



Indian and Northern
Affairs Canada

Affaires indiennes
et du Nord Canada

Implementation
of comprehensive
land claim and
self-government
agreements

A handbook
for the use of
federal officials

Cette publication peut aussi être obtenue en français sous le titre : Mise en œuvre des ententes sur les revendications territoriales globales et l'autonomie gouvernementale : Guide à l'intention des agents responsables fédéraux

This document has been prepared by the Implementation Branch of Indian and Northern Affairs Canada. For further information on implementation, please visit our Web site at www.inac.gc.ca or contact us at 819.997.9801.

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Introduction

1.

Purpose of This Handbook I.1

This Handbook is intended to capture, under one cover, the most up-to-date lessons and information available on the key principles and phases of implementation of agreements signed under federal policies for self-government and comprehensive claims. It will guide federal implementation practitioners as they embark on the implementation challenge – whether at the front end of preparing and planning for the implementation of agreements (i.e., “implementation planning and negotiations”) or at the post-effective-date stage of overseeing their actual implementation (i.e., “implementation management”).

It is also hoped that this Handbook will serve as a useful source of general information for other stakeholders and interested parties as they endeavour to better understand the processes and relationships emerging from negotiated land claim and self-government agreements.

The information and guidance contained in this Handbook have been gleaned from more than two decades of experience in implementing comprehensive land claim agreements and somewhat less experience with implementing self-government agreements. Periodically, as new experiences are gained and lessons learned, the continuing validity of this Handbook will be revisited.

The guidelines contained in this Handbook are designed to accommodate a variety of situations and agreements. It is

important to note that the guidelines are not intended to be prescriptive but rather serve the purpose of describing the practices of the federal team and may also serve as an information source for other parties who wish to understand the approach of the federal officials. It is also important to note that this document is not binding on the federal government and is not intended to serve as rigid template for federal implementation practitioners, but rather be flexible enough to address a variety of circumstances and situations.

Limitations of This Handbook I.2

One important implementation instrument, the financial agreement, is not discussed in this document, but its principles are outlined in federal policies; namely, *The Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government (1995)* and *The Comprehensive Land Claims Policy (1986)*.

Furthermore, the implementation of specific claims and treaty land entitlement (TLE) agreements is not covered by this Handbook. Because the implementation of these agreements involves either the payment of cash, or a combination of cash and an obligation to add lands to reserve status, it does not lend itself to the kinds of implementation processes described in this document.

What is Implementation?

I.3

The process of negotiating a comprehensive land claim agreement, a self-government agreement or some combination of the two, is a complex undertaking. Once an agreement is signed and brought into effect, a new and equally challenging phase begins for the parties, one which focusses on implementing the many provisions contained in the agreement. This is not a passing phase, but rather an enduring one, marking a new relationship among the parties – the federal government, the Aboriginal group and the provincial or territorial government involved.

In the case of a comprehensive land claim agreement, this new relationship involves fulfilling the many legal obligations each party has assumed. In the case of a self-government agreement, this new relationship begins interaction on a government-to-government basis.

One key tool to facilitate the transition to this new relationship is the implementation plan that accompanies each final agreement. While the comprehensive land claim or self-government agreement defines the new relationship, the implementation plan and its accompanying documents (e.g., financial transfer agreements) describe how this new relationship should operate.

Traditionally, implementation plans have focussed on the formal obligations of the parties, breaking these down into

activities and schedules. While this remains indispensable, it is important to realize that the implementation management stage of a land claim or self-government agreement is neither merely a collection of activities, nor another passing phase. Where self-government is involved, the implementation management phase should reflect and support a stable government-to-government relationship. Implementation management should, therefore, give effect to certain processes that are essential to such a relationship, including ongoing monitoring and reporting, information-sharing, consultation and dispute resolution processes.

Context

2.

Historical Context

2.1

Canada's first comprehensive land claim agreement was the James Bay and Northern Quebec Agreement of 1975, followed by the Northeastern Quebec Agreement of 1978. It became evident in the early years following their ratification that many provisions of these agreements were subject to vastly differing interpretations and that the parties had not clarified their respective roles and responsibilities regarding their ongoing relationship.

Criticisms of early implementation experiences have generally focussed on the absence of concerted pre-implementation planning efforts by the parties. Indeed, in 1986 the Auditor General noted the absence of implementation plans accompanying final land claim agreements. Such an omission was deemed to have led to delays, misunderstandings and litigation regarding the fulfilment of certain obligations of the agreement. As a result of that particular Auditor General's report, Canada published guidelines for the development of implementation plans for final comprehensive land claim agreements. Since then, implementation planning, negotiations and management has expanded to become a requirement for the finalization of self-government agreements. This handbook provides up-to-date information for the implementation of both comprehensive claims and self-government agreements.

The implementation plan is a road map that will guide implementation practices into the future. These plans, which are

now required by federal policy, identify the obligations contained in the land claim or self-government agreement and describe the "who", "how", "when" and "how much" of implementation activities that the parties have jointly determined will be necessary to ensure their respective and shared obligations are fulfilled.

Policy Context

2.2

The Comprehensive Land Claims Policy (1986)

The *Comprehensive Land Claims Policy (1986)* states that, as part of the federal ratification process, "final agreements must be accompanied by implementation plans" (p. 25) that set out the understanding of how obligations contained in the agreements will be fulfilled. The implementation plans are intended to ensure efficient and timely implementation of the various elements of settlement agreements.

The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government (1995)

The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government (1995) requires that each self-government agreement be accompanied by a separate implementation plan. The policy stipulates that the implementation plan "must identify the activities, time frames and resources that have been agreed upon to give effect to the agreements or treaties".

The policy further states that “issues related to affordability, efficiency, capital requirements, duplication of services, feasibility and capacity will have to be addressed” (p.16).

Operational Context 2.3

Headquarters – Implementation Branch

Implementation activities are currently coordinated, in large part, by INAC’s Implementation Branch (IB) with support from regional offices and other government departments and agencies (OGDs). IB’s business lines break down mainly along the implementation phases outlined later in this document. It may be helpful here to encapsulate how INAC is organized to carry out implementation activities. Implementation Planning and Negotiations (IPN) Directorate is responsible for all planning and negotiation of implementation plans and fiscal agreements. Implementation negotiators, who are housed in IPN, are members of the federal team and represent Canada at implementation sub-tables (and fiscal sub-tables).

Implementation Management Directorate (IMD) is responsible for ensuring fulfilment of post-effective date implementation activities. Federal implementation managers work closely with the representatives of the Aboriginal organization and, provincial or territorial government to ensure that land claim obligations are fulfilled.

There are two other Directorates in IB. The James Bay Implementation Office is responsible for the management, coordination and continued negotiation of the implementation of the James Bay and Northern Quebec Agreement and the Northeastern Quebec Agreement relating to the Cree, Inuit and Naskapi of Quebec. The fourth Directorate, Strategic Planning and Support, works closely with the other Directorates, supporting their work through research and policy development.

British Columbia – Treaty Implementation Unit

The Treaty Implementation Unit (TIU), located in the British Columbia (BC) Regional Office, performs both headquarters implementation functions in British Columbia - implementation planning and negotiations and implementation management. This includes the negotiation of fiscal and implementation chapters in agreements-in-principle and final agreements, implementation plans and fiscal agreements. The manager of TIU represents Canada on tripartite Implementation Committees to ensure that implementation activities are completed.

Other Federal Interests

OGDs and INAC Regional Offices represent a myriad of federal interests and expertise. Implementation negotiators and managers work with representatives of OGDs to ensure that their interests and expertise are considered in implementation planning, negotiations, management and renewal.

Principles

3.

Guiding Principles of Implementation

3.1

- > The primary responsibility for implementation planning, negotiations and management falls to Indian and Northern Affairs Canada (INAC) on behalf of the federal government, except where specific arrangements have been made. For example, in matters relating to taxation, Finance Canada leads negotiations. INAC works in cooperation with affected OGDs to ensure effective implementation planning, negotiations and management.
- > Provisions of comprehensive land claim and self-government agreements are intended to be binding and durable. Neither implementation negotiations nor implementation management processes are vehicles to renegotiate the terms of a final agreement.
- > A jointly developed implementation plan must accompany a final agreement before ratification. However, such an implementation plan does not form part of the final agreement and is not constitutionally protected. A tripartite final agreement will necessitate the negotiation of a tripartite implementation plan and in the case of self-government agreements, the additional negotiation of a financial transfer agreement.
- > The implementation plan neither creates nor diminishes any obligations or commitments relative to those in the final agreement. The federal preference is that the implementation

plan not be a legally binding document, but rather an operational and management tool that describes the parties' understanding as to how the obligations in the final agreement will be fulfilled.

- > Final agreements generally contain one-time, contingent and ongoing obligations. The fulfilment of these obligations should be thoroughly planned in advance and rigorously managed thereafter.
- > Implementation management efforts are most effective when they are joint or collaborative in nature, characterized by all-party planning, regular communications, periodic joint monitoring and reporting, and active issues management.
- > Implementation management should be an ongoing, iterative process characterized by regular monitoring, feedback and corrective action. The focus of the parties should be on keeping pace with the obligations contained in the final agreement, maintaining a sound working relationship and resolving implementation issues before they become disputes.

II

4.

Phases of Implementation

In general, and for the purpose of this document, the implementation process related to land claim and self-government agreements has five discernable phases:

- preparatory phase;
- implementation planning and negotiations phase;
- pre-effective-date phase (the period between the conclusion of negotiations, or “initialling” of the final agreement and the effective date of the final agreement);
- implementation management (post-effective date); and,
- the renewal of implementation plans and other implementation documents.

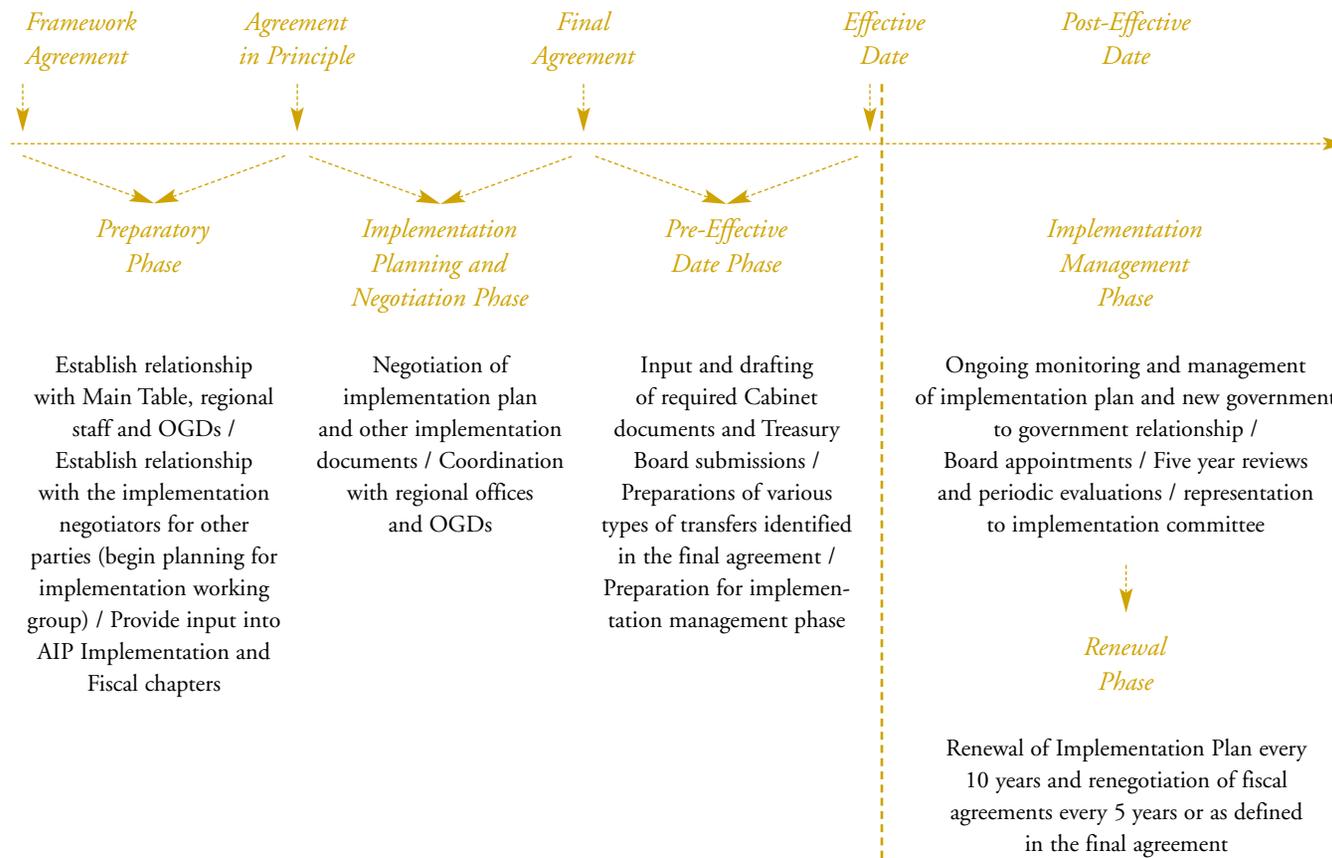
The sections that follow are organized according to these identified implementation phases. Figure 1 outlines the internal federal process of implementation planning, negotiations and management activities along a continuum.

This Handbook will address the activities of implementation planning, negotiation and management for both comprehensive land claim and self-government agreements. Because the two processes are similar in many ways, efforts have been made to discuss them jointly; however, where a given process is unique to either a comprehensive land claim agreement or

a self-government agreement, it will be so noted as *matters specific to comprehensive land claim agreements or matters specific to self-government agreements*.

Figure 1

Internal Federal Government Phases of Implementation



Preparatory Phase

4.1

The preparatory phase, which is generally the framework agreement stage, begins when implementation is first identified as a subject area in a land claim or self-government agreement negotiation process. At the framework agreement stage, the role of the implementation negotiator is to ensure that implementation is properly identified in the list of negotiation subjects. Actual commencement of the implementation negotiation process does not begin until it is apparent that negotiations on an agreement-in-principle (AIP) are nearing conclusion. At this point, the implementation negotiator will be responsible for establishing relationships with the Main Table negotiators, with INAC regional staff, with OGDs and with the implementation negotiators from the other parties to the agreement. The implementation negotiator focusses on becoming familiar with the content of the proposed AIP and offers comments on implementation-related AIP language to the federal negotiating team.

Interactions with the Main Table

- > During the framework agreement stage, the implementation negotiator should review the proposed language of the agreement to ensure that “implementation” is properly characterized as a matter to be negotiated.
- > Before an AIP is concluded, the parties’ respective implementation negotiators should provide input to the Main

Table negotiators for the negotiation of the implementation and fiscal arrangements chapters of the agreement.

> In addition, as AIP chapters are developed, the implementation negotiator should undertake a thorough review of the evolving AIP document and provide input to the federal Main Table negotiators on:

- proposed AIP language, identifying where obligations will be created;
- any issues that might arise from such obligations;
- any areas that require clarification; and,
- identification of any matters that have been problematic when implementing previous agreements.

> The implementation negotiator should ensure that he or she is involved in Main Table negotiations, at least to the extent that such negotiations relate to implementation or financial issues. The implementation negotiator advises the federal team on costing, drafting of concepts based on previous implementation experience, identifying options, and provides draft implementation and fiscal chapters. Implementation negotiators for the other parties are assumed to be carrying out the same function for their respective teams.

> It is important that implementation negotiators are consulted before tabling documents/offers that may have an impact

on implementation or the financial mandate of the agreement; e.g., interim measures, Joint Fisheries Committees, etc.

Interactions with INAC regional staff

> During the framework agreement stage, the implementation negotiator should begin to establish effective working relationships with the staff in the INAC regional office. This will help develop the negotiating mandate for the final agreement and facilitate the initial costing of obligations contained in the AIP.

Matters Specific to Self-Government Agreements

> Developing this relationship with regional offices will help the implementation negotiator obtain the information (e.g., analysis of existing fiscal and funding transfers or mechanisms, current programs and services, etc.) required to analyse the Aboriginal group's capacity and requirements for the transition to self-government.

> Regional staff manage existing funding arrangements and have insight into financial management and reporting practices of each Aboriginal group.

> Regional offices administer funding arrangements directly related to capacity building at the preparatory phase of implementation negotiation. These activities, funded through grants and contribution agreements, help an Aboriginal group develop the necessary skills and expertise required for the movement to self-government.

Interactions with OGDs

> As AIP chapters are developed, the implementation negotiator should review the draft language to determine which OGDs are involved and what their roles may be with respect to relevant obligations.

> During the AIP stage, the implementation negotiator should contact representatives of the OGDs to get their views concerning the implementation of the provisions being negotiated. If there is a meeting with OGD representatives (regional or headquarters), the implementation negotiator will keep the federal team informed on discussions and may call upon legal counsel to participate in discussions with OGD representatives when legal interpretation and advice is required.

> By attending federal caucus meetings, and main table negotiation sessions when appropriate, the implementation negotiator will be able to keep abreast of significant issues for the OGDs and of progress relating to negotiations.

> While INAC has the lead for Canada for implementation negotiations, representatives of the OGDs attend sessions where issues relevant to their departments are under discussion. In these instances, OGD representatives attend in an advisory capacity. The only exception is that in regard to negotiations dealing with tax matters, the Department of Finance Canada is the lead.

Interactions with other parties

> When AIP negotiations are nearing conclusion, the imple-

mentation negotiator should meet with his/her counterparts from the other parties to discuss establishing the Implementation Planning Working Group (IPWG). This group is composed of a lead implementation negotiator for each party who represents each party's interests during the implementation negotiation process. The implementation negotiator may also choose to initiate discussion on the need for, and approach to, negotiation protocols, work plans and agendas.

Implementation Planning and Negotiations Phase 4.2

Implementation planning and negotiations is one of the key phases of the implementation process because it determines much of what will occur in subsequent implementation. The implementation negotiator, as the federal member of the IPWG, leads the federal team in developing the implementation plan that accompanies the final agreement.

During this phase, obligations arising from the agreement are identified and the corresponding activities required to fulfill these obligations are agreed on by the parties. The timing for these activities and the responsibility for undertaking them are also negotiated during this phase, as are any planning assumptions made by the parties regarding the manner in which obligations are to be met. Also in this phase, it is important to note that implementation negotiators work with legal counsel and others on the federal team to ensure consistency

between Main Table and implementation sub-table negotiations regarding obligations.

Throughout the implementation planning and negotiations phase, the role of the implementation negotiator is to ensure that all parties agree on their respective obligations, as set out in the final agreement and to confirm the activities necessary to successfully implement the agreement. This process should assist the parties in avoiding post-effective date misunderstandings.

Matters Specific to Self-Government Agreements

As well as leading the federal team in developing the implementation plan, the implementation negotiator plays a significant role in developing and negotiating other implementation documents (e.g., financial documents such as the fiscal financing agreement and the own-source revenue agreement).

The type of implementation planning that takes place during the self-government negotiations process is primarily concerned with developing and supporting a stable and predictable, yet flexible, relationship between the parties. It is the implementation plan that maps out the nature of the government-to-government-to-government relationship as defined in the final agreement.

The implementation negotiator works with the Main Table negotiators, legal counsel, INAC regional offices and OGDs to support the transitional process that will move the Aboriginal group from the existing *Indian Act* regime to the new government-to-government relationship.

When approaching the negotiation of self-government agreements, the implementation negotiator must keep in mind such essential federal interests as affordability, efficiency, capital requirements, duplication of services, feasibility and capacity.

Nature of the negotiations

> The implementation planning and negotiations phase has three basic components:

- identification of the obligations contained in the draft chapters of the final agreement;
 - development of activities that identify the steps and timing required to fulfill the obligations in the final agreement, as well as the party or parties responsible for accomplishing them; and,
 - determination of sources of funds that may be required to fulfill the obligations.
- > Formal implementation negotiations should begin after the Main Table negotiations on the final agreement have started. This will help ensure that the implementation negotiations are based on final agreement understandings and language, rather than on the language in the AIP, which could face multiple revisions before being finalized.
- > Where the Main Table indicates that certain AIP chapters are already very detailed and unlikely to change substantially, the IPWG may want to initiate work on those chapters.

The clarification or modification of the draft AIP helps eliminate potential problems at an earlier stage.

- > Implementation negotiators should be willing to adopt negotiation protocols, work plans or agendas where the parties feel it would be beneficial to formalize such a process. The implementation negotiator should adopt openness protocols consistent with those used by the Main Table.
- > It should be made clear to all parties at the outset of negotiations that there is an inevitable time lag between completing a final agreement and completing an implementation plan.
- > Once the parties agree that the implementation documents are completed, the implementation negotiators for each party should initial the documents and submit them to the Main Table for initialling by the chief negotiators.

Matters Specific to Self-Government Agreements

- > The implementation negotiations for self-government includes the development of a series of implementation documents (e.g., implementation plan, financial transfer agreement, own-source revenue agreement, etc.), depending on the desires of the parties.
- > It is important to ascertain, as early as possible, an understanding among the parties as to the Aboriginal group's plan as to the timing for the coming into effect of their laws, institutions, harmonization protocols for programs and services, etc. This will facilitate effective, on-going planning, capacity-building and/or transition and implementation activities.

Scope of the implementation documents

> The implementation plan should address obligations in the final agreement, whether or not they involve the specific allocation of resources. These include:

- one-time obligations (e.g., obligations where a party, or parties, agree to complete a single, non-recurring activity or project during the implementation period);
 - contingent obligations (e.g., obligations where the activity is triggered by a particular action); and,
 - ongoing obligations (e.g., obligations where a party, or parties, undertake an activity that repeats on a cyclical basis or requires continuous actions/attention).
- > Permissive provisions (e.g., provisions that the parties, collectively or individually, may choose to do) may also be included in the plan if the parties agree.
- > The level of detail in the implementation plan may vary. Complex issues that must be dealt with upon the agreement coming into effect should have more detail. Obligations that will be triggered some time in the future may be described with less detail because it is often impractical to provide specific detail.
- > Operational details are best left to the implementation plan rather than the final agreement (keeping in mind that

the implementation plan cannot create obligations). The greater the detail in the implementation plan, the greater the plan's contribution to the successful implementation of the final agreement.

- > Where practical, related obligations should be grouped into a single set of activities.
- > The implementation plan should have a general section that clarifies the following:
- the implementation plan will not receive protection under Section 35 of the *Constitution Act, 1982*;
 - the implementation plan will accompany the final agreement;
 - where there is any inconsistency or conflict between the implementation plan and the final agreement, the final agreement shall prevail;
 - a review process will cover the progress of the implementation plan and make adjustments to the activities, time frames or responsible parties as required. This is to be a review of the existing plan only and not the creation of a new implementation plan; and,
 - any financial payments described in the implementation plan or a separate financial agreement are subject to appropriation by Parliament.

- > The implementation plan should identify the parties, the legal status of the document, its duration/term and the related amendment and renewal provisions.
- > The implementation plan should also include:
 - terms of reference for the implementation committee established pursuant to the final agreement;
 - details on financial commitments agreed to by the parties; and,
 - a communications strategy that details how the final agreement and the implementation plan will be communicated.

Matters Specific to Self-Government Agreements

> In the case of self-government agreements, the implementation plan will be accompanied by one or more financial agreements that reflect the new relationship being negotiated between the parties. An important objective in developing a new relationship is to provide stability and predictability in financing and to ensure accountability to community members as well as to the governments that provide the funding. Issues of accountability to citizens should be reflected in the final agreement. The other financial documents should be consistent with accountability provisions in the final agreement.

Legal status of the implementation documents

> The preferred federal approach is to develop a non-contractual

implementation plan that is used as a practical planning tool for fulfilling final agreement obligations. However, if requested by other parties, consideration can be given to developing an implementation contract that sets out the specific actions to be taken by the parties. The federal perspective is that the contract has potentially less value as a planning tool, however, because parties tend to hesitate to include too many details for fear of being held legally liable for what may prove to be impractical or unnecessary.

> In general, Canada prefers implementation plans to be flexible and non-contractual in nature. This reflects a desire to avoid the obligation to amend the contract formally every time operational circumstances arise that alter the manner or time frame in which activities can be undertaken. If an implementation plan were to be a contract, it would create a separate, independent set of legal obligations which may well exceed those which the treaty would have required.

Matters Specific to Self-Government Agreements

> Financial transfer agreements negotiated pursuant to a self-government agreement are contractual and legally binding because their terms and conditions must be met by both parties.

Relationship with other parties

> As part of the negotiations phase, an IPWG is generally created early in the implementation planning process. This group consists of implementation negotiating teams from Canada, the Aboriginal group and the provincial or territorial government.

> The IPWG works collaboratively in developing the required implementation documents as set out in the final agreement, responds to drafts of final agreement provisions referred by the Main Table and provides a “reality check” role in terms of the implementability and/or affordability of certain provisions.

Matters Specific to Self-Government Agreements

> In the context of self-government negotiations, the federal implementation negotiator should be particularly attentive to various aspirations, characteristics and abilities of the Aboriginal group and begin to consider means to facilitate and enhance the group’s capacity to achieve effective governance.

> Capacity building is an essential part of self-government. As self-government becomes a reality, Aboriginal communities must equip themselves with the necessary policy and program skills, institutional capacities and administrative structures to support good governance.

> The self-government negotiating process provides the opportunity to identify capacity and transition issues and develop approaches to deal with these issues prior to completion of either the final agreement, ratification or effective date.

Relationship to Main Table

> In addition to acting as Canada’s representative on IPWGs, implementation negotiators will work with and advise Main Table negotiators on implementation and fiscal issues. There

may also be situations, such as issues that the IPWG is unable to resolve, in which the IPWG would, as a whole, present these issues to the Main Table for resolution.

> Open communication between the Main Table and the IPWG is essential, particularly with respect to sharing draft documents, and subsequent changes to those documents, that will have an impact on the activities of both tables.

> The relationship between the IPWG and other tables (e.g., lands, legal or, in the case of self-government agreements, own-source revenue and taxation) will be determined by the Main Table in consultation with the IPWG.

Relationship with OGDs

> Relationships with the OGDs are maintained throughout the implementation planning and negotiations process by providing current drafts of pertinent implementation documents to OGD representatives for their review, comment and identification of funding and post-effective-date OGD responsibilities.

> OGD representatives could participate in IPWG meetings that deal with matters specific to their respective departments.

Relationship with federal caucus

> Periodic updates on the progress of the implementation negotiations should be included as part of the broader federal caucus process.

> Once the implementation documents are finalized, they are reviewed by the federal caucus and formally approved by the Federal Steering Committee on Self-Government and Comprehensive Claims as part of the review and approval of the final agreement.

Relationship with implementation managers and regional offices

> Implementation negotiators should meet regularly with federal implementation managers and the appropriate regional officials (i.e., those who will be responsible for co-ordinating implementation efforts after the effective date) to discuss any lessons learned from previous implementation processes that can be applied to the current negotiations.

> On an ongoing basis during implementation negotiations, the implementation negotiator should brief implementation managers and the appropriate regional officials on the content of the implementation plan in order to deal with any concerns that they might have.

> Implementation negotiators should consult with implementation managers and the appropriate regional officials regarding the actual costs involved in implementing similar activities under other land claim and self-government agreements.

> Implementation negotiators, implementation managers and the appropriate regional officials should meet to clarify roles and responsibilities regarding the management of implementation plans.

Matters Specific to Self-Government Agreements

> The regional office provides the IPWG with information and guidelines regarding the funding arrangements that the Aboriginal group currently has in place.

Pre-Effective-Date Phase 4.3

The pre-effective-date phase is the period between the conclusion of negotiations of both the final agreement and the implementation documents, generally indicated by the “initialling” of these documents by the Chief Negotiators of each party, and the effective date of the final agreement. The importance of this period cannot be overemphasized because it is during this time that commitments and plans related to the ratification, signing and effective date are carried out by the parties.

During this phase, OGDs prepare for those transfers (lands, capital assets, program funding, etc.) that have been agreed upon in the final agreement and associated documentation. It is also at this time that the required Memorandum to Cabinet, Treasury Board submission and enacting legislation are drafted and submitted for approval within the federal system. These documents are critical to the implementation process. Implementation negotiators generally bear the responsibility for preparing the Treasury Board submission and for reviewing the Memorandum to Cabinet to ensure it accurately portrays matters related to implementation, especially the financial package. It must also be kept in mind that these

activities take time and that factors beyond the control of the implementation negotiators can cause delay. It must also be remembered that Treasury Board submissions and Memoranda to Cabinet (including their early drafts) include sensitive information and must be handled with due care and attention according to federal security procedures.

Identification of federal pre-effective date activities

> Implementation negotiators, working with program officers, should determine whether any of the activities identified in the implementation plan should be completed before the effective date (e.g., development of replacement interests for land, reconciliation of wills and estates, etc.).

Input to the final agreement Memorandum to Cabinet

> It is the responsibility of the implementation negotiator to review the language in the draft Memorandum to Cabinet to ensure that implementation matters are fully reflected and accurately portrayed. Implementation matters include financial mandates, implementation plans, transition activities, capacity building, financial transfer agreements and annual adjusters to program and services amounts transferred.

Preparation of the Treasury Board submission and orders-in-council

> Implementation negotiators normally have the lead role in

developing the Treasury Board and order-in-council submissions associated with a final agreement.

> In developing such submissions, implementation negotiators should work closely with Treasury Board analysts and INAC legal counsel on the recommended structure and content of the submission.

> As soon as practical, the implementation negotiator should distribute a draft of the submission to those OGDs that are affected by its contents for their review and comment.

> Where the budget, programming or authorities of an OGD are affected by the final agreement, it is the responsibility of the implementation negotiator to obtain a letter of concurrence or ministerial sign-off from that OGD and ensure that it is appended to the submission when it is forwarded to the Treasury Board for approval.

Completion of the implementation plan

> The implementation negotiator is responsible for ensuring that a final, translated implementation plan is completed and reviewed by all parties in time for the signing process.

Liaison between implementation negotiators, implementation managers and regions

> Federal implementation negotiators should ensure that copies of the final agreement, implementation plan and, for self-

government agreements, that all financial implementation documents are provided to the federal implementation managers and the appropriate regional officials (including OGD officials, where appropriate).

> Implementation negotiators, implementation managers and the appropriate regional officials should discuss the contents of the final agreement and implementation plan as well as implications arising from financial documents relating to the self-government agreement.

Management of responsibilities prior to effective date

> Implementation managers should identify all obligations under the final agreement that require completion on or soon after the effective date of the agreement. They should also ensure that the organization responsible for the associated activities is aware of its obligations and is taking early and appropriate steps to implement them.

> In the case of federal obligations, implementation managers should contact the responsible group within the federal system and confirm that they are aware and prepared to undertake the required activities.

> Implementation managers should ensure that activities that must be undertaken on or before the effective date are completed (e.g., developing replacement interests for land; reconciling wills and estates; making final adjustments to settlement amounts before their payment; overseeing the

nomination of appointees to any boards or commissions established under the agreements; overseeing the preparation of ministerial briefing packages or orders-in-council for all required appointments; etc.).

> Implementation managers should be aware of, and facilitate as necessary, any transitional measures undertaken with or by the Aboriginal group, that are intended to build capacity within the community and its governance or implementation institutions.

Implementation Management (Post-effective Date) 4.4

This enduring phase involves ongoing management of the implementation of the final agreement and the new relationship established as a result. It is characterized by continuing liaison with the parties to the agreement, with OGDs and with boards and commissions established to coordinate the activities identified in the implementation plan.

It is crucial for federal implementation managers to establish and maintain relationships with the following stakeholders: representatives of Aboriginal beneficiary groups and/or self-governing Aboriginal groups; representatives of the parties who are designated to sit on multi-party implementation monitoring or oversight committees; OGD, INAC headquarters

and regional personnel who are involved in the implementation of the agreements; the Minister's Office to ensure timely appointment of members to the boards and commissions created pursuant to the final agreement; and representatives of boards, commissions and other implementing bodies created under the final agreement. With respect to implementing self-government agreements, it is essential for federal implementation managers to establish and maintain effective working relationships with INAC staff who administer the financial and other aspects of the new government-to-government relationship.

During the start-up period of implementation management, boards or commissions identified in the comprehensive land claim agreement are created, appointments to those bodies are processed, funds begin to flow for undertaking identified activities and progress begins to be monitored and reports prepared with respect to meeting obligations. For self-government agreements, Aboriginal groups will begin to exercise their jurisdictions as specified in the self-government agreement and implementation documents. Implementation committees are established and meetings are held with the other parties to discuss implementation issues that may arise from time to time.

Relationship with INAC regional offices and OGDs

> INAC regional offices are responsible, with support from headquarters, for implementing many of Canada's obligations falling within INAC.

> Federal implementation managers should maintain contact and attend regular meetings with INAC regional staff.

> Regional INAC staff should regularly attend implementation committee meetings to provide input on issues where the region has the lead role and to ensure follow up.

> Implementation managers should maintain regular contact with OGDs.

> In the case of British Columbia land claims and self-government agreements, the TIU is responsible for coordinating the implementation planning, negotiations and management of these agreements. OGDs are involved in the implementation of activities relating to their specific business lines.

Matters Specific to Self-Government Agreements

Our practice in managing the implementation of self-government agreements continues to evolve. Our experience so far is characterized by varying practices relating to the respective roles and responsibilities of regions and headquarters. The practices listed below are based on our current experiences. It is assumed that as more self-government agreements are finalized and the implementation of those agreements becomes a reality, the respective roles and responsibilities of the regions and headquarters will become more clearly defined.

> INAC regional offices and headquarters will jointly manage the undertaking of agreed-to periodic reviews of the self-government agreement and its implementation.

- > In the case of the Yukon self-government agreements, the INAC regional office is responsible for negotiating implementation agreements for post-effective-date transfers of programs and services with support from Implementation Branch in headquarters.
- > INAC regional offices are responsible for the day-to-day management and administration of fiscal arrangements, such as financial transfer agreements and own-source revenue agreements. Headquarters is responsible for supporting regional offices in the carrying out of this function, along with ensuring national consistency of practice and policy development. In British Columbia, however, the TIU has this responsibility.

Implementation committees

- > The main objective of an implementation committee is to ensure collaborative implementation of the comprehensive land claim or self-government agreement. The committee arrives at decisions (generally referred to as “records of decision”) on a consensual basis. It deals with problems that may arise in the implementation process and generally acts as the forum for the parties to resolve implementation issues, before having to resort to more formal dispute-resolution processes.
- > The implementation committee is also responsible for ensuring that periodic (e.g., five-year) reviews required by the final agreements or implementation plans are conducted and completed, that funding between implementing bodies and

fiscal years is re-allocated when necessary and that a joint annual report is produced and made ready for wider public distribution including tabling in Parliament.

- > Implementation committee members are appointed as representatives by each party. They are accountable to the party that appoints them. Each committee should meet as often as dictated by the final agreement or implementation plan, generally three or four times per year, or as determined by the parties.

Matters Specific to Self-Government Agreements

- > The role of implementation committees vis-a-vis self-government agreements continue to evolve. Implementation committees operating in the comprehensive land claims context focus primarily on an array of defined obligations. However, implementation committees operating in a self-government context will focus their work on developing the newly established government-to-government-to-government relationship as defined by the final agreement.

Preparation for and follow up to implementation committee meetings

- > Well in advance of the committee meetings, the federal implementation manager should co-ordinate the development of a draft agenda for the meeting with the other parties. The representative should be advised of any additional participants at the meeting and any potentially contentious issues that require resolution.

- > Where issues relevant to OGDs are being discussed at the committee meetings, the implementation manager may ask representatives from the OGDs for their input or invite them to participate.
- > Canada's representative on the implementation committee is briefed by the implementation manager in advance of the meeting regarding issues, possible options for addressing them and the general status of implementation.
- > In advance of the implementation committee meetings, federal implementation managers are responsible for providing the other parties with any documents that will be tabled at the meeting.
- > Where Canada has accepted the responsibility to do so, federal implementation managers prepare minutes and records of decision that summarize the committee deliberations and distribute them in draft to the other parties for review.
- > Federal implementation managers identify any federal action items resulting from the meeting, alert the appropriate OGD and meet with departmental representatives to discuss the issues for which that OGD has responsibility.
- > Federal implementation managers monitor action items to ensure that commitments are being met and that these items are followed up. They are responsible for providing an update on progress related to federal action items for the next implementation committee meeting. In British Columbia, the Manager, TIU, is Canada's representative on implementa-

tion committees. Implementation negotiators support the TIU Manager in providing day-to-day implementation management.

Matters Specific to Comprehensive Land Claim Agreements

- > Where issues relevant to the land claim agreement boards and commissions are being discussed at the committee meetings, the federal implementation manager should seek their input or invite them to participate.
- > Boards and commissions should be invited to attend implementation committee meetings, either on an ad hoc basis if necessary or for occasional updates on their activities.

Matters Specific to Self-Government Agreements

- > With respect to self-government agreements, subcommittees of the implementation committee may be established in accordance with the final agreement, implementation plan or financial agreement to deal with financial issues related to self-government. Staff in both headquarters and the regions should meet to discuss respective roles and responsibilities for such committees involved in implementation management.

Establishment of boards, commissions and other implementing bodies

- > Before the effective date, or as soon as possible thereafter, INAC implementation managers should contact the other parties and the Minister's Office regarding nominations for members to boards, commissions or other implementing bodies in accordance with the provisions of the final agreement.

- > The Minister's Office should be alerted that appointments to new boards will need to be made and should be consulted on the process for selecting federal nominees.
- > Preparatory work with respect to federal nominations (e.g., advertisements in local newspapers) for the new boards should begin as soon as possible after the agreement is signed or after the effective date of the agreement, or if separate legislation is required, soon enough so appointments can be made when legislation is passed.
- > The federal implementation manager is responsible for facilitating and overseeing the appointments process to ensure that appointments identified in the agreement are in place on a timely basis, in accordance with the mechanisms specified in the agreement.
- > For Governor-in-Council appointments, the federal implementation manager is responsible for preparing the order-in-council submission and obtaining the necessary approvals. For ministerial appointments, regional officials will normally prepare the appointment letters with the required documentation and forward this package to headquarters for review and submission to the Minister's Office.
- > The federal implementation manager should ensure that, six months before an appointment expires, the nominating party is contacted to request names to fill the vacancy. The Minister's Office should be advised that this process has begun.

- > Where a vacancy occurs before a federal appointment expires, the federal implementation manager should contact the nominating party immediately to request names to fill the vacancy.
- > The federal implementation manager should be satisfied that each board/commission and its members have been given adequate orientation on their mandate, responsibilities and modes of operation. The implementation manager may assist with such orientation as is requested or warranted.

Regular and periodic monitoring

- > A key component of successful implementation is monitoring. A mechanism to monitor the implementation of the agreement may be set out in the general provisions of the implementation plan, but usually merits a separate section in the implementation plan.
- > Monitoring includes: overseeing the progress of implementation; addressing issues relating to implementation; amending the implementation plan in light of changing circumstances; and, conducting any periodic reviews.
- > While each party is generally responsible for its own activity tracking/monitoring, it is generally helpful to share resulting information products/reports with the other parties at or around implementation committee meetings, to facilitate "joint" monitoring and effective information exchange.

- > The Land Claim Obligation System (LCOS), or similar automated tracking systems, is an in-house federal management tool that helps the federal implementation manager track the progress, current status and critical dates of projects and activities of OGDs with responsibilities under the agreement.
- > LCOS uses the same numbering sequences for activities and projects as outlined in the implementation plan.
- > LCOS can play a critical role during the creation of annual reports, five-year reviews and the renewal of implementation plans, as a system that can produce reports that identify the progress of obligations and activities in the implementation plan.

Financial management

- > Implementation plans or associated fiscal agreements provide for a negotiated level of implementation funding (distinct from settlement payments under land claim agreements) to enable delivery of a variety of implementation activities. These activities are generally carried out by designated OGDs or special implementing bodies created by the final agreement. Some implementation funding is “one-time” in nature; other implementation funding is considered “ongoing” and subject to renewal at periodic intervals (e.g., every five or ten years). Whether the funding is one-time or ongoing depends on the nature of the obligation in the final agreement.
- > Federal implementation managers participate in the departmental annual reference level update (ARLU) process in which

the department sets its spending levels for the following fiscal year and ensures that proper spending authorities are in place to fulfill Canada’s funding obligations according to final agreements, implementation plans/contracts and any associated financial documents.

- > Federal implementation managers oversee the funding arrangements associated with a final agreement, implementation plan or financial agreement. They are also responsible for monitoring funding agreements to ensure that terms and conditions are met, including the receipt of any financial reports required by the funding agreements.

Matters Specific to Comprehensive Land Claim Agreements

- > Federal implementation managers:
 - analyse requests from implementing bodies for reallocation or carry-forward of implementation funding and make recommendations to implementation committees regarding such requests;
 - analyse requests for additional funding to establish that a justifiable need exists and is in excess of funding provided under the respective implementation plan or contract. This could involve consultation with the body submitting the request, the implementation committee, other sectors of INAC and OGDs and central agencies; and,
 - where a need for additional funding has been established, the federal implementation manager must

seek either a reallocation from within the implementation plan or additional comprehensive land claim funding from INAC or from Treasury Board.

Matters Specific to Self-Government Agreements

> Implementation managers and/or regional officials are responsible for amendments/adjustments to financial transfer agreements as agreed to by the parties.

Amending final agreements

> While final agreements are generally not re-opened, there may be circumstances (e.g., technical errors or clarifying provisions that are of interest to all parties) in which amendments are required.

> If a party requests an amendment to a final agreement, federal implementation managers should ensure that the matter is fully discussed by the implementation committee before entering the formal amendment process established by the final agreement.

> Where the implementation committee agrees that an amendment to the final agreement is required, implementation managers should seek a legal review and assessment of potential options and wording of the amendment.

> If the proposed amendment to the final agreement would affect an OGD, implementation managers should consult with OGD representatives to discuss the amendment options.

> Once wording for the amendment to the final agreement has been developed and agreed upon by all other parties to the final agreement, federal implementation managers should prepare the required order-in-council submission and obtain the proper approvals.

> Federal implementation managers are responsible for ensuring that amendments to the final agreement are published in the Canada Gazette and widely distributed.

Matters Specific to Self-Government Agreements

Regional offices with support from headquarters are responsible for managing the process for seeking amendments to self-government final agreements.

Reviewing and amending implementation plans

> If an amendment to the implementation plan is deemed appropriate, a record of decision to that effect must generally be signed by the implementation committee.

> Federal implementation managers are responsible for amending the implementation plan as directed in the record of decision and distributing the amendments to the parties.

> Federal implementation managers are also responsible for amending financial annexes and schedules of the implementation plan to reflect records of decision made by the implementation committee to authorize re-allocation or carry forward of implementation funding.

Annual reports

Matters Specific to Comprehensive Land Claim Agreements

> Annual reports provide formal, preferably joint, records of implementation of a final agreement. While some final agreements do not require an annual report, INAC ensures preparation of annual reports for all final agreements as a sound management practice and in response to a recommendation from the Public Accounts Committee in 1987.

> Initial calls for input to the annual report are normally sent by federal implementation managers or hired contractors to the Aboriginal groups, OGDs, other governments and boards and commissions either at the end of a fiscal year or very early in the next fiscal year. Aboriginal groups should be encouraged to report any identifiable socio-economic impacts of implementation on their communities.

> Once the Implementation Committee has finalized and published the report, it is distributed to all parties, tabled in Parliament by the Minister of INAC, if required, and made available to the general public, including posting on the INAC Web site. The federal appointee to the Implementation Committee is charged with carrying out these responsibilities on behalf of committee.

> Federal implementation managers should adhere to agreed-on time lines to ensure that annual reports are completed and ready for release in a timely manner.

Periodic, comprehensive reviews

Matters Specific to Comprehensive Land Claim Agreements

> Beyond regular monitoring and annual reporting, parties generally undertake, at the end of fixed periods, retrospective, comprehensive reviews of implementation as required by most final agreements and their implementation plans.

> Periodic (e.g., five-year) reviews are generally undertaken by the implementation committees, unless otherwise agreed among the parties, and result in a published report. Copies are distributed to leaders of the territorial or provincial government, the Aboriginal community, throughout the federal government, as well as to the general public.

> Periodic reviews examine the current status of final agreement obligations and activities and generally include a detailed analysis of the activity sheets contained within implementation plans. They may contain recommendations for amendments to the implementation plan, for addressing implementation issues and for improving the implementation process in the future.

> Implementation committees are generally charged with developing and overseeing follow-up action plans with respect to the findings of the periodic reviews.

Evaluation of comprehensive land claim and self-government agreements

Matters Specific to Comprehensive Land Claim Agreements

> As an emerging interest and in recognition of the need to provide information to all parties on the outcomes of settled comprehensive land claims, INAC has developed a framework for evaluating socio-economic impacts of comprehensive land claim agreements.

> The comprehensive land claims evaluation framework integrates the perspectives of key stakeholders from the federal government, Aboriginal groups, provincial and territorial governments and third-party interests. It is intended to be the foundation for future evaluations of comprehensive claim settlements.

> The comprehensive land claims evaluation framework will also link to a multi-year evaluation schedule, which will suggest the timing and sequence of the settled claims that will be evaluated.

Matters Specific to Self-Government Agreements

> A similar evaluation framework is also being developed for the implementation of self-government agreements.

Renewal of Implementation Documents

In recent years, the renewal of implementation plans has emerged as a new business line. Experience in this area is relatively limited and has consisted of renegotiating the financial transfer arrangements to self-governing Yukon First Nations and the Sechelt in British Columbia, and the renegotiation of the Implementation Plans for the Nunavut and the Gwich'in Comprehensive Land Claim Agreements. It is expected that the task and content of renewing a specific Implementation Plan will diminish over time as the activities required to meet the Final Agreement obligations are completed. Eventually, the complexities involved in renewing a given implementation plan should diminish significantly and the relationship between the parties will continue primarily on the basis of parameters established within the Final Agreement for that relationship. In the meantime, current approaches to this relatively new area of renewal are outlined below.

Typically, two to three years before the end of the current implementation period (generally 10 years for implementation plans), the parties should begin discussions to ensure new implementation plans are in place for the next implementation period. Implementation committees should have a valuable role to play in renewing implementation plans. The committee should provide input and recommendations, regarding the current implementation period and records of

decision from committee meetings, to the implementation negotiators of the next implementation period. Outstanding issues should be discussed and possible resolutions recommended during this renewal. Periodic (five-year) review reports should be another important source of information for these renewals.

The formal renewal process officially begins when negotiators are designated by each party. The goal is a renewed implementation plan, and/or financial transfer agreement, for the ensuing implementation period.

In most cases, a considerable period of time has passed since the original implementation plans were negotiated and approved. The federal implementation negotiator should work closely with the implementation manager to determine what has worked well and what needs improvement. In addition, most of the funding identified in the original implementation plans may have been based on assumptions and perceived best practices at the time. The renewal process offers an opportunity to revisit assumptions and to examine how activities have been carried out in practice. This process may lead to a new set of planning and costing assumptions to guide the next implementation period. It may also involve adjusting or replacing activities which have not been effective as originally assumed and which may require seeking the appropriate federal approvals.

Once the various obligations and activities are identified and agreed upon by the parties, discussions on levels of implementation funding to be provided for the ensuing imple-

mentation period can begin, subject to appropriate federal funding authorities being in place.

Matters Specific to Self-Government Agreements

In the self-government context, when renewing financial transfer agreements, the parties are to engage in discussions and negotiations as called for in the current financial agreement (terms are generally five years).

Subjects for the renewal process

> It should be made clear to the parties that the final agreement is not on the table for renewal. Only the implementation plan or financial transfer agreement will be considered.

> Subjects for consideration during the renewal process can include:

- outstanding issues (e.g., issues raised during the five year review or issues identified at implementation committee meetings);
- new issues (e.g., evolving roles of organizations created pursuant to the land claim or self-government agreement or issues resulting from economic, political or social changes); and,
- matters relating to boards, commissions and other implementing bodies established pursuant to the land claim or self-government agreement.

*Matters Specific to
Self-Government Agreements*

> Subjects for consideration during the renewal process can include:

- the financial transfer agreement identifying funding provided by Canada, or any other party, and terms and conditions associated with the funding; and,
- an Aboriginal group's financial contributions to their own government (i.e., own-source revenue and its potential offsets/impacts on federal/provincial transfers).

Process

> The usual process for renewal begins with reviewing the final comprehensive land claim and/or self-government agreement and associated implementation plans to assess the parameters assigned to the renewal.

> As with the original implementation negotiations, the parties should:

- identify the obligations contained in the final agreement that continue to be relevant;
- develop activity sheets that identify the steps and timing required to fulfill the obligations in the final agreement, as well as the organization(s) responsible for accomplishing them; and,

- determine the resources that may be required to fulfill the obligations.

**Relationship with
INAC regional staff and OGDs**

> It is preferable that regional staff be committed/assigned to the federal team for the renewal.

> OGDs should be involved throughout the renewals. Implementation negotiators should provide OGDs with current drafts of pertinent implementation documents for review and comment.

Product

> Consistent with the implementation chapter of the final agreement, the revised implementation plan should address all obligations that arise from the final agreement and may identify one-time obligations contained in the final agreement that were completed in the first implementation period.

> The revised implementation plan should be clear and precise about the actions to be taken, by whom and when. Where the parties agree, it can also indicate who is responsible for associated costs and what those costs are.

Matters Specific to Self-Government Agreements

> The product of the renewal of a financial transfer agreement may include revised terms and conditions with respect to the financial transfers for the next funding period.

5.

Closing Remarks

Implementation planning is an essential aspect of the comprehensive land claim and self-government agreement negotiation processes. These activities include providing support and advice to the Main Table in the early stages of negotiations (i.e., pre-AIP). Such advice and support addresses the general question of the overall “implementability” of the agreement under development and specific areas such as the financial and implementation principles chapters of the agreement. Post-AIP, federal implementation negotiators are responsible for working with the other parties to the agreement in developing the implementation plan and associated implementation documents for the Main Table. Based entirely on obligations contained in a final agreement, the implementation plan: (1) helps ensure that all parties identify and agree on the meaning of all obligations contained in the final agreement; (2) confirms that the parties have a common understanding of how the agreement will be implemented; and, (3) secures their commitment to undertake certain activities to meet their respective obligations. The implementation plan and corresponding implementation documents are used as guides for the parties to facilitate the effective and efficient execution of the final agreement.

In the “post-agreement” world, implementation management plays a crucial role in ensuring that all parties’ obligations are carried out and monitored. Under comprehensive land claim agreements, federal implementation managers ensure that all federal funding obligations are being met. They also work closely with designated representatives of the other parties to ensure collaborative implementation of the provisions of the agreement and the implementation plan. In the case of self-

government, implementation managers are at the forefront of the new government-to-government relationship with the newly formed self-governing Aboriginal group. Early implementation contacts are important to set the tone for the relationship that will unfold in the years to come.

The process of renewing implementation plans and associated implementation documents is a new and evolving practice. Because the standard term for negotiated implementation plans is ten years, and five for financial documents, the renewal of these documents will undoubtedly be an expanding business line for implementation practitioners.

Finally, since the field of implementation itself is an evolving practice, there are continued opportunities for learning and development, as implementation negotiators and managers refine and expand their knowledge with each new experience. As such, this Handbook is intended to be an “evergreen document”. It will be updated periodically to reflect major changes that are evident in the implementation function.