



Land Procedure Head Lease

NAME OF LAND PROCEDURE:	Head Lease
APPLICATION:	Applies to head leases that are authorized under the <i>Land Act</i>
ISSUANCE:	Assistant Deputy Minister, Tenures, Competitiveness and Innovation
IMPLEMENTATION:	Ministry of Forests, Lands and Natural Resource Operations
REFERENCES:	<i>Land Act</i> (Ch. 245, R.S.B.C, 1996)
RELATIONSHIP TO PREVIOUS LAND PROCEDURE:	This is a new procedure established in 2012.

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Date:

APPROVED AMENDMENTS:		
Effective Date	Briefing Note /Approval	Summary of Changes:

Table of Contents

- 1. PURPOSE 1
- 2. BACKGROUND 1
- 3. DEFINITIONS 1
- 4. HEAD LEASE CONSIDERATIONS AND REQUIREMENTS 1
 - 4.1 Eligibility 1
 - 4.2 Suitability 1
 - 4.3 Pre- planning phase 2
 - 4.4 Head Lease preparation 3

1. PURPOSE

These guidelines have been prepared to compliment Crown land policies, and assist Ministry staff in the use and development of head lease agreements.

2. BACKGROUND

A Head Lease is a Crown land lease with a local government, Band corporation, Crown corporation or other public entity (including a port authority) which permits the tenure holder to sub-tenure to third parties.

Head leases can be very complex agreements and may be structured quite differently from other program specific leases, depending upon the particular circumstances relevant to each case. They often obligate an applicant to accept financial, professional and legal burdens which can be much larger than program specific leases.

Situations that require use of a head lease are rare. The agreements themselves are often unique, with some conditions and obligations being negotiated between Authorizing Agency staff and applicants.

As head leases are infrequently granted, staff knowledge and experience is quite limited. These guidelines have been developed to provide information that is critical to government staff when considering and negotiating a head lease agreement.

3. DEFINITIONS

Head Lease means a leasehold interest issued for the purpose of sub-tenuring of the land to others for specific uses. Authority is provided through the Lands Act.

Leasehold Interest means, in respect of land, the interest granted by an agreement creating the relationship of landlord and tenant and includes a right on the part of the tenant to enjoy the exclusive possession and use of the land for a stated definite period of time.

4. HEAD LEASE CONSIDERATIONS AND REQUIREMENTS

4.1 Eligibility

Head leases can only be held by federal government agencies, local governments, other public entities (including port authorities), First Nations Bands or First Nations companies or societies registered in BC or Canada.

4.2 Suitability

Head leases are used in situations where it is desirable to enable the conveyance of control of an area from the Crown to an eligible applicant. However, proposals should be reviewed to determine whether a head lease is the best option for conveying control and satisfying government and client needs. If the applicant is not in a position to absorb the obligations of a head lease, other options may be available. The Land Tenures Branch and the Ministry of Attorney General should be contacted for further information.

4.3 Pre- planning phase

Before committing to enter into head lease negotiations, the following steps should be taken:

1. Detail the authorizing agency's goals and objectives with respect to entering into a head lease for the specific situation. Additionally, be aware of the applicant's needs and objectives.
2. Complete a detailed land status of the area being considered, including all historic uses that may have an impact on a head lease (e.g. previous mining activities may have left areas of contamination, Tree Farm Licences that exist that may have to be cancelled or amended prior to issuance of a head lease).
3. Determine whether there are any existing Land Act tenures contained in the proposed head lease area and if so, whether these areas should be included or excluded from the head lease. If it is decided to include these areas, it is necessary to develop a migration / transition strategy.
4. Determine the nature and type of First Nations consultation that will have to be conducted with respect to the head lease itself and the sub-tenures that will be issued throughout the term, and assess the impact on the ministry's goals and objectives.
 - a. The nature of head leases may contribute to greater complexity in the consultation process and a corresponding requirement for a deep level of consultation with First Nations. It may be prudent to consider whether development of a Memorandum of Understanding with the applicant prior to negotiation of the head lease, or using a management plan as part of the head lease, could serve to reduce the amount of or intensity of consultation with First Nations that may be required prior to or throughout the term of the head lease.
 - b. If necessary discuss with regional operations First Nations consultation staff.
5. Determine which stakeholders will need to be informed or engaged in discussions, and decide the format and costs of that engagement.
6. Determine whether the head lease can be adequately described or whether a legal survey of the area will be required.
7. Prepare a detailed costs and benefits analysis
 - a. Determine potential costs to the authorizing agency associated with the issuance of a head lease. This should include not only "up-front" costs but also ongoing costs of administration. Examples of costs to be considered include:
 - Staff time.
 - The costs for Ministry of Attorney General legal advice and drafting of the tenure agreement.
 - Costs associated with the cancellation or amendment of existing tenures, including other resource tenures, such as Tree Farm Licenses.

- Costs for contract work that may be required; such as for phase 1 and phase 2 preliminary site investigations (in accordance with the Environmental Management Act).
 - Loss of gross revenue to the Crown as a result of the sharing of revenue through the head lease.
 - Costs of First Nations Consultation
 - Costs of stakeholder engagement
- b. Assess the benefits to the province of not having to administer tenures, including the potential cost savings from not having to directly engage in compliance and enforcement activities within the area.
- c. The cost/benefit analysis will assist in deciding whether a transfer of some control in the form of a head lease or other legal instrument meets the goals and objectives of the authorizing agency.
8. Confirm obligations with the applicant: are they prepared to take on the legal, financial and administrative obligations and risks that are inherent with a head lease in contamination obligations?

4.4 Head Lease preparation

Once it is decided that a head lease is an appropriate instrument to use, the head lease is prepared using a Ministry of Attorney General approved head lease template (contact Land Tenures Branch for details). The following provides a description of basic components that need to be decided as part of the drafting process. Ministry of Attorney General legal counsel can assist as needed.

1. Term

- Standard term for a head lease is 30 years to a maximum of 60 years.
- As sub-leases will likely be issued throughout the term and as sub-lessees will require reasonable time to amortise their investments, renewal or early replacement options of the head lease should be considered.

2. Survey requirements

- It will need to be decided whether Head Lease sub-tenures (especially sub-leases) should be surveyed, and to which standard; i.e. to the standards of the Surveyor General of BC or to a different standard.

3. Revenue

- Typically the rental formula provides for the Crown to get a minimum of 50% of the total revenue the head lessee receives from sub-tenure holders; the remaining amount is retained by the head lessee. However, the revenue sharing proportions can vary if rationale can be provided. If the Crown is to receive less than 50%, it must be approved by the Assistant Deputy Minister.
- There may also be limited situations where it is appropriate to have a revenue sharing formula where the amount to be retained is set as a proportion of the “net” revenues received (e.g. for a First Nations corporation the rental formula could provide for a 50/50 split of ‘revenues less operating expenses’).

- Irrespective of the nature of the rental formula agreed upon, it needs to be decided if payment of a minimum annual rental is warranted.
- Head lessees should be required to submit annual audited gross statements of all revenue received by the holder of the head lease. The revenue sharing formula should be applied against all revenue received, including rent, royalties and other fees.
- The rental formulas used by head lease holders in determining rental for sub-tenures do not need to be the same as the provincial formula. However, the head lease needs to ensure that rentals and royalties charged for sub-tenures are based upon prevailing market rates. The head lease may provide for a process that allows the Authorizing Agency to verify this, such as a report from an independent fee appraiser.
- The head lease should allow for a sufficient amount of time between the expiry of a lease year and when rental is due to the Crown to allow for collection of outstanding accounts, auditing of books, etc.
- The head lease needs to be clear about what, if any, charges need to be paid to the Crown should the head lessee utilize some of the land for their own purposes. If charges are deemed appropriate, they should be in accordance with the pricing for the Crown land policy for the intended use.
- The head lease should be specific about what, if any, sub-tenured uses will be exempt from paying rental or royalties (e.g. if the head lessee is a First Nations Band or Society, it is likely that uses associated with traditional rights will be excluded). Refer to the Community & Institutional Policy for more information on eligible uses and proponents.

4. Performance Standards

- The head lease must be very specific with respect to what actions or functions are to be provided by the head lessee. In addition to sub-tenuring sites, the head lessee should monitor the area, enforce conditions of sub-tenures, collect all rents, notify sub-tenure holders in writing of issues, and prevent unauthorized use.
- The head lessee should be required to submit all relevant details respecting sub-tenures to the Crown annually, or upon request. Additionally, there may be other information relevant to the leasehold (e.g. unauthorized uses or trespass action taken), that you wish to have the head lessee report on at regular intervals and/ or submit upon request. Such information has proven necessary in the past to respond to enquiries from both the public and government officials.
- Consider whether notification or consultation should occur between the head lessee and the Crown when applications are received by either party to use land that is contiguous to the other's area of control. This may be desirable as some uses will impact the immediately adjacent lands.

- If the head lease area contains foreshore or land covered by water, the head lease:
 - must contain a clause protecting the riparian rights of the upland properties and must contain a clause that indemnifies the Crown against their decisions in this regard; and may require the written consent of the Crown prior to any fill or permanent improvements being placed on the land.

5. Environmental Schedule

- In some cases the standard environmental provisions may not adequately reduce potential liabilities and risks to the Province relating to contamination or degradation of Crown land. In these situations a specific set of environmental terms and conditions (referred to as an environmental schedule), as well as additional insurance requirements, should be considered for inclusion into the head lease.
- The need for an environmental schedule or additional insurance requirements is to be considered on a case by case basis. Circumstances that may warrant an environmental schedule or additional insurance requirements may include sites where there is a known or high risk of contamination or environmental impacts due to current or past activities; or a high risk of contamination or environmental impacts occurring in the future as a result of the head lessee or sub-tenure holders proposed activities.

6. Insurance and Security

- Head lease documents must contain standard insurance clauses. Standard insurance policy wording should be used. In all cases optional insurance policies are available. Please contact Land Tenures Branch for assistance regarding insurance requirements. The branch will work with Risk Management Branch to determine what, if any, of the current available suite of policies is required. However:
 - Any changes to insurance clauses that might be required, and amounts of insurance that might be required, should be discussed with both Risk Management Branch and Ministry of Attorney General.
 - In addition to commercial general liability insurance, other insurance policies may be required (e.g. environmental risk). Further information can be accessed through Land Tenures Branch. If necessary, Risk Management Branch, Ministry of Finance will be consulted to provide additional advice.
 - Insurance rates for head leases of large areas can be extremely expensive and can influence the viability of head leases. Discussions about this should ideally occur with the applicant at an early stage.
 - Provincial requirements are that all insurers must be registered in Canada.

7. Rights to be Held Back in the Public Interest

- Head leases must ensure that the province has the right to grant rights of ways through the area without any compensation for impacts on the head lease. Additionally, the head lease should not give authority for the issuance of rights of ways by the head lessee.
- The province needs to retain the right (without compensation) of withdrawing from the head lease, any filled foreshore for the purpose of selling it to the upland property owner.

8. Assignment

- Most Crown tenures allow for assignment to third parties. It must be decided whether it is appropriate for the head lease to be eligible for assignment to a third party or be eligible for conveyance to a third party by other means such as bankruptcy, foreclosure or any other means.

9. Termination

- Head leases need to contain clauses indicating how terminations will occur should the head lessee wish to terminate the agreement, or if termination should happen to occur for any other reason.
- Among other issues, these clauses should indicate the responsibilities of each party; i.e. who will notify the sub-lessees with respect to the changes, which records will be returned to the Crown, and how users that have been authorized by sub-tenure pursuant to the head lease will be handled by the province upon termination of the head lease.