



Indian and Northern
Affairs Canada

Affaires indiennes
et du Nord Canada

Final Report

*Impact Evaluation of
Treaty-Related Measures in
British Columbia*

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Evaluation, Performance Measurement,
and Review Branch
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Canada 

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List of Acronyms

ARLU	Annual Reference Level Update
BC	British Columbia
BCCI	BC Capacity Initiative
BCTC	British Columbia Treaty Commission
CFA	Comprehensive Funding Arrangement
EPMRB	Evaluation, Performance Measurement and Review Branch
FNITP	First Nations and Inuit Transfer Payment
INAC	Indian and Northern Affairs Canada
ITA	Incremental Treaty Agreements
MARR	Ministry of Aboriginal Relations and Reconciliation (BC)
OAG	Office of the Auditor General of Canada
PM	Performance Measurement
P&ID	Professional and Institutional Development Program
PAA	Program Activity Architecture
SCC	Supreme Court of Canada
TAG-NW	Treaties and Aboriginal Government – Negotiations West
TRMs	Treaty-Related Measures

Executive Summary

To address issues arising from the Supreme Court of Canada (SCC) decision in *Delgamuukw (1997)*, Canada, the Government of British Columbia (BC), and the First Nations Summit Task Group produced a tripartite working group report in 1999 which made a number of recommendations on ways to accelerate treaty negotiations. Among these were suggestions that the parties: 1) develop better options to protect land and resources for treaties; 2) find ways to offer First Nations benefits from land and resources exploitation; and 3) pre-implement measures and benefits, which would likely be components of eventual treaty settlement. These recommendations were built upon Recommendation 16 of the BC Claims *Task Force Report of 1991*, which called on the parties to negotiate interim measures agreements before or during the treaty negotiations when an interest is being affected, which could undermine the process.

In response to these recommendations, in the year 2000, Canada and BC officials developed new negotiation tools called Treaty-Related Measures (TRMs) and an arrangement for sharing their associated costs. TRMs are a type of interim measure that is tied directly to treaty topics under negotiation.

There have been significant changes in the legal and political context that have affected the treaty process in BC since TRMs were introduced. Though the SCC has indicated that negotiations are the best way to resolve issues associated with Aboriginal rights and title, the courts have also provided viable alternatives to negotiations. Although both the federal and provincial governments are considering a broader focus that may include alternatives to managing the rights of Aboriginal people as set out in Section 35 of the *Constitution Act, 1982*, Canada's view remains that comprehensive treaties are the best way in which to resolve issues related to ownership and use of lands and resources and to promote social and economic well-being in Aboriginal communities.

The purpose of the Impact Evaluation of Treaty Related Measures is to provide the Deputy Minister of Indian and Northern Affairs Canada (INAC) with assurances that TRMs remain relevant, are cost-effective, and are achieving intended results. The evaluation will support the process of seeking a renewal of the contribution authority, *Contributions to First Nations, their organizations, provinces and third parties for interim measures and the British Columbia treaty related measures*. The authority has annual allocated funding of approximately \$4M and expires in March of 2010.

The evaluation was conducted from February to August of 2009. Evaluation results were based on the analysis and triangulation of data obtained through file and document review, key informant interviews, and focus group sessions with First Nations participating in the BC treaty process, officials from the Government of BC, and a selected treaty table.

The evaluation supports the following conclusions regarding the relevance, cost-effectiveness, and success of the TRMs Initiative.

Relevance

TRMs are directly linked to departmental objectives, priorities, and key policy areas as they support achieving treaty settlement and enable Canada to more effectively participate in the BC treaty process. TRMs support First Nations capacity, governance, and economic development and with many tables reaching critical stages of negotiations, a strong need for TRMs remain. Moreover, as TRMs are an interim measure tied directly to the treaty process, they are unique and can be viewed as an important contributor to treaty revitalization processes currently underway in BC.

The results that TRMs are intended to address are consistent with the objectives and approaches of the BC treaty process as they support facilitating fair and durable treaties with First Nations. Findings from the evaluation conclude, however, that the approach taken under the TRMs Initiative does not adequately address the recommendation stemming from the 1991 BC Claims *Task Force Report* that called for a process that would protect and share land and resources before or during treaty negotiations.

Cost-Effectiveness

The TRMs Initiative has been extremely cost-inefficient with a high percentage of the federal TRMs budget being re-profiled each year through Annual Reference Level Update (ARLU) to meet other claims related pressures. This is primarily the result of the Government of BC not devoting adequate and timely funding to support the TRMs cost-sharing arrangement with Canada. Cost-inefficiencies have also been the result of an overly complex administrative process. The evaluation results indicate that though there is some similarities between activities funded under TRMs and other programming, such as INAC's BC Capacity Initiative, there is evidence that TRMs complement, rather than duplicate, other federal and provincial programming and initiatives.

Success

TRMs have assisted First Nations in completing a wide-range of studies related to land and economic development; funded key projects of importance to First Nation communities; and provided support for economic development and governance activities. TRMs resulted in fewer information gaps at the negotiation tables and have allowed information to be generated without further increasing the amount of loans to First Nations. Though TRMs cannot be said to accelerate the treaty process, the work conducted by TRMs was reported to have helped maintain momentum at the treaty table.

However, the TRMs Initiative did not meet its full potential and results from the Initiative were severely hampered by the underutilization of its allocated resources. With the utilization of only 23% of Tier 1 eligible funding and 14% of Tier 2 eligible funding, the TRMs Initiative was not able to achieve the results to the degree anticipated when the TRMs Initiative was created.

Moreover, there is concern that TRMs have resulted in limited land protection for First Nations; been implemented at times in an ad-hoc manner without strategic considerations of the needs at the treaty tables and the needs of First Nations' preparing for treaty implementation; not taken full advantage of leveraging opportunities with other structures and mechanisms; and not included First Nations adequately in the TRMs process.

It is recommended that INAC:

1. Design a renewed TRMs Initiative that is strategic, cost-effective, and meets the needs of BC First Nations involved in treaty negotiations. This should include eliminating the cost-sharing arrangements with the Government of BC for Tier 1 TRMs, streamlining administrative processes, and leveraging, where possible, existing federal, provincial and industry mechanisms to support TRMs objectives. TRMs should remain tied directly to the BC treaty process and support the broader treaty revitalization process.
2. Engage the BC Treaty Commission (BCTC), the First Nations Summit, the Government of BC, and other relevant federal government departments on the design and implementation of a renewed TRMs Initiative. This should begin by revisiting Recommendation 16 of the 1991 BC Claims *Task Force Report*.
3. Implement a renewed TRMs Initiative in which First Nations negotiators have a greater degree of involvement in the selection and design of the TRMs activity. This should include improved communications about the full suite of TRMs tools available.
4. Promote a climate of information sharing and collaboration for TRMs in order to support the sharing of best practices and reduce duplication of effort.
5. Design and implement a Performance Measurement (PM) Strategy for the renewed TRMs Initiative that includes the collection of qualitative and quantitative data on results achievements. Data to support the PM Strategy should include feedback from First Nations through an annual TRMs survey similar to the federal negotiator survey currently undertaken.

Management Response / Action Plan

Impact Evaluation of Treaty-Related Measures: Program Project: 0803
Sector: Treaties and Aboriginal Government

Recommendation 1	Action	Responsible Managers	Planned Implementation Date
<p>Design a renewed TRMs Initiative that is strategic, cost-effective, and meets the needs of BC First Nations involved in treaty negotiations.</p> <p>This should include eliminating the cost-sharing arrangements with the Government of BC for Tier 1 TRMs, streamlining administrative processes, and leveraging, where possible, existing federal, provincial and industry mechanisms to support TRMs objectives.</p> <p>TRMs should remain tied directly to the BC treaty process and support the broader treaty revitalization process.</p>	<p>Seek approval of adjustments to the TRMs Initiative including new TRM types that better meet the needs of negotiation tables in the BC treaty process; removal of the 50:50, project-by-project cost-sharing requirement with BC for Tier 1 TRMs, allowing Canada to partner more strategically with other provincial and federal initiatives; and, develop a more efficient and streamlined TRMs administrative process that is consistent with the Treasury Board Policy on Transfer Payments.</p>	<p>Director General, Treaties and Aboriginal Government-Negotiations West (TAG-NW)</p>	<p>April 2010</p>

Recommendation 2	Action	Responsible Managers	Planned Implementation Date
<p>Engage the BCTC, the First Nations Summit, the Government of BC, and other relevant federal government departments on the design and implementation of a renewed TRMs Initiative. This should begin by revisiting Recommendation 16 of the 1991 BC Claims <i>Task Force Report</i>.</p>	<p>Continue engaging the Government of BC, the First Nations Summit, and other relevant federal departments in the design of a renewed TRMs Initiative.</p> <p>Engage in discussions with BCTC and First Nations Summit regarding: key findings of the TRMs Impact Evaluation, planned revisions to the TRMs Initiative, and issues related to the federal response to Recommendation 16 of the 1991 BC Claims Task Force Report.</p>	<p>Director General, TAG-NW</p>	<p>January 2010</p>

Recommendation 3	Action	Responsible Managers	Planned Implementation Date
<p>Implement a renewed TRMs Initiative in which First Nations negotiators have a greater degree of involvement in the selection and design of the TRMs activity. This should include improved communications about the full suite of TRMs tools available.</p>	<p>Implement a renewed TRMs Initiative with the following planned attributes:</p> <ol style="list-style-type: none"> 1. First Nations Negotiators will be involved in developing the TRM project at the recommendation stage of Tier 1 TRMs to ensure the TRM addresses the need identified by the negotiating table and is implementable by the First Nations. <p>Note: Tier 2 TRMs will remain as currently designed, due to the requirement to have BC/Canada cost-sharing agreed to prior to the negotiation of the Tier 2 TRMs with a First Nation.</p> <ol style="list-style-type: none"> 2. Create a more open and transparent TRMs communication process for all parties in negotiations. For example, provide general TRMs information on the BCTC website, with a link to an INAC-administered webpage with TRMs-related information (such as program guidelines and criteria, tips, reporting requirement information). 	<p>Director General, TAG-NW</p>	<p>1. May 2010 2. June 2010</p>

Recommendation 4	Action	Responsible Managers	Planned Implementation Date
<p>Promote a climate of information sharing and collaboration for TRMs in order to support the sharing of best practices and reduce duplication of effort.</p>	<ol style="list-style-type: none"> 1. Continue to encourage a more open and transparent TRMs communication process for all the parties in negotiations. TRMs information posted on the INAC website is also a viable option in this scenario. 2. Subject to funding availability, Canada will explore forums in which First Nations, Canada and BC may participate in a roundtable/focus group. 	<p>Director General, TAG-NW</p>	<p>1. June 2010 2. April 2011 * every two years thereafter</p>

Recommendation 5	Action	Responsible Managers	Planned Implementation Date
<p>Design and implement a PM Strategy for the renewed TRMs Initiative that includes the collection of qualitative and quantitative data on results achievements. Data to support the PM Strategy should include feedback from First Nations through an annual TRMs survey similar to the federal negotiator survey currently undertaken.</p>	<ol style="list-style-type: none"> 1. Design and implement a PM Strategy, including performance indicators and logic model, to support renewal of the TRMs Initiative. 2. Both federal negotiators and First Nation negotiators will be asked to complete a regular periodic TRM assessment questionnaire and results will be used in annual TRMs Performance Assessment Reports. 	<p>Director General, TAG-NW</p>	<ol style="list-style-type: none"> 1. April 1, 2010 2. April 1, 2011

1. Introduction

1.1 Overview

The purpose of the Impact Evaluation of Treaty-Related Measures (TRMs) is to provide the Deputy Minister of Indian and Northern Affairs Canada (INAC) with assurances that TRMs remain relevant, are cost-effective and are achieving intended results. The evaluation will support the process of seeking a renewal of the contribution authority, *Contributions to First Nations, their organizations, provinces and third parties for interim measures and the British Columbia treaty related measures*, which expires in March of 2010.

1.2 Treaty-Related Measures Initiative

Background

To address issues arising from the Supreme Court of Canada (SCC) decision in *Delgamuukw (1997)*, Canada, the Government of British Columbia (BC) and the First Nations Summit Task Group produced a tripartite working group report in 1999 which made a number of recommendations on ways to accelerate treaty negotiations. Among these were suggestions that the parties: 1) develop better options to protect land and resources for treaties; 2) find ways to offer First Nations benefits from land and resources exploitation; and 3) pre-implement measures and benefits which would likely be components of eventual treaty settlement. These recommendations were built upon Recommendation 16 of the BC Claims *Task Force Report* of 1991 which called on the parties to “negotiate interim measures agreements before or during the treaty negotiations when an interest is being affected, which could undermine the process.”¹

In response to these recommendations, in the year 2000, Canada and BC officials developed new negotiation tools called TRMs and an arrangement for sharing their associated costs. TRMs are a type of interim measure that is tied directly to treaty topics under negotiation.

Objectives and Expected Outcomes

The objective of TRMs is to remove obstacles to progress at treaty negotiation tables in BC so that treaty agreements can be concluded more quickly. TRMs provide a level of certainty and protection to Aboriginal interests. TRMs are time-limited agreements designed to:

- Accelerate negotiations by conducting treaty related land, resource, and economic development studies to answer questions required to move negotiations forward;
- Preserve negotiating options by protecting Crown land, and by acquiring available private land for treaty settlement purposes;

¹ The First Nations of British Columbia, The Government of British Columbia, The Government of Canada, *The Report of the British Columbia Claims Task Force*, June 28, 1991, p. 23.

- Prepare First Nations to implement anticipated treaty settlement by enhancing the role of First Nations on anticipated treaty settlement land and developmental measure supporting governance; or
- Take advantage of limited time sensitive economic and cultural opportunities by providing First Nations with pre-treaty access to small portions of anticipated treaty benefits within financial constraints.

Types of TRMs

TRMs are currently divided into two categories based on how their costs are assigned. “Tier 1” TRMs provide funding to First Nations at any stage of negotiations to undertake land, resource and economic studies, participate in land and resource management processes, and to help a First Nation prepare for self-government. Funding to pay for Tier 1 TRMs is jointly provided by Canada and BC through an annual TRMs budget that is unrelated to negotiator’s financial mandates associated with a particular set of treaty negotiations.

“Tier 2” TRMs are used to pay for the costs of protecting provincial and surplus federal Crown land for treaty settlements, acquiring and holding privately-owned lands for treaty settlements, and for providing First Nations that are negotiating a treaty with access to time-sensitive financial, economic and cultural opportunities that are expected to become part of an eventual treaty. The cost of implementing Tier 2 TRMs is also funded by an annual TRMs budget but their costs are charged against eventual settlement costs.

See Appendix A for details regarding the TRMs tools.

Management

The process for approving and implementing TRMs is jointly managed by Treaties and Aboriginal Government–Negotiations West (TAG-NW) and BC Ministry of Aboriginal Relations and Reconciliation (MARR). Canada and BC share costs associated with the implementation of TRMs as detailed in the 2003 Cost-Sharing Understanding between Canada and British Columbia.²

The Committee structure that supports the TRMs Initiative includes INAC’s Interdepartmental committees comprised of senior federal officials whose mandates and operations are directly affected by treaty negotiations. This includes the Federal Steering Committee on Self-Government and Comprehensive Claims, Federal Caucus and BC Caucus. There are also internal TRMs committees that support TRMs management and include the TRMs Committee, Directors’ Committee as well as the bilateral federal/provincial TRMs consultation process.

² 2003 Cost-Sharing Understanding between Canada and British Columbia Respecting the Sharing of Treaty-Related Measures Costs. With regard to Tier 1 TRMs, most are on a 50:50 cost-sharing basis, with one type of TRM – Developmental Measures in Support of First Nations Self-Government being cost-shared 60:40 with BC. Cost-sharing for Tier 2 TRMs is integrated with cost-sharing for treaties and is therefore dependent upon the type of Tier 2 TRM being undertaken.

Beneficiaries

Key beneficiaries of the TRMs Initiative are the three parties at the treaty negotiating table, Canada, BC, and First Nations, as each party has a vested interest in the key objective of TRMs to resolve treaty-related matters on an interim basis and facilitate treaty negotiations.

TRMs Funding and Renewal

Funding for TRMs is found in the authority, *Contributions to First Nations, their organizations, provinces and third parties for interim measures and the British Columbia treaty related measures*, which expires March 31, 2010, with a current annual allocated funding of approximately \$4M for incremental TRMs costs such as Tier 1 TRMs, fee simple land holding costs, and process costs.

TAG-NW is currently undertaking a process of renewing the TRMs Initiative in order to make TRMs more effective and to address the changes that have occurred in the treaty negotiation environment. This work is being done in conjunction with the broader treaty revitalization process also being undertaken by TAG-NW.

2. Methodology

2.1 Scope and Timing

The evaluation covered all TRMs related activity from the year 2000 to the present and involved the federal government, the Government of BC, and First Nations participating in the BC treaty process. The Terms of Reference for the evaluation was approved by INAC's Audit and Evaluation Committee in September 2008. An evaluation assessment was completed in February 2009 with field work conducted from March to May 2009.

2.2 Evaluation Issues

The evaluation focused on the following issues:

- *Relevance*: The evaluation looked for evidence that TRMs are consistent with departmental objectives, remain relevant to treaty negotiations in BC, and realistically address an actual need.
- *Cost-Effectiveness*: The evaluation looked for evidence that the most appropriate and efficient means are being used to achieve TRMs outcomes, relative to alternative design and delivery approaches.
- *Success*: The evaluation looked for evidence that TRMs are meeting their intended objectives.

2.3 Methodology

The evaluation's findings and conclusions are based on the analysis and triangulation of the following multiple lines of evidence:

- *Document review*: Audit and evaluation reports; Senate Standing Committee reports; INAC performance reports; Treasury Board submissions and Memoranda to Cabinet; B.C. Government Service Plans, documentation on the New Relationship; BC Treaty Commission (BCTC) Annual Reports and Common Table documentation, media review.
- *File review*: TRMs Performance Assessment Reports, TRMs and TAG-NW Administration Files, Annual TRMs Negotiator Survey.
- *35 Key informant interviews*: INAC (n=19); other federal departments (n=5); Government of BC (n=9); BCTC (n=1); First Nations Summit (n=1).
- *3 Focus Groups*: First Nations; Government of BC; Treaty Table.

2.4 Project Management and Quality Control

The Evaluation, Performance Measurement and Review Branch (EPMRB) directed and managed the evaluation in line with the EPMRB's Engagement Policy and Quality Control Process. A working group was established, which included representatives from TAG-NW – Negotiations Support.

3. Context

There have been significant changes in the legal and political context that have affected the treaty process in BC since TRMs were introduced. Although the SCC 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. Though both the federal and provincial governments are considering a broader focus that may include alternatives to managing the rights of Aboriginal people as set out in Section 35 of the *Constitution Act, 1982*, Canada's view remains that comprehensive treaties are the best way in which to resolve issues related to ownership and use of lands and resources and to promote social and economic well-being in Aboriginal communities.

3.1 Legal Environment

Section 35 of the *Constitution Act, 1982* established a legal framework from which Aboriginal claims might be addressed. In the absence of terms defining the nature and the scope of these claims, the Canadian courts have begun to define Aboriginal rights. There are numerous SCC cases in Aboriginal law that impact on Section 35 rights and claims and influence treaty negotiations.³

This legal framework continues to evolve while treaty negotiations progress in BC and is creating challenges to Canada's traditional approach to negotiating and addressing Section 35 claims by:

- increasing Aboriginal expectations to the value of Section 35 rights and claims;
- constraining Crown conduct, particularly when claims are the subject of negotiations or litigation; and
- offering Aboriginal groups with avenues to seek redress for Section 35 claims other than proof of rights in court or treaty negotiations.

The most significant case that continues to have an influence on the treaty process is *Haida and Taku River* (2004) in which the SCC decided that the Crown may have a legal duty to consult First Nations in respect of claimed but unproven Aboriginal rights. *Haida and Taku River* have created an alternative legal consultation framework that may provide immediate and tangible benefits more quickly and inexpensively than litigation or treaty negotiations. Many of the challenges facing the BC treaty process and the direction taken by the Province of BC to managing Aboriginal rights and title stem from this SCC decision.

³ Examples of SCC cases that have influenced the nature and scope of understanding of Section 35 of the Canadian Constitution within the BC treaty process include *Calder* (1973), *Guerin* (1984), *Sparrow* (1990), *Van der Peet*, *N.T. C. Smokehouse*, *Gladstone* (1996), *Delgamuukw* (1997), *Okanagan / Roger William* (2003), *Haida/Taku River* (2004), *Morris: Olsen* (2006), *Kapp* (2008).

3.2 Political Environment

When the BCTC was established, the treaty process was viewed as the only viable means for addressing Aboriginal issues and achieving certainty with respect to the ownership and use of lands and resources.⁴ While achieving full and final certainty remains the goal of the federal and provincial governments, there is recognition that this may not be achievable with all First Nations in BC. Both the federal and provincial governments are considering a broader focus that may include alternatives to managing the rights of Aboriginal people as set out in Section 35 of the *Constitution Act*, 1982. This is most evident in the direction being taking by the Government of BC.

Government of British Columbia

The Government of BC has adopted broader strategies in order to achieve operational certainty over lands and resources and to manage Aboriginal rights and title issues. In response to the evolving legal framework for Aboriginal rights and title, and in accordance with the 1991 Task Force recommendations, the Government of BC and the First Nations Leadership Council entered into a New Relationship grounded in the principles of recognition and respect for First Nations as self-determining and distinct nations. In its New Relationship policy, the Government of BC recognizes the right of First Nations to achieve self-determination through the exercise of their Aboriginal title. This includes realizing the economic component of Aboriginal title and exercising their jurisdiction over the use of the land and resources through their own structures. This is considered to be the most in depth and clear articulation of Crown duties and responsibilities prior to proof of Aboriginal rights in Canada.⁵ However, many BC First Nations have been disappointed with the implementation and results of the New Relationship.

This disappointment can be said to extend to Government of BC's proposed Recognition and Reconciliation Act that was designed to establish a new statutory framework to further the implementation of the New Relationship.⁶ It was proposed that the Act will recognize constitutionally established Aboriginal rights and title and the development of regulations, shared decision-making, and revenue and benefit sharing agreements, as well as support the rebuilding of the historic Indigenous Nations of BC. The proposed legislation came up against strong opposition by business leaders and the resource industries who objected that the Government of BC was going too far in recognizing Aboriginal title. The proposed legislation has also been rejected by First Nations communities who opposed the fundamental elements of the legislation as outlined in the discussion paper.⁷ The Government of BC will continue consultation with all stakeholders to look for new solutions to determine how to achieve reconciliation with First Nations.⁸

⁴ BCTC was established in 1992 as the independent and neutral body responsible for facilitating treaty negotiations among the governments of Canada, BC and First Nations in BC. Sophie Pierre was appointed new Chief Commissioner of the BCTC in April 2009.

⁵ National Centre for First Nations Governance, *Crown Consultation Policies and Practices Across Canada*, April 2009.

⁶ Government of BC, *Speech from the Throne*, February 16, 2009.

⁷ A discussion paper entitled, Discussion Paper on Instructions for Implementing the New Relationship was released on February 19, 2009.

⁸ Premier Gordon Campbell was re-elected Premier of BC in May 2009, with a platform of building new partnerships with First Nations.

In an open letter to the Premier of BC, the Union of British Columbia Indian Chiefs state:

New opportunities for reconciliation must emerge. First Nations are waiting for the Province to engage with them respecting Aboriginal title, including our laws and jurisdictions, sharing lands and resources and revenue and benefits derived from our lands and resources, and addressing past and ongoing interferences.⁹

Currently, the Government of BC negotiates accommodation agreements with First Nations, both inside and outside of the treaty process. This has allowed the province to manage legal risks until lands and other resources issues are dealt with through final agreements. Accommodation agreements include Strategic Engagement Agreements, Economic Community Development Agreements, Revenue Sharing Agreements, Forest and Range Opportunity Agreements, Joint Management Agreements, and Joint Land Use Agreements. These agreements have provided tangible results for First Nations involved in the treaty process, including the protection of Aboriginal interests in asserted traditional areas during negotiations in advance of final agreements.

More recently, the Government of BC has been pursuing Incremental Treaty Agreements (ITAs) with First Nations. ITAs advance treaty benefits in order to accelerate negotiation progress and to meet provincial consultation/accommodation interests. ITAs usually consist of fee simple land transfers and cash payments though they may include resource revenue sharing payments or forestry tenures. The Government of BC is proposing that there be a joint federal-provincial approach to ITAs. To date, Canada has agreed to cost-share elements of specific ITAs on a case-by-case basis once the treaty is concluded, though Canada is examining how it might participate more fully in these agreements.

Federal Government

Canada's approach has been to achieve finality regarding treaty and Aboriginal rights and self-government through final and comprehensive agreements. This current approach is consistent with the Comprehensive Claims Policy and Inherent Right Policy on Self-Government. Though these key federal objectives of negotiated resolution of claims and achieving certainty are still viable, as it is preferable to settle outstanding Aboriginal rights through negotiation rather than litigation, federal government policy is no longer considered to be ahead of jurisprudence in providing certainty regarding Aboriginal rights.

There is pressure on treaty negotiation mandates and processes to adapt to changes in the legal landscape and Canada acknowledges that there is considerable uncertainty regarding the scope, content and limitation of a particular Aboriginal group's rights recognized and affirmed under Section 35. As this legal framework provides for many policy options and approaches to addressing land claims, INAC, with Aboriginal and government partners, is exploring practical options for dealing with these pressures.

⁹ Union of British Columbia Indian Chiefs, *Open Letter: Implementing the New Relationship and the Legislative Initiative*, July 30, 2009.

Canada acknowledges that not all First Nations in BC wish to pursue treaty negotiations and has developed other tools to assist First Nations to better manage their lands and resources and pursue economic and community development. These tools include the *First Nations Land Management Act*, the *Indian Oil and Gas Act*, and the *First Nation Commercial and Industrial Development Act*.

3.3 British Columbia Treaty Environment

There are approximately 60 First Nations in the BC treaty process. Treaty negotiations in BC are founded upon the 19 commitments that were made by Canada, BC, and the First Nations Summit as outlined in the BC Claims *Task Force Report* of 1991.

*The task force believes that the process of negotiation to establish a new relationship will be positive for the First Nations and for the citizens of British Columbia and Canada. The status quo has been costly. Energies and resources have been spent in legal battles and other strategies. It is time to put these resources and energies into the negotiation of a constructive relationship... The task force recommends that 1. The First Nation, Canada, and British Columbia establish a new relationship based on mutual trust, respect and understanding – through political negotiation.*¹⁰

When the BC treaty process was created in 1992, the federal government expected that all claims would be resolved by the year 2000. Though the BC treaty process is open to all First Nations in BC, currently 46% of all *Indian Act* bands in BC are not participating in treaty negotiations. Of those participating, the majority of tables, 85%, remain at the pre-Agreement-in-Principle (AIP) Stage with approximately one third of all tables not progressing in negotiations. Though there is current momentum, with four Final Agreements and eight AIPs anticipated to be concluded over the next 18 months, to date only two Final Agreements have been completed: Tsawwassen Final Agreement, which came into effect on April 3, 2009, and the *Maa-nulth First Nations Final Agreement Act*, which received Royal Assent on June 18, 2009.¹¹ This overall lack of progress and the associated costs are of concern to all three parties.¹² According to the BCTC:

*Progress is being made but the pace is far too slow despite considerable investment. First Nations' expectation for the outcome of treaty negotiations appear much greater than currently supported by either the government of Canada or BC. This is worrying and should be of concern to all British Columbians. Failure to resolve the land question through negotiations will only lead to increased court action and the potential for confrontation. Treaty negotiations must be encouraged. We need successes.*¹³

¹⁰ The First Nations of British Columbia, The Government of British Columbia, *The Government of Canada, The Report of the British Columbia Claims Task Force*, June 28, 1991, p.8.

¹¹ The Nisga'a Final Agreement, which was not signed under the BC treaty process, came into effect May 2000.

¹² According to the Office of the Auditor General of Canada Audit Report, as of 2006, Canada has spent \$426M on the BC treaty process and provided \$289M dollars in loans to First Nations. According to the report from the Fraser Institute of July 2008, Incomplete, Illiberal and Expensive, spending on treaty negotiations as of end of 2008/09, and including costs to Canada, BC and First Nations totalled \$1,164M.

¹³ BCTC, *Annual Report*, 2008, p.1.

As the sustainability of the current momentum remains uncertain, the statement below by the Auditor General of Canada in the year 2006 has relevancy today:

Progress continues to be slow and there is a risk that the treaty process, as it exists today, may be overtaken by the changing legal, economic, and political environments in which the negotiations are taking place. At this point, we believe that signing treaties with most B.C. First Nations based on the treaty process as it currently exists will continue to be difficult. In our view, however, negotiations remain an effective means by which the parties can build the new relationship they are seeking and resolve their claims.¹⁴

Efforts are, however, being made to improve and revitalize the treaty process. In 2008, BC First Nations and the governments of Canada and BC established a common table to respond to the impediments facing treaty negotiations. Follow-up to the common table discussion took place in August of 2009. First Nations are calling for changes to federal and provincial negotiating mandates in six key areas which are seen as obstacles to progress: Recognition/Certainty; Constitutional Status of Lands; Shared Decision-Making; Governance; Fiscal Relations/Taxation; and Fisheries. Work to resolve the common table issues will continue through the Principals-level table process.

Though a full discussion on the BC treaty process is beyond the scope of this evaluation, key issue identified that have impacted on progress include:

- *First Nation debt*: Repayable loans to First Nations are estimated to be \$318M at end of the fiscal year 2007/08.¹⁵ It is estimated that some smaller First Nations have loan debts nearing the amount of the capital transfer in a comprehensive agreement.
- *Capacity*: There is a wide range of capacity levels among First Nations to negotiate and implement treaties.
- *Alternatives to treaty*: Consultation and accommodation settlements with government and industry are providing First Nations with alternatives to treaties.
- *Evolving Jurisprudence*: Given recent jurisprudence, some First Nations question the benefits of treaty-making versus litigation.
- *Overlapping Claims*: Overlapping territorial claims are a significant barrier to the reconciliation of Aboriginal rights and title. Consultation with First Nations with credible claims of Aboriginal rights or title that may be affected by a treaty must occur before treaty comes into effect.

¹⁴ Report of the Auditor General of Canada, Chapter 7 - Federal Participation in the British Columbia Treaty Process, November 2006, p. 3.

¹⁵ BCTC, *Annual Report*, 2007, p.39.

- *Perception of Limited Federal Mandates:* First Nations involved in the Unity Protocol do not feel that the federal government has the mandate to address the key issues brought forward at the common table discussions.¹⁶
- *Fisheries Mandate:* As the Department of Fisheries and Oceans completes its review of the west coast fisheries, the absence of fisheries mandates have stalled negotiations.

¹⁶ Unity Protocol Group is calling for fundamental changes to the BC treaty process and is reported to include 60 First Nations.

4. Evaluation Findings - Relevance

The evaluation would expect to find evidence that TRMs are consistent with departmental objectives, remain relevant to treaty negotiations in BC, and realistically address an actual need. Findings from the evaluation conclude that TRMs are directly linked to departmental objectives, priorities and key policy areas as they support achieving treaty settlement and enable Canada to more effectively participate in the BC treaty process. TRMs support First Nations capacity, governance, and economic development and with many tables reaching critical stages of negotiations, a strong need for TRMs remain. Moreover, as TRMs are an interim measure tied directly to the treaty process, they are unique and can be viewed as an important contributor to treaty revitalization processes currently underway in BC.

The results that TRMs are intended to achieve are consistent with the objectives and approaches of the BC treaty process as they support facilitating fair and durable treaties with First Nations. Findings from the evaluation conclude, however, that the approach taken under the TRMs Initiative did not adequately address the recommendation stemming from the 1991 *Task Force Report* and the 1999 tripartite review, which called for a process that would protect and share land and resources before or during treaty negotiations.

Though TRMs remain a highly relevant tool at the treaty table, they require updating to reflect changes to the legal and political environment in BC as well as the changing needs at negotiation tables as they advance through the treaty process. Changes to the TRMs Initiative should also provide opportunities for Canada to better work with the Government of BC in supporting processes and initiatives that enable the protection of land and resources for treaty settlement.

4.1 Linkages to Departmental Objectives, Policies and Priorities

Evidence from the evaluation demonstrates that TRMs have a high level of linkages to departmental objectives, policies, and priorities as they directly support Canada's participation in the BC treaty process.

Link to Departmental Program Activity Architecture

The negotiations of claims and self-government are an important contributor to INAC's overarching mandate. TRMs are linked to the *Cooperative Relationships* program activity within the *Government* strategic outcome as outlined in the departmental Program Activity Architecture (PAA).

Link to Federal Priorities

Achieving Treaty Settlement

TRMs support achieving treaty settlement and the certainty regarding the ownership and management of lands and resources that is created through this process and remains a priority of the federal government. Resolution of land claims and governance and self-government is currently one of the top five priority areas for INAC.¹⁷ Canada's policy framework for addressing Aboriginal and treaty rights includes the Comprehensive Land Claim Policy and the Inherent Right Policy.

Supporting Economic Development

During the treaty negotiation process, TRMs are used to identify economic opportunities, which can provide early tangible benefits for First Nations. Moreover, TRMs support achieving treaty settlement, which ultimately will provide an increased economic base and contribute to national and regional economies. According to an economic analysis undertaken by Grant Thornton for the BCTC, treaty settlement remains a large net positive financial and economic benefit for BC.¹⁸ Furthermore, supporting economic development activities through TRMs contribute to the expected outcomes of the new *Federal Framework for Aboriginal Economic Development*.¹⁹

Strengthening First Nations Capacity and Governance

Effective First Nations governance systems and institutions serve as the necessary foundation for community socio-economic development and overall community well-being. TRMs foster good governance and capacity development in order for First Nations to be prepared for self-government. TRMs that support strengthening First Nations capacity and governance can also contribute to the objectives of BC Region's Comprehensive Community Planning process.²⁰

4.2 Consistency with the objectives and approach of the British Columbia Treaty Process

The results that TRMs are intended to address are consistent with the objectives and approaches of the BC treaty process as TRMs support timely resolution of BC land claims through negotiated treaties. However, the evaluation found evidence that the TRMs Initiative did not adequately address the recommendations from the 1991 *Task Force Report* and the 1999 tripartite review, for which it was designed.

¹⁷ INAC and Canadian Polar Commission, *2009-2010 Estimates, Report on Plans and Priorities, 2009*.

¹⁸ British Columbia Treaty Commission, *An Update to the Financial and Economic Analysis of Treaty Settlements in British Columbia*, March 2004.

¹⁹ Government of Canada, *Federal Framework for Economic Development, 2009*.

²⁰ INAC, *CCP Handbook, Comprehensive Community Planning for First Nations in British Columbia*, August 2006.

As stated in the Report of the BC Claims Task Force in 1991,

*Treaty negotiations in British Columbia are likely to take some time. Therefore, the parties must balance their conflicting interests until these negotiations are concluded. One method is the use of interim measures agreements....Interim measures agreements may affect the management and use of lands, sea, and resources and the creation of new interests. They may facilitate the access to and development of resources, often a useful means of dealing in a preliminary or experimental way with a contentious issue, or provide transition to implementation of the treaty. **The Task Force recommends that:***
16. The parties negotiate interim measures agreements before or during the treaty negotiations when an interest is being affected, which could undermine the process.²¹

After the SCC decision in *Delgamuukw* (1997), Canada, BC, and the First Nation Summit undertook a tripartite review of the BC treaty process and produced a report in 1999. The central recommendation in the review was that First Nations, Canada, and BC shift their emphasis in treaty making to building treaties incrementally over time so that when a final treaty is signed, the new relationships necessary for success will largely be in place. Incremental tools could include land and resource protection; land and resource acquisition; First Nation access to land and resources; First Nation involvement in land and resource management and planning; governance arrangements; cultural resources and activities; fiscal arrangements; and economic development initiatives.²²

In the 2001 review of the treaty process, the BCTC states that:

*In the past, the Treaty Commission has battled Canada and BC over their reluctance to negotiate interim measures. Failure over several years to attain an interim measures protecting its interest in the Pavilion Creek watershed was a significant factor in Ts'kw'aylaxw First Nation withdrawal from the treaty process. More recently, with pressure from industry, some 60 agreements were signed. Only one of these was a land protection agreement....*²³

By 2006, as reported by the Auditor General of Canada, First Nations participating in the BC treaty process remain dissatisfied with interim measures:

*Few measures have been implemented to postpone resource exploitation or to protect resources in a claimed territory while negotiations continue.*²⁴

²¹ The First Nations of British Columbia, The Government of British Columbia, The Government of Canada, *The Report of the British Columbia Claims Task Force*, June 28, 1991, p. 23.

²² British Columbia Treaty Commission, *Report of the Tripartite Working Group, Improving the Treaty Process* May 2002.

²³ British Columbia Treaty Commission, *British Columbia Treaty Commission Annual Report: Looking Back, Looking Forward*, 2001, p. 11.

²⁴ Canada. *Report of the Auditor General of Canada, Federal Participation in the British Columbia Treaty Process – Indian and Northern Affairs Canada*, Chapter 7, November 2006, p. 10.

The issue of land protection remains a very important aspect of treaty negotiations. Since TRMs were introduced in the year 2000, there have been eight TRMs that have protected 33,534 hectares of crown land and seven TRMs that have acquired 655 hectares in fee simple land. Despite this, a widely expressed opinion among federal, provincial, and First Nation key informants is that the Government of BC's ITAs better support the 1991 *Task Force Report* recommendation for land protection than the TRMs Initiative.

4.3 Continuing Need

Findings from the evaluation support a high level of need for TRMs and their intended results. First Nations' focus group participants expressed a continuing need to accelerate negotiations, preserve negotiating options, assist in preparing to implement anticipated settlements, and take advantage of time sensitive opportunities. The BCTC states:

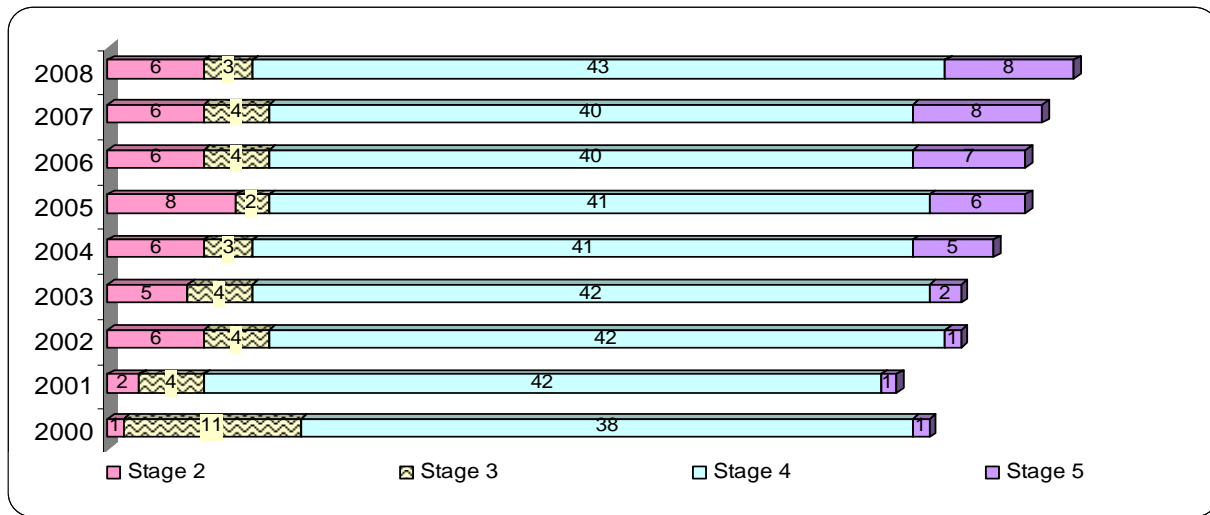
*One area where the Treaty Commission continues to see the potential for progress at individual treaty tables is with interim measures. There continues to be a need for more interim measures agreements earlier in the treaty process and these agreements need to be more strategically linked to treaty negotiations.*²⁵

The vast majority of negotiating tables in BC are at Stage 4 of the 6 stage treaty process.²⁶ It is at the fourth stage of the treaty process where the parties engage in substantive negotiations with the goal of reaching agreement on each of the topics that will form the basis of the eventual treaty. The average length of time that the tables currently in Stage 4 have been in the treaty process is twelve years. Table 1 illustrates that there remains a need for a tool, such as a TRMs, to support negotiations and to assist in moving tables from Stage 4: *Negotiation Of An Agreement-In-Principle* to Stage 5: *Negotiation to Finalize a Treaty* and then to Stage 6: *Implementation of the Treaty*.

²⁵ British Columbia Treaty Commission, *Annual Report*, 2008, p.5.

²⁶ The BCTC 6 Stage Process includes: Stage 1: Statement of Intent to Negotiate; Stage 2: Readiness To Negotiate; Stage 3: Negotiation Of a Framework Agreement; Stage 4: Negotiation Of An Agreement-In-Principle; Stage 5: Negotiation to Finalize a Treaty; Stage 6: Implementation of the Treaty.

Table 1: Number of Negotiation Tables by the 6-Stage Treaty Process (2000 – 2008) ²⁷



Typically each year there are more TRM proposals than funds available under the existing cost-sharing arrangement. For example in 2008/09, 14 TRMs were undertaken with 11 other TRMs proposed but not approved, primarily due to lack of funding. This figure, however, does not fully take into account the potential demand for TRMs. Interviews with key informants found that due to the perceived lack of funding and onerous administrative process associated with TRMs, negotiators have chosen at times not to bring the possibility of a TRM to the table though it would have been applicable to do so. TRMs are viewed by the Government of BC as relevant and having the potential to be useful, but the TRMs process, as it is currently structured, does not support their needs.

The issue of underutilization of the TRMs Initiative and the need to address recommendations stemming from the 1991 *Task Force Report* and the 1999 tripartite review will be discussed further in this report.

²⁷Retrieved from BCTC Annual Reports – 2000 to 2008. This table does not reflect developments in 2009 including Tsawwassen First Nation moving into Stage 6.

5. Evaluation Findings – Cost-Effectiveness

The evaluation looked for evidence that the most appropriate and efficient means are being used to achieve TRMs outcomes, relative to alternatives design and delivery approaches. We would expect to find effective cost-sharing arrangements between Canada and the Government of BC, effective program management, and evidence that there is no overlap or duplication with other programming.

Findings from the evaluation conclude that the TRMs Initiative has been extremely cost-inefficient with a high percentage of the federal TRMs budget being re-profiled each year through Annual Reference Level Update (ARLU) to meet other claims related pressures. This is primarily the result of the Government of BC not devoting adequate and timely funding to support the TRMs cost-sharing arrangement with Canada. Cost-inefficiencies have also been the result of an overly complex administrative process. The evaluation results also indicate that though there are some similarities between activities funded under TRMs and other programming, such as INAC's BC Capacity Initiative (BCCI), there is evidence that TRMs primarily complement, rather than duplicate, other federal and provincial programming and initiatives.

5.1 Cost-Sharing Arrangements

The single most cost-inefficiency of the TRMs Initiative stems directly from the TRMs cost-sharing arrangement.²⁸ As the Government of BC does not dedicate a similar amount of annual resources to its TRMs budget and has not contributed the level of funds to the TRMs Initiative as Canada, a significant amount of available federal funds have not be utilized for the TRMs Initiative each year.

Table 2 illustrates that Canada has only spent:

- 22.9% of its eligible allocation of \$47M for Tier 1 TRMs – (funding from the contribution authority, which, for example, funds land, resource and economic studies); and,
- 14.3% of its eligible allocation of \$71.5M for Tier 2 TRMs – (funding that is charged against eventual settlement costs, which, for example, pays for land purchases).

There was a high level of dissatisfaction among Canada and the Government of BC officials with the cost-sharing arrangement cited as a key weakness of the TRMs Initiative. Findings from the evaluation support the conclusion that Canada's inability to spend its dedicated resources for TRMs at the treaty table, as anticipated, has severely hampered the overall success of the TRMs Initiative and has led to cost-inefficiencies.

²⁸ Canada and BC share costs associated with the implementation of TRMs as detailed in the 2003 Cost-Sharing Understanding between Canada and British Columbia.

Table 2: TRMs Funding Allocation and Expenditure – Tier 1 and Tier 2 (2000/01 – 2009/10)

Tier 1 (not charged against financial mandate) ('000)

	2009/10	2008/09	2007/08	2006/07	2005/06	2004/05	2003/04	2002/03	2001/02	2000/01	Total 2000/01 to 2008/09
Eligible Allocation	3,500	3,500	3,500	3,500	4,500	7,500	7,500	7,500	6,500	3,000	\$47,000
Actual Allocation (ARLU)	5,780	4,040	5,900	3,900	3,900	na	na	na	na	na	-
Actual Expenditure	na	582	817	669	1,499	2,290	896	1,392	2,046	571	\$10,762
% Expenditure to Eligible Allocation	na	16.6%	23.3%	19.1%	33.3%	30.5%	11.9%	18.6%	31.5%	19.0%	22.9%

Tier 2 (charged against financial mandate) ('000)

	2009/10	2008/09	2007/08	2006/07	2005/06	2004/05	2003/04	2002/03	2001/02	2000/01	Total 2000/01 to 2008/09
Eligible Allocation	5,500	5,500	5,500	5,500	5,500	10,000	10,000	10,000	10,000	9,500	\$71,500
Actual Allocation (ARLU)	28,925	7,175	10,825	9,500	9,325	na	na	na	na	na	-
Actual Expenditure	na	0	0	850	0	0	3,721	5,525	0	102	\$10,198
% Expenditure to Eligible Allocation	na	0%	0%	15.5%	0%	0%	37.2%	55.3%	0%	1.1%	14.3%

The lack of federal expenditure of Tier 1 TRMs is directly the result of the Government of BC not allocating the same level of resources to the TRMs Initiative as Canada. Government of BC officials indicated that providing funding for TRMs is not a priority and has instead developed new tools and agreements with First Nations, which allows the province to address multiple interests in a way they believe is more flexible and coordinated across their government.²⁹ There was consensus among the Government of BC officials interviewed that though they view TRMs as relevant, Canada should, if possible, move away from cost-sharing Tier 1 TRMs.

Funding has decreased to such a degree that for 2009/10, the Government of BC did not receive any funding authority for TRMs. The result is that Canada is unable to plan for and implement any Tier 1 TRMs this fiscal year though 27 joint submissions were received from BC and Canada negotiating teams, totalling \$800,000 with a \$425,000 cost to Canada.³⁰

Delays in receiving TRMs funding was also cited as a problem as the Government of BC would often get funding allocated late in the fiscal year. This did not allow projects enough time to be completed and the limited dollars provided by the Government of BC would get lapsed. Moreover, each year a significant percentage of the Government of BC's TRMs budget is allocated for land holding costs. For example, in 2008/09, the Government of BC had a TRMs budget of \$573,000. Of that, \$175,000 was dedicated to TRMs land holding costs, an additional \$160,000 was used to complete projects that had lapsed from the previous year, thereby leaving a planned budget of \$238,000 to be cost-shared with Canada towards new TRMs projects.

According to federal officials, the lack of expenditure of Tier 2 TRMs is the result of a number of issues. First, cost is accounted for in the treaty cost-sharing accounting between Canada and BC and is not an immediate cash outlay for Canada. Second, Canada has been reluctant to implement, to any degree, Tier 2 TRMs until an AIP has been signed with the First Nation addressing the substantive issues which will form the basis of the eventual treaty. Lastly, the anticipated purchase of fee simple lands did not materialize as anticipated due to lack of available property that was desirable to the eligible First Nations, no willing seller, and properties being deemed too costly.

As part of the ARLU exercise, INAC's BC Region obtained permission to apply part of the TRMs budget surplus to other claims related pressures. These include, for example, funding for eligibility and ratification activities as well as governance projects through the INAC's Professional and Institutional Development Program (P&ID). Though not being spent on TRMs related activities, this additional funding has allowed INAC to meet obligations in other areas of treaty negotiations for which the Department has limited funds. INAC is aware of these funding gaps and the continued pressure on the claims envelope.

²⁹ The Government of BC is providing significant resources to facilitate treaty negotiations from numerous ministries throughout the provincial government. Though the total cost of these new tools and agreements is not available, funds spent on the Forest and Range Opportunity Agreements alone is valued at approximately \$50M per year. The agreements are not cost-shared with Canada, though Canada is currently cost-sharing elements of specific Incremental Treaty Agreements on a case-by-case basis.

³⁰ At the time of the evaluation, the Government of BC provided a small level of funding towards TRMs, which allowed a few projects to be undertaken this fiscal year.

5.2 Program Management

Evidence from the evaluation conclude that the management practices, primarily the approval and administrative processes, for the TRMs Initiative went beyond the scope of what was required for the risk associated with the funding activity. This severely hampered the ability of the TRMs Initiative to be managed effectively. With an average processing time of 62 days to approve a TRM, for which the average value is \$100,000, the management of the TRMs Initiative is not in keeping with the current practices as per the 2008 Policy on Transfer Payments.

...this policy requires that transfer payments be managed in a manner that is sensitive to risks, that strikes an appropriate balance between control and flexibility, and that establishes the right combination of good management practices, streamlined administration and clear requirements for performance.³¹

There was a high level of dissatisfaction among all three parties – Canada, BC, and First Nations, with the work required to secure and administer a TRM. Administrative processes were cited consistently as a key weakness of the TRMs Initiative. According to a First Nation negotiator, one TRM took up more time and cost to administer than all of their other funding initiatives put together. TRMs are also cumbersome for INAC to administer as each individual TRM is entered into the First Nations and Inuit Transfer Payment system (FNITP) as a separate funding agreement. As the Government of BC does not have standard funding arrangements with First Nations, INAC had to develop a funding agreement template that would meet both parties' needs. This has created additional reporting requirements outside the normal Comprehensive Funding Arrangement (CFA). If Canada chooses to go forward with no cost-sharing with the Government of BC for Tier 1 TRMs, this would allow the use of a standardized funding agreement model in FNITP, which would create a more consistent and efficient reporting system.³²

5.3 Overlap and Duplication

Findings from the evaluation conclude that TRMs are unique, being specifically tied to the treaty process, with the potential to complement, rather than duplicate, other federal and provincial programs and initiatives. Moreover, as TRMs are not proposal driven, they have the potential to respond in a timely and flexible manner to a requirement at the treaty table.

There is some overlap and duplication with other INAC programming, such as the BCCI. The BCCI has an annual budget of \$5.5M and has provided in total approximately \$40M to First Nations who are involved in the treaty process, compared to approximately \$20M from TRMs. The BCCI focuses on enhancing First Nations' abilities to prepare for comprehensive land claim negotiations by increasing First Nations' capabilities to negotiate, implement or manage land and resource components of their current or future Aboriginal title settlement agreements. Another INAC program is P&ID, with an annual budget of \$1.2M, which is designed to strengthen First Nations and Inuit governance by funding initiatives, which address needs in the areas of

³¹ Treasury Board of Canada Secretariat, *Policy on Transfer Payments*, 2008.

³² For detailed description of the TRM administrative process, refer to the *Interim Evaluation of Treaty Related Measures*, Departmental Audit and Evaluation Branch, INAC, November 2005.

human and institutional development at the local level and at the level of emerging regional and national First Nations and Inuit organizations. Both programs are proposal driven and are open to First Nations and Inuit communities both inside and outside of the treaty process.

First Nation focus group respondents indicated that while there was concern that creating too direct a link between TRMs and the other INAC programming could lead to coordination complications, there was specific mention of successful TRM/BCCI linkages. The evaluation found evidence of other programs and initiatives, both federal and provincial, complementing TRMs to achieve results at the treaty table. Moreover, there is the potential for TRMs to work in synergy with the Government of BC's ITAs as an ITA would typically consist of a transfer of Crown land to a First Nation. An economic development TRM could potentially be used in conjunction with an ITA to support economic development activities for the First Nation.

6. Evaluation Findings – Success

The evaluation looked for evidence that TRMs are meeting their intended objectives. We would expect to find increased protection to Aboriginal interests during the negotiation of an agreement, enhanced economic, cultural, and governance opportunities for First Nations, fewer information gaps at the treaty tables related to land, resources and economic development, and an accelerated BC treaty process.

Findings from the evaluation conclude that TRMs have assisted First Nations in completing a wide range of studies related to land and economic development; funded key projects of importance to First Nation communities; and provided support for economic development, and governance activities. TRMs resulted in fewer information gaps at the negotiation tables and allowed information to be generated without further increasing the amount of loans to First Nations. Though TRMs cannot be said to accelerate the treaty process, the work conducted by TRMs was reported to have helped maintain momentum at the treaty table.

However, the TRMs Initiative did not meet its full potential and results from the TRMs Initiative were severely hampered by the underutilization of its allocated resources. With the utilization of only 23% of Tier 1 eligible funding and 14% of Tier 2 eligible funding, the TRMs Initiative was not able to achieve the results to the degree anticipated when the TRMs Initiative was created. Moreover, there is concern that TRMs have resulted in limited land protection for First Nations; been implemented at times in an ad-hoc manner without strategic considerations of the needs at the treaty tables and the needs of First Nations' preparing for treaty implementation; not taken full advantage of leveraging opportunities with other structures and mechanisms; and not included First Nations adequately in the TRMs process.

6.1 What Took Place

Of the TRMs that were undertaken, Table 3 and Table 4 provide details of the TRMs activity between 2000/01 to 2008/09.

Within Tier 1 TRMs:

- 50% of TRMs undertaken (92 projects) were for land and resource and economic development studies; and
- The remaining 30% of TRMs (54 projects) were for development measures to support First Nation self-government, including intergovernmental relationships, governance and constitutional development with an additional 18% (33 projects) for First Nation participation in land and resource management processes within claimed traditional territory.

Within Tier 2 TRMs:

- Only two of the nine types of Tier 2 TRMs were utilized: Protection of Crown Land for Treaties without third party access, and Acquisition of Fee Simple Land.

Table 3: Level of Activity of Tier 1 TRMs 2000/01 to 2008/09

TRM #	Title	Number of TRMs undertaken³³	Total Costs/ Average Cost per TRM
3.1	First Nation Participation in Land and Resource Management Processes within Claimed Traditional Territory	Total Projects: 33 Most projects related to land and resource planning (11); and fisheries management (12).	Total Costs: \$4M (\$2M Canada / \$2M BC) Average cost per TRM: \$121,172
3.2	First Nation Participation in Land and Resource Management on Anticipated Treaty Settlement Land (TSL)	Total Projects: 0	Total Costs: 0
3.3	Land and Resource and Economic Development Studies	Total Projects: 92 Most studies related to land (27); economic development (24); and fish (18).	Total Costs: \$10.2M (\$5.1M Canada / \$5.1M BC) Average cost per TRM: \$110,900
4.4	Cultural Artefacts	Total Projects: 2 Projects involved archival research and artefact viewing.	Total Costs: \$.07M (.035M Canada / \$.035M BC) Average cost per TRM: \$35,000
5.1	Developmental Measures in Support of First Nations Self-Government	Total Projects: 54 Projects related to intergovernmental relationships (17); governance (16); program/service management (12); and constitutional development (8).	Total Costs: \$5.4M (\$3.25M Canada / \$2.16M BC) Average cost per TRM: \$100,000
Total		Total Number of Tier 1 TRMs: 181	Total Costs: \$19.67M (\$10.385 Canada / \$9.295 BC) Average cost per TRM: \$109,000

³³ This includes TRMs, which have been completed or are currently ongoing.

Table 4: Level of Activity of Tier 2 TRMs 2000/01 to 2008/09

TRM #	Title	Number of TRM undertaken³⁴	Cost Land Set Aside
1.1	Protection of Crown Land for Treaties without third party access	Number of TRMs: 8	Cost: \$13.6M ³⁵ Area: 33,534.34 hectares
1.2	Protection of Crown Land for Treaties with third party access	Number of TRMs: 0	-
1.3	Protection of Crown Land with First Nation access	Number of TRMs: 0	-
2.1	Purchase of Option to Acquire Fee Simple Land	Number of TRMs: 0	-
2.2	Acquisition of Fee Simple Land	Number of TRMs: 7	Cost: \$9.1M Canada Area: 655 hectares
3.4	Preparation to Implement Land and Resource Components	Number of TRMs: 0	-
4.1	Advance Payment or Portion of Capital Transfer	Number of TRMs: 0	-
4.2	First Nation Access to Licenses, Tenures and other assets	Number of TRMs: 0	-
4.3	Benefit Sharing	Number of TRMs: 0	-
Total		Total Number of Tier 2 TRMs: 15	-

6.2 What Worked

TRMs have assisted First Nations to complete a wide range of studies, funded key projects of importance to First Nation communities, supported the information needs at the treaty table, provided support for economic development, and governance activities. Though TRMs cannot be said to accelerate the treaty process, results from the evaluation conclude that the work conducted by TRMs help remove barriers to progress in negotiations and maintain current momentum. TRMs resulted in fewer information gaps at the negotiation table and allowed information to be generated without further increasing the amount of loans to First Nations. Though the overall impacts cannot be quantified, as this type of data was not systematically collected, there is evidence to support that the TRMs that were undertaken had an overall positive impact on the treaty process.

³⁴ This includes TRMs, which have been completed or are currently ongoing.

³⁵ Cost is accounted for in the treaty cost-sharing accounting between Canada and BC and is not an immediate cash outlay for Canada. The cost of \$13.6M is an estimate and will be cost-shared between Canada and BC as per cost sharing mechanisms.

First Nations have found TRMs to be useful. Eight of ten participants in the First Nation focus group session rated the TRMs “very useful” and the remaining two rated TRMs as “useful” as they move through the treaty process. Focus group participants used, or will use, TRMs for:

- Undertaking, land and resource economic studies (affirmative response by ten out of ten participants);
- Preparing for self-government (ten out of ten);
- Participating in land and resource management processes (nine out of ten);
- Accessing time-sensitive financial, economic and cultural opportunities (seven out of ten);
- Protecting provincial and surplus federal Crown land for treaty settlement (six out of ten); and
- Acquiring/holding privately-owned lands for treaty settlement (five out of ten).

Federal negotiators were satisfied that the objectives of the TRMs undertaken were addressed. Results from the survey of federal negotiators from 2005/06 to 2007/08 involving 68 completed TRMs projects, found that 86% of the negotiators stated that the TRMs strategic objective was either “addressed to their satisfaction” (77%) or “fully addressed and exceeded expectations” (9%). Comments by federal negotiators regarding the impact of TRMs include:

- *...vastly improved level of engagement with companies involved in forestry, coal mining, and oil and gas exploration than it has had in the past. Relationships that were previously focussed on disputes have been transformed into more productive engagements exploring mutually beneficial opportunities - Land and Resource Planning and Management Processes TRM;*
- *Community member interest and participation in this TRM served to call their attention to the relationships between business and employment development issues and health, education, training and social development issues - Business Development Planning TRM;*
- *Significant improvement; Aerial photos and detailed mapping are products of the TRM were shared with the community, which has positively impacted the community's understanding and support for the work at hand - Detailed Land Selection TRM; and*
- *Strong community involvement in the development of Treaty First Nation constitution and membership code led to both being ratified - Governance Development TRM.*

Results from the survey of federal negotiators and the First Nations focus group session demonstrate that TRMs can also assist in supporting intergovernmental relationships. More than half of negotiators (54%) reported that TRMs support “improvement in tripartite relationships” with focus group participants noting TRMs contribute to the broad benefits of intergovernmental relationship building.

The focus of TRMs have been with lead negotiating tables, with approximately half of all Tier 1 TRMs being undertaken by the seven treaty tables in Stage 5 and Stage 6 of the BC Treaty process.

Table 5: Level of Activity of Tier 1 TRMs at Lead Tables³⁶

Negotiation Table	Types of TRMs	Expenditures (Federal Costs Only)
Tsawwassen	Joint Fisheries Committee; Community Development Project; Economic and Human Resource Development Study; Land Parcels Study; Land Designation Study; Culture and Heritage; Archival Research and Artefact Viewing; Cultural and Heritage Resources Study; Intergovernmental Relations Study; Programs, Services and Government Activities Study; Constitution Development; Governance Development; Shared Territories; and Participation in Regional Board.	\$577,761
Maa-nulth / Nuu-chah-nulth	Aquaculture; Wildlife; Participation in Resource Management; Land Evaluation; Culture and Heritage; Shellfish Aquaculture; Forestry Economic Opportunities; Parks, Culture and Heritage; Commercial Recreation; Constitution Development; and Intergovernmental Relations.	\$1,697,277
Lheidli T'enneh	Wildlife; Fisheries; Fisheries Management; Gravel Management; Economic Development; Water; Intergovernmental Relations ; Programs and Services; Constitution; Fiscal Modelling; Capacity; and Project Management.	\$881,071
Sliammon	Land Use Planning; Fisheries; Commercial Recreation; Gravel Management; Land Management Planning; Water; Forestry; Fisheries, Shellfish; Culture and Heritage; Governance Capacity; Intergovernmental Relations; Programs and Services; and Fiscal Modelling.	\$531,796
Yale	Culture and Heritage; Traditional Knowledge; Economic Development; Water; Economic Development Study; Governance; Intergovernmental Relations; and Fisheries.	\$330,544
Yekooche	Fisheries; Land Use Planning; Economic Opportunities; Land Identification; Forestry; Business Development; Fisheries Operational Guidelines; Governance, Human Resources; Governance, Process; and Programs and Services.	\$507,389
In-SHUCK-ch	Economic Development; Land Use Planning; Wildlife; Wealth Creation; Water; Early Access; Governance, Programs and Services; Governance Structure; and Fisheries.	\$293,000

³⁶ Table prepared by TAG-NW as part of the TRMs renewal activities.

6.3 Challenges

The evaluation identified a number of challenges that have impacted negatively on the success of the TRMs Initiative.

Underutilization of the TRMs Initiative: As a result of the problems related to the cost-sharing arrangement with the Government of BC and the administrative processes as discussed in Section 5, only 23% of Tier 1 eligible funding, and 14% of Tier 2 eligible funding, was utilized. The TRMs Initiative was therefore not able to achieve the results to the degree anticipated when the TRMs Initiative was created.

Limited land protection for First Nations: There is criticism, particularly among First Nations, that TRMs have not protected Aboriginal interests in terms of land protection and did not meet the expectations of Recommendation 16 of the *Task Force Report*. From the federal perspective, the decision to enter into cost-sharing land protection TRMs only after an AIP is based on an assessment of risks and benefits.

TRMs implemented too late in the treaty process: There is criticism that TRMs come too late in the treaty process. First Nations would like to have access to more TRMs prior to AIP stage.

Perceived inequitable approach to TRMs funding: Though focusing TRMs on lead tables can be considered a strength, First Nations participating in the focus group session requested that INAC examine more equitable approaches to TRMs funding.

TRMs implemented in an ad-hoc manner: TRMs have been implemented without strategic planning to support First Nations capacity to implement eventual treaty settlement. TRMs have not applied a consistent approach to leveraging other structures and mechanisms within the federal and provincial governments as well as industry.

Lack of First Nation involvement with TRMs selection: It has been the practice for negotiators from Canada and BC to put forward a proposal for TRMs funding with little or no input from First Nation negotiators. First Nation negotiators report being unaware of the full suite of TRMs tools that are available.

Limited information-sharing: There is no structure to support the sharing of information regarding existing TRMs so that First Nations being engaged to develop a TRM can utilize this information. In addition, First Nations report at times having to duplicate information collection efforts that already exist within the federal and provincial governments and report a lack of guidance related to TRMs administrative procedures and reporting requirements.

Lack of capacity to implement TRMs: TRMs tend to emphasize processes and products that are not always within the capacity of First Nations to develop. First Nations report a reliance on external supports, including the use of consultants. Federal and provincial negotiators stated that the quality of reports is not always satisfactory and the reports are not always completed on time.

An Interim Evaluation of Treaty-Related Measures was completed in November 2005 by INAC's Departmental Audit and Evaluation Branch. Many of the issues that were identified through this evaluative process continue to be relevant to the TRMs Initiative.³⁷ The 2005 Interim evaluation came to the following conclusions:

- The design of the TRMs Initiative could be improved by ensuring First Nations are fully engaged in the initiation of TRMs;
- The TRMs Initiative could be improved by creating appropriate communication mechanisms for the planning and implementation stages. This will improve First Nations understanding of the linkage to the treaty process and will clarify TRMs' benefits at the community level;
- The TRMs Initiative could be improved by broadening the performance measurement strategy to include First Nation feedback;
- The TRMs Initiative could be improved by accelerating introduction of Tier 2 TRMs;
- The TRMs Initiative could be improved by removing what is effectively a \$100,000 cap on Tier 1 TRMs; and
- The prospect of treaty settlements could be improved by managing the TRMs Initiative in a way that encourages deployment of other government departments' programs to support strategic community development and to create incentives for continued negotiation and conclusion of treaties.

³⁷ Audit and Evaluation Sector's Follow-up Tracking System reports that all recommendations from the 2005 Interim Evaluation were implemented.

7. Conclusions and Recommendations

7.1 Conclusions

The evaluation supports the following conclusions:

- TRMs remain highly relevant to the treaty process in BC but require updating to reflect current realities;
- TRMs have assisted First Nations in completing a wide range of studies related to land and economic development; funded key projects of importance to First Nation communities; and provided support for economic development, and governance activities;
- TRMs have the potential to be used more effectively to support federal priorities that contribute to the self-sufficiency of Aboriginal people and to support the needs of First Nations during treaty negotiations;
- The cost-sharing arrangements with BC and the TRMs administrative process were highly inefficient. As a result, the TRMs Initiative was under utilized and did not meet its full potential; and
- There was criticism that the TRMs Initiative did not adequately address the recommendation stemming from the 1991 *Task Force Report* for which it was designed.

7.2 Recommendations

It is recommended that INAC:

1. Design a renewed TRMs Initiative that is strategic, cost-effective and meets the needs of BC First Nations involved in treaty negotiations. This should include eliminating the cost-sharing arrangements with the Government of BC for Tier 1 TRMs, streamlining administrative processes, and leveraging, where possible, existing federal, provincial and industry mechanisms to support TRMs objectives. TRMs should remain tied directly to the BC treaty process and support the broader treaty revitalization process.
2. Engage the BCTC, the First Nations Summit, the Government of BC, and other relevant federal government departments on the design and implementation of a renewed TRMs Initiative. This should begin by revisiting Recommendation 16 of the 1991 BC Claims *Task Force Report*.

3. Implement a renewed TRMs Initiative in which First Nations negotiators have a greater degree of involvement in the selection and design of the TRMs activity. This should include improved communications about the full suite of TRMs tools available.
4. Promote a climate of information sharing and collaboration for TRMs in order to support the sharing of best practices and reduce duplication of effort.
5. Design and implement a Performance Measurement (PM) Strategy for the renewed TRMs Initiative that includes the collection of qualitative and quantitative data on results achievements. Data to support the PM Strategy should include feedback from First Nations through an annual TRMs survey similar to the federal negotiator survey currently undertaken.

Appendix A –Existing TRMs Tools

Tier 1 TRMs – Funding Source: TRMs budget

TRM #	Title	Description	Prerequisites to Implement
3.1	First Nation Participation in Land and Resource Management Processes within Claimed Traditional Territory	Provides First Nations participation in land, resource and park planning and management processes on claimed traditional territory.	Framework Agreement (Stage 4 BC treaty process)
3.2	First Nation Participation in Land and Resource Management on Anticipated TSL	Provides First Nations with an enhanced role over lands and resources located on anticipated treaty settlement land.	AIP (Stage 5 BC treaty process)
3.3	Land and Resource and Economic Development Studies	Funds land and resource and economic development studies to be available to all three parties involved in negotiations.	Framework Agreement (Stage 4 BC treaty process)
4.4	Cultural Artefacts	Provide for the identification of First Nation artefacts held in public collections and that may be repatriated, and the compilation of associated information.	AIP (Stage 5 BC treaty process)
5.1	Developmental Measures in Support of First Nations Self-Government	Funds to First Nations to facilitate and expedite negotiations towards self-government.	Framework Agreement (Stage 4 BC treaty process)

Tier 2 TRMs – Funding Source: Charged against the financial mandate

TRM #	Title	Description	Prerequisites to Implement
1.1	Protection of Crown Land for Treaties without third party access	Protection of surplus federal Crown land or provincial Crown land that the parties have identified as anticipated treaty settlement land – with and without third party access.	Framework Agreement (Stage 4 BC treaty process)
1.2	Protection of Crown Land for Treaties with third party access		
1.3	Protection of Crown Land with First Nation access	Provide First Nations access through lease, license, and tenure to surplus federal Crown land or provincial Crown land.	AIP (Stage 5 BC treaty process)
2.1	Purchase of Option to Acquire Fee Simple Land	Option to purchase fee simple lands.	Framework Agreement (Stage 4 BC treaty process)
2.2	Acquisition of Fee Simple Land	Acquire fee simple lands where there is a willing –seller and a willing buyer.	Framework Agreement (Stage 4 BC treaty process)
3.4	Preparation to Implement Land and Resource Components	Provide First Nations early access to a portion of the treaty implementation funds to prepare First Nations for implementation of the anticipated land and resource components of the eventual treaty.	AIP (Stage 5 BC treaty process)
4.1	Advance Payment or Portion of Capital Transfer	Advance up to 5% of the capital transfer once the final agreement has been signed.	Final Agreement (Stage 6 BC treaty process)
4.2	First Nation Access to Licenses, Tenures and other assets	Provide First Nations temporary access to federal or provincial Crown assets, licenses and tenures, that all parties agree will form part of an eventual treaty settlement.	AIP (Stage 5 BC treaty process)
4.3	Benefit Sharing	Involve the provision of a share of federal or provincial resource revenues to a First Nation, including the sharing of resource revenues in areas outside eventual treaty settlement lands.	AIP (Stage 5 BC treaty process)