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STUDY OF LAND MANAGEMENT AND SUSTAINABLE ECONOMIC DEVELOPMENT ON FIRST NATIONS RESERVE LANDS

Report of the Standing Committee on Aboriginal Affairs and Northern Development

Chris Warkentin
Chair

MARCH 2014

41st PARLIAMENT, SECOND SESSION

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THE STANDING COMMITTEE ON ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT

has the honour to present its

FOURTH REPORT

Pursuant to its mandate under Standing Order 108(2) the Committee has studied Land-Use and Sustainable Economic Development and has agreed to report the following:

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CHAIR'S FOREWORD

As Chair of the House of Commons Standing Committee on Aboriginal Affairs and Northern Development, I am pleased to have participated in the Committee's study on First Nations land management and sustainable economic development, and to present this report on the Committee's behalf.

Land is a critical driver of economic growth. This fact is no less true for First Nations. As the reserve land base continues to expand, particularly through land claims settlements and additions to reserves, a range of economic opportunities are becoming available with the potential to substantially improve living conditions on reserve. Over the course of a year, the Committee heard from over 60 witnesses and travelled to a number of First Nations communities across the country operating under a variety of land management frameworks. Consistently, we heard that access to modern, transparent and effective land management tools is central to helping First Nations move forward on a sustainable economic path and to accessing the wealth stored in their lands.

The Committee recognizes that it is essential to provide First Nations with the contemporary tools and capacity to effectively manage their lands and to minimize barriers that can impede First Nations from sustainably developing those lands to their maximum economic benefit. The Committee's report seeks to address some of these existing barriers and to identify key elements of a modern framework for land management on reserves.

On behalf of the Committee, I want to express our thanks to the witnesses who appeared before us, to share their experiences and recommendations with us. We also commend those who made written submissions to assist the Committee in its process, and acknowledge these contributions with gratitude. I also wish to thank the Committee members for their dedication to this study. The unanimity of this report demonstrates a commitment to work together and reach consensus on what can often be complex issues.

Chris Warkentin, M.P.

Committee Chair

RESERVE LAND MANAGEMENT

INTRODUCTION

In Canada, as in most of the developed world, land is of central importance to economic development and it provides the foundation for a range of economic activities, such as natural resource development, tourism, industry and agriculture. Land is also among the most common means of storing wealth and, according to World Bank estimates, represents nearly one-half to three-quarters of the wealth of most economies.[1] When sustainably developed and governed through effective management and regulatory regimes, land can be a powerful economic asset and a significant driver of economic growth.

This is no less true for First Nations in Canada whose combined reserve land base totals approximately 3.8 million hectares[2] and is anticipated to increase by a further 1.1 million hectares as a result of treaty land entitlement and specific claims settlements.[3] As the land base under First Nations' jurisdiction continues to expand, significant opportunities are becoming available to them. Budget 2013 indicates that the federal government expects new investments of over $650 billion in over 600 major resource projects over the next decade.[4] Virtually all of these projects involve, or are in close proximity to, Aboriginal lands, creating the potential for substantial economic benefits.

First Nations leaders and policy-makers alike acknowledge that ownership of land alone is not a guarantor of economic success. Rather, land must also be managed in ways that can provide the maximum economic, social and cultural benefit. Without the appropriate capacity and tools to develop and use their lands sustainably, opportunities for First Nations to improve their social and economic outcomes can be severely restricted.

The Committee's Decision and Process

The extent to which existing land management regimes and community capacity allow First Nations to maximize the benefits of their reserve lands and unlock their economic potential is of significant interest to members of the House of Commons Standing Committee on Aboriginal Affairs and Northern Development (hereinafter, the

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1 House of Commons, Standing Committee on Aboriginal Affairs and Northern Development (AANO), *Evidence*, 1st Session, 41st Parliament, 15 March 2012, (Chief Clarence Louie, Chairman, National Aboriginal Economic Development Board).

2 Marena Brinkhurst and Anka Kessler, Simon Fraser University, Department of Economics, "Land Management on First Nations Reserves: Lawful Possession and Its Determinants," April 2013, p. 2.

3 Aboriginal Affairs and Northern Development Canada (AANDC), "Renovating Programs in Support of Lands and Economic Development."

4 Government of Canada, Economic Action Plan 2013, 21 March 2013, p. 136.

Committee). Accordingly, in November 2011, the Committee agreed to undertake a study of land and environmental management on reserves, with an emphasis on identifying the types of modern land management tools that First Nations need to sustainably develop their lands to their highest and best use. Throughout the course of our study, the Committee convened 20 meetings in Ottawa where it heard from over 60 witnesses, including government officials, First Nations' representatives, third party experts, as well as professional organizations. The Committee also travelled to eight First Nations communities in Québec, Nova Scotia, Saskatchewan and British Columbia, operating under various land management regimes, which break down as follows:

- *Indian Act* land management regime: Millbrook, Osoyoos and Penticton First Nations

- First Nations with operational land codes under the *First Nations Land Management Act*: Muskeg Lake and Whitecap Dakota First Nations;[5]

- Recent signatories to the *First Nations Land Management Act* but operating under the *Indian Act* pending development and ratification of a land code: Membertou and Mashteuiatsh First Nations; and,

- First Nations operating under a self-government regime: Westbank First Nation.

Committee members are deeply appreciative of the insights and the clarity provided by these witnesses and for their invaluable assistance in helping us to navigate the complexities surrounding reserve land management, including the more technical aspects of this policy area. The site visits in particular allowed us to see, first hand, how geography and capacity interact with land management regimes to influence a community's economic opportunities and outcomes. Community members and representatives spoke to us openly about the challenges they face, but also with great passion and enthusiasm for the possibilities that lay ahead. We are grateful to each of these communities for their warm welcome and for their patience as they helped us to understand their particular challenges.

5 In January 2012, the Whitecap Dakota First Nation and the Government of Canada signed a framework agreement to negotiate self-government, and will begin negotiations toward an agreement in principle to bring the First Nation out from under the *Indian Act*. Additional information is available here.

Report Scope and Structure

Aboriginal lands can be divided into three categories: First Nations' reserve lands, treaty settlement lands and Crown lands (traditional territories). The federal government estimates that First Nations currently own or control over 15 million hectares of land (reserve and treaty settlement lands), while the Inuit own or control over 45 million hectares of land, representing 6.5% of Canada's land mass.[6] Land and environmental management issues vary according to the category of land under consideration, as does the level of First Nation's legal jurisdiction and administrative control over that land.

In recognition of this breadth and complexity, the first phase of the Committee's study, and of this report, will focus primarily on First Nations' reserve lands. It is here that the federal government, primarily through the statutory provisions of the *Indian Act*,[7] exercises the greatest control. Even within the narrower category of reserve lands, the Committee received testimony covering a comprehensive range of issues. To the greatest extent possible, we have tried to capture the key concerns raised by witnesses across this broad spectrum.

What is Land Management?

Land management refers to managing the use and development of land resources in a sustainable way. Land can be used for a range of purposes that interact and may compete with one another, making it desirable to plan and manage land use in an integrated way that provides for protecting the environment from negative impacts of economic development.

Source: Office of the Auditor General of Canada, *Land Management and Environmental Protection on Reserves*, Fall 2009.

The Committee acknowledges the deep connection that many Aboriginal people have to the land and that Aboriginal views of land ownership and use may differ markedly from western conceptualizations. As noted in the 1996 *Report of the Royal Commission on Aboriginal Peoples*, this special relationship to the land is both spiritual and material.[8] From this perspective, land is not understood exclusively, or even primarily, as an economic commodity. Rather, it is as much a critical component of nationhood, identity and culture as it is a potentially important economic asset. While the Committee's study focuses on the latter aspect, we acknowledge that the reserve land base is integral to the social, cultural and political life of First Nations and represents, for many, the basis for the continuity of their societies and cultures.

This report represents the culmination of our inquiry into reserve land management. The first part provides an overview of the spectrum of land management regimes and

6 AANDC, "Renovating Programs in Support of Lands and Economic Development."

7 Government of Canada, *Indian Act*, R.S.C., 1985, c. I-5.

8 Royal Commission on Aboriginal Peoples, *Restructuring the Relationship*, Volume 2, Part 2, 1996, p. 448.

forms of land tenure on reserves. As evidenced by this brief review, mapping reforms onto existing land management frameworks can be challenging. Parts II and III set out what the Committee heard, both in Ottawa and during our site visits, and identifies some of the main issues raised by witnesses in relation to current land management regimes as well as their suggestions for improvement. Part IV briefly summarizes the key themes emerging from the testimony and site visits. Finally, Part V outlines the Committee's key findings and recommendations for improving land management on reserves.

PART I – RESERVE LAND MANAGEMENT: AN OVERVIEW

There are 3,003 reserves in Canada with a combined area of 3.8 million hectares.[9] The unique nature and legal status of First Nations' reserve lands gives rise to particular challenges not present in the off-reserve context. This status affects how reserve lands can be developed, transferred, alienated and registered. In order to better understand some of the complexities of reserve land management and associated challenges for sustainable economic development, a review of some of the more salient features of reserve lands may be worthwhile, including the legal status of reserve lands, how and to whom lands can be transferred, how interests are created and registered, and current land management regimes.

How Does Reserve Land Differ from other Land?

Legal title to reserve lands is held by the Crown rather than by individuals or organizations.

First Nations have a recognized interest in reserve land that includes the right to exclusive use and occupation, inalienability, and the communal nature of the interest.

The land cannot be seized by legal process or be mortgaged or pledged to non-members of a First Nation.

The Minister must approve or grant most land transactions under the *Indian Act*.

Source: Aboriginal Affairs and Northern Development, Land Management

A. Nature of First Nations Reserve Lands

Historically, reserve lands were set aside by the federal government to provide protected land for the exclusive use and occupation of First Nations. Today, reserve lands continue to be held by the Crown for the collective use and benefit of First Nations communities.[10]

Federal responsibility for "Indians and lands reserved for the Indians" is set out in section 91(24) of the *Constitution Act, 1867.*[11] The *Indian Act* is the principal piece of legislation through which federal jurisdiction for "Indian lands" is exercised.

Section 18 of the *Indian Act* defines reserve lands, in part, as follows:

> [...] reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

9 Marena Brinkhurst and Anka Kessler, p. 2.

10 Joan Holmes, "Reserve Land Surrenders: Best Practices for Documenting Historic Grievances," July 2006.

11 The *Constitution Act, 1867*, 30 & 31 Vict., c. 3.

From this definition, we are able to see that reserve lands are not, strictly speaking, "owned" by First Nations. Fee simple ownership — defined as absolute title to land, free of any other claims against the title, which one can sell or pass to another by will or inheritance — is generally not available on reserves.[12] Rather, legal title to the land remains with the Crown. Further, the Minister of Aboriginal Affairs exercises significant control and authority over land transactions on reserves. Today, ministerial approval continues to be required for most land transactions of First Nations operating under the *Indian Act*.

The Crown's early preoccupation with protecting the Aboriginal land base from erosion is reflected in various provisions of the *Indian Act.* In particular, section 89 of the Act provides that reserve lands cannot be mortgaged, pledged or charged to any person other than a First Nation member or a First Nation band. The only interest in reserve land that is subject to seizure under legal process is a leasehold interest. Nevertheless, subject to restrictions on alienation (reserve lands cannot be surrendered for sale except to the Crown), Indian interest in land "entails the absolute and exclusive possession, use and enjoyment of the land and all its economic resources."[13]

B. Types of Land Management Frameworks

There is no single land management regime that applies to all reserves in Canada. Rather, First Nations govern their lands pursuant to one of three broad types of land management regimes, with ascending levels of land governance authority:

- The *Indian Act* land management framework;
- The *First Nations Land Management Act*; and,
- Self-government arrangements (either as stand-alone agreements or as a component of modern treaties).

Of the 617 recognized First Nations Bands in Canada, the vast majority (550) govern their lands according to the *Indian Act*. Its land-related provisions, which account for roughly a third of the Act, determine the formal arrangement of reserve land governance and forms of land tenure, setting out how governments, bands, organizations, and individuals can control, use, and transfer reserve lands. Many observers and First Nations economic development practitioners have suggested that the current *Indian Act* system of land management is too ponderous, overly complicated, and fraught with

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12 Under modern treaties, however, settlement lands are owned in fee simple by the Aboriginal groups and are no longer considered "Lands reserved for the Indians" under subsection 91(24) of the *Constitution Act, 1867*, or, for First Nations, reserves within the meaning of the *Indian Act*.

13 Jack Woodward, *Native Law*, "Aboriginal Titles and Indian Lands", Volume 1, Chapter 8, 1989.

uncertainty.[14] The result of these deficiencies is that First Nations are unable to move "at the speed of business" and, as a result, lose economic opportunities.

The *First Nations Land Management Act* (FNLMA) provides the only alternative to land management under the *Indian Act,* outside of modern treaties and stand-alone self-government arrangements.[15] The FNLMA is a sectoral governance arrangement that removes participating First Nations from the land-related provisions of the *Indian Act.* Specifically, the regime provides First Nations with community-level jurisdiction over the management and administration of reserve lands and resources, short of full self-governing powers. Participating First Nations have the authority to pass laws for the development, protection, use and possession of their lands, and to issue leases and licences and to regulate other interests in their land. These laws are set out in a land code that must be ratified by the community before they can become operational. Importantly, although title to land continues to be vested in the Crown under the FNLMA, ministerial involvement over land management decisions on reserves is greatly reduced. Thus, while unable to sell land to third parties, participating First Nations are able to lease and develop their lands and resources in accordance with the rules set out in the ratified land code.[16]

First Nations Land Management Regime

An alternative to the *Indian Act* land management framework, the First Nations Land Management regime gives participating First Nations greater control over their reserve lands and resources.

Currently,77 First Nations are signatories to the FNLM regime;
36 first Nations have enacted their land codes; 30 First Nations are in the active development stage, preparing the land codes to be put to a community vote; and 48 other First Nations are on a waiting list.

Interest among First Nations wishing to opt into the FNLM regime has been growing. Budget 2011 committed to reallocate up to $20 million over two years to enable more First Nations to enter the FNLM Regime, and an additional two-year investment of $9 million was announced in Budget 2013.

First Nations with negotiated stand-alone self-government agreements and/or constitutionally-protected modern treaties enjoy extensive land management and law-making powers, irrespective of how lands are held. All such agreements recognize a First Nation's jurisdiction to address, under its own policy framework, key aspects of land management, including the creation and registration of interests in land, zoning, and management of private land transactions.[17] Under modern treaties, signatory nations own

14 See for example, Lang Michener LLP, "Best Practices in First Nations' Land Administration Systems", 2007.

15 Government of Canada, *First Nations Land Management Act* (S.C. 1999, c. 24).

16 Additional information on the *First Nations Land Management Act* is available online at the First Nations Land Management Resource Centre web site.

17 Assembly of First Nations (British Columbia), "Land Management", Part 1, Section 3:19.

land in fee simple collectively. However, individual fee simple interests have been granted, for example, under the Nisga'a and Tsawwassen final agreements, with the latter imposing restrictions on transferring land to non-members.[18] Since 1973, 24 comprehensive claim agreements (or modern treaties) have been signed and ratified and 18 self-government agreements have been concluded in virtually every jurisdiction across the country.[19] These include 16 self-government agreements completed in conjunction with comprehensive land claims as well as 2 stand-alone self-government agreements with the Sechelt and Westbank First Nations in British Columbia.

C. Land Tenure Arrangements under the Indian Act

Under the *Indian Act*, individual First Nation members and bands do not hold fee simple title to land.[20] However, it would be a mistake to assume that reserves function exclusively as enclaves of collective property.[21] Indeed, various forms of individual land holdings or "allotments" for on-reserve band members are available. Although not in the form of fee simple title, the three main types of individual holdings on-reserve include: customary land holdings, Certificates of Possession (CPs) and leasehold interests.

- **Customary land holdings:** Customary land holdings are the most common form of individual ownership on reserve lands. Individuals or families acquire tracts of reserve land by an allotment of the band council. Customary land holdings lack legal protection as well as recognition by the federal government through the *Indian Act*, or other legislation, and therefore, are typically not enforceable in courts. Accordingly, land-related disputes are generally handled by the band council. With some notable exceptions, these land holdings are not formally recorded or registered in a centralized data base.[22] Thus, while they can be passed down to other

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18 The Nisga'a legislation allows homeowners on former Indian reserves on Nisga'a land in northwestern British Columbia to apply to have their property transferred to fee simple ownership, meaning that Nisga'a citizens could mortgage or sell their residential property, but with control maintained by Nisga'a village governments. The legislation is limited to residential properties, such that large-scale commercial property development is excluded. For further information, see Nisga'a Lisims Government, *Nisga'a Landholding Transition Act*, October 2009.

19 AANDC, "Fact Sheet: Comprehensive Land Claims."

20 Section 20 of the *Indian Act* states that: "No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band." Parliament's 91(24) authority is generally considered plenary, or without subject matter limitation. As such, its enactment of the communal and inalienable features of reserve lands in the *Indian Act* does not preclude it from concurrently providing for individual fee simple ownership of the same lands under prescribed conditions in that Act or elsewhere.

21 Thomas Flanagan and Christopher Alcantara, "Individual Property Rights on Canadian Indian Reserves," Public Policy Sources, Fraser Institute, No. 60, July 2002, p. 3.

22 Membertou and Lac La Ronge First Nations have taken steps to survey and document customary land holdings on reserves. See, Thomas Flanagan and Katrine Beauregard, "The Wealth of First Nations: An Exploratory Study," Fraser Institute, June 2013, p. 9.

family members, they generally cannot be sold in any formally-documented manner.

- **Certificates of Possession:** CPs are a more formalized type of individual property right found on reserves, and most closely resemble fee simple ownership. With statutory recognition under the *Indian Act*, CPs provide a level of tenure security not enjoyed under customary land holdings. Issued under the authority of the Minister of Aboriginal Affairs subsequent to band council approval, they are evidence of an individual's lawful possession to a land holding. CPs are enforceable in court, can be transferred to other band members or to the band itself (in whole or subdivided), leased to third parties, including non-band members, and used as collateral in specialized band-backed mortgages of housing loans.[23] They cannot, however, be seized, pledged or mortgaged.

- **Leasehold Interests**: Reserve lands can be leased to any third party pursuant to the relevant provisions of the *Indian Act*. Reserve lands leased to non-band members for development purposes fall into two main categories: Certificate of Possession Lease and Lease of Designated Land.[24] The process for leasing reserve land is different depending on whether the land in question is held by the band (designated lands) or by an individual member (CPs). Unless the First Nation operates under the FNLMA or self-government agreements, lands are leased by the Minister on behalf of the band or the individual CP holder. However, all leasing revenues accrue to the benefit of the First Nation, or individual member, as the case may be. Unlike CPs, leasehold interests can be mortgaged and seized.

D. Registering Reserve Land Interests

Currently, most interests in reserve lands are registered in the federal Indian Lands Registry System (ILRS), and not in the provincial land title system. Because the ILRS is a deeds-based land registry system, the registrar is not responsible for verifying the legal validity of the registered documents maintained within the registry.[25] In contrast, provincial land registry systems applicable off reserves, such as the Torrens land title system, provide certainty of title in the registry, a system of priorities for ranking competing interests, and assurance that the registered owner is the true owner of the title. Since deeds-based land registries oblige the parties to undertake historical research of all

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23 Marena Brinkhurst and Anka Kessler, p.4.

24 For additional information on the process of leasing lands on reserves, see, Bob Starkell, Leases on Indian Reserves," October 2006.

25 For additional information regarding the Indian Lands Registry System, see Lang Michener LLP, "Best Practices in First Nations' Land Administration Systems," 2007.

land transactions to ensure the chain of title, they are often more costly and difficult to use than land title systems. For these reasons, off-reserve land registry systems are typically said to be more effective in providing tenure security and a level of confidence to investors, thus facilitating economic development.

In addition to the ILRS, AANDC maintains two additional registry systems:[26]

- The First Nations Land Registry System for First Nations who operate under their own land code pursuant to the FNLMA; and,

- The Self-Governing First Nations Land Register established in accordance with the terms of self-government agreements to record documents that grant an interest in self-governed First Nation lands.

Type of Registry	Total First Nations Land Base
Indian Lands Registry System (*Indian Act* Land Base)	3,385,950[27]
First Nations Land Registry System (Land Control under FNLM)	148,155
Self-Governing First Nations	17,499
Total Land Base	3,551,430

Source: Aboriginal Affairs and Northern Development Canada, Land Base Statistics.

It is important to note that customary land holdings and any other unregistered, unapproved transfers of lawful possession would not show up on a search of the ILRS.

E. The Federal Role

AANDC and the Minister exercise the greatest authority in relation to First Nations land management under the *Indian Act.* Importantly, the Department's role decreases as First Nations move away from the *Indian Act* and toward more autonomous regimes, such as the FNLMA.

26 AANDC, "Land Registration."

27 Please note that, as of February 2013, the total reserve land base totalled 3.8 million hectares.

AANDC carries out a range of land administration functions and transactions for First Nations operating under the *Indian Act* regime, including:[28]

- Approving individual land allotments (CPs) and related transactions;
- Issuing permits and leases for activities on-reserve, including commercial, industrial and residential activities;
- Designating land for leasing;
- Registering interests in the ILRS;
- Reviewing and recommending proposals for Additions to Reserve (ATR) policy;
- Surveying reserve boundaries and individual parcels;
- Monitoring compliance in respect of terms of leases and permits, and collecting revenues;
- Managing environmental issues, including environmental assessment, remediation of contaminated sites, and solid waste management.

The Department also assists First Nations in developing their land management capacity through its Reserve Land and Environment Management Program (RLEMP).[29] Initially launched in 2005 as a pilot program, RLEMP replaces the Department's previous land management programs (53/60 Delegated Authority and Regional Lands Administration Programs) and expands the responsibilities transferred to First Nations under those programs.

Designed to be a more fully integrated land and environmental management program, RLEMP seeks to establish the conditions under which First Nations are able to exercise increased responsibility over their reserve lands, including environmental management, rather than having those functions performed primarily by the Department. Specifically, First Nations are able to assume certain responsibilities under the *Indian Act*, such as community land use planning, environmental management, natural resources management, compliance monitoring, and administration of land transactions.[30]

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28 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 24 November 2011, (Andrew Beynon, Director General, Community Opportunities Branch, AANDC).

29 AANDC, "Frequently Asked Questions - Reserve Land and Environment Management Program (RLEMP)."

30 Office of the Auditor General of Canada, 2009 Fall Report of the Auditor General of Canada, "Chapter 6 - Land Management and Environmental Protection on Reserves," 2009.

Under the Program, First Nations also receive financial support for land management, and can participate in a two-year professional capacity building program delivered by the University of Saskatchewan and the National Aboriginal Lands Managers Association. To be eligible to participate in RLEMP, a First Nation must have a land manager, active registered land transactions, and a track record of good financial management.[31]

F. Land Modernization

In addition to the reform and consolidation of its land management programs, since the 2009 launch of the *Federal Framework for Aboriginal Economic Development*,[32] the federal government has sought to identify a range of options to allow First Nations greater control over their lands and resources. A key aspect of this "land modernization" agenda is to ensure that appropriate land management tools, including legislative and regulatory initiatives, are put in place to facilitate economic development on reserves.[33] Recent federal reforms in this area include the following measures:

- Bill C-45: *The Jobs and Growth Act, 2012*, simplified the process by which First Nations can lease designated lands, by reducing the voting threshold prescribed by the *Indian Act* from a double majority to a simple majority community vote, and by allowing the Minister of Aboriginal Affairs rather than the Governor in Council to approve land designations.[34]

- The establishment of a joint AANDC-Assembly of First Nations working group on ATR to explore options to expedite the lengthy ATR process in order to enable First Nations to take advantage of economic opportunities.[35]

- A commitment in Budget 2011 to reallocate up to $20 million in funding over two years to allow for new entrants into the FNLMA. Subsequently, in 2011, Canada and the First Nations Lands Advisory Board signed a memorandum of understanding regarding a new funding formula, paving the way for 18 additional First Nations to join the FNLM regime in January 2012. A further $9 million was committed in Budget 2013 to

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31 Ibid.

32 The Federal Framework for Aboriginal Economic Development is available here.

33 AANDC, "Update on the Implementation of the Federal Framework for Aboriginal Economic Development," 2012.

34 Bill C-45, A second Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures. See, in particular, Part 4 – Division 8.

35 AANDC, "Canada–First Nations Joint Action Plan," News release, June 2011. In July 2013, AANDC released proposed revisions to the 2001 Additions to Reserves Policy. The proposed revisions to the Policy would streamline the ATR proposal and remove duplication; clarify roles and responsibilities; and, facilitate economic development. Additional information is available here.

expand the First Nations Land Management Regime, supporting eight new entrants.[36]

- Legislative amendments to the FNLMA eliminating the requirement to conclude environmental management agreements with the federal government prior to developing local environmental laws.[37]

A potentially significant proposal for reserve land tenure reform was announced in Budget 2012. Endorsing a previous recommendation of the House of Commons Standing Committee on Finance,[38] the federal government signalled its intention to explore with interested First Nations the option of moving forward with legislation that would allow private property ownership within current reserve boundaries.[39] This proposal, advanced by the First Nations Tax Commission, is discussed in greater depth later in the report.

G. What the Context Tells Us

This cursory review of the reserve land management framework hints at the special challenges presented when contemplating reforms. Although the *Indian Act* can frustrate and delay reserve economic development, it is also seen as affording First Nations certain protections, especially with regard to preserving the integrity of the reserve land base. This seeming contradiction was captured by Andrew Beynon, Director General, Community Opportunities Branch, AANDC, who noted that while many First Nations are desirous of full autonomy over the governance of their lands, others prefer not to terminate Canada's role in respect of those lands, considering that "Canada owes specific fiduciary obligations related to reserve lands."[40]

These conflicting roles, together with differing conceptions of the land, tenure arrangements and community capacity can intensify the complexities of reform. Despite these challenges, many First Nations are seeking to develop modern and professionally managed land management systems that will allow their communities to tap into outside investment as well as the wealth locked in their lands and resources. The next two sections summarize what the Committee heard in respect to some of the challenges confronting First Nations in developing reserve lands and their proposals for addressing some of those challenges.

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36 AANDC, Harper Government Opens Door to Greater First Nations Control over Lands and Resources, 25 March 2013.

37 Bill C-38, Jobs, Growth and Long-term Prosperity Act. See, in particular, Part 4-Division 46.

38 House of Commons Standing Committee on Finance, *Staying Focused on Canadian Jobs and Growth*, 1st Session, 41st Parliament, December 2011.

39 Government of Canada, Economic Action Plan 2012 - A Plan for Jobs, Growth and Long-Term Prosperity, March 2012.

40 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 24 November 2011, (Andrew Beynon, Director General, Community Opportunities Branch, AANDC).

PART II – WHAT THE COMMITTEE HEARD

The Committee's hearings, as well as its site visits, have enabled it to benefit from the insights of First Nations leaders, individuals, organizations and third party experts from across the country. The proceeding sections set out what we heard throughout the course of our study. In this section, we set out the testimony received in Ottawa, beginning with issues related to land and environmental management under the *Indian Act,* followed by alternatives to that regime; notably, the *First Nations Land Management Act* (FNLMA) and the proposed First Nations Property Ownership Act. Testimony related to land management capacity as well as the process for adding land to reserves is also set forth in this section. Issues raised during community site visits, for which transcripts are not available, have been summarized, and are reported separately in Part III of the report.

A. Land Management Under the Indian Act

The majority of First Nations in Canada manage their lands, with varying degrees of control and capacity, under the *Indian Act*. Witnesses appearing before the Committee suggested that the current *Indian Act* system of land management impedes the efficient management and administration of reserve lands and resources. First Nations are often unable to move at the speed of business and as a consequence lose time-sensitive economic opportunities.

Committee members were told that simple land transactions on-reserve can require multiple approvals and take up to five times longer to complete in comparison to transactions off-reserve, hindering economic investment and activity.[41] As noted by Chief Clarence Louie, Chair of the National Aboriginal Economic Development Board:

> Under the *Indian Act*, land management processes involving common activities such as leasing and registration are expensive, complex, and often extremely slow. This presents significant challenges for large-scale, land-based economic activity, such as major resource development.[42]

Commenting on the challenges of expediting land transactions under *Indian Act* processes, Chief Sharon Stinson Henry told the Committee:

> First Nations do not have an ability to move swiftly in developing their lands as a result of the restrictions that arise under the *Indian Act* and the red tape that comes with them.[43]

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41 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 12 June 2012, (André Le Dressay, Director, Fiscal Realities Economists Ltd).

42 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 15 March 2012, (Chief Clarence Louie, Chair, National Aboriginal Economic Development Board).

43 Ibid., (Chief Sharon Stinson Henry, Member, National Aboriginal Economic Development Board).

Witnesses also expressed concern that *Indian Act* policies and accompanying procedures are applied uniformly by departmental officials, irrespective of the circumstances, in a one-size-fits-all approach. Witnesses suggested that departmental policies, whether they relate to designations, leasing or additions to reserve (discussed below), need to be flexible and responsive. Christopher Devlin suggested that it is this inflexible application of policies, more so than the *Indian Act*, which represents the greater impediment to economic development on reserve lands and the cause of most delays. He remarked:

> The Act is there, but the policies I see are kind of one-size-fits-all. There's no proportionality between the project and the policy … Essentially, whether you're developing a corner store or a shopping centre, you have to follow the same policy. If you want to do a gas station or an LNG plant, you still have to go through the same policy to get that approved.[44]

(i) Leasing Reserve Lands

Witnesses were especially critical of the procedural requirements for leasing reserve lands to third parties — an important instrument for economic development. First Nation members holding Certificates of Possession (CPs) are required to obtain ministerial and band council approval if they wish to lease their land. The Department also requires community approval if the lease exceeds 49 years.[45] Likewise, a First Nation wishing to commercially develop "unallotted" reserve lands must do so through a formal designation process requiring the assent of a majority of the electors. In addition to these ratification procedures, the Department requires environmental assessments, surveys, project plans and appraisals for significant developments prior to lease execution.

The entire designation process could take several years to complete during which time a First Nation may have had to forego economic opportunities. Commenting on its complexity, Warren Johnson, President of New Road Strategies, observed that the process for designating lands for leasing:

> suffers from using the highly onerous *Indian Act* surrender provisions, in terms of voting process, ratification thresholds, and the bureaucratic management process. The result is … [t]he designation process will require a minimum of 2 years to complete and more often … at least 3 … and drafting a new lease can take up to two more years, for a total of five years — hardly the speed of business.[46]

Accordingly, while many witnesses indicated that leases are a useful and powerful tool for economic development, the transaction costs associated with obtaining leases on

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44 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 12 June 2012, (Christopher Devlin, Partner, Devlin Gailus Barristers and Solicitors).

45 Ibid. (John Gailus, Partner, Devlin Gailus Barristers and Solicitors).

46 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 1 May 2012, (Warren Johnson, President, New Road Strategies, as an individual).

reserve lands can be quite high. Some suggested changing the ratification procedures for designation votes to a simple majority of electors from the double majority requirement, as well as eliminating ministerial and possibly band council involvement in CP transactions, once allotted.[47] Representatives of the National Aboriginal Economic Development Board further suggested that the federal government can begin to increase the speed and effectiveness of all land transactions by setting and enforcing timelines and service standards for AANDC's reserve lands management processes.[48]

(ii) Regulating Certificates of Possession

Along with measures to simplify processes for leasing reserve lands, strengthening the security of tenure on reserve (i.e., clarifying, documenting and regulating interests in reserve land) was also mentioned by several witnesses. A key concern in this regard relates to CPs. As noted by Warren Johnson, the *Indian Act* does not provide an effective legislative mechanism for either First Nations or the federal government to regulate CP land use.[49] Witnesses indicated that this "regulatory vacuum" gives rise to many of the questionable land use activities currently found on-reserve. Donald Maracle, Chief of the Mohawks of the Bay of Quinte First Nation, explained:

> There are few restrictions for individual holders of certificates of possession in terms of how they use the resources on the land described in their certificate of possession … So if a band member has a certificate of possession, he may say he is going to open up a quarry on his land and it's going to operate 24/7. There could be noise levels. It might lessen the groundwater of people who depend on their wells. There may be concerns that it may be polluting the river. With the machinery running back and forth, what is the impact of the heavy machinery on the local roads? It's all those sorts of things.[50]

Witnesses who addressed this issue indicated that a mechanism under the *Indian Act* is required to allow for the effective management of CP lands, and as Chief Maracle further observed, "to pass and enforce band council resolutions to shut down operations if need be."[51]

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47 See, for example, House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 7 February 2012, (Christopher Alcantara, Assistant Professor, Department of Political Science, Wilfrid Laurier University, as an individual).

48 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 15 March 2012, (Chief Clarence Louie, Chairman, National Aboriginal Economic Development Board).

49 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 1 May 2012, (Warren Johnson, President, New Road Strategies, as an individual).

50 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 16 February 2012, (Chief R. Donald Maracle, Band No. 38, Mohawks of the Bay of Quinte).

51 Ibid.

(iii) Certainty of Tenure

The Committee also heard evidence regarding the need to clarify and document existing privately held interests in reserve lands. According to John Gailus and Christopher Devlin, First Nations, especially those entering the FNLMA, spend much of their time dealing with land disputes that arise from unsettled and divided interests with regard to who owns, or is entitled to own, a parcel of land. Referencing the Auditor General's 2009 audit on reserve land management, Frank Barrett of the Office of the Auditor General advised the Committee that: "we've been told of situations of a plot of land notionally being divided among dozens of descendants of the original CP holder to the point that it's virtually impossible to know who everyone is who owns it, let alone how to re-gather it."[52] Chief Clinton Phillips described the challenges facing his community of Kahnawá: ke, whose lands are 85% privately held, as follows:

> Every issue in Kahnawá: ke has to do with lands and lack of lands that we can access. Personally, in my family, my grandmother inherited land with her siblings, and because of undivided interests and the family, her grandparents' lot now has about 50 owners at last count. So somebody has to buy somebody out. And who's going to win? This undivided interest is just not working for us; it's just creating more of a headache, more layers on that onion.[53]

Christopher Devlin indicated that the challenge for communities wishing to undertake large-scale development is grappling with these "legacy issues" and suggests that they are best dealt with on a community-by-community basis rather than through legislation.[54] Christopher Alcantara, Assistant Professor in the Department of Political Science at Sir Wilfrid Laurier University, recommended that the federal government work with interested First Nations to formally document all customary land holdings and to develop band council resolution models that treat customary rights as binding written contracts that list comprehensively all the information about the land, who owns the land, a survey of the land, the types of activities that the band member is permitted to carry out on the land, and a clause that specifies under what conditions the band can expropriate the land and revoke the customary right. He also recommended establishing regional First Nation land adjudication committees, or courts, so that land allocation decisions and land dispute resolution decisions are made by an impartial legal body rather than by political bodies.[55]

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52 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 8 March 2012, (Frank Barrett, Principal, Office of the Auditor General of Canada).

53 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 15 May 2012, (Chief Clinton Phillips, Council Chief, Mohawk Council of Kahnawake).

54 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 12 June 2012, (Christopher Devlin, Partner, Devlin Gailus Barristers and Solicitors).

55 House of Commons, AANO, *Evidence*,1st Session, 41st Parliament, 7 February 2012, (Christopher Alcantara, Assistant Professor, Department of Political Science, Wilfrid Laurier University, as an individual).

(iv) Registering Interests in Reserve Land

Once clarified and documented, registering property rights in a title-based system was also proposed by some witnesses.[56] Witnesses suggested that inefficiencies affecting land registry systems on reserves are widely considered to be disincentives to economic development and impede outside investment. Currently, most interests in reserve lands are registered in the federal Indian Lands Registry System (ILRS), not in the provincial land title system. The ILRS has been criticized as lacking the necessary rigour to protect third parties' legal interests in land. In addition, the transaction costs can be significantly higher as the parties must search a number of historical documents to ascertain effective title.

Given the effect of these uncertainties on potential investors, some have suggested that First Nations are often unable to realize the full value and benefit of their lands. In his work with the economic consulting firm Fiscal Realities, André Le Dressay, Director of Fiscal Realities Economists Ltd., concluded that the cost of establishing a marketable property right on First Nation land is at least four times more expensive than establishing the same property right off First Nation lands.[57] Commenting on the limitations of the ILRS, Chief Clarence Louie told the Committee:

> [T]he Indian land registry is inaccurate, lacks clear standards, and is unable to guarantee certainty of land title for landholders. This is compounded by the fact that the Indian land registry does not have formal regulations that govern the system, that registering certain transactions can take anywhere from months to years, and that the system allows for multiple descriptions and ownerships to be registered against a single property.[58]

To address these deficiencies, Christopher Alcantara and Gordon Shanks recommend moving away from the current deeds-based registry toward a Torrens style title system which provides certainty of title in the registry, a system of priorities for ranking competing interests, and assurance that the registered owner is the true owner of the title.

(v) Restrictions on Transferability of Title

Restrictions on the transferability of title (i.e., CP holders are permitted to sell or transfer their interest in land only to other band members) as well as the use of property as collateral under the *Indian Act* were also seen by some witnesses as potentially undermining the economic value of First Nations' lands. With regard to the latter, some witnesses indicated that a key obstacle to reserve economic development arises from

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56 Testimony to this effect was specifically provided by Gordon Shanks, Clarence Louie, Christopher Alcantara, André Le Dressay and Clarence T. Jules.

57 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 12 June 2012, Dr. André Le Dressay, Director, Fiscal Realities Economists Ltd.

58 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 15 March 2012, (Chief Clarence Louie, Chairman, National Aboriginal Economic Development Board).

section 89 of the *Indian Act* which provides a broad exemption from pledge and seizure of the real and personal property of an "Indian or band" situated on reserve.

According to Chief Clarence Louie of the Osoyoos Indian Band, "by explicitly prohibiting the mortgaging of property on reserve," section 89 of the *Indian Act*, "removes one of the key drivers of small business development."[59] The Committee heard that banks are reluctant to provide financing to First Nations given the issues around security and rights of seizure resulting from the restrictions placed on the use of property as collateral by the *Indian Act*. This has led to a situation where securing financing for investment in economic development activities on reserve can be challenging.[60]

Christopher Alcantara indicated that while section 89 constrains band members from obtaining mortgages on the basis of their reserve lands to build housing or start a business, some First Nations have found innovative ways to get around these obstacles, for example, "by transferring their CP to the band council, for instance, for the life of the mortgage or the loan."[61] Importantly, leasehold interests on designated lands can be mortgaged and transferred to non-First Nations members.

(vi) Land Use Planning

A number of witnesses appearing before the Committee highlighted the important linkages between sustainable community economic development and land use planning. Chief Tsannie of the Hatchet Lake Denesuline First Nation described land use plans as a "tool for good governance and decision-making," in relation to the conservation, development, and management of lands and resources.[62] Effective land use plans, we were told, balance environmental protection, promote social and cultural values, and maintain opportunities for economic development.[63] They also facilitate the orderly development of lands as well as provide an important mechanism for formal community engagement.

Departmental officials advised that "without strong land use planning, it is difficult to efficiently manage residential, commercial and industrial development on reserve lands".[64] Despite the importance of such plans, the *Indian Act* provides limited land use planning

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59 Ibid.

60 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 3 April 2012, (Clarence T. Jules, Chief Commissioner and Chief Executive Officer, First Nations Tax Commission).

61 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 7 February 2012, (Christopher Alcantara, Assistant Professor, Department of Political Science, Wilfrid Laurier University, as an individual).

62 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 15 May 2012, Bartholomew J. Tsannie, Chief, Hatchet Lake Denesuline First Nation).

63 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 24 November 2011, (Paula Isaak, Director General, Natural Resources and Environment Branch, AANDC).

64 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 17 November 2011, (Andrew Beynon, Director General, Community Opportunities Branch, AANDC).

authority to First Nations.[65] Importantly, by-laws enacted under section 81 do not require community approval and can be disallowed by the Minister.

While some First Nations have developed basic municipal-type zoning and land use by-laws, the Committee heard evidence that First Nations do not have the authority under the Act to undertake comprehensive land use planning and zoning. Reflecting on the limitations of the *Indian Act*'s land use provisions, Andrew Beynon told us that:

> First Nation communities typically do not have extensive land use planning facilitating orderly development and assisting with environmental protections and controls. There is a limited authority over zoning in the *Indian Act* that allows first nations to make zoning by-laws, but few first nations have established those zoning by-laws and none have the comprehensive systems for developing, updating, administering, and enforcing zoning undertaken in other communities in Canada.[66]

As a result of the limited land use planning authority under the *Indian Act*, many First Nations are challenged in their ability to harmonize their land use by-laws with neighbouring municipalities or identify areas where cooperation would be beneficial.[67] Underlining this point, Jennifer Copegog from the National Aboriginal Lands Managers Association, stated:

> If you look at neighbouring municipalities, they govern and manage their lands based on a land-use plan; first nations don't have that right now. There may be some first nations out there who have land-use plans, but these plans are probably not as complex as what a municipality would have. [68]

The Committee recognizes that some First Nations are looking for more powerful land use planning tools. Because such plans can provide an important foundation for community economic development and management of conservation objectives, we were encouraged to learn that AANDC, through a pilot project, is working with selected communities to support the development of high-quality, comprehensive land use plans, consistent with community values.

(vii) Addressing the On-Reserve Environmental Regulatory Gap

First Nations individuals residing on reserves typically do not benefit from the same level of protection from environmental risks as those residing off-reserve. This gap in

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65 Specifically, section 81 of the *Indian Act* provides First Nations with by-law making authority for: "dividing of the reserve or a portion thereof into zones and the prohibition of the construction or maintenance of any class of buildings or the carrying on of any class of business, trade or calling in any zone".

66 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 17 November 2011, (Andrew Beynon, Director General, Community Opportunities Branch, AANDC).

67 House of Commons, AANO, E*vidence*, 1st Session, 41st Parliament, May 1, 2012, (Warren Johnson, President, New Road Strategies).

68 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 2 February 2012, (Jennifer Copegog Chair, Ontario Aboriginal Lands Association; Director, National Aboriginal Lands Managers Association).

environmental management stems, in part, from the fact that constitutional authority for the environment is shared between the federal and provincial governments. However, due to federal legislative authority for "Indians and lands reserved for Indians," provincial environmental laws relating specifically to lands and resources do not apply on reserves. This places the onus on the federal government to establish the legislative base for environmental protection and management on reserve lands.

According to Ronnie Campbell, Assistant Auditor General, Office of the Auditor General of Canada, "while the federal government has the authority to develop regulations on reserves, it has rarely used this authority to mitigate environmental threats that are regulated off reserves by provincial governments."[69] Accordingly, few federal regulations are currently in place to protect the environment on reserves.[70] Further, the by-law authority of First Nations governments to step into this regulatory breach is limited under the *Indian Act*. Warren Johnson described the Act's limitations in this regard as follows:

> While First Nations have some local bylaw, business regulation, and land-use planning authority under the *Indian Act*, which they could use for environmental protection and land and resource management purposes, these provisions are antiquated, unfunded, and have penalty and enforcement provisions that are totally inadequate.[71]

This situation has given rise to an environmental regulatory gap on reserve. John Moffet, Director General of Legislative and Regulatory Affairs at Environment Canada, told the Committee that "reserve lands generally do not benefit from the full range of environmental protection that applies off reserve."[72]

Repeatedly, the Committee heard that the penalties under the *Indian Act* — fines not exceeding $1,000 — for environmental violations were sufficiently weak as to be a minimal deterrent. Similarly, Chief Sharon Stinson told the Committee that:

> [T]here are few federal regulations in effect to protect the environment on reserves. As a result, residents on First Nations reserves do not have the same environmental protection that other Canadians do.[73]

First Nation witnesses stressed that the sustainable economic development of their communities depends on a clean and healthy environment and that addressing the on

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69 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 13 December 2011, (Ronnie Campbell, Assistant Auditor General, Office of the Auditor General of Canada).

70 See, in particular, testimony provided by Laura Edgar, Scott Vaughan and John Moffet on 8 December 2011, 8 March 2012 and 13 December 2011, respectively.

71 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 1 May 2012, (Warren Johnson, President, New Road Strategies, as an individual).

72 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 13 December 2011, (John Moffet, Director General, Legislative and Regulatory Affairs, Department of the Environment).

73 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 15 March 2012, (Chief Sharon Stinson Henry, Member, National Aboriginal Economic Development Board).

reserve regulatory gap is considered essential to attracting investment. Commenting on the relationship between environmental regulations and economic development, Chief Maracle told the Committee:

> [l]ack of clear environmental regulations on reserve could also act as a deterrent for proponents. Without clarity on what regulations apply, economic development opportunities may be missed in the confusion.[74]

Warren Johnson told the Committee that the federal approach to addressing the on reserve environmental gap has been to work with First Nations on specific areas of legislative and regulatory development.[75] He suggested that this incremental approach is time consuming and could fail to achieve the objective of ensuring that First Nations enjoy the same level of environmental protection as non-First Nations communities. He proposed replacing the sector-by-sector approach with a single, national First Nations environmental protection act. He told the Committee that: "Given the failings of the incremental approach, it now appears time to fill the environmental gap as a comprehensive package."[76]

On the other hand, witnesses such as Laura Edgar of the Institute on Governance cautioned that comprehensive environmental legislation may not resolve the range of environmental issues on reserve. She noted that: "Putting legislation in place is very time consuming and is not a quick fix, by any stretch, and it's costly to actually implement a comprehensive regulatory regime."[77] She further argued that the environmental management gap is not just about enacting a set of regulations. Rather, Ms. Edgar suggested that an effective environmental management regime must also include a number of other elements, including approvals, standards, monitoring and inspection as well as the capacity within the First Nations to do all of these things. She told the committee that:

> [t]here's no point in having regulatory regimes if the First Nations don't have the capacity and the resources to meet those regimes because they're immediately going to be in non-compliance. So I think the first priority has to be building the capacity for them to actually do what they need to do, now, to manage effectively. Then, further legislation in some sort of collaborative process is the best approach.[78]

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74 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 16 February 2012, (Chief R. Donald Maracle, Band No. 38, Mohawks of the Bay of Quinte).

75 Examples provided by Mr. Johnson included legislative initiatives such as the *First Nations Land Management Act* and the *First Nations Commercial and Industrial Development Act.*

76 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 1 May 2012, (Warren Johnson, President, New Road Strategies, as an individual).

77 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 8 December 2011, (Laura Edgar, Vice-President, Partnerships and International Programming, Institute on Governance).

78 Ibid.

This view was supported by officials from Environment Canada who also cautioned against addressing environmental challenges through the use of regulations alone. John Moffet told the Committee that: "Developing practical and properly resourced solutions is significantly more challenging than either identifying the gaps themselves or coming up with a particular regulatory solution."[79] He added that because First Nations do not necessarily share the same challenges or priorities, they may be ill-served by uniform federal regulations.

Both Environment Canada and the Institute on Governance stressed that regulations alone are unlikely to resolve the environmental challenges on reserves. In their view, developing the capacity of First Nations to manage their environmental risks in "ways that account for their own land use and commercial and industrial development goals"[80] may be more important than regulations.

Several First Nations witnesses also highlighted the need to build and support First Nation environmental governance capacity as a key part of the solution going forward. Chief Sharon Stinson Henry stated:

> The federal government needs to properly resource first nations to deal with our environmental management needs, including providing appropriate financial, technical, and other resources.[81]

Finally, the officials from the Office of the Auditor General of Canada noted that as First Nations take on more environmental responsibilities it will be critical to ensure "that expertise [and] capacity is in place so people with responsibilities can fulfil those responsibilities."[82]

B. Alternatives to the Indian Act Land Management Regime

(i) The First Nations Land Management Act

The *First Nations Land Management Act* (FNLMA) removes many of the encumbrances associated with the land management provisions of the *Indian Act* by providing participating First Nations with a measure of control over reserve lands and resources, and by ending ministerial discretion under the *Indian Act* over land management decisions on reserves.[83] Lands under the FNLMA retain their status as

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79 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 13 December 2011, (John Moffet, Director General, Legislative and Regulatory Affairs, Department of the Environment).

80 Ibid.

81 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 15 March 2012, (Chief Sharon Stinson Henry, Member, National Aboriginal Economic Development Board).

82 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 13 December 2011, (Ronnie Campbell, Assistant Auditor General, Office of the Auditor General of Canada).

83 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 17 May 2012, (Gordon Shanks, as an individual).

reserve lands and therefore "cannot be sold, surrendered or expropriated for any provincial purpose."[84]

According to witnesses, the First Nations Land Management (FMLM) regime represents a modern institutional framework to more effectively address contemporary land management issues — such as land use planning, environmental management, and zoning by-laws — than what is currently possible under the *Indian Act*. Chief Austin Bear noted that the tools available under the FNLM regime "are far clearer and far more productive for managing our lands and resources."[85] Similarly, departmental officials indicated that the First Nations land management framework has proven to be a powerful tool for "modernizing" First Nations land management and unlocking the economic potential of reserve lands.[86]

Among the factors contributing to the success of the FNLMA is the provision of local decision-making authority, allowing First Nations to better move at the "speed of business." Gordon Shanks explained:

> [T]he regime created under the lands act is local. It creates local decision-making. Generally, that translates into speed, which is highly desirable in most economic instances. It provides the capacity to be nimble in terms of local circumstances. When you are operating under a national regime, such as the *Indian Act*, nimbleness is not something that is very common … The lands act, by virtue of putting the decision-making at the community level, really does provide some significant benefits. Communities that are using it are showing some of those.[87]

Similarly, Chief Robert Louie, Chair of the First Nations Lands Advisory Board (FNLAB), told the Committee that an independent study by KPGM Associates found that First Nations operating under the FNLM regime are able to complete land transactions significantly faster and at a lower cost than is experienced under the *Indian Act* system. He stated:

> We are able to respond to the business at the speed of business and not wait six months or two years for decision-making with the Department of Indian Affairs. … A recent KPMG study … found that we can manage our land matters and handle land transactions better, more efficiently and at a lesser cost, than the Department of Indian Affairs people can.[88]

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84 Lang Michener LLP, "Best Practices in First Nations' Land Administration Systems," 2007, p. 10.

85 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 1 March 2012, (Chief Austin Bear, Chair, First Nations Lands Management Resource Centre).

86 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 6 October 2011, (Andrew Beynon, Director General, Communities Opportunities Branch, AANDC).

87 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 17 May 2012, (Gordon Shanks, as an individual).

88 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 20 October 2011, (Chief Robert Louie, Chairman, First Nations Land Advisory Board).

Although a study conducted by André Le Dressay found that the costs of completing a project on favourably situated First Nation lands were four to six times higher than they were on comparable off-reserve lands, he told the Committee that the "FNLMA could be very effective in closing that gap" and that some First Nations have used it to effectively do so.[89]

Witnesses further indicated that the FNLMA facilitates developments that may not have been possible under the *Indian Act*. Phillip Goulais, Director of the FNLAB and former Chief of the Nipissing First Nation (one of the original FNLMA First Nations), told the Committee that investment deals that would have taken years to conclude under the *Indian Act* can be done within a month under the FNLMA. By way of example, he told the Committee:

> [I]n 1989 … we lost 16 opportunities for development, because it took us about two years [under the *Indian Act*] to formalize a relationship with a developer. Fast-forwarding to where we are today, we have business deals that are done within hours over a meeting. We can agree in principle on where we're going. Within the month we can formalize the final instruments to move forward with.[90]

Several witnesses noted that the ability to expeditiously complete land transactions under the FNLMA in comparison with the *Indian Act* land management regime, such as permits and leases, is a critical feature of the regime. This was particularly important with respect to lease approvals. Under the *Indian Act*, leases are negotiated by the Department, on behalf of First Nations, and require ministerial approval. First Nations under the FNLMA have statutory authority to negotiate their own leases, thereby significantly reducing the time and costs associated with this type of land transaction. Chief Stinson Henry indicated that where residential leases once took her community a year or two to complete, these are now finalized within a couple of days.[91]

Not only was the FNLM regime seen as a valuable tool for supporting economic development, a number of witnesses indicated that it also helped to build the governance capacity essential for moving toward self-governance. Commenting on the FNLM regime as a step on the way to eventual self-government, Chief Louie, whose community of Westbank has gone on to sign a self-government agreement, told the Committee:

> It is a stepping stone. The advantage of going through this incremental form of self-government with land management provides the first nation with the opportunity to get its feet wet, so to speak, to say that it now has the experience….

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89 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 12 June 2012, (André Le Dressay, Director, Fiscal Realities Economists Ltd).

90 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 20 October 2011, (Philip Goulais, Director, First Nations Land Advisory Board).

91 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 15 March 2012, (Chief Sharon Stinson Henry, Member, National Aboriginal Economic Development Board).

> In many communities across this country the ideal situation would be to take it step by step, for obvious reasons–to get the experience, the understanding; then everything starts to flow.[92]

In this sense, the FNLM regime was characterized by some witnesses as a critical aspect of nation-building. John Paul, Executive Director, Atlantic Policy Congress of First Nations Chiefs Secretariat, remarked that the FNLMA provides First Nations with the opportunity to develop land regimes in a manner consistent with their values and vision.[93] More broadly, Vice-Chief Jody Wilson-Raybould observed:

> [L]and management and jurisdictional authority over what happens on reserve land is one aspect of overall governance that our communities want to undertake in moving from the *Indian Act* to full self-determination. Our communities across the country are on various parts of the continuum and want to rebuild our nations.[94]

In addition, by providing First Nations with the ability to develop comprehensive environmental laws, Gordon Shanks told the committee that the FNLMA can provide significant economic benefits to participating communities. While several witnesses acknowledged that the FNLMA allows First Nations to manage their lands more competitively, others expressed concern that the environmental obligations associated with the regime can act as a barrier to First Nations' participation. For example, in response to a query regarding Kahnawá:ke decision not to enter the FNLMA, Debbie Morris, Associate Director of the Lands Unit, Mohawk Council of Kahnawá:ke e told the Committee:

> [A]t that time there were concerns with the environmental requirements that were in there and the liabilities that would have fallen onto Kahn awake–and, of course, we didn't have the funding to be able to carry forth what needed to be done. So that played a big role in why it was not followed up.[95]

Similarly, officials from the Office of the Auditor General of Canada observed that the potential environmental liabilities under the regime can act as a "stumbling block to entering the FNLMA,"[96] adding that as First Nations take on more responsibility, it is essential that the expertise and capacity be in place to effectively manage those responsibilities.

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92 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 20 October 2011, (Chief Robert Louie, Chairman, First Nations Land Advisory Board).

93 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 16 February 2012, (John Paul, Executive Director, Atlantic Policy Congress of First Nations Chiefs Secretariat).

94 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 1 November 2011 (Vice-Chief Jody Wilson-Raybould, Regional Chief, British Columbia, Assembly of First Nations).

95 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 15 May 2012, (Debbie Morris, Associate Director, Lands Unit, Mohawk Council of Kahnawake).

96 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 8 March 2012, (Frank Barrett, Principal, Office of the Auditor General of Canada).

However, given the economic benefits of the FNLM regime, the majority of witnesses recommended that steps be taken to adequately resource it in order to support participating communities as well as to address the backlog of First Nations seeking to opt into the framework.[97]

Representatives from the Assembly of First Nations, the National Aboriginal Economic Development Board as well as the First Nations Lands Advisory Board urged parliamentarians to facilitate greater First Nations' access to this initiative. Departmental officials advised that while as many as 80 First Nations have formally expressed an interest in entering the FNLM regime, funding limitations have constrained the number of new entrants.[98] Officials also advised that they are working with First Nations on options for changing the federal funding formula to allow for new entrants.

Finally, Chief Robert Louie emphasized that investing in the FNLM regime yields economic benefits not only for First Nations, but for neighbouring communities and businesses. "This is really an investment," he remarked, "and it will be a tenfold return to Canada and to the communities at large."[99]

(ii) The Proposed First Nations Property Ownership Act

Currently, under the *Indian Act* and the FNLM regime, neither First Nation members nor non-members can acquire a fee simple interest in reserve land. Rather, reserve lands are set aside for the use and benefit of a First Nation. Legal title to the land, however, remains with the Crown. The Committee heard evidence from Clarence T. (Manny) Jules who is spearheading an initiative with interested First Nations to create fee simple property rights on First Nations lands.

The proposed First Nations Property Ownership Act (FNPOA) is presented as a legislative alternative to both the *Indian Act* and First Nations Land Management regimes. Under the proposed FNPOA, legal title to reserve lands would be transferred from the Crown to First Nations. The First Nation would then have the authority to transfer freehold interest (or individual fee simple ownership rights) to individual band members, or others, if so desired. It would then be possible for First Nation individuals' fee simple interest to be transferred, mortgaged or sold to non-Aboriginal people and be seized under realization proceedings. All interests would be registered in a new national First Nations-controlled and administered Torrens land registry system. The proposed legislation would be optional for First Nations. Regardless of who holds the fee simple interest, the underlying title or reversionary right is intended to remain with the First Nation.

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97 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 15 March 2012, (Chief Sharon Stinson Henry, Member, National Aboriginal Economic Development Board).

98 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 6 October 2011, (Andrew Beynon, Director General, Communities Opportunities Branch, AANDC).

99 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 1 March 2012, (Chief Robert Louie, Chairman, First Nations Land Advisory Board).

According to Manny Jules, the potential benefits of the FNPOA include providing investors with tenure certainty, reducing the transaction costs associated with the *Indian Act*, and providing First Nation individuals with an opportunity to access financing for housing without requiring ministerial or First Nation guarantees. He told the Committee:

> FNPO will make First Nation lands and individuals more productive. The legislation will reduce tenure uncertainty and investor uncertainty. It will reduce the costs associated with business transactions such as issuing a mortgage, transferring title, and securing financing. It will confirm and help implement first nation jurisdiction and enable open markets.[100]

Apart from the positive testimony provided by the leading proponents of the initiative, those First Nations witnesses who spoke directly to the FNPOA did not endorse the initiative, though almost all acknowledged the right of other First Nations to choose this alternative. Some witnesses indicated that the FNPOA would not necessarily benefit rural, remote or isolated First Nations communities where demand for First Nation land is limited. Christopher Alcantara told the Committee that:

> [i]n remote areas fee simple rights aren't going to be a solution … it will be for certain First Nations, especially those that are in locations that can benefit from the use of fee simple. So we're talking about places where there's demand and interest in First Nations land within the First Nation but also outside of it, especially reserves that are beside cities for instance or municipalities. This is a place where fee simple ownership could be utilized in a lot of ways.[101]

Similarly, Chief Gilbert Whiteduck of the Kitigan Zibi Anishinabeg First Nation suggested that economic development in his community had less to do with the legal status of their land than with the health of the regional economy. He remarked:

> What I can say of what we've been able to manage in a community in developing a certain level of economic activity, from private enterprise to community enterprise, economic development on a territory is location, location, location. We are located near a town that is having a hard time because of the forestry industry downfall at this point. Whether we would be in control of our lands or not in a different way would not give us any more economic development. The area is depressed, and there are opportunities down the line.[102]

Christopher Devlin and John Gailus also suggested that the geography of most First Nations may explain the limited support to date for the initiative. Christopher Devlin observed:

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100 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 3 April 2012, (Clarence T. Jules, Chief Commissioner and Chief Executive Officer, First Nations Tax Commission).

101 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 7 February 2012, (Christopher Alcantara, Assistant Professor, Department of Political Science, Wilfrid Laurier University, as an individual).

102 Ibid., (Chief Gilbert W. Whiteduck, Algonquin Anishinabe Nation, Kitigan Zibi Anishinabeg First Nation).

> For the communities that are in urban and semi-urban areas or they're on a major highway and there's easy transportation access, then I think the kinds of questions about ownership and property ownership become more relevant. But most first nations aren't there, and I think that may be one reason why you're not seeing an overwhelming number coming forward saying we want that. As my partner said, I think the ones that are blessed with a certain geographic advantage, are the ones that are rightfully driving this debate.[103]

Aside from potential geographic limitations, Regional Chief Angus Toulouse spoke of the tension between indigenous perspectives and western values with regard to land, noting that for many First Nations land is not conceived as a commodity. He told the Committee that:

> The commodification of land was at one time foreign to our way of thinking and certainly goes against our traditional way of thinking … The beliefs and value system underpinning the current Canadian economic model are not necessarily shared by the indigenous peoples in this country. The system is based on private property ownership, the buying and selling of lands and amongst individuals and corporations. The idea of lands being held collectively for the benefit of a collective is an alien idea in this world view. This detachment from the land is an alien idea to the indigenous world view. Essentially, this is the core of the first nation's land ownership and designation conflict.[104]

In addition, in allowing for the transfer and sale of freehold interests in reserve land to third parties, some witnesses expressed concern that the FNPOA could affect the integrity of the reserve land base. Chief Whiteduck told the Committee that regardless of who owns underlying title, "we don't want to lose any more of our reserve in any which way."[105]

While witnesses acknowledged that individual fee simple ownership could increase investor confidence and ultimately enhance economic growth in First Nations, it was suggested that sustainable economic development could occur without privatizing reserve lands.[106] National Chief of the Assembly of First Nations, Shawn A-in-chut Atleo, told the Committee that:

> We have First Nations that are doing very well in unlocking their economic potential and doing so by still holding their land in common and findings ways to unleash that economic potential.[107]

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103 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 12 June 2012, (Christopher Devlin, Partner, Devlin Gailus Barristers and Solicitors).

104 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 14 February 2012, (Chief Angus Toulouse, Ontario Regional Chief, Chiefs of Ontario).

105 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 7 February 2012, (Chief Gilbert W. Whiteduck, Algonquin Anishinabe Nation, Kitigan Zibi Anishinabeg First Nation).

106 See, for example, testimony of Regional Chief Angus Toulouse on 14 February 2012.

107 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 1 November 2011, (National Chief Shawn A-in-chut Atleo, Assembly of First Nations).

Observing that many First Nations may be reluctant to opt into this legislative scheme, at least initially, Warren Johnson stressed the value of strengthening existing instruments (i.e., leases), and tools, which he argues have not been properly used, commenting that:

> That's not to say if a First Nation's preference is to get into a fee simple arrangement they shouldn't be doing that. My concern … is that in the current situation there are tools, with adequate resourcing and authorities, that First Nations could be using, which are satisfactory and which might be satisfactory to a large number of first nations, and certainly are satisfactory to some of the major economies in the world.[108]

Similarly, Gordon Shanks noted that although First Nations operating under the FNLMA are prohibited from selling reserve lands, "it does not appear to be a significant barrier to economic development at this time."[109]

C. Land Management Capacity

(i) Departmental Capacity to Manage and Process Land Transactions

A number of witnesses appearing before the Committee suggested that AANDC lacks the internal resources (human and financial) to effectively and expeditiously manage reserve land transactions. They remarked that departmental capacity has not kept pace with either the complexity or increasing number of transactions conducted on First Nations' reserve lands. Chief Clarence Louie told the Committee:

> I think of British Columbia, where there are 1,500 Indian reserves; you have a staff at the INAC office you can count on one hand looking after all the leases and all the new leases in the hopper in the province of British Columbia.[110]

In terms of the volume of land transactions handled by AANDC, departmental officials told us that in the last five years the Department has negotiated about 44,000 leases, and had almost 40,000 legal land transactions registered during that same time period. This significant volume of activity is overseen and administered by approximately 200 individuals. Not surprisingly, the lands management capacity at AANDC was identified by some as representing an even greater obstacle to economic development than the *Indian Act*.[111]

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108 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 1 May 2012, (Warren Johnson, President, New Road Strategies, as an individual).

109 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 17 May 2012, (Gordon Shanks, as an individual).

110 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 15 March 2012, (Chief Clarence Louie, Chairman, National Aboriginal Economic Development Board).

111 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 7 February 2012, (Chief Gilbert W. Whiteduck, Algonquin Anishinabe Nation, Kitigan Zibi Anishinabeg First Nation).

Similarly, Warren Johnson observed that: "Today, INAC is even more the problem than the *Indian Act*, due to underfunding of its own operations and those of First Nations."[112] Some witnesses suggested that because of internal capacity challenges, the Department is unable to respond to First Nations land transaction requests in a timely manner, resulting in delays having negative implications for successful economic development. John Gailus told the Committee that:

> At least in terms of the *Indian Act*, economic development isn't a priority for AANDC … Both human and financial resources aren't being allocated to deal with these sorts of issues. It's not necessarily the fault of the individuals who are there working away. They have heavy workloads. These human and financial resources need to be brought to task if First Nations' economic development is to be successful.[113]

Chief Whiteduck described the challenges facing First Nations when attempting to process their land transactions through the Department. He indicated that:

> The big difficulty has always been the bureaucracy of Indian and Northern Affairs Canada — the slowness of the machine to provide responses to questions, approvals, and that kind of thing. We're often ready to move very quickly. It's really the machinery. Usually what we get back is that they are overloaded and over-worked. All of these things are told to us. Then, they tell us they don't work in trying to deal with issues in months, but are looking at issues in years. That's very alarming. Business has to move forward. That's one of those barriers that somehow could be quickly removed to allow communities to move forward.[114]

Leona Irons, Executive Director of the National Aboriginal Lands Managers Association suggested that as First Nations become more sophisticated in land management and as the transactions become more complex, it will require a higher level of expertise within the lands management sections of the Department. She stated:

> As we ourselves raise the professional standards, our colleagues at the regional headquarters also have to be on equal ground. It seems as though they are limited as well in their funds to build capacity.[115]

Of potential concern, the Committee also heard testimony that because of the time it takes to process land transactions, some First Nations are bypassing the Department entirely, choosing not to register their land-related activities. According to Warren Johnson, a recent study of reserve land transactions found that a large proportion of these activities

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112 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 1 May 2012, (Warren Johnson, President, New Road Strategies, as an individual).

113 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 12 June 2012, (John Gailus, Partner, Devlin Gailus Barristers and Solicitors).

114 House of Commons, AANO, *Evidence*,1st Session, 41st Parliament, 7 February 2012, (Chief Gilbert W. Whiteduck, Algonquin Anishinabe Nation, Kitigan Zibi Anishinabeg First Nation).

115 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 2 February 2012, (Leona Irons, Executive Director, National Aboriginal Lands Managers Association).

are not registered in the Indian lands registry or involved no federal approvals. Specifically, he indicated that approximately "80% of all individual/family allotments are done outside the *Indian Act*; 50% of total band leasing is unregistered; and 66% of all short-term usage of reserve lands, like for gravel pits, garbage dumps, etc., is not federally regulated."[116] He went on to add that with "neither First Nations nor AANDC and Environment Canada having the necessary legislative authority or resources to manage reserves to a standard anywhere near comparable to that for other communities in Canada … the problem can only get worse."[117]

The extent of the Department's ability to properly enforce federal environmental regulations on reserve, and resulting environmental implications, was also raised by some witnesses. In testimony to the Committee, officials from the Office of the Auditor General indicated that their audit found that the Department was ill-equipped to adequately monitor and enforce federal environmental regulations on reserves. Ronnie Campbell told the Committee that:

> Aboriginal Affairs and Northern Development Canada has done little to monitor and enforce compliance with the regulations that do exist. For example, while there are regulations under the *Indian Act* that require a permit to be issued by the department for anyone wishing to operate a landfill site on reserve lands, we found that the department has issued few permits and is not equipped to conduct inspections, monitor compliance, or enforce regulations.[118]

Similarly, Scott Vaughan, Commissioner of the Environment and Sustainable Development, advised the Committee that while the federal government was expected to have a compliance rate of 60% of inspections for regulations that are in place, the rate was only 13%.[119]

(ii) Building First Nations Land Management Capacity

According to several witnesses, as First Nations move along the land management continuum it is increasingly important to ensure that the expertise is in place to fulfil the additional responsibilities transferred to them by the federal government as well as to mitigate against any potential risks and liabilities. In her appearance before the Committee, Jody Wilson-Raybould remarked that, "economic development and opportunities will come from the establishment of good governance capabilities and capacities within our

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116 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 1 May 2012, (Warren Johnson, President, New Road Strategies, as an individual).

117 Ibid.

118 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 13 December 2011, (Ronnie Campbell, Assistant Auditor General, Office of the Auditor General of Canada).

119 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 8 March 2012, (Scott Vaughan, Commissioner of the Environment and Sustainable Development, Office of the Auditor General of Canada).

communities."[120] In this regard, the Committee heard that training First Nations land managers is critical if communities are going to build capacity required to effectively manage their lands. According to Chief Robert Louie:

> Capacity-building is a very significant issue. With the transfer of responsibility for land management to our first nations, our communities have continually requested help in building capacity in our communities. We need trained land managers in order to assist us in that decision-making authority. It is something I want to emphasize, because it's clearly needed.[121]

Similarly, Jennifer Copegog, Chair of the Ontario Aboriginal Lands Association and Director of the National Aboriginal Lands Managers Association, told the Committee that:

> You need a highly qualified individual with clearly defined and well-developed competencies who can lead their community to proceed into greater responsibility and autonomy over their lands management.[122]

In their appearance before the Committee, officials from the Office of the Auditor General noted several challenges experienced by land managers in accessing and fulfilling training requirements. It was suggested that there are barriers to land management training opportunities, including inadequate funding by AANDC for its land management training programs and the distance and time that can be required to attend training programs.

In addition to these concerns, representatives of the National Aboriginal Lands Managers Association noted that, under its program, the Department only funds one lands manager per community. According to Joe Sabattis, Chair, Atlantic Region Aboriginal Lands Association and Director, National Aboriginal Lands Managers Association:

> With regard to the training itself, there's a problem we're having at the first nation level. We send our individuals to school, the Department of Aboriginal Affairs pays for it, and if the person dies in office, moves on, or retires, then it's the responsibility of the band to incur the added expense of sending the next land manager to school. They have to cover their tuition, their travel, and all of their stuff, and it's very hard on them.[123]

Training provided by the First Nations Lands Management Resource Centre for FNLMA First Nations did not appear to be similarly constrained as most courses are provided online and can be accessed by more than one individual per community.

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120 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 1 November 2011, (Vice-Chief Jody Wilson-Raybould, Regional Chief, British Columbia, Assembly of First Nations).

121 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 20 October 2011, (Chief Robert Louie, Chairman, First Nations Land Advisory Board).

122 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 2 February 2012, (Jennifer Copegog, Chair, Ontario Aboriginal Lands Association; Director, National Aboriginal Lands Managers Association).

123 Ibid., (Joe Sabattis, Chair, Atlantic Region Aboriginal Lands Association; Director, National Aboriginal Lands Managers Association).

Representatives from the Resource Centre and the National Aboriginal Lands Management Association stressed the importance of ensuring that adequate resources are available to support First Nations land management capacity. According to Ronnie Campbell, Assistant Auditor General, the "department provides too little access to training for First Nations in comparison with the land management responsibilities it is transferring to them if they operate under either of these regimes."[124] This view appears to be shared by representatives of both organizations. Julie Pellerin suggests that for National Aboriginal Lands Management Association:

> Capacity has always been an issue and always will be. We have received much more funding for our first nations, which we appreciate, but it's still not enough to cover all the gaps within those capacities.[125]

On this issue, Dr. Graham Powell of the Resource Centre noted that Canada's obligations under the First Nations Land Management Framework Agreement are to ensure that First Nations have the capacity to transition from the *Indian Act* and to develop their land codes. He stated: "If Canada doesn't support the training and the capacity-building, then it's not meeting its obligation under the framework."[126]

The Committee also heard evidence concerning the importance of ensuring that First Nations have access to Geographic Information System (GIS) capacity, especially as they begin to develop comprehensive land use plans. Representatives of the Saskatchewan Aboriginal Land Technicians indicated that all 74 Saskatchewan First Nations could be trained on GIS software for about $260,000, but that financially, even that amount is challenging for them. According to Aaron Louison, Director, Chair of the Saskatchewan Aboriginal Lands Technicians:

> I couldn't find any program that would give us that kind of money to train our First Nations land managers to utilize this software. The benefits of using the software are endless. They could do a lot with that software, but financially we can't do it. I can't even find an organization to help us with that kind of funding for that software.[127]

Given the importance of effective land use planning for the sustainable management and economic development of reserve lands and resources, witnesses, such as the National Aboriginal Lands Managers Association, highlighted the benefits of making GIS technology and training more readily available to First Nations. Leona Irons remarked that First Nations need this kind of technology, adding that it is a "decision-making tool and

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124 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 13 December 2011, (Ronnie Campbell, Assistant Auditor General, Office of the Auditor General of Canada).

125 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 3 May 2012, (Julie Pellerin, Manager, Support Services, First Nations Lands Management Resource Centre).

126 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 1 March 2012, (Graham Powell, Executive Director, First Nations Lands Management Resource Centre).

127 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 2 February 2012, (Aaron Louison, Director, Chair of the Saskatchewan Aboriginal Lands Technicians).

a mapping tool" which provides First Nations with the "ability to see and analyse layers of information based on location."[128] Otherwise stated, GIS capacity allows communities to first know what is on their land, thus contributing to effective land use plans.[129]

D. Reserve Expansion: The Federal Additions to Reserves Process

The process by which land is added to reserves is dealt with under the 2001 federal Additions to Reserve (ATR) Policy, which sets out acceptable grounds for expansion and procedural requirements. There are currently three policy categories under which a First Nation acquires or is entitled to receive land: legal obligations, which include legal obligations related to specific claim settlement agreements; community additions, which provide "for the addition to an existing reserve to meet land base needs related to the normal growth of a community"; and a third, catch-all category referred to as "new reserves/other policy."[130]

According to departmental officials and First Nations witnesses, the addition of land to reserves enables First Nations to strengthen the social and economic well-being of First Nation communities, encourages investment and promotes economic development. Reserve expansion also fulfils Canada's legal obligations to First Nations and provides additional land for much-needed housing and infrastructure. Consequently, ensuring that the reserve creation process is efficient is a matter of significant concern to First Nations.

There is widespread agreement among witnesses appearing before the Committee that the policy and associated procedures are costly, complex, cumbersome and time-consuming. Referring to the complexity of the ATR review and approval process, Chief Angus Toulouse told the Committee:

> There is just so much complication, if you will, in trying to ensure that the steps that are asked for are followed, and when you don't have any capacity at the community level to ensure you are following every single step in the way it is supposed to be done, and if you miss a step or whatever, if you fail to recognize a step, it is just reason to send it back.[131]

The majority of First Nations witnesses were critical of the length of time it takes to add lands to reserve, noting that the process can often take several years to complete. The Committee heard of several examples where communities have been engaged in the ATR process for well over a decade. In her appearance before the Committee, Chief

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128 Ibid., (Leona Irons, Executive Director, National Aboriginal Lands Managers Association).

129 Ibid., (Jennifer Copegog, Chair, Ontario Aboriginal Lands Association; Director, National Aboriginal Lands Managers Association).

130 A description of the Additions to Reserve policy and process is available through AANDC, Land Management Manual.

131 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 14 February 2012, (Chief Angus Toulouse, Ontario Regional Chief, Chiefs of Ontario).

Marianna Couchie of Nipissing First Nation indicated that it has taken almost 17 years for the land acquired under the community's specific land claims settlement to be converted to reserve status.[132] During this time, First Nations are required to pay property taxes on this land pending its conversion to reserve status, and can result in an unintended financial burden.

For many First Nations, ensuring that lands are converted to reserve status in a timely manner is critical to their economic development success. The longer the delays, the longer First Nations are unable to use the land to further their economic objectives. Commenting on the implications of the delays associated with the ATR process, Chief Clinton Phillips told the Committee:

> [M]y community has struggled with the inability to develop our lands for economic investment because of outdated, paternalistic Canadian government policies that limit and in most cases stop economic development; for example the Addition to Reserves or ATR policy, which continually provides time-related roadblocks that can last beyond five to ten years, in some cases–years when our land remains out of our control, years when economic development cannot occur, and ultimately years when we are denied prosperity.[133]

Similarly, James Cada of the Mississauga First Nation, whose ATR took over 15 years to complete, told the Committee that his community lost approximately $850,000 in land lease opportunities and $10.5 million in stumpage revenues and forestry-related employment opportunities during that time. "In short," he told the Committee, "the ATR process has to be more effective in order for First Nations to become more efficient in economic opportunities. If the Mississauga First Nation had experienced a speedy process, our current economic concerns would be very minimal."[134]

Witnesses also spoke about the importance of the ATR process in opening up economic development opportunities in remote or isolated communities. Chief Clarence Louie explained that for communities constrained by their geography, the ATR process can help overcome this challenge as it allows them to purchase land that is more favourably situated for economic development. Chief Louie remarked that, for a number of First Nations, it will "be their first chance at having a business or having good property from which to start a project."[135] Likewise, Dawn Madahbee, Co-Chair, National Aboriginal

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132 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 13 March 2012, (Chief Marianna Couchie, Nipissing First Nation).

133 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 15 May 2012, (Clinton Phillips, Council Chief, Mohawk Council of Kahnawake).

134 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 3 May 2012, (James Cada, Director of Operations, Mississauga First Nation).

135 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 15 March 2012, (Chief Clarence Louie, Chairman, National Aboriginal Economic Development Board).

Economic Development Board, indicated that "for most First Nations in this country, it's the first time they're ever going to have a chance to get developed land near highways."[136]

While all witnesses acknowledged that the process for adding lands to reserve is a lengthy one, some witnesses cautioned that the time it takes to complete an ATR may in fact be proportionate to the seriousness of the undertaking. Gordon Shanks, a former Senior Assistant Deputy Minister at AANDC, for example, advised the Committee that, in his experience, the ATR process itself was straightforward but the procedural requirements — such as title searches, environmental site assessments, environmental site remediation, surveys, negotiations with affected third parties and so on — takes considerable time and effort to complete. He stated:

> My experience in the delays was that usually there wasn't the information that was required … Very often there is a lack of communication. Sometimes the things are incredibly complicated. You have to verify all the outstanding aspects of a piece of land. Are there any liens on it? Are there any environmental problems associated with it? Who owns the mineral rights? Who has any leases on it? All those kinds of things have to be known, clarified, and agreed to. They're often complicated …. It requires a lot of legal nit-picking to ensure that all of the right information is there. You're taking on enormous responsibilities when you add land to a reserve, so the crown wants to be very clear.[137]

In addition, André Le Dressay suggested that because the Government of Canada assumes liability for land once it is converted to reserve status, the requirements for reserve creation and expansion will necessarily be stringent.[138]

Difficulties addressing third-party interests were also cited as a key factor delaying the ATR process. Departmental officials identified numerous challenges in this regard, including the negotiation of municipal services agreements as well as negotiations with third parties who have existing interests in the land such as easements, leases or permits. The Committee heard that these negotiations are often complex and time-consuming. As noted by John Gailus, "[i]t can take a long time to disentangle all of those interests when you are dealing with ATRs."[139]

The lack of a dispute resolution process to assist affected parties in resolving their differences during these complex, and oftentimes highly charged, negotiations, was also identified by some witnesses as a key shortcoming of the process. As noted by departmental officials, "there are no formal dispute resolution mechanisms in place to assist parties when negotiations break down" such that "municipalities and third parties

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136 Ibid., (Dawn Madahbee, Co-Chair, National Aboriginal Economic Development Board).

137 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 17 May 2012, (Gordon Shanks, as an individual).

138 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 12 June 2012, (André Le Dressay, Director, Fiscal Realities Economists Ltd).

139 Ibid., (John Gailus, Partner, Devlin Gailus Barristers and Solicitors).

who refuse to negotiate agreements in good faith can hold up or even stop completely a reserve creation."[140] Chief Stinson Henry observed that not only must First Nations deal with the federal government in the ATR process, but they must "also engage with local municipalities, which can create additional roadblocks."[141]

In order to resolve some of the challenges related to the reserve expansion process, a number of witnesses recommended bringing forward national ATR legislation. It was proposed that such legislation could incorporate some of the key components of the claims settlement legislation in place in Alberta, Saskatchewan and Manitoba which has helped to expedite the extraordinary volume of ATR's arising from Treaty Land Entitlements and specific claim agreements.

Specifically, the proposed legislation would authorize the minister, rather than the Governor in Council, to grant reserve status to lands selected for conversion. It would also enable First Nations to designate both existing and new rights and interests on "pre-reserve" lands during the reserve expansion process, thus providing a degree of protection and commercial certainty for third parties and First Nations.[142]

Currently, the *Indian Act* does not adequately accommodate public or private third-party interests on land that may be selected for reserve status. As a result, existing third-party interests on land that is selected for reserve expansion must be cleared prior to the land being converted to reserve status.

John Gailus explained that the ability to designate interests on pre-reserve lands could be of substantial economic benefit to First Nations as it would allow for these interests or potential development agreements to be recognized and become active the moment the lands obtain reserve status. Currently, First Nations do not have that authority. Designations can only occur on reserve lands and the process can often take two to three years, often because of the onerous double majority voting requirement. Accordingly, the ability to undertake the lengthy designation process while the ATR process is underway can substantially reduce investor uncertainty and allow First Nations to more easily capitalize on the economic potential of selected lands. Mr. Gailus observed that:

> [C]ertainly if you can be doing the processes in parallel rather than sequentially, it's going to be a way quicker process. We've heard about the designation process and how lengthy it can be given that there's often a requirement for two votes rather than one, given the double majority requirements. It would make sense to have your vote prior to the land gaining reserve status and to have essentially two orders in council going forward together … I can tell you from experience that … . on third-party interests pre-

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140 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 22 November 2011, (Margaret Buist, Director General, Lands and Environmental Management, AANDC).

141 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 15 March 2012, (Chief Sharon Stinson Henry, Member, National Aboriginal Economic Development Board).

142 See, for example, House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 1 May 2012, (Warren Johnson, President, New Road Strategies, as an individual).

> reserve that then get converted into *Indian Act* interests post-reserve, you have two orders in council going forward in concert.[143]

Finally, other proposals advanced to expedite the ATR process included establishing service standards for AANDC and applying the ATR policy more flexibly, in particular relaxing some of the procedural requirements for "conversion-ready lands."

143 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 12 June 2012, (John Gailus, Partner, Devlin Gailus Barristers and Solicitors).

PART III – COMMUNITY SITE VISITS

The Committee undertook a series of site visits to individual First Nation communities across the country, each operating under different land management regimes. Community leaders generously shared their experiences and perspectives in relation to reserve land management. What follows is a brief overview of these individual site visits.

MASHTEUIATSH FIRST NATION, QUÉBEC

Mashteuiatsh First Nation is a recent signatory to the First Nations Land Management (FNLM) regime. From their perspective, the FNLM regime is an important step toward self-government and is viewed as a tool for greater economic development. They indicated that because their population is relatively young (50% under 35 years old), there is an imperative to create economic opportunities for them. They are increasingly looking at entering into partnerships rather than merely seeking compensation for the use of their lands by third parties.

Snapshot: Mashteuiatsh

Land Management Regime: New signatory to the First Nations Land Management Framework Agreement

Governance: Chief and six city councillors

Membership: 6,360 (On-reserve: 2,027, off-reserve: 4,333)

Land Base: 1,522 hectares

Key Development Areas: Logging, construction, transport, arts and handicrafts, tourism, and public services

Notably, much of the Mashteuiatsh First Nation reserve land base is allocated to band members through pre-existing Certificates of Possession (CPs), with few communal (or band) land holdings. Representatives of the band council indicated that this situation has resulted in little land being available for community economic development purposes and that economic development planning has not been as coherent as they would have liked it to be.

A corollary issue for the band is that most of the revenue from land rent goes to the CP holder and the band only receives a nominal amount to administer leases. Although the First Nation has sought to repurchase CPs, they have found the process challenging and financially prohibitive.

While the community would like to develop its land code within two years, they told us that they feel strongly that lands subject to an eventual land code under the FNLM regime must be in sound environmental condition before they would enact such a code. However, community representatives pointed to various significant environmental concerns with the CP held lands on reserve (i.e., sceptic tanks built too close to the water). They indicated that AANDC advised them that it is not responsible for remediating CP lands. The First Nation estimates that it would cost them $100,000 to remediate land on one CP alone.

MILLBROOK FIRST NATION, NOVA SCOTIA

Millbrook First Nation currently operates under the *Indian Act* land management regime. In contrast to Mashteuiatsh First Nation, Millbrook has only a handful of CPs, covering roughly 2% of the reserve land base (approximately 59 active CPs).

Snapshot: Millbrook

Land Management Regime: Leasehold agreements under the *Indian Act*

Governance Framework: Chief 12 elected city councillors

Membership: 1,729 (on-reserve: 847, off-reserve:882)

Land Base: Approximately 300 hectares

Key Development Areas: Real-estate development, Fisheries, IT Services

Chief and council members indicated that they have been able to achieve a level of economic success within the *Indian Act* land management regime. Notwithstanding its restrictions, Millbrook representatives indicated that they have made extensive use of the by-law making authority of the *Indian Act*, and have developed zoning, land use plans, building standards and taxation by-laws. They added that while entrance into the FNLM regime was considered, Millbrook First Nation's preference is to remain under the legal protections afforded by the Act.

Central to the economic success of the Millbrook First Nation was designating land along the highway for commercial development purposes (current site of the Truro Power Centre) in the 1990s. MFN indicated that their reserve land designation was instrumental in helping them to develop economically.

Millbrook representatives expressed concern that the federal ATR process continues to be a slow and inefficient process. By way of example, we were told that MFN has been waiting 19 years for a 12 acre parcel of land to be added to their reserve. It was suggested that if all the requirements of the ATR policy have been met by a First Nation, the process should be expedited.

MEMBERTOU FIRST NATION, NOVA SCOTIA

Membertou First Nation is one of several new signatories to the FNLM regime. To date, Membertou's economic success has occurred under the *Indian Act* land management framework. Like Millbrook First Nation, Membertou is strategically located in an urban centre. Today, Membertou is an economic driver in the region, employing 700 people in peak season — close to half of them non-Aboriginal — and grossing annual revenues of $75 million from band-owned and operated businesses which are used, in part, to support community programs.

Snapshot: Membertou

Land Management Regime: New signatory to the First Nations Land Management Regime

Governance: Chief and 12 councillors

Membership: 1,400 (on-reserve 849, off-reserve 551)

Land Base: Approximately 989 hectares

Key Development Areas: Renewable resource development, fishing, GIS, IT services, gaming, insurance, real-estate, business management, and consulting services

Representatives of Membertou First Nation indicated that the FNLM regime should be open to all interested First Nations, but recognize that there are federal funding limitations on the number of First Nations that can enter the regime at any given time. They explained that, unlike other First Nations, Membertou was in a position to "self-fund" participation in the FNLM regime, but were told at the time that the regime was closed to new entrants. Representatives told us that they should have been able to enter the FNLM regime when they were ready.

Representatives also indicated that while the FNLM regime is a better alternative to the *Indian Act,* it is not ideal as they still see it as delegated authority by the minister. Echoing the view of other communities, the FNLM regime was described as a continuum of land management models with self-government being the ultimate goal.

Among the reasons cited for participating in the FNLM regime is the rapid economic growth experienced by Membertou in recent years and the view that Membertou First Nation has gone "as far as it could" under the *Indian Act*. Specifically, the ability to secure long-term financing under the Act was identified as a key challenge and a principal motivation for entering into the FNLM regime. Executive Director, Trevor Bernard, explained that the move to the FNLM regime would boost the community's financial development, since it would allow them to borrow money using its land as collateral.[144]

With respect to the ATR process, Membertou representatives highlighted the fact that economic development is tied to the expansion of the reserve land base. In Membertou's case, there was money available to expedite the ATR process as a result of the *Marshall* decision. They also recently completed an additional ATR on the "MacAulay lands"; a process that took 12 years, with delays largely attributable to the interests of a

144 Committee Analyst notes from the April 2012 community site visit to Membertou First Nation, Nova Scotia.

private land owner. In the end, MFN hived off the portion of land with the third-party encumbrance in order to complete the ATR.

MUSKEG LAKE CREE NATION, SASKATCHEWAN

Representatives of the Muskeg Lake Cree Nation (MLCN) indicated that land is their most important resource. They noted that the *First Nations Land Management Act* has given them greater control over their lands and enhanced opportunities to generate own source revenue (OSR) through economic development. OSR is used by the MLCN to help support social programs such as health and education.

Snapshot: Muskeg Lake

Land Management Regime: Signatory to the First Nations Land Management Regime with an operational land code since 2005.

Governance: Chief and six councillors

Membership: 1,848 (on-reserve: 367, off-reserve: 1,481)

Land Base: Approximately 14,213 hectares

Key Development Areas: Agricultural and recreational development, such as RV/camping ground, golf course, casino, as well as commercial real estate development through an urban reserve

MLCN stated that they view the FNLM regime as a valuable tool to support economic development and employment, describing the regime as a collaborative initiative with government, but one led by First Nations. Similar to other communities, MLCN representatives described the regime as an important step toward the ultimate goal of self-determination. When implementing their land code in 2005 they sought to ensure that it would support progression toward this overarching goal.

Representatives of the MLCN emphasized the value of a phased approach to land management and the usefulness of preparing First Nations to build the capacity to develop their lands and to take on additional responsibilities.

MLCN representatives further indicated that governance is also very important and that the First Nation has taken steps to separate politics from business. Members heard that the MLCN has done a lot of work on developing sound governance structures and becoming more transparent, in particular through its community development plan.

Chief and council members indicated that CPs are a difficult issue in the community, but that under the FNLMA they now have a tool to regulate these lands and to enforce environmental codes. They explained CPs were issued to veterans by the federal government after the war, thereby reducing the communal land base. This is an ongoing issue for the community and a specific claim has been submitted in this regard.

Representatives indicated that it is possible to develop on-reserve lands and that it is possible to “have our lands worth something.”

WHITECAP DAKOTA FIRST NATION, SASKATCHEWAN

Chief Darcy Bear of the Whitecap Dakota First Nation (WDFN) emphasized to Committee members that good governance practices, accountability and transparency have been the cornerstone of the community's economic success. He notes that when he was first elected to Council in 1991, the WDFN was nearly bankrupt with little financial controls or policies in place. In response to these financial challenges, chief and council established a financial management plan, consolidated its debt and worked with AANDC officials on a remedial management plan in order to avoid third-party management.

Snapshot: Whitecap Dakota

Land Management Regime: Signatory to the First Nations Land Management Regime with an operational land code since 2003. Whitecap Dakota is currently negotiating a self-government agreement

Governance: Chief and two councillors

Membership: 617 (on-reserve: 291 off-reserve: 326)

Land Base: Approximately 1894 hectares

Key Development Areas: Commercial real estate, recreational development such as a golf course, casino, and entertainment complex, IT development, gas station and convenience store

Chief Bear also noted that the *Indian Act* is not designed to support First Nations economic development. The FNLMA eliminates 25% of the *Indian Act* and provides a community with control over managing their lands. In that respect, the FNLM regime was of significant interest to the WDFN. However, Chief Bear cautioned that the FNLM regime is only as good as a community's land code, adding: "If you want to move at the speed of business, you need a good land code. Some communities have very restrictive land codes that are almost like *Indian Act*." [145]

Chief Bear explained that the FNLM regime was an important part of WDFN's empowerment strategy and in breaking the cycle of dependency. He remarked that the FNLMA has been a valuable economic tool and has brought WDFN closer to their goal of self-government. It was also seen as a tool for bringing back the community's culture and beliefs, which are reflected in the land code. Chief Bear indicated that the FNLMA ensures that community members are driving reform and not chief and council. This is also the case with the WDFN land use plan. Community input is sought to make sure that the First Nation had the right balance, with rezoning initiatives having to go back to the community for approval.

Chief Bear also remarked that WDFN wants to create an environment that business understands. He explained that the FNLMA has helped to level the playing field, observing that: "We are moving away from the on reserve financing model toward an off-reserve model."[146] Beyond the FNLMA, the WDFN has developed a series of laws and policies

145 Committee Analyst notes from the May 2012 community site visit to Whitecap Dakota First Nation, Saskatchewan.

146 Ibid.

that have helped to lay the foundation for sustainable development, such as a business licensing law, a land use plan identifying the highest and best uses of reserve land, matrimonial real property law, law respecting traditional interests, etc.

Chief Bear indicated that section 89 of the *Indian Act* continues to be a challenge. He stated that under current *Indian Act* provisions, a First Nations member cannot hold real property on reserve, making it difficult to obtain a mortgage. Chief Bear suggested that First Nations should have the opportunity to opt out of section 89 of the *Indian Act*.

The lack of environmental protection on reserve was also highlighted. Chief Bear indicated that the maximum penalty under the *Indian Act* is $1,000. In contrast, he noted that provincial environmental legislation has teeth and that violators are held responsible for remediating the land. He suggested that in the absence of environmental legislation on reserves, an interim solution would be to work with provincial authorities to apply their laws.

WESTBANK FIRST NATION, BRITISH COLUMBIA

Westbank First Nation (WFN) is one of the original 14 First Nations signatories to the 1999 *First Nations Land Management Act*. Since 2005, the WFN has been governed pursuant to its self-government agreement. WFN has the distinction of having the largest residential tax base of any First Nation in Canada.

Chief Robert Louie told Committee members that prior to 1990s little development took place on WFN lands, adding that a stable government, sound legal structures and a strong foundation of laws has helped to drive development on WFN lands. Chief Louie observed that a "proper framework has attracted quality developers and gives them confidence in the process."[147] WFN's land management system, including clearly defined land rules, land registry system, land use laws and subdivision and developments laws give developers confidence in the WFN lands system.

Snapshot: Westbank

Land Management Regime: Self-government agreement

Governance: Chief and four councillors

Membership: 802 (on-reserve: 415*, off-reserve: 387)

Land Base: Approximately 2147 hectares

Key Development Areas: Commercial and residential development, natural resource development, financial services, joint venture partnerships.

*on-reserve population including non-members is approximately 9000

Chief Louie remarked that under the FNLMA, WFN has been able to effect business transactions more quickly than the neighbouring municipality, while offering a level of services that is consistent and seamless to the off-reserve context. As an example, he noted that registering leases under the *Indian Act* was a cumbersome process in contrast to the current WFN land

147 Committee Analyst notes from the May 2012 community site visit to Westbank First Nation, British Columbia.

registry regulations established in 2007 under WFN self-government agreement. He went on to state that the leasing process is open and transparent, the regulations are available online and provide security and certainty to investors.

Chief Louie remarked that the rapid transition from a struggling to an economically successful community has not been without its challenges, but through the FNLMA and now self-government, control and decision-making rest with the community, which is seen as fundamental to the success First Nation economies.

Chief Louie emphasized that the money the federal government invests in getting First Nations into FNLMA will come back ten-fold, noting that WFN's annual GDP is roughly $3.5 billion, with assessed property values now at over $1.3 billion.

Representatives of the WFN described the ATR process as "a cumbersome process"[148] indicating that it took 12 years to convert one parcel of land to reserve status. They noted that it is a highly bureaucratic process, with high staff turnover at AANDC resulting in little continuity. They added that the ATR policy allows for municipalities and third parties to have input into the process and that this can cause delays. They further remarked that there is an inconsistent application across the country, pointing to the ATR process under the Manitoba and Saskatchewan Treaty Settlement Agreement which allows pre-reserve designations to occur, but is not available to other First Nations. They suggested that there should be an expedited process for specific claims settlements.

In response to questions about the on reserve regulatory gap, Chief Louie told us that penalties under the WFN environmental regime are equivalent to provincial jurisdiction and the *Canadian Environmental Protection Act* continues to apply.

Chief Louie and other representatives emphasized that development under section 91(24) lands is possible, noting that leases are a simple, modern process to which outside investors are able to relate. Chief Louie remarked: "they said we could not develop on 91(24) lands but we have – 91(24) works. WFN has the highest activity of permits and leases. We do not want fee simple lands."[149]

148 Ibid.

149 Ibid.

PENTICTON INDIAN BAND, BRITISH COLUMBIA

The Penticton Indian Band (PIB) is located in south Okanogan region in central British Columbia, one hour north of the Canada–United States border. Only 8,000 acres of reserve lands is useable and much of it is privately held. Three quarters of PIB land mass is under forest cover, and the remainder is held by band members under CPs. PIB representatives indicated that this is part of the challenge the community faces regarding economic development.

Snapshot: Penticton

Land Management Regime: Land management provisions under the *Indian Act*

Governance: Chief and eight councillors

Membership: 1,032 (on-reserve: 545, off-reserve: 487)

Land Base: Approximately 18,690 hectares

Key Development Areas: Construction, natural resource development, recreational services, planned commercial and residential development centre

PIB representatives stated that they are beginning to look at assuming greater land management responsibilities. They indicated to Committee members that other First Nations advised them not to skip a step during this process. Representatives told the Committee that the community prefers a phased-in approach and that they want to see how things unfold under the delegated land management program before proceeding to the FNLMA. PIB officials observed that the community is not ready for the FNLMA. They added that it is a question of timing and allowing a community to take steps toward greater responsibility as they feel comfortable.

Representatives also mentioned investments in infrastructure are essential, otherwise large-scale development projects will not happen. Additional challenges mentioned included the land designation process due to the ratification requirements, the need for standardized leases so that developers do not walk away because it takes too long, and financing of mortgages on First Nations lands.

OSOYOOS INDIAN BAND, BRITISH COLUMBIA

The Osoyoos Indian Band (OIB) is located just outside the town of Osoyoos, British Columbia, approximately four kilometres north of the Canada–United States border.

Snapshot: Osoyoos

Land Management Regime: Inactive signatory to the *First Nations Land Management Ac*t, governed by the land management provisions of the *Indian Act*

Governance: Chief and five councillors

Membership: 526 (on-reserve: 326, off-reserve: 200)

Land Base: Approximately 13,061 hectares

Key Development Areas: Tourism, residential and commercial development, world class winery.

The OIB has flourished and today is widely recognized for its economic achievements. Chief Clarence Louie attributes this success to strong and transparent leadership as well as a development strategy rooted in business principles. While the OIB is a signatory to the First Nations Framework Agreement on Land Management, efforts to pass their land code were not successful.[150] Consequently, OIB's status in the FNLM regime is identified as inactive. Accordingly, OIB currently operates under the *Indian Act* land management regime. The OIB states that it utilizes leases and joint ventures as a means of securing economic prospects.[151]

Chief Louie remarked that AANDC (and by extension the Department of Justice) is not business friendly. As an example, he observed that there are over 10,000 leases on First Nations lands, but the Department is always starting from zero, suggesting it would make more sense to have a template to reduce the amount of time it takes to complete leases. He added that staff turnover at AANDC exacerbates the delays associated with cumbersome processes.

Chief Louie explained that economic development in Osoyoos occurs on band land and not on "locatee lands". Chief Louie noted that the OIB is the biggest land owner on reserve and said that "we wouldn't have the economic development we have today if most of the land was owned individually."[152] He remarked that OIB was very lucky that the allotment of land to individual members by the AANDC did not result in taking away the best land, as is the case in other communities. The last CP allocations at OIB occurred in 1982. Chief Louie observed that most of the projects at PIB and Westbank occur largely on CP properties. Hence, revenue is generated primarily through taxation.

Chief Louie suggested that the CP system continues to be a source of internal conflict among First Nations, and is contrary to tradition of not owning land as individuals. "Our people do not believe in private land ownership" adding that "our communal lands

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150 First Nations Lands Advisory Board, "Vote Dates Listed in Chronological Order" *Member Communities*.

151 Osoyoos Indian Band Development Corporation, About Us.

152 Committee Analyst notes from the May 2102 community site visit to Osoyoos Indian Band, British Columbia.

allow for economic development."[153] Chief Louie suggested that AANDC wanted to break up tribal lands into individually owned plots so that Indians could become just like "white people". He also criticized the *Indian Act* system for undermining the authority of traditional chiefs by allowing elected chief and council to allot CPs. Chief Louie explained that the chiefs allotted all of the best property to themselves and their sons.

Chief Louie remarked that the *Indian Act* and associated delays has resulted in economic opportunities being lost. He noted that self-governance and the FNLMA are good systems. He indicated that when they introduced their land code it failed to pass by five votes and that OIB might try again, recognizing that it may not have been explained adequately to community members.

Finally, Chief Louie stated that OIB employs people from 38 other First Nations. Its prosperity has allowed it to buy both off-reserve property and on-reserve property (i.e., CP land) as it becomes available to convert it to band land.

153 Ibid.

PART IV – SUMMARY OF KEY THEMES FROM THE TESTIMONY AND COMMUNITY SITE VISITS

The Committee heard from dozens of witnesses concerning some of the key issues relating to reserve land and environmental management. Not surprisingly, many of the witnesses appearing before the Committee indicated that the *Indian Act* land management regime, and associated departmental policies and procedures, are overly bureaucratic, costly and inflexible. As a result of prescribed multiple approval processes for land transactions, First Nations are often unable to move at the speed of business and risk losing time-sensitive economic opportunities. A number of suggestions aimed at improving existing processes and reducing the cost of doing business on-reserve were advanced. Notably, amending the ratification threshold for land designations and reducing the approvals required for obtaining leases were commonly cited measures.

Of particular concern for witnesses was the extent of the environmental regulatory gap on reserves. Witnesses cautioned, however, that introducing comprehensive environmental legislation without first addressing the capacity of communities to implement and enforce such regulations might do little to effectively address environmental management issues on reserves.

The majority of First Nation witnesses signalled support for the *First Nations Land Management Act*, both as an effective alternative to the *Indian Act* regime and as a crucial step on the way to the eventual goal of self-government. Given the economic benefits of the FNLMA, a number of witnesses suggested that it be adequately resourced and that the current backlog of First Nations waiting to enter the FNLMA be addressed. At the time of writing, there was much less support among First Nation witnesses for the proposed First Nations Property Ownership Act. Notwithstanding potential economic benefits associated with the initiative, many cited concerns with preserving the integrity of the reserve land base, which was of greater importance to them.

Witnesses also highlighted the fact that the Additions to Reserve process is critical to enhancing economic opportunities available to First Nations, particularly by providing many with an opportunity to select lands more favourably situated for investment and development purposes. The majority of First Nation witnesses were extremely critical of the time it takes to add lands to reserve, noting that the process can take up to several years, with significant financial and economic impacts at times borne by First Nations as a result. National legislation, along the lines of claims settlement legislation in the Prairie provinces, was proposed by some witnesses.

Finally, ensuring that adequate and appropriate capacity is in place, both within AANDC, which must manage an increasingly complex number of land transactions, and among First Nations, so that they are able to effectively use and develop their lands and achieve improved economic outcomes, was highlighted.

With respect to the community site visits, notwithstanding some of the geographic and economic differences between communities, common themes also emerged, including:

- Most communities expressed a preference for a phased approach to taking on greater land management responsibilities;

- The First Nations Land Management regime was seen as a valuable tool for supporting economic development and in building the capacity of First Nations toward the eventual goal of self-governance;

- Leadership and sound governance practices were identified as essential to a community's economic success, in particular the separation of politics from business operations;

- All were critical of the federal Additions to Reserves policy noting that the process is overly bureaucratic and that delays in land conversions negatively affect economic opportunities. Reforms in this area (i.e., pre-reserve designations) were seen as essential;

- The on-reserve environmental regulatory gap was highlighted, especially the weak nature of penalties under the *Indian Act*;

- Several community representatives mentioned the link between infrastructure and economic development, and the need for adequate infrastructure funding and for innovative approaches to secure long-term financing for infrastructure projects;

- Communities did not indicate a strong preference for private property ownership on reserves, but felt it should be an option for those wishing to pursue this form of land tenure;

- The Department of Aboriginal Affairs and Northern Development Canada as well as the Department of Justice were seen as risk averse and not business-friendly;

- Many highlighted the importance of forming partnerships with other First Nation communities and with the private sector in the pursuit of economic opportunities; and,

- Constraints in regulating activities on Certificates of Possession lands were identified, including associated environmental and economic implications for individual communities.

Having set out the testimony placed before the Committee in the preceding sections, we turn to a discussion of our findings and recommendations.

PART V – FINDINGS AND RECOMMENDATIONS

Land is central to virtually all forms of economic development, and this is no less true for First Nations' reserve lands. Consistently, First Nations told us that inappropriate laws, inefficient bureaucratic processes and deficits in community and institutional capacity have prevented First Nation communities from taking advantage of the wealth locked in their lands. First Nations across the country also expressed a strong desire to develop their lands in ways that are consistent with their cultural aspirations. We heard unequivocally that land management initiatives should support First Nations' priorities and further community efforts to move away from the restrictive and outdated *Indian Act* and along the governance continuum toward full self-governance.

During the course of our study a number of important and, we believe beneficial, measures were introduced by the federal government to improve land management processes on reserves. As outlined earlier in the report, the ratification threshold for land designations under the *Indian Act* was amended to a simple majority from the more onerous double majority requirement, facilitating the ability of First Nations to lease designated lands and take advantage of economic development opportunities. In addition, the statutory requirement under the FNLMA to negotiate environmental management agreements with federal authorities was eliminated, paving the way for participating First Nations to enact their own environmental regulations. Based on the testimony outlined in this report, we find that these changes respond to several of the key concerns expressed by First Nations and will prove to be of significant benefit to them.

As we draw our report to a close, we are mindful that the unique nature of reserve lands, existing tenure arrangements, differing levels of community capacity, as well as First Nations' special relationship to the land, present some particular challenges when contemplating land management reforms. While this complexity can be daunting, we have tried to resist the urge to simplify the issues. Whatever land management reforms are eventually initiated, we firmly believe the arrangements most likely to succeed will be those most closely aligned with First Nations' priorities and aspirations.

A. Addressing the Deficiencies of the Indian Act Land and Environmental Management Regime

The vast majority of First Nations must manage their reserve lands under the constraints of a centuries' old legislative framework. Today, over 550, out of 617 recognized First Nations, operate under the land administration framework set out in the *Indian Act*.[154] With the exception of First Nations who have negotiated comprehensive governance arrangements or those operating under the *First Nations Land Management*

154 AANDC, *Submission to the Committee*, 24 November 2011.

Act, the *Indian Act*'s land-related provisions continue to influence how most First Nations can develop or profit from their reserve lands.[155]

It would be unrealistic to assume that a great number of these communities will be able to make the transition to the First Nations Land Management regime or negotiate full self-government agreements within the next few years. First, many are simply not ready to do so. First Nations, such as the Penticton Indian Band, told us that they prefer a phased approach to land management; one where, over time, they are able to build the needed capacity and experience to take on greater responsibilities. They are not alone in this view. We find that communities should be encouraged and allowed to evolve through a series of steps, based on the level of community readiness, which would gradually get them out from under the strictures of the *Indian Act*.

Secondly, notwithstanding recent federal investments, progress in extending the application of the FNLMA to additional First Nations has not kept pace with demand. Currently, there are over 48 First Nations on the waiting list and still many more have expressed an interest in entering the regime. Even at enhanced funding levels, it could likely take decades to transition the majority of First Nations from the *Indian Act* to the FNLM regime.

Given that most First Nations will continue to operate under the *Indian Act's* land administration framework for the foreseeable future, it is important that they not be held back from sustainably developing their reserve lands to their optimal economic benefit. The need to minimize the barriers to reserve land management posed by the *Indian Act*, as well as departmental practices that are inefficient, overly bureaucratic and time-consuming, becomes even more relevant when we consider that a great number of these First Nations are among some of the most economically disadvantaged communities in the country.

While we are firmly of the view that alternatives to the *Indian Act* that deliver improved forms of land governance must be strengthened, limited financial resources and community capacity mean that making changes to the *Indian Act*, and accompanying departmental policies and regulations, is critical. Based on the evidence placed before the Committee, we are of the view that reforms in this area must focus on (i) improving the legislative basis and tools for reserve land management available to the majority of First Nations who currently manage their lands under the *Indian Act*; and (ii) ensuring that the Department's processes, practices and policies are responsive to the land management and economic development needs of First Nations.

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155 Office of the Auditor General of Canada, 2009 Fall Report of the Auditor General of Canada, "Chapter 6 - Land Management and Environmental Protection on Reserves", 2009.

(i) Environmental Management

A key area with which the Committee is concerned, and on which it heard considerable evidence, is the overall lack of environmental protection on reserves and the resulting negative implications for community health, safety and economic development. Reserve lands currently do not benefit from the full range of environmental protection that applies off-reserves. The Committee finds that the lack of effective environmental regulations, enforcement and surveillance has left many First Nations communities exposed to conditions that other communities are protected from by regulation and enforcement.

A consequence of the weak environmental regulatory regime on reserves is the inability of First Nations to effectively regulate activities on CP lands, which frequently give rise to environmentally unsound land use activities. In this respect, we found that penalties under the *Indian Act* for environmental violations are not strong enough to act as an effective deterrent. Fines under the *Indian Reserve Waste Disposal Regulations* for dumping or burning garbage on reserves without a permit, for example, cannot exceed $100.[156] In addition, we heard that AANDC issues few permits and is not well-equipped to conduct inspections, monitor compliance, or enforce regulations. As a result illegal garbage or landfill sites are commonly found on reserves.[157]

We believe that strengthening existing penalties for environmental violations under the *Indian Act* is essential, but that this measure alone is not an adequate response to the depth of the environmental regulatory gap on reserves. First Nations' capacity to develop, monitor and enforce appropriate environmental standards on reserves must also be strengthened. The Committee is of the firm view that First Nation communities should enjoy the same level of environmental protection as non-First Nations communities and that sustainable economic development depends on a clean and healthy environment. We therefore recommend as follows:

RECOMMENDATION 1

That Aboriginal Affairs and Northern Development Canada and Environment Canada, in collaboration with First Nations, take immediate steps to develop an action plan to address the environmental regulatory gap on reserves to be tabled before this Committee by 31 March 2015; and that the plan include measures to strengthen existing penalties for environmental violations under the *Indian Act*, community capacity for environmental management and

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156 Government of Canada, "Indian Reserve Waste Disposal Regulations," C.R.C., c. 960, section 14.

157 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 8 March 2012, (Frank Barrett, Principal, Office of the Auditor General of Canada).

remediation, and that it identify specific areas of legislative and regulatory development.

(ii) Land Management

In addition to strengthening the tools for environmental management of reserve lands, improving reserve land management with respect to tenure security, land use planning, leasing, and land registration are key concerns. In particular, we find that privately held interests in reserve lands, such as customary land-holdings, are not well documented. As a result of this tenure uncertainty, many First Nations' communities find that undertaking large-scale economic development on reserve lands can be challenging. On the flip side, lacking formal legal recognition, individuals have little recourse if lands are taken up by the band. Accordingly, the Committee believes that efforts to formally document customary land holdings should be supported and aggressively pursued, with interested First Nations.

The Committee also finds that current statutory restrictions in relation to CPs need to be more closely examined and addressed. As discussed earlier, First Nation individuals can only transfer their CPs to other band members. In addition, they cannot use their CPs as collateral to secure financing from banks due to the restrictions on pledge and seizure by virtue of section 89 of the *Indian Act.* CP holders must also obtain ministerial and, where appropriate, band council approval, if leasing CP lands to a non-band member. Together, these restrictions can raise transaction costs associated with CPs and represent some of the principal barriers to being able to use CP lands to access capital.[158]

In addition to these constraints, the Committee also finds that deficiencies in the formal recording of land holdings in the Indian Lands Registry System (ILRS) are problematic. According to the National Aboriginal Economic Development Board, it can take an average of a few days to register a mortgage in British Columbia in comparison to an average of 180 days to complete an equivalent registration under the ILRS.[159] While we acknowledge the efforts of the AANDC to explore the possibility of allowing First Nations to submit their records electronically (currently the case for provincial land registries), we feel that online registration, while positive, is insufficient to address the fundamental, structural flaws of the current system. As identified earlier in the report, unlike provincial land registries, the ILRS provides no assurance as to title or as to priority of interests, nor is there a requirement to register interests in land. Overall, the Committee believes the lack of rigour associated with the *Indian Act* land registry system in protecting third parties' legal interests in land are disincentives to economic development and impede outside investment.

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158 The 2003 *Westbank First Nation Self-Government Agreement* allows the First Nation to lift the restrictions on seizure of the real and personal property of an Indian or a band situated on reserve, should it so desire.

159 National Aboriginal Economic Development Board, 2011 Pre-Budget Submission, January 2011.

Further, the processes by which reserve lands — whether band or individually owned — are leased must be given serious attention. As we saw earlier, leases are a vital economic tool for many First Nations and the legal mechanism for land development on reserves. Across the country, First Nations regularly lease their lands to non-members for a variety of commercial and residential development purposes. Creating leasehold interests in reserve land also allows a First Nation or individual member to circumvent the "pledge and seizure" restrictions of section 89 the *Indian Act,* making it easier to obtain financing from lending institutions.

The process for leasing reserve lands, however, is not straightforward. Band-owned lands, for example, must first be "designated" through a community referendum for that purpose. Similarly, CP-held leases require band council and ministerial approval, and for terms over 49 years, community approval. Repeatedly, we heard that departmental practices and procedures with respect to leasing of interests in reserve lands were cumbersome and that delays in obtaining approvals at the band and ministerial level often resulted in lost business opportunities. Streamlining departmental procedures for obtaining leases on reserve lands is critical to the economic outcomes of First Nations and an issue that we believe must be examined as a matter of priority.

Lastly, the Committee finds that many of the issues facing First Nations are, in part, a function of the lack of effective land use planning. Currently, few First Nations have land use plans in place to facilitate orderly development and assist with environmental protections and controls. Enhanced land use planning can be invaluable in supporting sustainable approaches to reserve land development. Such plans can promote regulatory harmony with neighbouring municipalities, laying the ground work for economic partnerships, as well as engage community members in land use decisions. However, the *Indian Act* provides a limited statutory basis for the development of comprehensive land use plans.

Issues of land tenure, registration, leasing and land use planning are all interconnected. Even a Torrens-style land registry system, for example, would be of limited use to First Nations whose customary land holdings remain formally undocumented. Accordingly, where possible, we believe that the issues identified above must be considered together and recommend as follows:

RECOMMENDATION 2

That Aboriginal Affairs and Northern Development Canada, in collaboration with First Nations, take immediate steps to identify legislative and policy proposals to address the restrictive aspects of the *Indian Act* land management regime and associated departmental policies and practices, and table an action plan before the Committee by 31 March 2015, with a focus on:

- **Exploring mechanisms to enhance land use planning capacity on reserves;**

- **Allowing First Nations the option of lifting restrictions placed on the use of property as collateral under the *Indian Act*;**

- **Modernizing the current system of Indian lands registration system;**

- **Streamlining departmental procedures as they relate to the leasing of reserve lands to third parties by reducing approval requirements and developing templates for reserve land leases; and,**

- **Establishing a process, with interested First Nations, to formally document and register privately held interests, such as customary land holdings.**

B. Strengthening Alternatives to the Indian Act

(i) The First Nations Land Management Act

Outside of comprehensive self-government arrangements, the FNLMA is widely considered among First Nations to represent a modern institutional framework by which to address contemporary land management issues on reserves and facilitate economic development. By providing participating First Nations with a greater measure of local control over reserve lands and resources, and by ending ministerial discretion over land management decisions on reserves, the FNLMA represents an important alternative to land management under the *Indian Act*. Independent studies confirm that First Nations operating under the FNLNA manage their lands more competitively and transparently, and are better able to expeditiously complete land transactions and at a lower cost than what is possible under the *Indian Act*.

Given the well documented and substantial economic benefits of the FNLMA, as well as its widespread appeal among First Nations, we find that every effort must be taken to reduce barriers to accessing the FNLMA. In this respect, Committee members are encouraged by recent federal investments that have allowed an additional 26 First Nations to opt-in to the regime and begin their journey toward greater self-reliance.

We note, however, that demand is far out-stripping available resources and will likely continue to do so for the foreseeable future. Accordingly, while we believe that the FNLMA regime must be adequately resourced, other financing options — such as allowing interested First Nations to self-fund their entry into the regime or allowing First Nations to pool their resources — should also be considered.

The Committee finds that the FNLMA represents an important vehicle for reserve land tenure reform for the vast majority of First Nations, one with proven economic benefits, and should be fully supported. We therefore recommend as follows:

RECOMMENDATION 3

That Aboriginal Affairs and Northern Development Canada take the necessary steps to extend the application of the *First Nations Land Management Act* with a focus on:

- **Ensuring that First Nations currently operating under the *Indian Act* land management regime are provided with the training necessary to transition to the FNLMA in a timely manner;**

- **Ensuring that the current signatory First Nations to the FNLMA regime are provided with the support necessary to become fully operational and to meet the increased requirements of the regime, including developing their land codes; and**

- **Addressing, on an urgent basis, the backlog of applicants currently awaiting entry to the FNLMA regime, and exploring, in collaboration with the First Nations Lands Advisory Board, financing options to allow for greater First Nations' participation in the regime.**

(ii) The Proposed First Nations Property Ownership Act

Currently, neither First Nation members nor non-members can acquire a fee-simple interest in reserve lands under the *Indian Act* or the FNLMA. Under both of these regimes, legal title to the land remains with the Crown and, as a result, the greatest interest that a third party can acquire in reserve lands is a lease.

The absence of a fee simple property system on reserves is seen by some as limiting the economic prosperity of First Nations.[160] Proponents of the proposed First Nations Property Ownership Act (FNPOA) suggest that by strengthening the property rights regime on reserves two of the main barriers to economic development would be addressed: the lack of tenure security and the high transaction costs inherent with the property rights regime under the *Indian Act*.[161]

Significantly, under the FNPOA a participating First Nation would be able to grant individual property rights to its members who could then leverage or sell those rights,

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160 See, for example, Thomas Flanagan, Christopher Alcantara, André le Dressay, "*Beyond the Indian Act: Restoring Aboriginal Property Rights,*" McGill-Queens University Press, 2010. Further information on the proposal is also available on the First Nations Property Ownership web site.

161 House of Commons, AANO, *Evidence*, 1st Session, 41st Parliament, 7 February 2012, (Christopher Alcantara, Assistant Professor, Department of Political Science, Wilfrid Laurier University, as an individual).

presumably, to their economic advantage. In this view, the ability of ownership rights in land to be traded freely like any other commodity, combined with a formal registration system, such as the Torrens system in British Columbia, would provide First Nations with the necessary tools to access capital and create markets on reserve lands. In response to concerns that the integrity of the First Nations land base could be compromised by individuals selling off their land to developers or to other third parties, proponents indicate that underlying title or reversionary rights to the reserve land base would remain with the First Nation, irrespective of who owns individual parcels.

The Committee acknowledges that this initiative has drawn criticism from several First Nations and commentators, including before the Committee, who see the proposal as a mechanism for alienating First Nations lands.[162] The fear is that privatization will not necessarily result in greater economic prosperity, but rather, the dissipation of the First Nations land base as parcels of land are sold off or lost through foreclosure to non-First Nations owners.

While we recognize these concerns, we nevertheless feel that the FNPOA is a legitimate response to growing First Nations' frustrations with land management processes under the *Indian Act* and the extent of poverty and lack of development opportunities on reserves. However, while the Committee believes that First Nations should not be denied the full range of property rights that other Canadians enjoy, there are complex legal questions that need to be addressed should this legislative initiative be introduced in Parliament, including:[163]

- How will reserve lands be transferred to fee simple ownership without having provincial jurisdiction apply to those lands?
- What legislative regime will apply to FNPOA lands and what will be the source of the legislative power?
- How might the creation of fee simple title affect other Aboriginal rights which attach to the land?
- How will titles on reserve be cleared for registration in a Torrens system when there are so many historical conflicts over CPs, family lands and boundaries on most reserves?

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162 For a critique of the proposed initiative, see Pamela D. Palmater, Opportunity or Temptation? Plans for private property on reserves could cost First Nations their independence, Literary Review of Canada, April 2010.

163 Heather Mahony and Murray Browne, "The First Nations Property Ownership Initiative and existing alternatives," Woodward and Company, 2011.

- How will AANDC manage its limited resources to support another land management regime? How will this affect resources currently allocated to existing land management regimes?

Our findings suggest that while tenure security is vital to economic security, the nature of that security is not necessarily tied to formal individual title. In many instances, a long-term lease, rather than freehold title, may be a less risky and more appropriate form of tenure for First Nations communities, as evidenced by the fact that existing property rights instruments, such as CPs, have not been widely adopted.[164] In addition, the number of First Nation communities interested in, and that might benefit from, the extension of individual fee simple title may well be limited given their location far from urban or semi-urban areas and markets.

A primary assumption of proponents of FNPOA is that the creation of fee simple title will lead to economic development and the creation of wealth in First Nations communities. Interestingly, we found that most economic development on reserves occurs largely on band-owned lands. However, communities such as Mashteuiatsh First Nation, told us that economic development was impeded because much of the reserve land base has been allocated to individual band members through pre-existing CPs. Though somewhat counter-intuitive, it would appear that fee simple property rights may not necessarily lead to economic development on reserves. Rather, wealth creation may depend on a combination of factors such as geographic location, stable and transparent governance framework, the health of the regional economy, transportation corridors, and availability of infrastructure, in addition to individual fee simple titling.[165]

Fundamentally, the Committee believes that First Nations should be able to determine for themselves the types of land tenure arrangements that are most appropriate for their communities, based on their local circumstances, aspirations and prospects for economic development, including fee simple title. However, the proposal is likely to have implications for federal, provincial and First Nations governments. While we find the FNPOA to be a worthwhile initiative, there are a number of outstanding questions that require serious consideration and independent analysis so that any First Nation choosing to undertake this type of land tenure reform can do so, on a voluntary basis, with full knowledge of both the potential risks and benefits. The Committeee therefore recommends as follows:

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164 In their study of land management on First Nations reserves, Marena Brinkhurst and Anka Kessler found that more than half of all reserves have no land under individual lawful possession (i.e., CPs), and of those who do, the majority have allocated only a small percentage of their land (less than 5%) as CPs.

165 Heather Mahony and Murray Browne, "The First Nations Property Ownership Initiative and existing alternatives."

RECOMMENDATION 4

That the federal government continue to explore options to allow First Nations living on reserve to obtain, on a voluntary basis, the benefits of private property ownership.

C. Expediting the Process of Adding Land to Reserves

For many First Nations, economic development is tied to the expansion of the reserve land base. Accordingly, the process by which land is "added" or converted to reserve status is of particular relevance to the Committee. There was almost universal agreement across the country that the federal Additions to Reserve policy and associated procedures are costly, cumbersome and time-consuming. The majority of First Nation witnesses were extremely critical of the time it takes to add land to reserves, noting that the process can take up to several years to complete, with significant financial and economic impacts often borne by First Nations as a result. Some First Nations went so far as to describe the process as "absurd", "cumbersome" and "horrible".

We found this evidence to be problematic, especially because the process by which land is added to reserves is critical to enhancing economic opportunities available to First Nations, providing many with a chance to select lands more favourably situated for investment and development purposes. Currently, land selected for reserve conversion is subject to a somewhat convoluted 12 step review/approval process designed to ensure the selection meets basic legal and environmental requirements.

The Committee is of the view that the Department's current ATR policy is difficult to navigate, and includes unnecessary steps which can lead to long delays and confusion. While we welcome the Department's collaboration with the National Aboriginal Lands Managers Association in the development of the ATR Toolkit designed to assist First Nations in navigating the policy's various requirements, we nevertheless feel that a review of the policy, last updated in 2001, is timely. Review objectives, in our view, should include identifying reductions in processing times and introducing procedural flexibility for lands that are considered "conversion ready" or otherwise unencumbered by various third-party interests and environmental liabilities.

The Committee also finds that although the ATR process is a lengthy one, the time it takes to complete the process may not, in a number of instances, be unreasonable given the seriousness of the undertaking. Because the Government of Canada assumes liability for lands converted to reserve status, the requirements for reserve creation and expansion will necessarily be stringent. In addition, title searches, environmental site assessments and possible remediation, surveys and negotiations with affected third parties all take considerable time and effort to complete.

We heard concerns from certain municipal organizations that municipalities do not have sufficient opportunities under the existing policy to raise, or have their concerns addressed, in the event that they do not support an ATR. They indicated that the federal

government has a role to play to help support better relations between First Nations and affected municipalities when an ATR policy has been advanced for consideration.

We feel strongly, however, that First Nations should not be prevented from taking advantage of economic opportunities on lands *selected and accepted* for reserve creation, irrespective of the time it takes to convert those lands to reserve status. Specifically, the Committee believes that the option currently available to First Nations under the claims settlements implementation legislation in the Prairies to arrange for pre-reserve designation on selected lands should be extended to all First Nations. The ability to designate interests on pre-reserve lands could be of substantial economic benefit for First Nations as it would allow for these interests and potential development agreements with third parties to be recognized and become active the moment the lands obtain reserve status. Given the importance of reserve expansion to the economic and social well-being of First Nations, and in recognition of the length of time it takes to fulfil the various legal and policy requirements of the ATR process, the Committee recommends as follows:

RECOMMENDATION 5

That Aboriginal Affairs and Northern Development Canada, in collaboration with First Nations, and where appropriate, local governments, explore legislative proposals to allow for pre-reserve designations on lands selected by First Nations for conversion to reserve status; and

That Aboriginal Affairs and Northern Development Canada take immediate steps to review its 2001 Additions to Reserves Policy, with a view to:

- **streamlining procedural requirements;**
- **reducing processing times; and**
- **addressing stakeholder concerns.**

AREA OF FURTHER STUDY

During the course of our hearings, one of the primary challenges raised before the Committee concerned the “legacy issues” that result when individual interests in land are not formally documented or otherwise lack legal recognition. Not surprisingly, many of these legacy issues pertain to the wills and estates of First Nations individuals; in particular, when determining the descent of property interests on the reserve.

Our recommendations around clarifying land tenure arrangements on reserve through the formal documentation of customary land holdings and title-based land registry systems are intended to address some of these legacy challenges. However, the range and complexity of issues related to the administration of wills and estates on reserve, which touch upon, *inter alia*, land management, citizenship, matrimonial property,

solemnization of marriages and financial management, extend beyond the scope of our current study.[166]

While the Committee was unable to deal with the particular issue of wills and estates directly in this report, we wish to underscore the importance of addressing this matter as one of considerable priority. Disputes in relation to the wills and estates of First Nation members relating to reserve lands can take several years to resolve, and have serious implications for individuals and communities, alike. Recognizing the importance of this subject matter, members of the Committee commit to examining this issue in greater depth at a future date.

CONCLUDING REMARKS

The sizeable and growing First Nations reserve land base represents significant economic opportunities for First Nations. Central to unlocking this potential and helping First Nations to move forward on a sustainable economic path is access to modern and effective land management tools. As First Nations seek to realize the economic potential stored in their lands, there is growing frustration with existing land management processes that neither adequately meets contemporary needs nor responds to community aspirations for growth.

The Committee recognizes that without the contemporary tools and capacity to effectively manage their reserve land base, the opportunities and standard of living enjoyed by First Nations will continue to be unnecessarily limited. We have listened carefully to the legitimate concerns expressed by First Nations concerning the negative effects on economic development of the *Indian Act* land management regime, and have put forward a number of recommendations in an attempt to assist First Nations in their aspirations to manage and develop their lands more effectively.

Specifically, we find that serious efforts must be taken, in partnership with interested First Nations, to modernize the current system of land tenure and registration under the *Indian Act*. An efficient land registry system, coupled with a greater tenure security, is an area for immediate investigation and is central to maximizing the economic value and potential of reserve lands, whether band or individually owned.

Given the restrictions and layered bureaucratic processes associated with managing reserve lands under the *Indian Act*, we are of the firm view that measures to allow First Nations to opt out of the land-related provisions of the Act and to manage their lands more competitively, such as the *First Nations Land Management Act*, must be supported, expanded and appropriately funded. Ultimately, First Nations who are able to transition away from the *Indian Act* and take on greater responsibility for land transactions will be in a better position to realize the economic value stored in their lands. Finally, while

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166 British Columbia Assembly of First Nations, Wills and Estates, Governance Toolkit. This document is available online at: http://www.bcafn.ca/toolkit/governance-bcafn-governance-tool-3.33.php.

the Committee believes that a range of land tenure reform options should be pursued, we observe that governance — that is, a strong foundation of laws and regulations — as well as community capacity, are essential components for the sustainable economic development of First Nations' lands.

LIST OF RECOMMENDATIONS

APPENDIX A
LIST OF WITNESSES

41st Parliament – First Session Organizations and Individuals	Date	Meeting
Department of Indian Affairs and Northern Development	2011/11/17	13
Andrew Beynon, Director General, Community Opportunities Branch		
Margaret Buist, Director General, Lands and Environmental Management		
Kris Johnson, Senior Director, Lands Modernization		
Department of Indian Affairs and Northern Development	2011/11/22	14
Andrew Beynon, Director General, Community Opportunities Branch		
Margaret Buist, Director General, Lands and Environmental Management		
Jolene Head, Acting Director, Lands and Environment Operational Policy		
Department of Indian Affairs and Northern Development	2011/11/24	15
Andrew Beynon, Director General, Community Opportunities Branch		
Margaret Buist, Director General, Lands and Environmental Management		
Stephen Gagnon, Director General, Implementation Branch		
Paula Isaak, Director General, Natural Resources and Environment Branch		
Kris Johnson, Senior Director, Lands Modernization		
As an individual	2011/12/06	18
Jim Aldridge, Legal Counsel		
Land Claims Agreements Coalition		
Alastair Campbell, Senior Policy Advisor, Nunavut Tunngavik Inc.		
David Kunuk, Director of Implementation, Nunavut Tunngavik Inc.		
Ruth Massie, Grand Chief, Council of Yukon First Nations		
Kevin McKay, Chair, Nisga'a Lisims Government		
Fred Tolmie, Chief Executive Officer, Nisga'a Lisims Government		
Institute on Governance	2011/12/08	19
Laura Edgar, Vice-President, Partnerships and International Programming		

Organizations and Individuals	Date	Meeting
Marion Lefebvre, Vice-President, Aboriginal Governance		
Department of the Environment	2011/12/13	20
John Moffet, Director General, Legislative and Regulatory Affairs		
Office of the Auditor General of Canada		
Frank Barrett, Principal		
Jerome Berthelette, Assistant Auditor General		
Ronnie Campbell, Assistant Auditor General		
National Aboriginal Lands Managers Association	2012/02/02	21
Jennifer Copegog, Director, Chair of the Ontario Aboriginal Lands Association		
Leona Irons, Executive Director		
Aaron Louison, Director, Chair of the Saskatchewan Aboriginal Lands Technicians		
Joe Sabattis, Vice-Chair - Eastern Region, Chair of the Atlantic Region Aboriginal Lands Association		
As an individual	2012/02/07	22
Christopher Alcantara, Assistant Professor, Department of Political Science, Wilfrid Laurier University		
Kitigan Zibi Anishinabeg First Nation		
Wayne Odjick, Councillor, Kitigan Zibi Band Council		
Gilbert W. Whiteduck, Chief, Algonquin Anishinabe Nation		
Chiefs of Ontario	2012/02/14	23
Angus Toulouse, Ontario Regional Chief		
Environmental Careers Organization of Canada		
Grant Trump, President and Chief Executive Officer		
Atlantic Policy Congress of First Nations Chiefs Secretariat	2012/02/16	24
JohnG. Paul, Executive Director		
Mohawks of the Bay of Quinte		
Todd Kring, Director of Community Infrastructure		
R. Donald Maracle, Chief, Band No. 38		
First Nations Lands Advisory Board	2012/03/01	26
Robert Louie, Chairman, Chief, Westbank First Nation		
First Nations Lands Management Resource Centre		
Austin Bear, Chair		
Elizabeth Childs, Advisor, Capacity Building, Training and Professional Development		

Organizations and Individuals	Date	Meeting
Daniel Millette, Manager, Strategic Planning		
First Nations Lands Management Resource Centre		
Ruth Nahanee, Senior Advisor, Capacity Building, Training and Professional Development		
Graham Powell, Executive Director		
Patti Wight, Advisor, Capacity Building, Training and Professional Development		
National Aboriginal Capital Corporations Association	2012/03/08	28
Ian Donald, Acting Chief Executive Officer		
Lucy Pelletier, Chair		
Kevin Schindelka, Director, Corporate Development		
National Aboriginal Forestry Association		
HarryM. Bombay, Executive Director		
Bradley Young, Senior Policy Analyst		
Office of the Auditor General of Canada		
Frank Barrett, Principal		
Kimberley Leach, Principal, Sustainable Development Strategies, Audits and Studies		
Scott Vaughan, Commissioner of the Environment and Sustainable Development		
Nipissing First Nation	2012/03/13	29
Marianna Couchie, Chief		
National Aboriginal Economic Development Board	2012/03/15	30
Clarence Louie, Chairman		
Dawn Madahbee, Co-Chair		
Sharon Stinson Henry, Member		
Mining Association of Canada	2012/03/27	31
Paul Hébert, Vice-President, Government Relations		
Mining Industry Human Resources Council		
Ryan Montpellier, Executive Director		
Prospectors and Developers Association of Canada		
Philip Bousquet, Senior Program Director		
Scott Cavan, Program Director, Aboriginal Affairs		
First Nations Tax Commission	2012/04/03	32
Clarence T. Jules, Chief Commissioner and Chief Executive Officer		

Organizations and Individuals	Date	Meeting
As an individual	2012/05/01	33
Warren Johnson, President, New Road Strategies		
Prince Albert Grand Council		
Brian Hardlotte, Vice-Chief		
First Nations Lands Management Resource Centre	2012/05/03	34
Julie Pellerin, Manager, Support Services		
Mississauga First Nation		
James Cada, Director of Operations		
Mississauga First Nation		
Keith Sayers, Lands and Resources Manager		
Hatchet Lake Denesuline First Nation	2012/05/15	35
Paul Denechezhe, Councillor		
Bartholomew J. Tsannie, Chief		
Jean Tsannie, Elder		
Anne Robillard, General Manager		
Mohawk Council of Kahnawà:ke		
Debbie Morris, Associate Director, Lands Unit		
Clinton Phillips, Council Chief		
Prince Albert Grand Council		
Diane McDonald, Land-Use Coordinator		
As an individual	2012/05/17	36
Gordon Shanks		
Manitoba Keewatinowi Okimakanak Inc.	2012/05/29	37
Michael Anderson, Director, Natural Resources Secretariat		
Devlin Gailus Barristers and Solicitors	2012/06/12	40
Christopher Devlin, Partner		
John Gailus, Partner		
Fiscal Realities Economists Ltd.		
André Le Dressay, Director		

APPENDIX B
LIST OF WITNESSES

41st Parliament – Second Session

Organizations and Individuals	Date	Meeting
City of Prince George	2013/12/03	7
Murry Krause, Councillor		
Devlin Gailus Barristers and Solicitors		
John Gailus, Partner		
Metro Vancouver		
Ernie Daykin, Director and Chair, Aboriginal Relations Committee		
Ralph Hildebrand, General Manager, Corporate Counsel, Corporate Services		
Union of British Columbia Municipalities		
Gary MacIsaac, Executive Director		

APPENDIX C
LIST OF BRIEFS

41st Parliament – First Session

Organizations and Individuals

Anishinabek Nation - Union of Ontario Indians

Fauteux, Paul

Fiscal Realities Economists Ltd.

REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109, the Committee requests that the government table a comprehensive response to this Report.

A copy of the relevant *Minutes of Proceedings* (Meetings Nos. 5, 7 and 15 from the 41st Parliament, Second Session and Meetings Nos. 13, 14, 15, 18, 19, 20, 21, 22, 23, 24, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 40, 51, and 72 from the 41st Parliament, First Session) is tabled.

Respectfully submitted,

Chris Warkentin

Chair