

# Annual Report 2003-2004



## First Nations Lands Advisory Board





First Nations Lands Management Resource Centre

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July 26, 2004

The Honourable Andy Scott  
Minister of Indian & Northern Affairs  
10 Wellington Street  
Hull, Quebec

Dear Minister Scott:

Re: 2003-2004 Lands Advisory Board Annual Report

As the Chairman of the Lands Advisory Board and on behalf of the First Nation signatories to the *Framework Agreement on First Nation Land Management*, I am pleased to forward to you our 2003-2004 annual report pursuant to Section 41.1 of this government-to-government agreement with Canada.

Sincerely,

Chief Robert Louie  
Chairman,  
Lands Advisory Board

## CHAIRMAN'S MESSAGE

I am pleased to report that 2003-2004 was a very successful and productive year for the Lands Advisory Board (LAB) and the First Nations Land Management initiative. First Nations Interest and participation in the *Framework Agreement on First Nations Land Management (Framework Agreement)* high and continues to grow. Close to one hundred First Nations from across Canada have either expressed interest or currently participate in this initiative.

First Nations entered into a government-to-government relationship with Canada in 1996 with the signing of the *Framework Agreement*. The *Framework Agreement* provides the opportunity for First Nations to assume direct authority and jurisdictional control over their reserve lands and resources. A First Nation who successfully ratifies their land code effectively become decision-makers over their lands and resources.

There is no other initiative in Canada today, short of a self government agreement or treaty settlement, whereby a First Nation is recognized as a government with the jurisdictional authority to pass their own laws. The *Framework Agreement* and the First Nation land code provides that opportunity.

The First Nations most interested in participating in this initiative are those who truly want to be the decision-makers over their own lands without reliance on INAC. First Nation land code development and law making is a serious matter. Exercising governmental decision making and law making powers imports responsibility. First Nations must not only be willing to take on this responsibility, but ready and able to implement their governmental decision making authority.

I am most pleased and proud to be associated and work with those Chiefs and their communities who have taken on this initiative and implementation of their land codes.

While there are issues of concern and some growing pains between the LAB and INAC, those matters are being addressed and I am confident will be resolved during the 2004-2005 fiscal year.

The road to success is never easy. The First Nations' unwavering desire to be self-sufficient and their resolve to be recognized as governments and make decisions over their own lands and resources remains crystal clear. This is being achieved by the *Framework Agreement* and land management initiative. The LAB and the First Nation Land Management Resource Centre remains committed to assist First Nations achieve their goals.

Chief Robert Louie  
Chairman, Lands Advisory Board

## EXECUTIVE SUMMARY

The *Framework Agreement on First Nation Land Management* represents the culmination of years of effort by a national group of dedicated Chiefs to create, for their First Nations, the option to manage reserve lands and resources under their own individual land code, free from constraints imposed under the *Indian Act*. The *Framework Agreement* was signed in February 1996 by the Chiefs of 14 First Nations and the Minister of Indian Affairs. Canada enacted the *First Nations Land Management Act (FNLMA)*, “an Act providing for the ratification and bringing into effect of the *Framework Agreement on First Nation Land Management*”. The *FNLMA* received Royal assent in June 1999.

Previously, Canada had not succeeded in enacting sectoral self-government legislation for First Nations that would provide a statutory alternative to the *Indian Act*. The Chiefs’ pursuit of a sectoral approach to the development of a government-to-government agreement on land management provided Canada with the opportunity to engage actively in a First Nation-led initiative. The Chiefs’ initiative was consistent with the Government of Canada’s policy objective of recognizing First Nations’ inherent right of self-government.

The *Framework Agreement* established a Lands Advisory Board (LAB). The composition of the LAB is determined by the Councils of those First Nations which have ratified the *Framework Agreement* by voting to manage their reserve lands under a community land code. The LAB is the political body with the mandate to implement the *Framework Agreement*. This includes providing support to the operational First Nations that have voted and are functioning under a community land code and to the developmental First Nations that are preparing to conduct their community vote on the land code.

In order to assist in fulfilling these responsibilities, the LAB established a Finance Committee, which deals with all financial and reporting requirements, and the First Nations Land Management Resource Centre, which deals with all technical and administrative duties.

The LAB and Resource Centre fulfilled a number of responsibilities in 2003 – 2004 in order to implement the *Framework Agreement*. These functions included:

- developing a new method for determining the operational funding requirement for land management;
- addressing the impact on the *Framework Agreement* of two proposed bills before Parliament and one existing piece of legislation;
- considering the feasibility of “group” signatories to the *Framework Agreement*;
- considering how Quebec First Nations could participate in the *Framework Agreement*;
- developing a model for the First Nation – Canada Environmental Management Agreements;
- developing land registry regulations; and
- establishing national partnerships with the Canadian Institute of Planners and the National Aboriginal Land Managers Association.

Throughout 2003-2004 the LAB and Resource Centre provided support to developmental First Nations planning to vote on their land code. The ratification process under the *Framework*

*Agreement* consists of 43 activities. The LAB and Resource Centre supported the First Nations to complete these activities by assisting with:

- developing a land code;
- developing and implementing a community communication and consultation strategy;
- advice and guidance on the environmental site assessment;
- advice and guidance on the survey of the reserve jurisdictional boundary;
- advice and guidance on the Individual Agreement with Canada; and
- development and implementation of the community voting process.

Six First Nations previously had completed the ratification process and voted to assume direct control over their reserve lands and resources. In 2003-2004 eight additional First Nations successfully completed the ratification process to begin operational land management under their own Land Code. Eighteen other First Nations are planning to vote in 2004-2005.

The LAB and Resource Centre also provided support throughout 2003-2004 to the operational First Nations functioning under their land codes. Once a land code takes effect, there are 34 land administration sections of the *Indian Act* that no longer apply to a First Nation's reserve lands and resources. The *Framework Agreement* now applies and First Nations are empowered to manage reserve lands and resources, pass land laws and enforce their land laws.

The authority to manage reserve lands includes all the interests, rights and resources that belong to those lands under the jurisdiction of Canada. The operational First Nations exercise all the rights, powers and privileges of an owner. The LAB and Resource Centre are responsible to assist the operational First Nations with drafting land laws, rules, procedures, agreements, policies, and land management systems that will be specific to each community.

The Chiefs who negotiated the *Framework Agreement* with Canada introduced the concept of an independent party who would ensure that all aspects of the ratification process were conducted to the satisfaction of both the First Nation and Canada. The "verifier" would be jointly appointed by the First Nation and Canada.

The role of a verifier in the ratification process has proven to be successful. The additional checks and balances by an independent party in validating the transition from the *Indian Act* to a land code has provided comfort not only to the First Nation membership and leadership but also to third-party interest holders and external financial institutions.

The verifier submitted to the LAB a year-end progress report outlining the assistance provided to First Nations in 2003-2004. The report identifies a number of issues and provides recommendations to facilitate the ratification process.

The LAB 2003-2004 annual report closes with a number of recommendations that the LAB will be discussing with the Minister. These recommendations are intended to facilitate the implementation of the *Framework Agreement* and *FNLMA*, recognize the government-to-government relationship between First Nations and Canada, and provide significantly more First Nations with the opportunity to assume control over their reserve lands and resources.

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## 1. **IMPORTANCE OF THE *FRAMEWORK AGREEMENT ON FIRST NATIONS LAND MANAGEMENT***

### 1.1 **Land Administration under the *Indian Act***

The *Indian Act* requires that the Minister and officials of Indian & Northern Affairs Canada (INAC) administer reserve lands on behalf of First Nations. INAC has adopted a “policy continuum” under the *Indian Act* which provides two possibilities for the potential involvement of First Nations in the administration of their own reserve lands. The First is delegation of management responsibilities to First nations themselves pursuant to sections 53 (designated lands) and 60 (reserve lands) under the Act. Under this option, the First Nations act effectively as “agents” of the Minister, subject to limitations on that agency set out in the delegation document.

Such increased involvement of First Nation staff in the administration of their own reserve lands under these options, however, does not address four fundamental problems:

- the *Indian Act* does not recognize First Nations’ inherent right to govern their reserve lands and resources nor afford First Nations adequate legislative scope to deal effectively with their lands and resources;
- the *Indian Act* does not protect reserve lands from being surrendered and sold which presents the possibility of further erosion of the limited reserve land base;
- the *Indian Act* does not prevent Canada and provincial governments from expropriating reserve lands under section 35 without the authorization of the First Nation; and
- the *Indian Act* does not provide an adequate statutory basis for managing and developing reserve lands in the 21<sup>st</sup> Century.

Exhibit 1 indicates the limited possibilities available to First Nations prior to the *Framework Agreement* in 1996. Self-government was the only option available to achieve the recognition of the inherent right of First Nations to manage their reserve lands and resources, but as of 1996 no First Nation had achieved a self-government agreement and no First Nation exercised enhanced legislative and management powers over its reserve lands and resources except by way of comprehensive land claim agreement. Such agreements were not an option for many First Nations and treaty negotiations in BC had only recently been initiated.



## EXHIBIT 1: Options for First Nations – Before the *Framework Agreement*

Option:	Land Administration by INAC	Regional Land Administration Program (RLAP)	Delegation of s53 & s60 authorities under the Indian Act	Self-Government
Statutory Regime:	Indian Act	Indian Act	Indian Act	Other (e.g., treaty, self-government legislation, etc.)
Distribution of Authority and Responsibility:	<div style="border: 1px solid black; padding: 5px; width: fit-content; margin: 0 auto;">Minister of Indian Affairs</div>			<div style="border: 1px solid black; padding: 5px; width: fit-content; margin: 0 auto;">First Nation</div>

### 1.2 Framework Agreement Alternative for First Nations

The *Framework Agreement* represents the culmination of years of effort by a national group of dedicated Chiefs to create, for their First Nations, the option to govern their reserve lands and resources under their own individual land code, free from constraints imposed under the *Indian Act*. The governance and management of reserve lands and resources is a crucial component of First Nations' self-government. The *Framework Agreement* was signed in February 1996 by the Chiefs of 14 First Nations and the Minister of Indian Affairs. Canada enacted the *First Nations Land Management Act (FNLMA)*, "an Act providing for the ratification and bringing into effect of the *Framework Agreement on First Nation Land Management*". The FNLMA received Royal assent in June 1999.

Previously, Canada had not succeeded in enacting sectoral self-government legislation for First Nations that would provide a statutory alternative to the *Indian Act*. The Chiefs' pursuit of a sectoral approach to the development of a government-to-government agreement on land management provided Canada with the opportunity to engage actively in a First Nation-led initiative. The Chiefs' initiative was consistent with the Government of Canada's policy objective of recognizing First Nations' inherent right of self-government.

The *Framework Agreement* and the *FNLMA* constitute a breakthrough in the creation of a statutory basis to support First Nation self-government of reserve lands and resources. The full text of both the *Framework Agreement* and the *FNLMA* are appended.

Exhibit 2 indicates the new option now available to First Nations seeking to assert their control over their reserve lands and resources.

**EXHIBIT 2:  
Options for First Nations After the *Framework Agreement***

Option:	Land Administration by INAC	Regional Land Administration Program	Delegation of s53 & s60 authorities under the <i>Indian Act</i>	<i>Framework Agreement</i>	Self-Government
Statutory Regime:	<i>Indian Act</i>	<i>Indian Act</i>	<i>Indian Act</i>	↗ FN Land Code ↗ FNLMA	Other (e.g., treaty, self-government legislation, etc.)
Distribution of Authority and Responsibility:	Minister of Indian Affairs				
			First Nation		

**1.3 Framework Agreement Parameters**

The *Framework Agreement* was designed by the Chiefs First Nations to provide an opportunity for First Nations to assume control over their reserve lands and resources. The Chiefs also were careful to establish the limits of the scope of the *Framework Agreement* to prevent unintended impacts on other parties, rights and relationships:

- “1.3 This Agreement is not a treaty and shall not be considered to be a treaty within the meaning of section 35 of the Constitution Act, 1982.
- 1.4 The Parties acknowledge that the Crown's special relationship with the First Nations will continue.

- 1.5** This Agreement does not affect any lands, or any rights in lands, that are not subject to this Agreement.
- 1.6** This Agreement is not intended to define or prejudice inherent rights, or any other rights, of First Nations to control their lands or resources or to preclude other negotiations in respect of those rights.”
- 55.1** Nothing in this Agreement prevents a First Nation, at any time, from opting into any other regime providing for community decision-making and community control, if the First Nation is eligible for the other regime and opts into it in accordance with procedures developed for that other regime.”

## 2 FIRST NATION SIGNATORIES TO THE *FRAMEWORK AGREEMENT*

### 2.1 Growing Number of First Nations Signatories

Exhibit 3 indicates the original 14 First Nation signatories to the *Framework Agreement* and the 20 additional First Nations that became signatories on March 31, 2003.

<b>EXHIBIT 3:</b> <b>Signatories to the <i>Framework Agreement</i></b>		
<b>Province</b>	<b>Original Signatories</b>	<b>Additional Signatories</b>
<b>British Columbia</b>	L'heidli Tenneh N'Quatqua Westbank Squamish Musqueam	McLeod Lake Beecher Bay Tsawout Tsawwassen Songhees Ts'kw'aylaxw Osoyoos Skeetchestn Kitselas Slammon Tseil-waututh
<b>Alberta</b>	Siksika	
<b>Saskatchewan</b>	Muskoday Cowessess	Kinistin Whitecap Muskeg Lake
<b>Manitoba</b>	Opaskwayak Cree	
<b>Ontario</b>	Scugog Island Georgina Island Nipissing Mnjikaning	Garden River Mississagi #8 Whitefish Lake Chippewas of Kettle and Stony Point Moose Deer Point Dokis
<b>New Brunswick</b>	St. Marys	Kingsclear

## 2.2 Signatory First Nations' Prior Experience with Land Administration under the *Indian Act*

Canada acknowledged the right of First Nations to govern their reserve lands and resources by ratifying the *Framework Agreement*. Neither the *Framework Agreement* nor the *FNLMA* mention any requirement for prior First Nation involvement with *Indian Act* land administration programs. The Chiefs' intention was that any First Nation may choose to pursue this sectoral self-government opportunity without first completing any prerequisite.

Exhibit 4 lists the 14 First Nation signatories that have exercised their inherent right and ratified the *Framework Agreement* by voting to assume control over their reserve lands and resources under their own Land Code. Six of these First Nations previously exercised the Minister's "delegated authority" under the *Indian Act* prior to ratifying the *Framework Agreement*. Three other First Nations were previously under RLAP and the remaining five First Nations had no involvement with *Indian Act* land administration programs prior to exercising their inherent right to manage their lands under their own Land Code.

<b>EXHIBIT 4: Land Code First Nations' Previous Involvement with "<i>Indian Act</i>" Land Management</b>			
<b>First Nation Signatory</b>	<b>Land Administration by INAC</b>	<b>Regional Land Administration Program (RLAP)</b>	<b>Delegated Sections 53 &amp; 60 Authorities</b>
<b>Statutory Regime</b>	<i>Indian Act</i>	<i>Indian Act</i>	<i>Indian Act</i>
Lheidli T'enneh	X		
Sliammon		X	
Tsawwassen		X	
Westbank			X
Ts'kw'aylaxw	X		
McLeod Lake	X		
Beecher Bay	X		
Muskoday			X
Opaskwayak Cree			X
Whitecap Dakota			X
Kinistin		X	
Scugog Island	X		
Georgina Island			X
Nipissing			X

### 3 ROLE OF LAB AND RESOURCE CENTRE

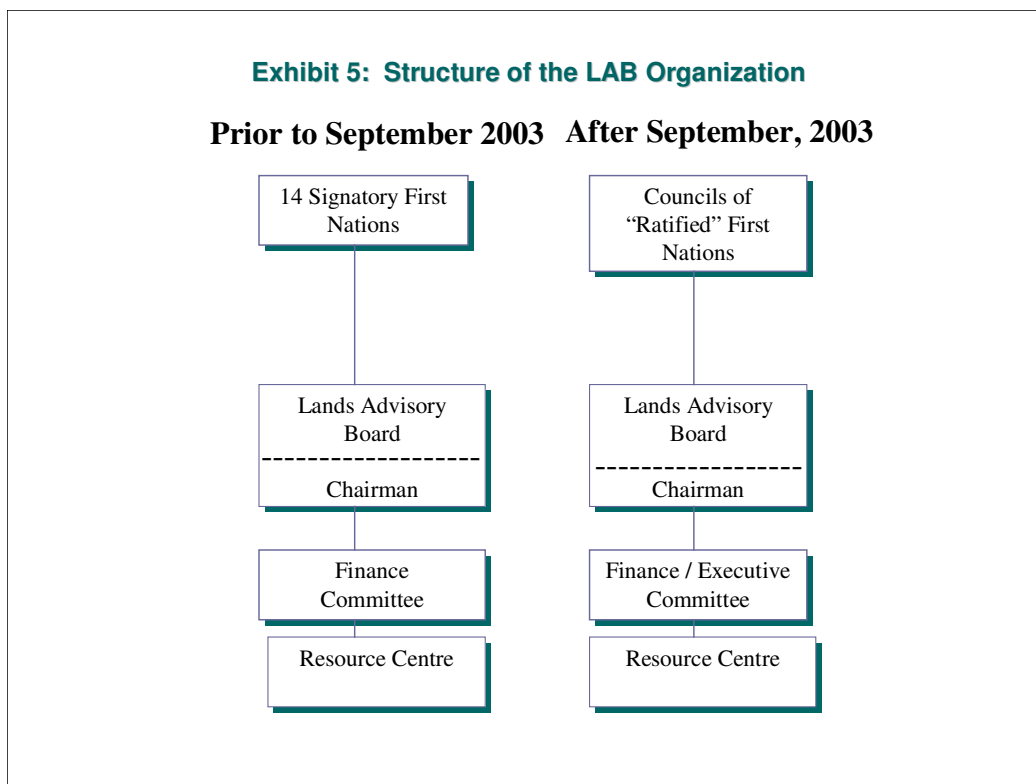
#### 3.1 Functions of the LAB

The *Framework Agreement* established the LAB. The principal functions assigned to the LAB are itemized in clause 39 of the *Framework Agreement*. They include:

- (a) developing model land codes, laws and land management systems;
- (b) assisting First Nations in developing and implementing their land codes, land laws, land management systems and environmental assessment and protection regimes;
- (c) establishing a Resource Centre, curricula and training programs for managers and others who perform functions pursuant to a land code;
- (d) proposing regulations for First Nation land registration; and
- (e) in consultation with First Nations, negotiating a funding method with the Minister.

#### 3.2 Composition of the LAB

After September 2003, when an amendment to the Framework Agreement came into effect, the Councils of those signatory First Nations which have ratified the *Framework Agreement* determine the composition of the LAB, as indicated in Exhibit 5:



Following the 2004 LAB annual meeting, all members, excluding the Chair, shall be deemed to have been appointed as follows:

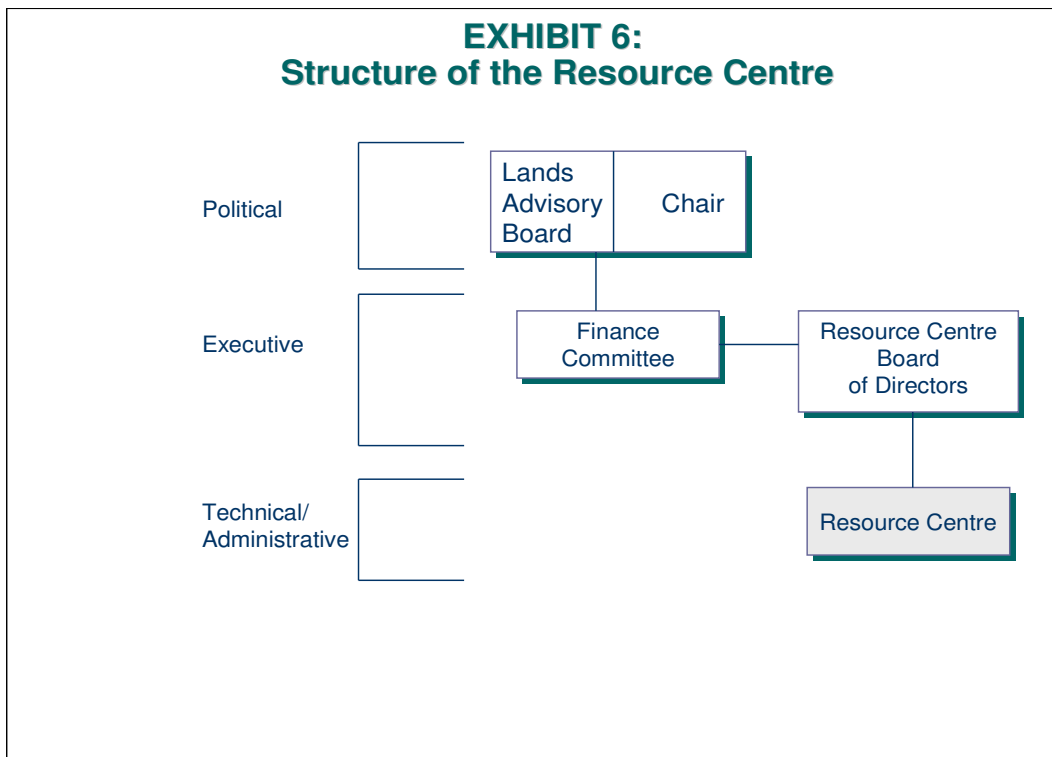
- three (3) members appointed by the Councils of those First Nations in British Columbia that have ratified the *Framework Agreement*;
- three (3) members appointed by the Councils of those First Nations in Alberta, Saskatchewan and Manitoba that have ratified the *Framework Agreement*;
- three (3) members appointed by the Councils of those First Nations in Ontario, Quebec and Atlantic Canada that have ratified the *Framework Agreement*.

The Chairman is an ad hoc appointment by the LAB members and not one of the nine members appointed by the Councils of the First Nations. The members of the LAB serve three year terms of office once the initial round of staggered terms is completed and three positions will be up for re-appointment each year.

### 3.3 First Nations Land Management Resource Centre

The *Framework Agreement* established the LAB, which is the political body of Chiefs. The LAB designed two entities to assist with implementing the functions of the LAB. The Finance Committee, which is made up of representatives of the signatory First Nations, was established to handle all financial and reporting matters on behalf of the LAB. The Finance Committee is responsible for the Resource Centre, which is the service delivery organization that fulfills the technical and administrative responsibilities under the *Framework Agreement*.

The structure of accountability for the Resource Centre is indicated in Exhibit 6:



It may be noted here that while the Lands Advisory Board is clearly identified in the Framework Agreement and assigned functional responsibilities, and while the First Nations have acted in constituting the Board and Resource Centre to discharge those functions in a streamlined and economical way, Canada does not regard either the Board or the Resource Centre as parties to the Framework Agreement and does not deal with them on the basis of the “government to government” relationship expressly established with the First Nations in the *Framework Agreement*.

The intention of the First Nations was never to dilute that relationship by creating and acting through their own institutions for purposes of the *Framework Agreement*. If the current structure is not seen by them as supporting, even enhancing, the fundamentals of the Agreement, there may be serious implications for the continued success of this initiative.

### 3.4 Mandate and Strategic Focus of the LAB

The mandate and strategic focus of the LAB and Resource Centre are summarized in Exhibit 7.

EXHIBIT 7: LAB MANDATE AND STRATEGIC FOCUS		
Mandate	Strategic Focus	Relevant Parts of the <i>Framework Agreement</i>
1. LAB (LAB) & Resource Centre (RC) policy, planning and administration to implement the <i>Framework Agreement</i> and <i>FNLMA</i> .	1.1 LAB will fulfill its responsibilities pursuant to the <i>Framework Agreement</i>	Parts VI, VIII & XI
	1.2 LAB & RC will support First Nations with their government-to-government relationship with Canada	Parts V, VIII & XI
	1.3 LAB & RC will support First Nations to access the governance tools required for land management.	Parts VIII
	1.4 LAB & RC will support First Nations to establish relationships with related sectors and institutions	Parts III, IV & VIII
	1.5 LAB & RC will support additional First Nations to be added as signatories to the <i>Framework Agreement</i>	Parts VI, VIII & XI
2. LAB & RC will provide support services to operational First Nations which have ratified the <i>Framework Agreement</i> .	2.1 LAB & RC will support First Nations to exercise their jurisdiction over their reserve lands pursuant to their Land Codes in such areas as rights & powers, law making, dispute resolution, enforcement, environment, registration, provincial & municipal relations	Parts III, IV, V & XI
3. LAB & RC will provide support services to developmental First Nations ratifying the <i>Framework Agreement</i> .	3.1 LAB & RC will support First Nations with developmental funding	Part VIII
	3.2 LAB & RC will support First Nations to complete the ratification process	Parts II & VIII
	3.3 LAB & RC will support First Nations to conclude their Individual Agreement with Canada	Parts II & VIII

#### **4. LAB & RESOURCE CENTRE IMPLEMENTATION OF THE *FRAMEWORK AGREEMENT***

The LAB and Resource Centre fulfilled 10 major responsibilities in 2003-2004 to implement the *Framework Agreement*.

##### **4.1 Transition to the Revised LAB Structure**

The transition to a revised LAB structure, as required by the March 20, 2002 amendment to the *Framework Agreement*, was completed. The revised structure is displayed in Exhibit 5.

##### **4.2 Developing a Land Management Funding Method**

###### **4.2.1 LAB Mandate to Negotiate a Funding Method**

Clause 30 of the *Framework Agreement* addresses the issue of operational funding for land management by First Nations pursuant to their land codes:

“30.1 An individual agreement between the Minister and a First Nation will determine the resources to be provided by Canada to the First Nation to manage First Nation lands and make, administer and enforce its laws under a land code. The agreement will determine specific funding issues, for example period of time, and terms and conditions.

30.2 A method for allocating such operating funds as may have been appropriated by Parliament will be developed by the parties and the LAB.

30.3 Unless a First Nation and Canada agree otherwise, an individual agreement respecting the provision of funding under this clause will have a maximum term of five years and will include provisions for its amendment and renegotiation.”

Clause 39 (i) of the *Framework Agreement* specifies the responsibility of the LAB with respect to negotiating a funding method with the Minister for First Nations operational land management.

###### **4.2.2 Interim Funding Formula**

Pursuant to clause 30.2 of the *Framework Agreement*, the LAB and INAC, with the assistance of the Resource Centre, developed an interim funding formula for First Nations' operational land management. The interim funding formula is an adaptation of the INAC formula for funding delegated land authorities pursuant to Section 53 and 60 of the *Indian Act*. The interim funding formula recognizes that First Nations operating under Land Codes will be incurring additional expenditures for dispute resolution, developing land laws, compliance monitoring and enforcement, as well as associated legal costs.



The “interim” status of the existing funding formula is problematic for First Nations. Operational First Nations report that current levels of land management expenditures consume much more funding than is provided under the current interim funding formula. Furthermore, arrangements for key land management functions such as environmental land management, and the associated costs to First Nations, have yet to be determined or incorporated.

All of the signatory First Nations to the *Framework Agreement* are seeking certainty regarding their future funding arrangements for operational land management under Land Codes, quite apart from reimbursement for reasonable expenditures to date which were unfunded. The “interim” status of the existing funding formula also is problematic for Canada. Canada cannot accurately forecast its financial obligations associated with operational land management by First Nations over the longer term.

Another problem for Canada has been its inability to develop consistent administrative procedures, which would naturally be part of a fully implemented formula, to deliver funds to First Nations pursuant to the Individual Agreements with Canada in a predictable or timely way even though some First Nations have been operational for more than four years.

Given the difficulties inherent in the current interim status of the operational funding regime, the LAB is committed to fulfilling its responsibilities to develop a funding method with the Minister pursuant to clause 39.1 (i) of the *Framework Agreement*.

#### 4.2.3 Independent Study

An independent study was commissioned by the LAB to define:

1. the elements of a feasible national strategy to support the fulfillment, by First Nations, of their land management obligations pursuant to their land codes; and
2. a full complement of relevant methodologies to determine the level of funding from Canada required to support operational land management by an individual First Nation pursuant to its Land Code (bearing in mind that any feasible methodology requires a sound rationale developed in consultation with First Nations and INAC and designed to make provision for any special or specific local needs).

One specific deliverable of the study was a comprehensive definition of the scope of the 15 key land, environmental and resource governance and management functions (“land management functions”) that First Nations have to carry out to manage their lands in accordance with prevailing and contemporary standards for local government in Canada. This definition of 15 key functions has been validated with First Nations and was formally presented to Canada in January 2003.

The Chiefs and the Lands Managers of the First Nation signatories to the *Framework Agreement* provided valuable information for use in the Land Advisory Board’s forthcoming negotiations with the Minister regarding future levels of operational funding. The survey results were used to compile the following database of information to help determine the true cost of land management:

- costs of transition to operational land management;
- priority requirements for funding and capacity building support;
- anticipated operational land management costs and trends;
- forecast pace of implementation of land management functions;
- workload drivers for land management; and
- relative resource requirements for the 15 land management functions

Key findings of the independent study were that:

- most First Nations are involved in all 15 operational land management functions;
- there is great variation among First Nations in their land management funding requirements;
- prevailing levels of land management expenditure by First Nations consume much more funding than is provided under the current interim funding formula;
- the operational funding method must make provision for periodic amendments to address funding requirements to be determined in the future (e.g., Environmental Management Agreements, registry, liability insurance).
- all First Nations urgently require transitional funding, to supplement formula-based operational funding, for:
  - transition, start-up and capacity building costs;
  - First Nation costs incurred in liaison with Canada to resolve outstanding issues identified in the course of developing the Individual Agreement, such as the land description and environmental issues;
  - costs imposed on First Nations to address or comply with future federal legislation; and
  - First Nations costs associated with the future transfer of jurisdiction over additional reserve lands.

#### 4.2.4 Potential Structure of the Operational Funding Method

First Nations indicated a requirement for three categories of operational land management funding:

**Transitional** or “start-up” activities that First Nations are expected to require with respect to land laws, research, policy, systems and staff development, for a period of several years, to establish the capacity to carry out the activity:

- transition, start-up and capacity building costs;
- First Nations costs incurred in liaison with Canada to resolve outstanding issues, pertaining to the land description and environmental exclusions identified in the course of development of the Individual Agreement; and
- First Nations costs associated with the transfer of jurisdiction, to the First Nation, of additional reserve lands, subsequent to coming into effect of the First Nations land code.

**Formula-based Operational Funding** or funding associated with ongoing land management activities that are typical cost centres for local government:

- activities, legal obligations and potential liabilities, formerly a responsibility of Canada, that have been taken over by the First Nations, including activities undertaken by other federal government departments (e.g., Justice);
- mandatory requirements imposed upon First Nations that have cost implications (e.g., fulfillment of Environmental Management Agreements, obligations to comply with changes in federal legislation [e.g., Species at Risk Act]); and
- requirements of First Nations to interface with Canada on land management issues (e.g., Registry, Surveys and Estates) that have cost implications;

**Special Projects** or project-based funding to manage specific land issues which arise, from time to time, that are not amenable to formula-based funding (e.g., reserve boundary disputes, environmental remediation projects, implementation of systems and capacity to comply with changes in federal legislation).

#### 4.2.5 LAB Negotiations with the Minister

The results of the independent study have been validated with the First Nations and as noted above, were delivered to INAC in January 2003. The next step is for the LAB to engage in substantive discussions with the Minister on:

- the scope of the 15 land management functions that First Nations have to carry out or must address pursuant to the *Framework Agreement* or unanticipated federal initiatives that may impinge upon land management;

- identification of those First Nations land management functions that Canada has an obligation to fund and the extent of those funding obligations;
- principles to guide development and negotiation of an operational land management funding formula and administrative delivery of funding that is mutually acceptable to the First Nations and the Minister.

### **4.3 Addressing Impacts of Proposed and Existing Federal Legislation on the Framework Agreement**

In order to defend the integrity of the *Framework Agreement* the Resource Centre was required in 2003-2004 to conduct reviews on two proposed pieces of legislation and one piece of existing legislation.

#### **4.3.1 Proposed First Nations Governance Act**

On April 29, 2003 the LAB wrote to Minister Robert Nault to inform him of the potential breach of the *Framework Agreement* and conflict with the *FNLMA* by the proposed First Nations Governance Act (FNGA). The LAB proposed specific amendments to ensure that the FNGA would not interfere with First Nations exercise of their jurisdiction over lands that is recognized and affirmed in the *Framework Agreement* and *FNLMA*.

The Lands Advisory Board delivered an extensive brief to the Minister in August, 2002 outlining its concerns about the FNGA and its potential impact on Land Management. The primary issue with Bill C-7 was that it sought to create governance “codes” in each First Nation. Those First Nations that didn't create their own would have one imposed on them. The existing FAFNLM also creates “codes” and there was no initial attempt by Canada to provide a distinction between the two. Hence, the clear potential for conflict regarding which code is paramount.

The initial response was that these concerns about the FNGA and its potential impact on Land Management were unjustified. After further interventions, the Standing Committee did make two amendments on May 27 2003 to the proposed FNGA that did not adequately address the concerns of the LAB.

#### **4.3.2 Proposed Fiscal and Statistical Institutions Act**

The First Nations Financial Management Board (FNFMB) to be created by this bill would be empowered to regulate all First Nation communities that wish to create financial management regimes. However, First Nations that have ratified the *Framework Agreement* already have created financial management regimes pursuant to their land codes.

The LAB was concerned that, should the bill be enacted as previously drafted, such as section 3, 4 and 15, the authority of the FNFMB would be imposed over the authority of the First Nation in relation to matters that are specifically recognized and affirmed as within exclusive First Nation jurisdiction by the *Framework Agreement and the FNLMA*. Ongoing discussions with various aboriginal representatives assisting in sponsoring this bill resulted in amendments that resolved the concerns of the LAB.

The position of the LAB is that First Nations that have ratified the *Framework Agreement* have the right to decide whether or not to delegate some of their authority to the FNFMB. Enactment of the proposed Fiscal and Statistical Institutions Act as previously worded would have constituted a breach by Canada of the *Framework Agreement* and would have been inconsistent with the *FNLMA*. Fortunately, the necessary changes appear to have been made but only after intervention of the Lands Advisory Board.

#### 4.3.3 *Species at Risk Act (SARA)*

The new legislation, which is only partially in effect, is one part of the federal government strategy to protect species that are defined as being at risk.

The bill would:

- prohibit the killing of extirpated, endangered or threatened species and the destruction of their residences;
- provide authority to prohibit the destruction of the critical habitat of a listed wildlife species anywhere in Canada;
- provide emergency authority to protect species in imminent danger, including emergency authority to prohibit the destruction of the critical habitat of such species; and
- enable the payment of compensation where it was determined to be necessary.

Section 3 of the *SARA* includes a non-derogation clause. However, the courts have suggested that in the event of a conflict between aboriginal and treaty rights and conservation, conservation may be of more importance.

Under *SARA*, a proposed development project on reserve land requires an environmental assessment of any species at risk. Therefore, *SARA* will complicate and increase the cost of a land development application, assessment and approval process for First Nations. However, there may be opportunities to enter into stewardship arrangements between First Nations and other governments which could provide financial incentives to preserve or protect a critical habitat on First Nation reserve lands.

#### 4.4 Feasibility of “Group” Signatories to the *Framework Agreement*

The LAB was asked by the Minister in 2003-2004 to study the feasibility for several First Nations to “aggregate” and join the *Framework Agreement* as a single signatory. Although the original spirit and intent of the *Framework Agreement* was geared towards individual First Nations, the LAB committed to review this possibility.

The review concluded that “group” entry is possible under the *Framework Agreement*. This option would treat constituent First Nations of a group as individual signatories and rely upon their common intentions and creativity to establish commonalities that would represent realistic

economies of time and resources in both the transition and operational phases of land management. First Nation specific rights to the use and possession of reserve lands and resources, and band funds, would not be affected.

In the fourth quarter of 2003-2004 the LAB met with two interested groups, the Anishinabek Lands and Housing Pilot Project (ALHPP) in Ontario consisting of 10 First Nations and the Swampy Cree Tribal Council (STCC) in Manitoba consisting of 7 First Nations. The consensus from both groups was that individual First Nations were not amenable to “aggregating” as one signatory. Aggregation would require delegating to a single “entity” the authority to control and manage all reserve lands. None of the First Nations wished to delegate this management authority, nor did it appear possible under the *Framework Agreement* to delegate legislative authority at all. Further, the time implications associated with the “aggregation” concept were not suitable to the First Nations.

Currently, there are no proposals from group applicants that suggest how the creation of a single “entity” of authority and the delegation of land management responsibility might be achieved to their satisfaction.

#### 4.5 Quebec First Nation Participation

Canada has informed the LAB that:

“...the Department of Justice (DOJ) has implemented a federal government wide policy of bijuralism which requires that all federal legislation be reviewed to ensure the co-existence of the legislation with both of Canada’s legal traditions (civil law and common law).

The *FNLMA* is drafted in both official languages, but the English and French texts express various legal concepts in common law terms, notably in matters relating to property law.

The *Framework Agreement* on First Nation Land Management (*Framework Agreement*) is also drafted to express legal concepts in common law terms. Furthermore, the translated version of the *Framework Agreement* has no official status and the correctness of some of its terminology to describe certain legal concepts in terms that are accepted to express the common law in French is questionable.

The issue is not so much one of official languages but it is instead an issue of addressing in both such languages the common law and civil law systems. There are numerous changes that are necessary to both the texts of the *FNLMA* and the *Framework Agreement* to introduce civil law concepts. The civil law concepts would have to be expressed in the English and French texts of the *FNLMA* and the *Framework Agreement*. As well, the French text of the *Framework Agreement* would also have to be adapted to better reflect the common law in French to produce a document which adequately meets bijuralism requirements.

Department of Justice bijuralists have completed their review of the *Framework Agreement* and *FNLMA*. This review looked at all the instances in both documents where revisions would be necessary to make them comply with the bijuralism policy. Based on the findings of this review, five options have been identified for addressing how the initiative could be implemented in Québec:

- 1) bijuralism changes to the *FNLMA*;
- 2) bijuralism changes to the *FNLMA* and the *Framework Agreement*;
- 3) a civil law *Framework Agreement* for use in Québec put into effect by:
  - a) an amendment to the *FNLMA*; or
  - b) a separate legislation; and
- 4) use the current *Framework Agreement* and *FNLMA* in Québec;  
and
- 5) use the current *Framework Agreement* and *FNLMA* in Québec  
now and pursue bijuralism changes to the *FNLMA* and  
*Framework Agreement* at a later date.

INAC considers the first option, i.e. amending the *FNLMA*, to be the most practical and FNLMI Directorate is presently discussing with DOJ the technicalities involved in proceeding with that option by way of adding a schedule to the Act outlining all the necessary civil code terminology. Therefore, the present text of the *FNLMA* would not [be] changed. **Furthermore, according to this option, no bijuralism amendments would be made to the *Framework Agreement*.**"

The Lands Advisory Board views the federal approach as confusing three important elements that must be addressed separately:

- The issue of bilingualism needs to be dealt with since there is no signed or approved French version of the *Framework Agreement*.
- The issue of consensual adherence to a *Framework Agreement* that First Nations that must be ratified by the First Nations. In the context of bijuralism, this means a signed version of a bijural schedule to the existing *Framework Agreement* that is approved by the LAB as an amendment and acceptable to Quebec First Nations;
- The issue of the role of the LAB and consultation with Quebec First Nations who wish to sign the *Framework Agreement*

To date, the Department of Justice has not signaled its commitment to the current *Framework Agreement* and the principles that underlie it. Indications are that DOJ's bijuralism section seeks a way to implement changes to the existing *Framework Agreement* unilaterally. That is unacceptable to the First Nations for obvious reasons. Similarly, there has been no commitment to develop an approved French language text of the *Framework Agreement*, which is an obvious necessity.

The LAB supports the application of this important initiative to Quebec First Nations. However, there have been no direct inquiries to date from Quebec First Nations to the LAB or the Resource Centre. Should First Nations from Quebec express the intention to take up the opportunity presented by the *Framework Agreement*, a number of technical and legal issues must be addressed.

DOJ proposals to implement bijuralism by unilaterally adding bijural terminology to the *FNLMA* does not in itself or by itself amend the *Framework Agreement*, nor does it create a bilingual and bijural *Framework Agreement* capable of being signed by Quebec First Nations. Without such signature and adherence, a First Nation has no opportunity under the *Framework Agreement* or the *FNLMA*. It is the LAB's view that the proposal from DOJ is legally meaningless and represents a serious breach of the concept and terms of the *Framework Agreement* as a government to government consensual agreement between Canada and the First Nations.

Canada has yet to recognize the potential problem that many First nations in Quebec have reserves on provincial lands; ie., on lands under which the underlying or radical title of the Crown is in right of the province. The *Framework Agreement* assumes the underlying title to First Nations land is in the Crown in right of the Canada. That assumption cannot apply everywhere in Quebec, and the reserves where it does apply might be in the minority. This could have profound implications. The Lands Advisory Board is not aware of any strategy by Canada to address this point.

#### **4.6 First Nation—Canada Environmental Management Agreements**

Section 24 of the *Framework Agreement* states the following:

“The Minister [of INAC] and the Minister of the Environment and each First Nation with a land code ...will negotiate an environmental management agreement.

An environmental management agreement in essence will be a plan on how the First Nation will enact environmental protection laws deemed essential...It will include timing, resource, inspection and enforcement requirements.

For those areas identified...First Nation environmental protection standards and punishments will have at least the same effect as those in the laws of the province in which the First Nation is situated.”

A draft model to facilitate the completion of the Environmental Management Agreement (EMA) was finalized in 2003-2004. Two workshop sessions held with First Nations resulted in valuable feedback and topics for the ongoing discussions with INAC and Environment Canada. The LAB has directed the Resource Centre to assist each of the operational First Nations to finalize their EMA as quickly as possible. The data gathering phase of the EMA development process already has begun.

#### **4.7 First Nation – Natural Resources Canada (NRCan) Survey Agreements**

The nature of the signatory First Nations' changing relationship with Canada necessitates direct protocols with various government departments. In particular, NRCan will now require a direct relationship with the operational First Nations in order to determine how surveys will be delivered. As set out under clause 2.3 of the *Framework Agreement*, underlying title remains



with Canada and First Nation's Lands continue to be federal lands for the purposes of the Canada Lands Surveys Act.

Previously INAC had a fiduciary responsibility for the day to day decision-making for reserve lands. Further, the land registry system established under the *Indian Act* required surveys to be conducted to satisfy the registration process. However, day-to-day survey decision-making for operational First Nations, will no longer be under the purview of INAC and the Minister.

How surveys will be delivered by NRCan to operational First Nations and the costs associated with this are a matter of negotiations, and this process has already begun. It is anticipated to be completed in 2004-2005.

#### **4.8 Land Registry Regulations**

There are no existing land registry regulations under the *Indian Act*. Financial institutions have expressed concern over this regulatory vacuum and the uncertainty it has created in relation to the security of investment in real estate on reserve.

The LAB has been mandated by clause 39.1 of the *Framework Agreement* to propose "regulations for First Nation land registration." The initial drafting of the land registry regulations was commenced by the LAB and First Nations in conjunction with INAC in 2003-2004. The drafting process will continue into 2004 - 2005.

A priority for the new registry regime is to achieve clarity and transparency with respect to land tenure and to improve the climate for investment on reserve while respecting the integrity of traditional land holdings. Once consultations with financial institutions and First Nations are concluded in 2004-2005, the next step will be for Canada to proceed with the regulatory enactment process.

#### **4.9 National Partnerships**

One priority in 2003-2004 was the creation of relationships with professional organizations. The Resource Centre was directed by the LAB to begin dialogues with the Canadian Institute of Planners (CIP) and the National Aboriginal Lands Managers Association (NALMA). These discussions led to protocol agreements with both professional organizations. The intent in both cases is to build support networks for signatory First Nations and to begin to formally develop training and capacity building opportunities.

##### **4.9.1 CIP Protocol Agreement**

On July 5, 2003 the Resource Centre entered into a five-year Protocol Agreement with the CIP on the joint promotion of progress in First Nations planning. The Agreement was signed by the CIP President and the Resource Centre Board of Directors at the CIP Council's meeting in Halifax, Nova Scotia.



From left to right) Chief Barry Seymour, Lheidli T'enneh First Nation (B.C.); CIP President Dave Palubeski, incoming CIP President Ron Shishido, and Rennie Goose, Mississaugas of Scugog Island First Nation (ON), take part in signing the 5-year Protocol Agreement between the CIP and the First Nations Land Management Resource Centre

Under the terms of the Protocol Agreement, the Resource Centre and CIP will collaborate on joint projects, mobilizing the expertise of the CIP and its members to promote progress in planning practices among the signatory First Nations. In addition, other organizations will be engaged as appropriate and by mutual agreement to support such projects.

Planning began in the fourth quarter to implement a land managers training workshop on community land use planning in collaboration with Dalhousie University. A series of workshops aimed at supporting land use planning are scheduled throughout the 2004-2005 fiscal year.

#### 4.9.2 Protocol Agreement with the National Aboriginal Lands Managers Association (NALMA)

NALMA and the Resource Centre are both national First Nations organizations dedicated to land management. NALMA assists First Nations under the *Indian Act* while the LAB assists First Nations under the *Framework Agreement*. A professional protocol seemed natural due to the complimentary mandates. On October 21, 2003 the Resource Centre and NALMA entered into a protocol agreement to provide reciprocal support and collaboration on projects and issues that support the aim of lands management.

Throughout 2003-2004 there has been professional collaboration between the Resource Centre and NALMA on INAC's redesign of delegated authority under *Indian Act* sections 53 and 60, the Reserve Lands Administration Programs (RLAP) and the Lands Management Training Program. The Resource Centre and NALMA also have conducted joint briefings to new First Nations interested in becoming signatories to the *Framework Agreement*.

The Resource Centre was pleased to accept an invitation from NALMA in the third quarter to make a presentation at the Manitoba Uske conference. The conference was well attended by many First Nation lands managers from across Canada as well as representatives from many different federal and provincial government departments. This sharing of information has proven to be valuable to both organizations, First Nations as well as the various levels of governments that were present at the conference.

#### 4.10 Enforcement Workshop

In the third Quarter, the Resource Centre held a workshop with First Nation Lands Managers to discuss strategies towards creating relationships with local courts and their administrations for the purposes of prosecuting offenses under a land code. The workshop discussions identified possible avenues to pursue to begin the dialog, such as:

- provide local courts with copies of land codes, accompanied with a letter that highlights punishable offences;
- begin to approach the administrative division of local courts by arranging meetings to discuss land codes;
- arrange meetings with the provincial Attorney General's office and Justices of the Peace to discuss land codes as well as adding training components to the curriculum for Justices of the Peace; and
- Identify and approach Native Justices of the Peace to discuss land codes.

Suggestions were made during the workshop to facilitate enforcement and land law development by ensuring "uniformity" of offences among communities and having the Resource Centre coordinate the approach to Chief Justices and developing a handbook for justices of the peace. The LAB and Resource Centre plans to implement a number of these recommendations and suggestions in 2004-2005.

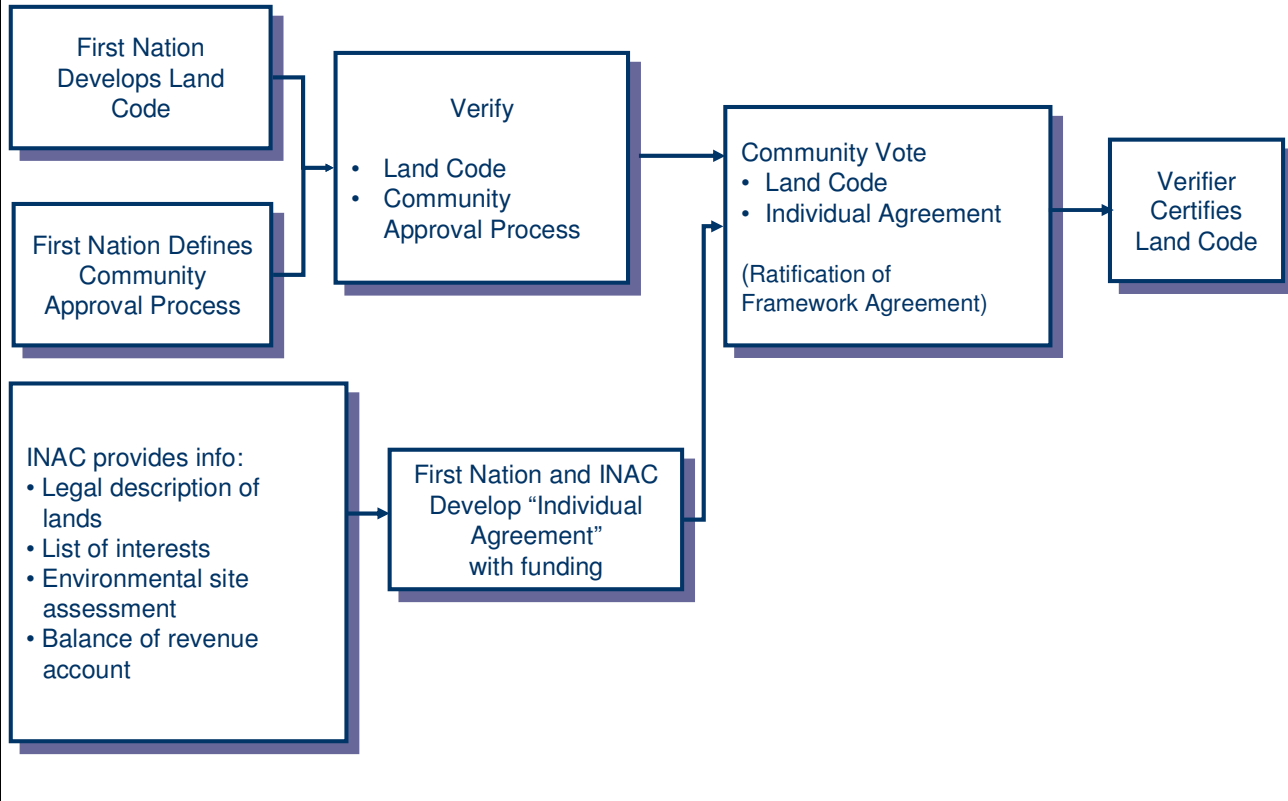
## 5 LAB AND RESOURCE CENTRE SUPPORT TO DEVELOPMENTAL FIRST NATIONS

### 5.1 First Nation Ratification of the *Framework Agreement*

In order to "ratify" the *Framework Agreement*, a First Nation is required to complete a vote by eligible members both on-reserve and off-reserve on whether to approve a Land Code prepared by the community and an Individual Agreement negotiated with Canada.

There are 43 activities required to complete the ratification process required in the *Framework Agreement*. Exhibit 8 presents a logic model for the ratification process.

## EXHIBIT 8: Logic Model for the First Nation "Ratification" Process under the *Framework Agreement*



### 5.2 First Nation Ratification Activities

There are 43 activities required by a First Nation, the Resource Centre, Verifier, INAC and independent contractors to complete a typical First Nation ratification process. The involvement of each of these parties detailed in exhibit 9:

## Exhibit 9: Ratification Process Activities

<i>Parties Involved</i>						
<b>ACTIVITY</b>	<i>Activity</i>	<i>First Nation</i>	<i>Resource Centre</i>	<i>Verifier</i>	<i>INAC</i>	<i>Contractor</i>
<b>Orientation</b>						
First Nation [FN] expresses interest	1	R: 1 day	I			
LAB & RC provide information to First Nation	2	I	R: 5 day			
LAB & RC provide orientation to First Nation	3	I	R: 6			
First Nation prepares BCR to join <i>Framework Agreement [FA]</i>	4	R: 1	A: 1			
<b>FN is added as a signatory to the <i>Framework Agreement [FA]</i></b>						
LAB advises Minister that First Nation wishes to sign <i>Framework Agreement</i>	5	I	R: 1		I	
Minister consents to adding FN to FA	6	I	I		R: 10	
First Nation signs <i>Framework Agreement</i>	7	R: 1	R: 3		I	
Minister instructs Governor-in-Council to add First Nation to the FNLMA schedule	8	I	I		R: 5	
First Nation & RC complete CAP	9	R: 1	R: 5			
RC budgets resources to assist First Nation	10	I	R: 1			
First Nation signs resolution to implement CAP	11	R: 1	A: 1			
First Nation & RC sign CAP	12	R: 1	R: 3			
<b>CAP Startup: Parties Appoint Representatives</b>						
First Nation appoints Land Committee	13	R: 30	A: 5			
First Nation & RC appoint technical reps.	14	R: 15	R: 1			
First Nation & INAC appoint independent Verifier	15	R: 3	A: 3	A: 1	R: 1	
First Nation appoints a Ratification Officer	16	R: 1	A: 1			
First Nation, INAC, Verifier & RC meet to discuss process and schedule	17	R: 3	R: 3	R: 1	R: 1	
<b>First Nation Develops Land Code</b>						
First Nation Lands Committee & RC develop draft of the community Land Code	18	R: 250	A: 115			

First Nation & RC review draft with Verifier	19	R: 2	A: 2	A: 2		
Verifier conducts compliance review	20			R: 2		
Verifier presents compliance review to FN	21	A: 1	A: 1	R: 1		
Community consultation process & revisions to the Land Code	22	R: 40	A: 15			
First Nation legal review of the Land Code	23	R: 5	A: 2			
Verifier confirms compliance with FA	24	I	I	R: 1		
<b>Individual Agreement</b>						
List of current <i>Indian Act</i> interests & documents provided by INAC to FN	25	A: 15	A: 5		R: 5	
Phase I Environmental Site Assessment conducted to determine environmental health of reserve lands under the <i>Indian Act</i>	26	A: 40	A: 15		A: 10	R: 70
Legal description of reserve land provided to INAC by NRCAN to determine jurisdictional boundaries under the <i>Indian Act</i>	27	A: 20	A: 2	I: 1	A: 3	R: 30
INAC identifies First Nation revenue money under the <i>Indian Act</i> to be transferred	28	A: 1		I	R: 3	
First Nation & INAC determine operational funding under the community Land Code	29	R: 3	A: 2		R: 3	
Draft Individual Agreement completed by First Nation & INAC	30	R: 2	A: 1		R: 2	
First Nation has legal review of Individual Agreement	31	R: 2	A: 2			
INAC has legal review conducted	32				R: 2	
First Nation, INAC & Verifier address any issues	33	R: 1	A: 1	R: 1	R: 1	
First Nation & INAC complete Individual Agreement	34	R: 1	A: 1	I	R: 1	
Minister signs Individual Agreement	35	I	I		R: 5	
Community consultation begins on the Individual Agreement	36	R: 40	A: 15			
<b>First Nation Ratification Procedure</b>						
First Nation locates Eligible Voters	37	R: 60	A: 10			
First Nation & RC develop Community ratification process	38	R: 60	A: 20			
First Nation Council meets with Verifier to confirm vote date	39	R: 1	A: 1	R: 1		

First Nation pre-voting procedure begins	40	R: 30	A: 10	I		
First Nation conducts vote	41	R: 3	A: 3	R: 3		
Verifier completes post-vote procedure	42	I	I	R: 3		
Verifier certifies the ratification process & vote	43	I	I	R: 2		
<i>Total days</i>		635 days	262 days	19 days	52 days	100 days

**Legend: R: Responsible; A: Assistance; I: Informed; CAP: Community Action Plan**

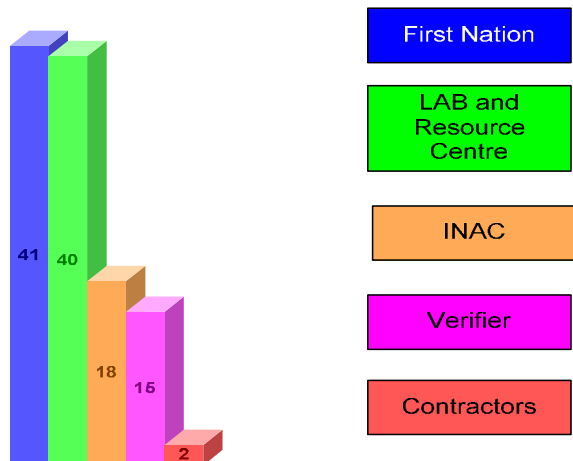
The calculation of accumulated time in days in exhibit 9 is based on an average size First Nation of approximately 200 to 400 eligible voters. Each of the 43 ratification process activities requires an amount of time to complete, either by some or all of the participants. The level of effort required of each participant is a product of the number of activities undertaken, the number of people who need to be involved on behalf of the participant and the number of work days that each person must contribute. The accumulated time required by the First Nation and the Resource Centre increases as the number of eligible voters and the number of land transactions increases.

### 5.3 Roles and Responsibilities in the Ratification Process

The First Nation is involved in 41 of the 43 ratification process activities. The LAB and Resource Centre are involved in 40 of the 43 activities to provide support services to the First Nation. The support services provided by the LAB and Resource Centre in order to fulfill these 40 activities include assistance to the Chief and Council, Lands Committee, coordinator and community.

Exhibit 10 indicates the distribution of the ratification process activity responsibilities to the First Nation, the LAB and Resource Centre, the verifier, INAC and the environmental and survey contractors.

Exhibit 10: Activities - Ratification Chart

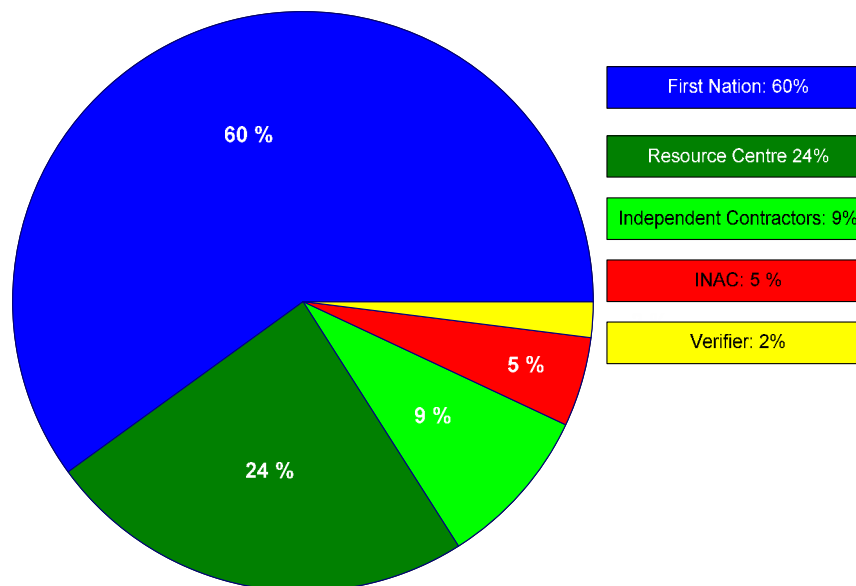


## 5.4 Time Required by the Parties to Complete the Ratification Process

There is an estimated overall accumulated time of 1,068 days that is required by all of the participants for an “average” ratification process. The First Nation’s involvement with 41 of the 43 activities requires an accumulated total of 635 days of time by the Chief and Council, Lands Committee, coordinator, Community and administrative staff. The LAB and Resource Centre involvement in 40 of the 43 activities to provide support services to the First Nation requires 262 days of time by the LAB Chair, the Resource Centre Board of Directors and the Resource Centre staff.

The percentage of accumulated time required to fulfill the various activities required by the First Nation, LAB and Resource Centre, verifier, INAC and the environmental and survey contractors is contained in exhibit 11

Exhibit 11: Pie Chart - Participants Allocated Time Percentage to Complete Ratification



## 5.5 First Nation Completion of the Ratification Process

Prior to April 2003, six First Nations had successfully completed the ratification process and voted to assume direct control over their reserve lands and resources:

<i>British Columbia:</i>	Lheidli T'enneh and McLeod Lake
<i>Manitoba:</i>	Opaskwayak Cree
<i>Saskatchewan:</i>	Muskoday
<i>Ontario:</i>	Georgina Island and Scugog Island



During 2003-2004, eight additional First Nations successfully completed the ratification process to begin operational land management under their own Land Code:

<i>British Columbia:</i>	Beecher Bay, Westbank, Tsawwassen, Sliammon and Ts'kw'aylaxw
<i>Saskatchewan:</i>	Whitecap Dakota and Kinistin
<i>Ontario:</i>	Nipissing

## 5.6 Summary of Support Services Provided to Developmental First Nations

The LAB and Resource Centre support to the developmental First Nations to complete their ratification process includes:

- development of the land code,
- development and implementation of a community communication and consultation strategy,
- advice and guidance on the environmental site assessment,
- advice and guidance on the survey of the reserve jurisdictional boundary,
- advice and guidance on the Individual Agreement with Canada, and
- development and implementation of the community ratification process.

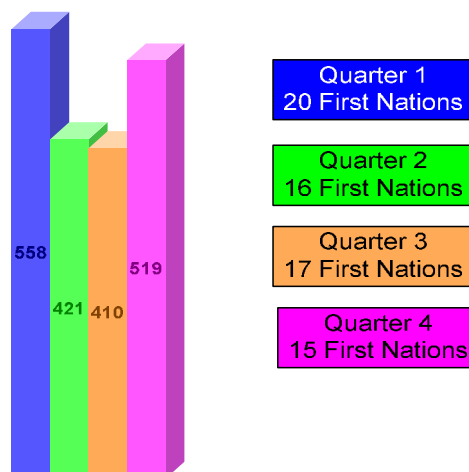
The “support services” provided by the Resource Centre consisted of interactions with other participants that ranged from telephone conference calls, emails, faxes and letter exchanges on the one hand to multi-day on site meetings and workshops with Chiefs and Councils, Land Committees, and coordinators on the other hand. In some cases these meetings and workshops required the participation of several Resource Centre staff and the LAB. Exhibit 12 indicates the extent of the support services provided in 2003-2004.

**Exhibit 12: Summary – Support Services to Developmental First Nations**

First Nation	Quarter 1	Quarter 2	Quarter 3	Quarter 4	Voted in:
Cowessess	19				Quarter 1
Beecher Bay	65				Quarter 1
Siksika	5				Quarter 1
Westbank	24				Quarter 1
Nipissing	59				Quarter 1
Whitefish Lake	11	9	Inactive	Inactive	
Dokis	16	6	Inactive	Inactive	
Moose Deer Point	23	19	Inactive	Inactive	
Whitecap Dakota	24	28	19		Quarter 3
Tsawwassen	10	27	7		Quarter 3
Kinistin	29	33	12	15	Quarter 3
Sliammon	21	53	41	47	Quarter 4
Ts'kw'aylaxw	36	20	41	56	Quarter 4
Squamish	31	23	45	74	
Tsawout	53	40	26	22	
Songhees	28	59	56	44	
Garden River	21	31	23	39	
Mississauga	32	27	13	25	
Kingsclear	30	14	16	24	
Mnjikaning	21	15	4	10	
Skeetchestn	Inactive	17	49	43	
Tseil-waututh	Inactive	Inactive	15	19	
Saint Marys	Inactive	Inactive	16	18	
Muskeg Lake	Inactive	Inactive	17	45	
Kitselas	Inactive	Inactive	10	19	
Skway	Inactive	Inactive	Inactive	19	
Totals	558	421	410	519	

In total, the LAB and Resource Centre provided 1,908 support services in 2003-2004 to the developmental First Nations working to complete their ratification processes. Exhibit 13 provides a comparison of support services by quarter in 2003-2004.

Exhibit 13: Chart - Quarterly Support Services to Developmental First Nations



## 6. LAB AND RESOURCE CENTRE SUPPORT TO OPERATIONAL FIRST NATIONS

### 6.1 Land Management Under the *Framework Agreement*

Once a Land Code takes effect, there are 34 land administration sections of the *Indian Act* that no longer apply to a First Nation's reserve lands and resources. The *Framework Agreement* now applies and First Nations are empowered to:

- manage reserve lands and resources;
- pass land laws; and
- enforce their land laws.

#### 6.1.1 First Nation authority to manage reserve lands and resources

The authority to manage reserve lands includes all the interests, rights and resources that belong to those lands under the jurisdiction of Canada. The operational First Nations exercise all the rights, powers and privileges of an owner. This authority is described in Parts II, III and XI of the *Framework Agreement* and sections 17 to 19 and 25 of the *FNLMA*.

The LAB and Resource Centre are responsible to assist the operational First Nations with drafting laws, rules and procedures in the following areas:

- granting interests in reserve lands;
- establishing and maintaining a First Nation register to record the granting of interests in reserve lands;
- dividing interests in reserve lands on the breakdown of a marriage;
- accountability to First Nation members (eg: moneys managed under a land code);

- making and publishing First Nation laws;
- establishing a forum for the resolution of reserve land disputes;
- conflict of interest;
- expropriating interests in reserve lands deemed necessary for Community works or other First Nation purposes;
- transferring, by testamentary disposition or succession, interests in reserve lands;
- exchanging reserve lands for other lands; and
- delegating administrative authority, or establishing a legal entity, to manage reserve lands and resources.

The Resource Centre assists operational First Nations by drafting model rules and procedures in the following areas:

- traditional and individual holdings;
- agricultural leases and permits;
- residential, commercial, industrial and recreational leases;
- resource leases and permits;
- utility and annual permits;
- assignments, transfers and exchanges;
- fees and rent collection; and
- mortgage registration and discharges.

#### 6.1.2 First Nation authority to pass land laws

First Nation authority to pass land laws includes development, conservation, protection, use and possession of reserve lands. In addition, operational First Nations are the only jurisdictions in Canada to have enacted (as required by the *Framework Agreement*) laws relating to the use and possession of lands on reserve following matrimonial breakdown or divorce. This authority is described in Parts IV and V of the *Framework Agreement* and sections 20 to 23 of the *FNLMA*.

The LAB and Resource Centre assist operational First Nations in designing land laws in the following areas:

- the creation, regulating and prohibition of interests and licenses in relation to reserve lands;
- the regulation, control and prohibition of zoning, land use, subdivision control and land development;
- the provision of services and the imposition of equitable user charges;
- the provision of services for the resolution, outside the courts, of disputes in relation to First Nation reserve lands and resources; and
- environmental protection and assessment.

The LAB and Resource Centre assist operational First Nations in developing land laws, processes, agreements, policies, plans and systems that will be specific to each of their communities:

- land laws,
- enforcement and dispute resolution processes,

- environmental agreements with provinces,
- service agreements with local municipalities,
- land management policies,
- land-use plans, land registry systems, etc.

### 6.1.3 First Nation Authority to Enforce Land Laws

First Nation authority to enforce land laws includes establishing offences and comprehensive enforcement procedures and providing for fines. The authority is described in Part IV of the *Framework Agreement* and in section 24 of the *FNLMA*.

The LAB and Resource Centre will assist these operational First Nations with designing enforcement procedures in four specific areas:

- appointing Justices of the Peace;
- establishing offences that are punishable on summary conviction;
- providing for fines, imprisonment, restitution, community services and alternate means for achieving compliance; and
- establishing comprehensive enforcement procedures consistent with federal law, including inspections, searches and seizures.

## 6.2 Capacity Building

This year marked the first year that Canada provided capacity building funds directly to the Resource Centre to assist the operational First Nations. The following is a synopsis of the capacity-building projects implemented:

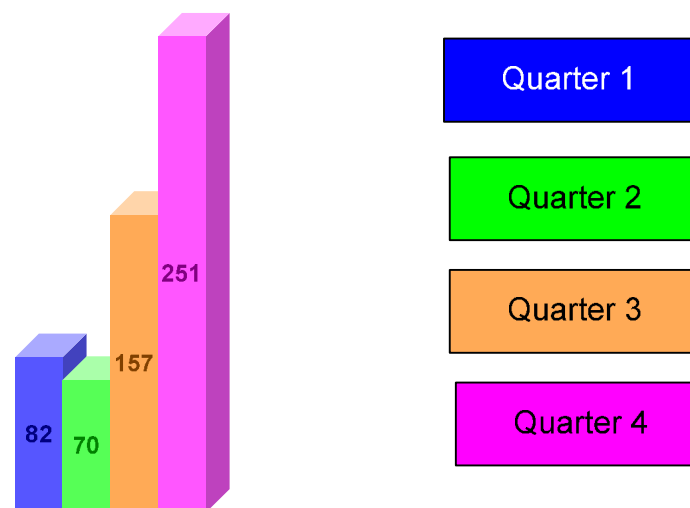
- McLeod Lake: environmental training and land use planning;
- Westbank: Geographical Information System (GIS) mapping;
- Lheidli T'enneh: land use planning;
- Muskoday: GIS automation;
- Whitecap Dakota: land use planning, automation upgrades, survey requirements;
- Opaskwayak Cree: automation upgrades and land use planning;
- Nipissing: law making workshop, land use planning, survey requirements;
- Georgina Island: automation upgrades;
- Beecher Bay: land use planning, Environmental Site Assessment training and automation upgrades; and
- Tsawwassen: automation upgrades.

## 6.3 Summary of Support Services to Operational First Nations

The LAB and Resource Centre provided a total of 560 support services to the operational First

Nations in 2003-2004. The “support services” consisted of interactions with other participants that ranged from telephone conference calls, emails, faxes and letter exchanges on the one hand to multi-day on site meetings and workshops with Chiefs and Councils, Land Committees, and Land Managers on the other hand. In some cases these meetings and workshops required the participation of Resource Centre staff and the LAB. Exhibit 14 indicates the LAB and Resource Centre support services by quarter in 2003 - 2004 to operational First Nations.

Exhibit 14: Chart - Quarterly Support Services to Operational First Nations



## 7. VERIFICATION PROCESS UNDER THE *FRAMEWORK AGREEMENT*

### 7.1 Role of the Verifier

The Chiefs who negotiated the *Framework Agreement* in 1996 introduced the concept of an independent party who would ensure that all aspects of the ratification process were conducted to the satisfaction of both the First Nation and Canada. The “verifier” would be jointly appointed by the First Nation and Canada.

Clause 8 of the *Framework Agreement* states that the role of this independent party is to verify that:

- (a) the proposed First Nation land code conforms with the mandatory land code components described in clause 5 of the *Framework Agreement*;
- (b) the proposed community ratification process conforms with the requirements of clause 7 of the *Framework Agreement*;

- (c) the community ratification process is conducted in accordance with the process that was confirmed by the First Nation Council; and
- (d) the Land Code was properly approved by the community and can be certified.

## 7.2 Success of the Verification Process

First Nations recognize the importance of the role of a verifier in the ratification process. The additional checks and balances by an independent party in validating the transition from the *Indian Act* to the Land Code has provided comfort not only to the First Nation membership and leadership but also to third-party interest holders and external financial institutions.

## 7.3 Verifier's Issues and Recommendations

The verifier has submitted to the LAB a year-end progress report outlining the assistance provided to First Nations in 2003-2004. The verifier's report also identifies a number of issues and presents recommendations regarding:

1. the appointment of the verifier;
2. the identification of representatives by the First Nation, Resource Centre and INAC;
3. the initial meeting of the verifier, First Nation and INAC;
4. the "legal description" of the jurisdictional boundaries of the reserve land; and
5. the Individual Agreements forwarded by INAC to the First Nations.

The verifier's full report is appended as Appendix 3. The five issues identified and the recommendations to resolve these issues are explained by the verifier as follows:

“1 Appointment of Verifier per FAFNLM clauses 8.1 and 44.1

Initially, after the execution of the *Framework Agreement on First Nation Land Management* (FAFNLM) in 1996 and before the promulgation of the *First Nations Land Management Act* (FNLMA) in 1999, Council Resolutions from First Nations and letters from Canada (Indian and Northern Affairs Canada) nominating an individual as Verifier were collected centrally by the LAB. The Chairperson of the Board, presumably after checking the list "established" under clause 44.1 of the FAFNLM, issued one letter of appointment to the nominee attaching copies of the nomination documents with cc's to the First Nation and Canada. That meant only one notice, one time, on one date.

For whatever reason, First Nation and Canada documents of appointment, not nomination, are currently being sent directly to the appointee. As the process has evolved, the appointment of a Verifier has become more and more disjointed. Some examples by fiscal year:

1998-1999 Mnjikaning First Nation - while the nomination documents were issued 41 weeks apart, one appointment letter reached the appointee on one date.

2002-2003 From the shortest, Beecher Bay - 1.5 weeks to the longest, Nipissing - 60 weeks.

2003-2004 From the shortest, Ts'kw'aylaxw - 2 days to the longest, Saint Mary's which was 14 weeks as of March 31<sup>st</sup>, 2004 without a document yet from Canada.

Recommendation 1: Have the nomination documents sent to one central repository/responsibility centre and have that responsibility centre check the nominee against the list of acceptable verifiers and have the responsibility centre issue one letter of appointment with cc's to the First Nation, Canada and the First Nations Land Management Resource Centre.

#### Identification of "representatives" per clause 8.1 of the FAFNLM

First Nations, in the cover letter transmitting the Verifier appointment FNCR [First Nation Council Resolution], identify their coordinator with appropriate telephone/fax numbers (and email addresses if they have specific ones).

Canada does not identify their contacts at the onset. Through trial and error, the east and west senior officers were identified by the Verifier while responsibility was centralized in Hull [INAC]. Contact's/representative's names, etc., since Canada's decentralization of responsibilities to Regions has begun, has remained trial and error even though a list has been promised.

Recommendation 2: If recommendation 1 is not implemented, Canada should identify their representatives with appropriate telephone/fax numbers and email addresses in their letter. If the verifier appointment process remains the same as it is currently then that information would go directly to the verifier. If recommendation 1 is implemented, then the appointment letter from the responsibility centre could include the information on each party's representative with a cc to the First Nations Land Management Resource Centre who provides advice and guidance to the First Nation.

#### Meeting with verifier required of FAFNLM clause 8.2

Initially, this responsibility for coordinating the meeting was taken on by the LAB. This process worked well.

In fiscal year 2002-2003, Canada assumed the responsibility for identifying the need for the meeting and incorrectly identified the verifier as the coordinator of such a meeting in their verifier appointment letters. In an effort to correct the information, Canada then delegated the responsibility to the particular First Nation in the verifier appointment letter which was cc'd to the First Nation. No timely meetings resulted until initiated by the verifier which were then coordinated by Canada. Finally, in 2003-2004, Canada assumed responsibility for coordinating the meeting per their letters of verifier appointment.

Recommendation 3: Canada and the LAB should review the current process to determine



whether the coordination of these meetings by Canada is the appropriate option. Is it more appropriate from Canada or the LAB?

If Canada is deemed the most appropriate coordinator, is it best done from Headquarters or best delegated to Regions.

In either case, whether coordination is done by Canada or the Lands Board, this information should be part of the appointment letter with the specific person responsible for the coordination named.

4. “Legal description” required of FNLMA clause 6.(1)(a) vs. FAFNLM clause 5.2 (a) “description”

Initially, prior to promulgation of the FNLMA in 1999, the requirement was only to have a description of the land to be included in a First Nation Land Code. This was determined by the parties signatory to the FAFNLM to be something as simple as a reserve number ie reserve 35. With the drafting and subsequent passage of the FNLMA in 1999, a legal description was required.

In fiscal year 2003-2004, when Canada was not yet able to produce the required legal description in a timely manner and with six First Nations prepared to vote, a solution was agreed to by the Land Advisory Board, Indian and Northern Affairs Canada and Natural resources Canada. The immediate solution was to develop and provide those particular First Nations with an interim land description with a complete legal land description to be completed later.

As an example, in an April 25, 2003 letter to the Westbank First Nation, Canada stated:

*“This interim land description will be prepared and attached as Annex “C” of the Individual Agreement. This land description will be prepared by referring to the following documents:*

- The original Order-In-Council of the Privy Council (OCPC) or Proclamation setting aside the lands for the benefit of the First Nation;*
- The OCPC’s adding land to reserve;*
- The OCPC’s taking land out of reserve;*
- A copy of the Reference Plan of the reserve or a sketch map specifically prepared for this purpose by the Office of the Surveyor General of Canada, Department of Natural Resources Canada.*

*This interim Land description and the easements will be subject to the following conditions:*

- The mineral rights and the easements will not be addressed;*
- No documents other than those of the Indian Lands Registry will be reviewed.*
- A complete Legal Land Description with an Explanatory Plan, approved by the Surveyor General of Canada will be completed within one year from ratification of the Land Code.”*

There were thirty-six (36) First Nations listed in the FNLMA clause 45 Schedule as of the

15<sup>th</sup> of May 2003. According to information available to verifiers at that time, nine (9) First Nations had gone through a community ratification up to that date. That meant that there were twenty-seven (27) still to complete their Codes for ratification, six (6) who were scheduled to vote and would complete their Codes using “the interim legal description”.

In fact, seven (7) First Nations voted in 2003-2004. Only four (4) had to vote on Codes that included interim legal descriptions. Due to the necessity to delay votes for other reasons, three (3) actual legal descriptions were completed by Canada in time to be included in the Codes.

That leaves some with interim legal descriptions and twenty (20) that still required legal descriptions as of March 31, 2004.

Recommendation 4: Canada has had seven years since June 1999 to complete the legal descriptions required of the FNLMA. Canada [should] complete all the legal descriptions this fiscal year [2004-2005].

Recommendation 5: Review the Codes/Individual Agreements of those First Nations who had a commitment from Canada to complete legal descriptions within one year of their ratification votes and establish a monitoring procedure to ensure Canada meets its commitment.

5. Individual Agreements required of the FAFNLM section 6 and FNLMA clause 6. (3)

No First Nation has any control over when this Individual Agreement (IA) is “concluded” to the satisfaction of the verifier or “executed” by the Minister of Indian and Northern Affairs Canada. Yet, First Nations are under extreme pressure from their community members/committees/coordinators to set the earliest possible ratification vote date so as not to lose positive energies and momentum generated in their consultation and development of a First Nation developed and responsive land management regime.

A template IA is provided by Canada which requires the inclusion of information available only from their data sources. Annexes are quite often blank when the template is provided to the First Nation. In the last two years, even Environmental Site Assessments have been removed from First Nation management to Canada management. When Canada determines the IA is complete and to their satisfaction, originals are sent to the First Nation for signature by the Chief.

The verifier is satisfied the date for a vote can be set by the First Nation once the IA is received by the Chief for signature and the Council through FNCR, approve the IA for community ratification. In the March 6, 2003 Verifier’s interpretation/decision letter transmitted the following was stated:

*“I disagree with the statement that prior to the Minister signing, there is no individual agreement and therefore there is nothing for the community to vote on. Nowhere do I see in the legislation, nor have your arguments convinced me, that the agreement has to be signed by the Minister before the community ratification. The Minister, by virtue of empowering his staff to provide the First Nation with an Individual*

*Agreement for signature of acceptance, is making an offer. The Chief, by signing, is accepting the terms of the offer. That constitutes an agreement. That agreement can be put forward to the community for ratification.”*

The signing of the IA by the Minister can take as few as eleven (11) days like the Westbank IA where the document was actually walked through the process by the community leadership. It can also fall into an abyss as is the case with Sliammon from September 10, 2003 where the Minister did not/could not sign, where the Minister was changed and an election called and the ratified Code cannot become effective and implemented by the First Nation until another Minister is appointed, brought up to speed on the initiative and has signed the IA per their Code clause 49.2.

Recommendation 6: Canada and the LAB should look at possible alternatives such as:

- (a) having the “negotiators” initial off the IA as an agreement-in-principle when concluded that can be put to community ratification before signatures by the Chief and Minister;  
or
- (b) delegating the signing authority to a sufficiently high position in the government, acceptable to both parties, where the person is less likely to change due to political process and more accessible on a day-to-day basis than a Minister; or
- (c) have the Minister sign the IA first where the final step before the IA is executed is the signature by the Chief.”

#### **7.4 Addressing the Verifiers Recommendations**

The LAB proposes to meet with the Minister in 2004-2005 to discuss the five issues and recommendations raised by the verifier. Three of the issues are administrative in nature and deal with procedures. Two other issues, which deal with delays in completing the Individual Agreement and decisions made by the verifier, are substantive.

## 8. LAB RECOMMENDATIONS

The LAB proposes to meet with the Minister to discuss recommendations which are intended to facilitate the implementation of the *Framework Agreement* and *FNLMA*, recognize the government-to-government relationship between First Nations and Canada, and provide significantly more First Nations with the opportunity to assume control over their reserve lands and resources.

### 8.1 Government-to-Government Funding Arrangement Required

The *Framework Agreement* requires that Canada enter into a five-year funding arrangement with the LAB. In 2003-2004 the Minister and the LAB completed a Memorandum of Understanding recognizing this five-year funding commitment. The LAB and Canada need to negotiate in 2004-2005 an appropriate funding format that identifies the annual funding arrangement. This format must also recognize the government-to-government relationship of the *Framework Agreement* and the *FNLMA*.

The LAB has set the completion of this new government-to-government funding format as a priority in 2004-2005. The *Framework Agreement* is a sectoral self-government initiative designed by First Nations, negotiated with Canada and ratified by Parliament. **The signatory First Nations to the *Framework Agreement* insist that their initiative is not a departmental program or a co-managed process with INAC, both of which are contradictory to the concept of First Nation sectoral self-government, to the spirit, intent and actual wording of the *Framework Agreement*, and to actual experience with implementation of the *Framework Agreement*.** The signatory First Nations to the *Framework Agreement* believe that a new approach is required with a new funding format that respects this government-to-government relationship.

### 8.2 Implement the New Operational Funding Method in 2004-2005

First Nations have identified that their current levels of operational land management expenditures consume much more funding than is provided by Canada under the current "interim" funding formula. Furthermore, they are concerned that arrangements for additional key land management functions, such as environmental and the associated costs to First Nations, are not included in the "interim" funding calculations.

The *Framework Agreement* and *FNLMA* stipulate that Canada will provide the operational funding to the First Nations to operate their land management regimes. The spirit and intent of the *Framework Agreement* and *FNLMA* was not to place the financial burden on the First Nations.

The operational First Nations have insisted that the next generation of the funding method be implemented in 2004-2005. They believe that sufficient land management information was gathered during the independent study and forwarded to Canada to finalize a new operational funding method.

### 8.3 Timely Funding Payments to Operational First Nations

The operational First Nations have reported that they have not received their payments in a timely manner and that this has been an annual problem since 2000-2001. Many indicated that their 2003-2004 funding was delayed for nine months and others that their funding was delayed twelve months.

The operational First Nations believe that the lack of timely funding payments is a violation of the Individual Agreement, the *Framework Agreement* and the *FNLMA*. They are being forced to reduce their land management staff component or borrow funds to operate. The delay in receiving funding from Canada restricts First Nation land management capabilities, which could result in potential liability and lost economic opportunities, revenues and jobs to the membership.

The operational First Nations must be assured by Canada that payments will be processed in a timely manner at the beginning of each fiscal year.

### 8.4 First Nations to Decide on Vote Delays

The ratification process requires that the First Nation, Resource Centre, verifier and INAC meet to discuss a schedule and set a proposed date for the community vote. However, the verifier's report indicates that most of these original vote dates are never met. Seven of the ten First Nations that completed their votes in 2003-2004 experienced vote delays ranging from two months to four months because the Individual Agreement from Canada was not ready. The verifier also reported that eight other First Nations were obliged to reschedule their future vote dates due to delays ranging from three months to eleven months in receiving the Individual Agreement from Canada.

First Nations have repeatedly expressed their concerns to the LAB that the Individual Agreement delays have caused unnecessary pressure on the community and prevented their land codes from being implemented earlier. The LAB recommends that clause 6.3 of the *Framework Agreement* be acted upon.

The Minister, "upon the request of the First Nation", is required to provide all existing environmental information in Canada's possession. When the environmental information is not current, Canada delays the completion of the Individual Agreement while independent environmental contractors complete an assessment of the reserve lands. This delays the community vote by several months or indefinitely.

The LAB recommends that the First Nation, which is "requesting" all existing information from Canada, should decide if the delay in conducting the community vote is acceptable. The quality of the environmental information at the time of the community vote, whether it is current or not, does not reduce Canada's responsibility under the *Framework Agreement* for acts or omissions before the land code takes effect.

## 8.5 Comply with Verifier's Decisions

The verifier was required in 2003-2004 to render a final decision on a situation dealing with the Individual Agreement. When the details of the Individual Agreement are completed by Canada and forwarded to the First Nation, the Minister's signature is not on the document. Canada has insisted that the Chief sign the Individual Agreement on behalf of the community and return the document, at least 60 days in advance of the vote date, to the Minister for signature.

First Nations in 2003-2004 asked the verifier to determine whether the minister needed to sign the Individual Agreement before they could proceed with their vote. Canada took the position that a signature by the Minister must be a prerequisite to a vote. The verifier disagreed with Canada's position and stated:

*"...Nowhere do I see in the legislation, nor have your arguments convinced me, that the agreement has to be signed by the Minister before the community ratification".*

Canada is not complying with the verifier's decision pursuant to section 8.5 (b) of the *Framework Agreement*. The LAB recommends that Canada comply with the verifier's decision pursuant to clause 8.5 (b) of the *Framework Agreement*.

## 8.6 Expand the Entry of Additional First Nations

Currently Canada's policy is that there can only be 30 First Nations in the ratification process at one time. Additional First Nations are admitted to this "rolling 30" only as the current signatory First Nations complete the community vote to implement their Land Codes and thereby create "openings" in the "rolling 30". Interested First Nations, requesting to be added as signatories to the *Framework Agreement*, are insistent that the "rolling 30" be expanded to allow for their entry.

The LAB recommends that the "rolling 30" be increased to at least a "rolling 50". This will enable more First Nations to "opt out" of the *Indian Act* and assume control over their reserve lands and resources under their own Land Codes. Economic development planning can begin.