

Intellectual Property and Specific Claims Research Funding

This document provides a preliminary analysis of the intellectual property rights section inserted into funding agreements between Canada and Claims Research Units (CRUs) for the 2021-2022 funding cycle.

Summary

Canada provides funding to First Nations and CRUs to support the research and development of specific claims. CRUs generate significant amounts of intellectual property through the specific claims research process. As of 2021, funding agreements between Canada and CRUs give Canada a licence to exercise all intellectual property rights in relation to activity, financial and evaluation reports and records and other records or communications related to the administration of funding agreements. Additionally, Canada has a licence to exercise all intellectual property rights in relation to intellectual property created or developed by or for the CRU in the course of implementing, providing or promoting the activities listed in the agreement, and in which copyright subsists.

Canada developed and inserted this language into this year's funding agreements without consulting with First Nations or CRUs. This appears inconsistent with the UN Declaration on the Rights of Indigenous Peoples, which requires states to consult and cooperate in good faith with Indigenous Peoples to obtain their free, prior and informed consent before adopting administrative measures that may affect them.

The inclusion of the new intellectual property language in funding agreements means that Canada may be able to exercise a wide range of rights in relation to intellectual property developed by CRUs. First Nations may have concerns that intellectual property developed by CRUs will be misused or mismanaged by Canada. First Nations could be adversely impacted if sensitive information is inappropriately disclosed or transferred to third parties. This risk could be heightened if the department handling the intellectual property is unfamiliar with Indigenous concerns about data security and Indigenous ownership of information.

The new intellectual property language contained in the funding agreements is broad. In particular, the section enables Canada to use the intellectual property for "any Crown purpose". It is not immediately clear what purposes would fall under this category. It is possible that Canada inserted this language for its own administrative purposes or to prevent access by third parties. Without further clarification, First Nations may be concerned that intellectual property developed by CRUs will be used by Canada in ways that adversely impacts their interests.

Background

Canada provides funding to First Nations and CRUs to support the research and development of specific claims. CRUs generate significant amounts of intellectual property through the specific claims research process. While many CRUs may treat this intellectual property as owned and

controlled by the relevant First Nations, the funding agreement provides that the CRU itself owns the intellectual property.

Evidence in the Specific Claims Process

The *Specific Claims Tribunal Act* provides First Nations with the flexibility to advance various forms of evidence in support of their specific claims. In this regard, the *Act* allows the Tribunal to,

“receive and accept any evidence, including oral history, and other information, whether on oath or by affidavit or otherwise, that it sees fit, whether or not that evidence or information is or would be admissible in a court of law, unless it would be inadmissible in a court by reason of any privilege under the law of evidence”.¹

As part of the specific claims process, First Nations will amass diverse forms of evidence. Some of this evidence may contain confidential information or knowledge that can only be shared pursuant to the claimant’s protocols.

Section #40 Intellectual Property

Crown Indigenous Relations and Northern Affairs Canada (CIRNAC) uses the *Funding Agreement Model: Other and Project Based 2021-2022* as the framework for funding agreements with CRUs. This document contains the following provision:

40 Intellectual Property

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.

¹ *Specific Claims Tribunal Act*, S.C. 2008, c. 22 at ss. 13(1)(b) [my emphasis added].

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.

Insertion of Section 40

In 2021, CRUs noticed that section #40 had been inserted into their funding agreements. Canada does not appear to have engaged in consultation with First Nations or CRUs prior to implementing this change. Article 19 of the UN Declaration on the Rights of Indigenous Peoples provides that,

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.²

The *Funding Agreement Model: Other and Project Based 2021-2022* is an administrative framework that may affect First Nations. As a result, Canada was obliged 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*.

“Any Crown Purpose” – Overbreadth & Vagueness

Section #40 provides Canada with “a non-exclusive, royalty-free, fully-paid, perpetual, worldwide, and irrevocable licence to exercise all intellectual property rights for any Crown purpose” in relation to the enumerated categories of information.

This may mean that:

- Canada could exert property rights to exclude other people from accessing or using the intellectual property.
- Canada could use the intellectual property for its own statistical or administrative purposes.
- Canada could transfer the intellectual property to other parties.

Section #40 is a broad licence that is vague in its potential applications. First Nations may have concerns that this information will be inappropriately used, sold, or transferred. Moreover, First Nations have a fundamental interest in ensuring respect for their intellectual property rights. Canada should disclose the purposes underlying the inclusion of the intellectual property

² UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295 at Article 19.

provision and discuss with First Nations how best to achieve these purposes. In its current form, section #40 may be characterized as overbroad and vague.

Relevance of OCAP™

Historically, researchers have gathered and stored information about First Nations without sufficient regard for First Nations' interests.³ OCAP™ was developed in order to facilitate First Nations' jurisdiction over information and to prevent harm to First Nations from the use and sharing of information.⁴ OCAP™ refers to ownership, control, access, and possession.⁵ OCAP™ may be relevant to the design of a new intellectual property provision in the *Funding Agreement Model* and individual funding agreements.

Applied properly, OCAP™ could ensure that:

- Intellectual property continues to be owned by the First Nation throughout the specific claims process;
- First Nations maintain control over the use and disclosure of their intellectual property after it has been transferred to other parties;
- First Nations continue to have access to their intellectual property after it is transferred to other parties; and
- Intellectual property is possessed by Canada and other parties in a manner that is acceptable to the First Nation.

Next Steps

- Determine whether Canada engaged with or consulted First Nations and CRUs prior to inserting section #40 into funding agreements for the 2021-2022 funding cycle.
- Determine why Canada added section #40 into funding agreements for the 2021-2022 funding cycle.

³ Canada. Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples*. Volume 3: Gathering Strength. Chapter 5 pp. 4 (1997).

⁴ The First Nations Information Governance Centre. *Ownership, Control, Access and Possession (OCAP™): The Path to First Nations Information Governance*. May 2014. (Ottawa: The First Nations Information Governance Centre, May 2014) at 5.

⁵ *Ibid.*