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A Report for the Access to Information Review Task Force on Selected Concerns of First Nations People

1. Introduction

Aboriginal peoples have expressed a variety of concerns with the content and operation of the *Access to Information Act* (the "Act"). The purpose of this paper is to explore some of these concerns and, where warranted, to recommend areas for change.

The first category of concern which we will consider involves the amount and time and resources required to obtain information under the *Act*. While dissatisfaction with cost and timelines is obviously not exclusive to First Nations, it is clear that the fact that First Nations are researching and otherwise pursuing land claims and other matters specific to aboriginal peoples means that they are particularly affected by difficulties associated with processing requests. We will consider how First Nations concerns in this regard can be most effectively addressed.

The second category of concern involves the question of whether the exemptions from disclosure set out in the *Act* properly take into account the needs of First Nations in accessing information necessary to pursue their claims and protect their rights. We will consider how the exemptions operate in this context. In addition, we will consider whether statutory reform or some alternative means, such as guidelines for the exercise of discretion under the *Act*, or some combination of the two, are necessary or desirable.

The third category of concern arises from the fact that the *Act* as drafted does not recognize First Nations as having interests similar to those of other governments. This has at least two aspects. First, the *Act* does not acknowledge that First Nations may have the same proprietary interest in information provided in confidence to the Government of Canada as do other governments. Second, the relationship between First Nations and Canada is not dealt with in the *Act* in the same manner as the relationship between Canada and provincial governments.

Many First Nations people believe that each of the above concerns implicate the fiduciary

relationship of the Crown to aboriginal peoples. The nature and scope of this fiduciary relationship between the Crown and aboriginal peoples, and the circumstances which give rise to specific fiduciary duties, are matters of considerable legal uncertainty and beyond the scope of this paper.[1] However, it is clear that in at least some circumstances, the Crown's obligations to disclose information will be affected by the existence of a fiduciary obligation, or by the fact that aboriginal peoples have constitutionally protected rights. Before addressing the three concerns set out above, this paper will begin with a brief discussion of how the obligation to disclose may be affected by a fiduciary duty owed to First Nations. Throughout the body of the paper, we will give consideration, in a general way, to how such special considerations can best be integrated into the access regime. However, this paper does not in any way explore the whole range of duties which may be owed by the Crown or their implications for the requirements of Crown disclosure or the interpretation and application of the *Act*.

2. Fiduciary Duty/ Aboriginal Rights and Title

There are at least two ways in which the fiduciary duty of the Crown to aboriginal peoples may affect the application and interpretation of the *Act*. First, the obligations owed by the Crown to aboriginal peoples may give rise to disclosure obligations which exist entirely independently of the

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[1] In *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159, the Supreme Court of Canada stated:

> It is now well settled that there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada: *Guerin v. The Queen*, [1984] 2 S.C.R. 335. Nonetheless, it must be remembered that not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574. The nature of the relationship between the parties defines the scope, and the limits, of the duties that will be imposed. The courts must be careful not to compromise the independence of quasi-judicial tribunals and decision-making agencies by imposing upon them fiduciary obligations which require that their decisions be made in accordance with a fiduciary duty.

For general discussion of the fiduciary relationship see Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown - Native Relationship in Canada* (Toronto: University of Toronto Press, 1996)

access regime set out in the *Act*, but which should be taken into account when administering the *Act*. Second, it may be that there is a fiduciary duty on the Crown to protect information provided to it by aboriginal peoples and governments.

2.1 Disclosure Obligations of the Crown towards First Nations

In this section, by way of example, we will consider only two types of situations where the Courts have found that the special obligations of the Crown might affect a duty to disclose information to aboriginal peoples. We will also examine how the courts have responded to the argument that the fiduciary duty of the Crown requires it to protect information provided by aboriginal peoples.

2.1.1 *Samson Indian Band*

In *Samson Indian Nation and Band v. Canada*[2], the Federal Court of Appeal held that certain legal opinions which would otherwise have been protected were disclosable in the litigation context. The action concerned an allegation of breach of trust or fiduciary obligations resulting from the Crown's management of oil and gas resources in surrendered reserve lands, from the Crown's management of moneys and from the Crown's provision of programs and services to the respondent Bands. The Bands argued that, where the beneficiary of a trust or a fiduciary obligation seeks information from the trustee, no privilege can be invoked for communications between the trustee and its solicitors respecting the subject matter of the trust; that the Crown was in fact acting as a trustee of the Bands' interests; and therefore that legal opinions received by the Crown were not subject to the solicitor-client privilege and should be disclosed.

The Federal Court of Appeal upheld the trial judge's ruling which required the Crown to disclose documents, which related to the *res* of the trust. The Crown was required to:

> produce any document in the nature of legal advice that concerns the administration of, or the discharge of, responsibilities of the Crown as trustee for the benefit of the

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2 [1998] 2 F.C. 60 (C.A.)

> plaintiff bands and peoples arising from the 1946 surrenders of rights in oil and gas mineral resources, including the royalties derived and the operation of programs and services where the advice sought made reference to the mineral resources surrendered and the revenues derived.[3]

The Court of Appeal also upheld the lower court's ruling in ordering disclosure of those documents which belonged "by necessary implication" to the "trusteeship in Indian land", since they were linked to the assets in question. This included documents intimately linked to the assets, as well as documents which did not refer to the assets but which referred to the application of the *Indian Oil and Gas Act* or applicable regulations. The Court of Appeal also upheld disclosure of those documents relating to cuts in programs and services that could have occurred considering the revenue of the assets.

However, the Court of Appeal also upheld the trial judge's rejection of the broader claim of the bands, endorsing the following statement:

> The plaintiffs urge that the general fiduciary relationship of the Crown to the Indians, in light of its treaty, statutory and contractual responsibilities had trust-like responsibilities that warrant close examination of any claim to privilege of relevant documents. I am not persuaded at this stage that the general relationship of the parties, aside from relations arising out of the specific variation of a trust in Indian land created by the surrenders of natural resources, and derivative responsibilities arising form the surrenders, warrants an order to produce documents on a wider scale than that now outlined.[4]

The *Samson Indian Band* case demonstrates that in some situations, at least, the Crown acts as trustee of Indian land or resources in such a manner that it is required to disclose information which would otherwise be protected from disclosure. Whether those circumstances exist will be determined by the facts of each case. In upholding the disclosure ordered by the trial judge, the Federal Court of Appeal made specific reference to the then recent decision in *Blueberry River*

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3 At para 9, *supra*

4 *Supra*, at para 29

Indian Band v Canada[5]. The Court held that this decision meant that "in the context of a trust in Indian land, the effects of a 'true trust' are generally applicable." However, the court also held that that the crown does not always act as a trustee and is sometimes be subject to other interests that might result in a finding that the communications remained privileged, with doubts being resolved in favour of privilege.

2.1.2 Aboriginal & Treaty Rights

A second way in which there may be an independent requirement for the disclosure of information, outside of the access regime in the *Act*, involves infringements of aboriginal and treaty rights. Aboriginal and treaty rights receive constitutional protection under section 35 of the *Constitution Act, 1982*, which provides:

> The aboriginal and treaty rights of the aboriginal people of Canada are hereby recognized and affirmed.

As the Supreme Court of Canada held in *R. v. Sparrow*[6], the constitutional protection given to these rights is not absolute. However, any infringement of thee rights must be justified. Such justification requires that the infringement be for a compelling purpose, and, further, that it be in accordance with the fiduciary relationship between the Crown and aboriginal peoples. In *Sparrow*, the Court stated:

> Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s. 35(1). *In other words, federal power must be reconciled with federal duty* and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights ... Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute *de facto* threats to the existence of aboriginal rights and interests" [emphasis added].[7]

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5 [1995] 4 S.C.R. 344

6 [1990] 1 S.C.R. 1075

7 Supra, at

Part of the justification test requires that there be adequate consultation with the group whose rights have been infringed.[8] The precise requirements of the justificatory test , including the requirement for consultation, will depend on the facts of each case.[9]

There is significant confusion in the case law regarding when the fiduciary obligations of the Crown to consult with respect to aboriginal and treaty rights and title arises.[10] However, it is clear that once an infringement is established, it will only be justified if adequate consultation has taken place.[11] Although the scope and content of the duty to consult is still being explored by the Courts, it is obvious that for consultation to be effective there must be adequate exchange of information between the Crown and aboriginal peoples.[12]

2.2 Crown obligations to Protect Information

Thus far, we have been considering how the independent constitutional or fiduciary obligations of the Crown may affect disclosure obligations towards First Nations. While it is clear that these obligation exist outside of the *Act*, the *Act* should be drafted in a manner that facilitates, or at least does not impede, the ability of the Crown to meet its obligations. However, aboriginal people have

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8 *Sparrow, supra*

9 *R v Gladstone,* [1996] 2 S.C.R. 723; *Delgamuukw v B.C.* [1997] 3 S.C.R. 101

10 See *Paul v Forest Appeals Commission*, 2001 B.C.C.A. 411; *Halfway River First Nation v British Columbia (Ministry of Forests)* 1999 B.C.C.A. 470; "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (Feb. 2000), 79 *Can. Bar Rev.* 252-279

11 See comments of Huddart, J.A., in dissent, in *Paul* supra

12 In *Halfway River First Nation, supra* the British Columbia Court of Appeal stated:

> [t]he Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action....

also argued that the Crown's fiduciary duty is implicated when it decides to disclose, under the *Act*, information provided by First Nations. To date, this argument has met with very limited success.

An exception is *Montana Band of Indians v. Canada (Minister of Indian and Northern Affairs)*[13], where Jerome A.C.J. considered one of seven applications under the *Act* for disclosure of audited financial statements of Bands provided to Canada under the *Indian Act*. The Band resisted disclosure on three bases: that the information was confidential, that disclosure would prejudice their competitive position, and result in material financial loss and that the government, because of its trust obligations, was required to protect the Band's position.

The respondent submitted that because Band members were permitted to view the statements, they could not be classified as confidential. Jerome, A.C.J. decided instead that the objective test for confidentiality under the *Act* "must have more to do with the content of the information, its purpose and the conditions under which it was prepared and communicated." [14] He went on:

> Applying those criteria, I have no hesitation in declaring this material to be objectively confidential in nature. The information at issue relates not to any public funds, but to the financial holdings of group of private individuals. By a complex series of historical and constitutional developments, it happens that those funds are held in trust for the Bands by the federal government. In the context of that fiduciary relationship, financial information passes between the parties. In any similar situation involving a non-governmental fiduciary, there would be no question that the information was subject to a duty of confidence. I do not think that a different result applies in this case.[15]

Jerome A.C.J. held that the statements were protected from disclosure under the exemption set out in section 20(1)(b) of the *Act* (confidential information supplied to a government institution and consistently treated as confidential by a third party).

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13 [1989] 1 F.C. 143

14 Supra at para 25

15 Supra at para 26

In *Chippewas of Nawash First Nation v. Canada (Minster of Indian and Northern Affairs)* [16], the Federal Court of Appeal reviewed the trial court judgements in both *Chippewas of Nawash First Nation v. Canada (Minster of Indian and Northern Affairs)*[17], a decision of Nadon J., and *Timiskaming Indian Band v. Canada (Minister of Indian and Northern Affairs)*[18], a decision of Cullen J. Both cases dealt with requests for document dealing with land, including Band Council Resolutions. In both cases, the applicants argued, *inter alia*, that the fiduciary obligations of the Crown required that the documents, which were supplied in confidence to the Crown, not be subject to disclosure. Cullen J. held that he did not have to deal with this argument, because he found that the information was not confidential. Nadon J. on the other hand, rejected the assertion that any fiduciary relationship existed on the facts of the case.

The Court of Appeal upheld the rulings of both courts and stated:

> The second argument is that the Government of Canada had a fiduciary duty to the appellants not to disclose the information in question because some of it relates to Indian land. We are not dealing here with the surrender of reserve land, as was the case in *Guerin v. The Queen* [cite omitted]. Nor are we dealing with Aboriginal rights under section 35 of the *Constitution Act, 1982.* This case is about whether certain information submitted to the government by the appellants should be disclosed under the *Access to Information Act*. The government is acting pursuant to a public law duty. Fiduciary obligations do not arise in these circumstances.[19]

An analysis of the correctness of this holding is beyond the scope of this paper. However, it is clear that courts will not readily imply a fiduciary obligation to administer the *Act* in a way that appears contrary to the language of the *Act*.

3. Time and Resources Required to Access Information Under the *Act*

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16 [1999] F.C.J. No. 1822

17 [1996] F.C.J. No. 991

18 [1997] F.C.J. No. 676

19 *Supra* at para 6

It may be argued that the fiduciary relationship between aboriginal peoples and the Crown gives rise to a requirement that the Crown facilitate access requests by First Nations, at least where those requests are aimed at pursuing their legal claims. However, it is not necessary to determine this question, if the policy of the Crown is to facilitate such access regardless of whether it is legally required to do so.

A common problem for researchers is delay caused by the need for information officers to comply with the information screening requirements of the legislation. Obviously if this could be expedited in the case of First Nations application this would be most desirable, and that appears to be what INAC has done. For some time now there has been an `informal' procedure whereby, upon production of identification and authorization - either by letter or a Band Council Resolution (BCR) - a First Nation or Inuit Association researcher may access records informally.

INAC officials have confirmed that the policy behind this informal procedure (which is of course subject to all applicable legislation) is (a) to give First Nations researchers priority and (b) to speed up the land claims process by easing their access to relevant information. Those contacted saw no reason why this procedure, which they report to have worked well, should not be expanded to include other government departments. The current guidelines reflect a number of years of experience with informal access to information, and no amendments to them are currently being contemplated. One possible problem is that appeals against decisions limiting access are also informal, but INAC does not appear to have received complaints about this.

First Nations' researchers report that this effort to standardize procedures and improve services within the departments and across regions. has generally been successful. Researchers have identified the following improvements:

- better file management
- improved accessibility through disclosure of file lists
- regularized screening criteria, with inserts put into a file notifying researchers what has been removed and on what basis

The Department agrees that about 90% of requests from First Nation researchers are now dealt with

"informally" under the guidelines set out in "Native Claims Research – Guidelines for Informal Access to Records". There is also a special form (attached as Appendix "B") for the release of personal information under section 8(2)(k) of the *Privacy Act*.

Researchers are still concerned with the accessibility of records held by other Departments, however. It is recommended that those Departments which receive a substantial number of requests from native researchers develop Guidelines similar to those adopted by INAC, in consultation with a representative of the claims research community. In addition, it is recommended that access officers in other departments receive training on developing an informal approach to native claims research requests.

4. Do the Exemptions in the *Act* Take into Account the Needs of First Nations?

There are two types of exemptions from the requirement for disclosure under the *Act*, mandatory and discretionary. The mandatory exemptions are found in sections 13 (information obtained in confidence from another government), 16(3) (certain policing information), 19 (personal information), and section 20 (third party information). In addition, the separate access regimes incorporated into the *Act* by way of section 24 and Schedule II may provide for exemptions from disclosure. Finally, those documents which are excluded from the operation of *Act* may not be accessible.

4.1 Mandatory Exemptions

Section 19(2)(c) provides that the personal information may be disclosed if disclosure in accordance with section 8 of the *Privacy Act*. Section 8(2)(k) provides that personal information may be disclosed:

> to any aboriginal government, association of aboriginal people, Indian band, government institution or part thereof, or to any person acting on behalf of such government, association, band, institution or part thereof, for the purpose of

> researching or validating the claims, disputes or grievances of any of the aboriginal people of Canada.

The Courts have held that for this provision to apply there must be research being done on behalf of a group, rather than merely by an individual.[20] In addition, the research must be in relation to specific claims or disputes pursued by aboriginal people as aboriginal people, and not simply disputes involving or between aboriginal people.[21]

Should a similar exception apply to the other mandatary exceptions set out in the *Act*? It is unlikely that information related to claims research would be exempt under section 16(3). However it is conceivable that information relating to claims research would be exempted from disclosure under section 20 (b). It is recommended that consideration be given to developing a discretionary exception to the exemption in section 20(1)(b), aimed at providing access to scientific or technical information that may be of assistance in pursuing the claims of the aboriginal peoples of Canada, provided that the information be used only for that purpose and that the confidential nature of the information be protected to the greatest extent possible.

The mandatory exemption for information supplied in confidence from another government may also raise a concern for First Nations[22]. However, except in the case of foreign governments, this concern may be somewhat alleviated by the fact that information should be available from the providing government under the relevant access legislation if no other exemption applies.

Section 24 of the *Act* provides:

> The head of a government institution shall refuse to disclose any record requested under this *Act* that contains information the disclosure of which is restricted by or pursuant to any provisions set out in Schedule II.

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20 *Sutherland v Canada (Ministry of Indian and Northern Affairs),* [1994] 3 F.C. 527 at para 34

21 *Supra* at para 36

22 *Grand Council of the Crees of Quebec v Canada (Minister of External Affairs and International Trade)*, [1996] F.C.J. No. 903

Schedule II lists other statutory provisions that deal with confidential information. The combined effect of section 24 and Schedule II is that information that would otherwise be subject to disclosure under the *Act* will not be disclosed if such disclosure is regulated by a provision set out in Schedule II.

Aboriginal people may have a special interest in the access regimes set out in Schedule II of the *Act*. For example, section 17 of the *Statistics Act*, which is listed in Schedule II of the *Act*, provides for the blanket prohibition on the release of census information. Census documents, however, are an important source of information for aboriginal claims researchers regarding community composition, land use and occupancy , especially for the period of 1911-1951. There is significant interest in the obtaining the release of census documents by individual genealogists and other historical researchers.[23] However, the interests of First Nations is researching claims involving their constitutional entitlements is unique and requires separate consideration. We recommend that the scheme of the *Statistics Act*, the *Privacy Regulations*[24] and the *Access to Information Act* be reviewed and amended as necessary to ensure that First Nations can access census information under the same terms that personal information can be disclosed pursuant to section 8(2)(k) of the *Privacy Act*.

4.2 Discretionary Exemptions

There are numerous discretionary exemptions set out in the *Act*. Some of the exemptions that are most likely to affect aboriginal peoples, particularly with respect to rights and title, are section 21 (advice or recommendations to government), section 23 (solicitor and client privilege) and section 14 (injurious to federal -provincial relations).

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23 See *Final Report of the Expert Panel on Access to Historical Census Records*, and submissions received by the Expert Panel, at www.statcan.ca/english/census96/interm.htm. See also see Submissions to Access to Information Task Force at www.atirtf-geai.gc.ca/submissions-e.html.

24 SOR/83-508

In her paper *The Nature and Structure of Exempting Provisions and the Use of the Concept of Public Interest Override*[25], Barbara McIsaac, Q.C. argues that "the application of discretionary exemptions is an area which is ripe for reform." As Ms. McIsaac notes, a discretionary exemption allows the government to release information where "no injury will result form the disclosure or where it is of the opinion that the interest in disclosing the information outweighs any injury which could result form disclosure." However, Ms. McIsaac notes that the tendency is to refuse disclosure of all documents which come within the discretionary exemption, without a separate determination being made as to whether disclosure should be refused.

Ms. McIsaac suggests a number of possible reforms, including additional directives or guidelines to assist Government institutions in the application of discretionary exemptions. She also suggests that it may beneficial to require the discretion to be more formally exercised, by requiring the head of an institution not only to identify the exemption under which information is withheld, but "also articulate why he or she has exercise the discretion in favour of exemption."

These comments are particularly apt in the consideration of the application of the discretionary exemptions to requests made by First Nations. Those who administer and apply the access legislation must be made aware of the special obligations which the Crown may owe to First Nations, and the circumstances in which those obligations are likely to arise. Because the circumstances which give rise to special duties are so individual and fact-specific, it would be impossible to enact statutory provisions which would ensure that the Crown fulfilled it obligations. However, unless access officers are educated with respect to the particular situation of aboriginal peoples, they are unlikely to take all relevant factors into account in the exercise of their discretion.

In some cases, the existence of a fiduciary duty will actually change the operation of the legislation. For example, with respect to the holding in *Samson Band, supra*, it would appear that when the Crown is acting as a trustee of Indian land, it cannot claim solicitor client privilege for legal opinions received on the use and administration of that land as against the beneficiary of that trust. Of course,

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[25] Report to Access to Information Task Force: http:/www.atirtf-geai.gc.ca/paper-nature1-e.html

determining when the Crown acts as a trustee may be difficult. However, as Ms. McIsaac notes, the exemption for documents subject to solicitor client privilege is a discretionary one. As a result, it is not necessary for a person administering the *Act* to make a determination that a fiduciary duty is owed in order to release documents which may be subject to privilege. Instead, the possibility of such an obligation is one matter which should be taken into account in the exercise of any discretion.

The suggestion that additional guidelines or directives be developed to assist in the exercise of discretion also carries particular force in the context of aboriginal peoples. In *R. v. Adams*, the Supreme Court of Canada stated:

> In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfill their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the *Sparrow* test.[26]

Without determining whether the *Act* risks infringing aboriginal rights often enough to render the lack of guidance itself an infringement, it would appear to be good policy to provide decision makers with additional education and guidance to enable them to exercise their discretion in a manner which is aware of and respects aboriginal entitlements.

It is recommended that the Information Commissioner's office work with Treasury Board and representatives of the aboriginal community to develop guidelines and educational materials for those administering the *Act* regarding the application of discretionary exemptions to requests for information by aboriginal peoples. For example, given the acknowledged fiduciary relationship of the Crown to aboriginal peoples, it may be appropriate to adopt a policy directive to the effect that

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[26] [1996] 3 S.C.R. 101 at para 54

where there is uncertainty about the application of discretionary exemptions, that uncertainty should be resolved in favour of disclosure to aboriginal peoples.

4.3 Information Excluded from the Operation of the *Act* - Cabinet Confidences

Section 69 of the *Act* provides that the *Act* does not apply to Cabinet confidence records. The significance of excluding these documents from the operation of the *Act* , rather than providing for a mandatory exemption, is that there is no available review by the Information Commissioner of a decision to refuse production. Section 69 works in a manner similar to the *Canada Evidence Act* , which provides that a Minister of the Crown or a Clerk of the Privy Council can object to the disclosure of information before a court or other tribunal on the basis that it contains Cabinet confidences. A court has no jurisdiction to review information to determine whether it is subject to such a privilege.

As Ms. McIsaac notes, the federal treatment of Cabinet confidences is unique. Most jurisdictions provide that such confidences are covered by the *Act* ; however, they often enjoy a mandatory exemption from disclosure. We agree with Ms. McIsaac's suggestion that the Task Force consider reform to the subject of Cabinet confidences.

As noted above, the fiduciary obligations of the Crown may involve disclosure obligations outside of the operation of the access regime. If there is a constitutional or fiduciary duty to disclose documents or information which would otherwise be subject to the exclusion from the *Act* and the privilege in the *Canada Evidence Act*, these statutory provisions can would not likely be effective in lessening that obligation. Accordingly, reform should be undertaken to allow for such disclosure if in fact the existence of such a duty can be proven in a particular case.

5. Should the *Act* be amended to recognize First Nations Governments as having the same interests as other Governments under the *Act*?

As noted above, in *Chippewas of Nawash First Nation, supra*, the Federal Court of Appeal held that the fiduciary obligation to protect confidential information did not arise in the situation where the documents requested related to unsurrendered Indian land, although the earlier ruling in *Montana Band, supra*, suggested that such obligations may be relevant in the context of financial statements. The Federal Court of Appeal also found that the information could not be exempted under section 20(1)(b), as that section only protects "financial, commercial, scientific or technical information." The Court also rejected the argument that the Band should be able to take advantage of the broader protection for confidential information provided to other governments under section 13, holding that the exclusion of Indian bands was not a breach of section 15 of the *Canadian Charter of Rights and Freedoms*.

Section 13 of the *Access to Information Act* provides that the head of a government institution shall refuse to disclose any record under the *Act* that contains information obtained in confidence from, inter alia, an aboriginal government, unless the aboriginal government makes the information public or consents to the disclosure. However, section 13(c) defines "aboriginal government" as meaning only the Nisga'a Government as defined in the Nisga'a Final Agreement. Section 14 of the *Act* provides that the head of a government institution may refuse to disclose information which could reasonably be expected to be injurious to the conduct of federal-provincial affairs

At least two other Canadian jurisdictions recognize aboriginal governments generally within their provisions respecting the protection of governmental information and intergovernmental relations. The British Columbia *Freedom of Information and Protection of Privacy*[27] *Act* (the "B.C. *Act*"), section 16, provides for a discretionary refusal to disclose information if such disclosure could reasonably be expected to

> (a) harm the conduct of by the government of BC of relations between that government and any of the following or their agencies:
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27 R.S.B.C. 1996 c. 165 as am

(iii) an aboriginal government

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(b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies, or

(C) harm the conduct of negotiations relating to aboriginal self-government or treaties.

The B.C. *Act* defines "aboriginal government" as "an aboriginal organization exercising governmental functions". In Order No. 14-1994, BC Office of the Information and Privacy Commissioner noted that the Policy and Procedures Manual "gives Indian bands and tribal councils as examples of aboriginal governments." The Commissioner rejected the suggestion that the meaning of "aboriginal government" should be limited to bands that had concluded agreements for self-government. In Order No. 01-13, the Commissioner stated "at the very least, an 'aboriginal government' includes a 'band' as defined in the Indian Act."

The Nova Scotia *Freedom of Information and Protection of Privacy*[28] *Act* also includes "aboriginal government" in the discretionary exemption for information received in confidence from another government, or information which could reasonably be expected to harm the conduct of relations between the Government of Nova Scotia and other governments.

Under the federal *Act*, information received in confidence from governments, including regional and municipal governments, is exempted from disclosure, recognizing the interest of those governments in that information. Information received in confidence from Indian bands may come under the exemption in section 20(1)(b), but only if it is of a financial, commercial scientific or technical nature. This fails to recognize that the functions of an Indian band are essentially governmental in nature, and that as a result a band's interest in its information is more akin to that of a municipal government than a corporate third party.

As noted above in part 4.1, the impact of the section 13 exemption may be lessened by the fact that some governments, namely provincial, regional and municipal governments, are also subject to

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28 S.N.S. 1993 c. S as am,

provincial access to information legislation. However, this is not necessarily true of foreign governments, international organizations of states or the Nisga'a Government. This distinction would not seems to be sufficient to exclude aboriginal governments generally from section 13 type of protection. In addition, band councils are already subject to certain openness and accountability requirements associated with the Indian *Act* and associated regulations.

Providing aboriginal governments with section 13 protection would also obviate the need for aboriginal people to argue that the confidentiality of their information requires special protection because of any fiduciary obligation which may be owed by the Crown in certain circumstances. It is recommended that section 13 type protection be extended to all aboriginal governments.

The negotiation of treaties and other agreements with First Nations would seem to be at least as deserving of protection as the conduct of federal -provincial affairs. As a result, it may be that section 14 should be amended to protect information which could reasonably be expected to be injurious to federal relations with aboriginal governments. However, as with all of the above recommendations, consultation should be undertaken with aboriginal peoples before such a change is made.

6. Summary of Recommendations

1. Departments which receive a substantial number of requests from native researchers should develop Guidelines similar to those adopted by INAC, in consultation with a representative of the claims research community.

2. Access officers in other departments should receive training on developing an informal approach to native claims research requests.

3. Consideration should be given to developing a discretionary exception to the exemption in section 20(1)(b) aimed at providing access to scientific or technical information which may be of assistance in pursuing the claims of the aboriginal peoples of Canada, provided that the information be used only for that purpose and that the confidential nature of the information

be protected to the greatest extent possible.

4. Recognizing their special interest in various access regimes, aboriginal people should be involved in any review of the provisions listed in Schedule II.

5. The regime for disclosure of census information should be amended to allow aboriginal peoples access rights equivalent to that set out in the *Privacy Act* section 8(2)(k).

6. The Information Commissioner's office should work with Treasury Board and representatives of the aboriginal community to develop guidelines and educational materials for those administering the *Act* regarding the application of discretionary exemptions to requests for information by aboriginal peoples.

7. The *Act* should be amended to allow for disclosure of Cabinet confidences if a fiduciary or constitutional obligation to disclose can be demonstrated.

8. Consideration should be given to eliminating the definition of aboriginal governments in section 13. Alternatively, such section 13 type of protection could be provided in a discretionary exemption until such governments can develop their own access regimes.

9. Section 14 should be amended to protect information which could reasonably be expected to be injurious to federal relations with aboriginal governments.