Aboriginal Affairs and Northern Development Canada
Affaires autochtones et Développement du Nord Canada

Final Report

Evaluation of the Process for Negotiating Comprehensive Land Claims and Self-Government Agreements

Project No. 10035

November 2013

Evaluation, Performance Measurement,
And Review Branch
Audit and Evaluation Sector

Canada

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Executive Summary

Comprehensive land claims and self-government negotiations[1] are based on two federal government policies: The *Comprehensive Land Claims Policy* (1986) and the *Inherent Right Policy* (1995). In accordance with the *British Columbia Treaty Commission Act*, 1995, negotiations in British Columbia follow a unique negotiation process under the British Columbia Treaty Process where negotiations are overseen by an independent facilitator, the British Columbia Treaty Commission.

As a result of the negotiation process, there are currently 26 completed agreements in effect.[2] These include 16 comprehensive land claims and self-government agreements, two self-government agreements, and eight comprehensive land claims agreements. There are currently 90 comprehensive land claims and self-government negotiation tables underway.[3] These include 52 comprehensive land claims and self-government negotiations in British Columbia, 13 comprehensive land claims and self-government negotiations in other parts of Canada, and 25 self-government negotiations across Canada.

The Government of Canada has mandates to establish negotiation processes to address Aboriginal and treaty rights in various parts of Canada. The Federal Steering Committee on Comprehensive Claims and Self-Government and the Federal Caucus on Self-Government and Comprehensive Claims are related bodies designed to maintain oversight across the federal system of comprehensive land claims and self-government related activities.

The Evaluation, Performance Measurement and Review Branch of Aboriginal Affairs and Northern Development Canada (AANDC) undertook an *Evaluation of the Process for Negotiating Comprehensive Land Claims and Self-Government Agreements*. The purpose of this evaluation is to assess the effectiveness, efficiency and economy of these negotiations. The Terms of Reference for the evaluation were approved at AANDC's Evaluation, Performance Measurement and Review Committee on September 28, 2012.

[1] The term" comprehensive land claims and self-government" refers to comprehensive land claims, with and without self-government. It also includes stand alone and sectoral self-government arrangements. The term "modern treaty" refers to comprehensive land claims, with and without self-government. The term "self-government" when used alone refers to stand alone and sectoral self-government arrangements.

[2] The Yale First Nation Final Agreement in British Columbia will come into effect on April 1, 2015. The Sioux Valley Dakota First Nation Self-Government Agreement in Manitoba was signed on August 20, 2013, and the date will be determined when it will come into effect once legislation has been passed. Both agreements are not included in the total of completed agreements in effect.

[3] Based on data provided by AANDC dated April 2013.

The evaluation supports the following conclusions.

Effectiveness[4]

The evaluation concludes that negotiated agreements contain clauses that work towards supporting expected outcomes and policy objectives. Moreover, evaluation findings indicate that where modern treaties have been concluded, they have reduced litigation in relation to Aboriginal rights with the Aboriginal signatory group. Modern treaties play an important role in placing the Crown/Aboriginal relation on a stronger legal foundation by providing greater continuity, transparency and predictability for the Crown/treaty Aboriginal group relationship.

However, modern treaties are arguably not capable of achieving the same certainty and finality that government initially anticipated. The reality is that there is now a very complex and shifting legal and constitutional framework. The evaluation identified pressures on existing federal policies that include Aboriginal groups having alternatives to modern treaties to obtain more immediate and tangible benefits, divergence of Crown/Aboriginal expectations, overlapping claims, and diverging provincial and territorial willingness to negotiate.

Although the settlement of agreements has resulted in some reduction in AANDC's contingent liability, the reduction was more than offset by other increases in the liability estimate as a result of new claims progressing through the process and adjustments for inflation, changes in populations, or other unplanned or unforeseen variables materializing. Consequently, rather than a decrease in the total reported liability, the net result was an increase in the liability estimate from 2003-04 to 2012-13 of approximately $255.6 million.

Efficiency and Economy

The evaluation concludes that progress is being made at the negotiation tables and that the number of completed agreements stands to increase significantly in the near future. However, comprehensive land claims and self-government negotiations are time consuming and costly with the federal mandating process adding significantly to the time required to negotiate agreements. Moreover, it is unclear if the Federal Steering Committee on Comprehensive Claims and Self-Government is providing intended leadership to ensure accountability, risk analysis and strategic advice. Significant effort is also being undertaken by AANDC at the Federal Caucus on Self-Government and Comprehensive Claims to secure agreements on mandates and agreements.

A number of impediments at the negotiation tables were identified that may also add time and costs to the negotiation process. They include Aboriginal groups wanting to have their fisheries interests reflected in agreements, overlapping interests with other Aboriginal groups, disagreement on Canada's own source revenue policy, and certainty and land status issues.

[4] The analysis for the effectiveness section relates to modern treaties and does not include sectoral and self-government arrangements.

Key areas of improvement identified in the evaluation include:

Structured Approach to Oversight and Reporting

Managing a process as complex as comprehensive land claims and self-government negotiations requires a structured approach in order to achieve results. Decision makers need consistent and coherent information about the status of negotiations and issues impeding progress to effectively prioritize resources.

Structured Approach to Table Planning

Effective program oversight requires a structured approach to planning and data/information collection in order that consistent and coherent information is available to decision makers when required. This includes developing and implementing a framework/methodology for negotiations to achieve high levels of consistency in planning and reporting and to promote a focus on results.

Systems to Maintain Documents and Manage Negotiations

Negotiators report that considerable time can be taken presenting the federal position to the other negotiating parties. A database of acceptable chapter language for negotiators should be available and updated regularly and could include federal program and policy changes.

Improvements to Performance Monitoring

There was a lack of data readily available to track and analyze the performance of the negotiation process. The current data collection processes were assessed, including the Annual Ministerial Table Review, Deputy Minister Quarterly Reporting, and the Federal Action Plans and Priorities. Though these data collection processes have been useful, there is the need to improve the approach to oversight and reporting to support a results-based approach to treaty and self-government negotiations. This will allow for increased accountability and transparency regarding the costs, progress and risks of these negotiations. Regional Management Plans have been recently introduced and are intended to be reporting and planning mechanisms from which an annual report to Cabinet and/or Parliament can be derived.

AANDC has already begun to make significant changes to support a more efficient results-based approach to negotiations as announced by the Minister of Aboriginal Affairs and Northern Development in September of 2012. The evaluation supports the direction being taken by AANDC.

Evaluation Recommendations

1. Adopt a proactive policy approach to more effectively manage and respond to risks and strategically shape or influence the evolving legal framework.

2. Strengthen the approach to oversight and reporting.

3. Strengthen the approach to table planning.

4. Implement systems to maintain documents and manage negotiations.

5. To improve results-based reporting, coordinate the ongoing monitoring of the efficiency and effectiveness of comprehensive land claims and self-government negotiations.

Management Response and Action Plan

Project Title: Evaluation of the Process of Negotiating Comprehensive Land Claims and Self-Government Agreements

Project #: 10035

1. Management Response

On September 4, 2012, the Minister of Aboriginal Affairs and Northern Development Canada announced Canada's plans to work with its partners on a new approach to comprehensive claim (modern treaty) and self-government negotiations. Canada is moving toward a more efficient, effective results-based approach to its participation in negotiations. This new results-based approach responds to past calls for change. Canada's work with partners to accelerate progress and achieve faster results will be based on three areas: focusing resources and efforts on negotiating tables with the greatest potential for success, offering alternative measures to address Section 35 rights for tables that need to address specific impediments, and streamlining the internal mandating, approval and reporting processes, resulting in increased Cabinet strategic oversight. The implementation of this approach will be incremental. Canada will consider options to improve access to other tools outside the negotiation process that address Aboriginal rights and promote Aboriginal economic development and self-sufficiency. **The Treaties and Aboriginal Government (TAG) sector is in the process of implementing the new approach.** The Evaluation of the Process of Negotiating Comprehensive Claims and Self-Government Agreements (the Evaluation) reiterates many of the points that informed Canada's adoption of a new approach to these negotiations and further supports the direction being taken to implement this initiative. Important Crown / Aboriginal high level dialogue is currently underway through a Senior Oversight Committee on Comprehensive Claims, which may inform the ongoing implementation of the new approach initiative as well as the action plan set out below. As noted above, the Evaluation's conclusions largely support the direction recommended by TAG management with respect to the government's new results-based approach to these negotiations. Overall, the Evaluation notes that progress is being made at negotiation tables and that the number of completed agreements stands to increase significantly in the near future. Where negotiations have been concluded, they have reduced litigation in relation to Aboriginal rights with the signatory groups. The Evaluation also highlights some short-comings within the negotiating process. TAG fully acknowledges the observation in the evaluation that the federal mandating process adds significantly to the time required to negotiate agreements. The horizontal nature of the agreements, intersecting with the responsibilities of a broad range of federal departments and agencies mean that extensive consultation and coordination is required. This can add a number of years to the process. In keeping with the new results-based approach initiative, efforts are underway to streamline these processes to support more timely results. However, this effort to streamline must be carefully balanced to ensure that the need for a whole of government approach to modern treaty and self-government negotiations, together with rigorous federal oversight, do not overwhelm capacity to deliver timely results. In 2011, the Office of the Auditor General, for example, noted improvements in federal oversight systems to

track commitments contained in agreements. In exploring any changes to the Federal Steering Committee process, TAG will need to be mindful of the balance that needs to be achieved between oversight and efficiency/effectiveness (getting results).

While many of the evaluation findings will aid in undertaking reforms to the current negotiations process, it must also be noted that some sweeping statements have been made. An example is found in the assertion that resources are not being used effectively. This assertion, however, is not based on any benchmark or comparison. Valid comparisons might include the comparative costs and outcomes of negotiation versus litigation, comparisons among negotiation tables, or comparisons to other types of negotiations (for example, complex, multi-party trade agreements). Without such comparisons, the accuracy of such a statement is questionable. In addition, we take issue with the assertion that the increase in contingent liability from 2003-04 to 2012-13 is an indication of a failure of the process. As in other domains of public government, when we further explore and clarify the Government's liability exposure, estimates on these liabilities can grow. If we had not negotiated the 26 agreements that are in place, these contingent liabilities would be additional to what is presently assessed. In our view, the conclusion made from the technical contingent liability analysis represents an unsupported leap using contingent liability as a measure of performance.

Finally, we suggest that the Action Plan presented below is appropriate with realistic measures to address the Evaluation's recommendations as it aligns with the new approach initiative to which the Department has already formally committed.

2. Action Plan

Recommendations	Actions	Responsible Manager (Title / Sector)	Planned Start and Completion Dates
1. Adopt a proactive policy approach to more effectively manage and respond to risks and strategically shape or influence the evolving legal framework.	We concur. A Crown / Aboriginal high level dialogue is underway that partly aims to examine the negotiation policy framework to more effectively address Section 35 rights. Further, the Government's new approach to comprehensive claims (modern treaty) and self-government negotiations provides a more risk and results-based strategic focus. In short, a proactive policy approach is being implemented in order to achieve more timely results, while also exploring strategic alternatives to address Aboriginal rights, and promote economic development and self-sufficiency. The courts consistently point toward negotiations to achieve reconciliation in the Crown / Aboriginal relationship; and the Government's good faith conduct in negotiations is guided by the evolving legal framework.	Director General (DG), Program Development and Coordination (PDC), TAG All other TAG DGs implicated	*Start Date:* *New Approach September 2012* *Completion: Ongoing implementation* **Status: Completed – Closed** **Update/Rationale: As of 30/06/2014:** The high level joint-policy work of the Senior Oversight Committee was completed in December 2013. Recommendations were submitted in accordance with the Senior Oversight Committee Terms of Reference. On July 28, 2014, the Minister announced new policy authorities to support more flexible S. 35 tools. The development of the Results-Based Approach to improve accountability and management of negotiation processes has been underway since September 2012. The input gathered from partners during 2012 engagement process has provided valuable input into the development of options for improvements to policies and

			processes. In 2013, a new regional planning approach was piloted. Lessons learned allowed TAG to integrate the approach in a revamped annual review of negotiations for 2014 and beyond. **AES: Sufficient progress made. Recommend to close. Closed.**
2. Strengthen the approach to oversight and reporting.	We concur. Canada's new results-based approach to negotiations seeks to improve accountability to Cabinet, to strengthen our oversight and reporting framework through the adoption of strategic regional management plans and associated annual reports. We are also examining options to streamline existing internal approval processes in order to realize more timely results. Finally, the Federal Action Plan and Profile (FAPP), a negotiations case management system pilot, will be renovated to enhance its capacity to contribute to strategic planning, reporting and management at the individual table, regional and national level to better align resources with priorities. For example, the FAPP can be utilized to identify common impediments at negotiation tables in different regions thus, enabling more effective investment of policy resources. That said, consideration of resource implications will be important when examining possible changes to reporting and oversight. AANDC will work with work with other government departments and Central Agencies on strengthening the Federal Steering Committee and add more rigor to the oversight process.	Director General, Financial Management and Strategic Services (FMSS), TAG All other TAG DGs implicated	*Start Date: New Approach September 2012* *Completion: March 2014* **Status: Completed – Closed** **Update/Rationale: As of 31/12/2014:** The development of the Results-Based Approach to improve accountability and management of negotiation processes has been underway since September 2012. In 2013, a new regional planning approach was piloted. Lessons learned allowed TAG to integrate the approach in a revamped annual review of negotiations for 2014 and beyond. The development of an elaborated FAPP called the RBIS (Results-Based Information System) database is developed and user acceptance testing has begun. Full implementation is

			targeted for March 31, 2015. The database will help monitoring and reporting on negotiation processes and will track the progress over time. AANDC continues the work on the development of options for strengthening the FSC processes and considering streamlining of the approvals and reporting processes. **AES: Closed.**
3. Strengthen the approach to table planning.	We concur. Table planning already exists through multiparty work planning, table and mandate review processes, and the use of internal federal action plans (see FAPP above) for each table to establish strategic objectives and to inform decisions on the allocation of financial and human resources to achieve those objectives. Implementation of the new approach aims to strengthen table planning with a more strategic level focus through the use of Regional Management Plans (RMPs) and associated annual reports. RMPs were piloted in 2013 within AANDC and modifications are currently being applied to address lessons learned. Finally, under the new approach Canada will introduce multi-year negotiations plans to ensure all the parties share common ground on goals and objectives, along with an annual review to reconfirm federal participation.	Director General, FMSS, TAG TAG Negotiation Branch DGs All other TAG DGs implicated	*Start Date:* *New Approach September 2012* *Completion:* *March 2015* **Status: Completed – Closed** **Update/Rationale: As of 31/12/2014:** The process and development of Regional Management Plans continues to be improved. This year the process was launched sooner to ensure better coordination with the development of annual and multi-year negotiation plans, as well as the funding contract renewals. The development of an elaborated FAPP called the RBIS (Results-Based Information System) database is developed and user

			acceptance testing has begun. Full implementation is targeted for March 31, 2015. The database will help monitoring and reporting on negotiation processes and will track the progress over time. **AES: Closed.**
4. Implement systems to maintain documents and manage negotiations.	We concur. Negotiations already utilize departmental Information Technology systems to maintain and share documents as they evolve. However, greater leveraging of technology and increased use of standard language in agreements is an element of the new approach, and will be examined as we look to improve and streamline our internal processes. The results- based focus of the new approach, with RMPs etc, will enhance our strategic management of negotiations. Streamlining efforts will further explore this while balancing effective use of operations and maintenance expenditures.	Director General, FMSS, TAG Director General, PDC, TAG All other TAG DGs implicated	*Start Date: September 2012* *Completion: March 2015* **Status: Completed – Closed** **Update/Rationale: As of 31/12/2014:** The development of an elaborated FAPP called the RBIS (Results-Based Information System) database is developed and user acceptance testing has begun. Full implementation is targeted for March 31, 2015. The database will help monitoring and reporting on the negotiation processes and will track the progress over time. AANDC continues the work on the development of options for strengthening the FSC processes and considering streamlining of the approvals and reporting processes. **AES: Closed.**

5. To improve results-based reporting, coordinate the ongoing monitoring of the efficiency and effectiveness of comprehensive land claims and self-government negotiations.	We concur. The planned improvements to TAG's result-based reporting capacity align with this recommendation. As noted above, implementation of the new approach will realize a number of results based reporting improvements. Complementary to the new approach will be a renovated FAPP, which will utilize the efficiencies of a genuine database program. The FAPP will enable a cost-effective focal point for strategic outcome planning, reporting and management, which simultaneously seeks to reduce the ad hoc and inefficient reporting burden on negotiation teams. In addition, measures are being taken to enhanced intra-negotiation / implementation branch collaboration at the working level (e.g., federal negotiators network) and senior levels to augment existing fora such as the weekly TAG Management and Senior Management meetings. Policy Development and Coordination Branch already tracks and reports on efforts to resolve regional and national table issues. Financial Management and Strategic Services Branch already tracks and reports on negotiations costs. Implementation Branch monitors fulfillment of modern treaty obligations. Leveraging this type of existing data, when coupled with other planned improvements in TAG processes, will establish a more coordinated and robust result-based reporting structure.	Director General, FMSS, TAG Director General, PDC, TAG All other TAG DGs implicated	*Start Date: September 2012* *Completion: March 2014* **Status: Completed – Closed** **Update/Rationale: As of 31/12/2014:** The development of the Results-Based Approach to improve accountability and management of negotiation processes has been underway since September 2012. The process and development of Regional Management Plans continues to be improved. This year the process was launched sooner to ensure better coordination with the development of annual and multi-year negotiation plans, as well as the funding contract renewals. The development of an elaborated FAPP called the RBIS (Results-Based Information System) database is developed and user acceptance testing has begun. Full implementation is targeted for March 31, 2015. The database will help inform monitoring and reporting on negotiation processes and will track the progress over time. **AES: Closed.**

I recommend this Management Response and Action Plan for approval by the Evaluation, Performance Measurement and Review Committee

Original signed on November 13, 2013, by:

Michel Burrowes
Director, Evaluation, Performance Measurement and Review Branch

I approve the above Management Response and Action Plan

Original signed on November 18, 2013, by:

Gina Wilson
Treaties and Aboriginal Government, Senior Assistant Deputy Minister

The Management Response / Action Plan for the Evaluation of the Process of Negotiating Comprehensive Land Claims and Self-Government Agreements were approved by the Evaluation, Performance Measurement and Review Committee.

1. Introduction

1.1 Overview

The Evaluation, Performance Measurement and Review Branch (EPMRB) of Aboriginal Affairs and Northern Development Canada (AANDC) undertook an *Evaluation of the Process for Negotiating Comprehensive Land Claims and Self-Government Agreements.*

The purpose of this evaluation is to assess the effectiveness, efficiency and economy of the negotiations process for comprehensive land claims and self-government agreements.

1.2 Description of Comprehensive Land Claims and Self-Government Agreements

1.2.1 Background

Comprehensive land claims and self-government negotiations are based on two federal government policies: The *Comprehensive Land Claims Policy* (1986) and the *Inherent Right Policy* (1995). In accordance with the *British Columbia Treaty Commission Act*, 1995, negotiations in British Columbia follow a unique negotiation process under the British Columbia Treaty Process where negotiations are overseen by an independent facilitator, the British Columbia Treaty Commission.

The *Comprehensive Land Claims Policy* stipulates that land claims may be negotiated with Aboriginal groups in areas where claims to Aboriginal title have not been addressed by treaties or through other legal means. Comprehensive land claims are based on the assertion of continuing Aboriginal rights and title. Section 35 of the *Constitution Act*, 1982, and the Courts have recognized the existence of Aboriginal rights. Reconciliation through the conclusion of agreements is intended to promote economic self-sufficiency and well-being for Aboriginal signatory groups. The reconciliation of those rights with the rights and interests of all Canadians is essential to ensure Canada's prosperity, to limit federal liabilities and to avoid potential conflicts.

The Government of Canada's current approach to Aboriginal self-government, the 1995 *Inherent Right Policy*, articulates the federal government's general recognition of the inherent right of self-government as an existing Aboriginal right under Section 35 of the *Constitution Act, 1982*. It is based on the view that the Aboriginal peoples of Canada have a right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and resources. Self-government agreements set out arrangements for Aboriginal groups to establish stable, self-reliant governments to manage their internal affairs and assume greater responsibility and control over the decision making that affects their communities.

Negotiation processes have generated a number of agreements over the course of the last 40 years and continue to produce innovation in both policy and process. The average current negotiation process, however, takes approximately 18 years to complete and while bureaucratic oversight is critical, the federal mandating and reporting processes is cumbersome and can add significantly to the time required to negotiate agreements. Cabinet is called to review individual negotiation mandates and agreements without the benefit of regular progress updates or regional context. Moreover, evolving constitutional law, changing public and economic environments, and experience from existing processes have served to identify a range of issues where there is a need to consider renewal of policies and processes for addressing s.35 rights.

A more efficient results-based approach to comprehensive land claims and self-government negotiations was announced by the Minister of Aboriginal Affairs and Northern Development in September of 2012. This new approach will focus its resources on tables with the greatest potential for success while considering options to improve access to other tools outside the negotiation process that address Aboriginal rights and promote economic development and self-sufficiency. It will also look at ways to speed up Canada's internal processes.

During the Crown-First Nations Gathering in January 2012, Canada and the Assembly of First Nations collectively recognized the need for change and, through the Outcome Statement, identified advancing claims resolution and treaty implementation as immediate areas for action. These commitments were reconfirmed by the Prime Minister following the recent January 11, 2013, meeting between the Canada and the Assembly of First Nations leadership. Moreover, the Government of Canada in the 2013 Speech from the Throne stated that it will continue its dialogue on the treaty relationship and comprehensive land claims.

Recent calls for change have also been made by Aboriginal claimant groups in British Columbia and Quebec, the Assembly of First Nations, the Senate and the British Columbia Treaty Commissioner. These calls for change include finding ways to expedite the negotiation process and speed up the internal federal mandating process.

1.2.2 Federal Structures

The Federal Steering Committee on Comprehensive Claims and Self-Government and the Federal Caucus on Self-Government and Comprehensive Claims are related bodies designed to maintain oversight across the federal system of comprehensive land claims and self-government related activities.

The Federal Steering Committee on Comprehensive Claims and Self-Government is composed of assistant deputy ministers from central agencies and other government departments and is chaired by the Senior Assistant Deputy Minister of Treaties and Aboriginal Government Sector in AANDC. Its responsibilities include reviewing and recommending or approving negotiation mandates and agreements within the policy framework. It also reviews the direction and strategic oversight for comprehensive land claims and self-government policy issues and maintains an overview of all related activities across the federal system.

It is supported by the Federal Caucus on Self-Government and Comprehensive Claims, which is the interdepartmental bureaucratic forum established to review, discuss and provide recommendations on comprehensive land claims and self-government negotiations and activities and implementation issues affecting particular departments. Its role is to strive for interdepartmental consensus on all items brought before recommending their submission to the Federal Caucus on Self-Government and Comprehensive Claims. It is composed of approximately 140 federal representatives from 36 departments/agencies who are involved in comprehensive land claims and self-government negotiations.

1.2.3 Expected Results

The expected result of the negotiations of comprehensive land claims and self-government is certainty and clarity with respect to law-making authority and the ownership, use and control of land and resources.[5]

As per AANDC performance measurement strategy,[6] immediate outcomes of comprehensive land claims and self-government include:

- *Governance*: new relationships established;
- *Programs and Services*: new programs and services responsibilities established;
- *Lands and Resources*: structures for lands and resource ownership, management and access established; and
- *Economic Development:* structures for economic development established.

Intermediate outcomes include stable and sustainable Aboriginal governments, control / jurisdiction of programs and services, clarity and certainty of ownership and access to lands and resources, and stable and predictable environment for economic development. Ultimate outcomes support strong and self-reliant Aboriginal individuals, communities groups and governments.

1.2.4 Alignment with Departmental Priorities

Negotiations of comprehensive land claims and self-government are situated within the 2013-2014 departmental Program Alignment Architecture under the:

- Government Pillar;
- Co-operative Relationship Program Activity; and
- Negotiations of Claims and Self-Government Sub-Activity.

Negotiations of comprehensive land claims and self-government remain an ongoing priority of AANDC.[7]

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[5] AANDC, 2013-2014, Performance Measurement Framework

[6] AANDC, Performance Measurement Strategy for Measuring the Impacts of Comprehensive Land Claims Agreements and Self-Government Agreements, Federal Government's Perspective, June 11, 2012

[7] 2013-2014 Report on Plans and Priorities - Aboriginal Affairs and Northern Development Canada and Canadian Polar Commission.

1.2.5 Management

The Government of Canada has mandates to establish negotiation processes to address Aboriginal and treaty rights in various parts of Canada. AANDC negotiates on behalf of all federal departments with the Treaties and Aboriginal Government Sector overseeing and coordinating the cross-departmental federal role in these negotiations. Other federal government departments are called upon to participate in the negotiations where agreements involve their areas of responsibility or jurisdiction.

1.2.6 Key Stakeholders and Beneficiaries

The primary stakeholders involved in negotiating comprehensive land claims and self-government are the three parties at the negotiation table: the Aboriginal group, the federal government and the relevant provincial/territorial government. Federal government involvement may include a number of departments and/or agencies depending on the interests under negotiation.

Although all Canadians, federal/provincial/territorial governments and business/industry are expected to benefit from the negotiations of comprehensive land claims and self-government, the primary beneficiaries are expected to be the Aboriginal groups.

1.2.7 Resources

AANDC Expenditure of Comprehensive Land Claims and Self-government Negotiations (Actual Fiscal Year 2012/13)

		Actual Fiscal Year 2012/13
AANDC expenditures for the negotiations of comprehensive land claims and self-government	Grants and Contributions (Vote 10)	47,438,645
	Operating (Vote 1)	32,009,294
	Total	79,447,939

1.2.8 Corporate Risk Profile

The departmental corporate risk profile ranks the negotiations of comprehensive land claims and self-government as “very high” due to the complexity and length of negotiations which requires a high level of knowledge and specific skills. In addition, the associated loans, contingent liabilities, and legal impacts also present a high risk.

1.2.9 Recent Evaluation and Audit Activities

Evaluation of the Federal Government's Implementation of Self-Government and Self-Government Agreements – February 2012: Selected findings:

- Self-government negotiations are taking longer and costing more than anticipated.
- Self-government negotiations are taking place with small communities.
- Possible disincentives to enter into self-government negotiations (i.e. own source revenue not being applied to other legislative models such as *First Nations Lands Management Act*).

Impact Evaluation of Treaty-Related Measures in British Columbia – September 2009: Selected findings:

- Key issues that have impacted progress on the British Columbia treaty process include: First Nation debt, capacity, alternatives to treaty, evolving jurisprudence, overlapping claims, perception of limited federal mandates, and fisheries mandate.
- Forty-six percent of British Columbia *Indian Act* bands are not participating in treaty negotiations.
- Of those participating, 85 percent remain in the agreement-in-principle stage or earlier stages, with approximately one third of all tables not progressing in negotiations.
- Although the Supreme Court of Canada has indicated that negotiations are the best way to resolve issues associated with Aboriginal rights and title, the Canadian courts have also provided viable alternatives to negotiations.
- Canada has developed other tools to assist First Nations to better manage their reserve lands and resources and pursue economic and community development such as the *First Nations Land Management Act*, the *Indian Oil and Gas Act*, and the *First Nation Commercial and Industrial Development Act.*

Impact Evaluation of Comprehensive Land Claim Agreements **–** February 2009: Selected findings:

- Agreements have brought clarity and certainty to settlement lands, enabling Aboriginal groups to benefit from resource development and helping to create a positive environment for investment.
- Agreements have had positive impact on the role of Aboriginal people in the economy and their relations with industry with their respective settlement areas.

Audit of Management of Negotiated Loans – February 2013: Overall conclusions:

- AANDC has implemented key governance and operational processes and controls to support the efficient and effective delivery of required services and support to the loans management process.

- There are opportunities where improvements could be made in the areas of governance, risk management and stewardship. These include the establishment of clear objectives specific to negotiation loans, as well as performance measures, to further support monitoring of the status and collectability of negotiation loans.

An *Audit of Negotiation of Comprehensive Land Claims and Self-Government Agreements* is scheduled to be completed by the departmental Audit and Assurances Services in fiscal year 2013-14.

2. Evaluation Methodology

2.1 Evaluation scope and timing

The scope of the evaluation included the federal negotiation processes of comprehensive land claims and self-government agreements and focused on the evaluation issues of performance (effectiveness, efficiency and economy).[8]

The Terms of Reference for the evaluation were approved by AANDC's Evaluation, Performance Measurement and Review Committee on September 28, 2012. The evaluation was conducted internally within EPMRB, with component analysis contracted externally to specialists. These include a business process-reengineering assessment by Bronson Consulting, and a contingent liability analysis by Elaine Grout-Brown.

2.2 Evaluation issues and questions

Performance – Effectiveness

- Assessment of progress towards expected outcomes.

Performance - Efficiency and Economy

- Assessment of resource utilization in relation to the production of outputs and progress towards expected outcomes.
- Examination of issues related to the negotiation process, including length of time and costs to complete modern treaty negotiations.
- Examination of options for streamlining the negotiation process.
- Exploration of policy options and approaches.

2.3 Evaluation methods

The results of the evaluation are supported by findings that were collected using the following research methods.

2.3.1 Business Process Re-engineering Assessment

The business process re-engineering assessment involved a review of: documents containing descriptions of the current process; data with respect to the progress of negotiation tables through the various steps of the process in terms of durations; and reviews of individual negotiations; documents describing policies that have an impact on the negotiation process; and files pertaining to individual negotiating tables.

[8] The evaluation core issue of relevance has been addressed in the *Impact Evaluation of Comprehensive Land Claims and Self-Government*, November 2013.

Eight interviews were conducted with Treaties and Aboriginal Government Sector representatives in order to understand the overall process, as well as plans under the new approach. Additional Treaties and Aboriginal Government Sector representatives were consulted regarding three negotiation tables to develop a deeper understanding of the steps involved in the negotiation process and the roles and responsibilities of those involved.

2.3.2 Contingent Liability Analysis

The contingent liability analysis involved a review of amounts reported as contingent liabilities for modern treaties for the fiscal periods from 2003-04 to 2012-13 to assess the impacts of settling, or conversely not settling, claims on the contingent liabilities of the Crown. For this analysis, two interviews were conducted with AANDC representatives involved in the reporting of contingent liabilities related to modern treaties.

2.3.3 Legal Landscape

An analysis was conducted to inform how the legal landscape related to modern treaties has evolved, the extent to which settling claims affects litigation related to Aboriginal rights and the legal benefits to Crown that result from settling claims.

2.3.4 File and Document Review

A review and analysis was conducted of documentation from AANDC, other government departments, and provincial and territorial governments concerning the negotiation of comprehensive land claims and self-government with respect to each party's roles responsibilities and achievements in support of the negotiation process.

In addition, a file review was conducted and included an in-depth matrix analysis and review of 10 final agreements and any associated side-agreements and annual reports.

2.3.5 Key Informant Interviews

A total of 21 key informant interviews were conducted with representatives from the following groups:

- AANDC Headquarters (n=7). Sectors – Treaties and Aboriginal Government, Lands and Economic Development, Northern Affairs.
- AANDC Regions (n=6). Regions – Atlantic, Quebec, Northwest Territories, Nunavut, Yukon, British Columbia.
- Other Government Departments (n=8). Departments - Canadian Northern Economic Development Agency, Department of Fisheries and Oceans, Natural Resources Canada, Parks Canada, Environment Canada, Canadian Heritage, Health Canada, Human Resources and Skills Development Canada.

2.4 Quality Assurance

The evaluation was directed and managed by EPMRB in line with the EPMRB's Engagement Policy and Quality Control Process. Quality assurance has been provided through the activities of an advisory group comprising representatives from the Treaties and Aboriginal Government Sector.

2.5 Considerations / Limitations

Consideration

The evaluation was conducted during a time of change within the federal government as it undertakes the new results-based approach to modern treaty negotiations.

Limitation

The key limitation to the evaluation was the lack of data and performance measures available for performing an accurate quantitative analysis of the negotiation processes.

3. Evaluation Findings: Effectiveness

The evaluation looked for evidence that there was progress towards expected outcomes is being made and that liability risks and reconciliation of s.35 rights are being managed.

3.1 Progress Towards Expected Outcomes

An *Evaluation of the Impacts of Comprehensive Land Claims and Self-Government Agreements* found that structures are in place in negotiated agreements that provide levers for the achievement of policy objectives and expected outcomes.[9]

The impact evaluation found that modern treaties have put in places structures for governance, program and services, land and resource management, and economic development thereby supporting immediate and intermediate level outcomes. However, the evaluation also found that social and economic indicators suggest that Aboriginal signatory groups on-reserve lag behind both the non- Aboriginal population and the (mostly off-reserve) Aboriginal identity population in education, income, and labour force characteristics.

An Impact Assessment of Aboriginal Self-Government[10] examined the differences in education and employment outcomes between all self-governing First Nations and all registered Indians on Reserves. The assessment found that, for both education and employment, self-governing First Nations outperformed the registered Indians on-reserves population in terms of absolute outcomes as well as rates of change.[11]

3.2 Managing Liability Risks

Findings from the evaluation conclude that although there has been some reduction through the years, overall the contingent liability to the Crown has not been minimized as a result of modern treaties. In the 10 year period from 2003-04 to 2012-13, eight settled claims came into effect and were removed from the reported liability. This resulted in a reduction to the liability estimate of approximately $1.2 billion.[12] In addition, between 2003-04 and 2012-13, 13 claims were re-assessed as "unlikely" and were also removed from the reported liabilities.

[9] AANDC, *Evaluation of the Impacts of Comprehensive Land Claims and Self-Government Agreements*, November 2013.

[10] AANDC – Policy Development and Coordination Branch, *Impact Assessment of Aboriginal Self-Government*, March 2011.

[11] The differing results between the two studies are due primarily to different populations under study and different comparison group. The Impact Assessment examined self-governing First Nations and compared results to the registered Indians on reserve population while the Impact Evaluation looked at modern treaties, including stand alone comprehensive land claims and compared results to the registered Indian population as a whole. Further analysis of Census / Household Survey data is being undertaken in fiscal year 2014-15 as part of the Impacts of Self-Government Evaluation.

[12] This amount was calculated based on the amounts that were reported as the liability estimates for these claims in the last fiscal period before they were removed from the liability estimate.

However, the reduction in the liability achieved from settling and reclassifying claims was more than offset by other increases in the liability estimate, such as:

- New additions to the estimated liabilities related to claims receiving agreement-in-principle mandates and an estimated value being reported for the first time, as well as the claim progressing through the process.

- Increases in the estimated liabilities due to changes in the estimated value of claims already included in the liability estimate at 2003-04 (i.e. existing claims) and not settled at 2012-13. The changes in the estimated liability related to existing claims may be due to a number of factors, including adjustments for inflation, financial impacts related to changes in populations, or other unplanned or unforeseen variables materializing.

Consequently, rather than a decrease in the total reported liability, the net result was an increase in the liability estimate from 2003-04 to 2012-13 of approximately $255.6 million. From a contingent liability perspective, the impacts of not negotiating agreements in an efficient and economic manner include:

- Having approximately half of the 41 claims outstanding in 2003-04 that were included in the liability estimate, still outstanding in 2012-13. The estimated liabilities associated with these claims have increased by approximately $489 million since 2003-04.

- Having inflation alone increasing the liability over time. For example, a 2.3 percent increase in the Final Domestic Demand Implicit Price Index[13] rate (as was experienced from 2010-11 to 2011-12) can result in increasing a $3.8 billion liability estimate by approximately $88 million.

- Having 33 claims in the "not determinable" category. These are claims that have been accepted to the table for which there is no financial mandate to negotiate an agreement-in principle and, therefore, no liability estimate is reported for these claims. These represent potential increases to the Crown's contingent liabilities in the future. However, there is no way of knowing the potential financial impact of these claims until a mandate to negotiate an agreement-in-principle is received.

- The risk for a contingent liability to arise again due to implementation issues once modern treaties are settled. Clear, unambiguous agreements and close monitoring of the implementation of agreements are key factors to mitigating this type of risk.

[13] The Final Domestic Demand Implicit Price Index (FDDIPI) rate is used by AANDC for factoring in the effects of inflation in estimating contingent liabilities.

3.3 Reconciliation of s.35 Rights

Evaluation findings indicate that where modern treaties have been concluded, they have reduced litigation in relation to Aboriginal rights with the Aboriginal signatory group.[14] Other factors have also contributed to reduced litigation, such as having a process in place to negotiate modern treaties.

The Supreme Court of Canada has encouraged all parties to seek resolution and reconciliation through negotiation rather than through litigation, which can be a more costly, adversarial and time-consuming process that often fails to achieve satisfactory resolution between the parties. In this regard, modern treaties play an important role in placing the Crown/Aboriginal relation on a stronger legal foundation by providing greater continuity, transparency and predictability for the Crown/treaty Aboriginal group relationship.

There is now a very complex and shifting legal and constitutional framework. Legal developments, starting with *Calder*, *Delgamuukw*, *Van der Peet and Sparrow*, but particularly since the *Haida/Taku* decisions in 2004, have changed the nature of the relationship with Aboriginal peoples, including Aboriginal expectations. Yet the s.35 policies have not evolved to accommodate this change, which has, at least in part, resulted in litigation by Aboriginal groups in relation to government's conduct in negotiating, interpreting, and implementing modern treaties. The most fundamental evolution in Aboriginal law impacting on Canada's *Comprehensive Land Claims Policy* and the *Inherent Right Policy* and the negotiation and implementation of modern treaties has been the Supreme Court of Canada's shift in focus to "reconciliation" and "honour of the Crown" and the "duty to consult".

The new results-based approach to modern treaty negotiations supports a proactive policy approach by promoting reconciliation through focusing resources on tables with the greatest potential for success. It is also considering options to improve access to other tools outside the negotiation process that address Aboriginal rights and promote economic development and self-sufficiency.

[14] As sectoral and stand alone self-government arrangements are not constitutionally protected, they do not resolve any issues as respect to s.35 rights.

3.4 Pressures on Existing Policies

Developments in the legal framework have led to further consideration regarding the implementation of existing federal government policies, particularly the effectiveness of these tools for responding to s.35 rights interests. In addition, developments in the jurisprudence have made provinces and territories, who control most Crown lands, more important players and partners in the Crown/Aboriginal relationship. Significant amongst the pressures arising out of the shifting legal framework are:

Full and Final vs. Immediate / Tangible: The stated goal in the current *Comprehensive Land Claims Policy* of achieving "full and final" settlement was developed before the recent jurisprudence in relation to reconciliation, duty to consult and honour of the Crown. As the courts continue to play an oversight role to ensure that the honour of the Crown is upheld, treaty-making is not the only option for many Aboriginal groups. Options that enable First Nations to assert their rights throughout their traditional territories and thus derive more immediate economic and social benefits from short-term arrangements with industry and governments, are in some instances preferred to treaty negotiations for a growing number of Aboriginal groups.

Divergence of Crown/Aboriginal Expectations: Many Aboriginal groups view the existing federal policies and mandates as out of step with recent jurisprudence. Aboriginal groups' interpretation of the court decisions such as *Delgamuukw*, *Roger William* and *Ahousaht* regarding the duty to consult and the scope and content of Aboriginal rights and title have contributed to a widening expectation gap as well as a declining interest in negotiating treaties among some Aboriginal groups. It has simultaneously resulted in increased demands for more robust federal mandates (including more generous land and cash offers), a different approach to certainty, and up-front recognition of Aboriginal rights.[15] The perceived failure of government to implement and interpret modern treaties consistent with Aboriginal groups' and organizations' understanding of the principle of reconciliation and honour of the Crown, has added to an already difficult task of negotiating modern treaties because it acts as a further disincentive for Aboriginal groups who have outstanding Aboriginal rights claims continuing in or entering into the treaty process.[16]

Overlapping Claims add Complexity to Concluding Treaties: For many years, a key policy element of Canada's approach to treaty negotiations has been to encourage Aboriginal groups to resolve overlap issues amongst themselves. This still remains a key component of the federal government's approach to addressing overlapping claims. Consistent with this approach, recommendation eight of the British Columbia Claims Task Force provides that First Nations have the responsibility for resolving overlapping issues among themselves.[17] However, recent jurisprudence has clarified and confirmed the application of the duty to consult in the treaty

[15] Although the SCC remanded the *Ahousaht* appeal back to the BCCA to be reconsidered in light of the SCC decision in *Lax Kw'alaam Indian Band v. Canada (Attorney General), 2011 SCC 56* which confirmed that Aboriginal claimants must precisely plead their claimed Aboriginal rights, nevertheless there remains high expectations among First Nations based upon the BCCA analysis of Aboriginal rights and a broad finding of a right to harvest and sell all species of fish.

[16] These views reflect those of the Land Claims Agreement Coalition who regard the proper implementation and interpretation of modern treaty as based on a spirit and intent approach; see the Second Universal Periodic Review of Canada, Submission of the Land Claims Agreement Coalition, to the United Nations Human Rights Council, October 9, 2012.

[17] The Report of the British Columbia Claims Task Force, dated June 28, 1991.

context, thereby casting significant doubt on past Crown assumptions about the need to delay consultation with overlapping groups until such a time as treaties are concluded.[18] In short, the courts are pushing for earlier consultation. This confirmation has created more onerous consultation obligations on the Crown to engage overlapping groups at an early stage in treaty negotiations, thereby adding to the cost, time and complexity of these negotiations. As a result of decisions such as *Sambaa K'e*, overlapping Aboriginal groups are increasingly asserting their rights, thereby delaying the conclusion of treaty negotiations. Finally, the existence of overlapping claims means that where a treaty is concluded in the face of unresolved overlapping claims, certainty over lands and resources covered by the treaty may not be achieved to the extent as envisaged under the policy.

Indian Act Legislative Alternatives offer Attractive Alternatives: Increasing options for development of reserve lands, such as the *First Nations Land Management Act* and the *First Nations Commercial and Industrial Development Act* provide additional economic opportunities for some First Nations while leaving s. 35 rights intact. These opportunities may be seen as preferable to treaty negotiations for a growing number of First Nations.

Diverging Provincial/Territorial Willingness to Negotiate Modern Treaties: Provincial and territorial governments vary in relation to their approach on a number of negotiation issues, including certainty, recognition of the inherent right to self-government and jurisdiction. Following the *Haida, Taku River* and *Mikisew Cree* decisions, provinces and territories have recognized the need to become more involved with s. 35 rights, but their focus has been primarily in relation to the duty to consult and particularly in the context of regulatory decisions in relation to land and resource use and development. British Columbia and Ontario have been the most active in developing policy frameworks for non-treaty agreements that address s. 35 rights. They have utilized a variety of approaches in an effort to achieve different time limited, operational certainty and managing the duty to consult at the provincial level. At the same time, these arrangements are facilitating immediate socio-economic benefits for Aboriginal groups while promoting broader economic, environmental and other Crown objectives. Utilizing consultation as a platform to build a broader relationship with Aboriginal communities, these techniques can include consultation protocols, revenue-sharing, joint land use planning, shared decision making and even rights recognition. They may be entered into on a regional basis with a number of Aboriginal groups or with individual communities, with or without industry involvement. Overall, they are focused on shorter term predictability rather than long-term certainty.

[18] See *Sambaa K'e Dene Band v. Duncan*, 2012 FC 204 and *Cook v. The Minister of Aboriginal Relations and Reconciliation*, 2007 BCSC 1722 at paras. 161-162

4. Evaluation Findings: Efficiency and Economy

The evaluation provided an assessment of resource utilization in relation to the production of outputs, including an examination of length of time and costs to complete comprehensive land claims and self-government negotiations.

4.1 Assessment of Outputs

Evaluation findings indicate that progress is being made at the negotiation tables and the number of completed agreements stands to increase significantly in the near future.

4.1.1 Completed Agreements in Effect[19]

As a result of the negotiation process, there are currently 26 completed agreements involving 96 communities (50 First Nations and 46 Inuit) in effect. These agreements cover approximately 40 percent of Canada's land mass.

- Sixteen comprehensive land claims and self-government agreements: Yukon (11), British Columbia (3), Newfoundland and Labrador (1), Northwest Territories (1)
- Two self-government agreements: British Columbia (2)
- Eight comprehensive land claims agreements: Quebec (4), Northwest Territories (3), Nunavut (1)

4.1.2 Agreements in Negotiations

There are currently 90 modern treaty negotiation tables underway involving 312 Aboriginal communities (276 First Nation, 20 Inuit, nine James Bay Cree communities and seven Métis locals).[20] Remaining claims cover approximately 20 percent of Canada's land mass.

- Fifty-two comprehensive land claims and self-government negotiations in British Columbia
- Thirteen comprehensive land claims and self-government negotiations in other parts of Canada: Ontario (1), Quebec (3), Atlantic (4), Northwest Territories (5)
- Tweny-five self-government negotiations across Canada: British Columbia (2), Alberta (1), Saskatchewan (2), Manitoba (1), Ontario (6), Quebec (3), Atlantic (1), Northwest Territories (7), Yukon (2)

[19] The Yale First Nation Final Agreement in BC will come into effect on April 1, 2015 and the Sioux Valley Dakota First Nation Self-Government Agreement in Manitoba was signed on August 20, 3013 and the date will be determined when it will come into effect once legislation has been passed. Both agreements are not included in this total as they are not yet in effect.

[20] Based on data provided by AANDC dated April 2013.

Of the 90 tables currently in negotiations, 16 tables are in the final agreement stage (18 percent)

- Fifty-six tables are in the agreement-in-principal stage (62 percent)
- Eighteen tables have not reached the agreement-in-principal stage (20 percent)

4.1.3 Possible Completed Agreements in Near Future

The number of completed agreements may increase by 62 percent in the near future as the 16 tables in final agreement stage are ratified. This would increase the number of completed agreements to 42.

- Twenty-four comprehensive land claims and self-government agreements: Yukon (11), British Columbia (9), Newfoundland and Labrador (1), Northwest Territories (1), Quebec (1), Atlantic (1)
- Ten self-government agreements: British Columbia (2), Alberta (1), Saskatchewan (1), Manitoba (1), Ontario (3), Quebec (1), Northwest Territories (1)
- Eight comprehensive land claims agreements: Quebec (4), Northwest Territories (3), Nunavut (1).

4.1.4 Impediments to Completing Agreements

As part of Canada's engagement process with Aboriginal organizations,[21] the following impediments to the negotiation process were identified.

- *Fish* – Aboriginal groups want to have their fisheries interests and rights reflected in agreements, however, fisheries negotiations have been deferred for several years.
- *Overlap* – Aboriginal groups having overlapping interests with other Aboriginal groups are not resolving overlapping interests.
- *Own Source Revenue* –Disagreement on Canada's policy to take into account the ability of self-government groups to contribute to the costs of their own government activities when determining the level of federal transfers.
- *Certainty* - degree of clarity and certainty as to the ownership of land and access to land and resources.
- *Land Status* – Lands held in fee simple by the Aboriginal group post effective date of the agreement will not be reserve lands, as per Section 91 (24) of the *Constitution Act, 1867*, or the *Indian Act*.

4.1.5 Ratification

Before a final agreement comes into effect, it must be ratified first by the Aboriginal community, then by the province or territory, and then Canada. The Aboriginal community must hold a referendum to allow its members to vote on the content of the final agreement.

[21] Canada engaged with its Aboriginal and provincial/territorial partners in the Fall of 2012 regarding the results-based approach to negotiations.

There have been a number of Aboriginal communities in the final agreement stage that have voted to reject the negotiated agreement. These include Lheidli T'enneh Nation in British Columbia, Nunavik Public Government in Quebec and Blood Tribe in Alberta.

Resolving issues related to failed ratifications among Aboriginal communities would assist in improving the results of treaty negotiations. This line of inquiry is beyond the scope of the evaluation but would warrant further examination by Treaties and Aboriginal Government Sector.

4.2 Assessment of Timing

The average negotiation takes approximately 18 years to complete. Evaluation findings indicate that although the more recently completed agreements have taken less time, the average time in negotiations for the agreements currently in final agreement stage is 19.4 years. As these are concluded, the total average time will increase. Though the evaluators note the numerous external factors that can significantly impact timeliness, such as overlapping claims, consultation requirements and ratification processes, the data indicates that the average time to negotiate is not decreasing as the federal government obtains more experience in negotiating agreements.

4.3 Assessment of Negotiated Costs

AANDC annual expenditure on comprehensive land claims and self-government negotiations is approximately $80 million. Treaties and Aboriginal Government Sector estimates an annual budget of $450,000 to support its internal governance structure.

With longer than anticipated negotiating time, contribution and loan funding to Aboriginal communities is higher than anticipated with over one billion dollars has been provided for contribution and loan funding to Aboriginal communities negotiating modern treaties. As of January 2013, Canada was owed approximately $817 million in outstanding principal and interest. Of this amount, approximately $70 million was in the process of being repaid by Aboriginal signatory groups that have concluded agreements. The remainder of $746 million is for 75 claims that are still ongoing, which makes the average loan per active claim approximately $10 million.[22] Levels of Aboriginal indebtedness has reached a critical level with some smaller First Nations in British Columbia have loan debts nearing the amount of the capital transfer in a comprehensive agreement.

4.4 Assessment of Consistency in Agreements

An assessment of 10 completed agreements reveals that each agreement contains the same general chapters and that the provisions support a common set of intended outcomes. This is evidence that the current policy framework has generally created workable parameters for negotiations.

[22] AANDC, Audit of the Negotiation Loan, Audit and Assurances Services Branch, April 2013

Negotiations focus on the specific obligations within these broader themes and interviewees reported that the common practice involves adopting the provisions of the latest approved agreement to create efficiencies in the negotiation process. Overall, the evaluation found inconsistencies between agreements with regard to actual provisions. This can be viewed in a positive light as it demonstrates the flexibility that is present in negotiations and the responsiveness to different circumstances of individual tables under negotiations. Inconsistency in agreements may raise questions as to what extent Canada is effectively leveraging its efforts to negotiate each agreement to achieve efficiencies across the process. While the use of prior agreements to inform other negotiations in terms of possible alternatives may appear to be desirable, their usage can limit innovation. The inconsistencies between agreements may create uncertainty around Canada's policy positions for future negotiation partners and risks creating downstream challenges in agreement implementation.

Moreover, consistency in agreements will continue to be important as AANDC moves forward on developing a new, national approach to fiscal arrangements with self-governing Aboriginal groups to support delivery of governance, education, social services, land management and other services. Fiscal harmonization is intended to bring greater consistency, timeliness, transparency and fairness to the process of negotiating and implementing these fiscal arrangements. This includes managing shifting policy regimes within AANDC and other federal government departments and agencies.

4.5 Assessment of Process to Approve Mandates and Agreements

The process to approve mandates and agreements is overly complex and unnecessarily extends the overall duration of the negotiation process. The factors that lead to issues are:

- The table-by-table approach to mandate and agreement approval, although intended to bring it all together, does not always adequately address issues of national or regional importance. This approach makes it more complex by presenting issues in a piecemeal fashion that lacks consistency and coherence.

- The table-by-table approach was practical when there were a limited number of tables, but the approach may not be practical, or sustainable, with the current volume of tables. The time required to reach decisions on individual issues for each table draws out the process.

- Attendance at Federal Caucus on Self-Government and Comprehensive Claims has been delegated down to lower levels that may not have sufficient authority within their respective organizations. In order to secure agreement on mandates and agreements, AANDC must engage significant effort in clearing issues on a bilateral basis with other government departments. In addition to extending the time required to gain approval, the bilateral approach increases the complexity associated with tracking these positions.

- It is unclear if the Federal Steering Committee on Comprehensive Claims and Self-Government is providing intended leadership to ensure accountability, risk analysis and strategic advice.

The overall duration required to gain approval can have a magnifying effect on the overall duration of negotiations. Because of the negotiation durations, representatives from other government departments, provinces and territories, political representation and direction for all negotiating parties, and the legal and social environments can all change, setting back negotiations.

5. Options for Improvements

This section highlights key areas for improvements. The evaluators acknowledge that the Treaties and Aboriginal Government Sector is already moving forward on a number of initiatives that are outlined in the following section.

5.1 Structured Approach to Oversight and Reporting

Managing a process as complex as comprehensive land claims and self-government negotiations, requires a structured approach in order to achieve results. Decision makers need consistent and coherent information about the status of negotiations and issues impeding progress to effectively prioritize resources. The current approach to oversight and reporting is not sufficient to support a results-based reporting environment. For example, the current Federal Action Plan and Priorities reporting does not have standardized measures of objective reporting. Without this in place, it is difficult to assess actual progress.

Standardizing a performance-oriented approach to modern treaty negotiations should begin with a prioritization of activities in order to focus resources (staff and funding) on high priority tables. At a minimum, negotiation tables should be prioritized within regions, but it would also be good practice to prioritize based on strategic national interests.

Regular, proactive operational reviews will help resolve issues experienced during negotiations, while managing timelines and costs. This can be critical when there is momentum. In order to provide coherent information, tables need to report progress at discrete levels within the stages. Reporting at only the framework agreement, agreement-in-principle, and final agreement level does not provide sufficient visibility in to the negotiations to determine if real progress is being achieved. At a minimum, tables should report on status of the proposed agreement chapters (e.g. not started, in-progress, and complete), but consideration should be given to reporting on the lower level activities required to reach agreement on chapters.

Oversight bodies should focus on progress toward achieving strategic and regional objectives with summaries of table performance that include:

- Achievements and performance to date – costs and milestones achieved compared to plans;
- Forecast – cost and timeline to completion compared to plans; and
- Issues – operational roadblocks, emerging issues.

This will help ensure that oversight bodies, charged with delivering a whole of government approach to negotiations, be engaged in achieving the overarching objective of concluding negotiations by providing strategic guidance, and removing obstacles to success.

By taking a strategic and regional approach, mandates can be focused on addressing strategic and regional issues. Reporting at that level while providing a summary of table performance will allow the Federal Steering Committee on Comprehensive Claims and Self-Government and the Federal Caucus on Self-Government and Comprehensive Claims to identify strategic and regional issues more quickly and to focus resources on their resolution. Regional Management Plans have been recently introduced and are intended to be reporting and planning mechanisms from which an annual report to Cabinet and/or Parliament can be derived.

Examples of senior government and oversight mechanism from Natural Canada Resources Major Projects Management Office Initiative could be examined by AANDC as a best practice. A recent evaluation of the initiative found that that effective senior governance and coordination mechanisms had been established through this initiative.[23] Specifically, the evaluation found:

> The range of new senior governance and coordination mechanisms – particularly the DM Committee – have been one of the most recognized and successful aspects of the Initiative. All lines of evidence used in this evaluation support the finding that the monthly DM, ADM and DG-level meetings have been effectively used to discuss and provide direction on project-level, strategic and policy issues.
>
> More broadly, interviewees within and outside the federal government also strongly praised these committees as a means to ensure greater levels of awareness and accountability within the federal regulatory system, and to achieve changes both horizontally and vertically. Industry associations were strongly supportive of the Major Projects Management Office and Deputy Ministers Committee as coordination and governance mechanisms. This was explained in part by the fact that representatives from industry associations were in contact with senior MPMO staff and DMs to regularly discuss project-specific and policy issues.
>
> With regard to issue resolution at the project level, the tracking and reporting mechanisms administered by the Major Projects Management Office – including the early warning system established in 2010 – have helped identify issues and propose short- and long-term solutions. For example, the Deputy Ministers Committee has discussed approximately 70 project-specific and 50 cross-cutting issues since the establishment of monthly meetings in 2008. The Major Projects Management Office has also been found to be effective in providing secretariat and information support to senior-level committees.
>
> Several internal interviewees – from senior management to regional staff – saw opportunities for future adjustments to the governance structure to ensure the optimal use of both senior-level committees and coordination functions delivered by the Major Projects Management Office. This was often framed as an efficiency issue, considering the level of administrative "burden" associated with this structure and the meeting frequency. Interviewees provided suggestions on ways to ensure the continued effectiveness of this structure that would also optimize the frequency and/or strategic focus of the meetings, including resolving issues at the lowest level possible rather than "bumping them up" to Assistant Deputy Ministers or Deputy Ministers. Western Australia also used senior-level committees to increase accountability and resolve issues in a coordinated manner. However, the focus of these committees was more on performance and accountability, as well as on policy/strategic issues, rather than on project- and operational-level issues.

[23] Natural Resources Canada, Evaluation of the Major Projects Management Office Initiative. Found at http://www.nrcan.gc.ca/evaluation/reports/2012/6323#a8731

5.2 Structured Approach to Table Planning

Effective program oversight requires a structured approach to planning and data/information collection in order that consistent and coherent information is available to decision makers when required. AANDC should develop and implement a framework/methodology for negotiations to achieve higher levels of consistency in planning and reporting, and to promote a focus on results. Although an argument can be made that each set of negotiations is unique, this option for improvement is to borrow from standardized project management approaches. The benefit of these approaches is that they can provide a level of standardization, but they also permit visibility and management of risks.

Negotiation teams should be required to develop, with the other parties, an overall plan to reach an agreement. The plan should be supported by activity/task planning (activities/tasks could be defined as chapters, but another metric could be that the lowest level activity/tack should be no more than 10 percent of the overall cost and duration). The plan should be supported by resource loading to ensure that staff, stakeholders, and financial capacity are available to complete the activities. The plan should specify a critical path that addresses key issues early in the negotiations; this should include discussion on how the agreements will be implemented in practical terms.

The plan should be updated on a regular basis, at least once per year, and include a forecast of the costs, resource time and duration to completion. It should be noted that early attempts to estimate completion will likely be substantially different from reality, but with experience the estimating process will be refined and be able to provide more accurate information to decision makers regarding what is possible. Even considering the inaccuracy of early estimates, the estimating process is worthwhile as it will improve the overall understanding of how negotiations occur.

5.3 Systems to Maintain Documents and Manage Negotiations

Negotiators report that considerable time can be taken presenting the federal position to the other negotiating parties. The development of a database of acceptable chapter language for negotiators to use during negotiations should be maintained and updated on a regular basis. The database should be centrally maintained, include links to language from other government departments and include references to applicable legislation and policies. This includes developing guidelines on what is possible and not possible within the context of each chapter to permit flexibility to negotiate, thus providing negotiators with starting and firm positions. Finally, the database should include easily understood interpretations of the language so that negotiators can use it to support their own understanding and also present it to Aboriginal groups in order to work towards a common understanding. This could considerably improve consistency with wording in documents and support the fiscal harmonization process currently being undertaken by AANDC.

Approval of mandates and agreements is perhaps one element that has considerable impact on timely conclusion of agreements. This results partly from issues with the acceptability of language in specific agreements by other government departments caused by unresolved policy issues and turnover among Caucus members.

Implementing a system to support the approvals of mandates and agreements should track the history of decisions that have been reached, along with any pertinent performance analysis. In particular, the systems should track:

- Mandates on an issue by issue basis and include agreement/approval of specific mandate elements from other government departments.
- Agreement language on an issue by issue basis, including decisions/agreement with other government departments on language, so that it can be easier to maintain momentum when there are staffing changes.
- Overall funding/spending.
- Milestones and context.
- Federal program and policy changes.

Moreover, a system to maintain documents could also assist in the ratification process by developing a standard text for ratification provisions and best practices experiences.

5.4 Improvements to Performance Monitoring

There was a lack of data readily available to track and analyze the performance of the negotiation process. The current data collection processes, in place at the time of the evaluation, were assessed, including the Annual Ministerial Table Review, Deputy Minister Quarterly Reporting, and the Federal Action Plans and Priorities. Though these data collection processes have been useful, there is the need to improve the approach to oversight and reporting to support a results-based approach to the negotiation of modern treaties.

Without effective performance data, it is difficult to prioritize action at national and regional levels and to prioritize resources within tables. A more rigorous performance and results driven approach would be supported by systems maintaining information at table and regional levels. For example, information relating the time and costs to complete each of the six phases for each of the tables. But to properly track performance, AANDC would need consolidated information for each table at the level of a detailed work plan broken down by cost, duration, level of effort, and resources.

6. Conclusions and Recommendations

6.1 Conclusions

Modern treaties play an important role in placing the Crown/Aboriginal relation on a stronger legal foundation by providing greater continuity, transparency and predictability for the Crown/treaty Aboriginal group relationship. However, modern treaties are arguably not capable of achieving the same certainty and finality that government initially anticipated. The reality is that there is now a very complex and shifting legal and constitutional framework.

Progress is being made at the negotiation tables and the number of completed agreements stands to increase significantly in the near future. However, negotiating comprehensive land claims and self-government agreements is time consuming and costly with the federal mandating process adding significantly to the time required to negotiate agreements.

Though negotiated agreements contain clauses that work towards supporting expected outcomes and policy objectives, inconsistencies in the wording may have the unintended consequence of resulting in inefficiencies during the negotiation process, as well as creating an overly complex implementation regime.

Though reporting processes are in place, findings from the evaluation conclude that there is a need to improve the approach to oversight and reporting to support a results-based approach to the negotiations. This will allow for increased accountability and transparency regarding the costs, progress and risks of negotiating comprehensive land claims and self-government agreements.

6.2 Recommendations

1. Adopt a proactive policy approach to more effectively manage and respond to risks and strategically shape or influence the evolving legal framework.

2. Strengthen the approach to oversight and reporting.

3. Strengthen the approach to table planning.

4. Implement systems to maintain documents and manage negotiations.

5. To improve results-based reporting, coordinate the ongoing monitoring of the efficiency and effectiveness of comprehensive land claims and self-government negotiations.