

On the Road to the New Reserve: Considering Canada's Preferred Path to Land Restitution

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Since 1987, Additions to Reserve Policy (ATR) has been Canada's pathway for First Nations to create new reserves. ATR governs all circumstances that can lead to the reclamation of land through reserve designation. Changes to the policy directly impact the ability of First Nations to turn recognition by Canada of lands owed to them into legal jurisdiction over actual land.

TWO YEARS HAVE PASSED SINCE INAC finalized the most recent ATR policy. There are important changes.

For instance, there has been a **renewed commitment** to more efficient implementation of the ATR process.¹ Second, compared with earlier versions, the “new” **2016 Policy**² has been substantially shortened, uses clearer language, and offers some substantive changes such as the relaxation of “contiguity requirements” long criticized by **First Nations** (contiguity is a technical term to describe proximity to an existing reserve).³ Finally, under the watch of a newly formed National Advisory Committee in support of First Nations undertaking ATR, the policy has more oversight than ever.

But there are still challenges that must be addressed. These revolve around wait times, consultation requirements on First Nations, and the obstruction by municipalities.

THE ATR POLICY PROCESS

The core of the ATR process has gone largely unaffected by recent policy development. But there is a minor shift in the level of CINRA support.

ATR proposals are submitted by First Nations and then reviewed by the regional CIRNA office. They are then sent to the relevant municipalities and provinces for notification before a preliminary decision by either the Regional Director General or the CIRNA Deputy Minister.

If a letter of support is offered by CINRA to the First Nation, a joint work-plan is created by the regional CIRNA office and the First Nation with the aim of addressing third-party interests and consultative requirements. (In other words, the First Nation needs Indian Affairs to help it convince non-Indigenous Canadians they can turn their land into reserve status).

The joint work-plan is a new addition to the ATR process, meant to increase support for First Nations in clearing “encumbrances.” It is primarily these third-party interests that **threatens significant ATR process delay**.⁴ Once the joint work-plan has been completed, the proposal is sent to the Minister of CIRNA for approval.

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WAITING FOR THE RESERVE

ATR processing times have been long criticized. A [1996 ATR Process Evaluation](#) commissioned by INAC found that 5 years or more was normal processing time.⁵ In 2005, the Auditor General (A-G) found that ATR turnaround had become further drawn out, to an average of [five to seven years](#), and ordered INAC to reduce processing times to two years.⁶ A [subsequent audit](#) by the A-G in 2009 found that this order had not been heeded, and that the five to seven year turnaround had remained.⁷ In 2012, the Standing Senate Committee on Aboriginal Peoples produced a report entitled [Additions to Reserve: Expediting the Process](#), and finding that “most First Nations continue to observe delays in the processing of ATR requests.”⁸

Lengthy ATR processing times are costly for First Nations. This is especially true where land has been purchased by communities prior to reserve designation and held in taxable fee-simple title until completion of the ATR process.

A [2012 ATR feedback report](#) from the Assembly of First Nations found that the costs of excessive processing times had caused some communities to sell fee simple lands before they could complete the ATR process.⁹ The same report pointed to a partial solution to this issue in Saskatchewan, where the provincial [Treaty Land Entitlement Framework](#) provides for tax loss compensation by Canada and the Province on rural land selections.¹⁰

In the absence of a reimbursement strategy, the costs incurred by a First Nation while an ATR proposal is processed may severely chip away at the economic potential of community development initiatives planned for these new lands.

THE (FIRST NATION) DUTY TO CONSULT

One thing that remains unchanged in the ATR policy is the continued onus on First Nations for consulting with municipal and provincial governments. The [2003 ATR policy](#) justified Canada’s delegation of the consultative burden to First Nations based on a presumption that they were creating a new jurisdiction (this is of course an erasure of pre-existing or on-going Indigenous title outside existing reserves generally).¹¹ Regardless, while still insisting First Nations do the engaging, the [2016 policy](#) has shifted language towards encouraging Local Governments and First Nations to mutually recognize each other’s jurisdiction.¹²

CIRNA has maintained that while provinces and municipalities must be consulted, they do not have veto power over reserve designation. This is mirrored by Saskatchewan’s Treaty Land Entitlement Framework, which provides for the issuing of reserve designation in the absence of a municipal services agreement. However, where an ATR proposal is not subject to a provincial TLE framework, CIRNA could be using its discretion to decide whether an intergovernmental agreement is a precondition to a proposal’s success, indicating an increasingly powerful hand of cities in the ATR process.

The burden on First Nations to lead in negotiations with local governments has come under important criticism by the Assembly of First Nations:

Canada is not required to be a party to any concluded First Nation / municipal agreement, however many participants, from all regions, identified the lack of involvement by Canada as conduct that is not supportive of their fiduciary relationship with First Nations.¹³

This is especially concerning, given the nature of Municipal Service Agreements (MSA). These agreements are ostensibly about the provision of essential services to new First Nations reserve lands. Under the guise of service provision costs, MSAs may create a pathway for municipalities to recoup lost tax revenues on newly created reserve lands they have no constitutional authority to tax. In other words, they have found a way to tax First Nations.

MUNICIPAL COLONIALISM¹⁴ & “CONTIGUITY”

This is not a new trend. Cities have always made a concerted effort to drive the ATR policy. For example, in the mid-nineties, the prospect of losses to municipal land-bases due to ATR was galvanizing prairie municipalities to assert their interests collectively.

In 2013, when ATR policy was open to public feedback, the Union of British Columbia Municipalities (UBCM) rallied their members [in opposition to proposed policy changes](#).¹⁵ One of the foremost concerns advanced by UBCM members was the anticipated impacts of the relaxation of contiguity requirements for new lands.

(Under the 2003 ATR policy, newly created reserve lands were required to be contiguous with a First Nation's primary reserve, or within the First Nation's "service area." But First Nations found that "contiguity" and "service area" were being **interpreted subjectively** by regional INAC officials, and affecting the success of their ATR proposals.¹⁶ Other First Nations **referenced** an unfairness in this criteria in the sense that new reserve lands must have development potential.)¹⁷

But UBCM demanded the maintenance of strict contiguity rules for "jurisdictional clarity and uniformity." Referencing similar concerns, Metro Vancouver noted in their **comments on the draft policy** that "feasibility, capacity (legal, physical, fiscal) and political" factors could preclude their delivery of services to urban selections within Lower Mainland municipalities.¹⁸

Ultimately, CIRNA relaxed contiguity requirements. The 2016 policy directs that while proposed lands should be within a First Nation's traditional territories, a selection may be outside of a Nation's traditional territory "but within the province or territory where the majority of the First Nation's existing reserve land is located."

But CINRA has supported municipalities in other areas. For example, a three-month time-frame for municipalities to review and respond to a First Nations' ATR proposal was reinstated in the 2016 policy in response to petitions from Local Governments across the country for greater influence over ATR outcomes.

THE FUTURE OF ATR

Going forward, CIRNA should allocate resources towards reducing ATR processing times substantially. They can do this by assuming greater responsibility in intergovernmental negotiations between First Nations and municipalities and provinces. Canada and the Provinces should negotiate reimbursement strategies to reduce the economic burden of First Nations in possession of fee-simple lands awaiting reserve title. Finally, without acknowledgement of First Nations' inalienable land-rights and sufficient will towards reforming Indigenous-municipal relationships, jurisdictional contestation will continue to figure prominently in the formation of new First Nations reserve lands. This is especially true of urban selections, where municipalities have asserted their influence over ATR policy, in some cases towards goals of Indigenous containment outside of the urban realm. This, too, must be addressed for First Nations to use the new ATR process to reclaim some of their lands.

ENDNOTES

¹Crown-Indigenous Relations and Northern Affairs: 2018-19 Departmental Plan. (2018). 3

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³Assembly of First Nations. (2012, March). *Additions to Reserve: Regional Dialogue Forums. Roll-up Report FINAL*. 6

⁴Indigenous and Northern Affairs Canada. (2013, February). *Audit of the Additions to Reserve Process*. 10

⁵Goss Gilroy Inc. (1996, June 6). *Evaluation of the Additions to Reserves (ATR) Policy [Prepared for: Audit and Evaluation Branch, Department of Indian Affairs and Northern Development]*. 10

⁶Office of the Auditor General of Canada. (2005, November). *2005 November Report of the Auditor General of Canada to the House of Commons, Chapter 7: Indian and Northern Affairs Canada – Meeting Treaty Land Entitlement Obligations*. 1

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⁸Standing Senate Committee on Aboriginal Peoples. (2012, November). *Additions to Reserve: Expediting the Process*. 10

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¹⁰Government of Saskatchewan. (1991, September 22). *Saskatchewan Treaty Land Entitlement Framework Agreement*. 65

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- ¹⁴ Stanger-Ross, J. (2008). Municipal colonialism in Vancouver: city planning and the conflict over Indian reserves, 1928–1950s. *Canadian Historical Review*, 89(4), 541-580.
- ¹⁵ Union of British Columbia Municipalities. (2013, October 25). *UBCM Submission on Canada's Revised Draft Policy on Additions to Reserve / Reserve Creation*.
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- ¹⁸ Metro Vancouver. (2013, October 31). *Metro Vancouver's Comments on Revised Draft Federal Policy on Additions-to Reserve/Reserve Creation*. 2