

Summary of Issues Regarding Access to Information and Privacy – Updated May 10, 2021

Legislative Reform and Review

Access to Information Act

The revised federal Access to Information Act, which came into force in June 2019 is currently up for its legislated one-year review. We have been in contact with staff at Treasury Board Secretariat (TBS) regarding comprehensive First Nations engagement.

Recall that First Nations were not consulted by TBS at all prior to Bill C-58 being drafted. The BCSCWG made a submission to a review of the bill after it had passed third reading. This submission was based on a legal review by the Indigenous Bar Association that highlighted Indigenous information rights under UNDRIP, and number of new barriers the proposed bill would impose on Indigenous researchers that would effectively undercut those rights (Nations require timely and equal access to federal government records in order to substantiate their claims against the federal government). We also highlighted Canada's conflict of interest and the complete lack of consultation with First Nations.

After prolonged discussions with TBS about any lack of substantive consultation with First Nations, the UBCIC received funding to commission a legal review of the bill by First Peoples Law, undertake a national survey of Indigenous claims researchers, and draft a discussion paper (done under the banner of the National Claims Research Directors). Again, we highlighted the lack of any substantive consultation with First Nations, Indigenous information rights, and barriers to access stemming from Canada's conflict of interest.

The NCRD was also assured by TBS that the claims community and Indigenous Nations would have the opportunity to have substantive input during the one-year legislative review of the new Act. We reached out to TBS by email in mid-April, reminding them of their earlier commitment to substantively engage with Indigenous Nations and their representative organizations during the one-year review period. We asked for details and timelines and were told that TBS reached out via letter to the leaders of national Indigenous organizations in November 2020 and they are currently reviewing these responses. TBS also indicated that they officially launched their public engagement platform at the end of March and they are currently inviting submissions. They indicated they would be contacting us about future discussions but gave no timeline for this or any details about what an engagement process would look like. We have followed up with TBS via email. On May 6, we reiterated our expectation that substantive engagement on the ATIA will occur and stressed the need to allow for adequate time for discussions to take place and to decide on an appropriate process. We are awaiting TBS's reply.

We have further questions about whether a review of the Act is appropriate at this time since COVID-19 delays and logistics have made it impossible to assess the proper and full functioning of many provisions of the Act. We have also heard anecdotally from colleagues involved in ATI reform that the potential for a federal election in the near future may be responsible for the slow pace of engagement.

Privacy Act

The federal government has begun a public engagement regarding reforming the Privacy Act. The UBCIC was contacted by the Department of Justice in 2019 and we were invited to make a submission on how to best engage Indigenous Nations in the reform process. We asked First Peoples Law to review a number of background documents sent to us by DOJ and to produce a legal opinion on impacts of federal privacy legislation on First Nations claims researchers. The NCRD made a formal submission to the pre-engagement process in November 2019, highlighting Indigenous peoples' unique interests in privacy issues, their rights under UNDRIP and section 35, the relationship between protecting privacy and ensuring access to information, and the importance of direct,

meaningful involvement of First Nations at all stages of the reform process. We set out a list of requirements and recommendations that DOJ says it is using to inform the next round of engagement.

We have been in conversation with the AFN and the First Nations Information Governance Committee (FNIGC) regarding the intersection of claims research and Indigenous collective privacy rights and information sovereignty as articulated in the latter's OCAP principles (Ownership, Control, Access, and Possession). This may be a productive line of discussion moving forward as Indigenous Nations articulate their access to information and privacy needs. We also included these issues in a June letter from the BCSCWG to the CCOLTR highlighting the need for advocacy to ensure substantive engagement regarding reforms of the *Privacy Act* and review of the *Access to Information Act*.

The NCRD met with DOJ and TBS representatives in November 2020 and they informed us they were launching their online public engagement. They assured us that they would be holding a separate engagement process for Indigenous Nations and their representative organizations but we have received no details about this yet. We have reached out to DOJ by email to inquire about next steps and to reiterate our expectation that substantive engagement with Indigenous Nations and their representative organizations will occur with ample time to address all relevant issues and concerns.

Library and Archives Canada Act

We have recently learned that the reforms mentioned above will likely have repercussions to the LAC Act and may result in new amendments. Understanding the relationship between these three pieces of federal legislation is key in order to ensure First Nations have full access to necessary records to support their claims. We will be reaching out to Normand Charbonneau, Deputy Librarian and Archivist of Canada, to initiate a discussion about the amendments' possible impacts on claims research.

Research directors met with LAC representatives on April 27, 2021 to discuss changes to the Library and Archives Canada Act, as well as gave an update on the ongoing work of LAC. LAC acting director, Jessica Squires, updated the group on the review of the LAC Act, highlighting areas where there is potential to include language that speaks to nation-to-nation relationships, and inclusion of Indigenous laws, particularly around intellectual and cultural property. Research directors raised concerns regarding the transfer of archival materials from government departments to LAC, and rules or legislation governing the transfer.

Informal Access to Information Requests

Researchers across the country rely on an "informals" process to gain timely access to government records held by CIRNAC. The process, first formalized in 1999, is rife with delay and complications, and lacks transparency due to Canada's conflict of interest. We have reactivated the CRU-Canada working group on informal access to information procedures and policies, motivated in part by the hiring of a new Director of Information Management (David King). We met with the new director on March 16, along with the CIRNAC's director of ATI. We had a productive meeting and it appears the new informals director is more amenable to problem-solving and facilitating access, as opposed to functioning as a 'gatekeeper' of records. The ATI director also offered to provide training to the claims research community to answer any questions and review formal ATI processes. A second meeting will take place in June.

ATI Guide Project Update

We are now in the final stages of drafting an ATI guide for Indigenous claims researchers. We will complete this publication by the end of the fiscal year and will distribute it to First Nations.