

BRIEFING NOTE

TO: BC Specific Claims Working Group
FROM: Jody Woods
DATE: August 24, 2021
RE: Intellectual Property Additions to Specific Claims Research and other Federal Funding Agreements

PURPOSE

To provide an update and analysis of the impacts to First Nations of new intellectual property rights provisions inserted by Canada into funding agreements sent to Claims Research Units for the 2021-2022 funding cycle.

RECOMMENDATIONS

1. File an Access to Information request pertaining to Canada's decisions/reasons to insert section #40 into funding agreements with First Nations for the 2021-2022 funding cycle.
2. Share briefing materials with UBCIC membership, AFN CCoLTR, and National Claims Research Directors advising First Nations and Indigenous organizations to:
 - a. review all federal funding agreements to determine whether intellectual property rights provisions have been added;
 - b. seek written confirmation from Canada that information prepared in the course of specific claims research will be treated as confidential and will not be subject to disclosure under the *Access to Information Act* or the *Privacy Act*.
3. Draft a letter to Indigenous Services Canada (ISC) and Crown-Indigenous Relations (CIRNAC) calling on Canada to work with First Nations and their representative organisations to revise all relevant funding agreements and related documents to ensure compliance with the *United Nations Declaration on the Rights of Indigenous Peoples* (UN Declaration) and The First Nations principles of ownership, control, access, and possession (OCAP®).
4. Conduct further research into the development of Treasury Board Secretariat directives and ISC funding agreement models to assess alignment with the UN Declaration and OCAP®

SUMMARY

Canada provides funding to First Nations and Claims Research Units (CRUs) via funding agreements to support the research and development of specific claims. Funding agreements for the 2021-2022 fiscal year included new provisions related to intellectual property rights that had not appeared in previous agreements. UBCIC commissioned a legal opinion examining the impacts of these new provisions on First Nations and whether the inclusion of the provisions in research funding agreements aligns with both UN Declaration and OCAP® principles.

The legal opinion concluded that Canada's introduction of new intellectual property language in the funding agreements increases the risk that First Nations' confidential information may be disclosed under specific provisions of both the federal *Access to Information Act* and the *Privacy Act*. In addition, the process for adding new intellectual property provisions, and the provisions themselves contravene the UN Declaration and do not align with OCAP® principles. Finally, the broad language of the new provisions would allow Canada to exert property rights to exclude others from accessing or using the intellectual property, use the intellectual property

for the federal government's own statistical or administrative purposes, or transfer the intellectual property to other parties.

BACKGROUND

In 2020, Directors of Claims Research Units learned that Canada had created and applied new specific claims research funding guidelines without consulting First Nations. These guidelines included wording that could grant Canada control of intellectual property owned by First Nations. In the process of trying to engage on the guidelines, Research Directors also learned that similar intellectual property rights provisions had been inserted into specific claims research funding agreements, the documents CRUs and First Nations are required to sign to receive funding for researching and developing specific claims.

The 2021 specific claims research funding agreements include the following new provision:

40 Intellectual Property¹

40.1 All intellectual property that arises out of or under this Agreement will be owned by [Name] or a third party as may be set out in an agreement between [Name] and such third party.

40.2 [Name] hereby grants to Canada a non-exclusive, royalty-free, fully-paid, perpetual, worldwide, and irrevocable licence to exercise all intellectual property rights for any Crown purpose with respect to all:

- a) activity, financial and evaluation reports and records and other records or communications related to the administration of this Agreement that are delivered by [Name] to Canada under this Agreement; and*
- b) intellectual property created or developed by or for [Name] in the course of implementing, providing or promoting the Activities, and in which copyright subsists.*

40.3 [Name] shall also fulfill any requirements relating to intellectual property set out in the Schedules and shall secure all necessary rights to give effect to the licences granted under this Agreement.

The model on which the 2021-2022 funding agreements is based is published on the Indigenous Services Canada (ISC) website and was developed "according to the Treasury Board Secretariat [Directive on Transfer Payments](#) [which] ... describes the requirements needed to maintain the accountability relationship between Indigenous Services Canada (ISC) and the funding recipient"²

The TBS Directive on Transfer Payments (modified 2020-02-21) sets out considerations federal departmental managers should explore with respect to intellectual property generated as a result of funded activities. Whether and to what extent First Nations were involved in the 2020 revision of these directives is unknown. It has also not yet been determined if the funding agreements imposed on First Nations and CRUs align with the TBS directives. This will require further research.

¹ Indigenous Services Canada (ISC) uses the *Funding Agreement Model: Other and Project Based 2021-2022* as the framework for funding agreements with CRUs (<https://www.sac-isc.gc.ca/eng/1607049308804/1607049334731>)

² <https://www.sac-isc.gc.ca/eng/1545169431029/1545169495474>.

ANALYSIS

The *Specific Claims Tribunal Act* provides First Nations with the flexibility to advance various forms of evidence in support of their specific claims³. As part of the specific claims process, First Nations will amass diverse forms of evidence, some of which may contain confidential information or knowledge that can only be shared pursuant to the claimant's protocols. Intellectual property generated by CRUs is understood to be owned and controlled by the First Nation who mandates the research.⁴

Section #40 and the *Access to Information Act*

The *Access to Information Act* provides individuals and corporations with rights to access records under the control of Canadian government institutions. Certain types of information are exempt from disclosure, including records that contain financial, commercial, technical, or scientific information that is supplied to the federal government on a confidential basis by a third party, or information which could prejudice the competitive position of a third party or interfere with contractual or other negotiations.⁵

The new intellectual property provisions introduced by Canada into research funding agreements could increase the risk of disclosure under the *Access to Information Act* in certain situations, including if:

- a federal representative determines that the information could potentially be disclosed
- the federal decision-maker requests further information from the First Nation confirming the confidential nature of the information, and the information is not provided within the time period specified by Canada.

Section #40 and the *Privacy Act*

The *Privacy Act* governs the use of "personal information" in Canada, including how the federal government collects, uses, discloses, retains, and disposes of individuals' personal information and the right of individuals to access their own personal information held by the federal government.

The *Privacy Act* provides exceptions to the general prohibition on the disclosure of personal information. In particular, the Act provides that personal information may be disclosed without an individual's consent:

- for research or statistical purposes, if the head of the government institution is satisfied that the purpose for which the information is disclosed cannot reasonably be accomplished unless the information is provided in a form that would identify the individual to whom it relates;⁶ and;
- to any "aboriginal government" for the purpose of "researching or validating the claims, disputes or grievances of any of the aboriginal peoples of Canada."⁷

As a result, the new intellectual property provisions in the research funding agreements could increase the risk of disclosure of First Nations' personal information if the request for information falls within one or more of the legislative exceptions described above.

³ *Specific Claims Tribunal Act*, S.C. 2008, c. 22 at ss. 13(1)(b)

⁴ For example, UBCIC provides recommended Band Council Resolution wording that stipulates: "All materials gathered in the course of researching this specific claim issue are the property of [FIRST NATION], all materials will be provided in digital form to the [FIRST NATION]; and an archived copy will be held in a secure location by the Union of BC Indian Chiefs Research Department and a copy sent to the [FIRST NATION]"

⁵ *Access to Information Act*, s. 20(1)(c)-(d).

⁶ *Privacy Act*, s. 8(2)(j)(i). Pursuant to s.8(2)(j)(ii), the government must also obtain from the person or body a written undertaking that no subsequent disclosure of the information will be made in a form that could reasonably be expected to identify the individual to whom it relates.

⁷ *Privacy Act*, ss. 8(2)(j) and (k).

Relevance of the UN Declaration on the Rights of Indigenous Peoples

In 2021 Canada enacted the *United Nations Declaration on the Rights of Indigenous Peoples Act*⁸ to affirm the UN Declaration as a universal human rights instrument with application in Canadian law, and to provide a framework for Canada's implementation of the UN Declaration.

The UN Declaration provides that:

- states shall consult and cooperate in good faith with the Indigenous Peoples in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them;⁹
- Indigenous Peoples have a right to maintain, control, protect and develop their intellectual property in respect of their culture heritage and traditional knowledge;¹⁰ and
- in conjunction with Indigenous Peoples, states shall take effective measures to recognize and protect the exercise of Indigenous Peoples' intellectual property rights.¹¹

The new intellectual property provisions directly affect First Nations' ability to protect their intellectual property and confidential information and were introduced without First Nations' involvement or consent. The [Funding Agreement Model: Other and Project Based 2021-2022](#) under which section #40 falls, is an administrative framework that affects First Nations. As a result, Canada was obligated to consult and cooperate with First Nations in good faith to obtain their free, prior and informed consent before inserting section #40 into the Funding Agreement Model. Instead, Canada developed and inserted language into the 2021-2022 funding agreements without consulting with First Nations or CRUs.

The new intellectual property provisions are also inconsistent with First Nations' right to control and protect their intellectual property in respect of their cultural and traditional knowledge, and with Canada's obligations to ensure that such rights are protected.

Relevance of OCAP®

The OCAP® principles were developed by the First Nations Information Governance Centre to establish standard best practices regarding the management and control of First Nations' information and intellectual property. Historically, researchers have gathered and stored information about First Nations without sufficient regard for First Nations' interests. OCAP® provides that First Nations have an inherent right to make informed decisions about how their information is collected, used, accessed, and shared, including the right to possess their cultural knowledge, data and information, and to control all aspects of research and information management processes that may affect them.

The new intellectual property provisions in the funding agreements are contrary to OCAP® in that they increase federal control over information generated by or on behalf of First Nations in the specific claims context and undermine First Nations' ability to control and protect their data and information.

Additional Concerns

- Provisions related to intellectual property rights are appearing in other policy documents, such as the draft research funding guidelines. There are concerns about widespread implementation of measures

⁸ *United Nations Declaration on the Rights of Indigenous Peoples*, SC 2021, c 14.

⁹ UN Declaration, article 19.

¹⁰ UN Declaration, article 31.1.

¹¹ UN Declaration, article 31.2.

that impact First Nations where First Nations' free, prior and informed consent was not sought or obtained.

- This language also appears for the first time in other 2021-2022 funding agreements, including agreements pertaining to Basic Organizational Capacity (BOC).