



The Disposal of Surplus Real Property in the Context of Aboriginal Issues

Best Practices Guidelines

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Treasury Board of Canada Secretariat

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Table of Contents

- Executive Summary1**
- 1. Purpose, Scope, and Context1**
 - 1.1 Purpose and Scope.....1
 - 1.2 Context.....3
- 2. Best Practices10**
 - 2.1 Aboriginal Interests and the Disposal Process.....10
 - 2.2 Interdepartmental Collaboration11
 - 2.3 Identifying, Assessing, and Managing Risk in the Context of Aboriginal Interests13
- 3. Monitoring20**
- Appendix 121**
- Appendix 2.....23**
- Appendix 3.....24**

Executive Summary

The *Treasury Board Policy on the Disposal of Surplus Real Property* (Disposal Policy) establishes a system for the disposal of real properties through sale or transfer when they are no longer required by departments for program delivery purposes.

The purpose of this document is to support the Disposal Policy by providing a best practices framework to help custodian departments identify and assess Aboriginal interests and make informed and prudent decisions about if, when, and how to consult with Aboriginal groups.

It was developed in close collaboration with the Department of Justice Canada (DOJ) and stakeholder departments and agencies and incorporates advice provided by officials in all regions of the country, during the course of two separate rounds of consultation.

It consolidates best practices; clarifies interdepartmental roles and responsibilities; facilitates interdepartmental collaboration; and provides key information on the legal context and federal claims policies and processes relevant to disposal in the context of Aboriginal interests.

It also provides guidance on specific issues about which there has been uncertainty, such as the following:

- the responsibility of custodian departments for initiating and implementing all disposal actions and for assessing and managing Aboriginal interests related to disposals (including taking decisions on if, when, and how to consult with Aboriginal groups), with advice and support from DOJ, Indian and Northern Affairs Canada (INAC) and Public Works and Government Services Canada (PWGSC), as appropriate;
- INAC's responsibility to make program decisions on whether to acquire surplus properties for claims purposes, as distinct from its supporting role in providing advice and information to custodians with respect to the nature and scope of Aboriginal interests;
- where to turn for information and assistance in assessing the legal, policy, and other risks associated with potential Aboriginal interests; and
- disposals and Aboriginal interests in the context of the Treaty Land Entitlement (TLE) processes in Manitoba and Saskatchewan.

This document is not intended to be a definitive statement of the Crown's legal obligations in the context of disposal and Aboriginal interests, nor is it intended to replace case-specific legal advice. It should, however, help departments to identify when they need the assistance of legal counsel and what questions need to be addressed.

1. Purpose, Scope, and Context

1.1 Purpose and Scope

Treasury Board Disposal Policy

On July 1, 2001, Treasury Board of Canada Secretariat (TBS) released the new [Policy on the Disposal of Surplus Real Property](#) (Disposal Policy). The policy establishes a system for the disposal of real properties through sale or transfer when they are no longer required by departments for program delivery purposes.

Aboriginal interests¹

Whenever the government disposes of property, it must assure itself that it owns what it thinks it owns, and custodian departments need to be aware of the possibility that Aboriginal rights, title, or treaty rights may affect the Crown's ownership.

When making disposal decisions that could affect Aboriginal rights, title, or treaty rights, custodian departments must respect the fiduciary relationship between the Crown and Aboriginal peoples and fulfill any federal fiduciary obligations as they relate to the interests of Aboriginal peoples in the property (see **Legal Context** below). Custodian departments must also take account of federal policies and strategic concerns relating to Aboriginal peoples.

Purpose of these guidelines

Support the Disposal Policy by

- providing a risk assessment and management framework to help custodian departments identify and assess Aboriginal interests and make decisions about if, when, and how to consult with Aboriginal groups;
- contributing to the larger process of assessing and taking account of the full range of federal and non-federal stakeholders' interests, as required by the Disposal Policy;
- consolidating best practices;
- clarifying interdepartmental collaboration, roles, and responsibilities; and
- providing key information on the legal context and federal claims policies and processes relevant to disposal in the context of Aboriginal interests.

¹ Unless otherwise specified, use of the term "Aboriginal interests" in this document encompasses both potential legal interests (Aboriginal rights, title, or treaty rights) and an Aboriginal group's interest in acquiring a specific surplus property.

Scope

Best practices guidelines

- provide a framework for assessing and managing risks related to disposal in the context of Aboriginal interests that is grounded in best practices;
- will be supported by DOJ guidance on constitutionally protected Aboriginal and treaty rights guaranteed in section 35 of the *Constitution Act, 1982* and on the Crown's duty to consult; they may also be complemented by appropriate departmental and regional operational processes; and
- supercede the TBS letter of interim guidance provided to custodian departments by Colin Potts, Deputy Comptroller General, on March 13, 1998.

Focus on disposal in the context of Aboriginal interests

Important

These guidelines are not intended to be a definitive statement of the Crown's legal obligations in the context of Aboriginal interests, nor are they intended to replace case-specific legal advice. They will be updated, as required, to reflect any significant developments in Aboriginal law.

This document is not intended to provide guidance for all real property management situations where Aboriginal interests may need to be addressed by custodian departments.

The main focus is on the transfer of real property through sale, gift, transfer, or any instrument evidencing a transfer of all federal interests in such property (not including a transfer of administration or a transfer of administration and control) because this type

of disposal is where Aboriginal interests most frequently arise.

However, given that Aboriginal interests may come into play in other real property management situations, such as, for example, long-term leases or significant changes of use, custodians should be mindful of the general principles and best practices set out in this document and, if in doubt about the appropriate way to address Aboriginal interests, seek advice from legal counsel.

1.2 Context

This section provides key information on the legal context and federal claims policies and processes relevant to disposal in the context of Aboriginal interests.

Legal context

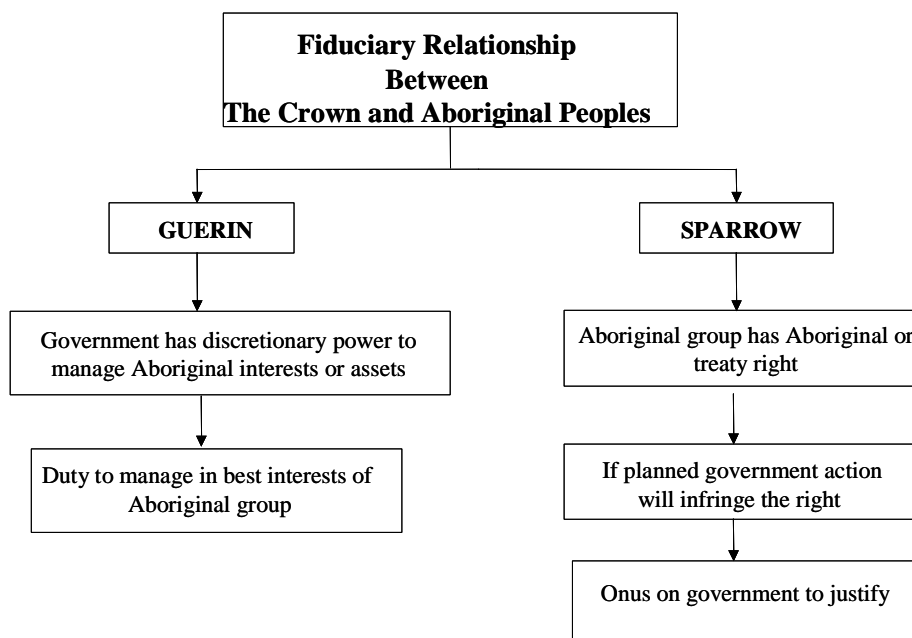
The relevant legal framework is set by what the Supreme Court of Canada has said about the Crown's fiduciary duties in the context of constitutionally protected Aboriginal and treaty rights.

Fiduciary duties: Guérin and Sparrow

The relationship between government and Aboriginal peoples is grounded in the fiduciary relationship of the Crown with Aboriginal peoples. The fiduciary relationship and any duties it may give rise to makes Aboriginal groups unique, as no comparable duties are owed to non-Aboriginal groups.

Courts have identified two main categories of fiduciary duties in relation to Aboriginal peoples, as follows:

1. *Guérin-type* situations generally are those where the Crown has discretionary power over the management of particular interests or assets of an Aboriginal group, e.g. in connection with the surrender of reserve lands. In such circumstances, the Crown has a duty to act in the best interests of the Aboriginal group concerned.
2. *Sparrow-type* situations are those where the Crown must respect constitutionally protected Aboriginal and treaty rights by justifying planned government activities, including land dispositions that will likely infringe those rights.



Sparrow-type obligations

The Supreme Court of Canada has provided a framework (the Sparrow test) for assessing whether government action infringes a constitutionally protected Aboriginal or treaty right and if so, whether the infringement is justifiable.

Sparrow test

- Is there an existing Aboriginal or treaty right?
- Does the proposed government action infringe the right?
- If so, can the infringement be justified because
 - (i) there is a valid legislative objective; and
 - (ii) the infringement upholds the honour of the Crown in that there is as little infringement as possible; the infringement is demonstrably reasonable; and there has been an appropriate level of consultation.

Existing Aboriginal and treaty rights

Section 35(1) of the *Constitution Act*, 1982 recognizes and affirms existing Aboriginal and treaty rights but is not intended to “revive” Aboriginal rights that are otherwise extinguished.

Treaty rights

Treaty rights are set out in historic treaties (such as land cession or peace and friendship treaties) or modern treaties (such as comprehensive land claims agreements).

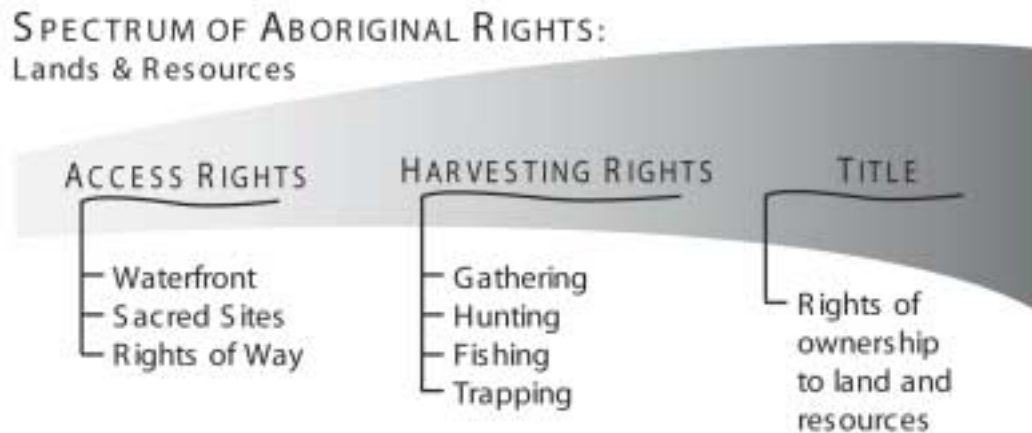
Aboriginal rights

Aboriginal rights are practices and customs that are an integral part of an Aboriginal society. Not all such practices are tied to the land (e.g. language and cultural customs), although they may nonetheless be protected as Aboriginal rights.

The scope of Aboriginal rights to lands and resources varies along a spectrum of connection to the land. For example, rights of access may be limited to quite narrow strips of land, and the existence of Aboriginal rights that are based on traditional uses of lands and resources (such as hunting and fishing) does not necessarily preclude use of the land by others.

At the far end of the same spectrum lies another form of Aboriginal right, namely Aboriginal title. By contrast with Aboriginal rights, Aboriginal title is a right to the land itself, giving rise to exclusive use and occupation of the land.

The list below provides some examples. It is not intended to be exhaustive or to confirm the existence or possible existence of such rights.



Aboriginal title

In *Delgamuukw*, the Supreme Court of Canada set out the defining characteristics of Aboriginal title; the criteria to prove Aboriginal title; and principles relating to the infringement of Aboriginal title, including a duty to consult.

Defining characteristics of Aboriginal title include:

- a right to the land itself, held communally;
- the right to choose the uses to which the land can be put—not restricted to traditional uses—including exploitation of minerals; but
- use must be compatible with the types of activity which made it Aboriginal title land.

Proving Aboriginal title:

The onus of proof lies with Aboriginal groups.

- The land must have been occupied in a way that is sufficient to establish title prior to assertion of sovereignty.
- That occupation must have been exclusive at time of assertion of sovereignty, although there can be shared exclusivity and resulting joint title.
- There must be a continuity between present and pre-sovereignty occupation if present occupation is relied on as proof of pre-sovereignty occupation.

Infringement and justification in relation to Aboriginal title:

- The Crown can infringe Aboriginal title in furtherance of a compelling and substantial legislative objective.
- The Crown may justifiably infringe Aboriginal title for a variety of objectives, including resource development and environmental protection.
- Where Aboriginal title has been proved to exist, it may be necessary to seek ways to incorporate Aboriginal interests and goals or to provide compensation in order to justify infringement.

Aboriginal title and the legal duty to consult:

Note

This document is not recommending that consultation take place only where there is a legal obligation to do so. In the absence of a legal obligation, there are policy factors that must also be assessed by the custodian department in determining whether to consult or inform Aboriginal groups regarding proposed disposals.

- There is a duty to consult with Aboriginal groups when the Crown by its actions will infringe Aboriginal title.
- The scope of the duty to consult will vary according to circumstances. In most cases, the duty will be significantly deeper than mere consultation, and in some cases may require consent.

Context: Federal Claims Policy and Processes

The federal claims policies and processes most likely to impact on disposals are those related to land claims (comprehensive and specific) and Treaty Land Entitlement claims.

A federal policy for the settlement of Aboriginal land claims was established in 1973. The policy divides claims into two broad categories, comprehensive and specific.

- **Comprehensive claims** are based on the assertion of continuing Aboriginal rights to lands and resources.
- **Specific claims** are based on the assertion of non-fulfillment of lawful obligations.

Comprehensive claims policy and process

The goal of the 1973 comprehensive claims policy, reaffirmed in 1981, is to exchange claims to undefined Aboriginal rights for a clearly defined package of rights and benefits set out in settlement agreements.

The comprehensive claims policy covers negotiations with Aboriginal groups in areas where claims to Aboriginal rights have not been addressed by treaty or other legal means. Canada has, however, accepted a limited number of claims for negotiation as comprehensive claims in areas affected by treaties.

[Indian and Northern Affairs Canada—Comprehensive Claims Branch](#)

Negotiations in British Columbia

Most First Nations in British Columbia have never signed treaties and, for this reason, claims there represent a large proportion of the total number of claims being negotiated across the country. They also encompass the entire territory of the province. The British Columbia Treaty Commission process was established in 1991 to facilitate negotiations throughout the province.

[Indian and Northern Affairs Canada—Federal Treaty Negotiation Office](#)

Note: Where Aboriginal groups express an interest in Dominion Coal Block lands in British Columbia, custodian departments should contact the Real Property Division of Natural Resources Canada.

Nova Scotia and New Brunswick

The *Maritime Peace and Friendship Treaties* did not involve land cession and there are continuing claims to both Aboriginal and treaty rights to lands and resources in Nova Scotia and New Brunswick. The negotiation process is in its early stages in Nova Scotia and has not yet been formally established in New Brunswick.

[Indian and Northern Affairs Canada—Comprehensive Claims Branch](#)

Disposal process and comprehensive claims

Disposal is in accordance with the requirements set out in the Disposal Policy that includes a 240-day timeline where INAC wishes to acquire surplus property for comprehensive claims program purposes.

Specific claims policy and process

Specific claims are based on the assertion of the non-fulfillment of legal obligations by Canada and include claims relating to financial matters or asset administration.

Settlements for such claims are primarily financial.

While INAC may have no program interest in acquiring surplus properties for specific claims, the presence of this type of claim may complicate a disposal.

[*Indian and Northern Affairs Canada—Specific Claims Branch*](#)

Disposal process and specific claims

Disposal is in accordance with the requirements set out in the Disposal Policy that includes a 120-day timeline where INAC wishes to acquire surplus property for specific claims program purposes.

Treaty Land Entitlement (TLE)

TLE claims are a sub-category of specific claims in which Aboriginal groups assert that land entitlements provided for under the relevant numbered treaties have not been fulfilled.

In Manitoba and Saskatchewan, money has been set aside to enable eligible Aboriginal groups to acquire land in fulfillment of treaty commitments.

Saskatchewan: the TLE Framework and process

- The *Saskatchewan Treaty Land Entitlement Act* legislates Canada's obligations to the Saskatchewan Entitlement First Nations (EFNs) that are set out in the [*Saskatchewan Treaty Land Entitlement Framework Agreement*](#) (STLEFA).
- The legislated provisions of STLEFA take priority over the Treasury Board Disposal Policy to the extent that they address the disposal of federal lands in Saskatchewan.
- STLEFA provides an opportunity for Saskatchewan EFNs to directly acquire available federal lands from custodians on a willing seller/willing buyer basis at market value.
- In practice, Saskatchewan EFNs are treated as having a priority interest after federal custodian departments or agent Crown corporations that hold property on behalf of the Crown but ahead of provinces or municipalities.
- All disposals of federal real property in Saskatchewan must comply with the terms and conditions of STLEFA.
- Custodian departments should consult with regional officials of INAC and PWGSC when they intend to declare real property surplus in Saskatchewan.

Manitoba: the TLE Framework and process

- The *Manitoba Treaty Land Entitlement Framework Agreement* (MTLEFA) sets out specific principles and a process to govern the acquisition of surplus federal land by Manitoba EFNs.
- MTLEFA explicitly provides that surplus federal land must be managed in accordance with the Treasury Board Disposal Policy.
- Therefore, all the requirements and processes set out in the Disposal Policy apply in Manitoba, including the requirement for INAC to identify any program interest it may have within the relevant specified timelines.
- In the case of routine properties, the priority circulation process applies.
- In the case of strategic properties, any program interest INAC or any other department may have with respect to the property would be considered equally with all other stakeholder interests, during the development of a recommended disposal strategy by the custodian department.
- Custodian departments should consult with regional officials of INAC and PWGSC when the lands they intend to declare surplus are within the area covered by MTLEFA.

2. Best Practices

2.1 Aboriginal Interests and the Disposal Process

This section outlines Disposal Policy requirements with respect to addressing Aboriginal interests.

Disposal process

The Treasury Board Disposal Policy establishes a system for the disposal of real properties through sale or transfer when they are no longer required by departments for program delivery purposes.

Two types of disposal process are set out in the policy, routine and strategic.

Routine disposal

This refers to the process for properties with lesser value that can be sold easily without any substantial investment, usually on an as-is basis.

Strategic disposal

This is the process for those properties with potential for significantly enhanced value, those that are highly sensitive, or a combination of these factors.

Process

Key steps and decision points for both routine and strategic disposals are outlined in the Disposal Policy.

Disposal policy and Aboriginal interests

The Disposal Policy requires that Aboriginal interests be identified and potential risks assessed and addressed by custodian departments as part of both the routine and the strategic disposal processes (*see Appendix 1*).

In developing a recommended disposal strategy, custodian departments are required to complete due diligence inquiries, including a legal assessment by DOJ of the potential existence of Aboriginal or treaty rights.

They must also identify and assess all federal and non-federal stakeholder interests, including those of Aboriginal groups, and take account of federal government policy and strategic considerations, including those relating to Aboriginal issues.

There are also opportunities for INAC to acquire property for program purposes, on behalf of Aboriginal groups, in accordance with the process set out for each type of disposal.

2.2 Interdepartmental Collaboration

This section clarifies roles and responsibilities relating to both the core accountability of custodian departments and the important supporting roles of other departments and agencies. It also highlights the importance of interdepartmental collaboration in order to effectively implement the Disposal Policy and address Aboriginal interests.

Custodian departments cannot do it alone. They need help from other departments and agencies in identifying, assessing, and managing the risks associated with Aboriginal interests.

Meeting required timelines

Collaboration is needed if Disposal Policy timelines are to be met.

- For example, a custodian department needs a timely decision from other government departments as to whether they are prepared to commit to acquiring the property, if it is to comply with the TBS policy requirement to dispose of properties no longer required for program purposes.
- Equally, other government departments need timely identification of precisely which parcels of land a custodian department intends to declare surplus, as well as an environmental assessment, an estimate or appraisal of market value, and information about holding costs and legal encumbrances, if they are to make a prompt decision on whether to acquire property for program purposes.

Accommodating different federal stakeholder interests

Collaboration is crucial to accommodating and reconciling different federal interests and to reaching a negotiated resolution of competing or incompatible interests using existing interdepartmental processes.

Maintaining an integrated federal position

Collaboration is also crucial in order to develop a consistent federal position with respect to the proposed disposal of a specific property that can be communicated to affected Aboriginal groups by the custodian department, supported by other departments, as required.

Roles and responsibilities in the context of Aboriginal interests

Treasury Board of Canada Secretariat

- provides leadership and co-ordination with respect to real property management, including the disposal of surplus real property in the context of Aboriginal interests; and
- an ADM Steering Committee on Real Property provides a forum to facilitate the horizontal co-ordination of federal interests in real property in order to help custodian departments develop a recommended disposal strategy.

Custodian departments

- determine whether a particular real property is surplus to program needs and are responsible for initiating and implementing all disposal actions;
- are responsible for assessing and managing Aboriginal interests related to disposals, including taking decisions on if, when, and how to consult with Aboriginal groups, with advice and support from DOJ, INAC, and PWGSC, as appropriate; and
- are responsible for making final recommendations to ministers.

Department of Justice Canada (DOJ)

- in concert with custodians, ensures that all legal aspects of any proposed real property disposal transaction, as identified through a due diligence review, have been dealt with;
- provides property-specific legal title search and risk analyses concerning the possible existence of Aboriginal rights and title and makes recommendations to custodian departments about the appropriate level of consultation with Aboriginal groups (if and when required), as well as providing information on any relevant litigation; and
- is responsible for the preparation of all necessary conveyancing documents, including their settlement and approval as to form and legal content.

Department of Indian and Northern Affairs Canada (INAC)

Important

INAC does not assume the overall responsibility of the custodian department with respect to disposal of the property, including any possible requirement to consult.

- provides all available information about specific properties to custodian departments, such as the status of claims and treaties; history of use and occupation by Aboriginal groups; the nature and scope of Aboriginal groups' interest in acquiring the properties; Aboriginal group proximity to the property; recommended contacts; and
- advises whether INAC is itself interested in acquiring the property for comprehensive claims or other program purposes.

Public Works and Government Services Canada (PWGSC)

- is the common service organization that offers a variety of real property services to departments, including disposing of real property within Canada on an as-is basis and can assist custodians in assessing and managing Aboriginal interests.

Canada Lands Company (CLC)

- is a non-agent federal Crown corporation mandated to dispose of surplus properties determined to be strategic in nature;
- may address Aboriginal groups' business interests when title to a property is transferred to it, as part of its development plan for dealing with community stakeholder interests, in accordance with the terms and conditions of transfer; and
- operates in accordance with its own Guidelines respecting Corporate Relations with First Nations.

2.3 Identifying, Assessing, and Managing Risk in the Context of Aboriginal Interests

This section provides a best practices framework to help custodian departments identify, assess, and address Aboriginal interests and make prudent and informed decisions about if, when, and how to consult with Aboriginal groups.

General guidance on the identification, assessment, and management of risk can be found in TBS' *Integrated Risk Management Framework*.

In the context of disposal and Aboriginal interests, custodian departments must

- determine the scope and nature of potential Aboriginal interests in the property and any relevant legal, policy, or strategic considerations (risk identification and assessment); and
- make informed decisions about if, when, and how to consult with Aboriginal groups about the proposed disposal (risk management).

Identifying and assessing risk

Carrying out risk assessment in the context of disposal and Aboriginal interests is neither exclusively an exercise in legal analysis, nor exclusively an exercise in fulfilling operational requirements.

It is useful to classify properties into four categories on the basis of key legal, policy, and strategic risk indicators: no risk; minimal risk; moderate risk; and high risk (*see Appendix 2*). However, the listed factors and indicators should not be viewed as exhaustive.

It is also important not to think of these categories as rigid. For example, different combinations of the same risk factors may lead the decision maker to conclude that the risk is low in one fact situation and moderate in another. Risk assessment should also be an ongoing exercise, since levels of risk fluctuate with changing circumstances and as new information comes to light.

Assessing risk: a process map

The following questions are intended to serve as a useful starting point; they should not be viewed as either all that needs to be considered or as providing all the answers.

Process Map

Step 1

Is the title clear of any Aboriginal rights or claims?

If so, the only residual issue is how to manage any policy or strategic risks associated with the disposal.

Questions to Ask	Whom to Ask
Are there any treaties that include a clear statement of total surrender of Aboriginal rights?	INAC (regarding treaties) DOJ (regarding what treaties mean)
Did the Crown expropriate all the interests in the lands in question? Did the Crown grant new title? Were any existing rights extinguished in any other way?	DOJ

Step 2

Is there any risk that the title is not clear of Aboriginal rights or claims?

If so, gather more facts in order to be able to assess the level of risk.

Questions to Ask	Whom to Ask
What evidence is there about use and occupation by Aboriginal groups?	INAC
Is the property subject to claims (comprehensive, specific, or TLE) either asserted or in negotiation?	INAC
Is there any expression of interest by Aboriginal groups in acquiring the property?	INAC

Questions to Ask	Whom to Ask
Is there any history of disputes or challenges to federal ownership, use, or management of the property?	<p style="text-align: center;">INAC</p> <p style="text-align: center;">DOJ (regarding legal challenges)</p> <p style="text-align: center;">possibly other government departments (OGDs) if property previously held by another custodian department</p>

Once the legal, policy, and strategic risks associated with a specific disposal situation have been assessed, decisions will need to be taken on if, when, and how to consult with Aboriginal groups about the proposed disposal. This aspect is addressed in the next section.

Managing risk and consultation decisions

Custodian departments are responsible for managing the consultation process with Aboriginal groups. As noted earlier, the Supreme Court of Canada provided some key general directions in *Sparrow/Delgamuukw*, but the law on consultation is unsettled and the nature of the duty to consult varies with the individual fact situation.

Consult

The term “consult” is used in these guidelines in the context of best practices and is not intended to define or imply the scope of the legal obligation to consult in any given situation.

For the purpose of these guidelines, the term “consult” is used to describe a wide spectrum of dialogue between government and Aboriginal groups, including information exchange; seeking advice; discussions aimed at finding ways of incorporating Aboriginal interests and goals or achieving a negotiated

resolution of federal and Aboriginal interests; and negotiations to secure the consent of Aboriginal groups.

Managing risk: principles for consultation decisions

- Consultation is a key tool and a best practice in the context of disposals and Aboriginal interests.
- Accurate and comprehensive assessment of the level of risk, as outlined in the preceding sections, positions custodians to make informed management decisions.
- Consultation should be appropriate to the level of legal, policy, and other risks to government (see following *Risk Management Chart*).

- For example, where the legal and other risks are assessed as low, an appropriate response might be to exchange information with an Aboriginal group and then move on to disposal.
- By contrast, where the legal and other risks are assessed as high, the appropriate response may well be to engage in negotiation with the explicit aim of fulfilling the Crown's obligation to secure the consent of the Aboriginal group to the proposed disposal.

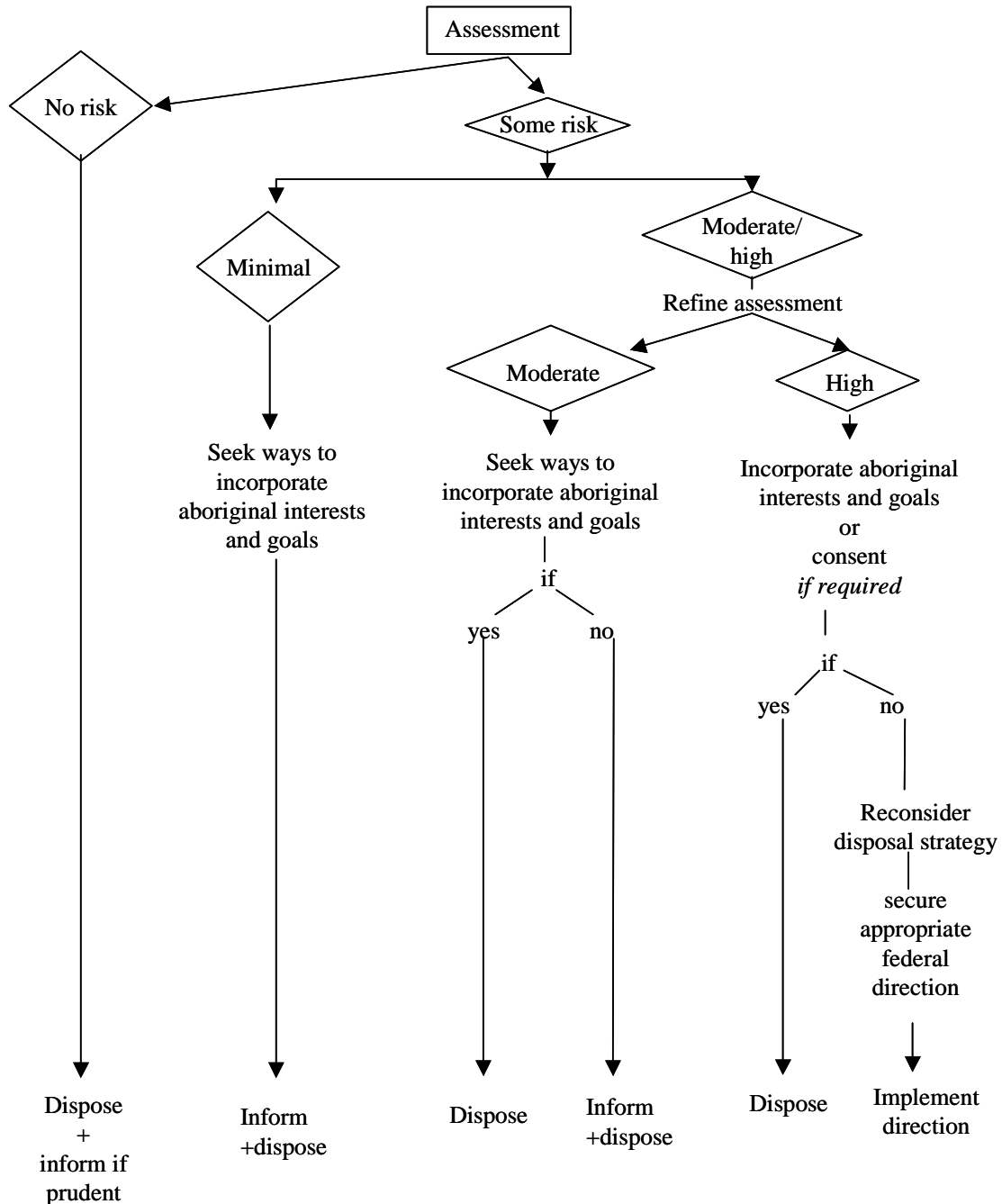
Risk management decisions and operational concerns: efficiency and cost-effectiveness

The operational process of risk assessment and consultations should be made as efficient and cost-effective as possible through the exercise of economy and discipline in information gathering, consultation, and negotiation.

Economy and discipline of process must, however, always be weighed in the balance of the overall risk assessment. The financial cost of adopting certain procedures must be weighed against the legal, strategic, and policy risks of failing to adopt them.

DISPOSAL IN THE CONTEXT OF ABORIGINAL ISSUES

**Risk assessment and consultation decisions
where aboriginal, title or treaty rights have not been proved or confirmed**



Managing the consultation process

Preparing for consultations

- Make sure you know (and can explain) why you are consulting—and on what.
- Liaise with other departments, not just to find out if they are interested in acquiring the property, but also to determine how your proposed consultations might affect them.
- Check whether INAC will be approaching Aboriginal groups about potential interest in a property in the context of their own program interests. If so, co-ordinate consultative activities to avoid confusion or redundancy.
- Finalize the list of contacts for interested Aboriginal group(s).

Ground rules

Government

- The scope and purpose of the process should be clearly explained to the Aboriginal groups being consulted, including an explanation of how information will be taken into account in decision making.
- Care should be taken that consulting with Aboriginal groups is not interpreted as constituting a recognition by government of the existence of Aboriginal or treaty rights or of Aboriginal title.
- Discussions should be informed by a shared understanding of their purpose; guided by mutual respect and clear communications; exhibit an openness to compromise; and create the opportunity for meaningful input.

Aboriginal groups

The courts have indicated that consultation is a 2-way street that requires the good faith participation of Aboriginal groups.

Consultation should be appropriate to the level of risk

The nature of consultation should be based on the risk assessment and may range along a spectrum from simple information exchange at one extreme to negotiations to secure the consent of the Aboriginal group at the other.

For minimal-risk scenarios

- Exchange information.
- Offer a follow-up explanatory meeting at a convenient time and place.

For moderate- or high-risk scenarios

- Initiate contact by written communication that describes the property, sets out the purpose of the consultations, and explains key aspects of federal disposal policy.
- Outline the process for input, including the specific time frame, federal contacts, information sharing, and intent to follow up with the Aboriginal group in question.
- In the absence of further response, make regular efforts to invite participation. Pertinent information and updates should be sent as a matter of course. If more research is needed, ask interested Aboriginal groups to participate in such work.

Good management practices

- Develop standard correspondence in consultation with DOJ.
- Respond to concerns expressed at meetings by telephone or in writing.
- Draft and exchange records of meetings, where this would be helpful to ensure that positions are fairly reflected and understood.
- Keep a good departmental record (see Appendix 3, Record of Consultation Template).

3. Monitoring

The Secretariat will

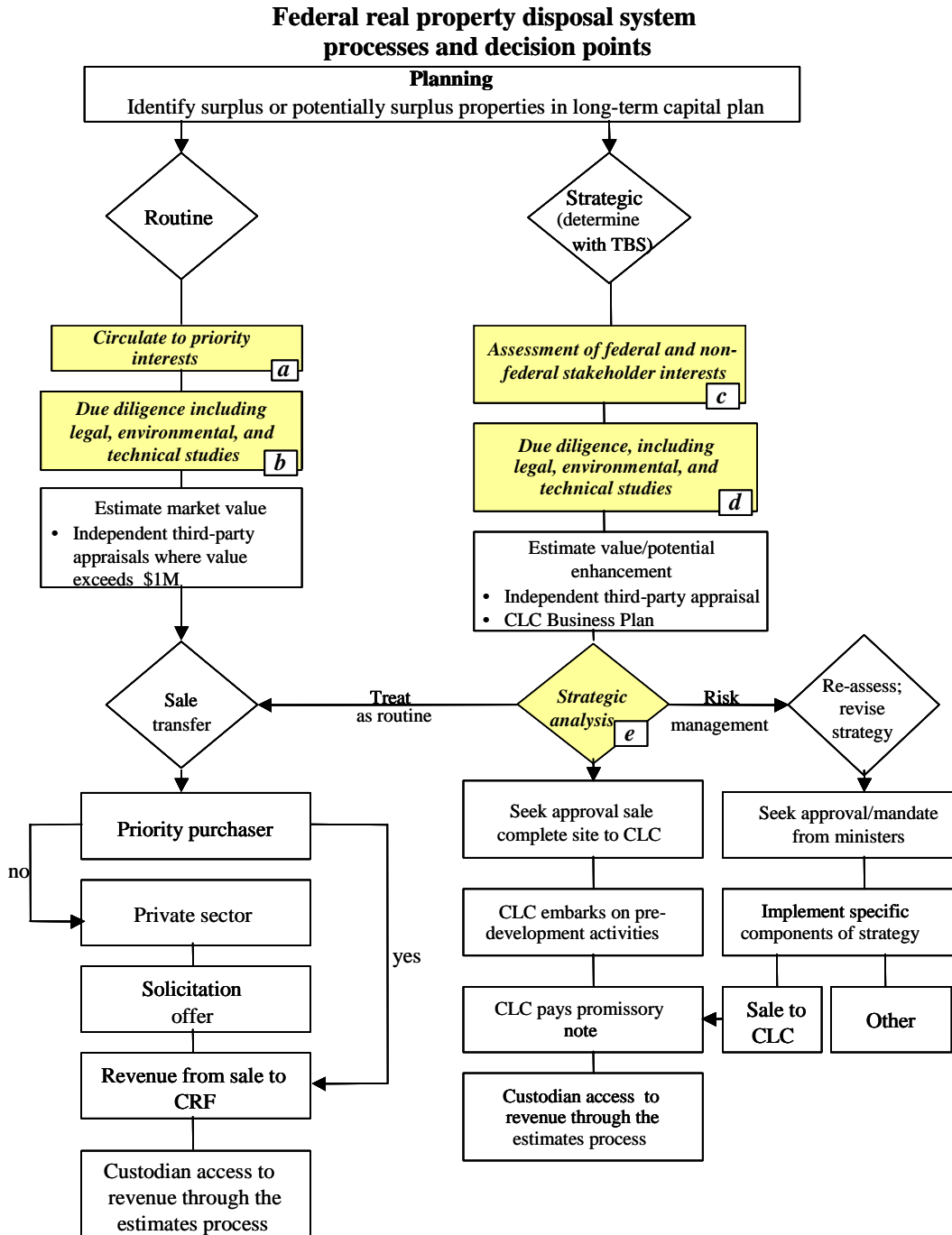
- determine how effective these guidelines are;
- find out how they are being applied in departments; and
- decide whether they need to be revised.

It will do this through

- ongoing contact with departments, including the Treasury Board Advisory Committee on Real Property and the ADM Steering Committee on Disposal;
- reviewing departmental strategic management frameworks;
- developing real property management overviews;
- considering audits and reviews conducted by departments or the Auditor General; and
- consultation with DOJ with respect to implications of court decisions and other relevant developments in the law.

Appendix 1

ABORIGINAL INTERESTS AND THE DISPOSAL PROCESS



See notes *a* through *e* on following page.

Notes to Appendix 1

Routine disposals

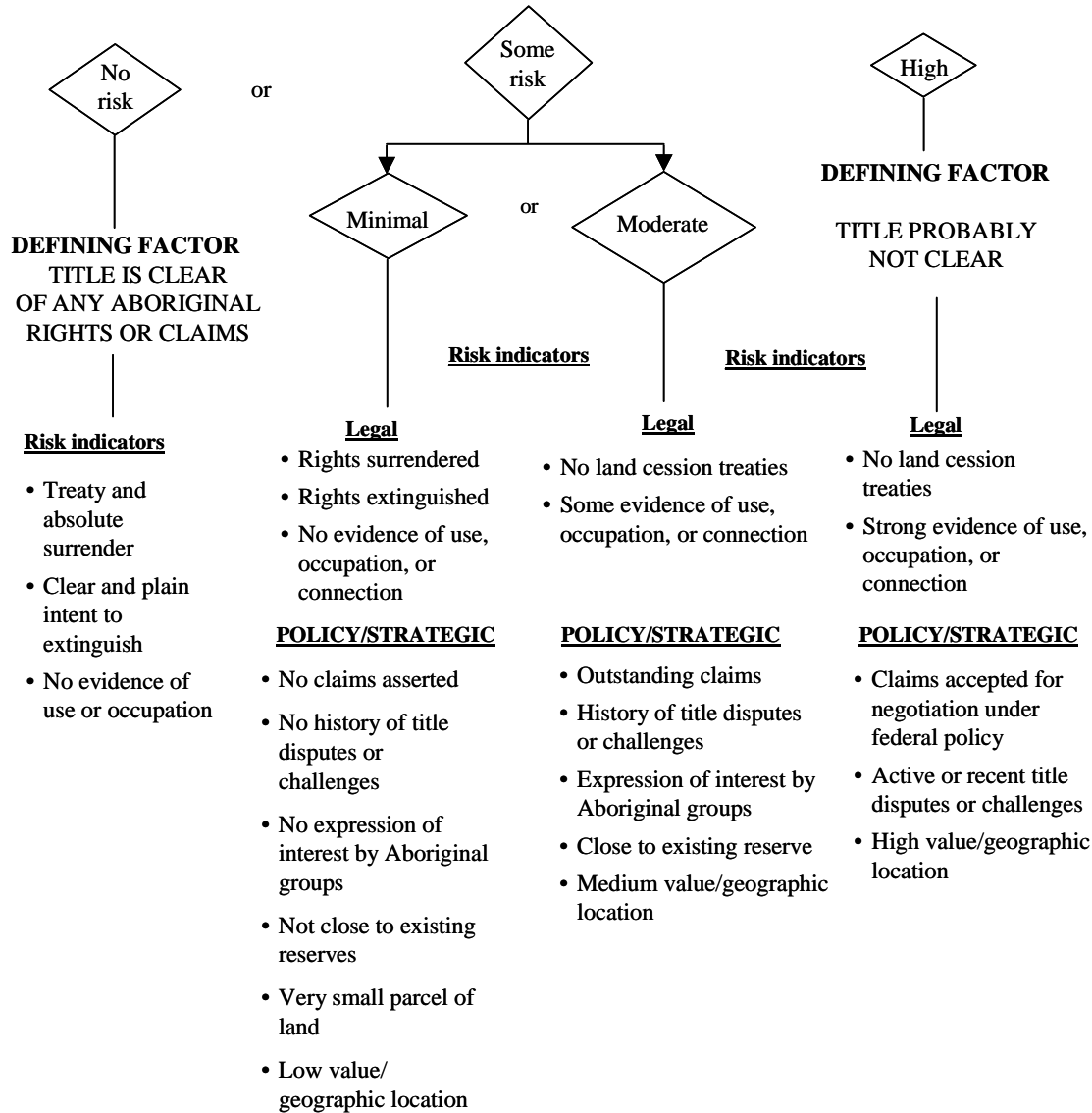
- a) INAC must make a program decision as to whether it will acquire the property for program purposes, on behalf of Aboriginal groups.
- b) Custodian departments are required to complete due diligence inquiries, including a legal assessment by DOJ of the potential existence of Aboriginal or treaty rights and assessment of potential fiduciary duty. INAC and PWGSC, as appropriate, may also assist in due diligence work.

Strategic disposals

- c) The custodian department is required to identify all federal and non-federal stakeholder interests, including those of Aboriginal groups. There is also an opportunity for INAC to express a federal program interest in all or part of the site, on behalf of Aboriginal groups.
- d) Custodian departments are required to complete due diligence inquiries, including a legal assessment by DOJ of the potential existence of Aboriginal or treaty rights and assessment of potential fiduciary duty. INAC and PWGSC, as appropriate, may also assist in due diligence work.
- e) In developing a recommended disposal strategy, custodian departments are required to:
 - take account of reports on the results of legal studies, including Aboriginal rights and title and fiduciary duty;
 - consider all federal and non-federal stakeholders' interests, including those of Aboriginal groups; and
 - test the recommended strategy against key federal policy and strategic considerations.

Appendix 2

DISPOSAL: RISK IDENTIFICATION AND ASSESSMENT



Appendix 3

Record of consultation template

- consolidated written record of custodian involvement in consultations
- who was contacted and how identified
- record of all correspondence (letters/faxes/e-mails)
 - o names, dates, content summary
- record of telephone communications
 - o name, dates, content summary
- record of meetings
 - o attendees, location, dates, content summary
- summary of input received
- response provided
 - o includes notice of transfer, if and when completed