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Report of the
**Auditor General
of Canada**
to the House of Commons

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Chapter 7
Federal Participation in the British Columbia
Treaty Process—Indian and Northern Affairs Canada



Office of the Auditor General of Canada

The November 2006 Report of the Auditor General of Canada comprises Matters of Special Importance—2006, Main Points—Chapters 1 to 12, Appendices, An Overview of the Federal Government's Expenditure Management System, and 12 chapters. The main table of contents is found at the end of this publication.

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Chapter

7

**Federal Participation in the British
Columbia Treaty Process**

Indian and Northern Affairs Canada

All of the audit work in this chapter was conducted in accordance with the standards for assurance engagements set by the Canadian Institute of Chartered Accountants. While the Office adopts these standards as the minimum requirement for our audits, we also draw upon the standards and practices of other disciplines.

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Federal Participation in the British Columbia Treaty Process

Indian and Northern Affairs Canada

Foreword

The reconciliation of Aboriginal rights and title to land with the assertion of sovereignty by the Crown in the province of British Columbia (B.C.) has been a long-standing issue. Despite several attempts by Canada, B.C. and First Nations to resolve this issue, a solution satisfactory to all has yet to be found. This matter has far-reaching implications for B.C. as it affects and raises questions about the use, management, and regulation of land and resources and the laws that apply to the land and the people.

In 1992, Canada, B.C. and the First Nations Summit, representing the First Nations involved in the process, created the B.C. treaty process. This process is aimed at building a relationship with B.C. First Nations based on respect and trust that will result in treaties, thus settling the uncertainty associated with unresolved land claims in B.C.

Initially, the federal government expected that all claims in B.C. would be resolved by the year 2000. Today, about 40 percent of eligible B.C. First Nations, or *Indian Act* bands, representing about 30 percent of their population, do not participate in the process.

At the federal level, Indian and Northern Affairs Canada (INAC) represents Canada in the B.C. treaty negotiations. About 40 other federal departments and agencies provide assistance to INAC. At the provincial level, the B.C. Ministry of Aboriginal Relations and Reconciliation has the primary responsibility for negotiating treaties on behalf of the province, with assistance from various other ministries.

The Auditors General of Canada and British Columbia are tabling separate audit reports to their respective legislatures on the management of the B.C. treaty process. The Auditor General of Canada primarily examined the procedures and the resources being used by the federal government to negotiate treaties. The Auditor General of British Columbia examined whether the provincial government has effective administrative processes and resources in place to negotiate treaties successfully. Both Auditors General focused on the results of their respective government's activities.

The two audits were performed concurrently to present a broader perspective on the treaty process. Our offices shared methodologies and met jointly with First Nations and other organizations.

Limited results

Although progress is being made at some negotiation tables, with two final agreements seen as imminent and a third close behind, the process has not yet resulted in any treaties with First Nations. After spending hundreds of millions of dollars over more than 12 years of negotiations, the results achieved are well below the three parties' initial expectations. In the last few years, however, efforts have been made by the two governments to improve the treaty process.

Differing views

Successful negotiations require that the participants share a common vision of their relationship and of the future. Our two audits found that the participants have differing views on the nature of the treaties being negotiated. For example, the two governments base their participation in the treaty process on their own policies, and do not recognize the Aboriginal rights and title claimed by the First Nations. Many First Nations base their participation in the process on the assertion that they have Aboriginal rights under Canada's Constitution and that these rights should be acknowledged before negotiations begin. Additionally, the governments see treaties as a full and final settlement of the Aboriginal rights and title claimed by First Nations, whereas First Nations see them as documents capable of evolving as the relationship between the parties develops.

These differences limit progress at a number of treaty negotiation tables and contribute to the fact that about 40 percent of the First Nations that could enter the treaty process have not done so.

Evolving context

We have noted that, in the absence of treaties, other options have evolved to deal with questions related to Aboriginal rights and title, although in many cases, these solutions are temporary. Both audits noted that some court decisions may make litigation a more attractive option than negotiation. A rising number of contracts between First Nations and the federal and provincial governments, municipalities, and private companies was observed. The audits also noted the endorsement by B.C. and the three organizations representing all B.C. First Nations of the document entitled "A New Relationship," which outlines how a new "government-to-government" relationship will be established between B.C. and First Nations based on respect, recognition, and the accommodation of Aboriginal rights and title.

As a result of these other legal, economic, and political options, it is challenging for the federal and B.C. provincial governments to offer

benefits to First Nations that meet or exceed those available outside the treaty process.

Need for review

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. As Supreme Court of Canada Chief Justice Lamer stated in the landmark 1997 *Delgamuukw* decision: “Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve (...) the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.”

We call on our respective governments, working together and with First Nations, to take action to address our recommendations.

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The report *Treaty Negotiations in British Columbia: An Assessment of the Effectiveness of British Columbia’s Management and Administrative Processes* is available on the Office of the Auditor General of British Columbia website at www.bcauditor.com. For copies, contact

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Federal Participation in the British Columbia Treaty Process

Indian and Northern Affairs Canada

Main Points

What we examined

The British Columbia treaty process is intended to reconcile claimed Aboriginal rights and title to land with the Crown's assertion of sovereignty. The resulting treaties are aimed at settling uncertainty about the use, management, and regulation of land and resources and the laws that apply to the land and the people. Indian and Northern Affairs Canada (INAC) represents the federal government in the B.C. treaty negotiations. First Nations (individual communities or groups) and the Province of British Columbia are the two other parties in these negotiations.

We examined INAC's participation in the treaty process and the results of its activities. We looked at the management procedures and processes and the resources used to develop and implement federal policies that apply to treaty negotiations; our audit also covered, where relevant, support provided to the treaty process by other federal departments. We interviewed officials of INAC and of other departments and reviewed relevant files and documents; we also sought the views of First Nations communities and organizations and of the British Columbia Treaty Commission.

Why it's important

From 1993 to 2006 the federal government has spent about \$426 million on B.C. treaty negotiations, and B.C. First Nations have borrowed close to \$300 million for the same purpose. To date, no treaties have been signed under the B.C. treaty process, although two final agreements are seen as imminent, with a third close behind. The costs to Canada and First Nations for negotiations continue to grow.

Settling the uncertainty associated with unresolved land claims in British Columbia is important for all Canadians. It can help First Nations people living in B.C. narrow the gap between their standard of living and that of other British Columbians. In addition, studies have indicated that this uncertainty results in lost economic opportunities.

What we found

- While some treaties are expected to be signed in the near future, most negotiations are either inactive or are making limited progress. Moreover, about 40 percent of First Nations (*Indian Act* bands) are not participating in the treaty process, and there is a growing number of activities outside the process that are being used to deal with questions related to Aboriginal rights and title.
- Although the policy process has been able to respond to some issues raised during negotiations, several other issues remain to be addressed. For example, due to changes in the legal environment, dealing with overlapping claims may make concluding treaties more complex.
- In 1991 the federal government expected that all land claims in B.C. would be resolved by the year 2000. As of 2006, no treaties have been signed under the B.C. treaty process and INAC does not have the management systems in place to be able to estimate how much time and what resources will still be needed to negotiate treaties with First Nations and groups presently in the process.

The Department has responded. Indian and Northern Affairs Canada has accepted all of the Auditor General's recommendations and has committed to take action. The Department's responses follow the recommendations throughout the chapter.

Introduction

7.1 The reconciliation of Aboriginal rights and title to land with the assertion of sovereignty by the Crown in the province of British Columbia (B.C.) has been a long-standing issue. It affects and raises questions about the use, management, and regulation of land and resources and the laws that apply to the land and the people.

7.2 Resolving the land question in B.C. is important to First Nations and to the federal government. First Nations, for example, state that as resource exploitation in their claimed territories continues during treaty negotiations, there will not be enough lands and resources to maintain their culture and livelihood. The federal government expects that the fair and timely resolution of B.C. land claims through negotiated treaties will clarify rights to land and resources in the province.

7.3 The lack of treaties results in lost economic opportunities. Studies by private consulting firms have found that the uncertainty over unresolved land claims is a major drain on the B.C. economy and that treaties would result in significant gains to the economy.

Historical background

7.4 Before the land now known as British Columbia became a province of Canada in 1871, 14 land purchases were made from Aboriginal people by Sir James Douglas, chief factor of the Hudson's Bay Company and later governor of the Crown colony of Vancouver Island. After B.C. joined Canada, the federal government assumed responsibility for Indians (members of "First Nations") and B.C. retained authority over land and resources in the province. The union created difficulties between the two governments and with First Nations. In 1876, B.C. and Canada established a joint commission to examine and allot Indian reserves in B.C. In 1912, a federal-provincial commission was established to "settle all differences between [the Government of Canada and the province] respecting Indian Lands and Indian Affairs generally in [B.C.]". Over time, dissatisfaction mounted among B.C. First Nations concerning how land rights and other issues were being handled. In 1916, a province-wide Aboriginal organization, the Allied Tribes of B.C., was formed to pursue First Nations' rights. Over the years, several First Nations pressed their cases in Victoria, Ottawa, and London, England.

7.5 Between 1871 and 1921, the federal government signed 11 treaties with First Nations, mostly in Ontario and the Prairie provinces. Only one of them, Treaty 8, signed in 1899, covers a portion

of B.C. In the meantime, in 1876, the *Indian Act* was passed, consolidating all previous legislation concerning Indians.

7.6 In 1969, the Nisga'a went to court seeking a declaration that Aboriginal title to their land in northwestern B.C. had not been "extinguished." In 1973, the Supreme Court of Canada ruled, in the *Calder* case, that the Nisga'a held Aboriginal title before the British established sovereignty, but the court split evenly on whether this title had been "extinguished" when B.C. joined Canada.

7.7 In 1973, in the wake of this landmark ruling, the federal government established its policy on comprehensive land claims. This policy was revised in 1981 and again in 1986 to become the Comprehensive Land Claims Policy. Under the policy, the federal government negotiates with First Nations a package of clearly defined rights and benefits in exchange for their claims to Aboriginal rights and title. According to INAC, 20 comprehensive land claim agreements (mostly in the three territories) covering about 40 percent of Canada's land mass have been concluded under this policy. These agreements involve more than 90 Aboriginal communities with more than 70,000 members. Among other benefits, these communities secured ownership for over 600,000 square kilometres of land and more than \$2.4 billion in cash.

7.8 In 1982, the *Constitution Act's* section 35 recognized and affirmed existing Aboriginal and treaty rights. By 1990, the federal government had accepted 21 comprehensive land claims from B.C. First Nations for eventual negotiations, but actual negotiations were taking place only with the Nisga'a.

The treaty negotiation process

7.9 In December 1990, in response to growing frustration on the part of First Nations over the lack of progress in dealing with their land claims, Canada and B.C., with First Nations, created the B.C. Claims Task Force to define the scope, organization, process, and time frames for negotiations to resolve outstanding claims in B.C. The Task Force reported in 1991 and made 19 recommendations, which were endorsed by all three parties. Based on these recommendations, in 1992, the British Columbia Treaty Commission (BCTC) and the B.C. treaty process were established by agreement among Canada, B.C., and the First Nations Summit (representing First Nations involved in the process). The federal government expected that the tripartite B.C. treaty process would accelerate the settlement of comprehensive land claims in B.C.

7.10 The role of the BCTC is to oversee the six-stage B.C. treaty negotiation process (Exhibit 7.1). The Commission’s responsibilities include

- administering funding for First Nations to participate in the treaty process, and allocating loans and contributions among them in accordance with criteria agreed to by the three parties;
- encouraging timely negotiations, and monitoring and reporting on their progress;
- identifying problems and offering advice; and
- assisting in resolving disputes, at the parties’ request.

Exhibit 7.1 The six stages of the B.C. treaty process

Entry	Stage 1	A First Nation, or group of First Nations, submits to the British Columbia Treaty Commission (BCTC) a statement of intent to negotiate a treaty with British Columbia (B.C.) and Canada. Among other things, the statement identifies the people involved and the general geographic area of the First Nation’s traditional territory, including where overlap may exist with other First Nations.
Preparation	Stage 2	The First Nation(s), B.C., and Canada (the parties) prepare for negotiations and submit to the BCTC their readiness documents. Negotiations begin when the Commission determines that the parties and the table have met the readiness criteria set out in the 1992 BCTC Agreement.
Negotiations	Stage 3	The parties negotiate a framework agreement that identifies the subjects, procedures, objectives, and time frames for reaching an agreement-in-principle.
	Stage 4	The parties negotiate an agreement-in-principle that addresses all the features of the eventual treaty settlement. This is usually the longest stage of treaty negotiations.
	Stage 5	The parties formalize, in a final agreement, the features of the eventual settlement as defined in the agreement-in-principle. The agreement also includes an implementation plan and financial arrangements. The final agreement must be approved first by the First Nation or group of First Nations, and then by the B.C. government and finally by Canada. The details of the ratification procedures are set out in the final agreement.
Implementation	Stage 6	Implementation of the final agreement officially begins once legislation is passed by the B.C. Legislature and federal Parliament.

Source: Various public documents

7.11 Excluding the Nisga’a Nation (already under treaty), there are 202 First Nations or *Indian Act* bands that could join the B.C. treaty process. This includes eight First Nations with populations living in the Yukon and Northwest Territories who are claiming land in B.C. Most of the province is potentially subject to claims under the process.

7.12 First Nations’ participation in the treaty process is voluntary. About 60 percent of eligible First Nations or bands are currently involved in the process. Each First Nation determines how it wants to organize itself for the negotiations. Some First Nations have joined individually while others have joined as groups. First Nations have identified several challenges with the treaty process (Exhibit 7.2).

7.13 Financial support, mostly in the form of loans provided by Canada, is available to First Nations participating in the B.C. treaty process so that they can prepare for and carry out negotiations on a

Exhibit 7.2 First Nations’ perspectives on treaty process challenges

First Nations in the treaty process

Negotiation funding. The accumulation of higher than expected negotiation loans has become one of the greatest obstacles to progress in treaty negotiations. This places First Nations at a disadvantage since governments are not under the same pressure to conclude negotiations.

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

Dispute resolution. The treaty process lacks a dispute resolution mechanism for negotiation tables.

Community support. First Nations’ support for treaty negotiations can be difficult to maintain in light of the complexity of negotiations, limited tangible results, growing debt loads, and the attention needed for other pressing social and economic problems.

Overlaps. Disputes can arise between First Nations claiming the same traditional territory.

Power imbalance. First Nations have limited capacity to negotiate all subjects that the two governments want to cover in treaties, while the governments have access to many experts.

Mandates. The federal government provides its negotiators with narrow and inflexible mandates that leave little room to negotiate on some issues.

Alternatives. Options outside of the treaty process have drawn some First Nations’ attention away from the negotiation table. The relevance of treaty negotiations is questionable when other attractive options are available.

First Nations outside the treaty process

No recognition of rights. The treaty process has been flawed from the beginning because it does not acknowledge Aboriginal rights and involves the surrender of Aboriginal title.

Nature of treaty. The type of treaty offered is archaic and outdated and is not in keeping with the kind of relations that First Nations would like to establish with Canada.

Source: Interviews with First Nations and documents provided by them (unaudited)

more equal footing with the federal and provincial governments. As of 31 March 2006, \$289 million in loans had been issued by the federal government to First Nations. At the end of March 2009, First Nations loans could reach over \$375 million. These loans are expected to be repaid by First Nations from the cash portions of their treaty settlements.

Federal participation in the process

7.14 The federal government placed INAC in charge of the federal participation in treaty negotiations in B.C. According to the Department, Canada participates in the treaty process to negotiate fair, equitable, and affordable treaties with B.C. First Nations in a timely manner. These treaties aim to define a new relationship between Canada and First Nations, clearly setting out rights, responsibilities, obligations, and jurisdiction over people, lands, and resources.

7.15 Organization. In 1992, the Department created a unit, the Federal Treaty Negotiation Office (FTNO), located in B.C., to manage treaty negotiations in the province. The FTNO reports to the Department's Claims and Indian Government Sector, based in Ottawa. This sector is responsible for developing and implementing key federal policies covering the negotiation and implementation of comprehensive land claim agreements (and self-government agreements) and for negotiating these claims with First Nations across Canada.

7.16 The FTNO is responsible for carrying out most of the treaty negotiations and representing the interests of Canada at the negotiation tables. It has an annual budget of \$15 million and a staff of about 100 people. The Department of Finance is responsible for negotiating the treaties' tax provisions. Annual funding totalling about \$7 million is provided to other federal departments and agencies that assist INAC in negotiations. The federal government has spent about \$426 million on the B.C. treaty process since its inception in 1993 (Exhibit 7.3). This includes some costs associated with the Nisga'a treaty, signed outside of the B.C. treaty process in 1999.

7.17 A key federal committee involved in the B.C. treaty process is the Federal Steering Committee on Self-Government and Comprehensive Claims, composed of assistant deputy ministers from relevant departments. The Committee provides policy direction and advice to negotiators. It also reviews proposed changes to mandates, and concluded agreements before their presentation to the government for approval.

7.18 Mandating. Federal negotiations are carried out by teams of federal officials, headed mostly by chief federal negotiators appointed by the Minister of Indian and Northern Affairs Canada. Two types of government-approved mandates (the government’s instructions) are provided to federal negotiators. A generic mandate outlines key B.C.-wide aspects common to all negotiations with First Nations in B.C., such as the need to address land claims and self-government. When a particular negotiation is more advanced, the responsible chief federal negotiator seeks from the government a specific mandate quantifying certain items for negotiation, such as the amount of land and financial transfer that the government is willing to offer, and approval for exceptions, if any, to the generic mandate. Exhibit 7.4 summarizes key federal positions in the B.C. treaty negotiations.

7.19 Sharing costs with British Columbia. The formal coordination between Canada and B.C. is governed by a Memorandum of Understanding (MOU) signed in 1993. This agreement covers the sharing of pre-treaty costs, settlement costs, implementation costs, and the costs of self-government. The MOU’s main purpose is to ensure, overall, that these costs are shared equally between the two governments. However, both governments remain responsible for their own negotiation costs.

Exhibit 7.3 Federal costs for the B.C. treaty process (in \$millions)

	Actual 1993–94 to 2005–06	Planned 2006–07 to 2008–09	Total actual and planned 1993–94 to 2008–09
Federal funding for INAC and other federal departments and agencies	236.8 ¹	66.7	303.5
Contributions to the British Columbia Treaty Commission and the First Nations Summit	34.3	9.3	43.6
Financial support to First Nations ²	155.3	85.0	240.3
TOTAL B.C. treaty process³	426.3	161.0	587.3

Note: Figures may not add exactly due to rounding.

¹ Includes some costs associated with the 1999 Nisga’a treaty, negotiated outside of the B.C. treaty process. INAC did not track these costs separately.

² Includes contributions to First Nations to cover 20% of their negotiation costs, contributions for treaty-related measures and capacity development, and interest charges covered by INAC on outstanding loans to B.C. First Nations.

³ Does not include outstanding loans to First Nations, which amounted to \$289.2 million from 1993–94 to 2005–06. Loans to First Nations are anticipated to increase by \$87.0 million from 2006–07 to 2008–09 for a total of \$376.2 million.

Source: Indian and Northern Affairs Canada

Focus of the audit

7.20 Our audit covered primarily the management procedures and processes and the resources used by the federal government to negotiate treaties in B.C., and the results of those activities. It focused on Indian and Northern Affairs Canada, but also included, where relevant, the support provided to INAC by other federal departments involved in the process. Although we did not audit First Nations, we sought their views on the matters included in the audit through community visits and consultations. We also interviewed BCTC Commissioners.

Exhibit 7.4 Federal positions cover a wide range of topics

Land	<ul style="list-style-type: none"> • First Nations select additional land within their claimed territory; B.C. and Canada must agree with the amount of land selected and the location of this land. • Existing reserves and additional lands become Treaty Settlement Lands, owned in “fee simple” (outright ownership) by First Nations.
Resources	<p>On Treaty Settlement Lands</p> <ul style="list-style-type: none"> • Surface and sub-surface resources are owned by First Nations, subject to restrictions. <p>Off Treaty Settlement Lands</p> <ul style="list-style-type: none"> • Access to forest, plants, and wildlife is defined over claimed territory. • Access to fish for food, social, and ceremonial purposes is defined and protected as a treaty right; participation in commercial fisheries is defined in a separate agreement.
Governance	<ul style="list-style-type: none"> • The <i>Indian Act</i> no longer applies, except for the definition of “Status Indian.” • Generally, self-government provisions apply only on Treaty Settlement Lands. • All federal and provincial laws apply, but in a few areas internal to the First Nation community or with respect to the operation of its government, First Nation laws prevail in the event of a conflict. • The <i>Charter of Rights and Freedoms</i> continues to apply.
Finances	<p>Funding:</p> <ul style="list-style-type: none"> • Programs and services to be funded are agreed upon. • First Nations contribute to programs and services using their own revenue sources. • Federal transfers are to be reduced as First Nations become increasingly self-reliant. <p>Taxation:</p> <ul style="list-style-type: none"> • Exemption from taxation for members of First Nations is abolished after a transition period. • Taxing powers for First Nation governments are to be defined, but exercised concurrently with federal and provincial tax authorities. • Separate tax agreements can be signed to share tax fields.
Financial benefits	<ul style="list-style-type: none"> • There will be a cash transfer, less loan reimbursement, plus resource revenue sharing and other benefits. The value of land selected is also taken into account. Cash and revenue sharing are provided over a number of years.
Certainty	<ul style="list-style-type: none"> • A treaty constitutes full and final settlement of all Aboriginal title and rights related to land and resources.

Source: Indian and Northern Affairs Canada

7.21 The objectives of the audit were to determine whether

- the federal government has effective and efficient management procedures and processes, and adequate resources, to achieve its policy objectives through the B.C. treaty negotiation process;
- the federal mandating process ensures that mandates are consistent with applicable authorities; and
- sufficient and appropriate information on the cost and progress of negotiations is being reported to management, the government, and Parliament.

7.22 More details on the audit objectives, scope, approach, and criteria are in **About the Audit** at the end of this chapter.

Observations and Recommendations

State of negotiations

Negotiations have not yet resulted in a treaty

7.23 In 1991, the federal government expected that all land claims in B.C. would be resolved by the year 2000. At the time of the audit, in 2006, after more than 12 years of negotiations, about \$426 million in costs to the federal government, and \$289 million in loans to First Nations, the process has not yet produced a treaty. In 1999, a treaty was signed with the Nisga'a Nation in B.C., but this treaty was negotiated outside of the treaty process.

7.24 Federal officials told us that the process should not be judged solely on the number of treaties signed to this point. They stated that many negotiations are advanced and should reach agreement-in-principle and final agreement stages over the next few years. In their view, participation in the negotiation process has also helped build better relations among Canada, B.C., and First Nations and between Canada and B.C. on Aboriginal affairs, and has assisted First Nations in developing expertise in a number of areas, including the management of land and resources. However, there are indications that the failure to deliver treaties, limited interim benefits, and the relatively slow pace of negotiations are actually straining the relations between the governments and First Nations.

7.25 The pace of negotiations can be disrupted by various events. For example, court decisions can slow down negotiations while the impacts of these decisions are analyzed. Elections at the federal, provincial, and First Nations levels can delay decisions or affect negotiation positions.

In addition, some First Nations have withdrawn from group negotiations and have chosen to negotiate on their own. In 2002, B.C. held a province-wide voter referendum to seek support on principles for treaty negotiations.

7.26 The majority of the 47 negotiations (or “tables”) in the process are not making steady progress. Documents we reviewed indicate that, in 2005, 12 of the tables were inactive, 17 were challenging, and 18 were productive. The Department’s current strategy to achieve treaties is to focus on the negotiation tables that are making progress toward agreements. Two final agreements are seen as imminent, with a third close behind.

There are differing views on the nature of treaties

7.27 There are fundamental differences in views between many First Nations in the B.C. treaty process and the federal government. For example, the federal government does not recognize Aboriginal rights unless they are proven in court. B.C. First Nations consider that Aboriginal rights and title should be acknowledged before negotiations begin. At some negotiation tables, First Nations believe that they are owed compensation for past denial of their rights. The federal government considers that there is no basis to establish such compensation since negotiations are not based on rights. Another critical difference is the federal government’s expectation that a treaty constitutes full and final settlement with respect to the Aboriginal rights and title claimed by a First Nation, while many First Nations see treaties as evolving documents recognizing their rights and title. According to the First Nations Summit, the most challenging and fundamental issue in treaty negotiations is “achieving certainty when governments and First Nations hold diametrically opposing views.”

The federal government has taken some corrective steps

7.28 The federal government has taken some steps in attempt to accelerate negotiations. For example, in 1999, the federal and provincial governments introduced new programs, such as the Negotiation Preparedness Initiative and Treaty-Related Measures, to support First Nations in negotiations. In addition, over the years, the federal government has approved changes to negotiation mandates and support funding to First Nations in efforts to move discussions along. The federal government has also proposed other measures, such as a minimum level of contribution funding (conditional transfer payment for a specified purpose) regardless of First Nations’ size, that

have not been adopted because they lacked the support of one or more parties.

Competing options to the treaty process

First Nations have other legal, political, and economic options

7.29 The legal, political, and economic environments within which treaty negotiations take place have evolved. As a result, there are other options available to all First Nations to pursue their claims, to protect resources, or to provide inputs into decisions regarding resources in claimed areas.

7.30 Legal environment. Federal officials told us that some court decisions have made litigation a more attractive option than treaties, for some First Nations. For example, under specific conditions, First Nations can now access court-ordered funding from the federal or provincial governments to pursue certain Aboriginal rights and title cases. Although litigation has always been available to First Nations as an alternative to negotiations, court-ordered funding may make it less expensive for some First Nations to litigate rather than negotiate since they usually have to borrow money to negotiate treaties.

7.31 Political environment. A significant event involving all B.C. First Nations occurred in March 2005. The First Nations Leadership Council (made up of the political executive of the First Nations Summit, the Union of B.C. Indian Chiefs, and the B.C. Assembly of First Nations) and the B.C. Premier endorsed a document entitled *A New Relationship*. This document outlines how a new government-to-government relationship will be established between the province and B.C. First Nations based on respect, recognition, and accommodation of Aboriginal rights and title. In 2006, the B.C. government committed \$100 million to the recently created New Relationship Trust Corporation to help First Nations effectively participate in land and resource management, and in social programs for their communities.

7.32 Economic environment. There are a growing number of contracts involving First Nations inside and outside the treaty process. The federal government, for example, has signed agreements with some First Nations regarding the co-management of, and/or access to, resources in federal parks. First Nations and provincial or municipal governments have signed a number of agreements covering land-use planning, resource development, and/or consultations. In addition, some First Nations have signed partnership agreements with companies wanting to exploit resources in their traditional territory. Many of these arrangements bring “operational” certainty over the

management of land and resources in claimed areas and imply that Aboriginal rights and title exist, without defining them. However, most of these arrangements are short term and of limited scope.

Legal, political, and economic options have consequences for the B.C. treaty process

7.33 Some of the non-treaty options have helped address, albeit temporarily in many cases, some of the issues that the federal government intended to resolve through the treaty process. At the same time, however, they have reduced some First Nations' interest in the treaty process and made it challenging for the governments to offer benefits to First Nations that meet or exceed those available outside the process.

7.34 Federal officials told us that, currently, many of the other options to treaty-making are appealing to First Nations. Some First Nations officials told us that many community members wonder what the benefits are of borrowing money to participate in the treaty process when attractive options are available outside of it.

7.35 In our opinion, given these other options, it will be more difficult under the treaty process as it exists today, for the federal government to achieve its policy objective of signing treaties with most B.C. First Nations.

Policy framework

7.36 We expected that INAC would have in place a policy function and analytic capacity to anticipate challenges and respond strategically. We also expected the Department would have a process to develop policy based on factual analysis and reliable modelling that also considers how policies will be implemented. We also expected that INAC would comply with all applicable authorities and have in place a legal framework of powers, duties, and functions related to treaty negotiations, and a process to identify issues of lawfulness or areas where legal authority may be lacking.

Adjusting federal policies is challenging

7.37 We found that INAC complies with the authorities and policies that apply to the federal participation in the B.C. treaty process. INAC has units in Ottawa and B.C. to develop new policies and guidelines and to revise existing ones. An interdepartmental structure is also in place to coordinate federal policy development in the areas of First Nations land claims and self-government, inside and outside B.C.

However, these structures are complex and make policy development challenging.

7.38 We also found that, despite the challenges, INAC has been able to respond to some policy issues, such as how to ensure a treaty constitutes the full and final settlement of all claimed land rights. INAC, with the cooperation of other departments, has developed new legal techniques and terminology to meet this objective, while considering the reluctance of First Nations to exchange or modify the Aboriginal rights they claim. These changes have allowed some negotiations to continue.

Several issues have not been addressed

7.39 The Comprehensive Land Claims Policy. The federal government's participation in the B.C. treaty process is based on its 1986 Comprehensive Land Claims Policy. Although some modifications have been made to the policy, we found no formal analysis to determine how relevant this national policy is to the B.C. treaty negotiations.

7.40 The combination of many factors makes settling land claims in a province like B.C. more challenging than settling land claims in the territories. As in other provinces, most land and resources in B.C. are under the control of the province, not the federal government. Available federal or provincial Crown land is scarce in many areas of B.C., and often is affected by third-party interests. Land generally has a high value, particularly in urban areas. The province is inhabited by a large non-Aboriginal majority with competing interests in the land, fisheries, and other resources that may be offered in treaties. As a result, in some areas of B.C., this limits the governments' ability to develop an offer of resources and benefits acceptable to all parties.

7.41 Under the land claims policy, the federal government considers that Aboriginal rights and title to land remain undefined. However, the nature, scope, and content of Aboriginal rights and title have been made clearer since the policy was established, notably due to decisions of the Supreme Court of Canada. INAC believes that, as a consequence, First Nations in B.C. have higher expectations regarding the way in which their claimed Aboriginal rights and title are dealt with. The Department continues to seek full and final settlement of Aboriginal rights associated with land claims. In response to First Nations' rising expectations, INAC has obtained authority to increase some of the benefits offered to them, which has raised the cost of settling land claims in B.C.

7.42 Negotiating with smaller First Nations. The federal government adopted a policy on the inherent right of Aboriginal self-government in 1995. In this policy, the government stated that the size of the group and economies of scale would be significant factors in determining what is practical to negotiate.

7.43 In the early years of the treaty process, many smaller First Nations were entering into negotiations on their own, as opposed to in larger groups as was initially expected by the parties. Concerns were expressed, notably by the BCTC, about the resources required for negotiating and implementing treaties with smaller First Nations and groups. Initially, INAC addressed only the concerns related to smaller First Nations' negotiation capacities and costs. Some federal recommendations intended to address other challenges associated with negotiating with smaller First Nations were rejected by the other parties on the basis that First Nations were free to organize themselves as they chose for treaty negotiations. It was only when negotiations were more advanced that INAC focused on addressing the federal implementation issues, such as the cost of supporting many small governments and the federal structures required to maintain treaty relations with many smaller First Nations. As many of the most advanced negotiations today are with smaller First Nations, these implementation issues must be addressed.

7.44 Overlapping claims. The large number of claims in B.C. creates many situations where territories claimed by First Nations overlap with each other. This means that the federal government has to deal with all First Nations claiming rights and title to land in a given area before reaching the certainty it is seeking over lands and resources in B.C. Under the B.C. treaty process, overlaps are to be addressed primarily by First Nations. Federal guidelines for settling overlapping claims were developed in 1994, taking into account the situation in B.C. However, due to recent court decisions, the federal government may need to consult with all First Nations that have a claim on an area, whether or not they are in the treaty process, before signing a treaty with a given First Nation. This potential need to consult may add further complexity to the treaty negotiation process where such negotiations have reached the final agreement stage and overlaps are not resolved. In response, INAC has developed a framework for consultations with First Nations regarding overlapping claims in B.C.

7.45 Surplus Crown land. Land potentially available for treaty settlement is scarce in many areas of B.C. As a result, the government's ability and willingness to offer federal Crown land to First Nations can be critical to advancing treaty settlements. In 1998, INAC received

authority and funding to acquire and hold land, including surplus Crown land no longer required by a federal department, for the purpose of eventual treaty settlement.

7.46 Since 1998, INAC has used its authority to acquire 14 properties at a total cost of about \$6.9 million. As properties are acquired when they become available and negotiations take a long time, the Department may have to hold the land for many years until a treaty is signed and the land formally transferred to a First Nation. At the time of the audit, the total cost to INAC of holding these 14 properties was about \$1.7 million and the eventual transfer of these properties to First Nations was still a few years away.

7.47 We found that some practices to dispose of surplus Crown land can be at odds with the objective of signing treaties in areas where land is scarce and valuable. When it comes to disposing of federal properties of high value and importance, INAC has no higher a priority than other departments to acquire surplus land. The procedures and time frames associated with disposals are also difficult to coordinate with those in the treaty process. For example, under existing practices, surplus Crown land cannot be acquired by INAC for treaty settlement purposes unless a First Nation has signed a negotiation framework agreement. In one case we examined, negotiations with a First Nation had not reached that stage, and the Department could not acquire a piece of Crown land that became available in the Vancouver area. The First Nation obtained a temporary court injunction to stop the sale of the property. Eventually, a solution was found, but it did not support treaty negotiations nor help resolve the First Nation's outstanding claim.

7.48 Case law. Since 1982, approximately 40 Supreme Court of Canada decisions have provided guidance on the nature and content of Aboriginal rights, including Aboriginal title to land, and on the Crown's obligations with respect to such rights. Certain decisions, such as *Delgamuukw* in 1997 and *Haida* and *Taku River* in 2004, have created challenges for various federal policies and practices, and for the treaty process as a whole. We found that INAC has identified risks and potential consequences, and made changes to some policies and practices. However, development of policies that respond to these court decisions is slow.

7.49 Our reading of some key court decisions found that the courts may now interpret treaty negotiations as a “reconciliation” process in which rights of First Nations are implicitly recognized since negotiations on those rights are taking place. This may be inconsistent

with the federal government's position that treaty negotiations are essentially based on policy and conducted "without prejudice" (the discussions cannot be used in court), and that it does not recognize rights until a final agreement is ratified. Nonetheless, courts strongly support negotiations as the preferred means of reconciling governments' and First Nations' interests.

7.50 Duty to consult. The Supreme Court of Canada, in *Sparrow* (1990) and *Delgamuukw* (1997), stated that governments have a duty to consult First Nations as part of the process of justification for infringements of proven Aboriginal rights or title. In 2004, the Supreme Court of Canada stated for the first time, in *Haida* and *Taku River*, that governments also have a duty to consult and where appropriate, accommodate First Nations when the governments have knowledge of the potential existence of an Aboriginal right or title, and are considering taking actions that might adversely affect it. Although work has started on how the federal government intends to fulfill this duty, no formal mechanism is yet in place.

7.51 Reviewing policy objectives. INAC acknowledges that a more timely and coordinated process for ongoing policy development and review is required.

7.52 Recommendation. Indian and Northern Affairs Canada, in collaboration with other relevant federal departments and agencies, should develop a more expeditious and coordinated process for ongoing policy development and review related to its participation in B.C. treaty negotiations. This ongoing federal policy review process should take into account

- lessons learned from its participation in the B.C. treaty process,
- case law on Aboriginal rights and title,
- the existence of other options available to First Nations, and
- the federal government's objectives and priorities.

Department's response. Indian and Northern Affairs Canada will work with its federal partners to improve existing internal federal processes with respect to policy development, in order to respond more effectively to policy-related challenges and opportunities at the treaty tables. Policy development will continue to be informed by individual treaty negotiations and evolving case law. The federal government will explore with B.C. and the First Nations Summit how the tripartite "principals' process," created for political and working-group level

discussion about policy and process issues affecting the B.C. treaty process, might be made more effective.

7.53 Recommendation. Indian and Northern Affairs Canada, in cooperation with other relevant federal departments and agencies, and in consultation with First Nations, should develop a policy to fulfill the federal government’s duty to consult and, where appropriate, accommodate First Nations, as set out in Supreme Court of Canada decisions.

Department’s response. Indian and Northern Affairs Canada will continue work already underway with respect to consultation. In response to the Supreme Court of Canada’s 2004 *Haida* and *Taku River* decisions, INAC and other federal departments are developing a federal approach on consultation and accommodation that could be applied consistently across regions and increase the level of interdepartmental coordination. Preparatory discussions have been held with representatives of First Nations, Inuit, and Métis groups and with provincial/territorial officials regarding the scope and content of the approach and how these groups wish to be engaged.

Negotiation process

Negotiating strategic outcomes is difficult

7.54 We expected that INAC would have clearly defined measurable strategic outcomes reflecting its mandate and strategic vision, and that clear results statements would be in place.

7.55 We found that INAC has a vision of the specific outcomes it wants to achieve from treaty negotiations and of the federal government relations with First Nations once treaties are in place. For example, it has developed position papers on key negotiation topics such as lands and resources. These positions were tabled in writing, or presented orally, at most of the negotiation tables we reviewed.

7.56 We also found, however, that some of the positions outlined in these papers are complex and difficult to negotiate. For example, the federal government expects that, under treaties, First Nations will contribute a share of revenues from their own activities to cover the costs of their programs and services. Some First Nations agree with this principle. The federal government has developed guidelines on the use of First Nations’ own revenues and provided specific information on the federal position to certain First Nations. However, officials told us that they are having difficulty negotiating with First Nations how the federal proposition will be implemented. Work is underway in an attempt to resolve philosophical and practical issues.

7.57 We also found that departments and agencies supporting INAC in treaty negotiations do not always provide timely responses about their treaty positions to INAC.

7.58 Further, tensions may arise between the need to sign treaties and the government's responsibility to consider other interests. For example, INAC must negotiate the fisheries provisions in treaties with First Nations, who can have strongly held positions on what they are prepared to accept. Fisheries and Oceans Canada must consider the interests of a number of stakeholders not involved in the treaty process (such as commercial and recreational fishers) with the objective of signing treaties. Fisheries and Oceans Canada believes that it must do this while maintaining ministerial discretion to manage and protect fish and fish habitat. INAC and Fisheries and Oceans Canada are required to reconcile these broader government objectives before the fisheries provisions of a treaty can be finalized.

7.59 The process of seeking a specific mandate (the federal government's detailed instructions for each treaty) or revisions to a mandate is lengthy, which can slow the pace of negotiations with First Nations. A fair amount of federal negotiating resources and time are spent trying to resolve internal differences within the federal government.

7.60 According to some officials, treaty negotiations are one of the most controlled and inflexible processes in the federal government, involving approximately 40 departments and agencies, including central agencies, and a coordination structure to manage different levels of approvals. Consequently, this process can only take small steps at a time. We were also told that while the various federal departments involved in mandate decisions may be willing to consider changes, supporting treaty negotiations may not be a priority for them. Other officials observed that this process is structured as if the main risk faced by the federal government in treaty negotiations is that of deviating from existing mandates, rather than that of not signing treaties.

Time and resources are not adequately managed

7.61 We expected that INAC would ensure that management structures and practices are in place, with adequate resources, to support timely negotiations of treaties. We also expected that INAC would have processes to gather relevant information on results and use it to make decisions.

7.62 We found that a negotiation management structure and negotiation practices are in place within INAC. However, the Department has not conducted the necessary analyses to be able to estimate the amount of time and resources required to negotiate individual treaties. In addition, the Department does not know whether the resources invested so far are in line with progress to date.

7.63 We also found that INAC gives limited attention to negotiation time frames. Nearly a third of the negotiation framework agreements signed by the Department do not identify a time frame for reaching an agreement-in-principle. For those that do, we found limited or no analysis by INAC before or during negotiations of the time or resources required by the Department and the federal government to meet the time frames. For example, in many framework agreements that did have a time frame, the parties agreed to attempt to complete an agreement-in-principle within two years. Although these framework agreements were signed by the Minister of INAC on behalf of Canada, we did not see any analysis of the Department's ability to meet the time frame set in each case.

7.64 For the framework agreements with set time frames for reaching agreements-in-principle, we found that all but one of the target dates have been missed. However, for the one target date that has not been missed, we were informed that it is unlikely to be met because these negotiations are inactive. The time frames set at the final agreement stage are also being missed. For example, both final agreement negotiation tables that we reviewed have already taken twice as long as their initial estimates and are over a year behind their original target dates for concluding a final agreement.

7.65 INAC officials told us that treaty negotiations are dynamic and that negotiators must remain flexible in order to deal with unforeseeable issues, many of which are outside INAC's direct sphere of influence. For example, some agreements-in-principle have been rejected by First Nations' members and some First Nations have withdrawn from the treaty process. According to these officials, it is impossible to manage treaty negotiations with the same level of planning and oversight as a construction project, for example. They state that they monitor progress in drafting the various chapters of a treaty and list issues to be resolved because these are tools more appropriate to this type of process.

7.66 We found that INAC is making some efforts to manage time and resources. For example, some negotiation teams have developed tripartite work plans. However, with few exceptions, the plans we

reviewed were in draft form, and essentially listed outstanding topics and calendar days on which these would be discussed. They covered periods of less than one year and contained no estimates of the time or resources needed to complete the tasks leading to an agreement-in-principle or final agreement.

7.67 INAC states that, since 2002, it has promoted results-based negotiations that focus on achieving agreements. To that end, the Department introduced an annual assessment of each negotiation table. The assessments are to identify those negotiations that are productive, challenging, or inactive; to suggest steps to improve productivity; and to allocate resources. The information provided allows the Minister of INAC to decide whether to disengage from some negotiation tables. These assessments are an improvement.

7.68 **There are no official targets.** Despite these activities, we did not find any reliable estimates as to when INAC believes negotiations with all First Nations and groups currently in the treaty process will be completed, and at what cost. In addition, there is no formal estimate of what results will be achieved in the short term. Unlike INAC's previous submissions to the Treasury Board, its most recent submission seeking a financial authority for the period 2004–2009 contained no reference to a projected number of agreements.

7.69 INAC internal documents, however, indicate that between June 2006 and March 2009, the Department expects to conclude 19 agreements-in-principle and three final agreements.

7.70 **First Nations debts.** One significant impact of longer than initially anticipated negotiation time frames is the higher debt load of First Nations. Negotiation loans are deemed by the federal government to be advances on an eventual treaty settlement and are recoverable through the cash portion of the settlement. As negotiations take more time, First Nations need to borrow additional funds to cover their costs and, therefore, the net value of their potential benefits is being reduced. The Department acknowledges that this problem is compounded by the fact that some negotiation costs are the same, regardless of First Nation size, while the amount of cash offered to smaller First Nations is lower.

7.71 Partly in response to the growing First Nations debt load, INAC sought and obtained changes to the loan program in 2002. For example, if negotiations are progressing, the date when loans become due and payable can be extended from 12 to 17 years after negotiations began. In addition, INAC will pay the interest charges on all loans,

including those taken by First Nations in final agreement negotiations, until 31 March 2009. In our view, these changes do little to keep negotiation costs down or to substantially limit the growth of First Nations debt.

7.72 High debt levels create challenges for concluding agreements. For some smaller First Nations, we estimated that outstanding loans relative to the cash offered at the agreement-in-principle stage range from 44 percent to 64 percent. In one of these cases, a First Nation was unwilling to borrow more money, so the Department found another program whose terms and conditions were such that the First Nation was able to apply for and receive \$600,000 to carry on treaty negotiations.

7.73 Finally, we found that INAC has continued to absorb the interest charges on the loans of three First Nations that withdrew from the treaty process. These loans amount to over \$7 million. Although the due date to repay the loans is nearing, the Department has not yet determined what course of action it will take.

Managing human resources is becoming a challenge

7.74 We expected that INAC would have in place a comprehensive human resources plan aligned with the Department's strategic outcomes. We limited our examination of this issue to the FTNO. We found that it has a human resources plan. The plan identifies some positions that are critical to meet the FTNO's goals and, where relevant, the actions that need to be taken to fill these positions. The FTNO believes that until recently, it had sufficient staff to meet the demand associated with treaty negotiations. However, the FTNO acknowledges that it will have to more carefully manage its human resources in the future in order to meet the expected growth in workload if the number of negotiation tables in the final agreement stage increases.

7.75 Recommendation. Indian and Northern Affairs Canada should improve its management of treaty negotiations by better defining the results to be achieved at each table, and the time and resources required, including those of First Nations, to achieve these results.

Department's response. Indian and Northern Affairs Canada will explore opportunities to improve its time and resource management, with particular attention to targeted deadlines and results. The Department will place greater emphasis on results-based negotiations,

focusing its efforts on negotiation tables where progress is demonstrably possible.

INAC's success in meeting some of these commitments requires the involvement of the other participants in the B.C. treaty process. A more effectively managed treaty process is in all the parties' best interests, enabling First Nations and governments to achieve their objectives more quickly and economically.

Reporting to Parliament

Parliament is not adequately informed

7.76 We expected that INAC's reporting on B.C. treaty negotiations would be balanced, transparent, and easy to understand. Parliament receives information on the B.C. treaty process mostly through INAC's report on plans and priorities and through its departmental performance report. BCTC annual reports are also tabled in Parliament; however, we did not audit them.

7.77 We found that Parliament is not adequately informed by INAC about the federal costs and progress of the B.C. treaty process. We found that the information provided to Parliament on results achieved and on the obstacles and impediments to progress in treaty negotiations in B.C. is not balanced, transparent, or easy to understand.

7.78 For example, progress toward key milestones is reported for some negotiation tables; however, the fact that many negotiation tables are inactive is not reported, leading readers to understand that negotiations are continuing at all tables. Although some reports contain information on various obstacles to progress in negotiations, there is limited information on their impacts on achieving expected results and on how they influence expectations. Expected results are not always defined, and when they are, achievements are not compared with expectations. This makes it difficult to assess performance.

7.79 Considering the importance that Canada has placed on the B.C. treaty process and the significant amount of funding that Parliament has been asked to approve, clearer reporting is needed.

7.80 Recommendation. Indian and Northern Affairs Canada should report to Parliament clearer information on the results expected by the federal government with time frames, the results achieved, the extent of First Nations' participation, and the costs involved. When results are lower than expected, explanations should be provided along with any adjustments to expectations, where relevant.

Department's response. Although current reporting systems comply with existing federal government statutory requirements and the BCTC's Annual Reports, which are tabled each fall in Parliament, are a good source of information, the Department agrees that the importance and cost of the B.C. treaty process warrant more accessible and comprehensive reporting to Parliament, and will explore ways to make improvements.

Conclusion

7.81 The procedures and processes in place to manage the federal participation in the B.C. treaty process are not adequate to allow Indian and Northern Affairs Canada to estimate the time and resources required to effectively and efficiently carry out negotiations. The resources invested so far in the B.C. treaty process, and associated procedures and processes, have not achieved the government's key policy objectives and no treaties have been signed. In addition, several issues that limit progress in negotiations have not been addressed.

7.82 The federal treaty mandating process ensures that mandates are consistent with applicable authorities. However, the mandating process is complex and internal differences between federal departments over some aspects of mandates can slow the pace of negotiations with First Nations. Moreover, there may be inconsistencies between case law and the federal government's position on the political nature of treaty negotiations.

7.83 Sufficient and appropriate information on the cost and progress of negotiations is not being reported to management or the government. Parliament is not adequately informed about the results of Canada's participation in the B.C. treaty process.

Department's overall response. Indian and Northern Affairs Canada accepts and will act on all four of the Auditor General's recommendations related to policy, consultation and accommodation, process management, and reporting structures. In so doing, the Department anticipates making the British Columbia treaty process better—a process that, despite the challenges, has made tangible progress and is likely to produce, in the near future, a number of final agreements. To quote the Auditor General's report, "Settling the uncertainty associated with unresolved land claims in British Columbia is important for all Canadians."

The negotiations have turned out to be more complex and time-consuming, and to involve more individual treaty tables and difficult issues, than was predicted by any of the parties when negotiations began. Nonetheless, as the Supreme Court has repeatedly stated, governments are obligated to reconcile Crown sovereignty with pre-existing Aboriginal title. The Court has endorsed treaty negotiations as a means of achieving this reconciliation.

Litigation can only partially resolve outstanding issues regarding Aboriginal rights and title. Sectoral agreements with First Nations are positive developments, but not a substitute for comprehensive treaties analogous to those that have been successfully reached in other parts of Canada. Treaties are more difficult to achieve, but the negotiation process in British Columbia has itself already accomplished a great deal in terms of capacity building, reducing conflict and potential litigation, increasing British Columbians' understanding of First Nations' issues, and forging new relationships and partnerships.

As one of three parties in a voluntary process of negotiation, the federal government cannot guarantee the outcomes at individual treaty tables. However, several final agreements and agreements-in-principle are within reach in the near future. This prospect of success is also creating momentum at other tables.

About the Audit

Objectives

The objectives of the audit were to determine whether

- the federal government has effective and efficient management procedures and processes, and adequate resources, to achieve its policy objectives through the B.C. treaty negotiation process;
- the federal mandating process ensures that mandates are consistent with applicable authorities; and
- sufficient and appropriate information on the cost and progress of negotiations is being reported to management, the government, and Parliament.

Scope, approach, and criteria

Indian and Northern Affairs Canada (INAC) is in charge of the federal government's participation in British Columbia treaty negotiations with First Nations and the Province of British Columbia (B.C.).

The audit covered primarily the management procedures and processes and the resources used by the federal government in treaty negotiations in B.C. Our audit focused on the activities of INAC related to these treaty negotiations, and the results of those activities. It also included, where relevant, the support provided to INAC by other federal departments involved in the process.

The audit team carried out interviews with departmental managers and staff, including federal negotiating teams, and reviewed relevant documents at INAC B.C. Region, including the Federal Treaty Negotiation Office (FTNO), and at headquarters. The audit team carried out additional interviews with officials at central agencies, Fisheries and Oceans Canada, and the Department of Justice Canada. We also reviewed federal negotiation files and related documents for 12 negotiation tables in the B.C. treaty process. We looked at the policy development and mandating processes within INAC. Although we did not audit the activities carried out by First Nations and their organizations, we sought their views on matters related to the B.C. treaty process. The team also visited two First Nations communities. These visits included discussions with political leaders and negotiators. We also sought the views of the First Nations Summit and the Union of B.C. Indian Chiefs and interviewed commissioners of the British Columbia Treaty Commission (BCTC).

We expected to find that

- INAC complies with all applicable authorities and has in place a legal framework of powers, duties, and functions related to treaty negotiations and a corporate process to identify issues of lawfulness and areas where legal authority may be lacking;
- INAC has in place a strategic policy function and analytic capacity to anticipate challenges and respond in a strategic manner, and a policy development process grounded in fact-based analysis with reliable modelling and due regard to implementation and operational matters;
- INAC ensures that management structures and practices are in place to support timely negotiations of treaties;

- INAC has in place clearly defined, measurable strategic outcomes that reflect FTNO/INAC's mandate and strategic vision, and clear results outcome statements that are linked to this government-wide priority;
- INAC has adequate resources to support timely negotiations of treaties;
- INAC has in place a comprehensive human resources plan aligned with the organization's strategic outcomes;
- INAC gathers relevant information on results and uses it to make departmental decisions; and that
- INAC has in place balanced, transparent, and easy-to-understand public reporting.

Audit work completed

Audit work for this chapter was substantially completed on 9 June 2006.

Related audit work

Follow-up of Recommendations in Previous Reports (December 2001 Report of the Auditor General, Chapter 12); see the section titled Indian and Northern Affairs Canada—Comprehensive Land Claims (September 1998 Report of the Auditor General, Chapter 14). See also the original report, Indian and Northern Affairs Canada—Comprehensive Land Claims (September 1998 Report of the Auditor General, Chapter 14).

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Appendix List of recommendations

The following is a list of recommendations found in Chapter 7. The number in front of the recommendation indicates the paragraph where it appears in the chapter. The numbers in parentheses indicate the paragraphs where the topic is discussed.

Recommendation	Department's response
Policy Framework	
<p>7.52 Indian and Northern Affairs Canada, in collaboration with other relevant federal departments and agencies, should, without delay, develop a more expeditious and coordinated process for ongoing policy development and review related to its participation in B.C. treaty negotiations. This ongoing federal policy review process should take into account</p> <ul style="list-style-type: none"> • lessons learned from its participation in the B.C. treaty process, • case law on Aboriginal rights and title, • the existence of other options available to First Nations, and • the federal government's objectives and priorities. (7.36–7.51) 	<p>Indian and Northern Affairs Canada will work with its federal partners to improve existing internal federal processes with respect to policy development, in order to respond more effectively to policy-related challenges and opportunities at the treaty tables. Policy development will continue to be informed by individual treaty negotiations and evolving case law. The federal government will explore with B.C. and the First Nations Summit how the tripartite “principals’ process,” created for political and working-group level discussion about policy and process issues affecting the B.C. treaty process, might be made more effective.</p>
<p>7.53 Indian and Northern Affairs Canada, in cooperation with other relevant federal departments and agencies, and in consultation with First Nations, should develop a policy to fulfill the federal government's duty to consult and, where appropriate, accommodate First Nations, as set out in Supreme Court of Canada decisions. (7.50)</p>	<p>Indian and Northern Affairs Canada will continue work already underway with respect to consultation. In response to the Supreme Court of Canada's 2004 <i>Haida</i> and <i>Taku River</i> decisions, INAC and other federal departments are developing a federal approach on consultation and accommodation that could be applied consistently across regions and increase the level of interdepartmental coordination. Preparatory discussions have been held with representatives of First Nations, Inuit, and Métis groups and with provincial/territorial officials regarding the scope and content of the approach and how these groups wish to be engaged.</p>

Recommendation	Department's response
Negotiation Process	
<p>7.75 Indian and Northern Affairs Canada should improve its management of treaty negotiations by better defining the results to be achieved at each table, and the time and resources required, including those of First Nations, to achieve these results. (7.54–7.74)</p>	<p>Indian and Northern Affairs Canada will explore opportunities to improve its time and resource management, with particular attention to targeted deadlines and results. The Department will place greater emphasis on results-based negotiations, focusing its efforts on negotiation tables where progress is demonstrably possible.</p> <p>INAC's success in meeting some of these commitments requires the involvement of the other participants in the B.C. treaty process. A more effectively managed treaty process is in all the parties' best interests, enabling First Nations and governments to achieve their objectives more quickly and economically.</p>
Reporting to Parliament	
<p>7.80 Indian and Northern Affairs Canada should report to Parliament clearer information on the results expected by the federal government with time frames, the results achieved, the extent of First Nations' participation, and the costs involved. When results are lower than expected, explanations should be provided along with any adjustments to expectations, where relevant. (7.76–7.79)</p>	<p>Although current reporting systems comply with existing federal government statutory requirements and the BCTC's Annual Reports, which are tabled each fall in Parliament, are a good source of information, the Department agrees that the importance and cost of the B.C. treaty process warrant more accessible and comprehensive reporting to Parliament, and will explore ways to make improvements.</p>

Department's overall response

Indian and Northern Affairs Canada accepts and will act on all four of the Auditor General's recommendations related to policy, consultation and accommodation, process management, and reporting structures. In so doing, the Department anticipates making the British Columbia treaty process better—a process that, despite the challenges, has made tangible progress and is likely to produce, in the near future, a number of final agreements. To quote the Auditor General's report, "Settling the uncertainty associated with unresolved land claims in British Columbia is important for all Canadians."

The negotiations have turned out to be more complex and time-consuming, and to involve more individual treaty tables and difficult issues, than was predicted by any of the parties when negotiations began. Nonetheless, as the Supreme Court has repeatedly stated, governments are obligated to reconcile Crown sovereignty with pre-existing Aboriginal title. The Court has endorsed treaty negotiations as a means of achieving this reconciliation.

Litigation can only partially resolve outstanding issues regarding Aboriginal rights and title. Sectoral agreements with First Nations are positive developments, but not a substitute for comprehensive treaties analogous to those that have been successfully reached in other parts of Canada. Treaties are more difficult to achieve, but the negotiation process in British Columbia has itself already accomplished a great deal in terms of capacity building, reducing conflict and potential litigation, increasing British Columbians' understanding of First Nations' issues, and forging new relationships and partnerships.

As one of three parties in a voluntary process of negotiation, the federal government cannot guarantee the outcomes at individual treaty tables. However, several final agreements and agreements-in-principle are within reach in the near future. This prospect of success is also creating momentum at other tables.

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