

# LIDSTONE & COMPANY

## BARRISTERS AND SOLICITORS

### BULLETIN

**TO:** Clients  
**FROM:** Lidstone & Company  
**DATE:** October 24, 2013  
**RE:** Additions to Reserve Policy  
**FILE:** 99999-042

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The federal government is seeking feedback on proposed amendments to its Additions to Reserve/Reserve Creation Policy ("ATR Policy"). The deadline has been extended to October 31, 2013. The revised ATR Policy has important implications for local governments. This memo provides background information about the policy and changes relevant to local government. This is a complex policy with many steps that are not outlined here - the memo provides a summary overview only.

### Executive Summary

The proposed amended ATR Policy signals a substantial policy shift to expand the locations where First Nations can request additions to their land base. This opens up the door to land that is located near or in existing municipal/regional district boundaries. However, the policy is vague on issues which have significant impacts on local governments.

The lack of clarity in the policy regarding First Nation-local government negotiation and consultation is concerning because this can cause more delays, confusion about responsibilities and conflict.

It is recommended that local governments review the amended policy and background information and provide feedback to the federal government.

### Background

The ATR Policy was created in 1972 and most recently updated in 2001. The Policy is part of Aboriginal Affairs and Northern Development Canada's ("AANDC") Land Management Manual. This kind of policy directive is considered "soft law", meaning that it does not have the same legal force as legislation and is more difficult to challenge in court because courts are

reluctant to interfere with the government's discretion as to how policy is carried out by its staff.

An Addition to Reserve allows a First Nation to add a parcel of land to an existing land base. Under the 2001 policy, First Nations could expand their reserve land base by applying to the federal government under different categories. The proposal had to be for an area of land within the "service area" of an existing reserve community, which meant the geographic area generally adjacent to the reserve.

In BC, there have been 77 ATR "projects" to date, the 4<sup>th</sup> highest in Canada after Saskatchewan, Manitoba and Ontario. First Nations in BC have initiated projects for 11,555 hectares of land with 8,150 hectares being granted. In comparison, Saskatchewan has managed 617 projects, granting 100% of the requested 112,057 hectares of additional reserve land.

The process has been criticized by First Nations for being too slow, inconsistently applied across the country and overly complex.

The lengthy delays have been attributed to the "stakeholder negotiation" phase, and AANDC has acknowledged that First Nations' discussions with local governments in particular have slowed down the process in the past.

### **The ATR Approval Process**

Briefly, the process for First Nations applying for an ATR is proposed as follows:

1. First Nation submits a Band Council Resolution and Reserve Creation Proposal to the AANDC office in their region;
  - a. The proposal must describe current and intended land use of proposed reserve land, proximity to a local government, any known municipal interests, whether services are required and the plan to acquire them, and other requirements.
  - b. If proposed land is within or adjacent to a local government, First Nation must notify the local government in writing of the proposal.
2. Regional Director General (RDG) issues a Letter of Support or rejects proposal;
  - a. If the RDG determines that the local government is unwilling to respond to a First Nation's proposal in good faith, it may agree to support the proposal despite the lack of agreement; in addition, if the First Nation demonstrates unwillingness to negotiate with the local government, the RDG may withdraw its support.

3. If Letter of Support issued, the regional AANDC office and First Nation develop a work plan to clarify roles and responsibilities re: environmental site assessments, addressing third party issues, etc.;
4. Once all of the proposal criteria/work plan steps are completed, transfer of land title moves from the province to the federal government;
5. Regional AANDC staff prepare an Order in Council (OIC) to the federal Minister to request the Reserve Creation. The federal Cabinet accepts or rejects the OIC;
6. If approved, the land is registered in the Indian Lands Registry. After an ATR has been approved, the local government's land use planning and zoning laws no longer apply to the use or development of the added land. The First Nation has the authority to determine how to use their reserve lands according to the needs and interests of the community.

In terms of duties owed to local governments in this process, the new ATR Policy requires that First Nations discuss issues of mutual interest and concern with the affected local government (i.e. joint land-use planning, bylaw harmonization, tax considerations, service provision and dispute resolution).

These discussions must be:

- Initiated by the First Nation. When requested by the First Nation, AANDC “may provide facilitative or technical assistance in support of negotiations”;
- Conducted with “good will, good faith and reasonableness”.

The policy is clear that local governments do not have a veto over a reserve creation proposal (i.e. they cannot override the proposal or reject it). The policy states that if local government concerns have “been addressed”, a reserve creation proposal may proceed.

### **Local Government Concerns**

The most significant suggested change to the ATR Policy is that the “selection area” for a proposed addition to reserve land is to be “normally..located within a First Nation’s treaty or traditional territory”. Proposed additions to reserve land may also be outside the First Nation’s treaty or traditional territory, provided it is within the province where the majority of the First Nation’s existing reserve land is located. This means that new reserves can be created that are not geographically adjacent to a First Nations’ existing reserve, and in British Columbia these will be within municipalities or rural areas of regional districts (except the area north of

Hazelton). The federal government has particularly promoted the economic benefits of creating reserves in urban areas.

Additional changes/relevant points:

- Significantly fewer references to local government in the new policy;
- The First Nation must give the Province three months to express views and set out issues in writing in the consultation phase. This requirement does not exist for local government under the new policy (i.e. no three month deadline).
- The new policy states that a First Nation-Local Government agreement “may” be necessary to address the provision of services, bylaw compatibility, tax losses, etc. This is softer language than the former policy, which required agreements to be made.
- Still no dispute resolution mechanism in place to resolve issues between First Nations and local governments, despite requests and calls for this change from First Nations.
- Change of definition of “municipality”. Under the new policy, the term is now “local government”, and it is defined as “a city, town, village or other built-up area with municipal or other authorities and includes a rural or urban municipality, as defined in relevant legislation”. The definition is somewhat unclear because it does not specifically name regional districts, which are unique to BC.

## Resources

The proposed amended policy can be found here: <http://www.aadnc-aandc.gc.ca/eng/1371823135092/1371823167789>

The original 2001 ATR Policy for comparison to the amended policy: [http://www.collectionscanada.gc.ca/webarchives/20071127101315/http://www.ainc-inac.gc.ca/ps/lts/pdf/ch10\\_e.pdf](http://www.collectionscanada.gc.ca/webarchives/20071127101315/http://www.ainc-inac.gc.ca/ps/lts/pdf/ch10_e.pdf)

Metro Vancouver’s comments on the policy at Item 5.2 (subject to endorsement by MV board October 25, 2013):

[http://www.metrovancouver.org/boards/Aboriginal%20Relations%20Committee/Aboriginal\\_Relations\\_Committee-October\\_9\\_2013-Agenda.pdf](http://www.metrovancouver.org/boards/Aboriginal%20Relations%20Committee/Aboriginal_Relations_Committee-October_9_2013-Agenda.pdf)

Feedback may be submitted online or via regular mail by October 31, 2013: <http://www.aadnc-aandc.gc.ca/eng/1369229675372/1369229707515>