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Memorandum

Privileged & Confidential

TO: Union of BC Indian Chiefs

FROM: First Peoples Law Corporation

SUBJECT: New Intellectual Property Provision in Funding Agreements

DATE: June 25, 2021

This memorandum provides our preliminary analysis of Canada's new provision regarding intellectual property rights for annual funding agreements for specific claims research for the Union of BC Indian Chiefs.

Summary

Canada provides annual funding to Indigenous research organizations for the development of specific claims on behalf of First Nations.[1] In 2021, Canada introduced a provision in the funding agreements which provides that the Indigenous research organization which is a party to the agreement in question grants Canada extensive rights regarding the use of intellectual property arising in respect of activities carried out pursuant to the agreement.[2]

Based on our initial analysis, the new provision raises a number of concerns for Indigenous research organizations and First Nations, including:

- the new provision could result in the potential disclosure of privileged, sensitive and confidential information arising from development of specific claims without the consent of the First Nation;
- the new provision could undermine First Nations' confidence in the integrity of the specific claims process; and
- the new provision was introduced without consultation with affected First Nations or consideration of Indigenous Peoples' laws and protocols regarding the protection of sensitive information.

Further details are set out below.

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[1] The analysis set out here builds on the draft memorandum entitled *Intellectual Property and Specific Claims Research Funding* provided by UBCIC.

[2] The new intellectual property provisions also appear in other funding agreements for core and project funding for UBCIC and other Indigenous organizations for the 2021-2022 funding cycle. The implications noted in this memorandum apply to these agreements as well.

Background

Canada provides annual funding to support specific claims research and development pursuant to agreements entered into between Canada and Indigenous research organizations.

The research and development of specific claims generates a significant amount of intellectual property, including sensitive and confidential information. Indigenous research organizations take the position that all materials created in the course of the research belong to the First Nation which authorized the work. Prior to 2021, Canada's annual funding agreement for specific claims research did not contain provisions relating to intellectual property.[3]

The 2021-2022 funding agreements include new language which purports to authorize Canada to:

- exercise all intellectual property rights for "any Crown purpose" in relation to the activity, financial and evaluation reports and records and other records or communications related to the administration of the funding agreements; and
- exercise all intellectual property rights in relation to intellectual property created or developed by or for the IRO in the course of implementing, providing or promoting the activities listed in the agreement, and in which copyright subsists.[4]

Considerations

The new language in the funding agreements raises the following concerns.

The new provision poses risks to First Nations' intellectual property

The new provision could be interpreted as providing Canada with rights related to information, including confidential and privileged materials, without the First Nations' knowledge or consent. This may include materials prepared in the course of developing a claim which are subject to solicitor-client and/or litigation privilege.

The provision includes language which suggests that the First Nation's intellectual property could be protected pursuant to a separate agreement between the First Nation and the research organization.[5] Further consideration is required to determine whether and to what extent this language could mitigate the concerns set out here.

The scope of the new provision is unclear and overly broad

The new language authorizes Canada to use the intellectual property for "any Crown purpose". In the absence of any qualifying language, it is not clear what purposes would fall under this category. As such, this provision raises concerns that Canada could use the information in a manner which adversely affects the interests of the affected First Nation or which provides Canada with an unfair advantage in the specific claims process.

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[3] This statement is based on a review of the sample funding agreements provided to FPL by the UBCIC, which include the 2019-2020 and 2020-2021 "Funding Agreement - Amending Agreement". This statement is subject to change upon receipt of additional funding agreements.

[4] Funding Agreement No.: 2122-BC-000059 at s. 40.

[5] S. 40.1 states that all intellectual property arising out of the funding agreement will be owned by UBCIC or a third party as may be set out in an agreement between UBCIC and such third party.

The agreement does not include a definition of what types of intellectual property fall within the scope of the new provision. Based on our initial analysis, the new provision appears to grant Canada an unqualified license to use and reproduce any copyrightable materials created by or for the research organization in the course of researching and developing a specific claim including research reports, documents, maps and other similar materials.[6]

Based on our initial review, the new provision does not appear to provide Canada with intellectual property rights in respect of information produced by First Nations for purposes outside the specific claims process (e.g. Traditional Use Studies), regardless of whether the research organization uses that information in developing a specific claim. However, we recommend that this issue be considered further in light of the broad scope of the new provision and the absence of language defining what constitutes intellectual property.

The new provision was added without consultation or consideration of Indigenous protocols

Canada added the new provision without consulting First Nations or taking into account Indigenous laws and protocols regarding the sharing of sensitive cultural information .

Canadian courts have been clear that the Crown must act honourably in all its dealings with Indigenous Peoples, including in the development of legislation, and that it is good policy for ministers to engage with Indigenous groups on legislative initiatives which may affect their rights or interests regardless of whether the legislative process triggers the duty to consult.[7] In our view, this principle should also apply to funding agreements regarding the resolution of claims against the Crown.

The inclusion of the new provision may also violate Indigenous laws and protocols regarding the sharing of sensitive information generated in the course of specific claims research.

The addition of the new provision is contrary to the UN Declaration on the Rights of Indigenous Peoples

The *United Nations Declaration on the Rights of Indigenous Peoples* requires states to consult and cooperate with Indigenous Peoples in good faith to obtain their free, prior and informed consent before adopting administrative measures that may affect them.[8] *UNDRIP* further provides that Indigenous Peoples have the right to maintain, control, protect and develop their intellectual property over their cultural heritage, traditional knowledge and traditional cultural expressions.[9] Canada's approach to revising the funding agreements is contrary to both of these principles.

With the recent passage of Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples* (the *Act*), Canada has legislated its commitment to consult and cooperate with Indigenous Peoples to achieve the objectives of *UNDRIP*. Consequently there are strong policy reasons indicating Canada should have consulted with Indigenous groups prior to introducing the provision. However, we note that the 2021-2022 funding agreement was signed prior to the coming into force of the *Act*. Furthermore, it is not yet possible to determine how the *Act* will be implemented given its recent passage. As a result, the extent to

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[6] In order to be subject to copyright, the conditions in the *Copyright Act*, RSC 1985, c. C-42 must be met. Facts and ideas are not subject to copyright and thus would not fall under this provision, nor would materials already in existence and simply relied upon in the course of researching and developing a claim.

[7] In *Mikisew Cree First Nation v. Canada (Governor General in Council),* [2018] 2 SCR 765, 2018 SCC 40 (CanLII) at para 52 the Supreme Court of Canada confirmed that there is no constitutional obligation to consult prior to enacting legislation. See also *Canada (Governor General in Council) v. Mikisew Cree First Nation*, [2017] 3 FCR 298, 2016 FCA 311 (CanLII) at para 61.

[8] *United Nations Declaration on the Rights of Indigenous Peoples*, Article 19.

[9] *United Nations Declaration on the Rights of Indigenous Peoples*, Article 31.

which the UBCIC may rely on the *Act* to establish the inapplicability of the new provision remains to be seen.

The new provision is contrary to the objectives of the Specific Claims process

Canada's unilateral approach to the development of its funding agreements could undermine the integrity of the specific claims process as a means of advancing reconciliation and righting long standing wrongs against Indigenous Peoples.

The new provision could diminish First Nations' confidence in the specific claims process, and in turn, result in fewer outstanding grievances against the Crown being resolved outside of traditional litigation.

This is contrary to the objective of the *Specific Claims Policy* of ensuring that the Crown discharges its lawful obligations to First Nations.[10] As set out in the preamble to the *Specific Claims Tribunal Act,* Canada recognizes that it is in the best interests of all Canadians that the specific claims of First Nations be addressed.[11] Furthermore, the revisions to the funding agreement are contrary to Canada's commitment to ensuring impartiality, fairness and greater transparency in the resolution of specific claims.[12]

Items for Further Consideration

UBCIC has raised a concern that the new provision may expose the confidential information of First Nations to requests made pursuant to the *Access to Information Act* or the *Privacy Act*.[13] This matter will require further consideration. We would be pleased to provide an opinion on this issue upon request.

UBCIC has also inquired into the applicability of the OCAP principles. Based on our preliminary review, the OCAP principles could be used to inform revisions to the new provision in the funding agreement. We would be pleased to provide a more detailed analysis of the potential application of the OCAP principles upon request.

[10] See the *Specific Claims Policy and Process Guid*e, online at <https://www.rcaanc-cirnac.gc.ca/eng/1100100030501/1581288705629>.
[11] *Specific Claims Tribunal Act*, SC 2008, c. 22.
[12] See the *Specific Claims Action Plan 200*7: *Justice at Last*, online at <https://www.rcaanc-cirnac.gc.ca/eng/1100100030516/1581289304223>.
[13] *Access to Information Act,* RSC 1985, c. A-1; *Privacy Act*, RSC 1985, c. P-21.