



Indian and Northern
Affairs Canada

Affaires indiennes
et du Nord Canada

Final Report

Impact Evaluation of Contributions to Indian Bands for Land Management on Reserve

Project Number: 09068

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

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Canada

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List of Acronyms

53/60	Delegated Lands Management Program
AFN	Assembly of First Nations
ATR	Additions to Reserve
CESP	Community Environmental Sustainability Plans
DG	Director General
DoJ	Department of Justice
EPMRB	Evaluation, Performance Measurement and Review Branch
EPMRC	Evaluation, Performance Measurement and Review Committee
ESA	Environmental Site Assessment
FN	First Nations
FNLMA	<i>First Nations Land Management Act</i>
HQ	Headquarters
ILRS	Indian Land Registry System
INAC	Indian and Northern Affairs Canada
LED	Lands and Economic Development Sector (INAC)
NALMA	National Aboriginal Lands Managers Association
NATS	National ATR Tracking System
NEDG	New Economy Development Group (New Economy Group)
NRCan	Natural Resources Canada
O&M	Operation and Maintenance
RLAP	Regional Lands Administration Program
RLEMP	Reserve Land and Environmental Management Program
SCB	Specific Claims Branch (INAC)
TLE	Treaty Land Entitlement

Commonly Used Terms

Buckshee leasing/customary land management practices and allocations. These land tenure arrangements take many forms from unwritten agreements to a sophisticated lease with clear roles and responsibilities for each party. Unlike legal interests, the courts do not recognize these arrangements.

Creation of legal interests. This term refers to the creation of legally-recognized tenure agreements both among band members and non-member parties. A number of tenure instruments are available under the *Indian Act*, including leases, permits, easements, designations and surrenders. The alternative to this system of tenure allocation under the *Indian Act* are customary land management practices and buckshee leases.

Fiduciary duty. The Crown's fiduciary duties to First Nations are premised on the fact that the federal government holds Indian lands in trust for the use and benefit of individual bands. The relationship and scope of these duties have been defined by and are subject to legal interpretation. *Guerin v. R.* (1984) is landmark Supreme Court of Canada decision both generally to the understanding of the Crown's fiduciary duties and in the specific land management context of this evaluation. Other case law has followed this case, which has further extended the scope and clarified certain aspects of the fiduciary relationship Canada shares with Aboriginal peoples.¹

Indian Lands Registry System. The Indian Lands Registry System (ILRS) is a database containing instruments relating to transactions on reserve lands. The system permits the generation of inquiries and reports by First Nation reserve.

Land management /administration. One author describes land management as the process of both decision-making and implementing the decisions about land.² Land management systems are the means by which policies related to the management and control of land tenure systems are implemented. These might include minimizing land disputes, facilitating orderly settlement and regulating the sustainable use of land and resources. Following a recent report prepared for the Lands Branch, land management is used in this report to refer to the economic, social and environmental uses of land, including land and environmental planning and stewardship.³

Land administration is the means by which land and resource management is implemented or facilitated.⁴ Activities include surveying and mapping of land parcels, land conveyance, taxation, creation and allocation of interests in land and land registration. Generally, the report uses the

¹ Refer to *R. v. Sparrow* (1990); *R. v. Adams* (1996); *Delgamuukw v. B.C.*; *Blueberry River Indian Band v. Canada*, [1995] 4 S.C.R. 344; *Wewaykum Indian Band (a.k.a. Roberts & Dick) v. The Queen* (2002), 220 D.L.R. (4th)1; *Osoyoos Indian Band v. Town of Oliver* (2001), 206 D.L.R. (4th) 385. Also refer to Hurley, M.C. (2000, Aug. 10). *The Crown's Fiduciary Relationship with Aboriginal Peoples*. Retrieved September 7, 2010 from, <http://www2.parl.gc.ca/content/lop/researchpublications/prb0009-e.htm>

² Tupou Rakai, M.E.. (2005, Jan.). *A Neutral Framework for Modelling and Analysing Aboriginal Land Tenure Systems*. Retrieved September 7, 2010 from <http://gge.unb.ca/Pubs/TR227.pdf>; Also see,

³ The Aboriginal Affairs Group Inc. (2010, March 31). *A Preliminary Study of Un-registered Interests in Reserve Lands: Phase 1 Report*.

⁴ Ibid.

Land administration is mostly used in this paper to identify INAC's statutory obligations to First Nations under the *Indian Act*.⁵

Land Surveys. Though this term has a number of uses, this evaluation primarily discusses land surveying as the process of locating and measuring property lines, both within an Indian reserve and to define its boundaries.

Performance measurement strategy. Treasury Board's *Policy on Evaluation* and related directive require all programs to have a performance measurement strategy in place at the time of program design (Treasury Board submission stage). Performance measurement strategies describe program logic, outline key indicators of outputs and outcomes and develop a strategy for collecting program data, including targets, timelines, responsibilities and methods.

Statutory obligations. This term relates to INAC's land administration responsibilities under the *Indian Act* and *Canada Lands Surveys Act*.

Survey fabric. This term is used to refer to the extent of coverage and quality of land surveys on reserve. A strong survey fabric is one in which the boundaries of the reserve and internal allotments are well-defined. This leads to greater certainty of possession, facilitates land use planning and removes impediments to economic development.

Transaction costs. The term transaction cost has its roots in economic theory where it describes any cost incurred through an economic exchange. This term is used in this report to refer to a variety of costs associated with land transfer, including research and identification costs, time and human resources costs associated with negotiating and bargaining and monetary acquisition costs.

⁵ Though not examined in this report, it should be noted that First Nations, specifically Band Councils, are responsible for a number of land administration activities under the *Indian Act*, which initiate INAC's land administration role. For instance, consenting to permits and set asides; allotting land; enacting by-laws; consenting to the expenditure of Indian moneys.

Executive Summary

Introduction

The evaluation examines certain activities under the Treasury Board authority *Contributions to Indian Bands for Land and Estates Management* for the period covering 2005/2006 to 2009/2010. The goal of the evaluation is to study the performance of the land management system as a whole, including the extent to which First Nations have access to land.

Two key program areas are included in this evaluation: Additions to Reserve (ATR) and the *Indian Act* Land Management Programs, Reserve Land and Environmental Management Program (RLEMP), Regional Land Administration Program (RLAP) and 53/60 Delegated Authority Program. The evaluation also considers a number of cross-cutting activities and systems supporting land management, including land surveys, the Indian Land Registry System, creation of legal interests and other related activities that are important to supporting ATRs and land management on reserve. Environmental issues are considered as part of the RLEMP, namely as they apply to First Nation funding for land use planning and environment management.

Total expenditures under the Contribution Authority for the activities being evaluated were \$46.3 million for the five-year period from 2005/2006 to 2009/2010. The scope of the evaluation includes an additional estimated \$76 million in direct program spending associated with supporting First Nation land managers and Indian and Northern Affairs Canada (INAC) land management on behalf of First Nations not involved in the capacity-building and devolution programs. This renders an evaluation scope covering a total of \$122.4 million in program spending.

Methodology

Structure

The evaluation is structured around the five core evaluation issues as outlined in the 2009 Treasury Board Secretariat *Evaluation Policy* and *Directive*: continued need for program; alignment with government priorities; alignment with federal roles and responsibilities; achievement of expected outcomes; and demonstration of efficiency and economy.

Lines of inquiry

The evaluation made use of a number of methodologies to fully examine the many activities under analysis.

- An Elders Roundtable Discussion provided an essential understanding of the special relationship Aboriginal people share with the land.
- A Historical-Legal Review analyzed applicable statutes, regulations and decisions of the courts to provide an understanding of land management under the *Indian Act* and

incorporated interviews with Department of Justice officials to provide perspectives on INAC's fiduciary obligation to First Nations in an increasingly complex environment.

- A Document and Literature Review provided evidence for the rationale of the programs, their alignment with government priorities and other evaluation issues.
- Key Informant Interviews with a number of representatives from First Nations, INAC (regions and Headquarters (HQ) and other stakeholders contributed to a multi-faceted understanding of how the programs are working and the extent to which they are achieving results.
- Case studies targeted important issues in modern-day land management, including integrated land use planning, land survey fabric, customary land allocations, capacity-building at the community-level and co-operation among ATR stakeholders.
- The Financial and Performance review, though limited in its application, enabled analysis of trends over time and provided an understanding of how departmental A-base and contribution funding support land management and land conversion.

Quality control

A Working Group consisting of program managers, and including regional representation, was established to review and verify documents throughout the evaluation process, including the methodology, preliminary findings and draft report. Quality control was further ensured through advice and support from an Aboriginal Advisory Committee.

Summary of findings

The following findings are organized based on the evaluation issues and questions outlined in the evaluation Terms of Reference.

Relevance

1) To what extent do the programs under evaluation address a demonstrable need?

All programs under analysis clearly address a demonstrable need. Increasing the reserve land base is necessary and significant to First Nations. The Additions to Reserve Program aims to correct historical inaccuracies, increase economic opportunities and help to sustain a growing on-reserve population.

First Nations require the resources, flexibility and expertise to respond to land management demands and take advantage of economic opportunities. INAC's land management services and capacity-building programs are intended to support modern land management to the greatest extent possible under the *Indian Act*.

2) To what extent are the programs responsive to the needs of Aboriginal people?

Though the programs target issues of great need in First Nations communities, they are not completely responsive to these needs. The ATR process is slow, cumbersome and focuses almost entirely on Canada's legal obligations to First Nations.

The RLEMP is responsive to the needs of some First Nations, namely those that have a high capacity in land management and are already involved in RLAP and 53/60. Entry requirements into the newly redesigned RLEMP program are still restrictive. Financial and human resources limit the extent to which INAC land administration services are responsive to First Nation needs.

3) To what extent are the programs aligned with Government of Canada priorities?

The evaluation found that the programs under evaluation are in line with Government of Canada priorities, specifically those related to engaging Aboriginal people in the Canadian economy, building capacity and self-reliance, and fulfilling Canada's treaty obligations. However, there is evidence that improvements could be made to the design of the ATR program to better enable it to achieve efficiency priorities.

4) To what extent are the programs aligned with INAC strategic outcomes and priorities?

The programs under evaluation are integral to achieving INAC's Strategic Outcome of the Land to enable First Nations to benefit from their land, resources and environment on a sustainable basis. The programs are aligned with INAC priorities of increasing social and economic well-being of First Nation communities, encouraging investment and promoting development.

5) Is there a legitimate and necessary role for INAC and the Government of Canada in the activities under evaluation?

Canada has the obligation to address legitimate claims. Most of the ATRs that were processed during the evaluation period fell under the Legal Obligations category of the ATR policy. INAC's land administration program fulfils statutory obligations under the *Indian Act*.

Design & Delivery

6) To what extent does the design of the programs contribute to outputs and outcomes?

Communication and collaboration regarding ATRs are weak, both within INAC (between HQ and regions, across the Lands and Economic Development (LED) sector, with the Specific Claims Branch) and with stakeholders and partners outside the Department. While program design satisfies the ATR policy, the policy itself impedes efficiency and the achievement of outcomes through cumbersome process requirements. As such, discussion is underway with the Assembly of First Nations to streamline the ATR process and achieve more timely results.

The current design of RLEMP excludes First Nations that do not already have some land management capacity. The curriculum of the program could be expanded to better meet First Nations' needs through a greater emphasis on environmental training. More generally, the evaluation found legislative and regulatory design flaws with land administration under the *Indian Act*. As a simple repository for lands transactions, the design of the Indian Lands Registry system is not aligned with the need for a reliable registry that secures land tenure through guarantee to title.

7) To what extent have programs been implemented as planned?

a) Understanding of roles and responsibilities

In addition to differences across provincial jurisdictions, roles and responsibilities are unclear and not well-understood. A lack of tools is resulting in the inconsistent delivery of policies, procedures and guidance.

b) Alignment of delivery with design

There has been mixed success in the alignment of program delivery with program design. Resource pressures, including staff turnover, limited organizational knowledge, low classifications and budgetary constraints are restraining the ability of programs to be delivered as planned.

8) To what extent are performance data, reporting and accountability systems in place and contributing to success?

Limitations and gaps in the performance and accountability systems make it difficult to fully assess success. Nevertheless, new performance measurement and reporting systems for both the RLEMP and ATR programs have been developed and are now being implemented.

Performance (effectiveness)

9) To what extent is the program achieving progress toward outcomes, including:

Immediate outcomes

Some of the immediate outcomes related to the ATR program have been achieved. Reserves are being created and expanded across the country. However, many of these new reserves are being created under the Treaty Land Entitlement process as Canada's legal obligations take precedence over other ATR policy categories. While the Crown's legal and policy obligations for the transfer of title are being met, a slow and cumbersome process based on an inefficient policy is impeding success. As well, there has been mixed success in the engagement of stakeholders, further slowing the ATR process. Special ATR legislation in the Prairie provinces was found to increase the effectiveness of the process.

The capacity-building/devolution programs, namely RLEMP, are increasing knowledge and skills and enabling First Nations to assume greater control over land management. Where possible, through its land administration services, INAC provides technical and advisory support upon request to all First Nations (including those outside the RLEMP program). However, land management on reserve is becoming increasingly complex due to land use planning and environmental standards and highly specialized commercial leasing projects. The level of human and financial resources available, including expertise and knowledge is presenting significant challenges in this regard. With an average backlog of 67 percent in survey needs requested versus survey needs met, INAC's land survey program does not adequately support land management.

In addition, at present, only eight percent of the total First Nations in the RLEMP, RLAP and 53/60 programs are managing their lands under delegated status. In total, 27 percent are either operational or fully administering their land. All others in these programs are involved only at the training and development levels or are performing land administration services alongside regional INAC land managers.

Intermediate outcomes

Without data concerning the requests by ATR policy category and the timeline between ATR request received and ATR completion, the evaluation is not able to properly assess the extent to

which the program is increasing access to land that meets First Nations communities' interests and needs.

Few First Nations have the ability to fully manage land and environment to meet their communities' needs as a result of the capacity building/devolution programs. Some First Nations land managers either do not have the opportunity to use knowledge and skills to perform a complete set of land management activities, or cannot perform these activities. However, the evaluation found that First Nations in the RLEMP, RLAP and 53/60 programs are involved in a range of land administration activities.

Long-term outcome

Given the prospect of resource development or urban location, there is the potential to increase economic development opportunities through ATRs. When available in 2011, data from the Community Well-being Index will allow for a comparison with 2006 data to better assess whether First Nations are benefiting from the lands programs. Analysis has shown, however, that there is a positive relationship between the Community Well-being Index and internal survey fabric.

It is difficult to establish attribution between the programs and the long-term outcome of increased quality of life and self-reliance. The limited number of First Nations operating under the RLEMP, RLAP and 53/60 programs, and the fact that RLEMP has just recently emerged from pilot status, suggest that more time is required before there is indication of progress toward this outcome.

Performance (efficiency and economy)

10) To what extent have the programs been delivered efficiently? How could efficiency be improved?

The evaluation found that efficiency could be improved by streamlining the ATR policy and process, which may require legislative and regulatory change. Greater capacity among INAC officials, First Nations and others involved in the ATR process may also help to increase efficiency.

The RLEMP program is achieving results; however, the efficiency of the program could be increased by expanding the role of the National Aboriginal Land Managers Association (NALMA). More generally, a lack of legislative frameworks, policies and tools that meet the needs of a modern land management regime is inhibiting efficiency. Communication and collaboration between the LED units of INAC are not maximized.

INAC's funding to Natural Resources Canada (NRCan) for survey services inhibits efficiency. Reliance on departmental operational funding late in the fiscal year makes it difficult for NRCan to properly plan for and implement surveys.

11) Are the programs cost-effective? How could cost-effectiveness be improved?

Given approximately 68 percent of all First Nations in Canada are not engaged in INAC's land management capacity building/devolution programs or are conducting land management activities outside of the *Indian Act* points to two key findings related to cost-effectiveness. First,

long term support from INAC is necessary to address the needs of those First Nations requiring assistance to perform their land management responsibilities. As such, the RLEMP program alone and as it is currently structured is not likely to achieve cost-effectiveness. Second, the fact that many of these First Nations choose to conduct land administration outside of the *Indian Act* suggests that the current land management regime under the *Indian Act* is not effective and does not meet their needs. In addition, INAC still plays a significant role in providing land management services to First Nations under RLEMP, suggesting that the program has not yet resulted in cost-effectiveness.

The evaluation found some evidence that fee-simple ownership of land may be a viable alternative to ATRs to achieve economic development. Fee-simple land holdings present far fewer challenges and transaction costs; however, it is also important to note that fee simple land remains under a provincial regime, which prevents First Nations governance over the land. Fee-simple land holdings do not offer the tax benefits associated with ATRs and impose further municipal tax requirements on First Nations.

Recommendations

It is recommended that INAC:

- 1) Continue to work towards / consider legislative change in the following areas:
 - national ATR legislation that incorporates process and approval improvements to streamline the process and increase efficiency;
 - legislative alternatives to the current designation process, which is cumbersome, unresponsive and sets a standard that has no off-reserve equivalent;
 - recognition of some forms of modern land tenure arrangements outside of the *Indian Act*. and
 - legislative and regulatory base for a modern land registry with possible interim arrangements with provincial land registries.
- 2) Examine the feasibility of broadening the reach and accessibility of the ATR and RLEMP programs through:
 - a) providing for the implementation of a greater number of ATRs from policy categories other than legal obligations; and
 - b) extending RLEMP access to First Nations of varying land management capacities, taking into consideration INAC's Capacity Development Policy being proposed.
- 3) Increase internal capacity and effectiveness of INAC land management services through the development of clear roles and responsibilities both within LED and among stakeholders and delivery partners, appropriate classification levels, training, tools and incentives to decrease turnover.
- 4)
 - a) Encourage joint/multiple collaboration between First Nations with limited capacity, including continued support to Aboriginal organizations (e.g. NALMA and tribal councils) that support and enable capacity-building among First Nations.

- b) Promote greater coordination and integration between economic development and land management functions and other INAC programs such as Capital Infrastructure.
- 5) Improve financial data and monitor the implementation of the ATR and RLEMP performance measurement strategies.

Management Response / Action Plan

Impact Evaluation of Contributions to Indian Bands for Land Management on Reserve
Project #: 1570-07/09068

Recommendations	Actions	Responsible Manager (Title)	Planned Implementation and Completion Date
<p>1)</p> <p>a) Continue to work towards:</p> <ul style="list-style-type: none"> • National ATR legislation that incorporates process and approval improvements to streamline the process and increase efficiency. • Legislative alternatives to the current designation process, which is cumbersome, unresponsive and sets a standard that has no off-reserve equivalent. <p>b) Consider legislative change in the following areas:</p> <ul style="list-style-type: none"> • Recognition of some forms of modern land tenure arrangements outside of the <i>Indian Act</i>. • Legislative and regulatory base for a modern land registry with possible interim arrangements with provincial land registries. 	<p>LED is continuing an engagement process with the Assembly of First Nations (AFN) on Additions to Reserve (ATR) and associated land management issues in accordance with the November 2007 Political Agreement signed by Minister Strahl and the National Chief. The joint agenda includes determining the possibility of proposing national legislation. These discussions will include the possibility of expanding any legislative proposal to deal with the areas raised by the evaluators, and more specifically to provide an optional alternative to some of the Indian Act land management tools. Any new tools would be focussed on supporting First Nations in economic and community development and address the impediments to effective land management that exist in the <i>Indian Act</i>.</p>	<p>DG, Lands and Environment</p>	<p>On-going/dependent on the engagement process</p>

Recommendations	Actions	Responsible Manager (Title)	Planned Implementation and Completion Date
<p>2) Examine the feasibility of broadening the reach and accessibility of the ATR and RLEMP programs through:</p> <p>a) Providing for the implementation of a greater number of ATRs from policy categories other than legal obligations.</p> <p>b) Extending RLEMP access to First Nations of varying land management capacities, taking into consideration INAC's Capacity Development Policy being proposed.</p>	<p>a) As noted above, LED is continuing an engagement process with the AFN on ATR. The joint agenda includes a renovation of the ATR policy and process, which includes a review of the policy categories and how they are prioritized, and will focus on the efficiency and effectiveness of the process. The parties have noted that the current policy is not supportive of ATRs undertaken for economic development purposes in situations where the ATRs are not also Legal Obligations or Community Additions.</p> <p>b) Additional funds for the land management programs were secured through the Aboriginal Economic Development Action Plan. INAC is presently in the process of renovating the current programs in an effort to identify more efficient mechanisms to meet First Nations' requirements related to land management capacity.</p>	<p>DG, Lands and Environment</p> <p>DG, Community Opportunities</p>	<p>On-going</p> <p>On-going</p>

Recommendations	Actions	Responsible Manager (Title)	Planned Implementation and Completion Date
<p>3) Increase internal capacity and effectiveness of INAC land management services through the development of clear roles and responsibilities both within LED and among stakeholders and delivery partners, appropriate classification levels, training, tools and incentives to decrease turnover.</p>	<p>LED, in consultation with regions and stakeholders, will develop communications strategies and related products. An example of this is that LED partnered with the National Aboriginal Lands Managers Association (NALMA) to produce an ATR Manual for First Nations. The manual, which will be rolled out by NALMA at its October 2010 National Meeting, clarifies the roles and responsibilities of First Nations, the department and other parties in the ATR process. LED has also partnered with the Office of the Surveyor General of Canada, Natural Resources Canada (NRCan) to work with five First Nations across the country to address the survey and parcel fabric on-reserve, which is typically of a much lower quality than off-reserve and results in numerous boundary and other disputes. The objective is to develop tools and systems that will be used to assist a wider range of First Nations with survey and boundary issues. Discussions are also underway with NALMA on the possibility of providing land management training to LED staff across the country. Additional opportunities for such joint work will be explored with AFN, NALMA and/or other First Nation partners. The issue of LED classification levels and staff turnover will be discussed with regional offices as part of the reorganization activities that are occurring both in Headquarters and in Regional Operations across the country. The reorganization activities and other efforts noted above are occurring in order to develop a more coherent approach to land management as a response to the Federal Framework on Aboriginal Economic Development.</p>	<p>DG, Lands and Environment</p>	<p>ATR Manual set for delivery to First Nations fall/winter 2010/11</p> <p>NALMA Training under review, due January 2011.</p>

1. Introduction

On September 24, 2009, the Department of Indian and Northern Affairs Canada's (INAC) Evaluation, Performance Measurement and Review Committee (EPMRC) approved Terms of Reference for an evaluation assessing the impact of INAC's land management programs.⁶ The New Economy Development Group (NEDG), a consulting firm based in Ottawa with offices in the Atlantic and British Columbia regions, was contracted to perform the research. The Evaluation, Performance Measurement and Review Branch (EPMRB) of INAC performed analysis and prepared the report. NEDG began work on the evaluation in December 2009 following an internal evaluation scoping exercise and initial methodology development.

The evaluation examines certain activities under the Treasury Board authority *Contributions to Indian Bands for Land and Estates Management* for the period covering 2005/2006 to 2009/2010.⁷ The key objective of this transfer payment authority is to increase First Nations control over their land and resources pursuant to the *Indian Act* under land management capacity-building programs. Key activities supporting this objective include providing *Indian Act* "First Nations with the ability to make plans, set land use standards, determine appropriate sustainable development policies and practices, make land management by-laws, and legally control/record land transactions [in the Indian Lands Registry System]."⁸ Further, the authority seeks to increase the capacity of First Nations to approve agreements, develop and operate land management systems and administer reserve and surrendered land transactions. Greater First Nation control over land management, in turn, enables economic development.

Land management capacity building and devolution programs, namely the Reserve Land and Environment Program (RLEMP) have drawn the greatest amount of funding from the Contribution Authority. The evaluation examines other programs that have drawn smaller amounts of funding from the authority, such as the Additions to Reserve (ATR) program and activities that support land management, including land surveys and the creation of legal interests.

Total expenditures under the Contribution Authority for the activities being evaluated were \$46.3 million for the five-year period from 2005/2006 to 2009/2010.⁹ The scope of the evaluation includes an additional estimated \$76 million in direct program spending associated with supporting First Nation land managers and INAC land management on behalf of First Nations not involved in the capacity-building and devolution programs.¹⁰ This renders an evaluation scope covering a total of \$122.4 million in program spending.

⁶ Refer to Annex A for the Terms of Reference.

⁷ While the title of the Contribution Authority includes estates, it should be noted that most activity under the Authority concerns land management. As a result, the evaluation focuses on land management rather than estates.

⁸ TB Authority (2005, March 21). *Contributions to Indian Bands for Lands and Estates Management*.

⁹ First Nations and Inuit Transfer Payment System 2005/2010, updated June 6, 2010 (amount for Surveys updated June 7, 2010).

¹⁰ OSMS Salary Reports from Regions, May 2010; HQ Salary Reports, Jan-May 2010. NWT data includes environment activities in addition to land.

1.1 Outline of the Report

This report is organized as follows: Section One, the Introduction, identifies the evaluation requirement and program profile. The methodological approach and the methods used to collect and analyze the data are described in Section Two. Section Three provides the cultural, historical and legal context within which the programs operate. Section Four and Five discuss evaluation findings organized by issues of relevance, design and delivery and performance. Section Six draws conclusions against the evaluation issues. Section Seven proposes recommendations.

1.2 Evaluation Requirement

The evaluation is in response to the requirement under the Treasury Board *Policy on Evaluation* to provide complete evaluation coverage of all grant and contribution spending. The Terms and Conditions for Contributions to Indian Bands for Lands and Estates Management were due to expire on March 31, 2010. Treasury Board has extended these Terms and Conditions for one year until March 31, 2011, to provide the necessary time to complete the evaluation.

1.3 Evaluation Scope and Timing

The evaluation covers the period from 2005/2006 to 2009/2010. The goal of this evaluation is to study the performance of the land management system as a whole, including the impact of individual program components on each other and the long-term objective of the Contribution Authority. Two central program areas are included in this evaluation: Additions to Reserve and *Indian Act* Land Management Programs: RLEMP, Regional Land Administration Program (RLAP) and 53/60 Delegated Authority Program. As discussed below, analysis focuses on RLEMP to best inform future programming.

The evaluation also considers a number of cross-cutting activities, including land surveys, the Indian Land Registry System (ILRS), creation of legal interests and other related activities that are important to supporting ATRs and land management. Environmental issues are considered as part of the RLEMP, namely as they apply to First Nation funding for land use planning and environment management.

In order to gain a comprehensive understanding of the services delivered through the Lands Branch, the scope of the evaluation also includes operational (A-base) funding related to INAC land administration on behalf of First Nations and to support RLEMP First Nations. Given the evaluation's focus on Contributions to Indian Bands for Lands Management, the impacts of A-based funding was considered less as a main feature of the evaluation than as a point of comparison for the devolution model.

Several programs that received small amounts of funding from Contributions to Indian Bands for Lands and Estates Management were excluded from the scope of the evaluation because they have been covered in other recent INAC evaluations. These include evaluations of the *First Nations Oil and Gas Moneys Management Act* Implementation, Strategic Investments in Northern Economic Development, Climate Change Adaptation and First Nations Land Management Initiative. The Estates Program, which is situated under Managing Individual Affairs in the Department's Program Activity Architecture, is scheduled for evaluation in 2012-13. It was excluded from the present evaluation because it was believed that it would be better evaluated alongside individual moneys management. In addition, the training component

of RLEMP was excluded to avoid duplication with another recent INAC evaluation and a recent Auditor General of Canada Audit¹¹. Nevertheless, design and delivery of the RLEMP is considered in relation to the achievement of outcomes.

Treaty Land Entitlement (TLE) ATRs, which make up the vast majority of ATRs, were partially included in the scope. The policy and process of ATRs in general, including success towards increasing the reserve base (namely through TLEs) were included. The claims process, which draws funding from another Contribution Authority, was excluded. An INAC evaluation of specific claims is currently underway.

Finally, it is important to note that two recent Auditor General of Canada reports were completed in 2009, which together examine TLEs and land and environment management on reserve.¹² Every effort was taken to avoid duplication of these reports, while at the same time considering important findings within the context of the present evaluation.

1.4 Program Profiles

1.4.1 Background and Description

a) Additions to Reserve

Additions to Reserve involve the transfer of either provincial Crown land or privately-held lands to the federal Crown. Through the ATR program, reserve status is granted to land that a First Nation has acquired or is entitled to receive through one of three policy categories:¹³

- **Legal Obligations.** Legal obligations, the category under which most land was added to reserve over the evaluation period, include land obligations related to specific claim settlement agreements, court orders and legal reversions of former reserve land.
- **Community Additions.** The community additions category provides for the addition to an existing reserve to meet land base needs related to the normal growth of a community. It provides the means to enhance the physical integrity of a reserve most commonly road right-of-way corrections. This category also provides for the return of unsold, unsurrendered land to reserve. In order for proposals to be accepted as a community addition, the ATR must not present incremental costs to INAC regions.

¹¹ Auditor General of Canada (2009, March). Chapter 4 – *Treaty Land Entitlement Obligations – Indian and Northern Affairs Canada – Status Report*. Retrieved August 4, 2010 from, http://www.oag-bvg.gc.ca/internet/English/parl_oag_200903_04_e_32291.html

¹² Auditor General of Canada (2009, March). Chapter 4 – *Treaty Land Entitlement Obligations – Indian and Northern Affairs Canada – Status Report*. Auditor General of Canada. (2009, Nov.). Chapter 6, *Land Management and Environment*. Retrieved August 10, 2010 from, http://www.oag-bvg.gc.ca/internet/English/parl_oag_200911_06_e_33207.html; Also refer to Auditor General of Canada. (2005, November). Chapter 7 – *Indian and Northern Affairs Canada – Meeting Treaty Land Entitlement Obligations*. Retrieved August 3, 2010 from, http://www.oag-bvg.gc.ca/internet/English/parl_oag_200511_07_e_14945.html

¹³ INAC. (2001). Chapter 10 – *Additions to Reserve*. In *Land Management Manual*. Note: A fourth policy category is to be added: additions to reserves arising from monetary awards of the Specific Claims Tribunal under the Specific Claims Tribunal Act. See the 2008 political agreement between the Minister of Indian and Northern Affairs and the Assembly of First Nations for more information: <http://www.ainc-inac.gc.ca/al/lcd/spc/pubs/sgnd/sgnd-eng.asp>

- ***New Reserves / Other Policy.*** The final category encompasses a number of additional reasons for adding land to reserve, including providing land for a landless band, the establishment of reserves for social or commercial purposes, creating a reserve from provincial land offerings and, in the case of claims settlements, to provide land beyond the commitment of the agreement.

If an ATR proposal is accepted under one of the three policy categories, the selected land is subject to a 12-step review/approval process designed to ensure the selection meets basic legal and environmental requirements. An acceptable legal condition has several components. The underlying title to the land must be authoritatively established. The land must be free of other legal interests, unless arrangements acceptable to Canada and the First Nation can be made to regularize those following transfer to reserve status. Legal, service and tax-related issues with the province or, in the case of urban reserves, adjacent municipalities, must be agreed upon in advance, especially where access to utilities or local infrastructure or services is required. In some cases, for instance, when there is a need to comply with treaty provisions, the land must include sub-surface rights that are capable of being separately held, or, where sub-surface rights are not part of the reserve, satisfactory arrangements must be made for surface access to those rights for mineral development.¹⁴ In addition, the land's boundaries must be legally determined and surveyed. The land's environmental condition must also be satisfactory.

b) Land Management/Administration under the *Indian Act*

There have been several developments in programming targeted at devolution of land administration duties from INAC to First Nations, specifically RLAP, 53/60 and most recently, RLEMP. While each of these programs drew some amount of funding from the Contribution Authority within the past five fiscal years, the central focus of the evaluation is on the RLEMP program, which drew the majority. It is believed that this approach will be most useful to inform future programming, particularly as RLEMP is the key INAC program for building First Nation capacity to manage land under the *Indian Act*, now that RLAP and 53/60 are sunseting.¹⁵

Regional Lands Administration Program

RLAP has been in existence since funding for land administration activities began in the 1980s. The program is based on a co-management model of land administration where First Nations partner with INAC regional land managers in implementing land administration activities required under the *Indian Act*. Together, the participating First Nation and INAC follow departmental policies, systems and operating guidelines.

53/60 Delegated Authority Program

The 53/60 Delegated Authority Program was introduced alongside RLAP. Under 53/60, First Nations assume land administration authority under sections 53 and 60 of the *Indian Act*, giving them greater autonomy to implement INAC's land administration policies and procedures.

¹⁴ Johnson, W. (2010). *Additions to Reserve Discussion Paper* [draft].

¹⁵ First Nations that have been participating in the 53/60 and RLAP programs will need to meet the criteria to enter RLEMP in order to maintain their delegated authority status; and, those currently participating in 53/60 or RLAP are given priority to the full roll-out of the RLEMP Program, now funded under the April 2010 Aboriginal Economic Development Framework Authority.

Reserve Land and Environment Management Program

RLEMP began as a pilot in June 2005 with 15 First Nations invited from the RLAP and the 53/60 programs. Delivered to First Nation land managers, the RLEMP is intended to build new competencies and to strengthen knowledge and skills of land and environment management under the *Indian Act*, specifically in the areas of community land use planning, management of reserve land and natural resources, environmental management and compliance with policy and legislative frameworks.¹⁶ In support of this objective, RLEMP provides tools, systems, procedures, templates and advice related to land and environment management and administration. A central purpose of the RLEMP is to devolve *Indian Act* land and environment management responsibilities from INAC to participating First Nations.¹⁷

First Nation land managers generally enter RLEMP at the Training and Development level. Two organizations – the National Aboriginal Land Managers Association (NALMA) and the University of Saskatchewan – deliver the two-year professional training and development curriculum consisting of general land and environment management training and technical instruction in land administration under the *Indian Act*. After successful completion of the Professional Land Management Certification Program and approval by the regional INAC lands office, land managers progress to the operational level where they begin to provide land administration services. The final stage – Delegated Status – occurs when the First Nation receives funding, on a transactional basis, for assuming land administration responsibilities under the *Indian Act*. INAC continues to play an advisory and monitoring role.

INAC Land Management

In total, approximately 68 percent of First Nations in Canada operate outside of any formal INAC land management/administration program. Under the *Indian Act*, Canada has a statutory obligation to provide some land administration services to these First Nations and they receive support for various land administration needs, on an ad hoc basis, through regions' A-base funding. Common activities include reviewing and approving land transactions among band members; approving the allotment of individual land holdings; preparing, executing and monitoring leases, licences and permits; and coordinating reserve surrenders, designations and expropriations. It is important to note up front in this report that INAC does not manage reserve land; it administers the *Indian Act* as it applies to these activities.

c) Other Land Administration Activities

An initial assessment of the scope of the evaluation revealed that it would be essential to consider not only INAC's ATR and RLEMP programs but the fundamental role that various other land management activities play in supporting the land and resource management system as a whole (including resulting economic development). These activities either relate to one or both of the two key programs under evaluation or to INAC's land administration duties on behalf of First Nations:

Land surveys. Surveys are conducted to define allotments to individual band members, leases, permits and other limited interests, a parcel of land for alienation, or to re-establish or restore

¹⁶ INAC (Lands and Economic Development Sector). (n.d.). *Reserve Land and Environment Training Program Manual*.

¹⁷ Goss Gilroy Inc. (2004, March). RMAF for the Reserve Lands and Environment Management Program (RLEMP).

boundaries.¹⁸ Surveys are required during the ATR process to determine the boundaries of the prospective reserve land. Natural Resources Canada (NRCan) is an important partner in the delivery of the survey program. NRCan's role historically has been as corporate surveyor for Canada. The Department fulfils a steward role by providing specifications for survey work, managing surveys and boundary work, ensuring standards are met and maintaining official records. And, it fulfils a facilitation role through its administration of various programs.

Creation of legal interests / Registration of legal interests under the Indian Act support economic development initiatives by allowing access to reserve lands and resources through various tenure instruments and agreements, including leases, permits, easements, designations and surrenders. Legal interests can be created both for First Nation and non-First Nation entities. Examples range from mining and timber permits to commercial leasing to arrangement with band-owned corporations. Of all of these interests, only funding used for commercial leasing was drawn from the Contribution Authority under analysis. However, the evaluation discusses to some extent, negotiation and transfer of legal interests related to fulfilling Crown obligations for the transfer of title under the ATR process.¹⁹ Creation of legal interests is performed with support from the Department of Justice (DoJ). ILRS is a database containing instruments relating to transactions on reserve lands. The system permits the generation of inquiries and reports by First Nation reserve.

1.4.2 Program Objectives

a) Additions to Reserve

The objectives of the ATR program are to:

- Ensure that all steps necessary for effective transfer of land are completed and all third-party interests are properly recorded and addressed;
- Ensure that all environmental concerns are identified and addressed;
- Promote good ongoing relationships with neighbours, third parties, municipalities, and provincial governments; and
- Balance the interests of First Nations, government, third parties, and the public.

b) Land Management: Reserve Land and Environment Management Program

According to the RLEMP Program Manual, the program objectives are to:²⁰

- Strengthen First Nation governance and improve accountability;
- Deliver an integrated training approach with skill development and institutional support;
- Increase involvement of First Nations in the full scope of land management and environmental activities on reserve;

¹⁸ See the following source for more information: Natural Resources Canada. (1997, Jan. 1). *General Instructions for Surveys – Chapter C5 – Surveys of Indian Lands*. Retrieved August 10, 2010 from, <http://clss-satc.nrcan-rncan.gc.ca/standards-normes/c5-v1-eng.asp>

¹⁹ For example, under the “willing-seller, willing-buyer” format of ATRs, issues in the clarity of legal interest typically arise when there are pre-existing third party interests in the lands identified for an ATR and the decision must be made whether these interests can or should continue to exist in their present form, be replaced with another interest, or be removed. The ATR Policy states that FNs are responsible for addressing third party interests in the proposed ATR land.

²⁰ INAC (Lands and Economic Development Sector). (n.d.). *Reserve Land and Environment Training Program Manual*.

- Provide opportunities for alignment with the First Nations Land Management (FNLM) Regime, treaty processes and self-government;
- Establish linkages between funding, scope of activities and results, as well as financial sustainability; and
- Increase First Nations' involvement in the core functions of community land use planning and environmental compliance.

c) Other Land Management Activities

Land surveys. Objectives and expected outcomes of the Land Survey Program are to ensure that the statutory duties of interests in Indian lands are carried out in accordance with the *Indian Act* and *Canada Land Surveys Act*. Beyond these obligations, the program engages in a number of activities, including providing advisory services; setting guidelines for survey work; disseminating land survey, mapping, imagery and land registry information; and working to ensure that external reserve boundaries and internal allotments are clear, unambiguously described and registered in ILRS.²¹

Creation of Legal Interests / Registration of Legal Interests in Reserve Land. According to representatives from the Lands Branch, a key expected result of this activity is to support First Nation goals for economic development, specifically, through the activation of their land base to generate income either directly through rent or indirectly by attracting business on reserve. Registration of legal interests contributes to certainty of possession.

1.4.3 Program Resources²²

Table 1 below shows the total amount of contribution funding allocated to each program or activity under analysis. Of the total amount of funding allocated to land management/administration and ATR activities (calculated as the A-base funding and contribution amounts combined), contribution funding comprised 38 percent, while A-base funding (salary and operation and maintenance) represented 62 percent. Later in the report, findings will highlight that INAC continues to play a significant role in land administration as the Department builds capacity among First Nations and works towards devolution of its *Indian Act* duties.

²¹ INAC. (n.d.). *Surveys*. Retrieved August 21, 2010 from, <http://www.ainc-inac.gc.ca/enr/lds/sur-eng.asp>

²² As indicated in the Evaluation Scope section above, these figures only represent investments in activities under Contributions to Indian Bands for Land and Estate Management being examined as part of this evaluation. The full investment under the Authority is in the order of \$63.8M.

Table 1: Program Resources by Key Activity for the period 2005-06 to 2009-10

Activity	2005/06	2006/07	2007/08	2008/09	2009/10	Total By Activity
1. Addition to Reserves	\$434,145 (4% of annual total)	\$758,692 (7%)	\$1,022,461 (11%)	\$118,900 (1%)	\$364,840 (14%)	\$2,699,038 (6% of G&C Total)
2. RLEMP, RLAP, 53/60	\$9,725,360 (89%)	\$9,079,155 (83%)	\$7,876,230 (84%)	\$10,588,481 (86%)	\$1,985,870 (74%)	\$39,255,096 (85%)
3. Other Activities						
Surveys	\$608,929 (6%)	\$766,531 (7%)	\$0 (0%)	\$615,430 (5%)	\$0 (0%)	\$1,990,890 (4%)
Commercial Leasing	\$204,712 (2%)	\$319,300 (3%)	\$500,470 (5%)	\$991,481 (8%)	351,128 (13%)	\$2,367,091 (5%)
Total Contribution	\$10,973,146 (49% of annual G&C + O&M)	\$10,923,678 (44%)	\$9,399,161 (36%)	\$12,314,292 (42%)	\$2,701,838 (13%)	\$46,312,115 (38% of annual G&C + O&M)
O&M + Regional Salary Dollars	\$11,404,920 (100%)	\$11,754,295 (86%)	\$11,879,624 (72%)	\$12,739,287 (76%)	\$13,443,163 (77%)	\$61,221,289 (81%)
O&M + HQ Salary Dollars	N/A	\$1,929,917 (14%)	\$4,732,706 (29%)	\$4,144,573 (24%)	\$4,058,320 (23%)	\$14,865,516 (20%)
O&M + Salary - Grand Total	\$11,404,920 (51%)	\$13,684,212 (56%)	\$16,612,330 (64%)	\$16,883,860 (58%)	\$17,501,483 (87%)	\$76,086,805 (62%)
Grand Total: Contribution + O&M	\$22,378,066	\$24,607,890	\$26,011,491	\$29,198,152	\$20,203,321	\$122,398,920

a) Additions to Reserve

Between 2005/2006 and 2009/2010, the ATR Program drew \$2.7 million from the Contribution Authority for non-TLE activities. Most of this funding was allocated to activities in British Columbia (\$820K), Alberta (\$220K), Ontario (\$720K), Quebec (\$110K), Saskatchewan (\$330K), and Manitoba (\$280K). The remaining funds were allocated to 17 projects in the Atlantic region (\$10K) and one project in the Northwest Territories (\$200K). ATR funding was provided to First Nations, which have an ATR proposal accepted under the “Community Additions” category. This funding provided support to First Nations for the selection of the new land and, land surveys and in negotiations related to third party interests who have an interest in the new reserve land.

b) Land Management: RLEMP, RLAP & 53/60

Between 2005/2006 and 2009/2010, RLEMP, RLAP and 53/60 drew some \$39.3 million from the authority. Regions receiving the highest proportion of funding were Saskatchewan (33 percent), Ontario (23 percent), and British Columbia (18 percent).²³

c) Other Land Management Activities

A relatively small amount of funding was spent through the Contribution Authority on surveys (\$1.9 million) and commercial leasing (\$2.4 million) between 2005-2006 and 2009-2010 to support the ATR program and economic development on reserve. However, these activities are mostly supported through NRCan and DoJ A-base funding (these figures were not available). As will be discussed in greater detail below, INAC also transferred a total of \$4.9 million to NRCan in surplus departmental operational funding late in each fiscal year for surveys to NRCan over the evaluation period.²⁴ Additional funding for supporting activities for ATR and RLEMP programs arrives at the regional level through the INAC's Environment Program.²⁵

1.4.4 Program Management, Key Stakeholders and Beneficiaries

a) Additions to Reserve

Most of the ATR steps are carried out at the regional level working with First Nations. The Director General of Lands Branch, Lands and Economic Development (LED) Sector at Headquarters (HQ) is responsible for providing national coordination of the program, including the approval of ATR either through the Minister, in accordance with either of the two existing *Claims Implementation Acts*, or the Governor General in Council if the reserve is being created through Royal Prerogative.

Key stakeholders include NRCan and Environment Canada, (NALMA), provincial governments, municipal governments, the Federation of Canadian Municipalities and third parties with legal interests in the land. ATRs may also present cost implications to other departments, such as the Royal Canadian Mounted Police and Health Canada through increased service requirements. In some ATRs, Justice Canada plays a facilitative role in providing legal support and negotiation advice and aids in moving legal instruments and documents associated with legal interests and easements to closure. Indian Oil and Gas Canada assists with creating leases in ATRs involving resource development and plays an educational role both with First Nations and resource companies. Key beneficiaries are the First Nations receiving additional reserve land through the ATR process.

²³ The RLEMP funding formula is both activity-driven (based upon number of transactions) and tied to the RLEMP level (i.e., training, operational or delegated), with funding increasing at each level. Other considerations include band population, area of reserve, quantity of individual land holdings, land use, environmental and compliance activities and base funding for operational and management costs. Additional funding is provided for other responsibilities, including the development of land use plans, Community Environmental Sustainability Plans (CESP) and compliance frameworks. INAC (Lands and Economic Development Sector). (n.d.). *Reserve Land and Environment Training Program Manual*.

²⁴ Source: NRCan; O&M data, updated June 10, 2010

²⁵ The funding levels were driven by project activities related to regional demands for surveys and negotiations on specific projects. The funds in these two categories were not allocated to regions. Rather, the regions used A-based funds and this Contribution Authority to fund First Nation activities where survey work was required or land was being developed for economic reasons.

b) Land Management: Reserve Land and Environment Management Program

Responsibility for monitoring and assessment at the program-level rests with the regional directors general and at HQ with the Director General of the Lands Branch. Two to three workshops with the Professional Land Management Certification Program Steering Committee (i.e., INAC, NALMA and the University of Saskatchewan) are held annually to discuss status and performance, region-specific issues/concerns and emerging issues in land, resource and environment management. At the agreement-level, responsibility for monitoring the finances and program progress rests with the regions. Regional land offices provide advisory and technical support to First Nations land managers.

Key stakeholders include NALMA, the University of Saskatchewan and other First Nation and non-First Nation associations that focus on land, resources and environmental management issues. Key beneficiaries are the First Nations participating in the RLEMP.

c) Other Land Management Activities

Surveys. Regional offices perform most activities related to land surveying, including identifying survey requirements, processing survey proposals and approving survey plans. INAC HQ provides advisory services, performs a quality assurance role, and provides ministerial approval of survey plans. The key partner in the delivery of the surveys program is NRCan, specifically the Earth Sciences Sector of the Department, which provides technical support. Key beneficiaries of this function are First Nations and others with legal interests in reserve land who are afforded greater certainty of possession.

Creation of Legal Interests / Registration of Legal Interests in Reserve Land. INAC HQ sets the policy, based on legal requirements, for drafting, issuing, cancelling and registering legal interests as well as administering leases and permits. INAC regions and DoJ work with First Nations to administer transactions. INAC regional lands officers are responsible for ensuring that the Department's policy requirements are met for preparing, executing and registering leases and are also available to provide support during negotiations.²⁶ DoJ Counsel provides legal advice and support. Operational RLEMP First Nations are responsible for registering transactions. The beneficiaries of this activity are First Nations who benefit through the activation of the economic development potential of their land and other stakeholders (i.e. leasees) afforded the opportunity to use reserve land.

1.5 Logic Model

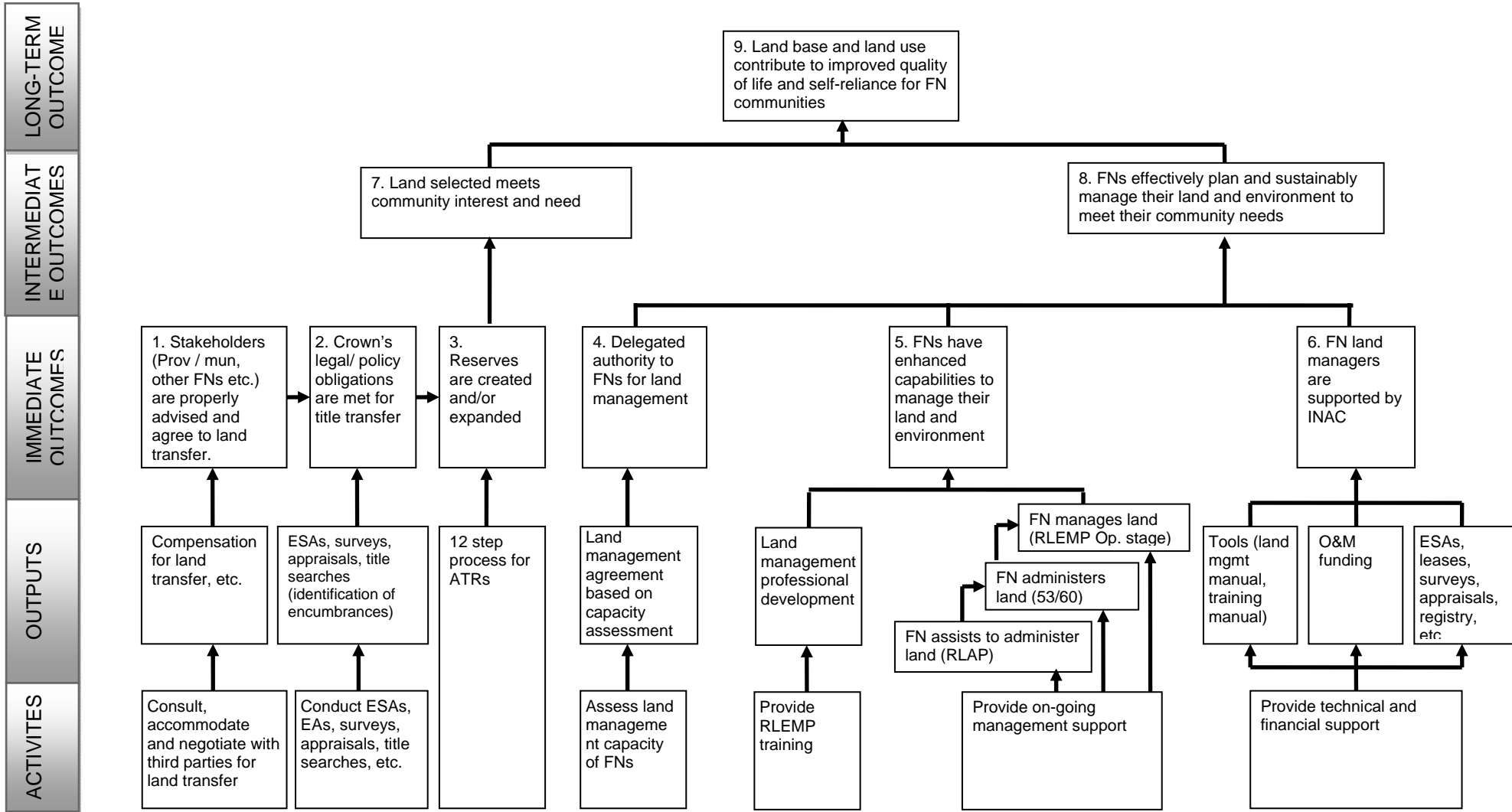
Logic models are used to demonstrate linkages between program activities, outputs and intended outcomes. They provide a conceptual foundation upon which performance indicators can be built. In the absence of a logic model that incorporated all activities considered in this evaluation, EPMB developed the model on the following page and received verification from program managers. It is primarily divided along the lines of the two central programs under evaluation.

Activities and outputs show the efforts and tangible products that result in outcomes. Immediate outcomes are those over which the Department has considerable influence and that occur in a short period of time. One example in relation to RLEMP is the enhanced capability of First

²⁶ INAC (LTS Sector). (n.d.) *Land Management Manual*. Retrieved August 12, 2010 from, <http://www.ainc-inac.gc.ca/enr/lds/pubs/lmm/lmm-eng.asp>

Nation land managers to manage land. One or more immediate outcomes contribute to intermediate outcomes. Following the same example, over time, given adequate and ongoing support from INAC and considering external influences, enhanced capabilities should result in First Nations effectively planning and sustainably managing their land and environment to meet their community needs. The long-term outcome speaks to a change in the state of being of Aboriginal communities that may occur as a result of these programs and others. Findings in Sections 4 and 5 below are organized around the outcomes identified in the logic model.

Figure 1: Logic Model for the Impact Evaluation of Contributions to Indian Bands for Lands Management



2. Methodology

2.1 Overview

Phase 1: Establishment of the Evaluation Working Group and Advisory Committee. An Evaluation Working Group consisting of six representatives from each directorate associated with the evaluation and, including regional representation was assembled early on to act in an advisory role.²⁷ The committee provided invaluable support throughout the evaluation, both clarifying complex program specific issues and assisting in the development of the scope and methodology of the evaluation.

In addition to the Working Group, EPMRB established a five-member Advisory Committee comprised entirely of Aboriginal people. Members included Aboriginal land managers, academics, Elders and others with knowledge of land management on reserve. The committee was instrumental in drawing connections between Aboriginal people and the land and providing insights into Aboriginal interests in land management.

Phase 2: Evaluation Assessment and Methodology Development. Early in the evaluation, EPMRB reviewed all available program documentation and developed a logic model and evaluation matrix that identified evaluation questions and related performance indicators. Following this initial scoping and methodology development, the Evaluation Team conducted a detailed evaluation assessment, involving consultations with INAC officials at HQ and across all regions and further engagement of the Working Group. The evaluation assessment was essential to operationalizing the approach to the evaluation, for instance through the development of meaningful key informant interview questions.

Phase 3: Data Collection. Discussed in detail below, a number of methodologies were developed in order to fully understand the range of programs and activities under evaluation.

Phase 4: Reporting. Following data collection, performed by NEDG, EPMRB and NEDG prepared technical reports with detailed analysis for each line of evidence. EPMRB fed information from these reports into a draft report underwent review by the Working Group members before being tabled at INAC's EPMRC meeting on September 24, 2010.

2.2 Evaluation Issues and Questions

The organizational structure of the evaluation focuses on relevance and performance, and follows the five core evaluation issues as outlined in the 2009 Treasury Board Secretariat *Evaluation Policy and Directive*: **Relevance**: continued need for program; alignment with government priorities; alignment with federal roles and responsibilities; and **Performance**: achievement of expected outcomes and demonstration of efficiency and economy

Ten key evaluation questions were developed in an Evaluation Matrix to address the core issues. The matrix includes a set of performance indicators upon which the evaluation report's findings,

²⁷ Directorates include: ATR, Land Management Capacity-Building, Surveys and Imaging and Environment.

conclusions and recommendations are based and identifies the various data collection methods used for the evaluation questions and , as well as sources of data.

2.3 Evaluation Methods

The evaluation has drawn upon multiple lines of evidence to fully address the core evaluation issues and questions. These include a document and literature review, a financial and performance data review, an historical and legal review, key informant interviews, case studies and an Elders roundtable discussion. Refer to the Evaluation Matrix in Annex B for more information.

2.3.1 Data Sources

Document and Literature Review. A document review was undertaken to collect and review documents that address the evaluation questions. It provided evidence for the rationale of the programs, their alignment with government priorities and relevant roles and responsibilities of INAC. Documents also contribute to an understanding of the historical and legal context of land management and support case studies.

In total, over 300 documents were identified for use in this evaluation. These included: INAC reports (HQ and regions); reports from other federal departments (i.e., NRCan and DoJ); audits, evaluations and management reviews; academic articles; and reports from First Nations and First Nation organizations. Documents were gathered through program managers and an extensive internet scan.

Financial and Performance Data Review. The evaluation undertook a review of the financial contributions provided to First Nations under the Contributions to Indian Bands for Lands and Estates Management authority and a review of the salary allocations provided to the Land Branch (HQ and regions) from the Department's A-base budget. A review of the available performance data related to ATR and RLEMP activities was undertaken.

Historical-Legal Review. Early in the development of the methodology, the Evaluation Team determined that it was essential to provide appropriate legal and historical context to understand and appreciate the intricacies, limitations and opportunities of land management under the *Indian Act*. The Historical-Legal Review focuses on issues identified in commentaries on Indian reserve land management and discusses applicable statutes, regulations and decisions of the courts. Information from ten interviews with DoJ officials from across the country supports this analysis and provides perspectives on INAC's fiduciary obligation to First Nations in an increasingly complex environment.

Key Informant Interviews. Following the scoping exercise, eight key stakeholder groups were identified with the following responses from each: INAC Senior Officials (HQ and regions) (N=5); INAC HQ Land Managers (N=13); INAC Regional Land Managers (N=23); FN Land Managers (N=16); Aboriginal Organizations (N=6); NRCan (land surveys) (N=5); DoJ (N=10); and Other Government (namely provinces and municipalities) (N=13). In total, 128 interviews were conducted. The researchers conducted 91 key informant interviews. An additional 37 stakeholders were interviewed to collect data as part of the Case Study research. Refer to Annex A for more detailed information on the interview groups.

Elders Roundtable. In response to the Advisory Committee’s recommendation to speak to Elders about Aboriginal peoples’ relationship with the land, the Evaluation Team was invited to participate in a roundtable discussion with six Elders representing First Nations from across Canada. This meeting was held over a two-day period in a traditional manner and was co-facilitated by the Elder who hosted the meeting. The results of this discussion form the foundation of this evaluation report by clearly establishing the significance of land to Aboriginal people, their culture, economies and overall quality of life.

Case Studies. Five case studies were examined as part of the evaluation. The case studies were selected with input and guidance from both the Advisory Committee and Working Group. Several criteria were employed during the selection process: the studies had to investigate key issues in each of the areas of inquiry and, have broad implications and, to the greatest extent possible, provide even coverage of the regions south of 60⁰. The case studies brought together several methodologies, including a review of documents (drawn from both First Nation communities and INAC); focus groups and key informant interviews with INAC officials, First Nations and other stakeholders.

- *Expediting ATRs through stakeholder cooperation:* an assessment of how one First Nation, INAC, the province, rural municipality and other stakeholders worked co-operatively to allow the First Nation to take advantage of economic opportunity.
- *Impacts and benefits of a strong survey fabric on land use planning and economic development:* how one First Nation is employing the tools of modern land management.
- *Impacts and benefits of RLEMP on environmental and integrated land use planning:* how two First Nations environmental and land use planning issues.
- *A model in providing land management services to First Nations that lack capacity:* how one tribal council works with six small First Nations to meet their land management responsibilities and plan for the future.
- *On the way to self-government:* how one First Nation enters into land transactions outside of the *Indian Act* in order to expedite economic development and increase self-reliance.

2.3.2 Presentation of findings

The following terms are used throughout the report to refer either to the proportion of key informants in agreement or the frequency with which an opinion was expressed²⁸:

Proportional Term	Frequency Term	Percentage Range
All	Always	100%
Almost all	Almost always	80-99%
Many	Often, usually	50-79%
Some	Sometimes	20-49%
Few	Seldom	10-19%
Almost none	Almost never	1-9%
None	Never	0%

2.3.3 Limitations and Mitigating Strategies

It is important to note that a number of limitations – both in methodology and analysis – constrained the ability of the evaluation to report on some findings.

Performance measurement information. Inadequate performance measurement information and difficulties with performance measurement systems limited analysis in some areas.²⁹

- *Indian Lands Registry System.* It was difficult to extract meaningful data from the ILRS system because the system collects information by reserve and not by band. The Evaluation Team was unable to conduct a comparison of transactions registered by RLEMP First Nations and INAC, which would have been a useful indication of the success of the program. Analysis relies instead on national totals.
- *Additions to Reserve.* The ATR tracking system had significant reliability problems until about three years ago and the new National ATR Tracking System (NATS) has only been fully operational in the last few months. A useful indicator of the extent to which the ATR program is meeting First Nations needs, for which data was unavailable, is the number of ATR proposals that are not accepted including rationale for rejection. Most data on processing times, a key indicator of efficiency in ATR delivery was not available at the time of the evaluation. These data are now being collected through NATS. The ATR program recently completed a performance measurement strategy.
- *RLEMP and INAC Land Administration.* The RLEMP tracking system is limited to collecting data on numbers of land managers involved in each of the programs, RLAP, 53/60 and RLEMP. It does not collect data related to land management activities, such as number and type of land transactions. One useful indicator of the effectiveness of INAC's land management support that is currently not being collected is the length of time it

²⁸ Findings may not apply to certain respondents or respondent groups because no response was provided or no response could be inferred from other comments; or because a different response was provided. Where possible, alternative views as well as the views of the majority have been reflected.

²⁹ During the evaluation period, a Results-based Management and Accountability Framework (RMAF) was in place for the full Lands Strategic Outcome; however, at such a high level, a limited amount of meaningful program level performance information was collected.

takes to execute a lease. RLEMP has completed a performance measurement strategy as part of the Federal Framework for Aboriginal Economic Development.

This limitation meant that performance information had limited application in analysis and was used generally as a descriptive tool. Another impact on the evaluation was the difficulty in trend analysis over time. To mitigate these shortcomings, analysis made use of as much relevant performance information as possible, supplementing gaps with other methodologies.

Financial data. The Evaluation Team encountered several instances where financial information from INAC and other government departments either was unavailable or imprecise. Since salary amounts are not allocated on a program basis and the organizational structure of each region differs, it was difficult to gather consistent salary information from the regions. As well, financial data on HQ salary allocations, while available for 2006-07 to 2009-10, were not available for 2005-06 because there was a change in financial systems at that time. A-base financial information from NRCan and DoJ related to surveys and creation of legal interests was not available.

These shortcomings limited the extent to which financial data used in the evaluation is comparable and reliable across regions and over fiscal years. It also made it difficult to understand the full cost of activities related to land management. For instance, without access to operational financial information from NRCan and DoJ, the evaluation could not determine the true cost of surveys and creation of legal interests to the Government of Canada. Financial limitations were mitigated by ensuring full collection and analysis of all available financial data, including INAC contribution and operational funding. These data, though imprecise at times, allow for some trends to be determined over time and by activity.

Expected outcomes. Few expected outcomes were available at the time of evaluation design, making it difficult to measure whether progress had been made over time. This limitation made it difficult to evaluate the programs and activities against agreed upon outcomes that they had been working towards over the past five years. To mitigate this issue, the Evaluation Team developed a full logic model and evaluation matrix, complete with outcomes and performance measures based on an understanding of the purpose and objectives of the programs. Program managers provided input and validated the model before the evaluation began. This exercise helped inform the concurrent development of performance measurement strategies for the ATR and RLEMP programs with the goal of establishing a baseline understanding of performance in the present evaluation and tracking this over time.

Data collection and triangulation of evidence. Although every effort was made to gather balanced evidence for each of the evaluation questions, in a few cases, the Evaluation Team had to rely on few lines of inquiry or limited variation of sources within one line of inquiry to address evaluation questions. The best example of this is can be found in analysis related to the extent to which stakeholders, including provincial and municipal governments, other First Nations with overlapping claims and other stakeholders have been engaged and accommodated in the ATR process. Unable to make contact with representatives from these stakeholder groups with the exception of several interviews conducted during a case study, analysis relies heavily on key informant information from INAC officials and First Nation land managers.

This limitation presents the potential for bias as the views from only several groups are relied on in some cases. This was mitigated through a thorough review of documents and literature related to municipal government involvement in ATRs. A case study on TLEs in Saskatchewan targeted provincial, municipal and third party players to better understand the web of relationships that makes adding land to reserve possible.

Gender-based analysis. The evaluation was unable to conduct gender-based analysis given a lack of performance information and the inherent difficulty in applying a gender-based lens to land management. The Evaluation Team considered examining matrimonial real property, but it was decided that inclusion of this issue would push the boundaries of an already ambitious scope. Gender-based analysis has been considered in both the ATR and RLEMP performance measurement strategies and recently, a study has been completed on gender-sensitive indicators for RLEMP through a partnership with INAC's Gender-based Analysis Directorate, EPMRB and the program.

Sustainable development. Discussions held with the Sustainable Development Directorate indicate that principles on sustainable development were in place and available to program managers beginning in 2007 (i.e., mid-way through the evaluation period). As a result, there is no performance data related to sustainable development and little indication that its principles were considered at the time of program design. The report includes limited discussion of sustainable development in analysis.

Attribution challenges. Attribution between government activities and outcomes in First Nation communities is often difficult to establish, especially when drawing conclusions on longer-term outcomes. That the RLEMP is only just emerging from its pilot stage made it hard to conclude, with certainty, progress towards some outcomes. For instance, joint management agreements for RLEMP First Nations have not yet been implemented. These will be useful in the future to examine the extent to which devolution of land management responsibilities is occurring. Another attribution challenge was linking the small amount of funding devoted to ATR through the Contribution Authority – a fraction of the total money spent on ATR delivery through specific claims settlements – to any tangible outcome.

At times, these limitations influenced the extent to which the evaluation could arrive at definitive conclusions on progress towards outcomes. To mitigate this, research relied heavily on key informant interviews to determine progress towards RLEMP outcomes. The scope of the evaluation was adjusted in an attempt to draw connections between ATR activities and outcomes. This meant that a large amount of ATR activity initiated through specific claim funding was included.

2.4 Quality Control

As indicated earlier, both a Working Group and an Advisory Committee were convened to reflect the knowledge and perspective, both of INAC programs and First Nations. Members of both groups reviewed and provided input on the methodology report. Preliminary findings were shared with the Working Group and the program for advice and validation and with EPMRC for

information. A draft report was shared with the Working Group and Advisory Committee before tabling with EPMRC

3. Context: Understanding Land Management

To situate issues of First Nation land management in context, this section of the report describes the importance of land to First Nation people, the role that the courts have played in recent times and the new directions relating to land that have evolved over the past few decades. This discussion sets the foundation for understanding the performance of the programs under evaluation. Elders offered their views on self-reliance, reserve land base, quality of life and other issues that are investigated as outcomes later in the report. An historical-legal review of the context surrounding land management on reserve outlines the constraints of the current land management regime under the *Indian Act* and offers opportunities moving forward.

3.1 Aboriginal Relationship to the Land

Land is considered to be the most valuable of First Nations' assets, both from an economic and a cultural perspective. Aboriginal peoples in all regions of Canada emphasize their special relationship with the land, specifically, their traditional territories, which almost always extend beyond reserve boundaries. This special relationship includes land as the epitome of social and economic relationships, of relationships with all living things and also takes into consideration the spiritual significance of traditional lands.³⁰

To ensure that the understanding of the importance of land to Aboriginal people is fully reflected in this evaluation, a group of Elders was convened³¹ early in the evaluation to discuss the relationship of land to Aboriginal People. Discussion centred on the protection of First Nation land and resources and ways of promoting sustainable land management and environmental protection. As well, Elders offered their opinions regarding the quality of life on First Nation reserve lands. At the heart of the discussion was the need to promote a common understanding of what the land represents to Aboriginal peoples and how this can be translated into modern land management practices, while being fundamentally respectful of Aboriginal culture and traditions.

Fundamentally, the Elders stated that the concept of management over the land does not fit with traditional ways of knowing. Rather than placing themselves in a position of control over the land, they emphasized the sacred social, cultural and spiritual relationship Aboriginal peoples share with the land. In considering this relationship with the land, the Elders presented a few key guiding principles for a way forward. There must be honour and respect for the treaties, "*which were born of peace and sharing, not defeat,*" as well as fairness and equitable sharing of resources. It must be understood that the depletion of resources contradicts the traditional Aboriginal way of knowing, which emphasizes taking care of the land and mutual responsibility for land management. Aboriginal people view themselves as part of the land and, as such, the notion of protecting the land goes farther than simply guarding it; it extends to protecting and nurturing the spiritual well-being of people to ensure survival. It was said that "*how we treat the land will determine our future and that of our children.*" This idea was closely tied to social and environmental sustainability. Respect and care for the land in a traditional sense is the only path to a sustainable future.

³⁰ e.g. National Centre for First Nations Governance. (n.d.). *The Land*. Retrieved August 12, 2010.

³¹ Elders Roundtable Discussion. (March 31 and April 1, 2010).

The Elders shared their concern that First Nations will never attain self-reliance if the narrow and limiting view of “land management” is perpetuated. For example, the Elders viewed sustainable development as more than the effective use of resources. Rather, sustainability means re-establishing First Nations’ relationship to the land. As well, the Elders recognized the importance of training First Nations people in sustainable land management practices because, in their words, “*if our lands are not healthy, then we cannot be healthy.*” This includes support and guidance from INAC in legal, environmental and engineering expertise and, most importantly, in comprehensive community planning. The Elders believed that self-reliance through economic development can successfully occur only in communities that have achieved social well-being. According to these elders, given that their people no longer have the freedom to move within (and manage) their traditional territories, “land management” has become more about the “*management of poverty.*”

According to the Elders, limited access to land further hinders the self-reliance of Aboriginal peoples as they are not afforded the opportunity to fully participate in the abundance offered by the land. Elders noted that the original land distribution was calculated when the First Nation’s population was much smaller, reserves do not meet current needs. As such, the successful implementation of ATR are critical to meeting the cultural, spiritual, community and socio-economic needs of the majority of First Nations who no longer have access to their traditional territories and who are not self-governing. Population density is putting a strain on local infrastructure which is already limited.

Fundamentally, Elders viewed the evaluation as an opportunity to voice their concerns that the current system of land allocation and land management is disharmonious with an Aboriginal worldview. The concept of increasing quality of life was distant and disconnected from the activities of the Department. How can one talk about “*quality of life*” when Aboriginal communities are “*bursting at the seams?*” asked one of the Elders.

3.2 Governance of Indian Reserve Lands

Federal jurisdiction over reserves is mandated by s. 91(24) of the *Constitution Act, 1867*, which confers exclusive legislative jurisdiction over “Indians and Lands reserved for the Indians” on Parliament. In contrast, for most Canadians, lands and natural resources and property fall within provincial legislative jurisdiction. Reserves are a special category of federal Crown land. The courts have held that, although provincial laws of general application can apply to Indians as persons, those laws cannot apply to use of reserve lands,³² because they are within exclusive federal jurisdiction.

Some First Nation property regimes are governed by twentieth-century agreements and legislation, such as the Cree-Naskapi lands in Quebec, the Sechelt or Nisga’a lands in British Columbia and reserves converted to the *First Nations Land Management Act*. By far the largest proportion, however, are those First Nation regimes wholly or partially governed by the *Indian Act*, whose basic legal architecture in relation to land dates from the first *Indian Act* of 1876.³³

³² *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285.

³³ Reserves were set aside before Confederation in 1867 under various arrangements including, but not confined to

3.3 Land Management Under the *Indian Act* and Other Statutes

The current *Indian Act* is based on a 1951 revision, with significant amendments in relation to land and other matters in 1985, and indirectly, on an opt-in basis, by means of more recent legislation.³⁴ A cornerstone principle of the *Indian Act* is protection of reserve land by imposing restrictions against transfer to the private property market.³⁵

Practically speaking, there are two main classes of property regime in Canada: Crown lands held by the federal government or a province and lands held by private individuals, businesses or other legal entities. Private lands are controlled and may be transferred by the owner. However, reserves governed by the *Indian Act* are held by Her Majesty in right of Canada “for the use and benefit of the respective bands for which they were set apart.”³⁶

The allocation of uses of reserve lands is determined partly by INAC (or in some cases the Governor-in-Council), partly by successive governing councils or membership vote of the First Nation, and sometimes partly by First Nations members who have acquired limited but legally recognized individual interests in certain reserve lands. Based on the *Indian Act* and INAC’s Land Management Manual, INAC does not determine how reserve land is used, but rather awaits direction from Band Council.

The *Indian Act* is not the only federal statute that may apply to reserve land administration. The *Canada Lands Surveys Act* and the *Canada Lands Surveyors Act*; the *Federal Real Property and Federal Immovables Act*; the *Canadian Environmental Assessment Act* and *Canadian Environmental Protection Act* and the *National Housing Act* all apply to federal Crown lands, including reserve lands and lands acquired to be set aside as reserves. There is an important class of laws that does *not* apply to reserve lands: provincial laws.³⁷

3.4 Court Decisions on Land Management and resulting initiatives

Court decisions are a further source of important legal direction on the administration of reserve lands. Perhaps the most fundamental was the decision of the Supreme Court of Canada in *Guerin v. The Queen*.³⁸ This 1984 ruling held that the Crown owes fiduciary duties, a duty of “utmost loyalty” to the First Nation for whom reserve lands are held, to carry out the terms on

treaties. For example, reserves were a religious project in Quebec: see George F. G. Stanley, *Revue d'histoire de l'Amérique française*, vol. 4, n° 2, 1950, p. 178-210. "The first Indian "Reserves" in Canada."

³⁴ Such as the *First Nations Land Management Act* (FNLMA) (1999); the *First Nations Commercial and Industrial Development Act* (FNCIDA) (2005); the *First Nations Fiscal and Statistical Management Act* (FNFSMA) (2005); *First Nations Oil and Gas and Moneys Management Act* (2005) and the *First Nations Certainty of Title Act* (2010). *Claim Settlements (Alberta and Saskatchewan) Implementation Act* (2002); *Manitoba Claim Settlements Implementation Act* (2000).

³⁵ Since the Proclamation of 1763, Aboriginal interests in land can only be acquired by the Crown.

³⁶ *Indian Act*, section 18(1).

³⁷ *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285. However, urban reserves must often accommodate to the surrounding provincial/municipal legal environment in some respects, although those laws do not apply to reserve lands.

³⁸ [1984] 2 S.C.R. 335. Other noteworthy Supreme Court of Canada cases include: *Blueberry River Indian Band v. Canada*, [1995] 4 S.C.R. 344; *Wewaykum Indian Band (a.k.a. Roberts & Dick) v. The Queen* (2002), 220 D.L.R. (4th)1; *Osoyoos Indian Band v. Town of Oliver* (2001), 206 D.L.R. (4th) 385; *R. v. Sparrow* (1990); *R. v. Adams* (1996); *Delgamuukw v. B.C.*;

which a surrender for lease was approved. As the 1986 Auditor General's Report observed, "until this decision, the Department had viewed the obligation created by its legislation as something of a 'political' trust... it must now examine and revise its procedures and policies in a number of areas to ensure it is living up to this responsibility."³⁹

This court decision led the department and First Nations to enter into discussions on how to develop new options for local control of matters regulated under the *Indian Act*.⁴⁰ Many First Nation-led initiatives, including the First Nations Tax Commission, the *First Nation Land Management Act* and the *Indian Oil and Gas and Management Act* legislation emerged from discussions held during this period.

While it took time for many of these initiatives to be developed and to build support for acceptance within government and the Aboriginal community, over the past two decades a number of these initiatives have become federal statutes that provide legislated land management tools supplementing those in the *Indian Act*.⁴¹ As well, there is legislation related to ATR that applies only to new reserves in certain provinces.⁴² Finally, there is recent legislation that allows First Nations to leave the *Indian Act* and opt into the more recent legislation.⁴³

3.5 Challenges Ahead

Despite these recent changes and despite repeated criticism of the land transaction provisions of the legislation as being outdated and paternalistic, the basic legal framework of the *Indian Act* has proven extremely resistant to change.⁴⁴ The significant amendments that *have* occurred in the last 25 years have been prompted by the need to comply with the *Charter of Rights*, by court decisions relating to First Nation membership, or, in the case of the 1985 designation amendments, reserve land surrenders. Efforts by previous governments to abolish or substantially revise the *Indian Act* through the 1990s came to naught.⁴⁵ Instead, the recent trend in legislative change has been incremental and opt-in for those First Nations that request and qualify for it.⁴⁶

³⁹ Auditor General of Canada. (1986). *Department of Indian Affairs and Northern Development*. Retrieved August 26, 2010 from, http://www.oag-bvg.gc.ca/internet/English/parl_oag_198611_11_e_4202.html

⁴⁰ Indian Revenues and Trusts Review, Phase II Report (1990, May); The Chiefs Proposal on New Optional Land Legislation (1991, April 22); The Speech from the Throne (1991, May 13).

⁴¹ FNLMA; FNCIDA; FNOGMMMA; the *First Nations Certainty of Title Act* (2010) and the *First Nations Fiscal and Statistical Management Act* (FNFSMA) (2005) A bill to enact the First Nations Housing on Reserves and Matrimonial Interests and Rights Act is expected to be re-introduced in the current session of Parliament.

⁴² *The Manitoba Claims Settlement Implementation Act* (2000) and *Claim Settlements (Alberta and Saskatchewan) Implementation Act* (2002) and comprehensive claims settlement legislation in Labrador, Quebec, British Columbia, Yukon and the Northwest Territories.

⁴³ The *First Nations Commercial and Industrial Development Act* and the *Certainty of Title Act*

⁴⁴ Although recent events suggest that there may be growing pressures within the Aboriginal community to move beyond the *Indian Act*. See Globe and Mail editorial 'Twilight of the *Indian Act*', July 22, 2010, A10. Note: the article cautions that some First Nations are ill-equipped "...to take on all the responsibilities of self-government."

⁴⁵ E.g. 37th Parliament, 2nd Session: C-7, *An Act respecting leadership selection, administration and accountability of Indian bands*

⁴⁶ Refer to FNLMA, FNCIDA and FNFSMA.

The difficulty of amending the *Indian Act* has led to two very different approaches to dealing with reserve land administration. Under one approach, lawyers⁴⁷ and land managers, from both INAC and First Nations, have made increasingly flexible and varied use of the available statutory provisions, particularly those dealing with land to be leased on behalf of the First Nation or First Nation member, as well as Section 28(2) permits. Leasing of reserve land connects it to the mainstream economic and financial system, but without it ultimately losing reserve status.⁴⁸ Leases are now used for a wide range of commercial, industrial, agricultural, residential and recreational purposes on reserve lands.⁴⁹

Under the second approach, discussed in greater length in the unintended outcomes section below, First Nations and First Nation individuals have essentially chosen to ignore the requirements of the *Indian Act*. On these reserves, internal housing allocations and other land-related uses are determined by local custom or decision of Chief and Council. In addition, there is widespread use of informal or “buckshee” leases for cottage developments, agricultural production and commercial activities in various regions.⁵⁰

Section 28(1) of the *Indian Act* stipulates that these arrangements are void. As a result, the courts have not enforced them.⁵¹ However, they work as practical arrangements, and they are less cumbersome and costly to put in place than *Indian Act* arrangements requiring INAC approval – a process, which among other things, includes requirements for appraisals, environmental assessments and surveys before a transaction can be completed, and which may take months or even years to complete.⁵²

In buckshee leasing, the band, or the individual Certificate of Possession holder, negotiates arrangements directly with the buckshee “lessee.” These transactions can occur without getting into the complex and lengthy INAC approval process.⁵³ The greater speed of these buckshee procedures does not, of course, lessen the risk that those transactions may later be found to be improper.

⁴⁷ See e.g. Gailus, J. (2009). *Land Management and Economic Development Under the Indian Act.. Indian Land Transactions*. Retrieved June 17, 2010 from, <http://www.pushormitchell.com/law-library/article/indian-land-transactions>

⁴⁸ INAC (LTS Sector). Land Management Manual.

⁴⁹ Examples include the Truro Power Centre on the Millbrook Reserve, Nova Scotia; Casino Rama on the Rama Reserve; a retail and commercial complex on The Pas Reserve in Manitoba and residential leases on the Musqueam Reserve in British Columbia.

⁵⁰ E.g. *Making The Indian Act Irrelevant: Membertou's Journey Towards Self-Government* (2010, April 13).

Retrieved June 21, 2010 from,

http://www.indigenouspeoplesissues.com/index.php?option=com_content&view=article&id=4903:qmaking-the-indian-act-irrelevantq-membertous-journey-towards-self-government&catid=52:north-america-indigenous-peoples&Itemid=74 ; Pushor-Mitchell. (2009, November 29). *Buckshee Leases of First Nations Land: Tenants Beware*. Retrieved September 12, 2010 from, <http://www.pushormitchell.com/law-library/article/buckshee-leases-first-nations-land-tenants-beware>

⁵¹ *Tsartlip Indian Band v. Canada* (Minister of Indian Affairs and Northern Development), [2000] 2 F.C. 314; *Ziprick v. Braun/el Engineering & Construction Ltd.*, [1994] B.C.J. No. 312 (S.C.); M.D. *Sloan Consultants Ltd. v. Derrickson* (1991), 61 B.C.L.R. (2d) 370 (C.A.); *Terbasket v. Harmony Coordination Services et al.*, [2003] B.C.J. No. 28, 2003 BCSC 17.

⁵² Gailus, J. (2009). *Land Management and Economic Development Under the Indian Act*.

⁵³ *Ibid*.

In summary, INAC is confronted with singular dilemmas in its *Indian Act* administration. Land management programs are to a significant extent designed by statute and to an equally significant extent constrained by statute. INAC is a fiduciary in relation to the beneficial interest of the First Nation on reserve lands, and this may include environmental issues. Moreover, INAC does not appear to have the tools or resources to compel compliance with *Indian Act* land provisions where a First Nation does not wish to comply, particularly in an era of self-government rights. Custom and buckshee land transactions are likely so extensive that it would be a large undertaking to bring them all into conformity with the *Indian Act* and other applicable federal statutes, including those relating to surveys and environmental assessment. The transition from *Indian Act* to *First Nations Land Management Act* land title arrangements has been complex both for INAC and those First Nations that have accomplished that transition. To transition from buckshee arrangements would likely be even more complex.

The most fundamental challenge ahead is to acknowledge and be responsive to this complexity. There is a need to rationalize the ad-hoc multi-faceted approach to land administration in a way that allows a broader range of options that supports all First Nations with different land management capacities while at the same time addresses the land and environmental regulatory issues.

4. Evaluation Findings – Additions to Reserve

4.1 Relevance

4.1.1 Meeting Land Base Needs

Many key informants, including those involved in the Elders roundtable claimed that adding land to reserve is necessary and significant to First Nations as existing reserve land is small.

Respondents felt that an adequate land base is important for economic and social outcomes and to support a growing on-reserve population. Land forms the basis of Aboriginal identity. Adding land to reserve addresses historical injustices and helps to provide for the cultural and spiritual survival of Aboriginal communities.⁵⁴

In 2005, at the beginning of the evaluation period, Indian reserves represented less than one half percent of the total land area of Canada's ten provinces.⁵⁵ The Report of the Royal Commission on Aboriginal Peoples discusses at length, inadequacies in the land base of First Nations, which it claims has shrunk by two thirds since the time of Confederation.⁵⁶ Canada's Aboriginal population has grown steadily since the Royal Commission on Aboriginal Peoples report, expanding by 45 percent to a total of 1,172,790 in the ten-year period between 1996 and 2006. Of this total, the 2006 Census counted 698,025 people identifying themselves as First Nations.⁵⁷ Future INAC projections place the number of First Nation people in Canada at over 1 million by the year 2024.⁵⁸ These findings suggest that more land is needed to support growing First Nations populations.

4.1.2 Consistency with Government Priorities

The evaluation found that while the ATR program is consistent with Government of Canada priorities, specifically those related to improving economic development on reserve and fulfilling Canada's treaty obligations; however, its design could be improved to better achieve these priorities (see Design section below).

In March 2007, the Standing Committee on Aboriginal Peoples found limited access to land and resources to be a key barrier to economic development, identifying this area an "urgent priority."⁵⁹ In June 2007, the Prime Minister announced plans to accelerate the resolution of

⁵⁴ Royal Commission on Aboriginal Peoples. (1996); Johnson, W. (2009, Aug.) *Reserve Land and Resource Management – Overview: Issues & Options*; AFN/INAC Joint Initiative for Policy Development. (2001). *The Voice of First Nations: Planning for Change*. Ottawa: Assembly of First Nations

⁵⁵ I.R. total: 3,221,212.7 hectares: INAC Surveys and Imaging Unit (2010, July 29). *Email Correspondence*. This figure refers to May 31, 2005. Data from April 1, 2005 was not available; 10 Province total: 606,293,100: Statistics Canada. (2005, Feb. 1). *Land and Freshwater Area, by Province and Territory*. Retrieved September 5, 2010 from, <http://www40.statcan.ca/101/cst01/phys01-eng.htm>

⁵⁶ Royal Commission on Aboriginal Peoples. (1996).

⁵⁷ Statistics Canada. Aboriginal Peoples - Statistics Canada.

⁵⁸ Indian and Northern Affairs Canada & Canadian Mortgage and Housing Corporation. (n.d). *Registered Indian demography: Population, household and family projections, 2004-2009*. Retrieved July 13, 2010 from, <http://www.ainc-inac.gc.ca/ai/rs/pubs/re/rgd/rgd-eng.pdf>

⁵⁹ Standing Senate Committee on Aboriginal Peoples. (2007, Mar). *Sharing Canada's Prosperity - A Hand Up, Not a Handout*. Retrieved August 12, 2010 from, <http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/abor-e/rep-e/rep06-e.pdf>

specific claims with the objectives of ensuring justice for First Nation claimants and certainty for government, industry and all Canadians.⁶⁰ The ATR program is necessary to carry out this commitment: INAC officials expect that the accelerated claims resolution process may increase the number of settlement agreements requiring additions to reserves.

The timely processing of additions to reserves continues to be a government priority and considered “essential to economic progress” under the Framework for Aboriginal Economic Development. This framework advocates adaptation of government processes to meet the speed of business.⁶¹

4.1.3 Alignment with Departmental Objectives and Initiatives

The emphasis of the ATR program on TLEs (discussed below in greater detail) is well aligned with departmental objectives and initiatives. In August 2006, the Minister of INAC committed to adding 150,000 acres of new reserve land per year in Manitoba to help fulfil TLE obligations.⁶² On November 27, 2007, an agreement signed by the Minister of INAC and the National Chief of the Assembly of First Nations (AFN) gave priority to ATRs affected by provisions of *The Specific Claims Tribunal Act*, which the Minister introduced in the House of Commons on the same day.⁶³ Most of INAC’s 2005-2010 Planning and Priorities Reports to Parliament state that ATRs are an integral program in achieving its Lands Strategic Outcome. According to INAC’s most recent Departmental Performance Report, they encourage investment and promote development, both on reserves and in surrounding communities.⁶⁴

While some key informants noted that the ATR program needs to be more closely aligned with the economic development priorities of INAC and the government of Canada, an ATR Policy and Process Review with the AFN, which is currently underway, confirms that the program is working towards better alignment in this regard.⁶⁵ This initiative is discussed in greater detail in the Design section that follows.

4.1.4 Legitimate and Necessary Role of INAC in Additions to Reserves

ATR are required to meet treaty obligations, which are solemn, constitutionally-protected agreements between the Crown and First Nations.⁶⁶ Claims may be resolved by adding lands to reserve. In 1992, Canada signed the Saskatchewan Treaty Land Entitlement Framework with

⁶⁰ INAC. (2007, June 12). *Specific Claims: Justice At Last*. Retrieved August 4, 2010 from, <http://www.ainc-inac.gc.ca/al/ldc/spc/pubs/jal/jal-eng.asp>

⁶¹ Canada. (2009). *Federal Framework for Aboriginal Economic Development*. Retrieved August 10, 2010 from, <http://www.ainc-inac.gc.ca/ecd/ffaed1-eng.asp>, p. 8.

⁶² INAC. (2007). *Status Report on TLE Obligations in Manitoba*. Retrieved August 3, 2010 from, <http://www.ainc-inac.gc.ca/ai/mr/nr/m-a2007/2-2925-rp-eng.asp>

⁶³ Indian and Northern Affairs Canada & Assembly of First Nations. (2007, Nov. 27). Political Agreement between the Minister of Indian Affairs and Northern Development and the National Chief of the Assembly of First Nations in Relation to Specific Claims Reform. Retrieved August 17, 2010 from, <http://www.ainc-inac.gc.ca/al/ldc/spc/pubs/sgnd/sgnd-eng.asp>; Indian and Northern Affairs Canada. (2007, Nov. 27). The Government of Canada Announces New Key Step to Resolve Specific Claims in Canada. Retrieved August 17, 2010 from, <http://www.ainc-inac.gc.ca/al/ldc/spc/pubs/sgnd/sgnd-eng.asp>

⁶⁴ INAC. (2009). *Departmental Performance Report*. Retrieved August 7, 2010 from, <http://www.tbs-sct.gc.ca/dpr-rmr/2008-2009/index-eng.asp>, p. 29

⁶⁵ INAC. (2009, Oct.). *Additions to Reserve Policy and Process Review*.

⁶⁶ *The Constitution Act* “recognizes and affirms treaty rights.”

25 First Nations and the Government of Saskatchewan to fulfil this obligation.⁶⁷ In 1997, a similar agreement was signed by 19 First Nations and the Government of Manitoba.⁶⁸ INAC has the lead responsibility for the implementation of these agreements, with support from other government departments.

There is commentary to the effect that Canada should settle “valid” specific claims. In 2006, the Senate Standing Committee on Aboriginal Peoples conducted a special study on the specific claims process. In this study, the committee stressed that the federal government’s responsibility to settle specific claims as an obligation and a legal imperative that cannot be postponed⁶⁹ Likewise, the Standing Committee acknowledged the responsibility of the federal government in their report, *Sharing Canada’s Prosperity – A Hand Up, Not a Handout*.⁷⁰ Finally, ATR are required by the Government of Canada where legal obligations of settlement have been specially legislated or where the courts have directed the Crown to add lands to reserve.⁷¹

4.2 Design and Delivery

4.2.1 Program Design

Land acquisition and harmonization of different legal regimes is a complicated task. The design of the ATR program has been under review several times since its inception to examine ways in which the land transfer process can be facilitated. While progress has been made, the evaluation found that the design of the ATR policy and process still requires improvement.

Past ATR policy / process design flaws

A 1996 evaluation of the ATR policy found that the ATR process was lengthy and that there was potential for streamlining specific steps through combining steps or completing some steps in parallel.⁷² The 2001 AFN-INAC Joint Initiative for Policy Development discusses a number of design issues of the ATR policy. For instance, First Nation focus groups claimed that the ATR policy/process suffered from an over-emphasis on liability and cost implications to the federal government.⁷³ The ATR policy was modified in 2001 as a result of the Joint Initiative.⁷⁴

⁶⁷ Auditor General of Canada. (2009, Nov.) *Status Report Chapter 4 –Treaty Land Entitlements Obligations*.

⁶⁸ Government of Canada, Government of Manitoba, Treaty Land Entitlement Committee of Manitoba, Inc. (1997, May 29). *Framework Agreement: Treaty Land Entitlement*. Retrieved August 17, 2010 from, http://www.gov.mb.ca/ana/interest/tle_framework_agreement1997.pdf

⁶⁹ Standing Senate Committee on Aboriginal Peoples. (2006, Dec.) *Negotiation or confrontation: It’s Canada’s choice: Final report of the Standing Senate Committee on Aboriginal Peoples Special Study on the federal specific claims process*. Retrieved August 4, 2010 from, <http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/abor-e/rep-e/rep05dec06-e.pdf>, p. 40

⁷⁰ Standing Senate Committee on Aboriginal Peoples. *Sharing Canada’s Prosperity – A Hand Up, Not a Handout, Part IV: Securing Access to Lands and Resources* (2007, Mar), Retrieved August 12, 2010 from, <http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/abor-e/rep-e/rep06-e.pdf>

⁷¹ INAC (LTS). (2003, Oct.) ATR Policy. In *The Land Management Manual*. Retrieved June 24, 2010.

⁷² Goss Gilroy Inc. (1996, June 6). *Evaluation of the Additions to Reserve Policy*. Retrieved August 7, 2010 from, <http://dsp-psd.communication.gc.ca/Collection/R3-24-1996E.pdf>

⁷³ AFN/INAC Joint Initiative for Policy Development. (2001). *The Voice of First Nations: Planning for Change*. Ottawa: Assembly of First Nations.

⁷⁴ One important change was the establishment of the three ATR policy categories. The 1991 re-write also clarified that municipalities do not have a veto over proposals that meet the policy criteria; economic development is a valid

In a 2005 report, the Office of the Auditor General (OAG) noted that a large number of treaty land entitlement acres in both Manitoba (790,000 acres) and Saskatchewan (473,000 acres) had been selected by First Nations, but that there had been limited progress in addressing longstanding problems with the land conversion process in these two provinces.⁷⁵ Although the 2009 OAG report acknowledged that the ATR program had made significant progress since the 2005 report in converting lands selected by First Nations to reserve status in Saskatchewan and Manitoba, many of the design issues remained unresolved particularly in the other provinces where there is no special TLE legislation.⁷⁶

Current issues with the ATR policy / process

The evaluation found considerable evidence that the current design of the ATR process flowing from the policy is cumbersome with unnecessary steps leading to long delays that compromise the potential for economic development. Many key informants identified a number of areas where change might be warranted and noted that work in some of these areas is already underway. These include the following:

- Conducting further research and policy work on sub-surface rights;
- allowing for approvals of ATRs to occur at the Regional Director General level, instead of at the Deputy Minister level;
- clarifying definitions around urban and rural ATRs and service areas;
- establishing greater collaboration with the provinces to address some of the challenges related to securing urban ATRs;
- better engaging Aboriginal land management associations (e.g., NALMA and its regional chapters);
- improving dispute resolution mechanisms;
- better monitoring ATR service standards; and
- further developing the ATR tool kit.

Promising change

Many of these obstacles and other design issues have been addressed for treaty land and certain other claim settlements in the Prairie provinces. The *Manitoba Claim Settlements Implementation Act* and the *Claim Settlements (Alberta and Saskatchewan) Implementation Act* provide procedures for First Nation councils to request permits or designations before transfer and for those to be conferred with lawful effect. Evidence suggests that a significant obstacle to other ATRs could be removed if such opt-in legislation were extended to all regions, thereby reducing the number of steps and time required to add land to reserve.⁷⁷

community growth need and ATRs do not need to be contiguous, but rather can be within the service area of the existing reserve. Ibid.

⁷⁵ Auditor General of Canada. (2005, Nov.). *Chapter 7 – INAC: Meeting Treaty Entitlement Obligations*. Issues with the conversion process included those related to environmental reviews and land surveys and requirements for the cooperation of other parties, such as municipal governments, other government departments and third party interests, such as pre-transfer uses or occupations for residential, recreational, commercial, resource harvesting or extraction activities.

⁷⁶ Auditor General of Canada (2009, March). *Chapter 4 – Treaty Land Entitlement Obligations – Indian and Northern Affairs Canada – Status Report*.

⁷⁷ Johnson, W. (2009, Aug.). *Reserve Land and Resources Management – Overview Issues and Options*.

INAC is working with the AFN to review the national ATR policy and process in an effort to reduce processing time and steps, significantly accelerate the ATR process and provide greater certainty to third parties. It is expected that the new policy and process direction will be restructured along the lines of settlement acts in place in the Prairies. Key informants from all groups claim that these developments are adequately involving the input of Aboriginal land managers and NALMA.

Clarity of roles, responsibilities, communication and collaboration

The evaluation found evidence that the clarity of roles and responsibilities in the ATR process needs to be improved. Better communication and collaboration both within the Lands Branch and with other INAC sectors and government departments is needed to ensure the effectiveness and efficiency of the ATR process and to support economic development outcomes.

Many evaluation respondents indicated that greater collaboration and coordination across the Economic Development and Lands Branches is needed, particularly at the regional level. It was felt that economic development outcomes would be better realized if regional economic development officials were involved with, or at least made aware of, ATRs early in the process. This was specifically the case when ATRs are being proposed to support economic development.

NRCan's role during the ATR process is to manage contracts with land surveyors, ensuring that standards are met, records are properly archived and, ultimately, that lands have legal standing. In terms of supporting ATRs, NRCan respondents indicated that while they have typically become involved near the end of the ATR process, they often identify problems. As a result, they are increasingly becoming involved in the consultation process before an ATR is accepted by INAC. NRCan receives no funding for those activities, despite the lengthy ATR process.

Through key informant interviews with representatives from LED and the Specific Claims Branch (SCB) of the Treaty and Aboriginal Governance Sector, the evaluation found that INAC officials in both of these branches sectors lack a common understanding of the implementation implications of specific claims settlements as they apply to ATRs.⁷⁸ Further, the two sectors approach prioritization of ATRs and claims involving land differently based on their obligations to First Nations. There was some concern on the part of LED that a lack of prioritization of claims based on economic potential impeded the achievement of outcomes. Representatives from Treaties and Aboriginal Government explained that based on processing requirements, all claims are dealt with as they arrive, without prioritization.

Both LED and SCB respondents mentioned that there may be several opportunities to improve communication and coordination between the two sectors, namely through a more systematic approach informing LED of the acceptance of land-related claims for negotiations and, including LED regional land managers in claims negotiations involving land earlier in the process.

⁷⁸ Guidelines in place for Specific Claims Branch (SCB) negotiators advise that claims settlement agreements should include provisions for financial implications of proposed ATRs in accordance with the ATR Policy. Representatives from the SCB claim that, for at least the past five years, all claims agreements have included these provisions. However, given the fact that ATR proposals do not necessarily follow immediately after claims settlements, LED may still be receiving proposals from a time before ATR implementation costs were covered in settlement agreements. INAC (Specific Claims Branch). (n.d.). *SCB Guidelines for Negotiators regarding Additions to Reserves Provisions in Specific Claims Settlement Agreements*.

No concerns regarding the relative roles and responsibilities of DoJ were raised.

4.2.2 Program Delivery

The evaluation found limitations in INAC's capacity to implement ATRs in a timely manner, primarily stemming from human resources pressures. In addition, many interviewees identified key supporting activities – the delivery of some of which are out of the direct control of INAC – that must be undertaken to implement ATRs. Completion of each of the following activities adds time to the ATR process and may be contingent on stakeholder capacity and cooperation: consultation with third parties; surveys; title searches, appraisals; environmental site assessments; negotiations; and transfers.

Internal delivery pressures

Limited human resources at INAC combined with workload pressures, are delaying ATR implementation, with land transfers taking many years as a result. A number of INAC key informants claimed that INAC land managers are ill-equipped to conduct the complicated transactions involved with ATRs. Reasons provided for this finding echo those discussed in the 2005 OAG TLE audit: Low job classifications and limited training to deal with complex files. Further, the program offers few professional development opportunities to equip lands managers with the necessary knowledge and skills to process ATR selections.⁷⁹

Evidence of some ATR program activities not delivered as planned

Key informants claimed that several specific activities related to ATRs were not implemented as planned. Environmental site assessments and land surveys – carried out to prepare land for transfer – have, in most regions, been constrained by either a shortage of resources or inflexible funding arrangements. Title searches, identification of encumbrances and transfer of title – activities carried out by DoJ – have faced similar challenges. A shortage of resources, difficulty in procuring DoJ agents at the fees that have been established for these activities and high DoJ workload have all contributed to delays in the ATR process. Again, these findings are aligned with the 2005 OAG TLE audit, which found that inadequate resources were being allocated to processing land selections.⁸⁰

Almost all INAC land managers reported difficulty in justifying non-TLE ATRs due to cost and backlog constraints. Other ATR categories outlined under the ATR policy, such as community additions, were rarely used. The implication of this on the performance of the program, namely First Nation accessibility to additional land, is discussed in greater detail below.⁸¹

⁷⁹ Auditor General of Canada. (2005, Nov.). *Chapter 7 – Indian and Northern Affairs Canada – Meeting Treaty Land Entitlement Obligations*.

⁸⁰ Ibid.

⁸¹ More detailed analysis below shows that 20 percent of ATRs were categorized as Community Additions over the evaluation period. During this time, no land was added under the New Reserves / Other category.

Support to ATR delivery partners / Extent to which INAC is meeting its legal and policy obligations for transfer of title⁸²

In order for an ATR to be successfully implemented, First Nations require cooperation from government departments, provinces, municipalities and other stakeholders. Orchestration of this complex set of activities and relationships depends in large part on INAC's support, but requires the understanding, collaboration and capacity of partners and stakeholders.

First Nations play a significant role and have many responsibilities in relation to the implementation of ATRs. They must become familiar with all the steps in the ATR process, a requirement that increases INAC regions' workload as the Department provides technical and advisory support to First Nations. Negotiation with third parties involved in the land transfer process and accommodation of their interests has experienced a number of challenges. These activities are the responsibility of the First Nation requesting the ATR; however, INAC is responsible for producing instruments involved in identifying third party interests. Delays in producing these instruments often delay the accommodation and transfer process. Discussion of this issue and its impact, not only on First Nations, but others with interests in reserve land, is developed in the following section on performance.

NRCan is another important partner in preparing land for addition to reserve through their guidance to First Nations to engage private professional surveyors. However, there is substantial evidence to suggest that the lack of long-term planning and INAC funding transfers to NRCan for surveys are problematic (refer to Table 5 below). Highly-skilled professionals are required to do this work, making it necessary for NRCan to be able to plan for the work requirements well ahead of time.

Potential ATR land requires environmental site assessments (ESA) – used to determine levels of site contamination – before a decision can be made to receive lands for reserve creation.⁸³ This is often a complex, time consuming and costly exercise. An important consideration is that ESAs are timed appropriately, as they often become stale-dated and require updating when the ATR process is not completed soon thereafter. INAC has recently mitigated this by increasing the stale date period from two years to five years.⁸⁴

Performance data and systems

While the 2009 Report of the Auditor General found that the Department had made satisfactory progress in implementing some of its 2005 recommendations, it indicated that the information system that the Department was using to track the overall time it takes to convert lands to reserve status could not demonstrate improvements in processing times over the last three years.⁸⁵ A new NATS is in the final stages of development, with a target completion of existing ATR data input for the fall of 2010. This new system will allow for improved tracking of the various types of ATRs by category, region and total number of hectares. An important addition to the tracking

⁸² Note that this is immediate outcome 2 is discussed to some extent in this section. Refer to the OAG TLE audits for more information.

⁸³ INAC (Land and Trust Services). (n.d.) *Land Management Manual*.

⁸⁴ Auditor General of Canada (2009, March). Chapter 4 – Treaty Land Entitlement Obligations – Indian and Northern Affairs Canada – Status Report.

⁸⁵ Ibid.

system will be the average time it takes to process ATRs.⁸⁶ As part of the implementation of NATS, INAC-HQ is conducting consultations with the regions this coming year, which will include how to better coordinate data collection across regions and eliminate duplication in reporting.

4.3 Performance

4.3.1 Results and Outcomes⁸⁷

Immediate outcome 1: Extent to which provinces and municipal governments and other stakeholders and parties have been engaged in the land transfer process

In addition to the central role that First Nations and INAC play in the ATR process, successfully adding land to a reserve requires the involvement and agreement of numerous stakeholders, including provinces, municipalities, other First Nations with overlapping claims and third parties that hold legal interests in the potential reserve land. This section expands on some of the delivery issues that impede successful engagement, negotiation and accommodation of these groups and reviews possible solutions.

Problems with and barriers to engagement and accommodation

Past audits and evaluations of the ATR policy and process have noted deficiencies in the design of the ATR policy and its implementation limiting the ability to successfully engage third parties.

The 1996 evaluation of the ATR policy found that its implementation did not adequately address resolution of third party interests, including access to sub-surface rights and compatibility with local municipal by-laws. Guidance provided to First Nations and municipal stakeholders was found to be less than adequate with no direction on how First Nations should handle municipal relationships. The same report recommended that the program ensure that municipalities and other affected parties are aware of the ATR policy's implications.⁸⁸

Findings from the 2005 OAG study on TLEs echoed those from the 1996 evaluation. This report found that resolving third party interests contributes to long delays. While the Department has little control over these negotiations, this report and the 2009 OAG follow-up found that guidance and support from INAC is rarely provided to First Nations to resolve third party issues. For instance, there is no strategy to guide facilitation between First Nations and third parties.⁸⁹ The Saskatchewan case study on stakeholder cooperation in one ATR and many of the key informants from a variety of groups confirmed this finding, claiming that First Nations lack the capacity and resources to deal with consultation in a timely and informed manner. In addition, First Nations may not always understand INAC's duty to consult with other Aboriginal groups in the case of overlapping claims to land, or fundamentally understand the ATR process.

⁸⁶ INAC (LED Sector). (2010, Feb.) *Performance Measurement Strategy for Additions to Reserve (ATR)*.

⁸⁷ Note that findings are organized on numbering found in the logic model

⁸⁸ Goss Gilroy Inc. (1996, June 6). *Evaluation of the Additions to Reserve Policy*.

⁸⁹ Auditor General of Canada. (2005, November). *Chapter 7 – Indian and Northern Affairs Canada – Meeting Treaty Land Entitlement Obligations*; Auditor General of Canada (2009, March). *Chapter 4 – Treaty Land Entitlement Obligations – Indian and Northern Affairs Canada – Status Report*.

Involvement of municipalities

The evaluation found evidence that INAC/First Nation relationships with municipalities involved in the ATR process may become strained due to a lack of information and understanding and, at times, conflicting interests. The document and literature review revealed common concerns and issues of municipalities in relation to ATRs that must be considered when entering into an ATR. Many key informants mentioned these issues as well:

- potential tax revenue loss and the possibility of providing municipal services to a First Nation community without adequate compensation;
- by-law compatibility, compliance and enforceability;
- apparent lack of dispute resolution processes;
- environmental standards/land use planning;
- access to reserve lands;
- resolution of municipal interests such as roads;
- uncertainty of ATR process including unclear consultation requirements;
- negotiating service agreements; and
- unclear jurisdictional matters.⁹⁰

The ATR policy urges consultation with municipalities and requires First Nation-municipal negotiation in areas, such as joint land use planning/bylaw harmonization, tax considerations, service provision and future dispute resolution.⁹¹

Engagement and accommodation of other third parties

Evidence from both the TLE case study and key informant interviews shows that there is a general disinterest by third parties to engage in negotiations unless First Nations offer significant economic incentives or favourable lease terms, such as an increase in lease tenure. Once third parties are engaged, INAC policies present a range of requirements, including cost, rental, limited term, environmental remediation, or decommissioning that make the process unduly complicated. Evidence suggests that the process could be simplified if a standard for transactions was developed.

As well, evidence indicates that there are often problems translating property interests under well understood provincial law into the federal scheme (e.g., under the *Federal Real Property and Federal Immovables Act* or the *Indian Act*). There is a general distrust of regime change from

⁹⁰ Federation of Canadian Municipalities. (n.d.). *Land Management Project: Building Capacity through Communication: Municipal-Aboriginal Partnerships in Land Management: Establishing Municipal-Aboriginal Relationships*. Retrieved August 12, 2010 from, <http://www.fcm.ca//CMFiles/establishing1OAG-412008-9438.pdf>; Lower Mainland Treaty Advisory Committee. (2010, July). *LMTAC Discussion Paper: Local Government Issues and Interests on the Federal Additions-to-Reserve Process*; AFN/INAC Joint Initiative for Policy Development. (2001). *The Voice of First Nations: Planning for Change*. Ottawa: Assembly of First Nations; Goss Gilroy Inc. (1996, June 6). *Evaluation of the Additions to Reserve Policy*. Retrieved August 7, 2010 from, <http://dsp-psd.communication.gc.ca/Collection/R3-24-1996E.pdf>; Fiscal Realities Economists. (2000, Sept. 28). *Comparing Additions to Reserves to municipal boundary expansion – A review.*; Government of Ontario. (2009). *Municipal-Aboriginal Partnerships in Land Management – Building Capacity through Communication*.

⁹¹ INAC. (n.d.) *Chapter 10 – Additions to Reserve. In Land Management Manual*.

provincial laws to federal jurisdiction, especially where such change would result in ministerial discretion.⁹²

Strategies to improve municipality and third party engagement

The literature and key informant interviews offer several solutions for dealing with impasses in consultation, negotiation and accommodation. Many of these findings were confirmed in the Saskatchewan TLE case study:

- increased intergovernmental coordination and meaningful engagement of local governments and other affected parties and organizations such as regional districts early in the ATR process, at the time of the ATR proposal;
- fee-for-service arrangements that are approximately equal to the tax revenue loss on the land;⁹³
- coordination in land use planning to prevent a patchwork of jurisdictions;⁹⁴
- educating third party partners and clearly defining roles that each party is responsible for;
- dispute resolution training and mechanisms; and
- a traditional talking circle as a first step to create a common understanding of the positions of both parties.

Progress being made

The TLE Case Study found that negotiations with stakeholders and third parties were more effective when there was special legislation to regulate this process.⁹⁵ There are some success stories of additions to reserves benefiting both First Nations and municipal stakeholders. A publication by the Western Economic Development Agency points out that strong municipal-First Nation relationships contributed to the establishment of nine urban reserves in Saskatchewan.⁹⁶ The Federation of Canadian Municipalities discusses several successful municipal-First Nation partnerships occurring through ATRs that resulted in positive economic development outcomes for both communities.⁹⁷

⁹² For example, utility companies with experience on reserves have a good understanding of the replacement rights they will obtain; however, others need to be persuaded that their interests will be protected, under federal law. As well, provincial mining law is well understood, but the *Indian Mining Regulations* are outdated and unfamiliar. Where there are pre-existing mortgages, transfer is essentially not possible.

⁹³ Federation of Canadian Municipalities. (n.d.) *Land Management Project: Building Capacity through Communication: Municipal-Aboriginal Partnerships in Land Management: Establishing Municipal-Aboriginal Relationships*. Fiscal Realities Economists. (2000, Sept. 28). *Comparing Additions to Reserves to municipal boundary expansion – A review*.

⁹⁴ Lower Mainland Treaty Advisory Committee. (2010, July). *LMTAC Discussion Paper: Local Government Issues and Interests on the Federal Additions-to-Reserve Process*.

⁹⁵ For instance, the Saskatchewan TLE Framework Agreement contains several considerations that give parties involved a common understanding, thereby helping to build relationships and trust. Under this agreement, Saskatchewan has a duty to proceed on a “best effort” basis. As a result, Saskatchewan has a duty to consult and Saskatchewan Ministries have a duty to respond within 90 days.

⁹⁶ Western Economic Diversification Canada, Saskatchewan Region. (n.d.) *Urban Reserves in Saskatchewan*.

⁹⁷ Federation of Canadian Municipalities. (n.d.) *Land Management Project, Book 3: Building Capacity through Communication: Municipal-Aboriginal Partnerships in Land Management: Additions to Reserve Policy*. Retrieved August 9, 2010 from, <http://www.fcm.ca/CMFiles/additions1OYZ-412008-7538.pdf>

The 2009 OAG report found that INAC was devoting greater effort to informing and educating third parties through learning sessions.⁹⁸ In addition, key informants mentioned that NALMA is creating a tool-kit for First Nations clarifying the roles and responsibilities of First Nations and the Department in relation to ATRs. The toolkit will assist First Nations in taking a “diligent buyer approach” to land acquisition, all of which is expected to significantly accelerate ATR processing times.

To address First Nation capacity development, INAC and NALMA have collaborated to create a tool-kit for Phase I of the ATR process clarifying the roles and responsibilities of First Nations and the Department in relation to ATRs. The toolkit will assist First Nations in taking a “diligent buyer approach” to land acquisition, all of which is expected to significantly accelerate ATR processing times. NALMA took the lead in arranging two focus groups (East and West) and invited First Nations, INAC regional staff and third party participants to map out the process and add best practices. NALMA plans to print and distribute this to all First Nations across Canada this fiscal year. As well, the organization plans to use the ATR toolkit to train various stakeholders, depending on the availability of funds from INAC.

Immediate outcome 3; intermediate outcome 4: Extent to which reserves are being created and / or expanded to meet First Nation community interests and needs

Indian reserve land in Canada totalled 3,221,212.70 hectares in 2005. During the five-year period under evaluation, reserve land grew by 294,281.483 hectares, or 9.14 percent⁹⁹ Although there has been marked progress in adding land to reserve, only 112 First Nations (less than 20 percent of the total First Nations in Canada) have accessed additional lands.¹⁰⁰ Further, the program focuses on meeting treaty obligations; rarely is land added under alternative ATR policy categories.

Table 2 below sets out the number of ATRs by category over the period of the evaluation. During this time, most of the expansion, in terms of total hectares, occurred in Manitoba with just over 48 percent of the total hectares added to reserves in Canada.¹⁰¹ Several other regions experienced a significant increase in hectares, namely Saskatchewan with 21 percent of the five-year national total, Ontario (12 percent), Alberta (nine percent) and Northwest Territories (8.6 percent). While all regions experienced some increase, British Columbia and Quebec stand out as two regions with little ATR activity.¹⁰²

⁹⁸ Auditor General of Canada (2009, March). *Chapter 4 – Treaty Land Entitlement Obligations – Indian and Northern Affairs Canada – Status Report*.

⁹⁹ INAC Surveys and Imaging Unit (2010, July 29). *Email Correspondence*. This figure refers to May 31, 2005. Data from April 1, 2005 was not available.

¹⁰⁰ Additions to Reserve Program. (2010, Aug 2). *Email Correspondence*. This figure is based on the period from April 1, 2005 to June 30, 2010.

¹⁰¹ The focus of ATR efforts on this province was expected due to the 2006 ministerial commitment to fulfil treaty obligations through an increase in the Manitoba reserve base by 150,000 acres per year for four years for a total of 600,000 acres by August 2010, a target that key informants claimed was not achieved due to increasingly complex and time-consuming land selections. INAC. (2007). *Status Report on TLE Obligations in Manitoba*. Retrieved August 3, 2010 from, <http://www.ainc-inac.gc.ca/ai/mr/nr/m-a2007/2-2925-rp-eng.asp>

¹⁰² Note that in some cases, there have been multiple ATRs for a single First Nation.

Showing 80 percent of the total ATRs classified as legal obligations, this table confirms key informant claims that this ATR policy category is the most used. The majority of this figure (80.3 percent) was added under TLE legislation in Saskatchewan and Manitoba. This strongly suggests that the focus of the Justice at Last initiative on resolving specific claims has put pressure on the ATR program to prioritize ATRs classified as legal obligations. This has resulted in a discrepancy between provinces. For instance, due to historical reasons, the Prairie provinces are subject to a far greater number of TLEs than British Columbia, a region where few historical treaties were signed.

Of the 20 percent of ATRs that were added under the Community Additions category, most were located in Quebec, British Columbia, Atlantic Canada and Alberta. The New Reserves/Other policy category was not used over the evaluation period. That 95 percent of ATRs occurred in rural areas is in line with the common key informant contention that it is easier to negotiate rural land as urban land involves more stakeholders and presents greater economic implications for these stakeholders. However, it should be noted that some key informants claim that securing rural ATRs involving mineral access is difficult, if not impossible in some provinces. These figures should be interpreted with caution as many INAC officials mentioned that there is a lack of consistency in the definition of rural and urban ATRs

Table 2: Additions to Reserves by Policy Category and Urban/Rural by Region, from April 1, 2005 to June 30, 2010

Region	Policy Category			Total ATRs*	Hectares	Urban/Rural**	
	Legal Obligations	Community Addition	New Reserve Other Policy			Urban**	Rural**
Atlantic	0 (0% of provincial total)	17 (100%)	0 (0%)	17 (5% of national total)	2,464.324 (1% of national total)	2 (12% of prov. Total)	15 (88%)
Quebec	0 (0%)	5 (100%)	0 (0%)	5 (2%)	247,748 (0.08%)	4 (80%)	1 (20%)
Ontario	4 (44%)	5 (56%)	0 (0%)	9 (3%)	35,138.240 (12%)	0 (0%)	9 (100%)
Manitoba	63 (98%)	1 (2%)	0 (0%)	64 (19%)	141,966.100 (48%)	2 (3%)	62 (97%)
Saskatchewan	192 (94%)	12 (6%)	0 (0%)	204 (61%)	61,665.330 (21%)	7 (34%)	197 (97%)
Alberta	7 (54%)	6 (46%)	0 (0%)	13 (4%)	26,496.750 (9%)	0 (0%)	13 (100%)
British Columbia	0 (0%)	20 (100%)	0 (0%)	20 (6%)	977.361 (0.3%)	0 (0%)	20 (100%)
Northwest Territories	1 (100%)	0 (0%)	0 (0%)	1 (3%)	25,272.950 (9%)	1 (100%)	0 (0%)
Yukon	0 (0%)	1 (100%)	0 (0%)	1 (3%)	52.690 (0.02%)	0 (0%)	1 (100%)
Total	267 (80%)	67 (20%)	0 (0%)	334 (100%)	294,281.483 (100%)	16 (5%)	318 (95%)

Source: INAC LED/ATR "List of Approved OIC and MO Submissions" July 28, 2010

*An ATR is based on OIC/MO Order Number and may include more than one reserve addition or creation.

**Urban/Rural definition differs from each Province and Territory

Access to land that meets the interests and needs of First Nations communities

Without data on the number of ATR proposals for each category and information concerning the reasons for which proposals were not accepted, the evaluation was not able to determine whether land selected is meeting First Nation communities' interests and needs.¹⁰³ Moving forward, the newly developed ATR performance measurement strategy will investigate this intermediate outcome through an assessment of ATR/TLE proposals.¹⁰⁴

Long-term outcome 9: Extent to which the land base and land use on reserve contribute to the improved quality of life and self-reliance for First Nations

Most respondents claimed that there is no direct evidence to suggest that ATRs, namely non-TLE ATRs, contribute to sustainable development, economic development or First Nation self-reliance. Respondents revealed that very few First Nations have been able to acquire land of significant value (e.g. in urban centres) to enhance their community's economic well-being and overall self-reliance. Processing times of ATRs were commonly noted as the main obstacle to economic development. Respondents indicated that nothing happens at the speed of business

¹⁰³ This is identified as an intermediate ATR outcome in the logic model.

¹⁰⁴ INAC (LED Sector). (2010, Feb.) *Performance Measurement Strategy for Additions to Reserve (ATR)*.

and, as was mentioned in the Delivery section above, that economic development outcomes could be improved through better and more timely communication and greater awareness both between First Nations seeking ATRs and between the economic development and lands programs. Finally, a number of respondents commented that access to valuable sub-surface rights would increase economic development opportunities, an issue determined through provincial jurisdiction.¹⁰⁵

The Saskatchewan case study and the literature that speaks to this issue reveal that ATRs have the potential to deliver positive socio-economic benefits to Aboriginal communities if they target the *right land* for the *right reasons*. Resource development made possible through the ATR has propelled the community examined in the case study to the wealthiest First Nation in the province. Urban ATRs provide First Nation communities with the opportunity to engage in the economy and to become increasingly self-reliant.¹⁰⁶ With additional land comes the opportunity to develop Aboriginal businesses, creating self-generating revenue that reduces dependence on federal government support. Economic development resulting from ATRs has been shown to increase employment opportunities for on- and off-reserve residents. All of this leads to an increased standard of living.¹⁰⁷ Strategic location of reserves in areas that allow access to markets is crucial to meeting economic development outcomes.¹⁰⁸

4.3.2 Unintended Outcomes

The evaluation found some evidence of unintended outcomes, both positive and negative.

The literature suggests that there may, in fact, be positive unintended outcomes for municipalities and neighbouring communities when an ATR is established. Successful urban reserves in Saskatchewan have provided economic benefits to surrounding populations through an increase in real estate values, development spin-offs and employment.¹⁰⁹ Likewise, there is evidence that ATRs promote community and capacity building not only within a First Nation, but also among surrounding municipalities. Several benefits include stronger infrastructure and reduced service provision costs.¹¹⁰

Conversely, some respondents believe that the long and tedious ATR process can discourage communities applying to add land to reserve and acts as a disincentive to engaging in the process. Some respondents reported that pressure to move parcels of land has sometimes led to ignoring some aspects of the process, which sets a poor precedent for future ATRs.

¹⁰⁵ As well, Quebec has a formal policy that states that it cannot undertake ATRs for economic reasons beyond those required as legal obligations.

¹⁰⁶ For instance, many TLE First Nations in Saskatchewan are using TLE settlement funds to purchase land in urban areas for economic development purposes. Western Economic Diversification Canada, Saskatchewan Region. (n.d.) *Urban Reserves in Saskatchewan*.

¹⁰⁷ Western Economic Diversification Canada, Saskatchewan Region. (n.d.) *Urban Reserves in Saskatchewan*.

¹⁰⁸ Fiscal Realities Economists. (2000, Sept. 28). Comparing Additions to Reserves to municipal boundary expansion – A review.

¹⁰⁹ Western Economic Diversification Canada, Saskatchewan Region. (n.d.) *Urban Reserves in Saskatchewan*.

¹¹⁰ Federation of Canadian Municipalities. (n.d.) Land Management Project, Book 3: Building Capacity through Communication: Municipal-Aboriginal Partnerships in Land Management: Additions to Reserve Policy.

4.3.3 Best Practices and Lessons Learned

The following best practices and lessons learned were drawn from the Saskatchewan TLE case study, an example in which many partners and stakeholders worked together to quickly move a high opportunity ATR forward.

Best practices

Capacity building. With First Nation personnel turnover, knowledge and capacity gaps are left in the process for moving an ATR forward. As a best practice, in 2009, the Saskatchewan region held an ATR-themed conference for Aboriginal Land Technicians. In years to come, the conference will include ATR-themed workshops. A second best practice identified in another case study is a model of capacity development and support in the ATR process offered through tribal council.

Dedication and innovation. The Saskatchewan TLE case study demonstrated that on many occasions, federal, provincial and municipal officials went above and beyond the requirements of their jobs to help move the ATR forward. Some examples include helping the First Nation draft letters, implementing concurrent processes instead of consecutive processes where possible and finding innovative solutions to problems.

Lessons Learned

Active involvement of the province. The evaluation found through the TLE case study in Saskatchewan that the provincial Ministry of First Nations and Métis Relations (FNMR) was key to liaising with and coordinating efforts among provincial departments. In addition, FNMR played an important role in identifying legal interests. The Ministry reviews lands under selection and provides First Nations with information concerning ownership of the land, leases, mineral rights, roadway issues, utilities permits and easements, and archaeological heritage.

Preliminary Designation Vote. When an ATR is connected to a commercial development, one of the biggest issues, in terms of third party interests, is the need for a designation vote by First Nation membership. Often quorum is not reached on the first vote and a second vote is required, adding greatly to an already expensive and time-consuming process. A designation vote before lands are added to reserve, for ATRs that involve third party leases, would avoid complications and provide more ease and harmony between First Nations and their business partners.

Process Coordination. While the end result of the Saskatchewan TLE case study was positive, respondents made note of the lack of coordination in the process. For instance, certain parties did not have the information they needed about what the process entailed. One suggestion for an improvement in this area could be a work plan that clearly identifies the process, the parties involved, the responsibilities of each participant and predictable timelines.

4.3.4 Efficiency

Most key informants claimed that the ATR policy and process is not efficient as it is currently structured. Without data on the processing time involved in each phase of the ATR process, the evaluation was not able to conclude beyond information provided through the key informant interviews the extent to which the process is inefficient. Informants claimed that the full process has taken anywhere between two and seven years. The 2005 Auditor General's report found a

range of five to seven years.¹¹¹ Limited information from NATS places the total time from the initiating Band Council Resolution received at the regional office to the approved date of the Order-in-Council at 2.91 years.¹¹²

The evaluation did, however, find key formant evidence of legislative and policy improvements in the Alberta, Saskatchewan and Manitoba have increased efficiency.¹¹³ For instance, some respondents claimed that vesting the Minister of INAC, rather than the Governor General in Council with authority to approve ATR applications has significantly improved Phase III processing times. This contention is supported through available performance information collected from 2008 to the present through NATS. A comparison of these two approval methods reveals that ministerial approval is 56 percent (68 calendar days) faster than obtaining an Order-in-Council. Data indicating efficiency trends over time were not available, though the Auditor General recently noted that since 2006, Phase III times in Saskatchewan had almost tripled from 76 to 210 days.¹¹⁴ As mentioned earlier, improvements in the ATR policy and process will be explored jointly with the AFN and NALMA. If these changes incorporate the process and approval improvements set out in *Prairie Settlement Acts*, greater efficiency in all categories of ATRs across regions may be achieved.

There is evidence that service standards play a role in increasing efficiency. For instance, a report of the United States Government Accountability Office suggests that a lack of specific time frames for deciding on land trust applications and a clear definition of what is acceptable increased the processing time of applications and caused significant inconsistency. The report suggests that setting clear service standards and consistently collecting data has the benefit of providing greater transparency to stakeholders and increasing processing times.¹¹⁵ The ATR program has had service standards in place since April 2008 for Phase III of the process (approval by the Minister of INAC or Governor General in Council). These include 75 calendar days for Saskatchewan TLE First Nations and 100 business days for all other ATRs. These are now being tracked through the NATS.

4.3.5 Cost-Effectiveness

The evaluation found some evidence from the key informant interviews that fee-simple ownership of land may be a viable alternative to ATRs to achieve economic development, but only at the discretion of the First Nation, i.e. it is not a true alternative to INAC programming. Fee simple land acquisition is far less complicated and may offer a more flexible alternative. This particularly holds true for urban reserves where First Nations are presented with high transaction costs, many of which are associated with competing municipal and private interests in the land. It is, however, important to note that fee-simple land remains under a provincial land

¹¹¹ Auditor General of Canada. (2005, Nov.) *Chapter 7 – INAC: Meeting Treaty Entitlement Obligations*.

¹¹² Source: National ATR Tracking System, data from 2008.

¹¹³ For instance, *Manitoba Claims Settlements Implementation Act* (2000) and the *Claims Settlements Implementation (Alberta and Saskatchewan) Act* (2002) vest the Minister of INAC, instead of the Governor-in-Council, with authority to approve ATRs

¹¹⁴ Auditor General of Canada (2009, March). Chapter 4 – *Treaty Land Entitlement Obligations – Indian and Northern Affairs Canada – Status Report*.

¹¹⁵ United States Government Accountability Office. (2006, July). *Indian Issues: BIA's Efforts to Impose Time Frames and Collect Better Data Should Improve the Processing of Land in Trust Applications*. Retrieved September 2, 2010 from, <http://www.gao.gov/new.items/d06781.pdf>

regime, which prevents First Nation governance of that land. This means that fee-simple acquisition of land is not an alternative for treaty land entitlement. It does not offer the tax benefits associated with ATRs and in fact, imposes further municipal taxes on the First Nation. The evaluation did not attempt to conduct a detailed analysis of the costs and benefits of tax implications of ATR and fee-simple land and transaction costs involved in acquiring reserve land.

5. Evaluation Findings: Land Management Programs under the Indian Act

5.1 Relevance

5.1.1 Meeting Land Management Needs

Land Management and Capacity-building Programs

Interviewees, both from INAC and Aboriginal organizations felt that capacity-building programs such as RLEMP are integral to achieving greater self-reliance and ultimately, the ability to self-govern. As the volume of activity on reserve lands increases,¹¹⁶ First Nations will require the resources, flexibility and expertise to respond to these demands and take advantage of economic opportunities.¹¹⁷ There is a need for First Nations to participate more fully in land management practices on reserve, evidenced in part by the high level of interest shown by First Nations in the capacity-development/devolution programs (RLEMP, RLAP and 53/60). There is a need for greater First Nation control over and involvement in land management, be it exclusive decision-making authority or co-management arrangements.¹¹⁸

INAC Land Administration Activities

There is a need for reliable land surveys, legally-enforceable land rights and reliable title-based registry systems to secure land tenure and orderly land development.¹¹⁹ Internal surveys and registry systems support housing development, community planning and sustainable land use and protection of culturally important sites. They provide clarity of title through defined tenure, which provides certainty to developers, private-sector investors and lending institutions. A focus group session related to the surveys case study undertaken for this evaluation found that poor survey fabric impedes economic development. A second case study found that surveys and proper registration of internal allotments is critical in providing social order by preventing disputes between neighbours. These systems provide a permanent record and identify encroachments on reserve land, thereby, limiting liability to the Crown. In short, they provide the foundation for a property rights infrastructure based on identification, documentation, registration and protection of land interests.¹²⁰ According to one key informant, surveys and registration of interests are the underpinnings of modern land management.

¹¹⁶ Indian and Northern Affairs Canada. (2010, March). *Reserve Land and Environment Management Program Manual DRAFT*.

¹¹⁷ Indian and Northern Affairs Canada. (2010, March). *Reserve Land and Environment Management Program Manual DRAFT*; Goss Gilroy Inc. (2004, March 31). *RMAF for the Reserve Lands and Environment Management Program (RLEMP)*.

¹¹⁸ Indian and Northern Affairs Canada. (2009, June 18). *Implementation Evaluation of the Reserve Land and Environment Management Program*. Retrieved June 22, 2010 from, <http://www.ainc-inac.gc.ca/ai/arp/aev/pubs/ev/rlemp/rlemp-eng.asp>; Royal Commission on Aboriginal Peoples. (1996).

¹¹⁹ Hickling, Arthurs & Low. (2001, June 21). *Social and Economic Review of the Impact of Land Survey and Registration Systems on Canada Lands*. Retrieved September 1, 2010 from, <http://www.acls-aatc.ca/files/english/aboriginal/HAL%20Study.PDF>

¹²⁰ Ibid.

5.1.2 Consistency with Government Priorities

Acknowledging the fact that there was limited articulation of outcomes linking the RLEMP and INAC land administration programs to broader goals of government during the evaluation period, evidence from the document review suggests that by design, the capacity-building and devolution programs are aligned with federal government priorities. Current federal government priorities include the provision of training and professional development for First Nations people in order to build capacity and economic self-reliance¹²¹ and ensuring that Aboriginal Canadians fully share in economic opportunities.¹²² The Government of Canada has sought to ensure the sustainable use of reserve lands and improve the value of Aboriginal assets.¹²³ To this end, RLEMP, RLAP and 53/60 allow First Nations to operate under an improved management environment, creating more favourable conditions for economic development; and, support First Nations in becoming more capable of managing their own lands, which in turn better positions them to capitalize on economic opportunities.

5.1.3 Alignment with Departmental Objectives and Initiatives

Evidence suggests that the RLEMP, RLAP and 53/60 programs and land management in general are aligned with INAC's priorities. Departmental priorities flow from those federal government priorities mentioned above and include training and professional development to build capacity in land management.¹²⁴ The Department is seeking to transfer decision-making responsibilities to First Nations so that communities might enjoy greater control over activities on reserve.¹²⁵ INAC's objective is to increase the number of First Nations moving towards FNLM or

¹²¹ Government of Canada. (2007, Oct. 16). *Speech from the Throne*. Retrieved August 17, 2010 from, <http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=archive-title-titre-eng.htm>; INAC. (2009, June 18). *Implementation Evaluation of the Reserve Land and Environment Management Program*; Office of the Auditor General of Canada. (1993, Nov.) *Chapter 11 Canadian Aboriginal Economic Development Strategy*. Retrieved August 5, 2010 from, http://www.oag-bvg.gc.ca/internet/English/parl_oag_199311_e_1157.html

¹²² Government of Canada. (2008, Nov. 19) *Speech from the Throne*.; Government of Canada. (2006, Apr. 4). *Speech from the Throne*. Retrieved August 16, 2010 from, <http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=archive-title-titre-eng.htm>; Government of Canada. (2007). *Speech from the Throne*; Government of Canada. (2010). *Speech from the Throne*. Retrieved August 10, 2010 from, <http://www.speech.gc.ca/eng/index.asp>; Indian and Northern Affairs Canada and Canadian Polar Commission. (2009). *Report on Plans and Priorities 2009-10*. Retrieved August 14, 2010 from, <http://www.tbs-sct.gc.ca/rpp/2009-2010/inst/ian/ian01-eng.asp>. INAC (LED Sector). *Performance Measurement Strategy: The New Federal Framework for Aboriginal Economic Development*.

¹²³ Indian and Northern Affairs Canada. (2010, May). *Performance Measurement Strategy for the Reserve Land and Environment Management Program*; Office of the Auditor General of Canada. (1993, Nov.) *Chapter 11 Canadian Aboriginal Economic Development Strategy*; Government of Canada. (2005, Nov). *Aboriginal Horizontal Framework*.; Indian and Northern Affairs Canada. (2010, May). *Performance Measurement Strategy for the Reserve Land and Environment Management Program*.

¹²⁴ Indian and Northern Affairs Canada and Canadian Polar Mission. (2009). *Report on Plans and Priorities 2009-2010*. INAC (LED Sector). (2010, May). *Performance Measurement Strategy for the Reserve Land and Environment Management Program*; INAC. (2000). *Gathering Strength: Canada's Aboriginal Action Plan, A Progress Report*. Retrieved July 28, 2010, from <http://dsp-psd.pwgsc.gc.ca/Collection/R32-192-2000E.pdf>; Indian and Northern Affairs Canada and Canadian Polar Mission (2009). *2008-2009 Departmental Performance Report*.

¹²⁵ INAC (LED Sector). (2010, March). *Reserve Land and Environment Management Program Manual DRAFT*; INAC (LTS Sector). (n.d.) *Chapter 11 RLAP and 53/60 Land Management Programs. In Land Management Manual*.

self-government.¹²⁶ Strong land management practices are one way to build institutional capacity, foster good government and improve accountability, according to INAC's 2008-09 Departmental Performance Report.¹²⁷ Such conditions are necessary to provide the stability and institutional certainty that attracts business and the partnerships necessary to pursue economic opportunities, fulfilling a key INAC priority of economic development.¹²⁸

The full roll-out of the RLEMP under the Aboriginal Economic Development Framework appears to provide better alignment to support these priorities through improved funding, a professional development training program and an expansion of the scope of land management responsibilities for First Nations.¹²⁹ There is also evidence that land and resource capacity-building initiatives are aligned with the Department's priorities to strengthen First Nations' capacity in economic development. In 2009-2010, the Department merged the Lands and Trusts Services Sector with the Economic Development Sector to facilitate a stronger linkage between land and economic opportunities.

However, some key informants – both INAC officials and First Nation land managers – were careful to point out that fundamentally, the *Indian Act* and by virtue programs developed under its structure, are not designed to meet outcomes and priorities associated with modern land management. These respondents suggested that the *Indian Act* creates a continued dependency of First Nations on INAC that could perpetually inhibit progress towards outcomes. The inherent restrictions and limitations of the *Indian Act* may stand in the way of government priorities to foster economic self-reliance on reserve.

5.1.4 Legitimate and Necessary Role of INAC in Land Management Activities

While key informants did not speak to the issue of INAC's role in land management on reserve, a review of documents and legislation suggests that there is a legitimate, appropriate and necessary role for INAC in the activities under evaluation. INAC's role is mandated by the constitutional and legislative responsibilities of the Government of Canada to First Nations.¹³⁰ Section 91 (24) of the *Constitution Act, 1867* gives the federal government exclusive legislative jurisdiction over "Indians and lands reserved for Indians."¹³¹ The *Indian Act* contains obligations

¹²⁶ INAC. (2010, May). *Performance Measurement Strategy for the Reserve Land and Environment Management Program*; INAC. (2010, March). *Reserve Land and Environment Management Program Manual DRAFT*.

¹²⁷ Indian and Northern Affairs Canada and Canadian Polar Mission (2009). *2008-2009 Departmental Performance Report*.

¹²⁸ INAC (2010, May). *Performance Measurement Strategy for the Reserve Land and Environment Management Program*; Royal Commission on Aboriginal Peoples. (1996); KPMG. (2007, Nov.16). *First Nations Land Management Summative Evaluation*.

¹²⁹ INAC (LED Sector). (2010, March). *Reserve Land and Environment Program Manual*.

¹³⁰ Office of the Auditor General of Canada. (2003, Nov.) *Chapter 9 – Economic Development of First Nations Communities: Institutional Agreements*. Retrieved August 10, 2010 from, http://www.oag-bvg.gc.ca/internet/English/parl_oag_200311_09_e_12932.html; PWC Consulting and the National Aboriginal Land Managers Association. (2002, Dec). *Evaluation of Regional Lands Administration Program (RLAP) and Delegated Lands Management Program (53/60)*; Goss Gilroy Inc. Management Consultants. (2004, March 31). *RMAF for the Reserve Lands and Environment Management Program (RLEMP)*.

¹³¹ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. II, No. 5.

in regard to land administration which have been considered by the Supreme Court of Canada.¹³² Pursuant to Section 2 of the *Indian Act*, reserves are set aside by the Crown in Right of Canada for use and benefit of a First Nation.

The *Indian Act* and *Canada Lands Surveys Act* mandate certain responsibilities concerning the registration of interests and surveys on Indian lands. Section 19 of the *Indian Act*, states that the Minister of INAC may authorize surveys of reserve lands and the preparation of plans and reports dealing with these surveys. The *Canada Lands Surveys Act* stipulates that NRCan is responsible for regulating surveys on Indian reserves at the request of the Minister of INAC.¹³³

Section 51(3) of the *Indian Act* vests the Minister with authority to “manage, lease or carry out any other transaction affecting designated lands.” Section 55(1) of the *Indian Act* sets out the requirement for a departmental registry of containing transaction particulars for surrendered and designated reserve lands.

The evidence suggests that these programs are not duplicated by any other. Educational institutions do not offer training in *Indian Act* land management.^{134 135}

5.2 Design and Delivery

5.2.1 Program Design

Land Management and Capacity-building and Devolution Programs

RLEMP was designed to replace the transaction-based and restrictive RLAP and 53/60 programs, which were found not to have met the needs of either INAC or First Nations. Unlike these earlier programs, RLEMP is intended to be a capacity-building program focused on integrated land and environmental management. It represents a further shift from the Department’s traditional operational role to more of an advisory and monitoring role.¹³⁶ The program’s focus on modern management practices includes a broad scope of land management responsibilities, a revised funding formula and an improved training program.

Design issues and First Nations needs

The evidence suggests, however, that some aspects of the program are not designed to address identified needs. Training is not sufficient to meet all demands and lacks practical applicability.¹³⁷ Many respondents suggested that training could be more comprehensive (e.g. environmental training, hands-on experience, dispute resolution, governance, interpersonal skills, accounting, economic development planning, refresher courses) and could include more

¹³² Refer to: *Geurin v. The Queen*, [1985] 2 S.C.R. 335; *Blueberry River Indian Band v. Canada*, [1995] 4 S.C.R. 344; *Wewaykum Indian Band (a.k.a. Roberts & Dick) v. The Queen* (2002), 220 D.L.R. (4th)1; *Osoyoos Indian Band v. Town of Oliver* (2001), 206 D.L.R. (4th) 385.

¹³³ *Indian Act*, RSC. 1985, c. 1-5.; Canada Land Surveys Act. Cap L-2.1

¹³⁴ INAC (LED Sector). (n.d). *Lands Branch*.

¹³⁵ However, it should be noted that the Building Environmental Aboriginal Human Resources (BEAHR) Learning Institute offers Land Use Planning and environmental management training programs for Aboriginal people. The institute issues licences to both private and public organizations to deliver these programs across Canada.

¹³⁶ Goss Gilroy Inc. (2004, March). RMAF for the Reserve Lands and Environment Management Program

¹³⁷ INAC. (2009, June 18). Implementation Evaluation of the Reserve Land and Environment Management Program.

hands-on experience to gain necessary technical skills. One suggestion was made to introduce an internship component to RLEMP training.

Admittance criteria for the RLEMP are not addressing identified needs. Some respondents found admittance to be unnecessarily restrictive. For example, RLEMP training requires familiarity with land management practices, thus, precluding inexperienced applicants.¹³⁸ Furthermore, the program will only fund a single trainee from any given community.¹³⁹ INAC is not able to meet demand for entry into RLEMP and the program has been unable to increase accessibility,¹⁴⁰ which, according to some interviewees may be because INAC did not expect the high level of First Nation interest in the RLEMP. Entry into the RLEMP was limited to First Nation land managers already enrolled in the RLAP or 53/60 programs. It should be noted, however, that the program is currently looking to address some of these design deficiencies. For example, INAC is expanding access to First Nations not currently in a land management program, revising entry assessment criteria for the 2011-12 cohort and exploring the possibility of equivalency exams to potentially reduce the training timeframe.¹⁴¹

Program funding structure

Many respondents found the funding formula to be deficient in its design, by awarding funding based on transactions, where transactions are not necessarily an appropriate proxy for need. Similarly, funding eligibility is based on the number of active land transactions registered in the Indian Lands Registry System¹⁴² and thus, is retrospective.¹⁴³ Some respondents felt that multi-year, block-funding would be more appropriate for these programs and would help to eliminate delays associated with the annual funding allotments. However, some respondents positively remarked that that RLEMP's new incentive based funding program encourages community development plans.¹⁴⁴

Clarity of roles and responsibilities in RLEMP

Roles and responsibilities in these programs are unclear to many respondents. Evidently, no accountability framework is in place. It was suggested that the development of such a framework could help to clarify roles and responsibilities. Several respondents claimed that when delegation occurs without proper monitoring, confusion about fiduciary or other responsibilities may occur. Some respondents indicated that the implementation of Joint Management Agreements between INAC and RLEMP First Nations will help to establish clear roles and accountabilities.

Almost all respondents identified a successful partnership with NALMA as contributing to the effective delivery of programs and to certainty in First Nations roles and responsibilities with

¹³⁸ INAC (LED Sector). (n.d.). *Reserve Land and Environment Training Program Manual*.

¹³⁹ INAC (LED Sector). (n.d.). *Joint Management Agreement Template*.

¹⁴⁰ Auditor General of Canada. (2009, Nov.). *Chapter 6, Land Management and Environment*.

¹⁴¹ INAC (LED Sector). (2010, May). *Performance Measurement Strategy for the Reserve Land and Environment Management Program*. For instance, new criteria will be sensitive to the economic development potential of the First Nation.

¹⁴² Ibid.

¹⁴³ INAC (LTS Sector). (n.d.). Chapter 11 RLAP and 53/60 Land Management Programs. In *Land Management Manual*.

¹⁴⁴ Deficiencies in the RLEMP funding structure are discussed in greater detail in INAC's implementation evaluation of RLEMP.

respect to land management. Further, NALMA provides land management resources and reference materials to First Nations upon request and is developing a basic training module in land management to be delivered to band councils.

INAC Land Administration Activities

A key finding recurring throughout all groups of key informant interviewees was that land management on reserve is becoming increasingly complex due to land use planning and environmental standards and a heavy reliance on legal advice to manage, for instance, specialized projects and the monitoring and enforcement of commercial leases. Increased opportunities for professional development and advanced hands-on training of INAC staff were suggested to compensate for this complexity and to fill a gap left by a shortage of corporate knowledge. One additional idea related to training was to develop the same curriculum for INAC and First Nation land managers. It was felt that this would provide an appreciation of each other's roles, policy development requirements and work.

Legislative and regulatory gaps

The evaluation found evidence of legislative, regulatory and program-specific design flaws. Some key informants and the Auditor General's reports referenced significant gaps in the policy and procedures relating to Lands programming.¹⁴⁵ Respondents commonly agreed that policies and manuals may not be applicable to First Nations situations or to provincial regulatory regimes. Several key informants suggested that new legislation is required to replace the *Indian Act* land regulations with a modern land regime better-suited to meet current requirements. One significant legislative and regulatory design gap is the lack of on-reserve environmental regulations, an issue given extensive consideration in the 2009 OAG report on Land and Environment Management.¹⁴⁶ The *Indian Act* and its regulations do not provide adequate tools or mechanisms for environmental monitoring, compliance and enforcement activities on reserve.¹⁴⁷ However, several key informants suggested that the problem is not a regulatory gap problem but a lack of support for monitoring and compliance.

While some work has been completed on developing national standards and templates for land management and new legislation has been introduced, strong evidence indicates that the current policies related to land management require updating to meet increasingly complex issues, become better integrated with one another and to create consistency across regions. For instance, many respondents voiced the concern that there is a lack of defined processes, roles and responsibilities within INAC.

Finally, there were mixed responses on whether First Nation input is adequately integrated into program and policy design. According to INAC officials, several opportunities exist for First Nations or First Nation organizations to provide input into policy redevelopment. While the main point of contact is NALMA, RLEMP has provided the opportunity for individual First Nation land managers with direct knowledge of land administration issues to become involved. Others felt that the existing mechanisms in place do not adequately engage First Nations.

¹⁴⁵ Office of the Auditor General of Canada. (2003, Nov.). *Economic Development of First Nations Communities: Institutional Agreements*; Auditor General of Canada. (2009, Nov.) *Chapter 6, Land Management and Environment*.

¹⁴⁶ Auditor General of Canada. (2009, Nov.). *Chapter 6, Land Management and Environment*.

¹⁴⁷ Ibid.

Indian Lands Registry System

Many respondents noted that the design of the ILRS was flawed, namely because it is difficult to find information in the system, it is incomplete and less reliable than a title-based system, causing time delays, additional legal costs and in some cases, uneasiness with entering into an agreement whereby an investment may not be secure. Others noted that it is not in fact a registry at all, but rather a repository of information. The system lacks legislative and regulatory underpinnings associated with a Torrens system that assure legal validity of registered transactions thereby affirming certainty to title. Instead, land managers and others rely on policy direction from INAC HQ on what elements of land transactions to collect, maintain and input into the registry system. Several informants claimed that direction in this area is limited.

With that said, improvements have recently been made to the ILRS software. The upgrade enhances usability of the system and, according to program managers, will support a title-based registry should that be implemented in the future.

5.2.2 Program Delivery

RLEMP

Three key activities fall under the capacity-building programs: assessment of First Nations' land management capacity and execution of joint management agreements; provision of training to First Nation land managers and the provision of ongoing management support during and outside of 53/60/RLAP/RLEMP. Respondents expressed highlighted issues related to the delivery of these activities. Land management assessments were lengthy, a model for joint management agreements is still under development and, as discussed in relation to performance in what follows, there are limitations to INAC's ongoing support. INAC officials attributed these deficiencies to the pilot status of RLEMP.

The evaluation found that NALMA, the University of Saskatchewan and the Regional Aboriginal Land Associations have played a significant role in delivering the training for First Nation land managers through the Professional Land Management Certification Program and workshops.¹⁴⁸

Human resources capacity and pressures

There is considerable evidence to suggest that high INAC staff turnover has impacted some regions' ability to meet their management support obligations, both to RLEMP First Nations and others.¹⁴⁹ Retirees are being replaced at lower classification levels. Less qualified and knowledgeable staff are then responsible for increasingly complex land management issues, creating stressful work environments and leading to high rates of turnover. High turnover in First Nations lands staff is depleting expertise, which necessitates ongoing support from INAC's regional offices, placing further burden on regional land management officers.

Due to the lack of continuity in leadership and human resources and the uncertainty of financial resources, HQ is often unable to provide regions with clear and concrete program directions. A

¹⁴⁸ Refer to the INAC's implementation evaluation of RLEMP for more information.

¹⁴⁹ For instance, the arrival of a new land manager unfamiliar with a specific commercial lease can slow the process as he or she takes time to understand the project.

few respondents noted that long-term funding resources, communication strategies, toolkits and policies have yet to be finalized. The uncertainty surrounding these resources has impeded effective program delivery and frustrated regions and recipients.

Despite the many human resources challenges facing the Lands Branch, it appears that some progress is being made in internal capacity development. Officials at HQ have been working with NALMA to undertake a review of the current First Nations training program under RLEMP to assess it as a foundation for an internal INAC training program.

Tools, policies, processes and procedures

A lack of consistency in application of advice or tools at the HQ and regional levels are resulting in inconsistent delivery of policies and procedures. Many respondents noted inconsistencies in documentation from region to region and variance in First Nation compliance with the land processes and procedures, as set out in the Lands Management Manual. Evidence also points to a lack of clarity in roles and responsibilities relating to the lands functions, and poor communication at all levels within INAC. Monitoring systems to facilitate First Nation compliance with regulations under the *Indian Act* are absent. One promising model mentioned to address this gap, employed by the Aboriginal Habitat Stewardship Fund, was for Aboriginal organizations to monitor First Nations.

Performance measurement

There is considerable evidence that program outcomes have not been adequately defined and program monitoring is insufficient.¹⁵⁰ This has led to confusion and inconsistencies across regions, particularly in reporting requirements and monitoring practices. According to the 2010 Performance Measurement Strategy for RLEMP work plans and final activity reports are submitted to INAC regions.¹⁵¹ Evidence suggests, however, that performance measurement is largely anecdotal.¹⁵² The re-designed RLEMP has taken these weaknesses into account and will include a performance monitoring, measurement and reporting system as part of RLEMP implementation.¹⁵³ This system is expected to be in place by end of fiscal year 2010-11.

Other delivery factors, according to many respondents, include delays in release of funding to the regions, a slow survey process and sporadic and delayed funding in support of surveys. The last point is discussed below in relation to performance.

¹⁵⁰ INAC (Audit and Evaluation Sector). (2009). *Audit of Capacity Development [Draft]*; INAC (Audit and Evaluation Sector). (2009). *Implementation Evaluation of the Reserve Land and Environment Management Program*.

¹⁵¹ INAC (LED Sector). (2010, May). *Performance Measurement Strategy for the Reserve Land and Environment Management Program*.

¹⁵² INAC (Audit and Evaluation Sector). (2009). *Audit of Capacity Development [Draft]*; PWC Consulting and the National Aboriginal Land Managers Association. (2006, June 30). *Modernization of RLAP and 53/60 Land Management Programs*.

¹⁵³ INAC (LED Sector). (2010, May). *Performance Measurement Strategy for the Reserve Land and Environment Management Program*.

5.3 Performance

5.3.1 Results and Outcomes

Immediate outcome 4: Extent to which authority has been devolved to First Nations to manage their land, resources and environment as a result of the activities

At the moment, very few First Nations are operating under a fully delegated model of land management. On a global level, figures from Table 3 below reveal that eight percent of all First Nations in the RLEMP, RLAP and 53/60 programs hold devolved status and 27 percent are either operational or fully administering their land. This suggests that at the present time, the majority of First Nations involved in the programs do not have the capacity to fully manage their land. Moreover, many respondents noted that INAC regional workload is increasing and becoming more complex despite attempts to build capacity at the community level. Other respondents identified regional inconsistencies in the degree to which devolved authority has been successful.

The extent to which responsibilities have been delegated to the First Nations that are operational under RLEMP is unclear without the implementation of RLEMP joint management agreements between the Department and First Nations – a key source of information to answer this question.

Access and reach of the devolution/capacity-building programs

It should also be noted that RLEMP provides the opportunity for First Nations women to become involved in land management. Although the program did not collect gender-sensitive data during the period of evaluation, the performance measurement strategy for RLEMP claims that women have made up approximately 50 percent of the student body since the inception of the program.¹⁵⁴

Table 3 below shows the number of First Nations involved in the RLAP, RLEMP and 53/60 programs.¹⁵⁵ These numbers indicate that of the 74 First Nations involved in RLEMP, eleven are operational. Including the two First Nations operating under 53/60, this means that 2.3 percent of the total First Nations in Canada currently hold delegated status.¹⁵⁶ Despite this small number, the future trend looks promising. According to program managers, the admittance of 61 First Nations is pending.¹⁵⁷ The total number of First Nations involved in all programs, including FNLMI is 33 percent. Respondents expect that over the next four years, the number of First Nations operational under RLEMP will increase by 20 each year.

Nevertheless, the fact that 68 percent of all First Nations in Canada either require full land management support from INAC or conduct land management activities outside of the *Indian Act* presents some issues that need to be taken into consideration for future program design:

¹⁵⁴ INAC (LED Sector). (2010, May). *Performance Measurement Strategy for the Reserve Land and Environment Management Program*.

¹⁵⁵ Over the timeframe of this evaluation, 15 of the 17 First Nations enrolled under 53/60 transitioned into RLEMP and three transferred to the First Nation Land Management regime, under the *First Nation Land Management Act (FNLMA)*. As well, about half of the RLAP FNs transferred into RLEMP.

¹⁵⁶ This percentage takes into account the nine First Nations operational under FNLMI.

¹⁵⁷ This figure is based on data updated to June 17, 2010.

- **Program reach.** The percentage of First Nations in each region with access to the programs may not adequately represent the total number of First Nations that desire and are eligible for developmental or delegated opportunities.
- **Alternatives.** There may be other types of land management support models that could be implemented to engage First Nations with lesser capacity (e.g. continued support through NALMA and through tribal councils). One suggestion that emerged from the interviews was to develop a land management support system that addresses the needs of three capacity levels: high, medium and low. This approach is in line with the Economic Development Branch and the Community Development Framework.

Table 3: Number of First Nations per Capacity Building/Devolution Program by Province: June 2010 data

Region	RLAP # of FN	53/60 # of FN	RLEMP			FNLN Developmental # of FN	Total # of FN in Programs	Total # of FN in each region ¹⁵⁸	% of FN with access
			Training and Development # of FN	Operational # of FN	Delegated Authority # of FN				
British Columbia	42		5	5	2	6	60	175	34
Alberta	5		2	2	1		10	44	23
Saskatchewan	12	1	12	10	2	2	39	66	59
Manitoba	6		2	3	2	1	14	62	23
Ontario	18	1	6	6	4	3	38	121	31
Quebec	3		3	4			10	30	33
Atlantic	2		1	2			5	33	15
NWT								22	0
Yukon								4	0
Grand Total	88	2	31	32	11	12	176	531	33
			74						

Source: First Nations and Inuit Transfer Payment System 2005-2010, updated June 8, 2010

Immediate outcome 5: Extent to which First Nations have enhanced capabilities to manage their land, resources and environment

Many respondents suggested that programs have helped to improve capacity in land management. First Nations have greater control, enhanced decision-making capabilities and the opportunity to develop lands and resources for socio-economic benefit. There is also some evidence from the key informant interviews that First Nations with certified land managers are more efficient and proficient in their land transactions than those that have not received RLEMP training. As certified land managers gain experience, their confidence grows and they are better able to advise their colleagues and other First Nations on land management matters.

¹⁵⁸ Total do not include self-governed First Nations (n=33) and First Nations under FNLMA (n=27). Figures do not account for landless bands.

However, almost all respondents identified improvements that could be made to enhance First Nation land management capabilities. In particular, land use planning and environmental management, though enhanced in the recent re-design of the RLEMP, have not been devoted sufficient attention in training programs. The same holds true for services offered through the Department. There is an absence of clear land use policies integrating economic development, housing, capital infrastructure and other INAC initiatives. Findings from the key informant interviews reveal that some First Nations under RLEMP do not perform or report land transactions. This may be because the land managers lack confidence in their land management abilities or because they are not supported by their Chief and Council to work within the *Indian Act*. Several other respondents claim that proper quality control measures in legal descriptions for the creation/registration of legal interests are not in place. As mentioned in the limitations section above, data is not available from the ILRS to conduct a comparison of transaction registration by RLEMP First Nations and INAC land managers to further investigate this issue.

First Nation Land Management Capacity in the Future

An analysis of RLEMP resources reveals some uncertainty as to whether the program will be able to emerge from the pilot stage to become increasingly accessible to First Nations. From 2005/2006 to 2008/2009, RLEMP contributions funding was an average of \$9.3 million per year. Only 35 percent of the funding allocated in 2009/2010 was spent under the RLEMP. Furthermore, the funding allocated on average, for the next four years, including 2009/2010, is \$6.65 million per year, representing a decrease of \$28.5 percent. This indicates that the RLEMP funding available to eligible recipients in 2009/2010 and coming years will be limited, which may in turn limit enrolment. In the medium to long term, this could limit the number of First Nations that will have the capacity to properly manage their land.

Table 4: Total funding allocated for RLEMP for 2009/2010 to 2012/2013 (ongoing funding)

Description	2009/2010	2010/2011	2011/2012	2012/2013*	Total
G&C – Land Mgt. Capacity Building	5,716,000	6,246,800	7,034,481	7,605,120	26,602,401
O&M – The Land – Responsible Federal Stewardship	807,091	1,058,148	1,018,148	1,048,148	3,931,535
Grand Total	6,523,091	7,304,948	8,052,629	8,653,268	30,533,936

Source: Treasury Board Submission #835286

* Designates funding as ongoing

Immediate outcome 6: Extent to which support provided to First Nation land managers for the management of their land, resources and environment is appropriate and effective.

Land Management capacity-building and devolution programs

The evaluation found a number of issues related to land administration support. Many of these could be addressed through design and delivery improvements. Many respondents noted that regions lack adequate financial and human resources to enable support. Other shortcomings include the lack of one-on-one support from INAC and the lack of strategies for dealing with turnover (and the associated loss of corporate knowledge) among band staff and council.

According to some respondents, limited funding does not support the breadth of responsibilities devolved to First Nation land managers.

There was a mixed response from First Nation land managers on the usefulness and ease of use of the tools provided under RLEMP for land management. About a third state that they are excellent, easy to use and effective. About a third find them hard to understand while the remaining third had not yet received the tool-kit at the time of the key informant interviews. Respondents suggested that access to GPS tools would improve land management capabilities and alleviate dependency on INAC resources. It is expected that the forthcoming NALMA ToolKit for First Nation land managers will present “how to” templates to clarify processes and develop standard approaches to various land management activities.

Evidence points to the fact that First Nation land managers are not equipped with the necessary training, tools and ongoing support to effectively manage the environment and develop community plans. Several areas that could use improvement are training and template development in land use planning and environmental by-laws and zoning, as well as ongoing support in monitoring and compliance. With that said, the case studies that investigated RLEMP’s environmental management training in depth found that the Community Environmental Sustainability Plan (CESP) required as a capstone project was indeed useful and applicable to community environmental planning. In order for this to make an impact on community environmental planning, the First Nation must implement the CESP, for instance through the development of a land use plan and by-laws.

Many informants across groups claimed that that First Nation land managers still rely (in some cases heavily) upon INAC regional staff to assist and/or take the lead on many land administration activities.

INAC land administration

Many key informant interviews and a case study on the capacity of smaller First Nations to undertake land management found that INAC’s regional lands staff are reactive in their delivery of these services, not proactive. INAC responds to requests from bands rather than initiating activity. However, many smaller First Nations lack the capacity to engage in land use planning and land management and thus require outside support to initiate land-based transactions. The result is that only those First Nations that have the internal land management capacity engage with the regional lands unit, leaving most of the smaller First Nations without capacity, on their own and without support. In addition, several respondents claimed that INAC does not have the capacity or expertise to offer support in specialized projects, such as mineral interests in potash or uranium.

One important finding that was heard from many key informants from all relevant groups was the active and helpful role that NALMA and Regional Land Associations are playing in educating and assisting First Nations. One promising model for reducing the burden on INAC staff and delivering better and more responsive services to First Nations was investigated through a case study on the role that a tribal council plays in educating, increasing capacity and providing other support to the First Nations served by the council. The benefits of this model are discussed in greater detail in the Best Practices section below.

Land surveys

A review of contribution funding revealed that of the total \$2 million (29 percent of the total survey spending) spent on surveys over the evaluation period, 65 percent supported surveys in the Maritime region. Eighteen percent was allocated to survey activity in Ontario, leaving the remaining 17 percent (\$340,000) for the rest of the regions. No contribution funding was available for fiscal years 2007/08 and 2009/10.¹⁵⁹

Over and above contribution amounts, INAC transferred \$4.9 million (71 percent of total survey spending) in departmental operational funds to NRCan.¹⁶⁰ The funding comes from INAC's budget late in the fiscal year and varies according to leftover operation and maintenance (O&M) funds available. Key informants claimed that this approach severely limits the ability of NRCan to plan for survey activities as it does not provide adequate time to plan and execute the many steps involved in surveying reserve land. This, combined with budgetary cuts to surveys for individual land holdings in 2005 and internal INAC allocation survey funding in 2008 and 2009, has made it very difficult for regions to determine which survey requests will be addressed and when. Moreover, this approach has limited First Nation registration activity due to the current policy requiring legal survey plans for the registration of many instruments.

Table 5 below further reveals that survey demand is not being met. On average, over the evaluation period, 33 percent of the value of surveys requested were completed, leaving an average backlog of 67 percent.

Table 5: Percentage of Survey Projects Funded in Comparison with Survey Needs Identified by Regions in \$ value from 2005/2006 to 2009/2010

Fiscal Year	Total Survey Projects Funded	Survey Needs Requested	Percentage of Requests Met
2005/2006	\$790,000	\$1,802,000	44%
2006/2007	\$796,260	\$2,293,500	35%
2007/2008	\$590,000	\$1,810,186	33%
2008/2009	\$1,325,500	\$7,036,141	19%
2009/2010	\$1,400,000	\$3,899,064	36%

Source: NRCan

Based on these findings, the evaluation cannot conclude that survey funding is being implemented efficiently to meet the needs of First Nations. As the foundation for land management, this directly impacts the ability of the land survey program to provide adequate support for other activities. Nevertheless, the case study that investigated land surveys found that support provided through the program contributed to good planning and decision making through internal surveys and GIS systems. Respondents noted that NRCan was responsive in its survey support and knowledgeable of private sector needs relating to development projects. It is important to note that increased support through the Land Surveys Program will only have an impact if improvements are made to the land registry.

Commercial leasing

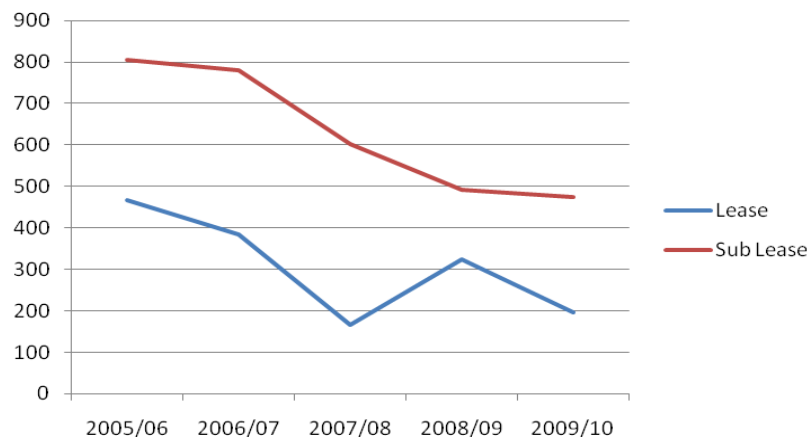
¹⁵⁹ Source: First Nations and Inuit Transfer Payment System 2005-2010, updated June 7, 2010

¹⁶⁰ Source: INAC HQ; NRCan; O&M data, updated June 10, 2010

Contributions to First Nations for commercial leasing through the authority totalled \$2,367,091 over the evaluation period. British Columbia region was the largest benefactor of this funding, receiving some 43 percent of the total national amount. Likewise, the Authority funded lease activity of 27 First Nations in British Columbia, representing 42 percent of the national total of 64 First Nations. Another noteworthy finding was that 21 percent of the funding was spent in the National Capital Region, leaving 36 percent for the remaining seven regions that received funding.¹⁶¹ Breakdown of INAC regional and DoJ A-base funding related to supporting commercial leasing activities was not available.

Chart 1 below shows the trend in lease and sub lease activity over the five-year period.¹⁶² This time series reveals a downward trend in the number of new registrations of leases and subleases over the past five years. Data on the total number of requests for support in creating leases would have revealed whether INAC’s involvement in this area is meeting First Nations’ needs. Over the five-year evaluation period, lease revenue totalled \$ 1.4 billion. There appears to be no trend over this period.

Chart 1: Commercial leases and subleases – New registrations: 2006/06 to 2009/10¹⁶³



Intermediate outcome 8: Extent to which First Nation communities managing their land and environment as a result of the program

The extent to which First Nations are managing their land and environment as a result of the programs varies across regions; however, substantial evidence emerged from the key informant interviews that the First Nations that have certified land managers under RLEMP are involved across a range of land management activities, from managing surrendered land transactions and approving the allotment of individual land holdings, to monitoring of leases, license and permits

¹⁶¹ These regions include: Alberta, Manitoba, Saskatchewan, Ontario, Quebec, Atlantic and NWT. Source: First Nations and Inuit Transfer Payment System 2005-2010, updated June 6, 2010

¹⁶² Source: Indian Lands Registry System, Updated: June 11, 2010. Note: Includes the following types of leases: Commercial (003), Offices (056), Airstrip (058), Residential (002) and Dock (049).

¹⁶³ Source: INAC Lands Branch performance data

on reserve, reviewing and approving land transactions among band members on reserve developing land use plans and by-laws and providing advisory services.

Awareness of environmental issues and processes is varied across regions. Some First Nations work within provincial laws to ensure adequate environmental provisions, particularly those First Nations pursuing large scale commercial or industrial developments. However, some First Nations operate primarily on buckshee leases and thus, outside provincial and federal laws. Through the case study on environmental management, the evaluation found that inadequate capacity, tools and limited knowledge of environmental laws contribute to non-compliance. Program managers and NALMA indicated that the principles were integrated in the RLEMP curriculum through, for instance, land stewardship and comprehensive sustainable community planning.

The ILRS is used to varying degrees. While some respondents reported that registry system was straightforward, others noted difficulty in accessing or manipulating the system and suggested that technical support from INAC would be necessary to improve usage or avoid error. In 2008/09, the Lands Branch conducted an analysis of transactions registered in ILRS. It was found that over 80 percent of land registry activities were linked to just over 10 percent of First Nations. Between 2004/05 and 2008/09, 77 of the total 615 First Nations in Canada had 80 percent of their transactions registered in the system. This and other evidence led a recent study to conclude that un-registered land transactions are more than equal to those recorded in ILRS with trends showing a decrease in registrations. For instance, this study estimates that at least 60 percent of all residential allotments on reserve are custom-based and not registered in ILRS.¹⁶⁴

One final indicator of the extent to which RLEMP communities are managing their land to meet their needs are examples of how community input is being incorporated into decision making at the band-level, including the following:

- involvement in a comprehensive community plan;
- traditional land holding dispute resolution through membership meetings;
- election of members with experience in land issues onto land-use committees, providing advisory services to the land manager;
- consultation with elders for building cultural norms into land code development; and
- land use planning based on cultural significance, such as archaeological importance.

Long-term outcome 9: Extent to which the land base and land use on reserves contribute to the improved quality of life and self-reliance for First Nations

Land Management capacity-building and devolution programs

There is limited evidence confirming whether the RLEMP, RLAP and 53/60 programs have contributed to improved quality of life, mainly because it was difficult to establish attribution between the program and this long-term outcome as the program is only just evolving from its

¹⁶⁴ The Aboriginal Affairs Group. (2010, March 31). *A Preliminary Study of Un-registered Interests in Reserve Lands*.

pilot stage. When available in 2011, data from the Well-being Index will allow for a comparison with 2006 data to better assess whether First Nations are benefiting from the lands programs.

INAC Land Administration

Many key informants claim that INAC's land administration and registration programs do not contribute to economic development, self-reliance or sustainable development due to a number of constraints, including insufficient resources, a patch-work of policies, legacy problems and changing economic and judicial environments. Without guarantee to title, the registry system does not contribute to economic development either. Some respondents suggested that a total renovation and modernization of lands policies on reserve would help to bring them into line with provincial regimes, thereby facilitating development.

Nevertheless, findings from one case study underscore that a strong and complete survey fabric on one reserve unlocked the economic development potential of that First Nation. This is supported by an analysis conducted by the Surveyor General Branch of NRCan, which found a statistically significant relationship between internal parcel fabric on reserve and Community Well-being Index scores.¹⁶⁵ Through defining clear parcels of land for commercial leasing, surveys have contributed to a dependable and long-term stream of lease revenues. This has led to taxation and utility revenues through, for instance, the provision of water supply and sewage treatment services by band operated utilities. A clear understanding of internal allotments has further contributed to quality of life on this reserve by facilitating emergency management services and enabling home insurance.

5.3.2 Best Practices / Lessons Learned

Best Practices

Integrated land use planning. The case study on environmental management and land use planning found that the development of an integrated land use plan is essential to understand the relationship between economics and the environment and to ensure sustainability.

Active participation of community members in surveys. The case study on surveys found that the First Nation involved community members throughout the survey process to avoid misunderstandings related to land possession. This included gathering input from community members during the survey and preparing a letter describing the survey results.

Surveying services. The same case study found that a key factor in NRCan and INAC's effective and timely provision of survey services is selecting the right surveyor, for instance, one that has built a relationship with NRCan and knows the lay of the land on a particular reserve. This First Nation requests that surveyors apply provincial standards to increase the "comfort level" of private and commercial leases.

Planning for the creation of legal interests. Case study findings from one successful First Nation engaged in multiple commercial leases reveal that it is useful to focus on a limited and manageable number of leasing projects to better control the timely implementation of these projects to meet the business needs of investors and leasees.

¹⁶⁵ NRCan, Surveyor General Branch. (2010, Sept. 10). *Internal Parcel Fabric on First Nation Reserves*.

Aboriginal community support for land management. Some Aboriginal communities and organizations are sharing their knowledge and expertise with those of lesser capacity. One example researched in greater detail through a case study is a tribal council that supports members in a number of areas, including support in the creation of community maps and in the ATR process, including the designation vote, setting the terms of leases, coordination of survey work with NRCan and ESAs. This model was identified as a key best practice because it provides a viable option to both provide land management services and, at the same time, build land management capacity. Several benefits of this model include the following:

- identifying opportunities for ATRs for member bands;
- working with member communities to identify economic development opportunities;
- establishing a centralized repository for lands information and corporate memory to provide continuity and stability in the face of changing First Nation leadership;
- providing access to a pool of expertise as needed including lands advisors, GIS technology, legal counsel, natural resource technicians and others;
- developing and providing easily accessible and comprehensive information and data to support informed governance decisions; and
- holding workshops and other forms of information sharing to increase understanding of the connection between land base, quality of life and self-reliance.

Lessons Learned

Consistency and continuity of First Nation Land Management Staff. Most of the case studies found that continuity of experienced First Nation land management staff with knowledge of the specific issues related to a particular First Nation community was a significant factor in the success of land and environment management. The Saskatchewan TLE case study found that continuity of staff was vital to sustaining a consistent vision for the project and maintaining strong relationships with third parties and stakeholders. Management of highly technical environmental issues in another case study was lost with the departure of a long serving land manager. Continuity of land management staff in yet another case example enabled cost-effective land use planning through expertise and experience in processes and fostered relationships with lease holders.

Ongoing training. While there is evidence that RLEMP is preparing First Nations to manage reserve land, a complex and changing development environment may require ongoing training opportunities for certified First Nation land managers. These could take the form of practical job shadowing/mentoring opportunities (with INAC staff or Regional Land Associations) as well as on-line platforms linking certified First Nation land managers.

5.3.3 Unintended Outcomes

INAC Land Administration Activities

Buckshee leasing

The high incidence of buckshee leasing on reserve is perhaps the most noteworthy unintended outcome of the significant transaction costs associated with administering land under the *Indian Act* regime, the dependency that the *Indian Act* fosters and the unresponsiveness of INAC land administration services. This topic arose throughout the evaluation not merely as an unintended

outcome, but as a serious issue that puts into question the legitimacy of the *Indian Act*. According to INAC land managers, all regions experienced some degree of buckshee leasing with one respondent claiming that buckshee leases represent 70 percent of land transactions in a single region. On a national level, informal tenure systems and buckshee leases raise several policy questions. For instance, given the inherent risk of these agreements, INAC is faced with the question of whether to allocate economic development funds in situations where *Indian Act* land provisions are not being followed.

The evaluation investigated this issue in greater depth through a case study in a community where non-*Indian Act* land transactions are extensively practiced. Fundamentally, the community believed it has an inherent right to make their own decisions relating to land management. The informal tenure system in place in this community has enabled it to achieve economic self-reliance and has increased quality of life for its members. In part, the community attributes this success to the strong survey and land use planning practices in place. More importantly, it is using innovative strategies to build financial and economic development partnerships. For instance, despite the fact that the community does not have legally recognized land transactions in place, its steady and reliable income gives assurance to lending institutions.

Although this particular community has realized great success working outside of the *Indian Act*, a number of key informants warned that without proper land planning and administration and given the significant risks of buckshee leasing, many communities operating under informal tenure systems are placing themselves and other stakeholders at high risk.

Surveys. The absence of a comprehensive survey program has created a number of issues including overlapping internal reserve boundaries and a lack of economic and community development stemming from the absence of property rights infrastructure on reserve. Since the majority of survey requests are tied to the housing and capital infrastructure programs, which requires an adequate description of the land before a decision is made to allocate housing, a lack of surveys limits the potential for housing development on reserve. Risk to the Crown as lessor of Indian lands is growing due to the inability to fully identify the extent and location of existing land interests when granting new leases or permits.

RLEMP. First Nation land managers who have received the RLEMP certification are in high demand off reserve, which has led to high turnover among First Nation land managers. One suggestion for mitigating First Nation land manager turnover is to adopt an ISO-type model that certifies that the community, instead of individual land managers, has in place land management processes and tools that meet the RLEMP standard. One positive unintended outcome of the program is that through the RLEMP training, First Nations have established a relationship with other First Nations across Canada and are networking and sharing information on land management issues. This networking has led to First Nations' partnering on land and economic development projects.

5.3.4 Efficiency

There is evidence that RLEMP is an efficient alternative to other forms of land administration under the *Indian Act*. Some respondents reported that working with First Nations who have certified land managers is much more efficient than working with First Nations outside of the

capacity-building/devolution programs that still depend upon INAC staff for their land administration needs. FNLM may be an even more efficient alternative. The majority of First Nation respondents in a recent study claimed that land management processes are faster under FNLM when compared with those under the *Indian Act* and all First Nations declared that they would not consider returning to operations under the *Indian Act*. Greater efficiency in land management processes, in turn, was cited as the key factor contributing to the attraction of business activity on reserve lands.¹⁶⁶

Key informant interviewee evidence suggests that the Lands Branch's efficiency could be improved by developing policies, frameworks and tools that better meet modern land management needs. Improving communication between the Lands Branch and the Economic Development Branch with activities merged at the working level (e.g. economic development plans merged with community land use plans) is another possible way to achieve efficiency.

During a case study, respondents from one First Nation with high land management capacity made the point that INAC should vary its approach to land administration support based on the needs of First Nations. For instance, high-capacity First Nations require more of a service-culture approach to stay abreast of economic development opportunities.

This same idea is discussed at length in an audit of Māori land administration in New Zealand. To better support land administration in a complex legal and historical environment, not wholly unlike the *Indian Act* regime, the Māori Land Court has established a trustee service independent of the Crown to manage Māori land on behalf of its owners. The service operates on a fully subsidized fee-for-service model and trustees operate in a competitive environment. If clients are not satisfied with services, they may choose another trustee. This model does not support administration of "uneconomic land" – land that cannot support the trustee administration costs (e.g. non lease-generating). Land owners must either administer these lands themselves, or leave them without administration. A key benefit of this model is that trustees search for innovative ways to identify opportunities for development on their clients' land. They take a proactive interest in land administration to build and retain a clientele base.¹⁶⁷

5.3.5 Cost-Effectiveness

Land management capacity-building and devolution programs

A comparison of the funding allocated to First Nations to enable management of their own lands with ongoing INAC land administration support through departmental operational funding suggests that funding appears to be allocated proportionally based on the services and programs being delivered. As discussed above, a total of \$46 million (38 percent of total funding of \$122 million) was contributed to the 32 percent of First Nations involved in the RLEMP, RLAP and 54/60 programs, while \$76 million (62 percent) was spent land administration support activities through departmental A-base funding.¹⁶⁸

¹⁶⁶ KPMG. (2010, Jan. 27). *Cost/Benefit Analysis of Future Investment in the Framework Agreement on First Nations Land Management*.

¹⁶⁷ Controller and Auditor-General of New Zealand. (2004, March). *Māori Land Administration: Client Service Performance of the Māori Land Court Unit and the Māori Trustee*. Retrieved September 9, 2010 from, <http://www.oag.govt.nz/2004/maori-land-court/part3.htm>

¹⁶⁸ As previously mentioned, these calculations control for First Nations operating under self-government agreements and FNLM

Cost-effectiveness does not yet appear to have been achieved. Few First Nations are operational under RLEMP, RLAP and 53/60 and most require ongoing support from the Department.¹⁶⁹ Further, many of the remaining 68 percent of First Nations not involved in INAC's land administration/management programs appear to be conducting land administration activities outside of the *Indian Act*, making it difficult to determine the full extent to which these First Nations are benefiting from INAC's support.

A recent cost-benefit analysis of the FNLM program sheds light on the cost-effectiveness of building capacity in First Nation communities to manage their own land, suggesting that greater First Nation involvement in land management (which, may be achieved through a higher percentage of operational RLEMP First Nations) increases self-reliance and lowers costs to the Government of Canada.¹⁷⁰

INAC Land Administration

Evidence from both INAC and NRCan officials suggests that better funding arrangements between the two departments could improve the ability to plan and deliver services and to manage risks. In the Yukon and Northwest Territories funding is profiled over five years, which gives NRCan greater predictability and lowers costs.

One of the case studies conducted for this evaluation found that the involvement of tribal councils in local-level land management support and capacity-building is an effective model for relieving INAC's role. INAC's support to NALMA and regional land management associations, similarly, achieves cost-effectiveness.

Evidence suggests that the recent software improvements to ILRS will only be cost-effective if the registry system itself is improved to provide certainty of title.

¹⁶⁹ It is possible that this will change through the introduction of a clearer set of roles and responsibilities and the implementation of joint management agreements.

¹⁷⁰ KPMG. (2010, Jan. 27). *Cost/Benefit Analysis of Future Investment in the Framework Agreement on First Nations Land Management*.

6. Conclusions

Relevance

1) To what extent do the programs under evaluation address a demonstrable need?

All programs under analysis clearly address a demonstrable need. Increasing the reserve land base is necessary and significant to First Nations. The Additions to Reserve Program aims to correct historical inaccuracies, increase economic opportunities and help to sustain a growing on-reserve population.

First Nations require the resources, flexibility and expertise to respond to land management demands and take advantage of economic opportunities. INAC's land management services and capacity-building programs are intended to support modern land management to the greatest extent possible under the *Indian Act*.

2) To what extent are the programs responsive to the needs of Aboriginal people?

Though the programs target issues of great need in First Nations communities, they are not completely responsive to these needs. The ATR process is slow, cumbersome and focuses almost entirely on Canada's legal obligations to First Nations.

The RLEMP is responsive to the needs of some First Nations, namely those that have a high capacity in land management and are already involved in RLAP and 53/60. Entry requirements into the newly redesigned RLEMP program are still restrictive. Financial and human resources limit the extent to which INAC land administration services are responsive to First Nation needs.

3) To what extent are the programs aligned with Government of Canada priorities?

The evaluation found that the programs under evaluation are in line with Government of Canada priorities, specifically those related to engaging Aboriginal people in the Canadian economy, building capacity and self-reliance, and fulfilling Canada's treaty obligations. However, there is evidence that improvements could be made to the design of the ATR program to better enable it to achieve efficiency priorities.

4) To what extent are the programs aligned with INAC strategic outcomes and priorities?

The programs under evaluation are integral to achieving INAC's Strategic Outcome of the Land to enable First Nations to benefit from their land, resources and environment on a sustainable basis. The programs are aligned with INAC priorities of increasing social and economic well-being of First Nation communities, encouraging investment and promoting development.

5) Is there a legitimate and necessary role for INAC and the Government of Canada in the activities under evaluation?

Canada has the obligation to address legitimate claims. Most of the ATRs that were processed during the evaluation period fell under the Legal Obligations category of the ATR policy. INAC's land administration program fulfils statutory obligations under the *Indian Act*.

Design & Delivery

6) To what extent does the design of the programs contribute to outputs and outcomes?

Communication and collaboration regarding ATRs are weak, both within INAC (between HQ and regions, across the LED sector, with the Specific Claims Branch) and with stakeholders and partners outside the Department. While program design satisfies the ATR policy, the policy itself impedes efficiency and the achievement of outcomes through cumbersome process requirements. As such, discussion is underway with the AFN to streamline the ATR process and achieve more timely results.

The current design of RLEMP excludes First Nations that do not already have some land management capacity. The curriculum of the program could be expanded to better meet First Nations' needs through a greater emphasis on environmental training. More generally, the evaluation found legislative and regulatory design flaws with land administration under the *Indian Act*. As a simple repository for lands transactions, the design of the Indian Lands Registry system is not aligned with the need for a reliable registry that secures land tenure through guarantee to title.

7) To what extent have programs been implemented as planned?

a) Understanding of roles and responsibilities

In addition to differences across provincial jurisdictions, roles and responsibilities are unclear and not well-understood. A lack of tools is resulting in the inconsistent delivery of policies, procedures and guidance.

b) Alignment of delivery with design

There has been mixed success in the alignment of program delivery with program design. Resource pressures including staff turnover, limited organizational knowledge, low classifications and budgetary constraints are restraining the ability of programs to be delivered as planned.

8) To what extent are performance data, reporting and accountability systems in place and contributing to success?

Limitations and gaps in the performance and accountability systems make it difficult to fully assess success. Nevertheless, new performance measurement and reporting systems for both the RLEMP and ATR programs have been developed and are now being implemented.

Performance (effectiveness)

9) To what extent is the program achieving progress toward outcomes, including:

Immediate outcomes

Some of the immediate outcomes related to the ATR program have been achieved. Reserves are being created and expanded across the country. However, many of these new reserves are being created under the TLE process as Canada's legal obligations take precedence over other ATR policy categories. While the Crown's legal and policy obligations for the transfer of title are being met, a slow and cumbersome process based on an inefficient policy are impeding success.

As well, there has been mixed success in the engagement of stakeholders, further slowing the ATR process. Special ATR legislation in the Prairie provinces was found to increase the effectiveness of the process.

The capacity-building/devolution programs, namely RLEMP, are increasing knowledge and skills and enabling First Nations to assume greater control over land management. Where possible, through its land administration services, INAC provides technical and advisory support upon request to all First Nations (including those outside the RLEMP program). However, land management on reserve is becoming increasingly complex due to land use planning and environmental standards and highly specialized commercial leasing projects. The level of human and financial resources available including expertise and knowledge is presenting significant challenges in this regard. With an average backlog of 67 percent in survey needs requested versus survey needs met, INAC's land survey program does not adequately support land management.

In addition, at present, only eight percent of the total First Nations in the RLEMP, RLAP and 53/60 programs are managing their lands under delegated status. In total, 27 percent are either operational or fully administering their land. All others in these programs are involved only at the training and development levels or are performing land administration services alongside regional INAC land managers.

Intermediate outcomes

Without data concerning the requests by ATR policy category and the timeline between ATR request received and ATR completion, the evaluation is not able to properly assess the extent to which the program is increasing access to land that meets First Nations communities' interests and needs.

Few First Nations have the ability to fully manage land and environment to meet their communities' needs as a result of the capacity building/devolution programs. Some First Nations land managers either do not have the opportunity to use knowledge and skills to perform a complete set of land management activities, or cannot perform these activities. However, the evaluation found that First Nations in the RLEMP, RLAP and 53/60 programs are involved in a range of land administration activities.

Long-term outcome

Given the prospect of resource development or urban location, there is the potential to increase economic development opportunities through ATRs. When available in 2011, data from the Well-being Index will allow for a comparison with 2006 data to better assess whether First Nations are benefiting from the lands programs. Analysis has shown, however, that there is a positive relationship between the Well-being Index and internal survey fabric.

It is difficult to establish attribution between the programs and the long-term outcome of increased quality of life and self-reliance. The limited number of First Nations operating under the RLEMP, RLAP and 53/60 programs, and the fact that RLEMP has just recently emerged from pilot status suggests that more time is required before there is indication of progress toward this outcome.

Performance (efficiency and economy)

10) To what extent have the programs been delivered efficiently? How could efficiency be improved?

The evaluation found that efficiency could be improved by streamlining the ATR policy and process, which may require legislative and regulatory change. Greater capacity among INAC officials, First Nations and others involved in the ATR process may also help to increase efficiency.

The RLEMP program is achieving results; however, the efficiency of the program could be increased by expanding the role of the NALMA. More generally, a lack of legislative frameworks, policies and tools that meet the needs of a modern land management regime is inhibiting efficiency. Communication and collaboration between the Lands and Economic Development units of INAC is not maximized.

INAC's funding to NRCan for survey services inhibits efficiency. Reliance on departmental operational funding late in the fiscal year makes it difficult for NRCan to properly plan for and implement surveys.

11) Are the programs cost-effective? How could cost-effectiveness be improved?

Given approximately 68 percent of all First Nations in Canada are not engaged in INAC's land management capacity building/devolution programs or are conducting land management activities outside of the *Indian Act* points to two key findings related to cost-effectiveness. First, long term support from INAC is necessary to address the needs of those First Nations requiring assistance to perform their land management responsibilities. As such, the RLEMP program alone and as it is currently structured is not likely to achieve cost-effectiveness. Second, the fact that many of these First Nations choose to conduct land administration outside of the *Indian Act* suggests that the current land management regime under the *Indian Act* is not effective and does not meet their needs. In addition, INAC still plays a significant role in providing land management services to First Nations under RLEMP, suggesting that the program has not yet resulted in cost-effectiveness.

The evaluation found some evidence that fee-simple ownership of land may be a viable alternative to ATRs to achieve economic development. Fee-simple land holdings present far fewer challenges and transaction costs; however, it is also important to note that fee simple land remains under a provincial regime, which prevents First Nations governance over the land. Fee-simple land holdings do not offer the tax benefits associated with ATRs and impose further municipal tax requirements on First Nations.

7. Recommendations

It is recommended that INAC:

- 1) Continue to work towards / consider legislative change in the following areas:
 - national ATR legislation that incorporates process and approval improvements to streamline the process and increase efficiency;
 - legislative alternatives to the current designation process, which is cumbersome, unresponsive and sets a standard that has no off-reserve equivalent;
 - recognition of some forms of modern land tenure arrangements outside of the *Indian Act*; and
 - legislative and regulatory base for a modern land registry with possible interim arrangements with provincial land registries.
- 2) Examine the feasibility of broadening the reach and accessibility of the ATR and RLEMP programs through:
 - a) providing for the implementation of a greater number of ATRs from policy categories other than legal obligations; and
 - b) extending RLEMP access to First Nations of varying land management capacities, taking into consideration INAC's Capacity Development Policy being proposed.
- 3) Increase internal capacity and effectiveness of INAC land management services through the development of clear roles and responsibilities, both within LED and among stakeholders and delivery partners, appropriate classification levels, training, tools and incentives to decrease turnover.
- 4)
 - a) Encourage joint/multiple collaboration between First Nations with limited capacity, including continued support to Aboriginal organizations (e.g. NALMA and tribal councils) that support and enable capacity-building among First Nations.
 - b) Promote greater coordination and integration between economic development and land management functions and other INAC programs such as Capital Infrastructure.
- 5) Improve financial data and monitor the implementation of the ATR and RLEMP performance measurement strategies.

ANNEX A: SUMMARY OF INTERVIEWS

Interview Category/Group	Number Planned (case study interviews)	Actual Number (case study interviews)
<i>Key informant interviews</i>		
<i>INAC Senior Officials HQ & Regions</i> <ul style="list-style-type: none"> • Lands Branch Director Generals • Regional Director Generals 	5	5
<i>INAC HQ Land Managers Lands and Economic Development Sector</i> <ul style="list-style-type: none"> • Imaging and Surveying • Additions to Reserves • First Nations Land Management / Capacity-building • Commercial Leasing • Environment • Lands Branch Planning <i>Treaty and Aboriginal Governance Sector</i> <ul style="list-style-type: none"> • Specific Claims Branch <i>Legal Services Sector</i> <ul style="list-style-type: none"> • Legal Services 	12	13
<i>INAC Regional Land Managers</i> <ul style="list-style-type: none"> • Atlantic Regional Office • Quebec Regional Office • Ontario Regional Office • Manitoba Regional Office • Saskatchewan Regional Office • Alberta Regional Office • British Columbia Regional Office 	7	23
<i>Other Federal Departments</i> <ul style="list-style-type: none"> • Natural Resources Canada • Department of Justice 	N.A.	15
<i>First Nation Land Managers</i> <ul style="list-style-type: none"> • Representatives from across Canada 	21	16

Interview Category/Group	Number Planned (case study interviews)	Actual Number (case study interviews)
<i>Aboriginal Organizations</i> <ul style="list-style-type: none"> • National Aboriginal Lands Association (NALMA) • Regional Aboriginal Lands Associations 	7	6
<i>Other stakeholders</i>	N.A.	13
Grand Total – Key informant interviews	52	91 (121% of total planned interviews excluding groups where number of interviews was not planned)
<i>Case Studies</i>		
<i>On the way to self-government: Registering land transactions outside of the Indian Act</i> <ul style="list-style-type: none"> • First Nation members • NRCan surveyor • Bank lender 	7	6
<i>A model in providing land management services to First Nations that lack capacity</i> <ul style="list-style-type: none"> • First Nation members 	3	3
<i>Co-operation with other parties and expediting ATRs</i> <ul style="list-style-type: none"> • First Nation members • INAC Legal Counsel • Regional ATR Implementation Staff • Indian Oil and Gas Corporation • Provincial officials • Rural municipality official 	N.A.	11
<i>Impacts and benefits of a strong survey fabric on land use planning and economic development</i> <ul style="list-style-type: none"> • First Nation members • NRCan surveyors • Private surveying company • Leasee • Municipal official 	7	6
<i>Impacts and benefits of RLEMP on environmental and integrated land use planning</i> <ul style="list-style-type: none"> • First Nation members • Provincial government officials 	7	6
Grand Total – Case Studies	24	32 (87.5% of total planned interviews excluding groups)

Interview Category/Group	Number Planned (case study interviews)	Actual Number (case study interviews)
		where number of interviews was not planned)