THE CANADIAN BAR ASSOCIATION

L'ASSOCIATION DU BARREAU CANADIEN

Proposed Revisions to Policy on Additions to Reserve and Reserve Creation

NATIONAL ABORIGINAL LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 37,500 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Aboriginal Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Aboriginal Law Section of the Canadian Bar Association.

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I. INTRODUCTION

The Canadian Bar Association's National Aboriginal Law Section (CBA Section) is pleased to comment on the federal government's Proposed Revisions to the Policy on Additions to Reserve and Reserve Creation. The CBA Section is comprised of lawyers specializing in aboriginal law and related issues from all parts of Canada.

Federal government policy on additions to reserve (ATR) is important to the everyday lives of First Nations and to Chiefs and Councils as they attempt to improve the lives of their members. That policy determines whether and how First Nations are able to:

- expand their reserve land base to deal with increased population;
- take advantage of economic opportunities;
- resolve land claims for insufficient land entitlement under treaties or for past deprivations of their legal entitlement to reserve land; or
- in extreme cases, to relocate their communities.

Unlike rules relating to surrenders of reserves, which have been codified in law for 250 years,[1] federal ATR policy has never been codified in legislation and remains a matter of the Crown prerogative. Creation of a reserve continues to be a matter of discretion exercised by Cabinet (or in some limited situations by the Minister of Aboriginal Affairs and Northern Development),[2] although that discretion is guided by formal policies. No policy on ATR provides the procedural clarity and predictability that a statutory regime governing reserve creation and addition would offer.

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1 Royal Proclamation of October 7, 1763.

2 Both the *Manitoba Claim Settlements Implementation Act*, S.C. 2000, c. 33 and the *Claim Settlements (Alberta and Saskatchewan) Implementation Act*, S.C. 2002, c. 3 authorize the Minister of Indian Affairs and Northern Development to create reserves by Ministerial Order in the implementation of land claims.

Aboriginal Affairs and Northern Development Canada (AANDC) has in recent years engaged in a joint process of review of the additions to reserve policy with the Assembly of First Nations (AFN).

The initiative to reform the ATR policy responds to many pressures. A 2012 report of the Senate Standing Committee on Aboriginal Affairs and Northern Development summarizes problems with the existing policy.[3] The Auditor General has also criticized delays that arise in implementing the policy.[4]

On July 26, 2013, a proposed revised ATR policy[5] was posted on the AANDC website, with a September 30, 2013 deadline for comments. The deadline was subsequently extended to October 31, 2013.

Apart from the important role of the AFN, it is unclear whether or how individual First Nation communities will be directly involved in this policy review. In July 2013, each First Nation in Canada received correspondence from AANDC on the proposed new ATR policy (including an information package or directions on how to access the package online). A subsequent follow-up letter and a third letter advised them of the deadline extension for responses.

The CBA Section believes that the newly revised ATR policy is a significant improvement in many formal and substantive respects over its predecessor, particularly the internal organization and reader-friendliness of the policy. However, we have concerns about the process, particularly the consultations with First Nations and the broader policy implications for reserve creation and related issues.

II. ENSURING ADEQUATE CONSULTATION

Substantial revision to an important policy requires extensive consultations with First Nations, to consider and analyze responses not only from Chiefs and Councils but from First Nation employees, who have a wealth of practical experience dealing with the existing ATR policy.

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3 *Additions To Reserve: Expediting The Process Report of the Standing Senate Committee on Aboriginal Peoples* (hereafter "*Senate Report*"), November 2012, available at: http://www.parl.gc.ca/Content/SEN/Committee/411/appa/rep/rep09nov12-e.pdf

4 These are discussed in the text accompanying footnotes 20 to 23 of the *Senate Report*.

5 Available on the AANDC website at: http://www.aadnc-aandc.gc.ca/eng/1371823135092/1371823167789

Making an important announcement in the summer, using the internet and notice by mail, coupled with the short time for review and comment, causes us to question whether sufficient consultation has taken place. The CBA Section commends AANDC for writing to First Nations and providing information on the proposed changes, but recommends that on request by any First Nation, comments on the new ATR policy be accepted beyond the deadline, to ensure that First Nations and their advisors have an adequate opportunity to review the proposed policy and provide their input.

III. FORM OF PROPOSED POLICY

The proposed ATR policy is a significant improvement over the existing policy. The current policy is lengthy, repetitive and poorly organized, in our view, while the proposed new policy is concise, well-organized and easy to use. The existing policy is 73 pages long, comprised of seven directives. The proposed new policy is only 31 pages, and many repetitive lists of criteria have been removed, while operational parts of the policy are more focused. As a result, the proposed process would be more consistent regardless of the category of reserve addition or creation involved.

IV. ISSUES OF SUBSTANCE

The proposed ATR policy makes substantial improvements to the previous policy. We comment briefly on key issues.

A. Additions to Reserve/New Reserve Distinction

The policy continues to cover two main types of reserve expansion: additions to reserve and new reserves. However, the term "Addition to Reserve" now means "the act of adding land to any existing Reserve land base of a First Nation."

The term "New Reserve" means "the act of creating a Reserve for a First Nation with no existing land base."[6]

The latter definition would exclude a First Nation that has a land base owned in fee simple. We recommend adding the word "Reserve" to the definition to modify "land base." Otherwise, a

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6 Proposed ATR Policy, 25- 26.

First Nation that had purchased land on the open market intending it to become reserve land would fall outside the purview of the policy, which was surely not intended by the drafters.

A First Nation that already has a reserve and wishes to add a second reserve will have to apply under the "Addition to Reserve" provisions of the policy although the second reserve would not actually be a 'new reserve.'

B. Small Surface Additions

The current ATR policy provides for the addition to reserves of small parcels of land that are surrounded by existing or proposed reserve lands. The purpose of these additions is "to preserve the integrity of the reserve boundaries by eliminating pockets of land that do not have reserve status within those reserve boundaries."

The revised policy, as proposed, contains no provision for the addition of pockets of third party land to reserves. It simply provides for "access to any third-party lands that would be "landlocked' by the Reserve Creation". This could suggest the primary focus is on protecting third-party interests to landlocked parcels rather than simplifying reserve boundaries by integrating these parcels into reserves.

The CBA Section recommends that the ATR policy maintain the existing directive for small additions of parcels surrounded by reserve land to minimize boundary disputes and crossing reserve land by third parties, and continue to maintain the integrity of reserves boundaries.

C. ATR Categories

As before, there are three categories of ATR applications. However, the three categories have been significantly altered.

Most significant is the new category for lands acquired with compensation awarded by the Specific Claims Tribunal. The Tribunal is given authority to award only financial compensation and can make no order for ownership or possession of land.[7] This addition arose from a

[7] *Specific Claims Tribunal Act,* S.C. 2008, c. 22, s. 20 (1).

political agreement between the Minister of Indian Affairs and Northern Development and the AFN at the time of the enactment of the *Specific Claims Tribunal Act*.[8]

The existing category on "Legal Obligations and Agreements" would carry over from the current policy, but with a useful list of situations where a legal obligation will be seen to justify in addition to reserve:

a. Settlement Agreements;
b. Land exchange Agreements;
c. Land transactions with a reversionary interest to the First Nation;
d. Agreements for returns of former Reserve land where there is no express reversionary interest;
e. Agreements with landless Bands;
f. Agreements for the relocation of communities or the establishment of new Reserves.

It would be beneficial for First Nations and their advisors to see additional policy guidelines about some of these categories. For example, land exchange agreements may be useful to improve the quality of a reserve land base without altering its quantity. Many First Nations have reserve land of a substandard quality and could benefit from a policy that permitted them, using predictable criteria, to exchange that land for land of greater utility.

Similarly, a policy on relocating communities could be valuable for First Nations who find themselves in geographically disadvantageous locations, for example where excessive or endemic spring flooding causes disruption and harm on a regular basis.

The ATR category "Community Additions" carries over from the previous policy, using clearer language.

D. Land Selection Areas

In the existing ATR policy, an addition to a reserve must be within the "service area" of an existing reserve. The definition of "service area" has been problematic from the inception of this concept some years ago:

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[8] See *Senate Report*, footnote 8.

> "Service area" means the geographic area generally contiguous to an existing reserve community within which existing on-reserve programs and community services can be delivered, infrastructure extended and installations shared, at little or no incremental cost.

Anecdotally, we understand that this loosely defined term has generated controversy. Ironically, it was introduced to permit more flexibility for reserve additions, in that additions to reserves were previously required to be physically contiguous to an existing reserve. The thinking behind the service area concept was to focus on the incremental costs associated with servicing a new parcel of reserve land. It has, however, proven to be problematic.

Under the new policy, AANDC will entertain ATR proposals within the "Traditional Territory" of a First Nation. The policy does not define this term, which may give rise to difficulties. As before, consultations must take place with local governments and other First Nations in the reserve-creation process. While neither local governments nor other First Nations have a veto, disputes about Traditional Territory may give rise to additional delays in the process.

This new approach also creates the prospect of more urban reserves. Indeed, the AANDC website offers a "Backgrounder - Urban Reserves: A Quiet Success Story" that states:

> Improving the social and economic circumstances of First Nation people is a major priority for the Government of Canada. By offering First Nations economic opportunities that are unavailable in rural areas, urban reserves serve as springboards into the mainstream economy. They reduce operating costs and provide better access to capital markets and transportation routes, enabling First Nations to diversify their economic base. At the same time, they contribute to the economic and business development of urban centres across Canada. All Canadians benefit from their success.[9]

The CBA Section welcomes the new flexibility for reserve locations and the apparent willingness to approve urban reserves in all regions of the country.

E. Proposal-Driven Process

The new ATR policy is driven by "proposals" initiated by a First Nation. Currently, an addition to reserve request is initiated by Band Council Resolution (BCR) and there is no specified

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[9] Available online at: http://www.aadnc-aandc.gc.ca/eng/1100100016331/1100100016332. This new focus represents a remarkable departure in regions, such as Ontario, in which the ATR policy has been applied so as to prevent the creation of urban reserves.

content for the BCR. In practice, ANNDC officials were frequently unsure about the details of an ATR request, including the policy or other rationale for the request.

The proposed new policy would require the initiating BCR to be accompanied by a Reserve Creation Proposal before an ATR request will be considered. The CBA Section generally regards this as a positive development in that the current informality and uncertainty are removed at the outset of an ATR request. However, the new approach will impose greater demands on the First Nation and its staff at the front end of the process. The First Nation will now have to address the following matters in its Proposal:

i. The applicable Policy category;
ii. Selection Area;
iii. Land Use – Unless otherwise stated in an Agreement, the First Nation must describe the current and intended use of the Proposed Reserve Land;
iv. Where available, the offer to purchase, title search including, the registered owner(s), and a general description of Proposed Reserve Land sufficient to identify location;
v. Proximity of the Proposed Reserve Land to a Local Government;
vi. Whether mineral rights are to be included and, if so, the registered owner(s);
vii. Although an Environmental Site Assessment is not required at this stage, any environmental information of the historical, current and intended use of the Proposed Reserve Land;
viii. Transaction costs applicable under the Policy (and the potential source of funds);
ix. Other net benefits of Proposed Reserve Land use;
x. Results of investigations identifying existing encumbrances normally achieved by a title search, provincial canvass, and/or site visit, and including supporting documentation if applicable;
xi. Any known provincial, municipal, Aboriginal, or other interests; and
xii. Whether services are required. If services are required, enumerate what services and the plan to provide for or acquire them.[10]

Information for the selection area and proposed reserve land criteria may be practically difficult to obtain, particularly during the proposal stage of the process. Identifying available

[10] Proposed ATR Policy, at 27 (Directive 10-2: Reserve Creation Process, s. 5.1.1).

Crown or private land can be an onerous process and circumstances may change, including availability and market value.

In general though we believe that this level of detail will, at least in theory, enable AANDC to evaluate an ATR request more efficiently and could streamline the process considerably. However, without adequate resources, these new requirements could be a potential barrier to the process for First Nations. The CBA Section recommends that regional offices of AANDC arrange information sessions for First Nations who have expressed an interest in preparing an ATR proposal. In addition, AANDC should be prepared, on request, to provide appropriate technical assistance to First Nations during the proposal development phase.

F. Applicable Environmental Standard

The proposed new ATR policy adopts an "Applicable Environmental Standard" concept. This recognizes that different environmental standards need to be applied to land depending on its intended future use. An inappropriately stringent environmental standard would make it difficult to establish an urban reserve or to take almost any improved property into reserve status.[11]

However, the proposed new policy provides for a possible Indemnification Agreement so a First Nation would release Canada from liability for claims relating to the environmental condition of the land, an indemnity against such claims and an agreement from the First Nation to impose restrictions on land use in future, as well as other conditions.

The CBA Section sees this as a reasonable requirement that, if applied properly, should streamline the reserve approval process. AANDC has at times been subject to criticism that environmental site assessments have been conducted with the objective of eliminating or at least minimizing future federal liability for environmental claims. A chronic shortage of federal funding for environmental site assessments has meant that First Nations often have to wait for this step, which can seem primarily to protect AANDC from liability, rather than to protect the legitimate interests of First Nations themselves.

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[11] However, details of the environmental site assessment process are not in the APR policy itself (Ch.10 of the *AANDC Land Management Manual*) but in Ch. 12 of that Manual. There is no indication in the published materials whether a review of Ch.12 has been undertaken in tandem with the review and revision of Ch.10.

The CBA Section believes that an Indemnification Agreement, made with legal advice and tailored to the specific circumstances of an ATR Proposal, can assist both First Nations and AANDC to choose an appropriate environmental standard. This would allow negotiation of a reasonable and informed allocation of risk related to potential environmental liability.

The CBA Section is concerned about use of the agreements in a way that results in unfair environmental risks for First Nations, through either the application of an inappropriate environmental standard or the negotiation of an Indemnification Agreement with commercially unreasonable provisions aimed primarily at protecting the Crown from liability.

V. OUTSTANDING ISSUES

A. Regional Variations

One problem identified by the Senate Committee was regional variation in the application of the ATR policy.[12] It is unclear whether the proposed new policy would overcome that issue, or whether variations are due to endemic divergences in regional office practices, office cultures and, generally speaking, entrenched ways of doing things.

The CBA Section suggests that AANDC conduct an internal review of the performance of all regional AANDC offices relating to ATR matters. This could ensure that the ATR policy is applied consistently across the country both in the exercise of Crown discretion to create reserves, and the consistent application of ATR criteria, environmental standards, consultation policies with local governments and other First Nations and, of course, the adequacy of funding so that each regional office can perform its obligations under the ATR policy equally effectively.

B. Lack of Legislative Tools

As a policy to guide the exercise of a prerogative power, the ATR policy lacks the predictability of a legislated process, and ready judicial review if any statutory process goes awry. While the advantages and possible disadvantages of legislation over policies have not been considered in depth by the CBA Section, we note gaps in the reserve-creation process that could only be addressed through legislation.

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12 *Supra,* note 2, at 11-13.

An important example that arises in many, if not most, reserve creation proposals, is the lack of tools to authorize creation of third-party interests such as leases in advance of reserve creation. Legislation applies in just three provinces, and only to the resolution of land claims that enables pre-reserve creation designations.[13] The *Indian Act* precludes leasing reserve lands without a designation vote by members of the First Nation, but at the same time makes no provision for a designation vote for land intended to become reserved but not yet reserve.

If land is proposed to become reserve and is subject to third-party interests of various types, there is no mechanism for the pre-authorization of those third-party interests. This can result in an impasse and create serious barriers to creating reserves. A third-party (such as a utility company or private enterprise) may agree to surrender its rights in exchange for equivalent rights but this cannot be guaranteed in the present circumstances.

It is important to note that the proposed *Indian Act Amendment and Replacement Act* (private member's Bill C–428) could result in dramatic legislative changes in the coming years to the *Indian Act* and perhaps the reserve system itself. While a private member's bill, it has received some support from the government.[14] If enacted into law, the bill could provide new opportunities for legislative change on First Nations, their governance and their lands.

C. Funding

Changes in the proposed policy could result in a simplified and more efficient ATR process. Unfortunately, these changes do not come with explicit funding commitments on the part of AANDC.

In its 2012 report on the ATR policy, the Senate Standing Committee on Aboriginal Peoples noted that absence or insufficiency of federal funding for First Nations participating in the process can cause important delays, notably with respect to environmental assessment.[15]

In addition to delays, without adequate funding many First Nations would not be able to participate in the ATR process on an equal footing with other government and third party

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13 *Ibid*.

14 In April 2013, the CBA Section prepared a submission on Bill C-428, *Indian Act Amendment and Replacement Act.* See, http://www.cba.org/CBA/submissions/2013eng/13_21.aspx

15 See, http://www.parl.gc.ca/Content/SEN/Committee/411/appa/rep/rep09nov12-e.pdf at 12.

actors. The CBA Section suggests that the new commitment of the federal government to "facilitate negotiations" with third parties (municipalities, provinces, other First Nations and private parties) upon the request of a First Nation with an ATR proposal should include federal government funding to assist the First Nation in those negotiations.

VI. SUMMARY

The CBA Section commends the AANDC and the AFN for their commitment to improving this important policy. We see many of the proposed changes as positive, and likely to improve the predictability and effectiveness of the reserve creation process to the benefit of First Nations. These improvements must be accompanied by a serious attempt by the federal government to ensure that the ATR policy is applied consistently in all regions of Canada and that sufficient resources are available to First Nations to live up to the promise of these positive policy changes.