and EWs is a concern, particularly as the demand for these resources are expected to continue.

Data concerning the diversity of CFNs, CDs, or EWs appointed through the ECLA is not collected. Consequently, the extent to which the ECLA provides access to a diverse population of contractors could not be determined. However, the ECLA has the potential to support GBA Plus goals of promoting equality, diversity, and inclusion. While this did not occur over the evaluation period, the need to do so is widely appreciated and early steps to do so have been considered by some business lines. Since there were 81 ECLA appointed contractors over the evaluation period, supporting 161 new negotiation and litigation files, there is a clear opportunity to consider GBA Plus goals.

Effectiveness

The ECLA was used to retain the majority of CFNs, CDs and EWs newly appointed by CIRNAC over the evaluation period. Since non-ECLA contracts were not within the scope of the evaluation, further analysis was not conducted as to factors associated with those contracts.

The ECLA has been instrumental in contributing to the advancement of key files through the appointment of CFNs, CDs, and EWs with the appropriate expertise, knowledge and experience. There is satisfaction with the performance of contractors retained by ECLA as their appointments are frequently extended or renewed, suggesting that timeframes defined in negotiation action plans, agreements or by the Court had been met.

The integrity of the performance review process for CFNs and the precision of CD and EW deliverables helps to ensure contractual obligations are respected.

Efficiency and Economy

Management and oversight of the authority is embedded in the programs, requiring support from the procurement hub when needed, including in the application of the delegation of the authority, support and guidance on how the delegation of the authority occurs, and choices of contractual arrangements and instruments to meet program needs. The ECLA is widely viewed as the most economical and efficient procurement arrangement available to efficiently appoint CFNs, CDs, and EWs.



Recommendations

It is recommended that CIRNAC:

1. Establish the extent to which the ECLA is expected to support GBA Plus goals of promoting equality, diversity, and inclusion, and the implications on applying GBA Plus to negotiation and litigation. Incorporate these requirements into a recruitment and retention strategy to meet business needs and GBA Plus targets.
2. Reassess the requirement for a performance measurement framework, considering alternatives that are more suitable for monitoring a contracting mechanism.



Management Response and Action Plan

Project Title: Evaluation of the Exceptional Contracting Limits Authority

1. Management Response

The Treaties and Aboriginal Government (TAG) sector and the Policy and Strategic Direction (PSD) sector acknowledge the findings of the evaluation report and have provided an action plan to address its recommendations.

The exceptional contracting limits authority (ECLA) is a special non-competitive contract authority that authorized the former Minister of Indian Affairs and Northern Development to appoint Federal Negotiators / Representatives for negotiations with Indigenous groups, expert witnesses, and Crown deponents deemed necessary for litigation. The authority was last renewed in 2017 and is currently in the process of being renewed for another five years for Indigenous Services Canada, Crown Indigenous Relations and Northern Affairs Ministers.

CIRNAC's Exceptional Contracting Limits Authority is co-managed primarily by TAG and PSD, in partnership with Chief Finances, Results and Delivery Officer (CFRDO) Procurement services, as two separate contracting streams. Negotiators/Representatives are managed by TAG, and expert witnesses and Crown Deponents are managed by PSD. The authority is also used by Northern Affairs Organization (NAO) and Resolution & Partnership (R&P - Childhood Claims). The action plan will be implemented jointly by TAG and PSD. TAG and PSD will consult with NAO and R&P as necessary.



2. Action Plan

| Recommendations | Actions | Responsible Manager (Title / Sector) | Planned Start and Completion Dates |
|--|--|---|--|
| <p>1. Establish the extent to which the ECLA is expected to support GBA Plus goals of promoting equality, diversity, and inclusion, and the implications on applying GBA Plus to negotiation and litigation. Incorporate these requirements into a recruitment and retention strategy to meet business needs and GBA Plus targets.</p> | <p>Policy Directorate and Coordination Branch (PDCB): TAG has recently completed an analysis of the common characteristics found in past and current CFN appointments and has identified gaps. TAG identified the need to broaden the pool of candidates so it is more equal, diversified and inclusive of, amongst others, women and Indigenous peoples. In collaboration with CFRDO's procurement services, TAG has recently started looking at ways to establish an expanded pool of candidates. TAG will work with the departmental GBA Plus champion to determine how the ECLA can support the goals of GBA Plus within the Department and its implications on negotiations. TAG will draw from the experience acquired incorporating GBA Plus considerations into the work at negotiations tables, which has received positive feedback within the federal system. TAG will work closely with CFRDO procurement services to incorporate the pathways identified into recruitment and retention strategies for CFNs.</p> <p>Litigation Management Oversight Directorate (LMO): PSD will work with the departmental GBA Plus champions to determine how the ECLA can support the goals of GBA Plus within the Department. For any pathways that are identified, PSD will work with the Department of Justice to develop strategies to promote GBA Plus goals while also meeting the business needs and reconciliation mandate of the Department.</p> | <p>This Action Plan will be co-managed by TAG and PSD</p> <p>Senior Assistant Deputy Minister of the Treaties and Aboriginal Government Sector</p> <p>Senior Assistant Deputy Minister of the Policy and Strategic Direction Sector</p> | <p><i>Start Date:</i> July 2021</p> <p><i>Completion Date:</i> July 31, 2022</p> |
| <p>2. Reassess the requirement for a performance measurement framework, considering alternatives that are more suitable for monitoring a contracting mechanism.</p> | <p>PDCB: Though the ECLA has modified its performance indicators and results in the recent policy renewal process, in consultation with CFRDO, TAG will take the opportunity presented through this Management Response and Action Plan to work with procurement services to determine if more appropriate performance indicators for contracts can be used to monitor ECLA CFN contracts.</p> <p>LMO: In consultation with CFRDO Procurement services, PSD will determine if more appropriate performance indicators for contracts can be used to monitor ECLA Expert witness and Crown Deponent contracts.</p> | <p>This Action Plan will be co-managed by TAG and PSD</p> <p>Senior Assistant Deputy Minister of the Treaties and Aboriginal Government Sector</p> <p>Senior Assistant Deputy Minister of the Policy and Strategic Direction Sector</p> | <p><i>Start Date:</i> July 2021</p> <p><i>Completion Date:</i> July 31, 2022</p> |



1. Introduction

1.1 Evaluation Purpose

The Exceptional Contracting Limits Authority (ECLA, also referred to as the “authority”) was evaluated to assess its relevance, design and delivery, effectiveness, and efficiency for the period of April 1, 2015 to March 31, 2020. Management and oversight of the ECLA is dispersed across four sectors of Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC). The evaluation was initiated and conducted by the Evaluation Branch of CIRNAC.

CIRNAC’s predecessor, Indigenous and Northern Affairs Canada (INAC), was granted use of the ECLA by Treasury Board (TB) in 2002. The ECLA was a consolidation of previous authorities that had been in place to enable non-competitive contracts that exceeded government-wide contracting and procurement policies. Since 2002, the authority has been renewed three times: in 2007, 2012, and 2017 (only the latter included amendments). Three internal audits have occurred since 2002, as required by TB, the most recent in 2020 by the department’s Audit and Assurance Services Branch. The ECLA has not been evaluated previously.

In 2017, the authority’s renewal was approved with the stipulation that any further renewal or amendments would require an evaluation. As CIRNAC will be seeking renewal of the ECLA in 2021, the requirement for the evaluation was an addition to CIRNAC’s Five-Year Evaluation Plan 2020–21 to 2024–25.

1.2 Authority Profile

The ECLA allows the Minister of Crown-Indigenous Relations to enter into and renew non-competitive contracts with Contract Federal Negotiators (CFNs) for negotiations with Indigenous parties, and Crown Deponents (CDs) and Expert Witnesses (EWs) required for litigation.¹ Since the authority provides CIRNAC the ability and flexibility to award and amend contracts, and to maintain the continuity of CFNs, CDs, and EWs, it supports the department’s mandate to re-engage in a renewed nation-to-nation relationship with Indigenous peoples and to move forward with reconciliation and resolution.

The ECLA is granted to the Minister of Crown-Indigenous Relations, however, in January 2020, TB clarified that, through an interdepartmental service memorandum of understanding, Indigenous Services Canada (ISC) can access the authority until its renewal in 2022. The authority to use the ECLA is presently assigned to the Minister of Crown-Indigenous Relations

¹ CFNs include Chief Federal Negotiators, Chief Federal Representatives, Chief Liaison Representatives, Minister’s Special Representatives and Federal Special Representatives who are engaged to work in politically sensitive environments and who represent the Government of Canada in claims, self-government negotiations or other processes involving Aboriginal groups and provincial or territorial governments (from *Selection and Review Guidelines for Contract Federal Negotiators/Representatives*, p. 3–4). A CD is the representative of the Crown for the purposes of an examination for discovery in the civil litigation process (from *Exceptional Contracting Limits Authority (ECLA) Process Guide*, p. 5.) An EW provides opinion evidence based on their recognized knowledge, experience and/or expertise (from *Exceptional Contracting Limits Authority (ECLA) Process Guide*, p. 4).



who can delegate this authority to the Minister of Northern Affairs for CFNs hired under their purview.² In a separate 2002 authority, TB authorized the Minister to include a provision for explicit indemnification in all contracts with CFNs appointed under the ECLA.

There are four categories of authority limits for the department, renewed and amended in February 2017 (valid until July 31, 2021):

- maximum non-competitive service contract for the services of CFNs for claims, litigation, and self-government negotiations \$2,000,000 per contract, with:
 - maximum entry-level limit \$550,000
 - maximum amendment value in a 12-month period \$500,000
 - maximum professional services \$300,000
- maximum non-competitive service contract for CDs and EWs for litigation \$800,000
- maximum non-competitive service contract for CDs and EWs for litigation who are former federal public servants in receipt of a pension \$225,000
- amend contracts with CFNs that were entered into under the exceptional contracting limits to extend the period of the explicit indemnification provisions

1.2.1 Governance

Management and oversight of the ECLA is dispersed across four sectors, based on the two authority streams: litigation and negotiations. For both the litigation and negotiations streams, the operational and administrative relationship with contractors rests with the business line project authorities/case managers. The authority, as with all contracts, is processed through the procurement hubs with the project authority/case managers leading the process, and the associated resources allocated from regular program management.

Policy & Strategic Direction (PSD) sector was solely responsible for all CD and EW contracts issued under the ECLA until the 2018 reorganization. In support of CIRNAC's continued implementation of the transformation agenda, litigation management was decentralized, including the approval of using the ECLA. However, PSD continues to provide management and oversight over the authority. Treaties and Aboriginal Governance (TAG) sector continues to provide management and oversight of all CFN contracts.

As part of the 2002 authority approval, the department was required to establish compliance documents to enable a system of checks and balances, including detailed guidance documents to support compliance of the ECLA terms and conditions. Together, these documents serve as the management control framework used by business lines and the Cost Centre Manager when considering, initiating, and managing service contracts under the authority.

CIRNAC must comply with relevant legislation and TB policies, including the *Financial Administration Act* and the *Contracting Policy*. To enable compliant activities, CIRNAC (TAG and

² Procurement and Contracting are shared services providers housed within ISC.



PSD) established their own set of procedures and guidelines, which include specific processes for establishing and managing CFN, CD, and EW contracts³.

Ministerial approval is required on all CFNs issued under the ECLA, and CD and EW contracts over \$100,000. Contracts for CDs and EWs under \$100,000 are approved at the Senior Assistant Deputy Minister level. Each sector has developed its own governance processes to support the initiation, renewal, and amendments process for contracts using the authority. Governance processes take into consideration the sensitivity and complexity of the deliverables that each contract seeks to achieve in relation to the associated litigation or claim, along with other factors as deemed appropriate.

The primary beneficiaries of the authority are the individuals (CFNs, CDs, and EWs) who hold a contract with CIRNAC issued under the ECLA. In the context of the department's mandate to engage in a renewed nation-to-nation relationship with Indigenous peoples, however, First Nations, Métis and Inuit communities and individuals can be viewed as beneficiaries. Additionally, the intention is that Canadians overall also benefit when contracts are issued under the ECLA, due to CIRNAC having access to an enabling mechanism that facilitates responsiveness and timeliness specific to litigation and claims matters.

1.3 Authority Narrative

The ECLA logic model was developed for the 2017 renewal process. The authority's activities and outputs, carried out by CIRNAC, are expected to contribute to the following short-term outcome:

- *Short-term outcome:* Hire and retain Contract Federal Negotiators/representatives, Crown Deponents and Expert Witnesses. *Performance indicator:* Appointments approved by the Minister and contracts signed and in place in appropriate timeframe to meet litigations, negotiations or other applicable processes deadlines.

The short-term outcome contributes to the attainment of the authority's medium- and long-term outcomes respectively:

- *Medium-term outcome:* Successfully advance the position of the Department by re-engaging in a renewed nation-to-nation process with Indigenous peoples. *Performance indicator:* Contract Federal Negotiators/representatives, Crown Deponents and Expert Witnesses deliverables submitted as per contractual obligations.
- *Long-term outcome:* Support a renewed relationship with Indigenous peoples; one based on the recognition of rights, respect, co-operation, and partnership. *Performance indicator:* Agreements reached between Indigenous communities and government organizations on Section 35 assertions, including self-government rights and other processes that support reconciliation.

³ TAG updates the negotiations stream documents on annual basis, and PSD updates the litigation stream document on as needed basis.



Given that the department has relied on the authority for nearly 20 years to specifically advance negotiations, claims, and court processes, the ECLA contributes to the following CIRNAC results:

- Indigenous peoples determine their political, economic, social and cultural development.
- Past injustices are recognized and resolved.

1.4 Authority Resources

Table 1 provides actual spending for fiscal years 2015–16 through 2019–20 for the ECLA. All contracts issued under the ECLA are Vote 1 expenditures. There are no associated grants or contributions.

Table 1. Actual expenditures, by Year⁴

| Authority Category | 2015–16 | 2016–17 | 2017–18 | 2018–19 | 2019–20 |
|--------------------|-------------|-------------|--------------|--------------|-------------|
| CFNs | \$2,470,827 | \$ 993,865 | \$ 1,797,108 | \$ 1,071,361 | \$ 894,732 |
| EWs | \$1,306,407 | \$1,351,702 | \$1,515,815 | \$1,049,969 | \$2,010,152 |
| CDs | \$113,773 | \$90,131 | \$140,807 | \$71,022 | \$24,736 |
| Total | \$3,891,007 | \$2,435,698 | \$3,453,730 | \$2,192,352 | \$2,929,620 |

2. Evaluation Description

2.1 Evaluation Scope, Approach and Design

The evaluation focused on CIRNAC’s implementation of the ECLA from April 1, 2015 to March 31, 2020, in accordance with CIRNAC’s Five-Year Evaluation Plan 2020–21 to 2024–25 and in compliance with TB’s *Policy on Results* (2016).

The use of multiple lines of evidence and triangulation increased the reliability and validity of the evaluation findings and conclusions. Overall, the evaluation employed the following lines of evidence and methods.

⁴ Expenditure calculations were tabulated from reports provided by business line Financial Management Advisors (FMA) for the negotiations stream and SAP for the litigation stream, based on parameters and guidance provided by TAG and PSD. ISC expenditures may have been excluded.



Summary of Data Collection Methods

| Document Review | Performance & Financial Data Review | Key Informant Interviews (n=30) |
|---|---|--|
| <ul style="list-style-type: none"> • 54 internal documents and files • 51 of 98 EW authorization files • 58 of 115 CFN authorization and performance reports | <ul style="list-style-type: none"> • The performance data review included, for CFNs, a data set of 51 files using ECLA contracted CFNs that were active during the evaluation period • Data sets of new contracts over the evaluation period with complete data included: <ul style="list-style-type: none"> - 10 CD contracts - 132 EW contracts • The performance data review included data sets of new contracts over the evaluation with complete data, included: <ul style="list-style-type: none"> - 51 CFN files - 10 CDs, 132 EWs • An SAP full data set of new CFN, CD, and EW contracts raised during the evaluation period, using ECLA and other procurement arrangements included: <ul style="list-style-type: none"> -60 active CFN contracts, (26 were new) -267 active CD and EW contracts (185 new)⁵ -Five contracts for parliamentary monitoring services, raised through traditional competitive approach, were excluded | <ul style="list-style-type: none"> • In-depth interviews to gain primary understanding of the role and utilization of the authority • Interviews included representatives from: <ul style="list-style-type: none"> - PSD - RPS - TAG - NAO - CFRDO - Other government departments |

2.2 Limitations and Mitigation Strategies

| Limitation | Impact | Mitigation Strategy |
|---|---|---|
| 1. Data to assess performance against indicators and targets associated outcomes were not reported or available. | <ul style="list-style-type: none"> • Unable to measure progress or achievement against authority outcomes. | <ul style="list-style-type: none"> • Key informant interviews and the file review were used to supplement performance data. |
| 2. Limited pre-existing data and supporting analysis and reporting of the use and rationale for the use of ECLA for CFNs, and EWs and CDs at the portfolio level. | <ul style="list-style-type: none"> • Information about use and rationale for the ECLA found in the review of documentation consisted of general statements. Key informant interviews provided anecdotal information or focused on specific examples. | <ul style="list-style-type: none"> • A detailed file review was conducted to tabulate the use and rationale for the use of CFNs and EWs, examining an approximate 50% sample of EW authorization files, and CFN authorizations and performance reports. • A request was also made for information about the full extent CFN, CD, and EW contracts to understand the use of the ECLA and other procurement arrangements. |
| 3. Some ISC business lines were not available to participate in the key informant interviews. | <ul style="list-style-type: none"> • As a user of the ECLA for CFNs, EW and CDs, the findings do not specifically reflect ISC as a user group. | <ul style="list-style-type: none"> • ISC contracts and financial information were considered in the analysis. |
| 4. The ECLA is part of the TB government-wide <i>Contracting Policy</i> . The procurement arrangements other than the ECLA, part of the broader | <ul style="list-style-type: none"> • Unable to comprehensively understand how the range of procurement arrangements work together. | <ul style="list-style-type: none"> • Key informant interviews and the file review provided some information about alternative procurement arrangements to the ECLA. |

⁵ Active contracts include those that were raised prior to the evaluation period and continued for at least a portion of the evaluation period, as well as new contracts that were raised during the evaluation period.



| Limitation | Impact | Mitigation Strategy |
|---|--------|---------------------|
| <i>Contracting Policy</i> , were out of scope of this evaluation. | | |

3. Findings

3.1 Relevance: Continued Need for the Authority

There is a continued need for negotiations and litigation activities. CIRNAC has led the whole-of-government approach to renewal of nation-to-nation, Inuit-Crown, and government-to-government relationships with Indigenous peoples, and advancing reconciliation, all clear priorities for Canada. This responsibility is not expected to change, and negotiations and litigation have and will continue to play an important role.

There is a continued need for negotiations and litigation activities, particularly given the department’s mandate to pursue renewed nation-to-nation relationship with Indigenous peoples and to move towards reconciliation. CFNs, EWs, and CDs support negotiations and litigation activities, which contribute to CIRNAC’s broader mandate.

The ECLA allows the Minister to enter into and renew non-competitive contracts with CFNs for negotiations with Indigenous parties, and CDs and EWs required for litigation. Since the authority provides CIRNAC the ability and flexibility to award and amend contracts, and to maintain the continuity of CFNs, CDs, and EWs, it aligns with and supports federal priorities and the department’s mandate to re-engage in a renewed nation-to-nation relationship with Indigenous peoples, and to move forward with reconciliation and resolution.

The ECLA is aligned with CIRNAC results, serving as an enabling authority policy to appoint external negotiation and litigation resources that contribute to departmental results, in particular “Past injustices are recognized and resolved”.

The ECLA is positioned to contribute to the following CIRNAC results:

- Indigenous peoples determine their political, economic, social, and cultural development.
- Past injustices are recognized and resolved.

These CIRNAC results are tied to the federal priorities of renewed nation-to-nation and government-to-government relationships, and reconciliation. As such, an alignment of ECLA with CIRNAC results is established. It is important to note that the ECLA is an enabling authority policy, rather than a program itself. The authority is intended to support the department and business lines to meet their mandates. Among those interviewed, there was agreement that ECLA aligns with the departmental result *Past injustices are recognized and resolved*. There was some consensus on the degree of alignment with the departmental result *Indigenous peoples determine their political, economic, social and cultural development*. As stated by one key informant, “self-



determination is not something up for negotiation—Indigenous peoples self-determine themselves”.

CIRNAC’s policy landscape shifted substantially over the evaluation period. This policy shift has had impacts on the manner in which CFNs, CDs, and EWs have been used, and the need for these types of contractors continued throughout the evaluation period and is expected to continue.

In 2015, the government committed to achieving reconciliation with Indigenous peoples and to implement the recommendations of the Truth and Reconciliation Commission of Canada (TRC).⁶ At that time, the new authority to create the [Recognition of Indigenous Rights and Self-determination discussion tables](#) was obtained. In 2016, the government endorsed the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) without qualification, and committed to its full and effective implementation.⁷ 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.

The impact of this legislative agenda has required a move from reactive negotiations to proactive collaboration, consultation, and engagement. Consequently, there has been a greater focus on the reconciliation of relationships and nation-building over the evaluation period, and it is expected that the impacts of this change will only increase. Over the evaluation period, CFNs appear to have been rarely employed for reasons having to do with critical or volatile situations, or pressing emergencies. Instead, CFNs are increasingly required to have knowledge of the whole-of-government priorities such as reconciliation, and be more comfortable in, as one informant noted, the “gray area” that these priorities require. It is expected that this need will only increase.

Litigation has, however, felt the greatest impact of the shifting policy landscape, because the very nature of litigation, as opposed to negotiation, is defensive. Over the evaluation period, CIRNAC has deployed EWs earlier in the litigation process, to help gain out-of-court agreements with Indigenous parties. Key informants noted that the ECLA was instrumental in this respect, serving as a tool preadapted to the shifting policy landscape.

There has been a continued need to supplement CIRNAC’s capacity with external resources, a need that is expected to continue.

CFN appointments are frequently justified based on the need to supplement internal resources or expertise, and are commonly selected based on their experience and knowledge of the relevant decision-making processes, in negotiating and resolving difficult issues, particularly with Indigenous groups, and knowledge of the particular parties involved. CFNs are often better equipped to handle negotiations than departmental negotiators, depending on the sensitivity or complexity of particular files, the stage of the negotiation process, and the expectations of Indigenous parties. CFNs are most frequently required for reasons of political sensitivity, and particularly the need to establish federal commitment or credibility on files considered sensitive.

⁶ Truth and Reconciliation Commission of Canada, [Calls to Action](#)

⁷ United Nations, [United Nations Declaration on the Rights of Indigenous peoples](#)



There remains a need for the department to have a set of flexible procurement tools and as an enabling authority, the ECLA is key in being able to appoint external negotiation and litigation resources.

CDs and EWs are central to the department's litigation activities and managing its legal risk. EWs are typically required or justified for a variety of reasons, such as responding to plaintiffs' expert witness reports, testifying before the courts and the Specific Claims Tribunal, developing the Crown's position and strategy, and contributing to the settlement of claims in accordance with the department's reconciliation mandate. Typically, requests for an EW contract state that without an EW, the Crown would be unable to adequately present its defense, leading to adverse outcomes and greater potential consequences.

The ECLA enables the Minister to enter into and renew non-competitive contracts with CFNs for negotiations with Indigenous parties, and CDs and EWs required for litigation. By design, the ECLA has a number of advantages over other possible procurement options for contracting the same services, primarily higher contracting limits without requiring TB approval, which impacts speed and flexibility, and the ability to avoid divulging the Crown's strategy.

3.2 Design and Delivery: Delivery Structures and Governance

The ECLA is managed in a similar fashion as a program, with robust governance, management, and financial management structures. This is an important factor facilitating the achievement of the ECLA outcomes. The limited pool of appropriately qualified and diverse CFNs, CDs, and EWs is a concern, as the need for these resources has continued, and is anticipated to remain into the future.

Key informants identified several factors that have facilitated and hindered the achievement of the ECLA's stated outcomes—some are internal (e.g., related to delivery structures and governance), while others are external (e.g., availability of resources). These are summarized below.

Although the ECLA is an enabling authority policy, it has been managed in a similar fashion as a program. The governance structure defines roles and responsibilities, and the management structure consists of processes, procedures and guidelines, expected results and indicators to assess performance, and regular and structured performance reviews (e.g., assessment of CFNs as part of the table review process). The financial management structure tracks and controls expenditures made through the authority. Consistent with the findings of the most recent audit, respondents were in broad agreement that this management framework is robust and an important factor that has facilitated the achievement of the ECLA's stated outcomes.

The department's procurement hub noted that, given the strength of the management framework, the ECLA requests submitted by business lines were generally sound, and CFN, CD, and EW approvals clear and straightforward.

The table review process, which includes the assessment of the performance of CFNs (in combination with self-assessment), was highlighted by respondents to be a key accountability



mechanism. This annual process involves the Minister, the Minister's Chief of Staff, and the Deputy Minister reviewing the performance of each negotiation table and individual CFN in detail (which results, in part, in a decision to retain, deploy, or terminate CFNs). It also serves as a forum to discuss the medium- and long-term negotiation table planning needs, to adjust expectations for the progress of negotiations, refine negotiation plans, and readjust CFN reappointment packages. With respect to CDs and EWs, key informants stated that, given the small pool of available resources, there was "little point in assessing their performance" (e.g., as Department of Justice does).

The transformation of the department has seen some unintended consequences regarding the ECLA. Respondents noted that the decentralization of litigation has led to an erosion of corporate memory regarding the authority, interrupted communications across the dispersed litigation teams, and questions about the ECLA guidelines to appoint CDs and EWs. This has also resulted in some confusion among litigation teams related to the ECLA signing authority. Like litigation, the negotiation function has also been decentralized, however, the ECLA has continued to have a single focal point within TAG.

Some respondents pointed to the change in the negotiations landscape over the evaluation period, with Canada committing to enable Indigenous peoples to build the appropriate capacity that supports implementation of their vision of self-determination, continue ongoing work to redesign the *Comprehensive Land Claims* and *Inherent Right Policies*, and move from Self-Government and Comprehensive Claims negotiations to Recognition of Indigenous Rights and Self-Determination. These respondents stated that the ECLA needs to better accommodate this landscape to advance negotiations.

The department, as previously noted, unsuccessfully sought to broaden the scope of the ECLA. Most recently during the 2017 renewal, it sought to include Indigenous priorities beyond traditional claims, litigation, and self-government negotiations. This included processes that would assist in fulfilling the Government of Canada's commitment to undertake and re-engage in a renewed nation-to-nation relationship between Canada and Indigenous peoples, to move forward with rights and reconciliation, and to address the unique needs, rights, and interests of Indigenous groups through negotiations and implementation of related activities pursuant to the terms of settlement agreements and/or directions by a Tribunal or court as part of a National Reconciliation Framework.

While there was a general recognition that the ECLA was an effective and efficient procurement enabler to appoint CFNs, CDs, and EWs, there were some criticisms about the length of time required to put an ECLA contract in place due to requirements related to security clearances, HST/GST registration, and providing a sample invoice.

The limited pool of appropriately qualified and diverse CFNs, CDs, and EWs was raised consistently by key informants, particularly as demands have increased among some business lines over the evaluation period, and are expected to increase as the policy landscape shifts and initiatives, like reconciliation, gather momentum. The most commonly cited reason for this is the growing reluctance of potential resources to work for the Crown, defending against Indigenous groups, which can have negative reputational and revenue consequences.



Finally, the core characteristics of the ECLA, viewed by respondents as a rapid, sole source, and high contract limit procurement enabler, have been important factors facilitating the authority's outcomes and departmental results. Key informants agreed that the rapid deployment of CFNs, with the appropriate credibility, status, experience, and knowledge, signals Ministerial commitment to Indigenous parties. Respondents noted that the use of external resources, rather than public servants, allowed for fresh perspectives and reduced the requirement for direct engagement by senior management, so that interventions at negotiation tables can be more judicious, strategic, and impactful.

3.3 Design and Delivery: Diversity and Alignment with GBA Plus

Data concerning the diversity of CFNs, CDs, or EWs appointed through the ECLA is not collected. Consequently, the extent to which ECLA provides access to a diverse population of contractors could not be determined. Since there were 81 ECLA appointed contractors over the evaluation period, supporting 161 new negotiations and litigation files, there is a clear opportunity to consider GBA Plus goals of promoting equality, diversity, and inclusion.

Diversity data regarding CFN, CD, and EW appointments through the ECLA is not collected. Nevertheless, the volume of contractors retained through the ECLA presents a considerable opportunity to diversify the supplier base. In the case of negotiations, 19 new files were added to the portfolio and 10 new contractors added to the active roster over the evaluation period. In the same period, 132 new contracts for EWs were placed with 64 contractors to support litigation, and an additional 10 new contracts for CDs were placed with seven contractors.

The ECLA has the potential to support GBA Plus goals of promoting equality, diversity, and inclusion. While this did not occur over the evaluation period, the need to do so is widely appreciated. Business lines have been exploring ways to address the main barriers to the recruitment and retention of contractors from diverse communities.

The ECLA has not considered or contributed to GBA Plus goals of promoting equality, diversity, and inclusion over the evaluation period, and there is no evidence that data is being collected to do so. This was the primary criticism of the authority raised by key informants. Since the Minister has the sole discretion to make appointments, however, the ECLA has potential to promote equality, diversity, and inclusion. Business lines have been actively exploring ways to diversify the CFN, CD, and EW contractor base so it is more reflective of Canadian society, and more inclusive of all races and ethnicities. To do so is viewed by respondents as a distinct advantage and conveys a message of respect when working with Indigenous peoples.

The main barriers to the recruitment and retention of contractors from diverse communities include the small pool of potential candidates, a pool that reflects Canada's historical professional demographics, inherent biases towards Caucasian men and away from women and Black, Indigenous and People of Colour (BIPOC), hesitancy among Indigenous people to represent the Crown, business requirements required to be a contractor (e.g., HST/GST registration, obtaining



security clearances, preparing proposals, invoicing), and the lack of tombstone equity information about contractors appointed through the ECLA.

The [Contracting Policy](#) requires that an inventory of contractors be maintained, even for sole source purposes.

16.10.3 Competition for consultants or professionals. Procedures and source lists should be designed to ensure that qualified individuals or firms are not omitted from consideration and that there is a fair opportunity for those qualified to obtain a share of the available work. Repeat commissioning of a firm or individual without competition should not become a practice, even if the value of the contract is under the mandatory threshold for the calling of bids.

16.10.4 Inventories and source lists. Representative and up-to-date inventories or source lists of firms that provide consulting and professional services and wish to do business with the federal government should be maintained for consistency, economy, effectiveness and fairness in selecting and procuring best value. These inventories should be consulted before inviting bids or proposals or recommending a non-competitive selection.

Inventories and source lists of contractors have been developed periodically, although, as some key informants noted, these need to be harmonized, regularly updated, and shared and used by business lines.

3.4 Effectiveness: Achievement of Outcomes

Hiring and retaining of CFNs, CDs and EWs

The performance indicator associated with this outcome is “Appointments approved by the Minister and contracts signed and in place in appropriate timeframe to meet litigations, negotiations or other applicable processes deadlines”. The annual target for this indicator is 100% of contracts in place in the appropriate timeframe. While the evaluation was unable to assess performance against expectations because data was unavailable, descriptive data was available to present the following profile of the hiring and retaining of CFNs, CDs, and EWs over the evaluation period.

Key informants were broadly in agreement that the ECLA had successfully facilitated the rapid appointment and retention of CFNs, CDs, and EWs, which in their view was not feasible using other procurement arrangements. In this respect, respondents pointed to the flexibility of the ECLA Terms and Conditions and the sound management framework resulting in a process described as “turnkey” and streamlined. Key informants did suggest some efficiencies to improve the ECLA turnaround times, including modifying contracting requirements for HST/GST registrations and obtaining security clearances.⁸

⁸ These are mandatory contracting requirements outside the control of CIRNAC.



The ECLA was used to retain the majority of newly appointed CFNs, CDs and EWs over the evaluation period.

There were 161 new contracts raised by CIRNAC using ECLA. It is unclear if and to what extent CFNs, CDs and EWs were contracted using other procurement methods. Information from the document review indicates that this is an area that needs further understanding but was outside the scope of the evaluation.

CFNs were contracted to fill a variety of roles, across four business lines, with TAG as the primary user.

During the evaluation period, 51 negotiation files were supported by resources appointed through the ECLA, with 67% Chief Federal Negotiators and 29% Ministerial Special Representatives (MSP). Of these, just over half (52%) served only as Chief Federal Negotiator, 20% only as Ministerial Special Representatives, while nearly one-quarter (24%) acted in both roles, with the remainder serving in an unspecified role.

Table 2. Breakdown, by User

| Sector | Percent |
|----------------------|---------|
| TAG | 76 |
| Negotiations-East | 14 |
| Negotiations-Central | 18 |
| Negotiations-West | 29 |
| NAO | 10 |
| RPS | 8 |
| Implementation | 4 |
| PSD | 2 |
| Other | 15 |

During the evaluation period, there was some turnover of negotiation files supported by CFNs appointed through the ECLA. As a result there was an ongoing need to hire and retain CFNs. This requirement was met using the ECLA.

Apart from 2015–16, there has been a fairly consistent number of negotiation files carried over from previous fiscal years, between 20 and 25 files (Table 3). Over the evaluation period, 19 new files were opened (requiring the appointment of CFNs), 31 files were closed, and 20 files continued beyond 2019-20. The high number of files carried over from one year to another demonstrates the need to retain CFNs to ensure year-to-year continuity.

Table 3. Distribution of negotiation files supported by CFNs appointed through the ECLA, by Year⁹

| Files | 2015–16 | 2016–17 | 2017–18 | 2018–19 | 2019–20 |
|--|---------|---------|---------|---------|---------|
| Files carried over from the previous fiscal year | 32 | 25 | 24 | 20 | 23 |
| New files opened | 9 | 3 | 2 | 5 | 0 |
| Files closed | 16 | 4 | 6 | 2 | 3 |

⁹ For 2015–16, those files carried over includes files with a start date 2014–15 and earlier.



| Files | 2015–16 | 2016–17 | 2017–18 | 2018–19 | 2019–20 |
|--|---------|---------|---------|---------|---------|
| Files continuing to the next fiscal year | 25 | 24 | 20 | 23 | 20 |

Source: ECLA time series statistics.

The roster of CFNs demonstrated similar turnover as negotiation files (Table 4). Over the evaluation period, 15 contractors were carried over from 2015–16, 10 new contractors joined the active roster, 16 contractors left the active roster, and nine contractors continued beyond 2019-20.

There was retention, with nine CFNs, appointed prior to 2015–16, continuing through 2019–20, and of these, seven retained into 2020–21¹⁰. Thirty-six percent of CFNs have contributed to two or more negotiation files over the evaluation period, with one supporting five files and another nine files.

Table 4. Distribution of CFNs appointed through the ECLA, by Year

| ECLA Contract Federal Negotiators | 2015–16 | 2016–17 | 2017–18 | 2018–19 | 2019–20 |
|---|---------|---------|---------|---------|---------|
| CFNs carried over from the previous fiscal year | 15 | 14 | 12 | 11 | 11 |
| New CFNs joining the active roster | 6 | 0 | 2 | 2 | 0 |
| CFNs leaving the active roster | 7 | 2 | 3 | 2 | 2 |
| CFNs continuing to the next fiscal year | 14 | 12 | 11 | 11 | 9 |

Source: ECLA time series statistics.

Over the evaluation period, 64 EWs were appointed through 132 contracts raised through the ECLA. EWs were engaged across several business lines, Resolution and Partnership Sector (RPS) being the most represented sector.

During the evaluation period, 64 EWs were appointed through 132 contracts raised through the ECLA. RPS was the greatest user (75%) followed by TAG (21%). Within RPS, the Specific Claims Branch (61%) was the greatest user, followed by the Settlement Agreement and Childhood Claims Branch (14%).

During the evaluation period, there was some turnover of litigation files supported by EWs appointed through the ECLA.

The available data for EWs focused on new contracts for each fiscal year, excluding those contracts already underway prior to 2015–16 that continued during the evaluation period. The data demonstrated that EWs were appointed using the ECLA, and in the case of multiyear contacts, retained.

Over the evaluation period, the ECLA was used to appoint EWs as shown in

¹⁰ The number of CFNs not approved was unknown.



Table 5. A substantial number of contracts were multi-year, demonstrating the need for retention of EWs to ensure year-to-year continuity. For example, since there were 35 new EW contracts raised through the ECLA during 2017–18, and payments were made on 67 contracts, 32 contracts were extended into at least a second year.

There was a significant degree of retention of EWs, with 44% of EWs with two or more contracts over the evaluation period, one with six contracts, one with seven contracts, and two with eight each.

Table 5. Distribution of EW ECLA contracts, by Year¹¹

| Files | 2015–16 | 2016–17 | 2017–18 | 2018–19 | 2019–20 |
|---|---------|---------|---------|---------|---------|
| Number of new EW contracts issued | 27 | 32 | 35 | 16 | 22 |
| Percent of EW contracts issued | 20% | 24% | 27% | 12% | 17% |
| Number of contracts for which expenditures (payments) were made | 22 | 49 | 67 | 47 | 43 |

Source: ECLA time series statistics

Ten CD contracts raised through the ECLA were distributed across several business lines.

During the evaluation period, six CDs were appointed through 10 contracts raised through the ECLA (Table 6). TAG was the primary user (60%), followed by Individual Affairs Branch (previously part of RPS but moved to ISC in 2019) and RPS with 20% each.

Table 6. Distribution of CD ECLA contracts by Year¹²

| Files | 2015–16 | 2016–17 | 2017–18 | 2018–19 | 2019–20 |
|---|---------|---------|---------|---------|---------|
| Number of new CD contracts issued | 1 | 2 | 3 | 2 | 2 |
| Number of contracts for which expenditures (payments) were made | NR | NR | NR | NR | NR |

Source: ECLA time series statistics.

For the 10 CD contracts raised through the ECLA during the evaluation period, six different contractors were hired, with three working on one contract, two on two contracts, and one on three contracts, suggesting a degree of retention within the roster of CD contractors.

Re-engaging in a renewed nation-to-nation process with Indigenous peoples.

The performance indicator associated with the outcome is “CFNs, CDs, and EWs deliverables submitted as per contractual obligations”. The annual target for this indicator is 100% of deliverables met. Performance data was unavailable, however, some inference, with the support

¹¹ The low number of payments during 2015–16 reflects payments not made during the first year of some contracts issued during 2015–16.

¹² Number of contracts for which expenditures were made each fiscal year is not reported (NR) here because, in the source data, file expenditures and total expenditures are misaligned.



of the other lines of inquiry, could be made on the importance of the ECLA as an enabler in support of this outcome.

CFNs, CDs, and EWs were appointed, and often extended and reappointed, using the ECLA, over the evaluation period. This indicates satisfaction with the performance of these contractors, suggesting that deliverables had been met.

CFNs, CDs, and EWs were continually appointed using the ECLA on many ongoing and new negotiations and litigation files, with many concluding their assignments. Contractors also continued to be paid, in many cases over several years. This suggests that CFNs, CDs, and EWs contracted through the ECLA met their contractual obligations, and provided cost-effective contributions to progress negotiation and litigation files, which in turn contributed to re-engaging in a renewed nation-to-nation process with Indigenous peoples.

The integrity of the performance review process for CFNs and the precision of CD and EW deliverables helps to ensure contractual obligations are respected.

Contracts are based on appointment packages approved by the Minister for all CFNs and for CDs and EWs over \$100,000. These packages state the objectives and outcomes particular to a negotiation or litigation file. Due to the predictability of litigation, contracts for CDs and EWs can be much more precise in terms of deliverables than those for CFNs. Key informants did not raise any performance issues with CFNs, CDs, and EWs appointed through the ECLA.

A widely recognized strength of the ECLA process is the table review process which includes an assessment of the performance of CFNs (in combination with self-assessment). Respondents noted that this process is particularly useful in the context of negotiations which can be “abstract” when compared to mainstream professional services, meaning that anticipated deliverables and deadlines can be subject to external factors out of control of the CFN and CIRNAC. Approximately half of the CFN table review performance appraisals occurred over the evaluation period. Annual performance reports for CFNs were overwhelmingly positive regarding the performance and contributions of CFNs, and almost all CFNs were assessed to have fulfilled contract terms, negotiated in good faith, acted in accordance with the federal mandate and guidance, established positive working relationships with other parties, presented valid and credible recommendations, made significant progress in meeting departmental objectives, and effectively managed public communications.

Given the small pool of available candidates, the performance of CDs and EWs are not formally appraised during the contracting and renewal process by PSD, however, Justice Canada may take performance into account when making future recommendations.

The ECLA has been instrumental in contributing to the advancement of key files, through the appointment of CFNs, CDs, and EWs with the appropriate expertise, knowledge and experience.

Supporting this medium-term outcome are observations of key informants, identifying the ECLA as instrumental in supporting many high-profile and sensitive files, such as devolution of the



Northwest Territories and Nunavut, and the Caledonia blockade. Although Ministerial Special Representatives (MSR) have reportedly not been deployed as often as in the past, MSRs successfully supported the Arctic Policy Framework, a role that involved nation-to-nation considerations, and led community healing and commemoration sessions following the settlement of the Anderson claim in Labrador.

Many of the same findings noted above are equally applicable to the litigation function, and the ECLA has proven to be instrumental in the appointment of independent, neutral and specialized CDs and EWs. Respondents noted that there has been a shift in the way CDs and EWs have been used over the evaluation period, engaging in a more collaborative fashion (e.g., assisting CIRNAC in determining if out-of-court settlements should be pursued rather than litigation, and helping to develop out-of-court settlement mandates).

A renewed relationship with Indigenous peoples based on the recognition of rights, respect, co-operation, and partnership.

The performance indicator associated with this outcome is “Agreements reached between Indigenous communities and government organizations on Section 35 assertions, including self-government rights and other processes that support reconciliation”. The annual target for this indicator is “within timeframe defined in the negotiation action plans, agreements, or by the Court”. The assessment of performance against these expectations was not completed because data was unavailable, however, based on other lines of inquiry, it can be inferred that the importance of the ECLA is as an enabler in support of this outcome.

This outcome has stronger links to negotiations, and the ECLA is one of the Minister’s tools to support negotiations. Key informants noted that the ECLA has been particularly useful in advancing a renewed relationship and reconciliation, as CFNs act as Minister’s representatives but are able to maintain distance from the departmental bureaucracy. CFNs have been able to lend credibility and trust to the Minister they represent, particularly in cases where the public service may have been unsuccessful in building and sustaining strong, productive, and respectful relationships with Indigenous peoples.

There is satisfaction with the performance of contractors retained by ECLA as their appointments are frequently extended or renewed, suggesting that timeframes defined in negotiation action plans, agreements, or by the Court had been met.

CFNs, CDs, and EWs were continually appointed using the ECLA on many ongoing and new negotiations and litigation files, with many concluding their assignments. Contractors also continued to be paid, in many cases over several years. This suggests that CFNs, CDs, and EWs contracted through the ECLA contributed to meeting timeframes defined in negotiation action plans, agreements or by the Court, which in turn contributed to a renewed relationship with Indigenous peoples based on the recognition of rights, respect, co-operation, and partnership through the medium-term outcome.

Key informants supported the contribution that ECLA has made to achieve the timeframes defined in negotiation action plans, agreements, or by the Court. Respondents noted that there are many



other factors that can impact the action plans, agreements, and Court proceedings, but that the authority assists by ensuring that risks associated with the timeliness of CFN, CD, and EW contracting are mitigated.

4. Efficiency and Economy

The ECLA is widely viewed as the most economical and efficient procurement arrangement available to efficiently appoint CFNs, CDs, and EWs. However, a comprehensive analysis of alternatives to the ECLA has not been conducted.

The ECLA is widely viewed by key informants as the most economical and efficient procurement arrangement available to efficiently appoint CFNs, CDs, and EWs.

The ECLA was the primary contracting method during the evaluation period for CFNs, CDs and EWs. There is indication that alternative arrangements to the ECLA were used in a minority of contracts. These alternative pathways were not included in the scope of the evaluation and are noted for descriptive purposes. Some key informants reported investigating alternative procurement arrangements over the evaluation period (e.g., mainstream sole source service contracts, standing offers), but indicated that none of these alternatives would yield the same level of performance as the ECLA in terms of appointing contractors rapidly through a sole source process, and at a higher budget threshold than is available through regular contracting mechanisms and for CFNs, ensuring an explicit indemnification clause is added to all contracts. While there are several procurement pathways outside of the ECLA to retain contract CFNs, CDs and EWs, additional analysis would be required to assess the extent to which they could support CIRNAC's requirements to rapidly appoint contractors in support of negotiation and litigation to meet Court imposed timelines, higher expense ceilings, and confidentiality.

Management and oversight of the authority is embedded at the business line level. The procurement hub provides transactional support to business lines in the application of the ECLA and other procurement arrangements.

CFRDO respondents characterized their role as being to provide support service to the programs on applying the delegation of the authority, support and guidance on how the delegation of the authority occurs, and choices of contractual arrangements and instruments to meet program needs (e.g., advice on the application of the Terms and Conditions, but not on the overall policy itself). Management and oversight are embedded in the business line delivery, with CFRDO providing support capacity to explain the consequences of following the available options in the "contracting arsenal" of the department. Among OGDs, procurement hubs act as centres of expertise, ensuring consistent and compliant application of the *Contracting Policy*, providing support to business lines by developing the optimal procurement strategy to meet their policy goals.

The adherence to some of the *Contracting Policy* requirements in terms of non-competitive contracts, which equally apply to exceptional contracting limits such as the ECLA (e.g., inventories of firms and individuals be developed and maintained "for consistency, economy, effectiveness and fairness in selecting and procuring best value" and that "these inventories should be



consulted before inviting bids or proposals or recommending a non-competitive selection”) require increase rigour than other types of procurement arrangements. Based on the information provided to the evaluation team, it appears that a more informal approach has been taken for the ECLA (e.g., inventories are out of date).

5. Conclusions and Recommendations

5.1 Conclusions

Relevance: Continued Need and Alignment with Federal Priorities and CIRNAC Results

CIRNAC is leading Canada’s whole-of-government approach to the renewal of nation-to-nation, and government-to-government relationships with Indigenous peoples, and advancing reconciliation. This responsibility is not expected to change, and negotiations and litigation have and will continue to play an important role.

The department’s policy landscape has, however, shifted considerably over the evaluation period, following Canada’s 2015 commitment to achieving reconciliation with Indigenous peoples and to implement the recommendations of the Truth and Reconciliation Commission of Canada (TRC), the launch of the RIRSD tables in 2015, endorsement of UNDRIP in 2016, and the introduction of *Bill C-15: The United Nations Declaration on the Rights of Indigenous peoples Act* in 2020. These commitments have meant a greater focus on the reconciliation of relationships and nation-building over the evaluation period, and it is expected that the impacts of this change on negotiations and litigation (i.e., towards collaboration, consultation, and engagement) will continue.

The ECLA is an enabler that allows the Minister to enter into and renew non-competitive contracts with CFNs for negotiations with Indigenous parties, and CDs and EWs required for litigation. There remains a need for the department to have a set of flexible procurement tools and as an enabling authority, the ECLA serves as one of the mechanisms to appoint external negotiation and litigation resources, noting that over the evaluation period, the authority was not the only contracting enabler used for CFNs, CDs and EWs, however, the analysis of the objectives, roles and responsibilities of those other contracts were not within the scope of the evaluation.

As the policy landscape has shifted, CFNs, CDs, and EWs have been expected to be more sensitive to and comfortable working in the context of reconciliation. One of the ways to achieve this is by diversifying the contractor base to be more reflective of Canadian society, and more inclusive. When working with Indigenous peoples, there is an obvious benefit to source contractors from the same communities as those being engaged through negotiation or litigation. While the ECLA has not measurably contributed to GBA Plus goals over the evaluation period, it has potential to do so by recruiting and retaining contractors from diverse communities, and help to overcome the hesitancy among Indigenous peoples to represent the Crown.

Design and Delivery: Delivery Structures and Governance, and Diversity and GBA Plus

The core characteristics of the ECLA, viewed by respondents as a rapid, sole source, and high contract limit procurement arrangement, have been important factors facilitating the achievement



of the authority's stated outcomes and departmental results. The authority has enabled the Minister to rapidly deploy CFNs, with the appropriate credibility, status, experience, and knowledge, which signals Ministerial commitment to Indigenous parties.

External resources appointed through ECLA have brought fresh perspectives to files and reduced the requirement for direct engagement by senior management, so that interventions at negotiation tables can be more judicious, strategic, and impactful. It is arguable that this result could be even greater if the contractor base is diversified to be more reflective of Canadian society.

The ECLA has been managed in a similar fashion as a program with a robust management framework, also widely viewed as an important factor that has facilitated the achievement of the ECLA's stated outcomes. The authority is an enabler to implement policies of business lines, not a program in and of itself. This may explain the approach to the ECLA by the procurement hub, as compared to other procurement arrangements. The ECLA is entirely managed and administered by programs, with minimal involvement of the procurement hub. The procurement hub executes a contracting strategy developed by their business line clients, and does not exercise an oversight or compliance function. An innovative approach in which the procurement hub is positioned as a centre of expertise could ensure consistent and compliant application of the *Contracting Policy* while supporting business lines through the development of an optimal procurement strategy to meet their policy goals.

The transformation of the department has seen some unintended consequences regarding the ECLA, with an erosion of corporate memory regarding the authority, interrupted communications across the dispersed litigation teams, questions about the ECLA guidelines to appoint CDs and EWs, and some confusion regarding roles and responsibilities. Decentralization has highlighted the need to ensure that the ECLA management framework is consistent and clearly understood (e.g., through up-to-date documentation and guidelines) across the department.

The reportedly limited pool of appropriately qualified and diverse CFNs, CDs, and EWs is a concern, particularly as demands have increased among some business lines and are expected to increase as the policy landscape shifts and initiatives, like reconciliation, gather momentum. A more explicit GBA Plus focus may help to address this shortfall, by recruiting and retaining contractors from diverse communities, and help to overcome the hesitancy among Indigenous peoples to represent the Crown.

As noted above, while the ECLA has the potential to support GBA Plus goals of promoting equality, diversity, and inclusion, this has not occurred over the evaluation period, which is a widely recognized shortfall.

Effectiveness

There is a noticeable misalignment between the ECLA outcomes and performance indicators, with no targets in some cases and unavailable data.

In terms of the short-term outcome "Hiring and retaining of CFNs, EDs and EWs", the ECLA was used for the majority of CFNs, CDs, and EWs appointments by CIRNAC over the evaluation



period. TAG was the greatest user of the ECLA for CFNs and CDs, and RPS for EWs. As negotiation files tend to continue from one year to the next, CFNs were retained year-over-year to ensure continuity, with only a handful of new contractors joining the roster over the evaluation period. Similarly, CDs and EWs tended to be retained in the case of multiyear files.

The indicator for the medium-term outcome “Re-engaging in a renewed nation-to-nation process with Indigenous peoples” is “CFNs, CDs, and EWs deliverables submitted as per contractual obligations”. This is an example of the misalignment noted above, and no data was available to directly assess performance. Based on the remarks of key informants, the repeat appointment of CFNs, CDs, and EWs, and review of a sample of CFN performance appraisals, contractual obligations have been met and cost-effective contributions have been made to the progress of negotiation and litigation files, which in turn has contributed to re-engaging in a renewed nation-to-nation process with Indigenous peoples.

The indicator for the long-term outcome “A renewed relationship with Indigenous peoples based on the recognition of rights, respect, co-operation, and partnership” is “Agreements reached between Indigenous communities and government organizations on Section 35 assertions, including self-government rights and other processes that support reconciliation”. Again, data was unavailable to directly assess performance, although the same inference as the medium-term outcome could be made on the importance of the ECLA as an enabler in support of this outcome.

The authority, however, is not a program in and of itself, but an enabler to implement policies of business lines. Given this, the requirement to develop a performance measurement framework and monitoring for one of many procurement arrangements appears out-of-place.

Efficiency and Economy

The ECLA is widely viewed as the most economical and efficient procurement arrangement available to appoint CFNs, CDs, and EWs, however, a comprehensive analysis of alternatives to the ECLA has not been conducted.

5.2 Recommendations

It is recommended that CIRNAC:

1. Establish the extent to which the ECLA is expected to support GBA Plus goals of promoting equality, diversity, and inclusion, and the implications on applying GBA Plus to negotiation and litigation. Incorporate these requirements into a recruitment and retention strategy to meet business needs and GBA Plus targets.
2. Reassess the requirement for a performance measurement framework, considering alternatives that are more suitable for monitoring a contracting mechanism.



Appendix A: Evaluation Matrix

| Evaluation Issues and Questions | Document and File Review | Performance Data Review | Key Informant Interviews |
|--|--------------------------|-------------------------|--------------------------|
| Relevance | | | |
| 1. Is there a continued need for the ECLA? | ✓ | | ✓ |
| 2. To what extent does ECLA align with and contribute to the Government of Canada policies, priorities and department results? | ✓ | | ✓ |
| Effectiveness | | | |
| 3. To what extent has the ECLA achieved the expected short-term outcome: Hire and retain contract federal negotiators/representatives, Crown deponents and expert witnesses. | | ✓ | ✓ |
| 4. To what extent has the ECLA achieved the expected medium-term outcome: Successfully advance the position of the Department by re-engaging in a renewed nation-to-nation process with Indigenous peoples. | ✓ | ✓ | ✓ |
| 5. To what extent has the ECLA achieved the expected long-term outcome: Support a renewed relationship with Indigenous peoples; one based on the recognition of rights, respect, cooperation, and partnership. | | ✓ | ✓ |
| 6. What are the factors, both internal and external, that have facilitated and hindered the achievement of outcomes (human resources, the economy, policy, governance)? | | | ✓ |
| Design and Delivery | | | |
| 7. To what extent has the design and delivery of the authority facilitated the achievement of outcomes and its overall effectiveness? | ✓ | | ✓ |
| 8. To what extent does the authority provide access to contracts to a diverse population of contractors? | | ✓ | ✓ |
| Efficiency | | | |
| 9. Is the current approach the most economic and efficient means of (producing outputs) achieving (or making progress towards) the intended outcomes, objectives? | | ✓ | ✓ |
| 10. Are there alternative ways of achieving (or making progress towards) the intended outcomes, objectives? | ✓ | | ✓ |
| Best Practices/Lessons Learned | | | |
| 11. Are there notable practices to improve performance? | ✓ | | ✓ |
| 12. Have there been any unintended outcomes or results of the authority? | ✓ | | ✓ |

