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## OPERATIONALIZING ABORIGINAL LAND AND PROCUREMENT ISSUES WITHIN DND

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JCSP 45

*Exercise Solo Flight*

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*Reconciliation calls upon us all to confront our past and commit to charting a brighter, more inclusive future. We must acknowledge that centuries of colonial practices have denied the inherent rights of Indigenous Peoples. The recognition and implementation of Indigenous rights will chart a new way forward for our Government to work with First Nations, Inuit, and Métis Peoples and to undo decades of mistrust, poverty, broken promises, and injustices. We have listened and learned and we will work together to take concrete action to build a better future and a new relationship.”*

—The Rt. Hon. Justin Trudeau, Prime Minister of Canada.<sup>1</sup>

## INTRODUCTION

Almost two centuries later, the legacy of Canada’s assimilation policy towards Indigenous Peoples has caused many enduring social problems. This includes a wide disparity between Indigenous and non-Indigenous populations in almost every aspect of individual and community well-being. Many Indigenous groups lost ownership and access to their traditional lands and were forced to live in remote communities resulting in a lack of access to economic and social infrastructure. The consequences for them have resulted in lower levels of employment and economic status as compared to non-Indigenous populations.<sup>2</sup> At the same time, Indigenous groups are fighting to restore access and ownership to their traditional lands and defend their rights and interests in regard to resource, self-government and land use. As the Prime Minister acknowledged the need for Canada to confront its legacy and fulfill its obligations to the Indigenous Peoples in Canada, it has also begun to re-examine how it will achieve its reconciliation goals.

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<sup>1</sup> Prime Minister Of Canada, “Government of Canada to create Recognition and Implementation of Rights Framework,” last modified 14 February 2018, <https://pm.gc.ca/eng/news/2018/02/14/government-canada-create-recognition-and-implementation-rights-framework>

<sup>2</sup> Truth and Reconciliation Commission of Canada, *What We Have Learned: Principles Of Truth And Reconciliation*. (n.p., 2015), 103-106.

As a guide toward the implementation of the recommendations provided by the Truth and Reconciliation Commission Report, the federal government has established ten “principles respecting the Government of Canada's relationship with Indigenous Peoples” to steer its ministers in their respective department’s reconciliation efforts.<sup>3</sup> One of the key principles recognizes that Canada must undertake a “distinctions-based approach ... to ensure that the unique rights, interests and circumstances of the First Nations, the Métis Nation and Inuit are acknowledged, affirmed, and implemented.”<sup>4</sup>

The Department of National Defence (DND) is one of the biggest federal departments with a procurement budget of \$6.5 billion and real property holdings of 2.3 million hectares.<sup>5</sup> Approximately 80% of DND establishments are in close proximity to Indigenous communities, resulting in DND’s operations intersecting Aboriginal rights and interests. As such, it is one of the key departments that have the greatest potential and opportunity to affect Canada’s reconciliation efforts. The following paper will discuss how to better operationalize Indigenous participation in DND operations with a specific focus on land and procurement.

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<sup>3</sup> Department of Justice Canada, *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*, (Ottawa: Her Majesty the Queen in Right of Canada, 2018), 18.

<sup>4</sup> *Ibid.*

<sup>5</sup> Government of Canada, “Mandate of National Defence and the Canadian Armed Forces,” last modified 24 September 2018, <https://www.canada.ca/en/department-national-defence/corporate/mandate.html>; Department Of National Defence, *Department Of National Defence, and the Canadian Armed Forces 2018-19 Departmental Plan*, (Ottawa: Her Majesty the Queen in Right of Canada, 2018), 40; Office of the Auditor General of Canada, “Chapter 5—Real Property—National Defence 2012 Fall Report of the Auditor General of Canada,” last accessed 20 April 2019, [http://www.oag-bvg.gc.ca/internet/English/parl\\_oag\\_201210\\_05\\_e\\_37349.html#hd3b](http://www.oag-bvg.gc.ca/internet/English/parl_oag_201210_05_e_37349.html#hd3b).

## A WICKED PROBLEM

Public policy issues are inherently wicked in the fact that the problems they attempt to address are ill-defined and the solutions formulated are not necessarily judged as correct or incorrect but rather as an iterative progress of solutions that provide progressively better results.<sup>6</sup> Common traits characterizing wicked problems include challenges to problem definition that become better refined by understanding the context and increased knowledge derived from formulating solutions. Thus, each problem is distinctive from another and should be examined within its particular framework. That is not to say that ideas from similar problems cannot be applied, but should be approached within the systems and environment unique to that specific problem.

Additionally, there is no precise end state for a solution. Rather, as described above, it is a continuum of solutions that are judged to be sufficient at the moment and are typically bounded by the limiting parameters of time, resources or patience. Therefore, solutions are judged on a graduated scale to indicate if the problem is better or worse, with no discrete right or wrong answer. The last two traits are related to the interconnectedness and complexity of relationships inherent in social problems which results in every attempt to resolve a wicked problem impacting other related problems. Finally, such problems are dynamic due to the involvement of various stakeholders whose perspectives are not always aligned and are changeable based on the situation and environment.<sup>7</sup>

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<sup>6</sup> Horst W. J. Rittel, and Melvin M. Webber, "Dilemmas in a General Theory of Planning," *Policy Sciences*, 4, no. 2 (June 1973): 160 and 162.

<sup>7</sup> *Ibid.*; National collaborating centre for Healthy Public Policy, and Quebec Institut national de santé publique, *Wicked problems and public policy fact sheet*, (n.p. 2013), 2.

Promoting reconciliation between Canada and Indigenous groups is a wicked problem in that the problem is not clearly defined and is reliant on developing solutions which will promote understanding of the stated problem. Issues for reconciliation intersect various systems which encompass the realms of governance, health, land access and management, economic success and education, which are difficult to encompass within a precise solution.<sup>8</sup> For example, there is no determinant to say when a healthy economy has been achieved. Though employment indicators and average wage statistics might assist in measuring Indigenous economic success, an economic system also encompasses many interrelated factors and stakeholders, including access to diverse and higher levels of education and skills training, financing, business knowledge and experience, as well as resource management.<sup>9</sup>

Furthermore, economic health is relative and dependent on individual perspectives. Economic success at the expense of the environment, sustainable management and the protection of Indigenous culture may be acceptable for certain stakeholders, but not likely for those whose environment or culture is affected.<sup>10</sup> This potential for success is complicated by the fact that Indigenous Peoples and their culture are not homogeneous. They include First Nations, Metis and Inuit peoples who are distinct from one another in terms of history, language, traditions and geography.<sup>11</sup>

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<sup>8</sup> Truth and Reconciliation Commission of Canada, *What we have learned...*, 106.  
<sup>9</sup> National Aboriginal Economic Development Board, *Aboriginal Economic Progress Report 2015*, (Gatineau, Quebec: n.p.), 10-11.  
<sup>10</sup> *Ibid.*, 35-37.  
<sup>11</sup> *Ibid.*, 6.

## THE PROBLEM

Federally, Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC) is the lead department for Indigenous relations, however, all other federal departments have been instructed to “renew relationships with Indigenous peoples [through the] recognition of rights, respect, co-operation, and partnership.”<sup>12</sup> Thus, DND is in the process of developing a framework for its strategy for the integration of Indigenous people.

As an initial step, DND is reviewing existing policies and procedures that intersect with Indigenous interests to ensure they are aligned with the intent of reconciliation. Within the department, the Assistant Deputy Minister of Infrastructure and Environment (ADM(IE)) is leading the effort in collaboration with the Commander of the Canadian Army (CCA) in his role as the Defence Aboriginal Champion. Current aspects that DND is reviewing include areas of land access, land remediation, real property transactions, procurement, recruitment and employment.<sup>13</sup> Due to the fact that ADM(IE) has the role of both technical authority and operationalizing policies related to real property and the procurement-heavy infrastructure projects, the focus of this paper will be restricted to real property and procurement issues.

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<sup>12</sup> Prime Minister of Canada, *Minister of Crown-Indigenous Relations and Northern Affairs Mandate Letter* (Ottawa: 4 October 2017); Prime Minister of Canada, *Minister of Infrastructure and Communities Mandate Letter* (Ottawa: 28 August 2018); Prime Minister of Canada, *Minister of National Defence Mandate Letter* (Ottawa: 12 November 2015).

<sup>13</sup> Mr. Olivier Fondjo,, telephone conversation with author, 12 April 2019..

## Real Property

Aboriginal rights are delineated in section 35 of the Constitution Act, 1982 which recognizes “existing aboriginal and treaty rights [which] includes rights that now exist by way of land claims agreements or may be so acquired.”<sup>14</sup> In regards to laws and regulations concerning DND real property, the recognition of Aboriginal rights is reinforced by the common law requirement for the Duty to Consult (DtC), the National Defence Act, and Treasury Board policies.<sup>15</sup> Areas that intersect DND activities and Aboriginal rights and interests include land access, real property transactions and the remediation of DND lands.<sup>16</sup>

The management of federal real property is governed by Treasury Board’s Policy on Federal Real Property which outlines the roles and responsibilities for the sustainable and financially responsible management of federal real property to effectively support government programs.<sup>17</sup> The roles and responsibilities require intergovernmental support through a wide spectrum of federal departments and agencies including Environment Canada, Fisheries and Oceans Canada, Human Resources and Skills Development Canada, CIRNAC, Indigenous Services Canada, the Department of Justice Canada, Natural Resources Canada, Parks Canada, Public Services and Procurement Canada, the Royal Canadian Mounted Police and the Treasury Board Secretariat. Together they

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<sup>14</sup> Government of Canada, “Justice Laws Website Section 35, Constitution Acts, 1867 to 1982 Part II,” last modified 10 April 2019, <https://laws-lois.justice.gc.ca/eng/const/page-16.html>.

<sup>15</sup> Minister of the Department of Aboriginal Affairs and Northern Development Canada, *Aboriginal Consultation and Accommodation, Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*, (n.p., 2011), 6; National Defence Act, Defence Controlled Access Area Regulations, SOR/86-957,(27 March 2019); Treasury Board, *Policy on Management of Real Property*, (n.p.: 12 November 2013), Sections 2-6;

<sup>16</sup> 4 Wing Command, *CLAWR Policies and Procedures Part II Policies*, (Cold Lake: 2018), 13; Assistant Deputy Minister (Infrastructure and Environment), *Aide-Memoire for DND Employees and CAF Members The Common Law Duty to Consult with Indigenous Groups*, n.p.: 19 January 2017, 1.

<sup>17</sup> Treasury Board, *Policy on Management...*, Section 5.1.



provide expertise and advice to ensure that federal real property management aligns with existing laws and government policies for environmental stewardship, health and safety compliance, legal transactions and title searches, respect for Aboriginal claims, rights and interests, as well as federal and provincial resource rights, heritage protection, real property services, security and access standards and the development of real property best practices.<sup>18</sup>

In regard to real property management that pertains to Indigenous groups, the Crown (Territorial/Provincial and Federal governments) has a common law duty to consult with Indigenous groups in respect of their rights and interests whenever the Crown anticipates conducting any activity. The DtC not only requires consultation with Indigenous groups but also the accommodation of their rights and interests in accordance with the objectives of reconciliation.<sup>19</sup>

This duty is triggered by three key elements that include “Contemplated Crown conduct; Potential adverse impact; and Potential or established Aboriginal or Treaty rights recognized and affirmed under section 35 of the Constitution.”<sup>20</sup> Thus, in determining whether there is a DtC, the Crown, and DND specifically, must plan for the extra time and resources required to step through the DtC process. The process requires research to assess the scope and potential effects of DND actions on land and resources, identifying land title and other stakeholders that might include other government

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<sup>18</sup> *Ibid.*, Section 8.

<sup>19</sup> Minister of the Department of Aboriginal Affairs and Northern Development Canada, *Aboriginal Consultation and Accommodation...*, 6.

<sup>20</sup> *Ibid.*, 11.

departments and agencies such as Environment Canada, provinces and territories, as well as any established or potential claims by local Indigenous groups.<sup>21</sup>

The scope and depth of consultation will be proportional to the strength and number of claims asserting Aboriginal rights and interests. Signed modern treaties, also known as Comprehensive Land Claims Agreements (CLCAs), are agreements establishing Aboriginal rights and interests which DND must adhere to. Other claims may be in the process of negotiations, have only been declared locally, or known to only a limited number of stakeholders. Similarly, the strength of the claim will typically establish what actions must be taken to accommodate Aboriginal rights and interests, however, DND may still choose for policy reasons, to undertake accommodation of Aboriginal interests where appropriate.<sup>22</sup>

The DtC impacts the planning timeline and resource requirements to conduct any DND activity. Those affected activities that are specific to ADM(IE) include land disposals and acquisitions, change in the use of land, contaminated site clean-up, certain contracting activities, infrastructure projects, training activities or daily operations that might affect potential or existing treaty rights.<sup>23</sup>

Similarly, there is a mutual concern for Indigenous access to DND-owned or controlled lands that are subject to Aboriginal treaty rights. Aboriginal rights and interests are not necessarily tied to land ownership but may encompass ancient burial grounds on ceded territory or hunting, fishing and gathering rights on what were once

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<sup>21</sup> Assistant Deputy Minister (Infrastructure and Environment), *Determining if there is a legal duty to consult*, (n.p.: 2017), 2-4.

<sup>22</sup> Minister of the Department of Aboriginal Affairs and Northern Development Canada, *Aboriginal Consultation and Accommodation...*, 21.

<sup>23</sup> Assistant Deputy Minister (Infrastructure and Environment), *Aide-Memoire for DND...*, 1.

traditional lands but are no longer under the control of an Indigenous group.<sup>24</sup> This is the case for access to the Canadian Forces Base Cold Lake Air Weapons range.<sup>25</sup>

### Real Property Challenges

Challenges affecting real property management include ensuring DND has the time and resources to research, access and maintain the knowledge of all of the existing and potential treaty rights of the Indigenous people, whose rights intersect land that DND is either seeking access to or that DND owns or controls. There are currently 25 modern treaties signed with 97 Indigenous groups across Canada that cover roughly 40% of the nation's land mass. Approximately 80% of DND establishments are in close proximity to Indigenous communities.<sup>26</sup> Thus, there is a high potential for the intersection of DND real property management activities with Aboriginal rights and interests.

In regards to DtC, Aboriginal claims are not always easy to assess. Where agreements exist through CLCAs, which include the Yukon, the Northwest Territories, Nunavut, northern Quebec, northern Labrador and parts of British Columbia and Manitoba, Aboriginal rights are established.<sup>27</sup> The rights encompass interests in regards to land use, self-government, and decisions regarding land and resource development and preserving Indigenous culture and traditions. As these rights have been guaranteed in the signed treaties, the Crown and as such, DND, are bound to act in accordance with the

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<sup>24</sup> Minister of the Department of Aboriginal Affairs and Northern Development Canada, *Aboriginal Consultation and Accommodation...*, 48.

<sup>25</sup> 4 Wing Command, *CLAWR Policies and Procedures Part II Policies*, (Cold Lake: 2018), 13.

<sup>26</sup> Aboriginal Affairs and Northern Development Canada, "A Whole of Government Approach to Modern Treaty Implementation," (Presentation to the Aboriginal Affairs Network at Department of National Defence, 4 November 2015) slide 4; Government of Canada, "Treaties and Agreements," last modified 11 September 2018, <https://www.rcaanc-cirnac.gc.ca/eng/1100100028574/1529354437231>.

<sup>27</sup> Indigenous and Northern Affairs Canada, *Map of Modern Treaties and Self-Government*, (n.p.: 2016).

negotiated agreements. Specific actions may encompass consultation requirements, accommodation for hunting and harvesting, financial compensation, sharing in resource revenues or implementing processes and programs to improve Indigenous participation in the Canadian economy.<sup>28</sup>

Where CLCAs do not exist, the strength of claims for Aboriginal rights must be investigated through federal departments or agencies such as the Consultation Information Service of CIRNAC, the Department of Justice or through provincial or other agencies and departments that may already be aware of claims declared by local Indigenous groups by virtue of established consultation processes.<sup>29</sup> Thus, having timely access to intergovernmental agencies to provide expertise to assist in determining Indigenous title and claims is critical. This also includes ensuring the correct stakeholders are determined both within and outside of DND.

Within DND, this includes at minimum, the local DND representatives in the form of the Base/Wing Commander, the Real Property Operations Detachment Commander, who administers and manages local DND real property and any Office of Primary Interest who is responsible for specific local DND activity that might possibly impact Aboriginal rights.<sup>30</sup> Stakeholders external to DND comprise government departments responsible for administering Aboriginal interests such as CIRNAC, provincial and Crown agencies that might have jurisdiction over the land or activity in question, as well as the specific Indigenous representatives of the affected communities.

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<sup>28</sup> Government of Canada, "Treaties and Agreements," last modified 11 September 2018, <https://www.rcaanc-cirnac.gc.ca/eng/1100100028574/1529354437231>.

<sup>29</sup> Minister of the Department of Aboriginal Affairs and Northern Development Canada, *Aboriginal Consultation and Accommodation...*, 38, 42.

<sup>30</sup> Department of National Defence, *Defence Administrative Orders and Directives 4001-0, Real Property Life Cycle Management*, Section 3.

They may be specific individuals, such as a band council, land management officer, a board or tribunal.<sup>31</sup>

In terms of access to DND-controlled lands by Indigenous groups, there is the challenge of balancing the needs of Indigenous groups weighed against the requirements for security and the ability to carry out training and operations safely and securely.<sup>32</sup> This situation specifically impacts ranges and training areas as well as flight lines and jetties where controlling access to specific areas ensures the security of assets and users as well as the safety of any potential trespassers.<sup>33</sup>

Thus, an additional complication for DND stakeholders is appropriately navigating between protecting DND's interests, and accommodating the rights and interests of local Aboriginal groups, whether these are enshrined in established treaties or are respected in accordance with DND reconciliation policies. This leads to the potential for impacts on DND financial and legal resources as well as DND operations which ultimately require effective consultation and negotiations between all stakeholders to balance competing interests.<sup>34</sup>

### Real Property Opportunities

Despite the complexity involved in DtC and accommodation, there are several places where DND has successfully accommodated Aboriginal rights and maintained

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<sup>31</sup> *Ibid.*

<sup>32</sup> L. June McCue, *Indigenous Peoples' Self-Determination and the Right to Security*, (University of British Columbia, Faculty of Law: 28 November 2004), 7-8.

<sup>33</sup> 4 Wing Command, *CLAWR Policies...*, 2; National Defence Act, Defence Controlled Access ....

<sup>34</sup> Assistant Deputy Minister (Infrastructure and Environment), "Indigenous Reconciliation Implications for DND/CAF," (PowerPoint presentation, Department of National Defence, 14 Dec 2018).

effective operations. These include the Cold Lake Air Weapons Range (CLAWR), and the remediation of Camp Ipperwash.

In the case of CLAWR, the Range Control policies recognize the interests of the local Indigenous group, the Cold Lake First Nations (CLFN), in accordance with the province of Alberta's environmental legislation and guidelines for Aboriginal consultations. Any land or resource development within the CLAWR requires industry to undertake Traditional Knowledge assessments that may impact the rights and interests of the CLFN. This includes the requirement to use CLFN members as experts to help identify cultural and sensitive areas such as ancestral, spiritual and ecologically sensitive sites and recommend mitigation measures to address the impacts to these interests. The policy also provides for special access to the range to accommodate traditional rights such as hunting, trapping, and fishing. In the case of CLAWR, though the DtC is not specifically referred to, the range policies acknowledge the consultation process already established by the province of Alberta.<sup>35</sup>

In regards to the former Camp Ipperwash, DND is committed to returning it to the Chippewas of Kettle and Stoney Point First Nations (KSPFN). A Memorandum of Understanding (MOU) signed in 1995 outlined DND's commitment to work with the KSPFN to remediate the site and contribute to community healing while negotiations are on-going to settle the claim.<sup>36</sup> Due to the extensive environmental contamination, which includes unexploded ordnance and derelict DND buildings, the site remediation will take several decades to conclude. As part of the MOU, DND has hired members of the KSPFN to provide security and conduct some of the site maintenance. While remediation

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<sup>35</sup> 4 Wing Command, *CLAWR Policies...*, 16-20 and 50.

<sup>36</sup> Minister of Indian Affairs and Northern Development, *Camp Ipperwash*, (Ottawa, 1996), 2.

activities proceed, there is no clear provision in the MOU for DND to maintain their abandoned buildings to allow for the safe accommodation of occupants, despite the fact that many of them are occupied by KSPFN members.<sup>37</sup>

Nonetheless, the Commanding Officer of the Real Property Operations Unit responsible for the maintenance of the site, committed in late 2018 to upgrade the existing buildings in order to allow for the safe accommodation of occupants, believing it was the right thing to do in upholding the Honour of the Crown.<sup>38</sup> The pertinent aspect here is that the local Commander understood the strategic importance of respecting Aboriginal interests based on his own assessment. Ensuring that all commanders are equipped with the correct knowledge and understanding of what reconciliation efforts may require when not explicitly documented, is an important aspect for consideration in the rebuilding of trust and relationships with Indigenous groups.

## **Procurement**

Canada recognizes that on average Indigenous people earn less than non-Indigenous people and have lower labour participation rates.<sup>39</sup> In addition, the Indigenous population is projected to increase at a rate of four times that of the rest of Canada which

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<sup>37</sup> *Ibid.*; Colin Graf, “Inside the Indigenous Community That Occupies a Canadian Military Base,” *VICE*, 7 September 2017.

<sup>38</sup> Lieutenant-Colonel D. Henley, telephone conversation with author, 29 October 2018.

<sup>39</sup> Melissa Moyser, *Aboriginal People Living Off-Reserve and the Labour Market: Estimates from the Labour Force Survey, 2007-2015* (Ottawa: Statistics Canada, 2017), 8; On average the labour force participation rate for aboriginal people was 75.9% in 2015, which is more than 10% lower than that of the non-aboriginal population which stood at 86.5%.; National Aboriginal Economic Development Board, *Aboriginal Economic Progress...*, 19; The average income for the aboriginal population in 2010 was \$ 29,780, which was 27.5% less than that of the non-aboriginal population amounting to a difference of over \$11, 000.

emphasizes the importance of improving the lives and prosperity of future generations.<sup>40</sup> In order to help rectify the economic disparity, the federal government is assessing current procurement programs to increase Indigenous participation. Procurement related programs that currently exist include the Procurement Strategy for Aboriginal Businesses (PSAB), the Industrial and Technological Benefits (ITB) policy and procurement-related mandates specific to individual CLCAs.<sup>41</sup>

The PSAB is a CIRNAC program that has the goal of increasing Aboriginal participation in the federal procurement process. It accomplishes this through both mandatory and voluntary requirements to set-aside competitive bidding for contracts to qualified Indigenous companies. The mandatory set-asides affect contracts that are valued at more than \$5,000 and have Indigenous people as the primary recipients of the contract, whereas the voluntary set-asides encourage federal departments and agencies to consider setting-aside contracts where “Aboriginal capacity exists.”<sup>42</sup> Qualifying firms must have a majority (51%) ownership and control by Indigenous people and if there are more than six employees, at least one-third of whom must be Indigenous. In a similar vein, joint ventures must be majority owned and directed by an Aboriginal company or companies with the latter performing at least two-thirds of the value of the work.<sup>43</sup>

The ITB policy is administered by Innovation, Science and Economic Development Canada (ISED) and requires companies who are awarded defence contracts

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<sup>40</sup> Department of National Defence, “White Paper V4” (draft discussion paper on PSAB, Department of National Defence, October 2017), 2.

<sup>41</sup> Government of Canada, “Treaties and ...”; CLCAs may contain procurement-related mandates but largely encompass much broader aspects of land claim rights, self-government and access.

<sup>42</sup> Indigenous and Northern Affairs Canada, “Procurement Strategy for Aboriginal Business: Booklet,” last modified 21 July 2014, <https://www.aadnc-aandc.gc.ca/eng/1354798736570/1354798836012>.

<sup>43</sup> Indigenous and Northern Affairs Canada, Procurement Strategy ...



to fund business activities in Canada proportional to the costs and benefits to Canada. The policy incentivizes bidders to provide Value Propositions in specific areas that will grow and sustain Canada's defence industry and Canadian suppliers, improve the exportability of Canadian businesses, and encourage skills development and training of Canadians to improve employment opportunities. Bids are evaluated in part by the quality of Value Propositions submitted which are weighted at no less than 10% of the overall bid score.<sup>44</sup>

The intersection with Indigenous participation lies within the areas of Gender and Diversity planning, the implementation of the PSAB policy and skills development and training. Though submissions of Gender and Diversity plans are mandatory, they are not a scored part of the bid. In regards to the PSAB, its use and evaluation may be considered on a "procurement-by-procurement" basis when appropriate but it is not mandatory. The most promising aspect of the Value Propositions for Indigenous economic development is through skills development and training. It is an evaluated and scored part of the bid, and its applicability to Indigenous communities is contingent on the current and potential gaps and opportunities assessed. As the majority of bases are located close to Indigenous communities, there may be greater opportunities for their positive participation in this area.<sup>45</sup>

With respect to CLCAs, each agreement specifies requirements for procurement activities with Indigenous people specific to the agreement. Currently CLCAs with procurement-related provisions exist in the Yukon, the Northwest Territories, Nunavut,

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<sup>44</sup> Government of Canada, *Industrial and Technological Benefits Policy: Value Proposition Guide*. (Ottawa, 2018), 1-3,5 and Annex A

<sup>45</sup> *Ibid.*

northern Quebec, and northern Labrador. These may contain provisions for the notification of procurement activities, the right of first refusal to the specific Indigenous community, the inclusion of socio-economic benefits consisting of skills development and training, employment opportunities, subcontracting to Indigenous businesses and establishment of a supplier office within the CLCA area.<sup>46</sup>

The above policies and programs have the aim in whole or in part to increase the economic development of Indigenous communities through the use of set-asides, established agreements and incentives. Though there are several federal departments that have used these programs to promote procurement from Indigenous businesses and economic development in Indigenous communities, the results have been inconsistent.

Under the PSAB policy, federal procurement from Indigenous businesses accounted for 0.32% (\$63 million) of the \$20 billion procurement budget.<sup>47</sup> For DND, the average amount of procurement from Indigenous businesses between 2013 and 2014 was 0.31%.<sup>48</sup> Last summer, CIRNAC reached out to federal departments to encourage them to reach an objective of 1% growth each year in procurement from Indigenous businesses in

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<sup>46</sup> Public Works and Government Services Canada, "Buyandsell.gc.ca Supply Manual Chapter 9 Modern treaties," last modified 7 June 2018, <https://buyandsell.gc.ca/policy-and-guidelines/supply-manual/section/9/35#section-9.35.5> Sections 9.35.5, and 9.35.20-45.

<sup>47</sup> Canadian Council for Aboriginal Business, *Industry and Inclusion: An analysis of Indigenous potential in Federal Supply Chains* (n.p., n.d.) 2.

<sup>48</sup> Indigenous and Northern Affairs Canada, "Procurement Strategy for Aboriginal Business: 2013 Annual Report - Business Development Directorate," last modified 3 June 2016, <https://www.aadnc-aandc.gc.ca/eng/1463067197950/1463067249329>; Indigenous and Northern Affairs Canada, "Procurement Strategy for Aboriginal Business: 2014 Annual Report - Business Development Directorate," last modified 6 December 2017, <https://www.aadnc-aandc.gc.ca/eng/1511553413701/1512141805690>; Treasury Board of Canada Secretariat, "Purchasing Activity Report 2012 - Departmental Details," last modified 4 April 2014, [https://www.tbs-sct.gc.ca/pubs\\_pol/dcgpubs/con\\_data/pard-12-rpad-eng.asp](https://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/con_data/pard-12-rpad-eng.asp); Treasury Board of Canada Secretariat, "Purchasing Activity Report 2013 - Departmental Details," last modified 2 June 2015, <https://www.canada.ca/en/treasury-board-secretariat/corporate/reports/contracting-data/2013-purchasing-activity-report-departmental.html>

support of the PSAB policy and to reach a target of 5% by 2023.<sup>49</sup> This target is consistent with the demographic representation of the Indigenous population of 4.8% and would provide opportunities to Indigenous businesses that have the capacity to provide up to 24.2% of goods and services to the federal government.<sup>50</sup>

Under the ITB, there are no available figures for Indigenous participation in large defence procurement projects, however, literature reviews and stakeholder engagement reveals uneven participation across Canada and overall lower levels of participation in general.<sup>51</sup>

### Procurement Challenges

There are several challenges identified that are both external and internal to DND. External issues concern policies, access to Aboriginal businesses and the lack of capacity and capability of Aboriginal businesses. With respect to government policies, issues encompass the restrictive definitions of Aboriginal businesses that prohibit the reporting of all contracts awarded to Indigenous businesses.<sup>52</sup> Moreover, other procurement policies not exclusively focused on Indigenous participation, such as the ITB, are not necessarily aligned with the PSAB policy and do not guarantee awarding of contracts to Indigenous businesses nor the necessary development of the skills and

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<sup>49</sup> Crown-Indigenous Relations and Northern Affairs Canada, Letter concerning PSAB departmental performance agreement for DND, (n.p., 27 July 2018.)

<sup>50</sup> Canadian Council for Aboriginal Business, *Industry and Inclusion*, 2.

<sup>51</sup> Group ATN Consulting Incorporated, *The Aerospace and Defence Sector: What is required for Aboriginal businesses to enter and operate in supply chains? Final Report*, (n.p., 31 March 2017), 61-62.

<sup>52</sup> Indigenous and Northern Affairs Canada, "Interpretation Bulletin - Procurement Strategy for Aboriginal Business," last modified 15 September 2010, <https://www.aadnc-aandc.gc.ca/eng/1100100032811/1100100032822>;

experience to grow Aboriginal businesses.<sup>53</sup> Finally, the issue with competency and capability involves difficulties experienced by Aboriginal firms to respond to request for proposals due to “the lack of practical knowledge and capacity to respond” which is compounded by a lack of experience and expertise and exacerbated by the belief that dealing with Aboriginal firms is complicated and more expensive due to their remote locations.<sup>54</sup> This can extend the bid timeframe and thus the overall procurement timelines and creates risks to both operations and procurement budgets when businesses are unable to deliver on contracts.

Within DND, the concerns relate to a lack of governance and expertise. In regards to governance, there is little oversight and guidance on the need to provide opportunities for Aboriginal businesses to compete for DND contracts and purchases. This includes a lack of objectives and targets and an accountability mechanism to ensure objectives are met. The perception is that accommodating Aboriginal businesses increases the risk to timely, effective procurement which impacts operations.<sup>55</sup> This is related to the lack of expertise and experience within DND concerning procedures to implement policies such as PSAB, ITB and CLCAs that provide economic development opportunities in Aboriginal communities. Certain federal departments rely on PSAB coordinators to assist with policy implementation, however DND does not have one at the moment.<sup>56</sup>

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<sup>53</sup> Government of Canada, *Industrial and Technological Benefits Policy...*, 1-3,5.

<sup>54</sup> Aboriginal Affairs and Northern Development Canada, *Evaluation of the Procurement Strategy for Aboriginal Businesses Project Number: 1570-7/1305*, (n.p: Ottawa, June 2014), 16.

<sup>55</sup> Department of National Defence, “White Paper...,” 2-4.

<sup>56</sup> Aboriginal Affairs and Northern Development Canada, *Evaluation of the Procurement...*, 7 and 21.

## Procurement Opportunities

The example of Seaspan, in its successful bid to participate in the National Shipbuilding Strategy, demonstrates that early engagement with the local Indigenous communities and the submission of a comprehensive Indigenous Business Plan (IBP) can be mutually successful for industry and Indigenous communities. Their IBP, which provides training and skills development as well as business opportunities for the local Indigenous groups are lauded as an example of the possibilities of what can be achieved, however, this is not the norm.<sup>57</sup>

## EXISTING BARRIERS

There exist many barriers to Indigenous participation within DND activities, some of which are specific to particular policies or functions. However there are several themes common to the real property and procurement functions which are related to governance and knowledge management.

## Governance

Governance concerns how an organization is structured to achieve its goals and consists of the dimensions of “authority, decision making and accountability.”<sup>58</sup> In general, it is ultimately the deputy department heads who have the authority and accountability for real property and procurement functions.<sup>59</sup>

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<sup>57</sup> Group ATN Consulting Incorporated, *The Aerospace and Defence Sector...*, v, and 29-30.

<sup>58</sup> Institute of Governance, “Defining Governance,” last accessed 2 May 2019, <https://iog.ca/what-is-governance/>.

<sup>59</sup> Treasury Board, *Policy on Management ...*, Sect. 5.1.

However, due to the separation of roles between ADM(IE) and the other departmental Level Ones in terms of who has the authority for DND real property activities and who has the authority for the activities on real property, there is a disconnect between the functions of compliance and operations.<sup>60</sup> As an example, Base and Wing Commanders (Base-level operators for Environmental Chiefs of Staff) are the authority for access to and activities on DND land, however Real Property Operations Detachments (Base-level operators for ADM(IE)) ensure leases and licenses, which legally acknowledge access, comply with federal real property regulations.<sup>61</sup> Though both functions exercise authorities in regards to land access, there is no clear governance structure to ensure the delineation of responsibilities to lead DtC, nor is there an accountability mechanism to ensure it is appropriately conducted. Hence, there are challenges in coordinating both laterally across functions to ensure regulation compliance and effective operations can both be achieved.

In addition, there is no accountability mechanism or performance metrics to assess if consultations are completed in a sufficiently timely and effective manner. Specifically, there are no measures or definitions to assess how early or how frequently Aboriginal stakeholders should be consulted, or what constitutes satisfaction levels of Aboriginal stakeholders, which may include ensuring their concerns are taken into consideration and/or integrated into decisions impacting their right and interests.<sup>62</sup>

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<sup>60</sup> Treasury Board of Canada Secretariat, "Reports on Plans and Priorities 2008-09," last modified 12 February 2008, <https://www.tbs-sct.gc.ca/rpp/2008-2009/inst/dnd/dnd01-eng.asp>; "Refers to any one of the Assistant Deputy Ministers or Environmental Chiefs of Staff who report directly to the Deputy Minister and/or the Chief of the Defence Staff."

<sup>61</sup> Department of National Defence, *Defence Administrative Orders ...*, Section 3.

<sup>62</sup> Tony R. Walker, "Evaluation of criteria for meaningful Aboriginal consultation in Canada during environmental assessment" (School for Resource and Environmental Studies, Dalhousie University, 15 November 2018), 3, 9-11.

There is a similar lack of governance mechanisms for economic development for Indigenous communities through DND procurement. Though CIRNAC has encouraged federal departments, including DND, to increase the value of procurement contracts awarded to Aboriginal businesses, there is a lack of oversight by senior management. As such, there are no mandated targets within DND, nor is there an established system of compliance or incentives to achieve objectives.<sup>63</sup>

For both procurement and real property activities, guidelines and procedures are deficient in determining levels of risk in regard to Indigenous consultations and opportunities for Aboriginal businesses when weighed against the risk to DND training and operations. Specifically there is no quantitative or qualitative standard to determine a specific point in time or dollar amount at which Indigenous or DND interests outweigh one over the other.

### **Knowledge management**

Though governance is a significant barrier, knowledge management is also important to Indigenous participation. There is a general lack of corporate knowledge and understanding of existing programs, policies, and institutions related to Indigenous participation within both internal and external stakeholder groups.<sup>64</sup> Information is not easily accessible and requires corporate experience or expert guidance to research and find amongst the various departmental and federal websites.<sup>65</sup>

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<sup>63</sup> Department of National Defence, "White Paper..." 2-3.

<sup>64</sup> Aboriginal Affairs and Northern Development Canada, *Evaluation of the Procurement...*, 26.

<sup>65</sup> For example, information concerning Indigenous consultations, treaties and agreements are located three levels down on the INAC website with information on PSAB found four levels down. The ITB policy is found three levels down on the ISED website.

In regards to procurement opportunities for Indigenous communities and businesses, the challenge of locating information helpful to them can be frustrating and lead to the impression of a lack of government transparency. This also contributes to the tendency for Aboriginal communities to be unaware of and thus unprepared to provide timely bids for DND procurement contracts.<sup>66</sup> For stakeholders internal to DND, the lack of training and easy access to information contributes to a lack of awareness of policies that promote Indigenous participation. Furthermore, the considerable time and effort to research information coupled with a lack of compliance mechanisms can result in inadequate policy implementation.<sup>67</sup>

Regarding real property access, consultations can be complex as they require a broad range of intergovernmental experts to help interpret various legislation and guidelines as well as to advise on Aboriginal rights and interests. This information and the processes associated with consultation takes time to gather and learn.<sup>68</sup> This is exacerbated by employee turnover leading to a loss of corporate knowledge and a reinvestment of time and effort to regain the expertise.

Information access is only one aspect of knowledge management that needs consideration; however it is limited to a single direction of information flow. Information sharing is a multi-directional flow of information that has the potential to leverage a greater range of experiences and expertise.<sup>69</sup> Both the real property and procurement functions have no venue to share information on best practices, lessons learned and

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<sup>66</sup> Aboriginal Affairs and Northern Development Canada, *Evaluation of the Procurement...*, 39-40.

<sup>67</sup> *Ibid.*, 26.

<sup>68</sup> Minister of the Department of Aboriginal Affairs and Northern Development Canada, *Aboriginal Consultation and Accommodation...*, 38 and 42

<sup>69</sup> A. Riege and N. Lindsay. "Knowledge Management in the Public Sector: Stakeholder Partnerships in the Public Policy Development." *Journal of Knowledge Management* 10, no. 3 (2006): 25-26.



potential solutions. Acknowledging that Indigenous communities are not homogenous and are diverse across the nation, there may be processes or ideas that could be modified and adopted to improve consultation or procurement processes to meet the interests specific to a local DND and the Indigenous community. For example, the Indigenous land access and consultation requirements for the CLAWR could be adopted in whole or in part on other training ranges. Similarly the examples of Camp Ipperwash and Seaspan provide all stakeholders potential models on how to provide opportunities for Aboriginal companies and to improve relationships through honouring Aboriginal interests in addition to timely and comprehensive consultations.

## **RECOMMENDATIONS**

Recommendations to enhance the operationalization of Indigenous participation in DND operations should include improved governance and knowledge management.

### **Improve governance**

External to DND, the department should coordinate with external procurement entities to support accurate reporting and with other federal departments to synchronize procurement policies. Internal to DND, the department should coordinate across functions to ensure operational effects are achieved without compromising regulatory compliance and provide oversight and guidance in policy implementation. It should also establish mandated targets and develop a compliance system to enforce accountability. Finally, DND should develop procedures to ensure risks to Indigenous reconciliation efforts and DND interests are balanced and sufficiently mitigated.

### **Develop effective knowledge management systems**

DND should institute training at all levels to encourage understanding of the need for increased Indigenous participation through real property and procurement activities and support the implementation of related policies. This would help promote trust by providing transparency regarding plans and strategy to achieve Indigenous-related goals. In addition, it should develop a single point of access for information concerning Indigenous-related real property and procurement activities for the internal and external stakeholders to ensure awareness and timely and easy access to knowledge.<sup>70</sup> Finally, DND should establish mechanisms to encourage information sharing to enable the adoption of best practices, lessons learned and potential solutions.<sup>71</sup>

### **CONCLUSION**

DND is one of the largest federal departments in terms of its real property and procurement budget and has the potential to have a significant impact on Canada's reconciliation efforts with the Indigenous Peoples in Canada. By implementing policies to ensure consultations with Indigenous groups in order to honour their rights and interests and provide increased opportunities for their economic development, DND has the potential to build trust and positively advance reconciliation with Indigenous groups.

However, to fully realize that potential, DND must improve its governance mechanisms in order to better coordinate efforts both within and outside the department, develop key performance metrics and ensure accountability for achieving them.

Furthermore, DND should develop its knowledge management systems in order to

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<sup>70</sup> A. Riege and N. Lindsay. "Knowledge Management...", 24-26.

<sup>71</sup> *Ibid.*, 36.

educate its stakeholders and leverage existing ideas and expertise to effectively exercise procedures and processes for effective policy implementation. For too long, Canada has neglected its obligations to the Indigenous Peoples in Canada and as such should make every effort to effectively define and implement policies towards reconciliation.

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