

ADDITIONS TO RESERVE: EXPEDITING THE PROCESS

**Report of the
Standing Senate Committee
on Aboriginal Peoples**

The Honourable Gerry St. Germain, P.C.

Chair

The Honourable Lillian Eva Dyck

Deputy Chair

November 2012

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MEMBERSHIP

THE STANDING SENATE COMMITTEE ON ABORIGINAL PEOPLES
41th Parliament, 1st Session
(June 2, 2011 -)

The Honourable Gerry St. Germain, P.C.
Chair

The Honourable Lillian Eva Dyck
Deputy Chair

and

The Honourable Senators:

Salma Ataullahjan
Patrick Brazeau
Larry Campbell
* James S. Cowan (or Claudette Tardif)
Jacques Demers
*Marjory LeBreton, P.C. (or Claude Carignan)
Sandra Lovelace Nicholas
Dennis Glen Patterson
Nancy Greene Raine
Nick G. Sibbeston
Charlie Watt
Vernon White
*Ex officio members

Other Senators who have participated in this study:

The Honourable Senators Jane Cordy, Jean-Guy Dagenais, Linda Frum, Don Meredith, Jim Munson
and Carolyn Stewart Olsen

Committee Clerk:
Marcy Zlotnick

*Analysts from the Parliamentary Information and
Research Service of the Library of Parliament:*
James Gauthier

Extract from the *Journals of the Senate* of Thursday, June 16, 2011:

The Honourable Senator St. Germain, P.C. moved, seconded by the Honourable Senator Champagne, P.C.:

That the Standing Senate Committee on Aboriginal Peoples be authorized to examine and report on the federal government's constitutional, treaty, political and legal responsibilities to First Nations, Inuit and Metis peoples and on other matters generally relating to the Aboriginal Peoples of Canada;

That the papers and evidence received and taken and work accomplished by the Committee on the subject during the Third Session of the Fortieth Parliament be referred to the Committee; and

That the Committee submit its final report no later than December 31, 2012, and that the Committee retain all powers necessary to publicize its findings until 180 days after the tabling of the final report.

The question being put on the motion, it was adopted.

Gary O'Brien

Clerk of the Senate

EXECUTIVE SUMMARY

The alienation of land and resources has been a major contributor to the economic marginalization of Aboriginal peoples in Canada. In their appearances before the Committee, many witnesses have noted that, from an economic point of view, access to land and natural resources represents one of the most critical issues faced by First Nations today. This issue has become evident to the Committee through its own previous study of economic development, as well as through many other studies, most notably the Aboriginal Affairs and Northern Development Canada (AANDC) – Assembly of First Nations (AFN) Joint Working Group, established in the fall of 2009 to explore ways to increase the efficiency of the existing Additions to Reserve (ATR) policy and process, and the 1996 Report of the Royal Commission on Aboriginal Peoples, which called for a major redistribution of lands and resources upon which Aboriginal people could rebuild their nations and secure a level of economic self-reliance.

During our investigations into the ATR policy and process, the Committee benefited greatly from the valuable insights of witnesses who appeared during meetings on this important subject. A key message conveyed by virtually all witnesses was that, although some positive change has occurred in recent years, major changes are required to the existing system to better enable First Nations to engage in economic development by facilitating the resolution of their Addition to Reserve (ATR) in a fast and effective manner.

Based on what we heard, the Committee observes that there is an urgent need for the federal government to enhance the existing ATR policy and process by improving AANDC management practices, both nationally and within regional AANDC offices, by improving the effectiveness of dealing with municipal and third-party interests, and by exploring options for supporting First Nations in their negotiations with municipalities and third parties. The Committee is especially concerned with testimony provided by officials of the Office of the Auditor General (OAG) of Canada, who noted that most of its recommendations from a 2005 audit of the ATR policy regarding deficiencies in ATR management systems had not yet been implemented. As well, the Committee is highly concerned with testimony from First Nations witnesses in relation to the predatory pricing strategies of third-party landowners. According to a report tabled with the Committee by the AFN, inflated land values have had negative consequences, including

“depleting a First Nation’s financial resources” and “limiting future purchasing options.”¹ The report further indicates that fair market land values “should be independently appraised to mitigate inflated land values as much as possible,” and “should be fairly projected into the future.”² The Committee strongly urges the Government of Canada, working with First Nations and other stakeholders, to address the issues of management systems, predatory pricing, and the many other issues highlighted within this report.

To facilitate the development of a more efficient and effective process for converting land to reserve status through the ATR process, the Committee recommends:

That the Department of Aboriginal Affairs and Northern Development Canada, in collaboration with First Nations through the Joint Working Group, develop and table an action plan before the Committee by 31 March 2013 that establishes clear targets and timelines for implementing agreed-upon measures to improve the existing ATR process, and clearly identifies and provides options for resolving areas within the ATR process causing the greatest delays, including legislative or policy options relating to:

- Pre-reserve designations and/or recognition of interests for lands identified by First Nations for conversion to reserve status;
- Support mechanisms, including dispute resolution assistance, to First Nations in their negotiations with municipalities and third parties;
- Identifying best practices and implementing measures to prevent predatory pricing strategies of third-party landowners on the sale of privately held land to First Nations; and
- Streamlining the procedural requirements in relation to the federal ATR policy, including implementing recommendations from the OAG on improving management systems.

The Committee believes that, through the development of this action plan, the federal government would be better equipped to enable transformative change for First Nations peoples in reserve communities and, indeed, for all Canadians.

¹ Assembly of First Nations (AFN), report submitted to the Standing Senate Committee on Aboriginal Peoples (the Committee): [*Additions to Reserve: Regional Dialogue Forums, Roll-up Report*](#), March 2012, p. 7.

² Ibid, p. 16.

INTRODUCTION

The alienation of land and resources has been a major contributor to the economic marginalization of Aboriginal peoples in Canada. In their appearances before the Committee, many witnesses have noted that, from an economic point of view, access to land and natural resources represents one of the most critical issues faced by First Nations today.³ This issue has become evident to the Committee through its own previous study of economic development,⁴ as well as through many other studies, most notably through the Aboriginal Affairs and Northern Development Canada (AANDC) – Assembly of First Nations (AFN) Joint Working Group, established in the fall of 2009 to explore ways to increase the efficiency of the existing Additions to Reserve (ATR) policy and process,⁵ and the 1996 Report of the Royal Commission on Aboriginal Peoples, which called for a major redistribution of lands and resources upon which Aboriginal people could rebuild their nations and secure a level of economic self-reliance.⁶

First Nations organizations and the Government of Canada have recently initiated a process to review the current policy and process of converting land to reserve status through ATR,⁷ with the goal of making the existing system more efficient and effective. These efforts have been driven by various developments in recent years. Most notably, in November 2007, a Political Agreement between AANDC and the AFN was signed in anticipation of a growing numbers of ATR requests through the impending establishment of the Specific Claims Tribunal.

³ See, for example, Standing Senate Committee on Aboriginal Peoples, *Proceedings*, 1st Session, 41st Parliament [hereinafter referred to as “*Proceedings*”]: Angus Toulouse, Ontario Regional Chief, Chiefs of Ontario, February 8, 2012; Chief Nelson Genaille, President, Treaty Land Entitlement Committee of Manitoba Inc., and Chief Robert Louie, Chair, First Nations Land Advisory Board, February 14, 2012; Frank Barrett, Principal, Office of the Auditor General (OAG) of Canada, March 7, 2012; and Jody Wilson-Raybould, British Columbia Regional Chief, AFN, April 3, 2012.

⁴ See Standing Senate Committee on Aboriginal Peoples, [*Sharing Canada’s Prosperity – A Hand Up, Not a Handout*](#), March 2007 (pp. 7, 39-40).

⁵ AFN, report submitted to the Committee: [*Additions to Reserve: Regional Dialogue Forums, Roll-up Report*](#), March 2012.

⁶ Canada, Report of the Royal Commission on Aboriginal Peoples, 1996, vol. 2, chapter 5, p. 952.

⁷ A description of the Additions to Reserve (ATR) policy and process is available through Aboriginal Affairs and Northern Development Canada (AANDC), [*Land Management Manual*](#).

Through the Political Agreement, it was agreed that the existing ATR policy would be reviewed.⁸

The Joint Working Group has recognized the need for streamlining the ATR policy and process to enhance the economic development potential of First Nation reserves. In June 2011, AANDC and the AFN agreed to a Canada-First Nations Joint Action Plan (the Joint Action Plan) to improve the long-term prosperity for First Nations people and all Canadians. Through the Joint Action Plan, both parties agreed to “explore concrete initiatives aimed at unlocking the economic potential of First Nations, including improvements to the additions to reserve policy.”⁹

In December 2011, to provide input into the efforts of First Nations and the Government of Canada to improve the ATR policy and process, the Standing Senate Committee on Aboriginal Peoples (the Committee) agreed to study the topic of Additions to Reserve (ATR). This study, which focuses on the key issues raised by witnesses, forms a part of the Committee’s general mandate to examine the federal government’s constitutional, treaty, political and legal responsibilities to First Nations, Inuit and Métis peoples and on other matters generally relating to the Aboriginal peoples of Canada. Over the course of five meetings on this topic, held between February 7 and April 3, 2012, eleven organizations provided their input on the challenges and deficiencies within the existing ATR policy and process. Witnesses included First Nations representatives – including those from key communities, public institutions, advocacy groups, and lands managers and advisors – senior federal government officials, and representatives from the OAG.

⁸ The [*Political Agreement Between the Minister of Indian Affairs and Northern Development and the National Chief of the Assembly of First Nations in Relation to Specific Claims Reform*](#), signed on November 27, 2007 states:

In situations where a First Nation seeks to re-acquire or replace lands that were the subject of a Specific Claim, the Minister will review with First Nations’ policies and practices respecting additions to reserves with a view to ensuring that these policies and practices take into account the situation of bands to which the release provisions of the proposed Specific Claims Tribunal legislation apply. In particular, the Minister will provide priority to additions to reserve of lands affected by the consequences of the release provisions in the legislation or to lands required to replace them.

⁹ AANDC, “[Canada–First Nations Joint Action Plan](#),” News release, June 2011.

BACKGROUND

The Additions to Reserve process involves either the addition of land to existing reserves or the creation of new reserves.¹⁰ According to the current policy, ATR proposals are for land which is located in the general geographic area of an existing reserve to which services and infrastructure can be extended at little or no cost. New reserve proposals are for lands that are not in the general geographic area of an existing reserve and, as such, are likely to be uncommon as they involve greater costs.

There are currently three policy categories under which a First Nation acquires land:¹¹

1. *Legal Obligations*, resulting from treaty or claim settlement agreements, court orders, or other legal reasons such as return or exchange of lands expropriated under section 35 of the *Indian Act*;¹²
2. *Community Additions*, including: community growth creating a need for additional land for housing, schools, community economic projects, or infrastructure enhancements; natural geographic enhancements of the existing reserve land base; or First Nation requests for unsold surrendered land to be returned to reserve status, or to be added as a new reserve; and
3. *New Reserves/Other Policy*, which covers all proposals that do not fall within the other categories, such as for new reserves for landless bands, and band relocations (e.g. due to flooding of existing reserve land, etc). AANDC notes that this category is rarely used, as it “requires extensive analysis and ‘justification.’”¹³

The Government of Canada has noted recently that, to better meet the requirements under the existing ATR policy, the AANDC—AFN Joint Working Group is currently working towards adding a fourth category to the ATR process related to monetary awards of the Specific Claims Tribunal. As some studies on the ATR process have noted, the creation of a fourth ATR category

¹⁰ For further details, see: AANDC, [Land Management Manual](#), October 2003, Directive 10-1, p. 10.

¹¹ Ibid, pp. 10-14.

¹² As described in the AANDC [Land Management Manual](#) (September 2005, Directive 9-1, p. 7):

While not a requirement of the *Indian Act*, Section 35 is usually used when an expropriating authority has negotiated an arrangement with the First Nation. The First Nation then asks Canada to grant or transfer the land or an interest in the land to the expropriating authority. If granting or transferring a less intrusive or destructive interest in the land can meet the expropriating authority’s need for the land, it is the department’s obligation to use the less intrusive option...

¹³ AANDC [Land Management Manual](#), Directive 10-1, October 2003, Ibid, p. 14.

is deemed necessary since Tribunal decisions do not fit within existing ATR categories. In particular, Tribunal decisions do not create legal obligations for ATR, nor are they meant to satisfy normal community growth requirements.¹⁴

The process to be applied in carrying out an ATR for the above categories must satisfy various “site-specific” criteria, depending on the category, as provided within the ATR policy.¹⁵ These criteria include the need to:

- Respect the treaty and Aboriginal rights of other First Nations that may be affected;
- Consult and negotiate within the First Nation communities and with provincial and/or municipal governments (e.g. for land use planning, zoning, tax loss adjustments, etc.);
- Consider financial implications and funding;
- Ensure good title transfer and resolution of third party interests; and
- Undertake environmental assessments.¹⁶

The process by which land is added to reserves is set out in AANDC Land and Trusts Services’ *Land Management Manual*, and further clarified in a Toolkit¹⁷ developed by the National Aboriginal Land Managers Association, in collaboration with AANDC.

As noted by the OAG, there are three main phases to the ATR process (note: see Appendix A for a more detailed description of these phases):

- Phase 1 includes land selection and (if necessary) purchase of land, which is the responsibility of First Nations. This phase ends with a formal Band Council Resolution (BCR) that transmits the First Nation’s proposal on the land selected to the Department and requests that the selected land be added to their reserve;
- Phase II includes, among other things, the completion of the required land surveys and environmental assessments, coordinated by AANDC regional offices; and

¹⁴ See, for example, Warren Johnson, [*Additions to Reserve: Discussion Paper \(Working Draft\)*](#), New Road Strategies, study commissioned by the AANDC–AFN Joint Working Group, January 18, 2010, p. 12. Cited with permission from the author.

¹⁵ AANDC [*Land Management Manual*](#), Directive 10-1, October 2003, pp. 14-18.

¹⁶ Ibid.

¹⁷ National Aboriginal Land Managers Association, *ATR Toolkit*, First Edition, Version 1.2, January 18, 2010, chapters 3 and 4.

- Phase III is primarily the responsibility of the Department's head office. It includes seeking approvals through ministerial orders or orders-in-council to convert land to reserve status.¹⁸

WHAT THE COMMITTEE HEARD

Article I. Managing the Process of Additions to Reserve

1. Minimizing Processing Times

As acknowledged by witnesses through their testimony to the Committee, attempting to disentangle the reasons behind delays in converting land to reserve status is a challenging task. One key issue relates to the management of the ATR process. As explained by Chief Angus Toulouse (Chiefs of Ontario):

The complex process of converting land to reserve requires sustained human and fiscal resources by both the First Nations and... [AANDC]. Unfortunately in the current fiscal environment where everyone is competing for... limited resources, the challenges are mounting.¹⁹

Representatives from the OAG discussed the findings of two reports on the Treaty Land Entitlement (TLE) process²⁰ in Manitoba and Saskatchewan – an original audit in 2005²¹ and a

¹⁸ See Office of the OAG, "[Chapter 4: Treaty Land Entitlement Obligations – Indian and Northern Affairs Canada](#)," *Status Report of the Auditor General of Canada*, March 2009.

¹⁹ *Proceedings*, Angus Toulouse, Ontario Regional Chief, Chiefs of Ontario, February 8, 2012.

²⁰ As explained by the OAG, "[Chapter 4: Treaty Land Entitlement Obligations – Indian and Northern Affairs Canada](#)," *Status Report of the Auditor General of Canada*, March 2009:

A Treaty Land Entitlement (TLE) claim arises when a First Nation asserts that the Government of Canada did not provide all of the reserve land promised under an historical treaty signed with the Crown. Once the federal government is satisfied that a First Nation has a valid claim, a settlement is negotiated and set out in a TLE agreement. TLE agreements provide First Nations with the right to select Crown land or with funds to buy private land, or both. These agreements are modern legal commitments that recognize the government's failure to comply with its treaty obligations, an element of which relates to land transfers.

²¹ OAG, "[Chapter 7: Indian and Northern Affairs Canada – Meeting Treaty Land Entitlement Obligations](#)," *Report of the Auditor General of Canada*, November 2005.

follow-up audit in 2009.²² Although the 2009 audit noted some progress in implementing the ATR policy, such as improvements in communication between AANDC and First Nations, it was highlighted that most of the 2005 audit recommendations regarding deficiencies in ATR management systems had not yet been implemented. As well, it was noted that AANDC had not addressed several underlying weaknesses in its processes for meeting TLE agreements. Jerome Berthelette (OAG) concluded that, “without sustained management to correct the weaknesses we had identified, the department risked being unable to sustain its progress in converting land to reserve status.”²³

According to current information available from AANDC, there are some 600 First Nations living on more than 2,800 reserves covering over 3 million hectares (about 8 million acres) of land across Canada – an area about the size of Vancouver Island, or roughly equivalent to less than half of the Navajo Nation reservation in the southwest United States.²⁴ Based on data provided by Natural Resources Canada, 575,000 hectares of land (about 1.4 million acres) have been identified by First Nations through ATR requests since 2005, of which about half (312,283 hectares or 771,339 acres) have been surveyed for conversion to reserve status (see Table 1, page 9). Overall, there has been a greater emphasis on processing ATR requests related to legal obligations, as almost 90% of ATR requests initiated since 2005 have been recorded under this category. While virtually all ATR land descriptions for First Nations in Saskatchewan since 2005 have been completed, less than half of the land selected by First Nations in Manitoba has been surveyed over that same period.²⁵

²² OAG, “[Chapter 4: Treaty Land Entitlement Obligations – Indian and Northern Affairs Canada](#),” *Status Report of the Auditor General of Canada*, March 2009.

²³ *Proceedings*, Jerome Berthelette, Assistant Auditor General, OAG of Canada, March 7, 2012.

²⁴ Source: AANDC, [Land Management](#). Depending on the source, these estimates can vary. For example, Warren Johnson, in his study on [Additions to Reserve: Discussion Paper \(Working Draft\)](#) (New Road Strategies, January 18, 2010, p. 3), estimates that there are some 584 First Nations in Canada with reserve land, involving 3,049 reserves distributed nationally, totalling approximately 3.4 million hectares.

²⁵ Some 479,000 acres have been converted to reserve status since the establishment of the Manitoba Treaty Land Entitlement (TLE) agreement in 1997; representing 34% of the total shortfall of 1.14 million acres identified through that 1997 TLE agreement. Source: Brian T. Gray, Assistant Deputy Minister, Earth Sciences Sector, Natural Resources Canada, *Letter to Senator Gerry St. Germain, Chair, Standing Senate Committee on Aboriginal Peoples*, March 2, 2012.

Table 1: Additions to Reserve: by Number, Region and Land Area (Since 2005)

	Number of ATR Projects Opened				Hectares (Area)	
Region	Legal Obligations	Community Additions	New Reserves /Other	Total ATR Projects	Initiated	Completed
Atlantic	26	22	1	49	3,240 (8,006)	2,717 (6,711)
Quebec	31	24	2	57	31,953 (78,958)	547 (1,351)
Ontario	64	31		95	41,419 (102,349)	39,903 (98,560)
Manitoba	374			374	304,266 (751,858)	126,141 (311,568)
Saskatchewan	617			617	112,057 (276,899)	112,057 (276,781)
Alberta	6			6	70,555 (174,345)	22,768 (56,237)
British Columbia	15	62		77	11,555 (28,553)	8,150 (20,131)
Total	1,133	139	3	1,275	575,000 (1,420,000)	312,283 (771,339)

Sources: Natural Resources Canada: Surveyor General of Canada (Natural Resources Canada), *Additions to First Nations Reserves – Land Surveys and Legal Land Descriptions*, Briefing for the Senate Standing Committee on Aboriginal Peoples, January 26, 2012; and Brian T. Gray, Assistant Deputy Minister, Earth Sciences Sector, *Letter to Senator Gerry St. Germain, Chair, Standing Senate Committee on Aboriginal Peoples*, March 2, 2012.

In addition to concerns related to the limited number of land selections being completed through ATR, especially in Manitoba, the OAG noted a lack of available information as to whether processing times have been reducing sufficiently in recent years:

For instance, in Manitoba, the department had not developed a plan that outlined how it would manage its operations to process outstanding selections within a reasonable period of time. Furthermore, it had not tracked processing times, and it could not demonstrate that these times had improved over the previous three years.²⁶

As well, in the 2005 OAG audit, it had been recommended that AANDC “develop and implement a plan that sets out the explicit steps it would take to process outstanding selections and reduce processing times to two years.”²⁷ While representatives of the OAG were aware that an ATR tracking system had since been developed by AANDC, it was noted that a formal audit had not been conducted.²⁸

Although partial information on progress in processing ATR requests has been provided by the Government of Canada over the course of the Committee’s study on ATR, a clear picture of the time required to process ATR transactions across Canada and by region is not currently available. Most First Nations continue to observe delays in the processing of ATR requests by the federal government. As reported by Chief Nelson Genaille (Treaty Land Entitlement Committee of Manitoba Inc.), although the former Minister of Aboriginal Affairs and Northern Development had made a five-year commitment in 2006 to convert a total 600,000 acres of priority TLE land selections to reserve status in Manitoba, to date less than two-thirds have been converted.²⁹

²⁶ *Proceedings*, Jerome Berthelette, Assistant Auditor General, OAG of Canada, March 7, 2012.

²⁷ OAG, “[Chapter 4: Treaty Land Entitlement Obligations – Indian and Northern Affairs Canada](#),” *Status Report of the Auditor General of Canada*, March 2009.

²⁸ *Proceedings*, Frank Barrett, Principal, OAG of Canada, March 7, 2012.

²⁹ *Proceedings*, Chief Nelson Genaille, President, Treaty Land Entitlement Committee of Manitoba Inc., February 14, 2012.

2. Application of ATR Policy by Regional AANDC Offices

Many witnesses referred to various deficiencies in the management and application of the ATR policy by AANDC officials in the regional offices. In contrasting the situation in Saskatchewan, for example, Chief Angus Toulouse noted that, “First Nations in Ontario must run the gauntlet of an unclear policy and process with much discretion resting in the hands of the federal employees as they interpret the policy on a case-by-case basis.”³⁰

As well, through its 2009 audit, the OAG found that, rather than focus on managing its operations for processing outstanding selections under the respective TLE agreements, the regional AANDC office in Manitoba focused on meeting other short-term priorities.³¹ In contrast, the OAG found that the Saskatchewan regional office focused more on directly satisfying its obligations related to ensuring minimum required reserve acres under the TLE agreement within that province.³²

The most significant issues identified by witnesses included the maintenance of file management systems, the ability of AANDC regional officers to allocate their budgets effectively, the financial burden faced by First Nations in working with AANDC through the ATR process, resource requirements related to environmental site assessments (where required)³³ and land surveys, and varying interpretations of “generally contiguous” land.

a. Maintenance of File Management Systems

³⁰ *Proceedings*, Angus Toulouse, Ontario Regional Chief, Chiefs of Ontario, February 8, 2012.

³¹ OAG, “[Chapter 4: Treaty Land Entitlement Obligations – Indian and Northern Affairs Canada](#),” *Status Report of the Auditor General of Canada*, March 2009.

³² *Ibid.*

³³ According to ATR policy, as specified in the AANDC [Land Management Manual](#) (Directive 2-5, pp. 35-38; and Chapter 12, pp. 1-27), an Environmental Site Assessment (ESA) must be conducted on all lands requested by a First Nation for additions to reserve, where a federal department is: granting an interest in land; performing a regulatory duty; providing financial assistance; or recommending that the Governor in Council perform a regulatory duty. One exception to the ESA requirement can occur in the case where an ATR request does not include a project proposal for the intended use of the land by the First Nation.

Commenting on the different ATR file management systems present in Manitoba and Saskatchewan, Frank Barrett (OAG) stated that First Nations in Saskatchewan appeared to have a better relationship with the regional offices and were more familiar with the officials. In the Manitoba office, it was not “nearly as amicable a relationship. There was not as much knowledge back and forth.”³⁴

b. Regional Differences in Budget Planning

In relation to differences across regions in budget planning, Chief Angus Toulouse explained that regional offices are in control of the majority of the ATR processes, however First Nations “have no assurance that the regions have created any systematic prioritizing of the ATR budgetary needs.”³⁵ Similar concerns were expressed by Kathleen Lickers (AFN), who noted that “[t]he inability to coordinate the timing and decision-making with the budgetary needs strategically, within the region, leaves everyone with this continuous uncertainty.”³⁶

c. Environmental Assessments and Land Surveys

Many First Nation representatives noted that delays in the completion of surveys and environmental assessments in some regions often occur due to a shortage of qualified personnel or lack of federal funding. These costs can grow if the land selection is located within remote areas. In a submission from the AFN, it was noted in particular that AANDC does not reimburse First Nations who undertake their own ESA, unless it forms a part of a TLE Framework agreement.³⁷ Moreover, even when ESA and survey costs are covered by AANDC through an ATR, witnesses note that this funding is often either insufficient or can be delayed as AANDC will only provide funding once all third party interests are resolved.³⁸

d. Interpretations of “Generally Contiguous” Land

³⁴ *Proceedings*, Frank Barrett, Principal, OAG of Canada, March 7, 2012.

³⁵ *Proceedings*, Angus Toulouse, Ontario Regional Chief, Chiefs of Ontario, February 8, 2012.

³⁶ *Proceedings*, Kathleen Lickers, External Legal Advisor, Assembly of First Nations, April 3, 2012.

³⁷ AFN, report submitted to the Committee: [Additions to Reserve: Regional Dialogue Forums, Roll-up Report](#), March 2012. As noted in that report, in the Atlantic region, this applies to lands within 50 kilometres of a reserve, while in British Columbia land within 70 kilometres is eligible.

³⁸ *Proceedings*, Jody Wilson-Raybould (British Columbia Regional Chief), and Kathleen Lickers (External Legal Advisor), Assembly of First Nations, April 3, 2012.

Witnesses referred to differences in the definition of “generally contiguous” land across regional AANDC offices for purposes of deciding what parcels of land are eligible for conversion to reserve status.³⁹ It was noted that, while First Nations conducting an ATR request through legal obligations can negotiate the geographic area of the potential ATR lands with federal and provincial governments, First Nations applying outside of a treaty land entitlement (TLE) process (e.g. mainly through category 2: community additions) must adhere to a definition of “contiguous land” that may differ across regional AANDC offices, depending on that office’s interpretation of the ATR policy. As stated by Chief Angus Toulouse, “... a strict interpretation of ‘generally contiguous’ may mean the First Nation has nowhere to grow either because there is no available land to annex to an existing reserve or land values are so high that the First Nation cannot afford to grow.”⁴⁰

Article II. Dealing with Municipal and Third-Party Interests

In addition to deficiencies in the management of the ATR process leading to delays in the conversion of land to reserve status, First Nations witnesses expressed concerns regarding the lack of support from the federal government when trying to resolve municipal and/or third party issues. For their part, federal government officials generally considered issues related to dispute resolution among First Nations, municipalities and/or third parties as beyond the control of the Government of Canada. As noted by Margaret Buist (AANDC) in reference to these challenges:

... negotiations have to take place for the purchase [of private land by a First Nation], which can take several years. Once the land is selected by the First Nation, they need to go through their political process, and a band council resolution is required... most of the delay in ATRs happens before it gets into the department... Often, before they get in the door, it has been five to ten years.⁴¹

³⁹ For example, see *Proceedings*: Angus Toulouse, Ontario Regional Chief, Chiefs of Ontario, February 8, 2012;

⁴⁰ Ibid.

⁴¹ Senate, Standing Committee on Aboriginal Peoples, *Evidence*, 7 February 2012 Margaret Buist, Director General, Lands and Economic Development, Aboriginal Affairs and Northern Development Canada).

To shed some light on these issues, this section presents some of the major challenges faced by First Nations through the ATR process in dealing with municipal and third-party interests.

1. Negotiating Agreements with Municipalities

When land selected by a First Nation for conversion to reserve status is within a municipality, in addition to the requirement that First Nations pay property taxes on any purchased land until such time as the ATR is completed, federal ATR policy requires that First Nations negotiate agreements with municipal governments. These agreements can include joint land use planning; by-law harmonization; compensation for tax loss; and compensation for basic municipal services such as sewage, water, and hydro. Many witnesses agreed that these negotiations can cause extensive delays, and that this problem can be exacerbated if a municipality is not entering into these negotiations in good faith. As stated by Jody Wilson-Raybould (AFN): “[w]hile the current policy clearly does not give a municipality a veto over ATR, they can often stall the advancement of ATR, giving municipalities, in a sense, de facto veto.”⁴²

Both Chief Angus Toulouse, and Gordon Bluesky (National Aboriginal Lands Managers Association) noted that the ATR process puts the onus on First Nations to settle these interests prior to land conversion. In particular, reference was made to the frustration of being put “... in a position where they [First Nations] are trying to negotiate agreements and settling issues and interests on properties that are not even under their jurisdiction yet.”⁴³

For many witnesses, the costs involved with purchasing land and paying fees to municipalities until that land is converted to reserve status serves as an additional barrier to engagement in the ATR process. For example, Chief Nelson Genaille spoke of his community’s

⁴² *Proceedings*, Jody Wilson-Raybould, British Columbia Regional Chief, Assembly of First Nations, April 3, 2012. Similar comments were provided by Angus Toulouse, Ontario Regional Chief, Chiefs of Ontario, February 8, 2012.

⁴³ *Proceedings*, Gordon Bluesky, Director, National Aboriginal Lands Managers Association, February 14, 2012.

challenges in trying to facilitate economic development while paying property taxes on land selected through their TLE agreement that has yet to be converted to reserve status:

... my community keeps telling me, 'Let us buy more land so that we can get into economic development.' I keep telling them that we have two pieces of property that were bought in 2006 and 2008. How can I look to buying more land when my First Nation is paying taxes for the land we just bought? It is a Catch-22.⁴⁴

Many First Nation representatives questioned the requirement under ATR to negotiate tax loss adjustments with municipalities. In particular, it was noted that, under ATR policy, tax loss adjustments require First Nations to pay municipality fees to compensate foregone municipal taxes (e.g. school taxes, etc.). First Nations generally consider this requirement as a form of double taxation, as reserve communities generally provide their own municipal-like services, such as the on-reserve school system. As stated by Chief David Meeches: "...we have to address the municipal taxes that we have been paying since [the purchase of the land] and establishing municipal service agreements with those municipalities whose services we will never use."⁴⁵

As noted by AANDC, municipalities have expressed concerns related to the burden imposed on them for losing their tax base through an ATR.⁴⁶ In response, Chief Jody Wilson-Raybould stated that any tax loss for municipalities through an ATR: "... pales in comparison to the benefits that will accrue by supporting First Nations and establishing a viable land base for them."⁴⁷ This view is supported by various external studies on urban reserves, especially for First Nation reserve communities in Saskatchewan.⁴⁸ Although it is not known with certainty to what

⁴⁴ *Proceedings*, Chief Nelson Genaille, President, Treaty Land Entitlement Committee of Manitoba Inc., February 14, 2012.

⁴⁵ *Proceedings*, David Meeches, Chief, Long Plain First Nation, February 8, 2012. Similar comments were provided by other witnesses. See, for example, *Proceedings*, Angus Toulouse, Ontario Regional Chief, Chiefs of Ontario, February 8, 2012.

⁴⁶ For example, see: *Proceedings*, Margaret Buist, Director General, Lands and Environmental Development, AANDC, February 7, 2012

⁴⁷ *Proceedings*, Jody Wilson-Raybould, British Columbia Regional Chief, Assembly of First Nations, April 3, 2012.

⁴⁸ For example, see the paper by Evelyn Peters, [Urban Reserves](#), National Centre for First Nations Governance, August 2007.

extent First Nation-owned businesses on urban reserves might be more or less successful than those in non-reserve urban areas, these studies point to various success stories such as the Muskeg Lake Cree Nation urban reserve. At the time of conversion to reserve status in 1988, this parcel of land within the municipality of Saskatoon was essentially a vacant lot. Today, it has been noted that this reserve has developed into a thriving business centre, which has generated “millions in revenue” and employs about 300 Aboriginal people.⁴⁹

To better support First Nations in meeting their obligations related to municipal tax payments and tax loss adjustments, the AFN, in a report submitted to the Committee, has suggested that negotiations should be held with the federal government to arrive at an agreement on fair reimbursement of this cost. As an alternative solution, the AFN pointed to the current process under the Saskatchewan TLE Framework Agreement, in which a clear tax loss compensation formula is specified, and strict timelines are required for finalizing land conversions to minimize First Nations’ costs related to paying municipal property taxes (i.e. the federal government is required to take over the payment of property taxes to municipalities if an ATR is not resolved within 75 days).⁵⁰

2. Resolving Issues with Third Parties

As acknowledged by essentially all witnesses, lengthy negotiations can often occur when unresolved third-party interests exist for First Nation land selections and purchases. This problem occurs most frequently in urban areas, as much of this land is typically privately owned, but can also occur in rural or remote areas in relation to private interests in mineral or mining rights. More generally, third party interests can occur when there are unresolved issues related to utility easements or rights-of-way, existence of leases on the land, or private ownership of subsurface rights, etc.

a. Respect for Prior Legal Interests

⁴⁹ Saskatchewan Chamber of Commerce, [Background Paper—Urban Reserves](#), June 2008.

⁵⁰ For more information, see: AFN, report submitted to the Committee: [Additions to Reserve: Regional Dialogue Forums, Roll-up Report](#), March 2012; and Evelyn Peters, [Urban Reserves](#), National Centre for First Nations Governance, August 2007.

According to ATR policy, to respect prior legal interests, the acquisition of land by a First Nation that is privately held property must occur on the basis of a willing seller / willing buyer relationship.⁵¹ Under the current system, although the federal government, working with the provinces and municipalities, can aid in identifying private sector interests on potential land selections, as noted by Chief Angus Toulouse, “The current policy puts the onus on First Nations to resolve these interests before the order-in-council is granted.”⁵²

A major concern expressed by some First Nations relates to the actions of provincial governments in issuing mining licenses on land prior to the completion of ATR land conversions. In a statement consistent with that of Chief Wilfred McKay Jr. (Treaty Land Entitlement Committee of Manitoba Inc.),⁵³ Michael Sutherland (Peguis First Nation) noted that: “many times over the years since our TLE notification became valid in 1997 provincial departments have been issuing these leases without consultation with our First Nations communities.”⁵⁴

b. Third Party Pricing Strategies for the Sale of Private Land to a First Nation

Another issue of great concern to First Nations relates to their experiences in negotiating purchases of privately held land through the ATR process. Several First Nation representatives observed that private land holders often inflate the value of their land once they are made aware that a potential buyer is a First Nation.⁵⁵ While the TLE framework agreements for Crown land in the Prairies include strict provisions for the assessment of fair market value, through an

⁵¹ AANDC, [Frequently Asked Questions – Additions to Reserve](#).

⁵² *Proceedings*, Angus Toulouse, Ontario Regional Chief, Chiefs of Ontario, February 8, 2012.

⁵³ *Proceedings*, Wilfred McKay Jr., Member, Treaty Land Entitlement Committee Inc., February 14, 2012

⁵⁴ *Proceedings*, Michael Sutherland, Councillor, Peguis First Nation, February 14, 2012.

⁵⁵ For example, see *Proceedings*: David Meeches, Chief, Long Plain First Nation, February 8, 2012; Chief Wilfred McKay Jr., Member, Treaty Land Entitlement Committee of Manitoba Inc, February 14, 2012; and AFN, report submitted to the Committee: [Additions to Reserve: Regional Dialogue Forums, Roll-up Report](#), March 2012.

independent appraisal,⁵⁶ these assessments do not necessarily apply to separate negotiations with landowners on their privately held land. As noted by Chief David Meeches: “[w]hen we settle our TLEs, we settle for a specific amount per acre. All of a sudden, we are buying [privately held] land that has increased in value and everyone around us is consistent in terms of capitalizing.”⁵⁷ According to a report tabled with the Committee by the AFN, inflated land values for privately held land have had negative consequences, including “depleting a First Nation’s financial resources” and “limiting future purchasing options.”⁵⁸ The report further indicates that fair market land values “should be independently appraised to mitigate inflated land values as much as possible,” and “should be fairly projected into the future.”⁵⁹

While federal officials noted their ongoing work to increase capacity and develop tools such as the ATR toolkit, several witnesses noted that regional offices do not provide sufficient capacity to aid First Nations in resolving disputes with municipalities and third parties.⁶⁰ Many witnesses pointed more specifically to the lack of sufficient dispute resolution mechanisms. In particular, Margaret Buist stated that “... there are no formal dispute resolution mechanisms in place when ATR negotiations break down, and sometimes additions to reserve can languish for decades if those negotiations fail.”⁶¹ As noted by Ms. Buist, municipalities are concerned that First Nations and AANDC are able to proceed with the creation of a reserve without their

⁵⁶ For example, see: AANDC (formerly Department of Indian and Northern Affairs Canada), [A Synopsis of the Saskatchewan Treaty Land Entitlement Framework Agreement](#), Treaty Land Entitlement/Specific Claims Unit, Saskatchewan Region, p. 13.

⁵⁷ *Proceedings*, David Meeches, Chief, Long Plain First Nation, February 8, 2012. Similar comments were provided by other witnesses. See, for example, *Proceedings*, William McKay Jr., Member, Treaty Land Entitlement Committee of Manitoba Inc., February 14, 2012; and AFN, in their report submitted to the Committee: [Additions to Reserve: Regional Dialogue Forums, Roll-up Report](#), March 2012, p. 15.

⁵⁸ AFN, report submitted to the Committee: [Additions to Reserve: Regional Dialogue Forums, Roll-up Report](#), March 2012, p. 7.

⁵⁹ *Ibid*, p. 16.

⁶⁰ For example, see *Proceedings*: Angus Toulouse, Ontario Regional Chief, Chiefs of Ontario, February 8, 2012; and Jody Wilson-Raybould, British Columbia Regional Chief, Assembly of First Nations, April 3, 2012.

⁶¹ *Proceedings*, Margaret Buist, Director General, Lands and Environmental Development, AANDC, February 7, 2012.

consent, and First Nations are concerned that municipalities and third parties are able to delay the process by refusing to negotiate.⁶²

As noted by the OAG, there has been a consistent underutilization of formal dispute resolution mechanisms within the ATR process, even where provisions for these mechanisms exist within TLE Framework agreements.

Dispute resolution mechanisms for resolving obstacles that may arise during the course of implementation can be helpful, but only when the parties involved use them... Although such mechanisms exist in both regions—the Settlement Board and Arbitration Board in Saskatchewan and the Implementation Monitoring Committee and Senior Advisory Committee in Manitoba—they are not being used in a way that helps to resolve outstanding issues and conflicts, such as third-party interests.⁶³

Article III. Developing Legislation

Andrew Beynon (AANDC) described the current efforts of the AANDC—AFN Joint Working Group to explore ideas for national ATR legislation. Mr. Beynon noted that the development of such legislation could include common features currently found in the optional claims settlements implementation legislation facilitated through the TLE Framework agreements in the Prairies.⁶⁴ Various First Nations representatives expressed the need to adapt this type of legislation for application across Canada.⁶⁵

Witnesses agreed that the benefit of moving to enforceable legislation would enable a more efficient and effective system for resolving the issues noted throughout this report. As well, the inclusion of specific criteria and conditions for negotiating agreements among First Nations,

⁶² Ibid.

⁶³ OAG, “[Chapter 7: Indian and Northern Affairs Canada – Meeting Treaty Land Entitlement Obligations](#),” *Report of the Auditor General of Canada*, November 2005.

⁶⁴ *Proceedings*, Andrew Beynon, Director General, Community Opportunities, AANDC, February 7, 2012.

⁶⁵ See, for example, the comments in the proceedings from Committee hearings with Angus Toulouse, Ontario Regional Chief, Chiefs of Ontario (February 8, 2012); and Chief Robert Louie, Chair, First Nations Lands Advisory Board (February 14, 2012).

municipalities and third party interests would minimize the necessity for federal government involvement.⁶⁶ As noted by Kathleen Lickers (AFN):

One of the things that both the Saskatchewan and Manitoba TLE Framework Agreements provide is very concrete examples of the benefit of the First Nations in... [a negotiation]... being able to foresee what it is that they are working toward and to actually negotiate a lot of those issues at the front end of the process.⁶⁷

As well, Andrew Beynon noted that one option available to First Nations under the claims settlements implementation legislation in the Prairies is to arrange for pre-reserve designation on selected lands.⁶⁸ Mr. Beynon went on to state that “[pre-reserve designation]... is a very effective tool where, before a reserve is created, First Nations membership can decide what use they would like to see of particular parcels of land. That is very helpful in assisting with existing developments that are on parcels of land that people want to acquire.”⁶⁹ In particular, a pre-reserve designation allows a First Nation to hold a vote from its community members, asking whether there is agreement on having a particular third-party interest maintained on a proposed parcel of land once it is converted to reserve status through ATR.⁷⁰ If the community is in favour, pending approval by the Minister of Aboriginal Affairs and Northern Development, this would allow development to occur in a timely fashion as soon as the land has been set apart as a reserve, and would expedite the land conversion process by eliminating the need for negotiations among First Nations and the relevant third party.⁷¹ While the AFN has indicated its support for pre-reserve designations, they caution that “more capacity is needed...”⁷² Another option would

⁶⁶ *Proceedings*, Jody Wilson-Raybould, British Columbia Regional Chief, Assembly of First Nations, April 3, 2012.

⁶⁷ *Proceedings*, Kathleen Lickers, External Legal Advisor, Assembly of First Nations, April 3, 2012.

⁶⁸ *Proceedings*, Andrew Beynon, Director General, Community Opportunities, AANDC, February 7, 2012.

⁶⁹ *Ibid.*

⁷⁰ For further information on the pre-reserve designation process, see: Mary Hurley, [*Bill C-37: Claim Settlements \(Alberta and Saskatchewan\) Implementation Act*](#), Parliamentary Information and Research Service, Library of Parliament, LS-415E, Revised 14 March 2002.

⁷¹ *Ibid.*

⁷² AFN, report submitted to the Committee: [*Additions to Reserve: Regional Dialogue Forums, Roll-up Report*](#), March 2012, p. 15.

be for the Minister to issue a written permit granting a third party the right to occupy, use, reside on or exercise rights on reserve land for limited purposes and periods.⁷³

COMMITTEE OBSERVATIONS

During our investigations into the ATR policy and process, the Committee benefited greatly from the valuable insights of witnesses who appeared during meetings on this important subject. We thank all those who took the time to provide their views and suggestions. The Committee observes that a key message conveyed by virtually all witnesses was that, although some positive change has occurred in recent years, major changes are required to the existing system to better enable First Nations to engage in economic development by facilitating the resolution of ATR in a fast and effective manner.

Based on what we heard, the Committee observes that there is an urgent need for the federal government to enhance the existing ATR policy and process by improving AANDC management practices, both nationally and within regional AANDC offices, improving the effectiveness of dealing with municipal and third-party interests, and exploring options for supporting First Nations in their negotiations with municipalities and third parties. The Committee is especially concerned with testimony provided by officials from the OAG, who noted that most of its recommendations from a 2005 audit of the ATR policy regarding deficiencies in ATR management systems had not yet been implemented, and by First Nations witnesses in relation to the predatory pricing strategies of third-party landowners. The Committee strongly urges the Government of Canada, working with First Nations and other stakeholders, to address the issues of ATR management systems and predatory pricing, as well as the many other issues highlighted within this report.

To facilitate the development of a more efficient and effective process for converting land to reserve status through the ATR process, the Committee recommends:

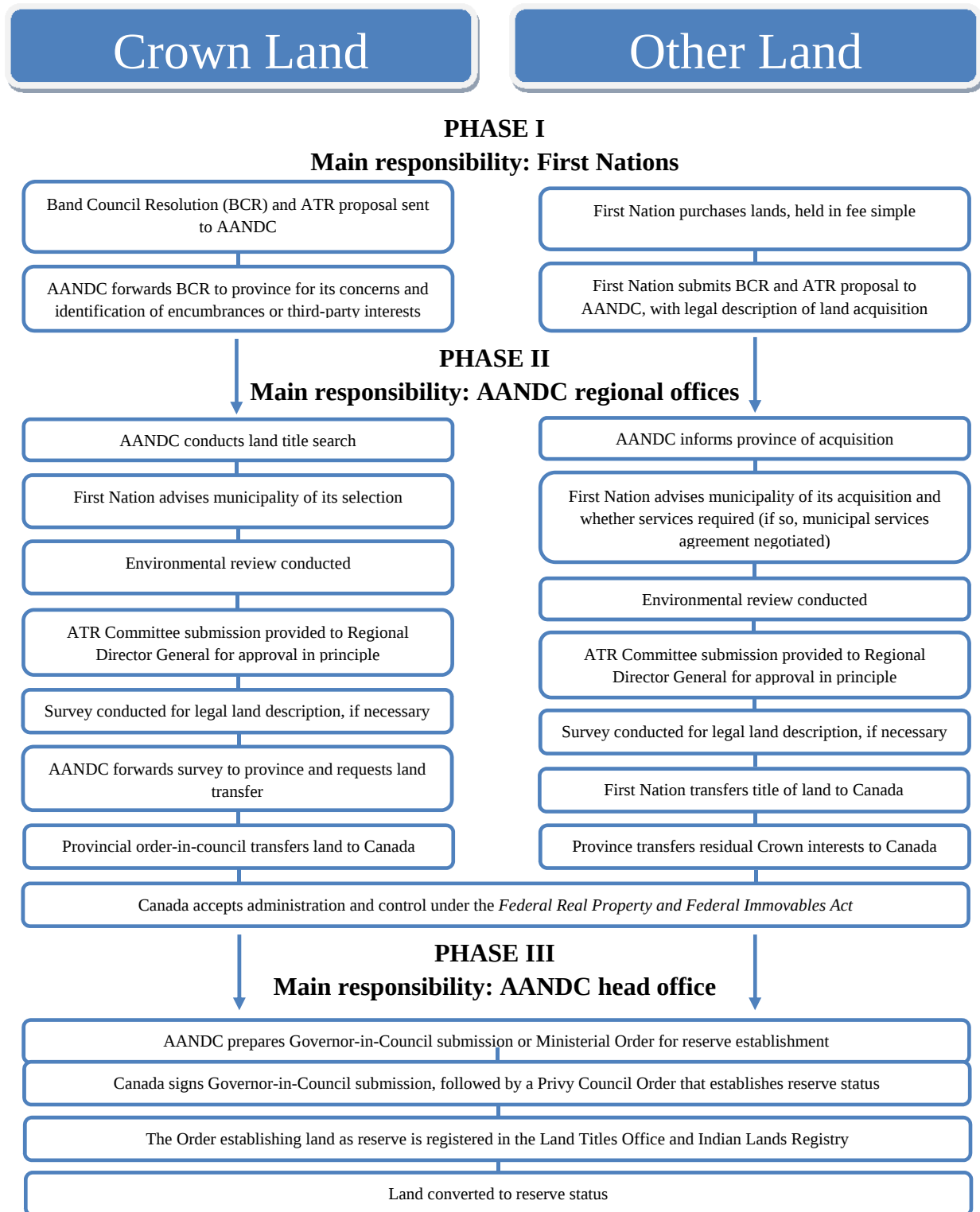
⁷³ Ibid.

That the Department of Aboriginal Affairs and Northern Development Canada, in collaboration with First Nations through the Joint Working Group, develop and table an action plan before the Committee by 31 March 2013 that establishes clear targets and timelines for implementing agreed-upon measures to improve the existing ATR process, and clearly identifies and provides options for resolving areas within the ATR process causing the greatest delays, including legislative or policy options relating to:

- Pre-reserve designations and/or recognition of interests for lands identified by First Nations for conversion to reserve status;
- Support mechanisms, including dispute resolution assistance, to First Nations in their negotiations with municipalities and third parties;
- Identifying best practices and implementing measures to prevent predatory pricing strategies of third-party landowners on the sale of privately held land to First Nations; and
- Streamlining the procedural requirements in relation to the federal ATR policy, including implementing recommendations from the OAG on improving management systems.

The Committee believes that, through the development of this action plan, the federal government would be better equipped to enable transformative change for First Nations peoples in reserve communities and, indeed, for all Canadians.

APPENDIX A – OVERVIEW OF ADDITIONS TO RESERVE PROCESS



Source: Adapted from OAG of Canada, “[Chapter 4: Treaty Land Entitlement Obligations – Indian and Northern Affairs Canada](#),” *Status Report of the Auditor General of Canada*, March 2009.

APPENDIX B – WITNESSES

Meeting Date	Agency and Spokesperson	Brief
February 7, 2012	Aboriginal Affairs and Northern Development Canada: Margaret Buist, Director General, Lands and Environmental Management; Andrew Beynon, Director General, Community Opportunities; Anik Dupont, Director General, Specific Claims.	X
	Natural Resources Canada: Jean Gagnon, Deputy Surveyor General, Surveyor General Branch; Peter Sullivan, Surveyor General and International Boundary Commissioner, Surveyor General Branch; Brian Ballantyne, Senior Advisor, Land Tenure and Boundaries, Surveyor General Branch; Brian Gray, Assistant Deputy Minister, Earth Sciences Sector.	X
February 8, 2012	Chiefs of Ontario: Angus Toulouse, Ontario Regional Chief.	X
	Long Plain First Nation: David Meeches, Chief; Vincent Perswain, Executive Director, Long Plain Trust; Tim Daniels, Special Projects Officer; Ernie Daniels, Elder.	
February 14, 2012	Treaty Land Entitlement Committee of Manitoba Inc.: Nelson Genaille, President; Wilfred McKay Jr., Member.	X
	Peguis First Nation: Nathan McCorrister, Executive Director; Michael Sutherland, Councilor.	X

	National Aboriginal Lands Managers Association: Leona Irons, Executive Director; Gino Clement, Chairman; Gordon Bluesky, Director.	X
	First Nations Lands Advisory Board: Chief Robert Louie, Chair.	
March 7, 2012	Office of the Auditor General of Canada: Jerome Berthelette, Assistant Auditor General; Frank Barrett, Principal.	X
April 3, 2012	First Nations Tax Commission: C.T. (Manny) Jules, Chief Commissioner and Chief Executive Officer.	
	Assembly of First Nations: Jody Wilson-Raybould, British Columbia Regional Chief; Tonio Sadik, Senior Advisor; Kathleen Lickers, External Legal Advisor.	X