



Treasury Board of Canada
Secretariat

Secrétariat du Conseil du Trésor
du Canada

Guide to Real Property Management:

Aboriginal Context

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1. Introduction

The *Guide to Real Property Management: Aboriginal Context* replaces and expands on *Disposal of Surplus Real Property in the Context of Aboriginal Issues: Best Practices Guidelines*, providing an updated overview of Aboriginal consultation throughout the real property life cycle.

In accordance with the Treasury Board [Policy on Management of Real Property](#) and [Directive on the Sale or Transfer of Surplus Real Property](#), custodians are to ensure real property is managed in a manner that both fulfills federal legal obligations to Aboriginal groups (First Nations, Inuit, Métis) and upholds the honour of the Crown.

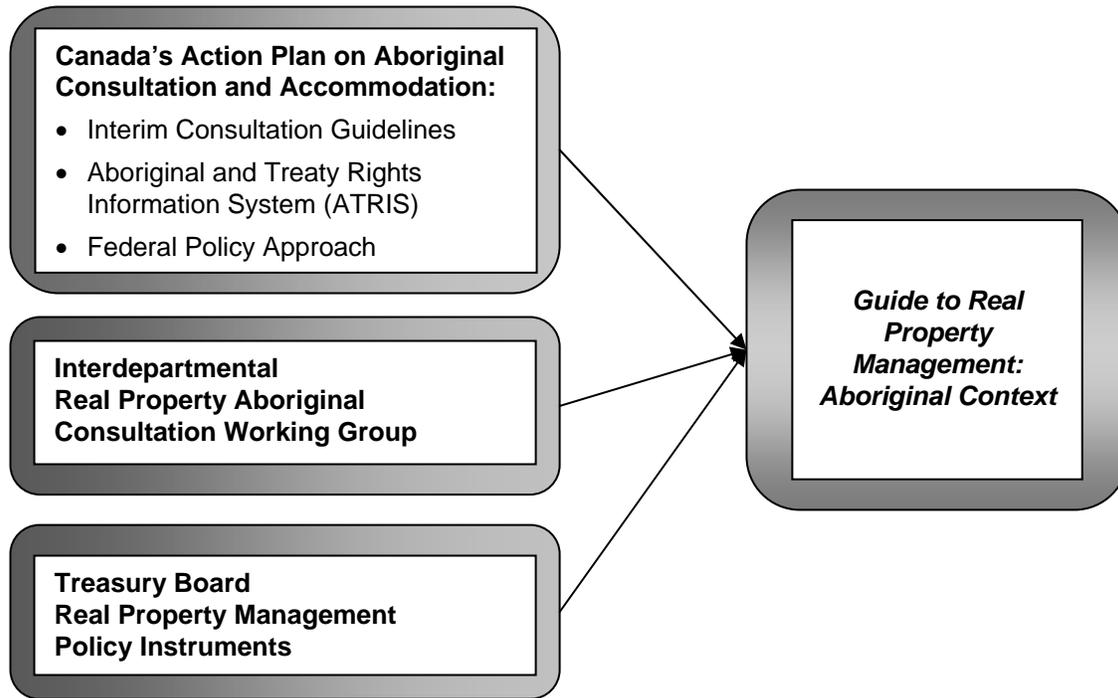
This Guide supports Treasury Board policy requirements for managing real property and materiel assets and provides guidance on managing real property where federal actions or interests and Aboriginal rights and interests intersect. The Guide also supports and is aligned with federal direction on Aboriginal consultation, in keeping with [Canada's Action Plan on Aboriginal Consultation and Accommodation](#) and [Aboriginal Consultation and Accommodation: Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult](#).

This Guide is to be read in conjunction with ***Aboriginal Consultation and Accommodation: Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult*** (hereafter referred to as the Interim Consultation Guidelines), which provides a framework for:

- General roles and responsibilities when consultation is required;
- Preparing for consultation;
- Information for practitioners regarding pre-consultation analysis and planning;
- Crown consultation, accommodation and implementation; and
- Monitoring and follow-up.

Indian and Northern Affairs Canada (INAC) and the Department of Justice Canada jointly developed the Interim Consultation Guidelines and can provide information on the availability of training on the legal duty to consult Aboriginal peoples.

The Guide was developed by the Interdepartmental Real Property Aboriginal Consultation Working Group, co-chaired by the Treasury Board of Canada Secretariat (TBS) and Justice Canada, in collaboration with INAC, Public Works and Government Services Canada, and several key federal custodial departments and agencies.



Federal Policy Drivers Contributing to the Guide

The Guide is a framework; it cannot address all possible scenarios that a real property practitioner might face. The federal real property community is encouraged to partake in conferences, training and mentorship opportunities, and federal employee social networking to increase its understanding of the federal and Aboriginal issues affecting real property management and to develop innovative best practices within the context of this Guide. The goal is to foster fresh, dynamic and productive relationships between Aboriginal communities and the Crown, including the federal real property community.

While strict adherence to this Guide is voluntary, legal obligations must be addressed in an appropriate manner. The Treasury Board of Canada Secretariat may ask departments to explain any deviation from the advice that it offers.

Disclaimer: This document aims to help custodian departments identify when to seek legal counsel or policy advice in cases where the Crown's activities intersect with its legal obligations to respect Aboriginal rights or interests. It does not replace case-specific legal advice. Beyond legal obligations, practical, operational and governance relationships with Aboriginal groups are encouraged. The Guide does not address land management on Indian reserves.

2. Purpose of this Guide

The Supreme Court has held that the Crown has a legal duty to consult and, if appropriate, accommodate Aboriginal groups when the Crown is contemplating conduct that might “negatively impact” established or potential section 35 Aboriginal and treaty rights under the *Constitution Act, 1982*. Aboriginal rights refer to the activities, practices and traditions of the Aboriginal peoples of Canada that are integral to and distinctive of their culture.

The Guide is meant to enable real property practitioners and managers to make informed, prudent decisions on policy objectives and legal and statutory obligations related to Aboriginal rights, which might include treaty rights.

The Guide also addresses Aboriginal interests that are not rights-based, such as instances where the Crown has no legal obligation but may benefit from having effective, practical relationships with Aboriginal groups. Furthermore, it aims to strengthen federal-Aboriginal relations and clarify custodial and Aboriginal interests in federal real property. This may be achieved through understanding and applying the federal program interests and policy objectives identified in the *Treasury Board Policy on Management of Real Property* and *Directive on the Sale or Transfer of Surplus Real Property*.

In this Guide, Aboriginal rights and Aboriginal interest are understood to mean the following:

- **Aboriginal rights** include potential or established Aboriginal rights or treaty rights.
- **Aboriginal interest** refers to an Aboriginal group’s specific practical interest in federal real property, i.e. not rights-based; Canada has no legal obligations associated with this interest.

The Guide complements the Interim Consultation Guidelines. It expands on the Interim Consultation Guidelines from a real property perspective (see the Real Property Aboriginal Consultation Planning Cube under Best Practice 1), with a focus on the following:

- ▶ Legal, policy and jurisdictional considerations for real property where federal interests and Aboriginal rights or interests intersect;
- ▶ The responsibilities of custodial departments for:
 - fulfilling legal obligations to Aboriginal groups and upholding the honour of the Crown, including taking decisions about if, when and how to consult Aboriginal groups; and
 - assessing, implementing and monitoring management actions to address recognized or asserted Aboriginal rights or expressed Aboriginal interests in federal real property;

-
- ▶ The building of effective, mutually beneficial relationships with neighbouring Aboriginal communities that have rights or interests involving federal real property; and
 - ▶ Information and assistance available to real property practitioners for assessing legal and policy risks and opportunities associated with Aboriginal and treaty rights or with other practical interests in real property.

3. Background

Intersection of federal interests and Aboriginal rights and interests in real property

Throughout the real property life cycle, Canada must take into account the rights and interests of both Aboriginal and non-Aboriginal Canadians. There are also valid policy reasons why Canada may wish to address Aboriginal interests in its decision making. This section examines the various contexts—federal, Aboriginal, and provincial, territorial or local jurisdictions—to be considered when managing federally administered real property where federal interests and Aboriginal rights intersect.

Aboriginal consultation is key to meeting legal obligations and reconciling or building relationships.

Federal context

Real property practitioners need to understand federal-Aboriginal relations and remember that they are acting on behalf of the Crown, not just their departments. As Aboriginal rights or interests arise, prudent practitioners seek information and expertise to foster productive relationships with Aboriginal groups and ensure federal property management legislation and policy compliance.

Ignoring legal obligations to Aboriginal groups or only addressing those obligations without concern for lasting federal-Aboriginal relationships could potentially result in disputes and legal challenges. It is wise for all parties, including neighbouring Aboriginal communities, to jointly develop an honourable, trusting and sustainable relationship to reconcile common challenges and find mutually beneficial solutions to intersecting real property management challenges.

Canada's Action Plan on Aboriginal Consultation and Accommodation

The Action Plan of 2007, developed by Justice Canada and INAC, provides a framework for the federal government's approach to Aboriginal consultation and accommodation. This approach is being strengthened through improved information sharing, better coordination, and policy development. The Action Plan is focussed on the following:

- ▶ engaging Aboriginal groups, provinces and territories, and industry in the development of federal policy positions on Aboriginal consultation;
- ▶ creating a repository of information on the location and nature of established and potential Aboriginal and treaty rights (Aboriginal and Treaty Rights Information System, ATRIS);

- ▶ distributing the Interim Consultation Guidelines to federal officials and providing training to support the federal real property community;
- ▶ establishing interdepartmental mechanisms to monitor and improve coordination of consultation and accommodation practices; and
- ▶ forming an interdepartmental team to implement the Action Plan.

Under the Action Plan, INAC and Justice Canada developed the Interim Consultation Guidelines, which are the primary resource on Aboriginal consultation for federal departments and agencies and for real property managers and practitioners. The Interim Consultation Guidelines ensure that departments apply a whole-of-government approach to consultation practices.

The Interim Consultation Guidelines detail the following legal and practical principles:

Legal principles

Honour of the Crown
 Reconciliation
 Reasonableness
 Meaningful consultation
 Good faith
 Responsiveness

Principles from practice

Mutual respect
 Accessibility and inclusiveness
 Openness and transparency
 Efficiency
 Timeliness

Aboriginal consultation context

Aboriginal consultation is subject to the principles developed in Supreme Court of Canada decisions on the reconciliation of Aboriginal and treaty rights recognized and affirmed under section 35 of the *Constitution Act, 1982* and Justice Canada’s advice on the Crown’s legal duty to consult. These decisions outline when, who and how to consult pursuant to the common law duty to consult, as described in Supreme Court of Canada judgments such as *Haida Nation v. British Columbia (Minister of Forests)*, *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* and *Mikisew Cree First Nation v. Canada Minister of Heritage*.

The Supreme Court determined that the legal duty to consult stems from the Crown’s unique relationship with Aboriginal peoples and must be discharged in a manner that upholds the honour of the Crown and promotes reconciliation of Aboriginal rights with the sovereignty of the Crown.

The duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*.

—*Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, at para. 32

It is essential to identify the source of potential legal consultation obligations. This will inform what form of consultation is required in which particular context and may serve to guide the consultation process. The legal duty to consult will vary both with the seriousness of the potentially adverse impact of custodial activities on Aboriginal rights and treaty rights and the strength of the claimed right. Justice Canada counsel can help in assessing the strength of the claimed rights and advise on the nature and scope of the consultations. Jurisprudence will continue to evolve as the courts examine how the Crown manages its relationship with Aboriginal groups and addresses constitutionally protected Aboriginal rights.

Treasury Board real property policy context

In accordance with the Treasury Board *Policy on Management of Real Property*, when Aboriginal rights are identified, potential risks must be assessed and, where appropriate, remediated by custodial departments. This policy applies throughout the life cycle of the property.

If the Crown meets its legal duty to consult and does not engage in practices or dealings that would take advantage of Aboriginal rights holders, it will be acting honourably and upholding the honour of the Crown. Specifically, section 3.4 of the *Policy on Management of Real Property* notes that deputy heads are:

. . . responsible for ensuring that real property is managed in a manner that fulfills any legal obligations with respect to Aboriginal groups and that the Honour of the Crown is upheld.

Section 5.3.4 of the [Guide to the Management of Real Property](#) notes that custodians should identify and assess all stakeholder interests and take federal government policy and strategic considerations into account, including potential and established Aboriginal rights and title or treaty rights. Aboriginal consultation is a key part of this process.

Aboriginal community governance context

Aboriginal communities

It is important to consult the proper representatives of an Aboriginal group. Information on the nature of neighbouring Aboriginal government structures, powers and jurisdictions is available from INAC and Aboriginal communities to help custodians understand these communities.

Custodians may face several common forms of Aboriginal governance, including:

- ▶ **Indian Act bands** subject to INAC ministerial powers;
- ▶ **Self-government or land claim settlements agreements** negotiated in accordance with the federal [*Comprehensive Land Claims Policy*](#) and/or [*Inherent Right of Self-Government Policy*](#);
- ▶ **Aboriginal and public governance relationships**, which may be linked to territorial or regional governments (e.g. Nunavut or Nunavik Inuit);
- ▶ **Provincially recognized Métis Settlements** in Alberta; and
- ▶ **Landless Métis and First Nation communities** (e.g. Gaspé region of Quebec or Ontario).

Federal-provincial Treaty Land Entitlement Agreements

Canada has Treaty Land Entitlement (TLE) Framework Agreements with Saskatchewan and Manitoba that fulfill its land commitments under treaties. In Alberta, several band-specific TLE agreements may require attention. Federal custodians are advised to examine the scope of these agreements with INAC or Justice Canada as they plan any land disposal in the Prairies.

Practical federal government and Aboriginal agreements and relationships

Apart from treaties or self-government agreements, federal custodians need to be aware of any formal, practical, time-limited agreements or contracts with Aboriginal groups. These may serve to harmonize management practices between jurisdictions or enable Aboriginal groups to work with custodians on common concerns (e.g. access to federal property for hunting or fishing, wild fire management, infrastructure, services, regional land planning) or to explore public-private partnerships.

4. Best Practices

The courts have determined that all of the following conditions are required to trigger the legal duty to consult:

1. Contemplated Crown conduct
2. Potential or established Aboriginal or treaty rights
3. Potential adverse impact

If the above conditions apply, federal property custodians are legally obliged to account for Aboriginal rights when developing their property management strategies. Meeting such obligations will depend on the seriousness of the impact and strength of the claimed rights.

Consultation must be real, meaningful and timely before a decision on a property is made so as to avoid adversely affecting Aboriginal rights or interests. When planning consultation, it is best to have a working understanding of the people involved and the issues needing attention and to build mutually respectful relationships with the Aboriginal groups. It is important to be honest and transparent and fully disclose federal intentions during consultation. Awareness of Aboriginal culture, local meeting protocols or observances, interpersonal skills, and attention to the local personalities and politics may facilitate effective consultation. Funding to enable meaningful Aboriginal engagement may also be a factor in a successful outcome. While real property consultation is primarily supported by departmental funding, in some cases it could be linked to major project or environmental assessment funding.

It is important for practitioners to be sensitive to regional and local concerns when cultivating sound relationships with Aboriginal groups. Such interactions may combine legal obligations, policy, and practical objectives. For example, it can be useful to understand Aboriginal treaties or the interjurisdictional decision-making processes of neighbouring Aboriginal groups. In the same vein, it is important to become informed about issues ranging from Aboriginal burial site management on federal property to harmonizing adjacent land uses, managing flood plains or sharing infrastructure and services.

Information sources to help assess actual or potential Aboriginal interests appear in Appendices 1 and 2. An Aboriginal and Treaty Rights Information System (ATRIS) is being developed by Justice Canada and INAC and will be phased in during 2010. At first, ATRIS will focus on INAC's existing electronic information: Aboriginal community profiles, treaties, land claims, litigation and asserted rights. Information from other departments and other jurisdictions will be added later.

Appendix 3 presents common questions regarding typical operational, managerial, or policy and legal decision-making scenarios. Answers to those questions touch on the following:

- ▶ getting the necessary training;
- ▶ gathering information to initiate consultation with the appropriate Aboriginal groups;
- ▶ obtaining advice and drawing on the experience of the real property community; and
- ▶ determining if resources are in place to meet obligations and management objectives.

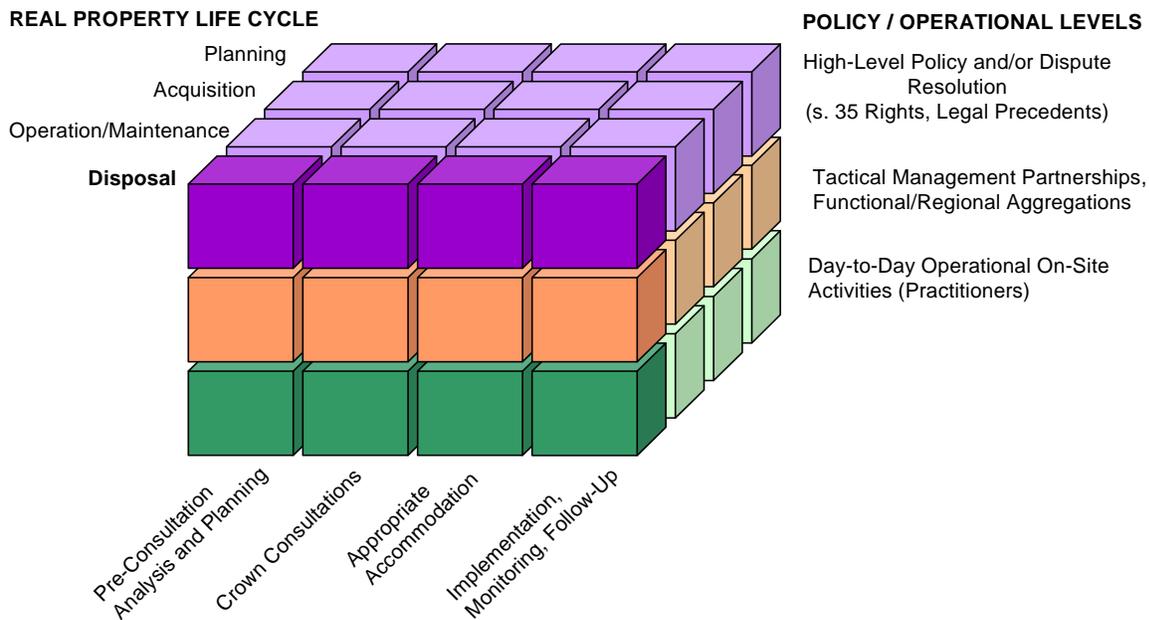
Appendix 4 offers best practices for effectively consulting on real property disposal.

Best Practice 1: Read this Guide along with the Interim Consultation Guidelines

The best starting point for the real property community is to read this Guide along with the Interim Consultation Guidelines. It is important to become familiar with the Aboriginal Consultation Planning Cube shown below. It links real property management authorities and decisions to Aboriginal rights and interests at three fundamental levels:

- ▶ **Managers** who deal with **high-level or complex** real property and Aboriginal **policy** development, **dispute** resolution, or resolution of **legal rights or title** issues;
- ▶ **Managers** who make real property decisions of a **tactical nature** (possibly involving many stakeholders) to meet several federal real property or Aboriginal policy or program goals or to balance public and Aboriginal needs (including complex rights or interests); and
- ▶ **Real property practitioners** who usually focus on **day-to-day operations**, seek site-specific solutions, and are likely to work within established relationships with local Aboriginal groups.

Real Property Aboriginal Consultation Planning Cube



CANADA'S INTERIM CONSULTATION GUIDELINES

The above figure depicts the three intersecting dimensions of real property consultation planning. With the appropriate policy or operational level in mind (right of cube), consultation may occur throughout the real property life cycle (left of cube), and its planning needs to follow the Interim Consultation Guidelines' planning phases (base of cube). The cube can help managers and/or practitioners determine the following:

- ▶ which phase of the planning process to focus on;
- ▶ the **consultation context** and custodians' capacity to effectively address the decisions they face;
- ▶ whether to **defer to higher management-level or policy-level decision makers** to address broad consultation issues that are beyond the capacity or mandates of practitioners; and
- ▶ whether the **appropriate advice and regulatory direction was obtained and training taken** before consulting.

Best Practice 2: Answer key real property management questions

Key starting questions to frame effective consultation planning

1. Is there a **strategic or broad economic and social policy or legal context** that may require attention to Aboriginal rights or interests during the management of a property, e.g. harvesting or access rights, regional economic development or shared resource use?
2. Before starting the Aboriginal consultation process, does the department or agency have an **Investment Plan, Long-Term Capital Plan or Real Property Management Framework** in place to provide a departmental context for and possible perspective on Aboriginal relationships?
3. Is Aboriginal consultation addressed in **management plans** for a particular real property?
4. What **expertise or community** exists **within a custodial department** to provide advice and support regarding Aboriginal issues that affect real property management or to undertake joint consultation planning or relationship building?
5. What **Aboriginal awareness**, consultation planning or practical consultation **training** have departmental real property practitioners and managers taken?
6. If, as a result of consultation, the custodian **deems Aboriginal accommodation to be appropriate**, has the department positioned itself to offer and follow up on accommodation?

Best Practice 3: Engage in interdepartmental collaboration

Interdepartmental collaboration, in keeping with the Interim Consultation Guidelines, helps to establish the lead and supporting roles of respective custodial departments when addressing Aboriginal rights and interests. Furthermore, it supports the Treasury Board *Policy on Management of Real Property* and *Directive on the Sale or Transfer of Surplus Real Property*.

Interdepartmental collaboration is crucial for reconciling federal interests and Aboriginal rights or interests. On the whole, reconciliation of those rights is a legal duty of the Crown; therefore, such collaboration enables the Crown to work with Aboriginal groups in a coordinated, efficient and honourable manner that reflects the collective voice of the federal government.

Mechanisms that enable interdepartmental collaboration include the Treasury Board Advisory Committee on Real Property, Director General Committee on Strategic Disposals and Assistant Deputy Minister Steering Committee on Real Property, which bring custodians together to discuss strategic coordination and real property management issues that intersect with Aboriginal issues. Information on these committees is available from the Treasury Board of Canada Secretariat's Real Property and Materiel Management Policy Division (see Section 5,

“Enquiries,” for the Division’s contact information). Ongoing interdepartmental coordination is encouraged, especially in the regions through regional councils.

Best Practice 4: Know and understand your federal real property roles and responsibilities as they relate to Aboriginal rights and interests

Custodial departments

- ▶ Custodians are responsible for their real property management decisions, making final recommendations to ministers about significant property use and management changes, disposal options, and appropriate accommodation of Aboriginal or treaty rights.
- ▶ Departmental Long-Term Capital Plans and Investment Plans are strengthened by assessing and addressing Aboriginal rights and interests during the life of the property.

All custodians are ultimately responsible for consultation related to their real property.

Delegation to others does not absolve departments of their consultation responsibilities.

Treasury Board of Canada Secretariat, Real Property and Materiel Policy Division

- ▶ Develops, interprets and maintains policies for real property and materiel assets management.
- ▶ Facilitates coordination of federal interests and provides leadership and oversight for the management of real property and materiel assets through a variety of interdepartmental, senior management-level review and decision-making committees (noted in Best Practice 3).

Department of Justice Canada

- ▶ Provides custodians with preliminary legal information on Aboriginal rights or other legal interests and helps custodians ensure that all legal aspects of a real property transaction are identified and addressed through a due diligence review.
- ▶ Performs legal risk analysis for properties where Aboriginal rights and title are claimed or established or where treaty rights exist, recommends to custodians the appropriate level of Aboriginal consultation and provides information on relevant legal dispute resolution options (page 23 of the Interim Consultation Guidelines covers Justice Canada’s role during consultation).
- ▶ Prepares necessary conveyance documents, including their settlement and approval as to form and legal content, and reviews protocols or other agreements for possible incorporation of Aboriginal rights or interests into the management of federal lands.

Indian and Northern Affairs Canada

- ▶ Can provide contextual information or advice on the Aboriginal rights, interests and legal or practical relationships affecting properties (e.g. claims or treaties, Aboriginal history, use and occupation, nature and scope of Aboriginal groups' interests or those of neighbouring groups, and useful contacts in a community).
- ▶ On behalf of Canada, INAC may acquire property for claims settlement, treaty implementation, non-operational programs or its own departmental operations.

Public Works and Government Services Canada

- ▶ Offers custodians a range of real property services, including disposing of real property within Canada "as is" and helping custodians assess and manage Aboriginal rights or interests.
- ▶ May participate in consultations between custodians and Aboriginal groups, whether those discussions are on a rights basis or a practical interest basis.

Canada Lands Company CLC Limited (CLC)

- ▶ CLC is a non-agent federal Crown corporation that can act as a disposal agent for custodians, following Treasury Board of Canada Secretariat review, to dispose of a "strategic" surplus property, which is often a large property or one that offers potentially valuable gain to Canada and its stakeholders.
- ▶ If a property is sold to CLC, any part of the property's development plan that deals with community stakeholder interests may address Aboriginal groups' interests that are not rights-based, in keeping with the terms and conditions of transfer.

<h3>Best Practice 5: Address different stakeholder interests</h3>

Public property management is complex. It may require federal, provincial or territorial, municipal and Aboriginal collaboration. A whole-of-government approach to identify, assess and manage legal risks or benefits when addressing Aboriginal rights or interests is recommended, but it is useful to identify a lead department to manage interdepartmental coordination. This approach could be framed within the governance and decision-making structures of real property management, including a department's Investment Plan. Strategic planning can result in a coordinated effort among federal custodians, ideally with other stakeholders (pages 15, 16, 39 and 48 of the Interim Consultation Guidelines).

Throughout the life cycle of a property, custodians can benefit from a range of legal and practical relationships with neighbouring interests, which may touch on, for example, common interests in environmental management or shared infrastructure and services such as roads or fire protection. Aboriginal groups may have specific interests in a property. For example, a property may be subject to harvest rights set out in a treaty, be subject to a contractual business agreement or

follow practical protocols between neighbours, possibly with access rights to adjacent properties. Managers may need to balance other stakeholder interests along with Aboriginal rights.

Real property disposal draws particular attention to stakeholder rights, interests and relationships, including those of Aboriginal groups. Departments are encouraged to make timely decisions when developing their property disposal strategies (details in Appendix 4). Under Treasury Board policy, they are required to give equal consideration to federal departments, agent Crown corporations, and provincial or municipal governments that have interests in acquiring surplus lands for program, policy or public purposes, especially if they are considered complex or strategic properties.

<p>Best Practice 6: Gather relevant information and contact Justice Canada to assess the level of consultation and accommodation required</p>

It is important to address Aboriginal consultation early in the property management process. The level of consultation and accommodation depends on the strength of the claim of Aboriginal or treaty rights and the seriousness of any “negative impact” to those rights. Within the real property context, the information itemized in the following table is required for Justice Canada to assess what action is necessary.

The table refers to consultation for rights-based interests. Consultation for building non-rights-based relationships is encouraged for practical purposes. For detailed, formal direction on the information required for assessing legally required levels of consultation or accommodation, please refer to the [Interim Consultation Guidelines](#).

Information Required	Possible Source of Information
Detailed description of the proposed project: <ul style="list-style-type: none"> • Location of activity • Type of activity (e.g. property acquisition, management, disposal, leasing, letting or change of use, including new construction and archaeological research) • Timing of activity • Scale of activity • Profile of activity (high or low) • Significance of change of use • The when, where, why and how • Cross-jurisdictional management or policy issues (shared with Aboriginal neighbours) 	<ul style="list-style-type: none"> • Activity or project manager • Real estate advisor • Leasing or letting advisor • Management • Intergovernmental sources • ATRIS • Aboriginal communities
Owner of the property	Title search (Justice Canada)
National security project	<ul style="list-style-type: none"> • Project manager • Real estate advisor • Leasing or letting advisor

Further details on assessing the nature and scope of Aboriginal rights and interests in federal real property are outlined in Appendix 2.

5. Enquiries

Please direct enquiries about this Guide to your departmental headquarters. For interpretation of this Guide, departmental headquarters should contact:

Real Property and Materiel Policy Division
Treasury Board of Canada Secretariat
L'Esplanade Laurier
140 O'Connor Street
Ottawa, ON K1A 0R5

Telephone: 613-957-2400

Toll free: 1-877-636-0656

Email: publicenquiries-demandederenseignement@tbs-sct.gc.ca

Various communities of practice have created pages on the [GCPedia](#) wiki to share information and best practices. The [Federal Real Property Community](#) page allows the exchange of ideas and possible solutions for the challenges real property practitioners face as they deal with the intersection of federal interests and Aboriginal rights and interests in real property. An [Aboriginal Affairs Community](#) is also found on GCPedia.

Appendix 1—Web Links to Key Reference Documents

Federal legislation

- ▶ [Constitution Act, 1982](#)
- ▶ [Financial Administration Act](#)
- ▶ [Saskatchewan Treaty Land Entitlement Framework Agreement](#)

Federal policy guidelines

- ▶ [Canada's Action Plan on Aboriginal Consultation and Accommodation](#)
- ▶ [Aboriginal Consultation and Accommodation: Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult](#) (INAC and Justice Canada)
- ▶ [Guide to the Management of Real Property](#) (Treasury Board of Canada Secretariat)

Treasury Board policy instruments

Policies

- ▶ [Policy on Management of Real Property](#)
- ▶ [Common Services Policy](#)
- ▶ [Policy on Investment Planning – Assets and Acquired Services](#)
- ▶ [Policy on Fire Protection](#)
- ▶ [Reporting Standard on Real Property](#)
- ▶ [Policy on the Management of Projects](#)

Directives

- ▶ [Directive on the Sale or Transfer of Surplus Real Property](#)

Standards

- ▶ [Appraisals and Estimates Standard for Real Property](#)

Frameworks

- ▶ [Policy Framework for Assets and Acquired Services](#)
- ▶ [Integrated Risk Management Framework](#)
- ▶ [Manitoba Treaty Land Entitlement Framework Agreement](#)

Historic treaties

INAC maintains a [website on historic treaties](#). Issues related to interpretation will require the advice of treaty specialists and legal advisors.

Modern treaties and self-government agreements

INAC maintains a summary [website for all Final Settlement Agreements](#). Other settlements are anticipated in the future, so please check the website for updates.

Note that some settlement agreements provide for implementation of real property elements.

Newfoundland and Labrador

- ▶ [*Land Claims Agreement Between the Inuit of Labrador and Her Majesty the Queen in Right of Newfoundland and Labrador and Her Majesty the Queen in Right of Canada*](#)

British Columbia

- ▶ [*Nisga'a Final Agreement*](#)
- ▶ [*Tsawwassen First Nation Final Agreement*](#)
- ▶ [*Maa-nulth First Nations Final Agreement*](#)
- ▶ [*Sechelt Indian Band Self-Government Act*](#)
- ▶ [*Westbank First Nation Self-Government Agreement*](#)

Quebec

- ▶ [*James Bay and Northern Quebec Agreement and Complementary Agreements*](#)
- ▶ [*The Northeastern Quebec \(Inuit\) Agreement*](#)

Northwest Territories

- ▶ [*Tlicho Agreement*](#)
- ▶ [*Gwich'in Comprehensive Land Claim Agreement*](#)
- ▶ [*Sahtu Dene and Métis Comprehensive Land Claim Agreement*](#) ([Volume I](#), [Volume II](#))
- ▶ [*The Western Arctic Claim Inuvialuit Final Agreement*](#)

Nunavut

- ▶ [*Nunavut Land Claims Agreement*](#)

Yukon

- ▶ [Yukon First Nations Self-Government Act](#)
- ▶ [Numerous Yukon First Nations Final Agreements](#)

There are up to 14 agreements anticipated at this time. As of December 31, 2008, the following 11 Yukon First Nations have both comprehensive land claim and self-government agreements:

- Champagne and Aishihik First Nations
- Teslin Tlingit Council
- First Nation of Nacho Nyak Dun
- Vuntut Gwitch'in First Nation
- Little Salmon / Carmacks First Nation
- Selkirk First Nation
- Tr'ondëk Hwëch'in Council
- Ta'an Kwäch'än Council
- Luanne First Nation
- Kwanlin Dün First Nation
- Carcross/Tagish First Nation

Training

- ▶ [Canada School of Public Service](#)

Appendix 2—Assessing the Nature and Scope of Aboriginal Rights and Interests in Federal Real Property

Custodians can begin gathering information on Aboriginal rights and interests that might apply to a particular property when planning for its acquisition. This knowledge will be useful throughout the life cycle of the property. In older properties, such analysis may not have been undertaken or updated to reflect changes in the Aboriginal relationships over time. If an Aboriginal interest is thought to exist, it is recommended that Justice Canada and INAC be asked to undertake a due diligence exercise to assess if there is an Aboriginal right or treaty right that needs attention.

The following information is necessary for custodians to assess the scope of any Aboriginal right or treaty right that might apply to the life-cycle management of the property.

Necessary Information	Possible Sources of Information
<p>Property is in an area claimed by an Aboriginal group (or groups) or is covered by:</p> <ul style="list-style-type: none"> • Historic treaty • Modern treaty • Accepted or asserted claim (comprehensive or specific claim) • Rights or title-based court decisions or pending litigation <p>Include nature of any treaty, claim or dispute.</p>	<ul style="list-style-type: none"> • Treaties and Aboriginal Government Sector, INAC • Aboriginal groups' websites • Directory of Federal Real Property (DFRP) • Justice Canada for litigation or key court decisions • Aboriginal Treaty Rights Information System (ATRIS)—being developed by INAC • Internet searches
<p>Agreements between local Aboriginal groups and the federal government:</p> <ul style="list-style-type: none"> • Treaty Land Entitlement (TLE) • Notification Agreement • Settlement Implementation Agreement • Side Agreements to Land Claim Settlement Agreements (e.g. wild fire management, waterfront or harvesting access, shared road or utility services) • Administrative and interim measure agreements with federal departments 	<ul style="list-style-type: none"> • Lands and Economic Development Sector, INAC • Treaties and Aboriginal Government Sector, INAC • Specific federal custodial departments or Crown corporations (e.g. Parks Canada, National Capital Commission)

Necessary Information	Possible Sources of Information
Consultation protocols within modern treaties, related side agreements or other practical measures	<ul style="list-style-type: none"> • Treaties and Aboriginal Government Sector, INAC • Information on project- and region-based agreements may be available from the regional offices of custodial departments and the Aboriginal parties to these agreements.
Status of negotiation of accepted claim(s) if there are sensitive real property issues on the negotiating table	<ul style="list-style-type: none"> • Custodians' Aboriginal Issues officers • Treaties and Aboriginal Government Sector, INAC • Departmental Legal Services unit
INAC is interested in real property for non-operational program purposes (e.g. claims settlement, Treaty Land Entitlement, Additions to Reserve).	<ul style="list-style-type: none"> • Treaties and Aboriginal Government Sector, INAC • INAC headquarters or regional offices
Aboriginal use and occupancy of the subject property (historical perspective)	<ul style="list-style-type: none"> • Assessment of potential use and occupancy (INAC and Justice Canada—historical research) • Departmental and custodial information • Private sector and provincial records (e.g. Hudson's Bay Company Archives, Archives of Manitoba) • Provincial archaeological databases or inventories • Court records
Property is situated on or near an archeological or burial site that has known Aboriginal significance.	<ul style="list-style-type: none"> • Parks Canada—historical research • National and regional anthropology museums
Title search	<ul style="list-style-type: none"> • Justice Canada • Departmental and custodial • Federal and provincial land title offices
Property is situated in or near an Indian reserve, a Land Claim Settlement area or a recognized Métis settlement.	<ul style="list-style-type: none"> • Treaties and Aboriginal Government Sector, INAC—historical research • Office of the Federal Interlocutor for Métis and Non-Status Indians • Northern Affairs Sector (Inuit), INAC • Provincial and territorial governments (e.g. Alberta Métis, Nunavik Inuit)

Necessary Information	Possible Sources of Information
<p>Issues have been raised by Aboriginal groups in past consultations as part of federal, provincial or territorial environmental assessments (e.g. panel reports) or major project reviews.</p>	<ul style="list-style-type: none"> • Records of previous formal consultations from other government activities and of other types of consultation [e.g. Canadian Environmental Assessment Agency, National Energy Board, Natural Resources Canada, Major Projects Management Office (MPMO) or territorial assessment] • Websites of Aboriginal communities and organizations
<p>Media and general environmental scans indicate Aboriginal interest that might affect federal property.</p>	<ul style="list-style-type: none"> • Scan of media and Aboriginal websites • Custodial department • General and local knowledge

Appendix 3—Common Questions and Answers for Managing the Interface Between Aboriginal Rights or Interests and Federal Real Property Management

The following questions and answers provide general guidance on building effective relationships with neighbouring Aboriginal rights and interest holders. They expand on the Real Property Aboriginal Consultation Planning Cube in Best Practice 1.

High-level (strategic) policy issues and dispute resolution considerations

- Q. When a real property practitioner is faced with a high-level, strategic real property issue, such as Aboriginal rights or title litigation, asserted land claims or proposals to explore new relationships within treaties, what is the role and response of the practitioner in such matters?**
- A. Think big picture:** Real property practitioners are not expected to deal with high-level legal and policy issues. Nevertheless, practitioners are advised to become familiar with the legal and policy environment outlined in the Interim Consultation Guidelines. This will enable them to avoid situations they should not handle alone. In such situations, the departmental Legal Services unit can advise on the legal obligations to consult that custodians must honour, while INAC can provide background on the strategic and negotiation context. This will help custodians plan, manage and possibly dispose of their properties in a manner that addresses the relevant Aboriginal rights or interests.
- A. Consider high-level objectives:** Effective relationships between property managers and Aboriginal groups may contribute to high-level policy objectives. This might involve managing federal properties in a manner that can resolve elements of land claims negotiations, serve federal treaty land entitlement commitments or advance Aboriginal and regional economic opportunities if they align with property management objectives.
- A. Get legal and policy feedback:** Custodians are invited to work with their departmental Legal Services unit and with INAC to identify the issues that need high-level policy and legal attention. Policy discussion can be raised through the Treasury Board of Canada Secretariat's Director General Committee on Strategic Disposal and Assistant Deputy Minister Steering Committee on Real Property.

Tactical partnerships and functional regional aggregations

- Q. If more than one Aboriginal group has rights and interests in a federal property, there may be overlapping legal rights or title claims to address while managing the property. Alternatively, there may be several federal properties within an area where Aboriginal rights or interests arise. What might be a good approach for managing consultation in such complex situations?**
- A. Interdepartmental administrative collaboration:** Consider establishing a team composed of members from the federal custodial departments involved in the area where Aboriginal rights and interests arise. It is important for the Crown to speak with one voice and act in an honourable manner when working with Aboriginal groups in such situations. Interdepartmental collaboration is recommended; it establishes effective relationships with the Aboriginal groups and provides a consistent framework for making operational decisions on specific federal real properties.
- A. Functional aggregations:** Consider an appropriate aggregation for developing a strategic framework to manage federal real property and reconcile related Aboriginal rights or interests (e.g. a regional jurisdiction or geographic area such as a city, a coastal zone or areas subject to treaty or claims negotiations). Some Aboriginal groups have offices to enable coordinated consultation or strategic relationship building with other jurisdictions.
- A. Environmental scan:** Justice Canada and INAC can direct custodians to important sources of information, data and knowledge related to Aboriginal groups who might have Aboriginal rights or interests in a property. Other federal sources, however, may need to supplement this information. Before formal consultation, consider exploring Aboriginal community websites and working with experienced federal custodians and claims negotiators at INAC to identify other consultations that have occurred in the area and to learn of Aboriginal concerns. Also scan regional or national Aboriginal political, business and cultural organizations to gain insight into their views on Aboriginal interests in the property.
- A. Consultation protocol agreements:** The Interim Consultation Guidelines provide a framework for planning Crown consultation and accommodation, along with advice on subsequent implementation. When dealing with complex real property decisions, the use of formal protocols for consulting with Aboriginal groups may be useful. For local and routine operational matters, informal, mutually beneficial consultation relationships may suffice. It is important, however, that participants in the consultation process understand their respective roles. Furthermore, they should be aware of the time and capacity

pressures they will face during consultation. Consultation should help to avoid making property management decisions that may inappropriately infringe on Aboriginal rights or interests in the area or materially change operational relationships with local Aboriginal groups.

Real property day-to-day operational on-site activities (practitioner)

Q. As a new real property practitioner, I am unsure if there are Aboriginal rights or interests in the federal property I manage. How do I get started?

- A. Use your departmental expertise:** Seek out the real property practitioners and managers in your department with expertise in Aboriginal issues to gather information on how departmental interests intersect with those of neighbouring Aboriginal groups. Liaise with other experienced custodial departments to see if they have or need a broad, collaborative relationship with Aboriginal interests in the area.
- A. Be prepared:** If there is little departmental expertise to draw on or you are new to Aboriginal issues, consult the Interim Consultation Guidelines to become familiar with the framework for planning and undertaking Crown consultation or accommodation. Consider taking Aboriginal cultural awareness and sensitivity training from the Canada School of Public Service or training in meeting Canada's Aboriginal consultation obligations from INAC and Justice Canada.
- A. Understand your operational relationship:** Document Aboriginal interests that may affect the management of your property but may not involve Aboriginal rights, for example:
- ▶ Operational agreements with neighbouring groups, e.g. access across property to adjacent Aboriginal lands, harvesting flora or fauna on federal lands, shared utilities or services with neighbouring Aboriginal groups;
 - ▶ Culture and heritage, e.g. discovery of apparent Aboriginal artefacts or burial sites on federal property (Parks Canada is developing a guide for negotiators);
 - ▶ Economic opportunity through employment or business agreements with Aboriginal interests, e.g. forest harvesting agreements, catering or maintenance contracts; and
 - ▶ Environmental management, e.g. joint management agreements on potable water sources, wildfires, floods, pests, weeds, toxic spills or contamination.

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- A. **Consider if strategic considerations need attention:** Consider if operational objectives can be achieved where some rights-based interests are not completely reconciled. If high-level Aboriginal rights or title claims arise during discussions with Aboriginal groups, consult INAC and Justice Canada about how best to respond. Furthermore, respectfully inform the Aboriginal group that other federal authorities may be better positioned to address complex policy or legal matters outside the operational context of the particular real property.
 - A. **Consider working with other partners:** Complex questions requiring interdepartmental collaboration or discussion with several Aboriginal groups may arise during consultation. Seek the advice of your departmental real property policy group to reconcile such matters if they involve overlapping or shared challenges that exceed local operational capacity.
 - A. **Consult Justice Canada** about required levels of consultation or accommodation.

Appendix 4—Disposal Planning: Best Practices and Anticipated Results

Establishing an effective rapport with neighbouring Aboriginal groups early in the real property life cycle provides the foundation for an ongoing, trusting relationship at the end of the property life cycle. It is recommended that contact with Aboriginal groups or interests be established well before the disposal stage; otherwise, significantly more effort may be required to undertake effective consultation with Aboriginal groups. Early engagement will help to develop mutual trust and ensure that well-informed, objective decisions can be made.

Many of the consultation practices outlined below apply throughout the real property life cycle. During disposal, attention to Aboriginal rights and interests in real property is more focussed and prone to dispute, as expectations of Aboriginal ownership or accommodation may be high.

The four key Aboriginal **consultation points** appearing below describe best practices for effective decision making on disposal. The diagram at the end of this Appendix illustrates where these points are positioned in the disposal decision-making process.

Consultation Point I: Build relationships early in the real property life cycle, before making decisions

Best practice: Open a pre-consultation dialogue with the Aboriginal groups, noting the custodian’s willingness to consult on real property management issues. Ideally, relationships with Aboriginal groups should be established and maintained throughout the real property life cycle. Custodians, with the advice of Justice Canada, should work with nearby Aboriginal groups to establish consultation protocols, where appropriate, and consider related funding, particularly before entering the disposal stage. Models for planning initial consultation are outlined in the Interim Consultation Guidelines.

Anticipated result: A consultation protocol with Aboriginal groups (or adopt an existing one) that provides a framework for federal-Aboriginal consultations. The parties might agree on how to effectively administer and conduct consultations at this point. This may result in identifying practical measures (e.g. contact points and representatives, scheduling and consultation capacity building), in determining the scope of necessary consultation, and in finding other suitable mechanisms to enable effective consultation.

Consultation Point II: Undertake effective information gathering for disposal planning

Due diligence

Best practice: Consult on the scope of Aboriginal rights and interests and other practical relationships. Due diligence research of a formal, legal nature may miss useful information on Aboriginal interests, including those related to Aboriginal traditions or history, or other verifiable but informal agreements that might support notable Aboriginal rights or title assertions. The context for information gathering needs to be clear to the Aboriginal groups involved so they understand the purpose of such consultation.

Anticipated result: A comprehensive report on the strength and nature of Aboriginal rights and interests and relationships. Through consultation, Aboriginal interests in federal lands may be identified and assessed for their legal significance. Reports should be thorough enough to inform decisions on effective options for the property's disposal.

Identify federal program interests and public purpose uses

Best practice: Explore links between Aboriginal rights or interests and federal program interests or public purpose uses. Identify federal program needs (e.g. comprehensive claims, specific claims or treaty land entitlement implementation, national parks) or public uses (e.g. housing, docks or transportation corridors) that might also serve Aboriginal communities.

Anticipated result: A summary of the relative merits of competing interests. Disposal options would consider federal program needs, public purpose uses or development interests based on highest and best use and taking market value into account. Routine properties of interest to only one party may be suitable for sale or transfer for local, Aboriginal or public purposes. Large or high-value strategic disposals would need to balance the interests of many stakeholders, including Aboriginal groups, before disposal options are finalized.

Valuation

Best practice: Identify Aboriginal or other legal rights that might affect property value. Federal property managers need to be aware of Aboriginal rights that may affect property use. Examples might include access agreements for harvesting wildlife or fish, access rights across federal properties to adjacent lands owned by Aboriginal communities, or management of protected burial or archaeological sites.

Anticipated result: A report on formal or informal activities that affect property value. Aboriginal rights or other legal rights would be identified to determine their effect on land value, especially where there are unresolved Aboriginal rights or title.

Consultation Point III: Ensure transparent analysis and formulation of disposal decisions

Best practice: Inform Aboriginal parties of the disposal decision and provide justification, in keeping with the Interim Consultation Guidelines. Justification of a decision should be transparent to all stakeholders, especially if it involves accommodating or putting aside some Aboriginal rights or interests to balance the needs of all stakeholders.

Anticipated result: The decision would reflect an honourable relationship with the Aboriginal rights or interests affected. After considering all interests, a custodian would justify the decision to dispose of the property in a respectful manner, explaining how and why the Aboriginal concerns were addressed in the disposal decision.

Consultation Point IV: Examine and implement appropriate accommodation measures

Best practice: Identify Aboriginal accommodation measures in the disposal decision and implement such measures. Work with the Aboriginal rights or interest holders to effectively implement and monitor such accommodations until their conclusion.

Anticipated result: All parties understand what accommodation is to be undertaken and how it will be implemented. Any disputes over accommodation would be directed to the appropriate legal or dispute resolution mechanisms—in some cases, those described in Claims Settlement Agreements, which apply to the relationship between Canada and the Aboriginal stakeholders.

This diagram depicts the Real Property Disposal Process and locates the four Aboriginal consultation points within the real property management life cycle.

Disposal Planning Best Practices & Anticipated Results

