

BRIEF TO THE
SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
REGARDING BILL C-58

**"An Act to Amend the Access to Information Act and the Privacy Act and to
Make Consequential Amendments to Other Acts"**

November 1, 2018

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Who We Are

This submission has been prepared by National Claims Research Directors. We are a national body of technicians who manage over thirty centralized Claims Research Units mandated to research and develop specific claims on behalf of First Nations. We work closely with First Nations, legal counsel, funding administrators, Canada's Specific Claims Branch of Indigenous and Northern Affairs (INAC), claims negotiators, and the Specific Claims Tribunal, and are regularly involved in accessing information from federal government departments and agencies.

We are mandated by First Nations to document and develop evidence related to their histories, claims, disputes and grievances. Much of our work is focused on the development of claims against the Government of Canada related to its breach of lawful obligations against First Nation communities, pursuant to the Specific Claims Policy and the Specific Claims Tribunal Act, as well as other disputes and litigation related to Treaties and Aboriginal title and rights.

First Nation governments have a recognized right of access to federal records, in particular, to document their claims, disputes and grievances with the Crown. In this context the federal government is in a conflict of interest because it is the defendant; it controls access to the evidence; and at the same time it owes a fiduciary duty to the First Nations.

Therefore any attempt to modify the legislative basis for access to information will have a disproportionate impact on First Nations and their ability to identify and gather the evidence required to substantiate and resolve their claims, disputes and grievances with Canada.

Why are Federal Records Important for First Nations?

Federal records are the largest repository of historical records relating to Crown-Indigenous affairs. They document the Crown-First Nation relationship in most of its historical, political, legal, and administrative aspects: treaty negotiations; annuity pay lists; membership lists; the administration of assets, including reserve lands, surrendered lands and trust funds; records related to education, residential schools, health, relocations, surveys and reserves, programs and services. They also include a record of current negotiations and litigation between Canada and First Nations.

Most of these records are now held at Library and Archives Canada (LAC), but many are still held by various federal agencies and departments, including INAC,¹ Parks Canada, Fisheries and Oceans, and Justice. But especially Indigenous Affairs: it holds about 59 kilometers of files, with

¹ INAC = Indigenous & Northern Affairs Canada. This department has an ongoing identity crisis. Formerly IAB, DIA, DIAND, INAC, AANDC, then INAC again, and now divided into two, and re-named ISC and CIRNA. For consistency's sake, we will refer to it as INAC in this document.

another 15 km of files in the process of being transferred from Health Canada.² While service delivery and access at LAC has improved dramatically over the past four years and LAC stands out for its commitment to provide access to First Nations, the same cannot be said for federal departments.

First Nations need access to these records for many reasons. For instance, in connection with day to day governance: records related to membership, programs and services and reserve land management. Or in connection with land claims or litigation: lands and survey files; treaty records; administration of assets such as timber and trust funds; land sales. The list goes on. For these materials, the question is, how can we be assured that Canada fulfils its duty to ensure that these records are available to First Nations?

At the same time, more current information find their way into the system, and may be the subject of Access to Information requests from third parties. These include documents provided to Canada in the context of land claims or settlement negotiations, which are privileged and confidential. For these records, the question is, how can First Nations be assured that materials which they provide to the Crown on a privileged and confidential basis are treated as such?

Federal Duty to Disclose and Conflict of Interest

The federal government has a fiduciary duty to First Nations, which includes a duty to disclose information that it holds in its custody. But Canada's conflict of interest is highlighted by the fact that is also the defendant in Specific Claims and litigation cases, and can control access to documents that may be used as evidence by First Nations.

When Canada first introduced land claims policies in the 1970's, it recognized that First Nations would require access to federal records in a way that was different than other Canadians. This was acknowledged when the *Privacy Act* and the *Access to Information Act* were introduced in the 1980's. Paragraph 8(2)k of the *Privacy Act* enables bona fide researchers documenting claims, grievances and disputes between First Nations and Canada, to have access to information that would otherwise would be off limits to other Canadians. But recognition of this legislated right of access has been uneven at best.

² Pierre Desrochers, Director, Corporate Information Management Directorate Department of Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC) and Indigenous Services Canada (ISC) Presentation to the National Claims Research Workshop, Dartmouth, NS October 10, 2018.

Problems with the Current ATI Regime

The current access to information system is badly broken.

First Nations access is supposed to be first through an informal process, by request. The formal ATI is intended to be used only as a backstop. But the informal route is subject to bureaucratic whim and government caprice. Over the past twenty five years, agreements reached between First Nations and INAC officials regarding informal access have been negotiated, authorized, forgotten, disregarded, and dusted off and revised, most recently in the past year. Even with agreed procedures, it can take anywhere from three months to over a year to obtain records by the informal request route, and at INAC there are no available finding aids or guides, so First Nations are entirely dependent on officials to identify and produce records. Compare this to Library and Archives Canada (LAC), which has finding aids available and where delays are rarely more than a few days or weeks.

The formal ATI route is supposed to guarantee a response within 30 days but that deadline is meaningless in practice, and the process as it has evolved has little to do with meeting client needs, and more to do with satisfying bureaucratic imperatives. Please refer to Attachment 1, which provides some examples of recent experiences with the ATI process.

One improvement of the past three years is that we now rarely receive what used to be a stock response: "The records you have requested do not exist". But requests for long delays are the norm: 150, 200 or 300 days, and even then they may not be met. Some of the most common justifications for delays are:

- That "the request is an interference in government operations":

In fact, responding to ATI requests is a part of government operations; in particular when First Nations are requesting information relating to their affairs that is held by the federal government. If the historical materials now held at INAC were instead housed at LAC (where we believe they should be), this would not be an issue.

- That the volume of materials is too large:

The fact of the matter is that large volumes of material must be reviewed to prepare the evidentiary base for a claim or a court case. First Nations are willing to work with officials to make requests manageable. If finding aids were made available, or if historical materials, as indicated above, were at LAC, this would not be an issue.

- That there is a need for third party consultations:

The third party exemption vexes First Nations and officials who must determine how to proceed. Long delays can be the result when third parties don't respond to ATI referrals in a timely manner. On the other hand, some First Nations may be presented with third party referrals amounting to thousands of pages, but without the resources to review and provide a full response.

These justifications are used even when the prescriptive criteria contained in section 6 of Bill C-58 are met (ie, when the researcher has provided a specific file number, date range and the type of information sought).

As a general rule, there are no interactions between the requester and the Department once a formal request is made. And once the package is ready, there are more problems. Although researchers are supposed to be able to review materials in person via ATI, in practice INAC only provides poorly scanned electronic files, which do not even meet INAC's own minimum standard for claims submissions (this requires that documents must be legible, and copies clear).³ The poor quality of document copies received in this manner renders them close to useless for land claims or litigation purposes.

Common Exemptions / Grounds for Redaction

Officials often make gratuitous use of exemptions to remove or redact information. One of the most common is "advice or recommendations" (sec 21), which can mean just about anything. Another exemption, which does raise issues on both sides of the fence, is the "third party" exemption (sec 20). Who or what qualifies as a third party and how might that affect First Nation's right of access to information, or how might it affect a First Nation's right to have privileged and confidential information protected? Other favourites are Federal - Provincial relations (sec 14) and Solicitor-Client privilege (sec 23) - even when the documents in question may be 50 or 100 years old.

According to statistics provided by the OIC in 2016, many of the exemptions which are invoked by officials will fail if the refusal is appealed to the OIC. This strongly suggests that departmental and ATIP staff are using the exemptions too broadly, costing all parties time,

³ See Attachment 5, "Minimum Standard for filing a Specific Claim Submission with the Minister of Aboriginal Affairs and Northern Development Canada".
<https://www.rcaanc-cirnac.gc.ca/eng/1100100030303/1539617885830>

money and, ultimately, good will.⁴

If you decide to file a formal complaint with the Office of the Information Commissioner, there are additional hurdles and delays. The current backlog of complaints is 3,380. In 2016-17, it could take six months or longer just to have an investigator assigned to your file. In fact, some of our members have outstanding complaints dating from 2016 which have still not been assigned to an investigator. Once an investigator is assigned, it can take three years or longer for a complaint to make its way through the system. It becomes a war of attrition. There does not appear to be much room for mediation or negotiation between the parties once a formal complaint has been launched. This is compounded by the extreme delays at the OIC which sometimes render complaints obsolete.

Bill C-58.

In the preceding section we've identified some - but by no means all - of the problems we face when trying to obtain records from federal departments and agencies. Now, the next question is, will Bill C-58 address these problems? The short answer is, NO.

The emphasis in the Bill on proactive disclosure does little or nothing to address the problems that First Nations have with the ATI regime. Other parts of Bill C-58 address the bureaucracy's problems, and do not ensure that the ATI regime is more responsive to users, including First Nations.

Though some amendments to Bill C-58 have been proposed by the government, for First Nations, two key concerns remain:

- 1) the Bill, even as amended, still provides officials with ample tools with which to frustrate or suppress the release of information related to claims against the Crown, and
- 2) for the majority of First Nations, there are no protections for materials provided to Canada on a privileged and confidential basis

The reason why C-58 does not address these key issues is that the Treasury Board Secretariat undertook no consultation with First Nations when the Bill was being developed. And they did

⁴ See Attachment 3, Joint Submission to the Standing Committee on Access to Information, Privacy and Ethics - First Nations Experience with Access to Information. National Claims Research Directors, 29 June, 2016: p 6.

not respond substantively when we presented them with our concerns about the Bill, beginning in 2016 (see Attachments 3 & 4, briefs to the House of Commons ETHI committee, 2016 and 2017). Very recently this has changed somewhat, and Treasury Board Secretariat has begun to engage with us, but it is now very late in the game. It's been less than ten weeks since we were able to access resources to even to study the draft legislation. The degree of consultation which has taken place in connection with this Bill is still far below the acceptable threshold.

Another part of the reason why Bill C-58 does not address the problems we've identified is that the Bill does not respond to some of the fundamental problems with the ATI regime: lack of training, lack of personal contact, lack of resources, and lack of understanding of First Nation rights of access. The Bill also avoids addressing the existing exemptions, and how they are used and misused by officials (for instance "advice or recommendations"). There has also been an absence of discussion about how to address problematic exemptions such as "third party", which presents challenges for both requesters and government officials.

Government officials have told us that this should not be cause for concern because they are taking steps to improve access by way of procedures for informal requests, but that is no consolation. We have seen from experience how the informal request process can be subjected to political interference, or simply bureaucratic indifference and lack of continuity. A legislative backstop is essential to provide a timely and effective alternative should the informal access route fail.

Government officials have also pointed out that there will be additional reviews of the legislation, and reports, at some future date. This is not an acceptable response. Once legislation is adopted, it is very difficult to change. And by the time the promised review takes place, we will have a new federal government which may well have different priorities and objectives. The time to address these issues is now.

At the same time, we do not believe that simply handing more responsibility to the Office of the Information Commissioner is necessarily a remedy in all cases. In particular, the suggestion that the OIC would have to consent in cases where Departments refused to disclose records, just seems like a way to get departments off the hook and dump more busy work on the doorstep of the OIC. We've seen in the past that governments often try to get rid of a backlog by looking for a dumping ground off-site: the Specific Claims Branch did this after 2007 by removing the claims it had in its backlog inventory, and putting them on the doorstep of the Specific Claims Tribunal. The same could well happen to the OIC, particularly if no new resources are attached to the new legislation. Remember that the OIC already has a backlog of almost 3,400 cases.

Certain parts of Bill C-58 would actually set us back decades, and entrench the bureaucracy's ability to stonewall or frustrate efforts to obtain access. For instance, some of INAC's favourite reasons for delay - in particular, "interference in government operations" and the volume of records - would, under Bill C-58, become transformed into a legislative basis for denial of access. It seems far-fetched to suggest that this is an improvement over the status quo.

Custody of Federal Records

Another important issue that Bill C-58 does not address is, who should hold these records? Historical records belong at LAC. They have the expertise and the organizational model to facilitate the retention, organizing and access of records. Why is INAC sitting on 60 kilometers of documents, many or most of which are of historical, not administrative, value? The Department has so many conflicting priorities and mandates that access to records will never be high on its list. In contrast, LAC's mandate is to hold records for public access, and it does not have the direct conflict of interest that INAC does.⁵

When one compares their respective service delivery standards, these differences become clear: LAC has readily accessible finding aids, many of them online, as well as staff who specialize in particular thematic areas. At INAC there are no publicly accessible finding aids - researchers are dependent on Departmental staff to search for, and identify, relevant materials. One can get records from LAC within hours, or at most, weeks, when the same type of record, held by INAC, may take months or years to obtain. LAC has dedicated reading rooms with proper facilities (in particular for electronic duplication), whereas at INAC the space for viewing records is cramped, with inadequate lighting and no room for more than one or two researchers at a time.

Please refer to Attachment 1, which summarizes some recent experiences with the formal and informal access process at INAC. A review of that summary provides a good snapshot of the unworkable nature of the status quo.

⁵ LAC's mandate, outlined in the preamble of the *Library and Archives of Canada Act*, includes the following: to preserve the documentary heritage of Canada for the benefit of present and future generations; to be a source of enduring knowledge accessible to all, contributing to the cultural, social and economic advancement of Canada as a free and democratic society; to facilitate in Canada co-operation among communities involved in the acquisition, preservation and diffusion of knowledge; to serve as the continuing memory of the Government of Canada and its institutions. <https://www.bac-lac.gc.ca/eng/about-us/Pages/our-mandate.aspx>

Some Recommendations re: ATI

Please refer to the submissions which we made in 2016 and 2017 to the House of Commons ETHI Committee in connection with this Bill (Attachments 3 & 4). Those contain additional information, as well as some basic recommendations regarding ATI: government should consult properly; make adequate resources available for ATI and the OIC; train staff; decentralize; and encourage human contact.

Conclusions

We have been working with the Indigenous Bar Association and the Assembly of First Nations on our response to this Bill. We invite you to review their submissions, and in particular, the recommendations regarding amendments to the Bill which are being put forward by the Indigenous Bar Association. We include, as Attachment 2, a legal review of Bill C-58, prepared by First Peoples Law, which highlights some of the problems with Bill C-58 and provides an outline of possible amendments.

Bill C-58 as currently drafted is a step backwards, and provides government with new tools to frustrate and suppress First Nation access to federal records. This draft legislation needs significant amendment, or, in the alternative, it should be sent back to government for proper consultation and amendment before being considered further.

Attachments

1. Summary of selected INAC ATI requests, 30 October, 2018
2. Legal Review of Bill C-58, Prepared for the Union of BC Indian Chiefs, the National Claims Research Directors, and the Indigenous Bar Association, October 25, 2018.
3. NCRD submission to the House of Commons ETHI Committee, June 29, 2016
4. NCRD submission to the House of Commons ETHI Committee, October 16, 2017
5. "Minimum Standard for filing a Specific Claim Submission with the Minister of Aboriginal Affairs and Northern Development Canada"

Attachment 1: Review of Some Recent Experiences with the ATI System.

Prepared by the National Claims Research Directors (NCRD), 30 October 2018

This note contains summary information on a number of formal and informal access requests by First Nations or Claims Research Units, made with mandate Band Council Resolutions (BCR's), relying on 8(2)k of the *Privacy Act*.

We have been working on a survey of First Nations and Claims Research Units across Canada to get a better sense of their experiences with the Access to Information (ATI) regime. This research is still in process, but partial results are as follows:

- 80 percent of respondents said that ATI responses took 60 days or more (i.e. are not occurring within the 30-day timeframe)
 - 77 percent of participants said that extensions to timeframes were unwarranted, based on the records they received
 - 64 percent of participants said that a government institution had (a) failed to respond to their request without claiming a formal deadline extension or (b) failed to meet an extended timeline.
 - 80 percent of respondents had submitted ATI requests that yielded no records
 - 87 percent had records removed (redacted) under an exemption within the ATI act
-

Following are some individual experiences with the ATI process:

Community "A" and "B":

Sometime in 2015-16 a file from INAC re: Robinson Treaties of 1850. The volume in question contains information covering the period 1916-1965.

The files being requested were clearly identified and directly relevant to the claims, disputes and grievances of the communities. The first two volumes of this file had originally been ordered circa 2013 through INAC's "informal" access process. Sixteen out of 104 pages had been removed:

- 6 for "personal information", covering the years 1925-1957
- 9 for "third party", covering 1957-1964
- 1 for "solicitor client privilege", 1916

These removals were not acceptable. A formal ATI request was made June 2017 for the same two file volumes, as well as subsequent volumes of the same file series. INAC requested a 220 day extension because of: "the large volume of records involved"; the request constituted "interference with government operations"; and "third party consultations".

On June 7, 2017 a formal complaint was made to the OIC re: unreasonable delay. By February 2018, nine months later, it appeared that nothing had been done to follow up on the complaint; it was not clear that the OIC had assigned an investigator yet. After discussions with INAC, another informal request was made in February 2018. We finally obtained copies in third week of March 2018 - about two years after initial informal request. The formal ATI request and complaints process proved to be useless.

Community “C”:

This has to do with Survey and Reserves files requested from INAC, which contain baseline data on the creation of Reserves. They are a staple of land claims research. These files had already been released to us by INAC in their entirety in the 1990's / early 2000's. We had made an informal request in 2016 to get better copies, in order to meet INAC's "minimum standard" for documents connected to land claims. It took a year to receive severely redacted files. In one file, 92 out of 109 pages had been severed; in another file, 79 of 95 pages had been severed; in another, 142 of 185 pages had been severed. Most of grounds for exemption were: "advice and recommendations", "third party". Some were "solicitor client". In many cases these same materials had already been released 10 or 20 years earlier.

We filed a formal ATI request in summer 2017 and INAC requested 210 day extension based on "the large volume of records involved"; that the request would constitute "interference with government operations", and the need for "third party consultations". These are for files to which we had already been granted full access.

A formal complaint was filed with the OIC in July 2017, but it appears that no investigator was assigned. We finally received disclosure from INAC on February 1, 2018 - the same day as the extension expired. Apparently this was only a result of the fact that we had contacted OIC to follow up on our initial complaint, and they had called INAC. But we were not allowed to review the original file as we had requested - instead, we received a USB stick with 1300 pages. Some information was still redacted. The quality of the reproductions were very poor, and did not meet INAC's own minimum standard for documents to be used in land claims submissions. We had to re-order the files through informal process so that we could review the originals, and it took another 2 or three months to finally get the documents. This was about two years after the initial informal request. The formal ATI and complaint process were useless.

Community “D”:

A formal request for nine different subject files from INAC, in July 2017. The names of the files were clearly identified, as were the date ranges. On 9 August, INAC requested a 120 day extension, because of "the large volume of records involved"; and that the request constituted an "interference with government operations". The 10 December 2017 extension deadline came and went. There was no production of documents. INAC provided no notification or

courtesy call to inform that the deadline had been missed.

We had requested to view the materials in person. Instead we received CDROM on February 5, 2018, with a cover letter dated 31 January 2018. The package only contained 2 of the 16 files requested; it was labelled “interim response”, but contained no explanation or indication of when the remainder of the materials would be supplied. There was no indication of whether the files were complete. Quality was extremely poor. On some pages the watermark “Released under Access to Information Act” obscured the document itself. The release did not meet INAC’s own minimum standard. We had to reorder the files through informal process. We finally received them end of May, 2018 - 22 months after our initial request.

Community “E”:

Informal request to INAC in 2016; some materials provided. Some documents were removed. Inquiries were made; we waited over six months to finally get a call back from program staff, but still no access to the removed records. We filed formal ATI request in June 2017 for 3 specific files. INAC sought a 220 day extension because of “the large volume of records involved”; that the request would “interfere with government operations” , and “consultations involved”.

We filed complaint with OIC in August 2018, but an investigator was apparently never assigned. We re-filed informal request at INAC’s recommendation, and finally received disclosure in spring, 2018 - about two years after the initial request.

Community “F”:

This related to materials from Parks Canada which had been released and copied in 1991-93 were re-requested in the summer of 2013 to get better copies. An informal request was made, and we were told that the records did not exist. We knew that they did exist so a formal ATI request was filed in July 2013. There was no disclosure until the end of March 2014, but that was only partial, and we were only provided with a CDROM containing images - we were not able to review the original files, as we had requested. We made a revised request with a full and detailed list of files in June 2014. One year later, after inquiries, we received a letter basically saying “don’t call us, we’ll call you”, and inviting us to file a complaint with the OIC. A complaint was filed with the OIC in August 2015. Partial disclosure followed, initiated by Parks Canada, but a significant number of documents were still removed from the files. In June 2017 another complaint was filed with the OIC specifically targeting the items that had been removed. As of 29 October 2018, this complaint is only partially resolved, and is still with the OIC. It is now over five years since the materials were requested.

Community “G”:

Informal request to the Ontario regional office of INAC in January 2017 for annuity paylists - a total of 65 files. In September 2017, 12 heavily redacted files were produced. 10 years of

paylists were missing and INAC staff were informed. Ongoing communications between the researcher, regional office and headquarters staff of INAC between September 2017 and October 2018 have been marked by confusion and contradictory positions from INAC regarding what can be released and what permissions are required, who the Band Council Resolution must come from, who has a right to the information. Ongoing mis-communication between headquarters and regional office staff. Some materials have finally been released and are ready for review as of October 29, 2018. But we are still unclear if the missing files have yet been found. Part of the problem is that this request involves communities that were amalgamated and then de-amalgamated. INAC staff do not understand the nature of the request or the relationship between the communities.

Community “H”:

In December 2017 an informal request was made to INAC HQ for aggregate statements of annuities paid under the Robinson Treaties (Ontario) for the period 1956-1984. Some materials were finally made available in May-June 2018. These were reviewed but were incomplete. Additional files were requested. These were produced in October 2018 and reviewed, but still incomplete. It appears that the files may be missing or destroyed. Almost one year after the initial request, still not complete disclosure and uncertainty as to whether the files still exist or not.

ATIP Issue Impacting 6 BC Communities and 17 Specific Claims

In November 2015, the BC Regional office of INAC denied UBCIC researchers access to records (informal access request). The denial of records was based on a new internal policy that did not recognize the validity of existing Band Council Resolutions (BCRs) authorizing this access if a Band elects a new Chief and Council. INAC staff has stated they require a new BCR in order to release a Band’s records. This policy had been communicated through email without reference to any statutory or regulatory provision. Several informal access requests denied on this basis. Despite numerous efforts by researchers, INAC BC Region refused to honour valid BCRs.

We contracted legal counsel to review the legal basis for records refusal. There was no valid justification for INAC managers and staff to refuse access to records on this basis. Band Council Resolutions are legal instruments that reflect a Band Council’s decisions made in accordance with the Indian Act and Regulations. There is no expiration provision in the Indian Act and Regulations that states that BCRs become invalid upon the election of a new Chief and Council.

On November 18, 2015, UBCIC Executive write open letter to Minister Bennett calling on her to instruct departmental staff to respect Band Council’s decisions and

In February 2016, Minister Bennett wrote to the UBCIC Executive stating as of Sept 2015, BC Regional office of INAC enhanced its info management security procedure for accessing departmental records “to protect First Nations info and ensure only authorized access to

records. BC Regional office recognizes legitimacy of BCRs; in light of UBCIC concerns an updated BCR no longer required to access records following a change in council.”

This frustrating experience arose because departmental officials acted unilaterally to impose an unnecessary and paternalistic policy which caused significant delays and additional costs that impacted 17 active claims and potentially dozens more.

Resolving this issue required considerable escalation.

Despite this, almost a year later, we were faced with the same issue related to BCR validity in connection with expiry dates. It too had to be escalated to be resolved.

Community “I”

In 2017, UBCIC Research made an informal access request on behalf of Community I and included an 8(2)(k) form, BCR, and researcher authorization with the request. The INAC Director of Access to Information at HQ approved releasing the records pursuant to 8(2)(k) of the Privacy Act. Despite this, the release of records was refused by the BC Regional analyst on the grounds that the records contained third party interests. The issue remained unresolved until UBCIC brought it to the attention of the Director of INAC’s Information Management Corporate Services. The records were released eight months after the original request.

Resolving this issue required considerable escalation.

Issues Impacting 7 BC Communities and Over 30 Claims

Many of the problems we have surround how files are organized and how they can be accessed, by Government staff as well as by us. These issues speak directly to the fact that departmental records should be transferred to LAC. Departments are not equipped or trained to retain them or to create and provide access.

Community “J”

We were denied access to documents that related to our claimant community but were also connected with another band. We obtained documents for Community J dating to 1950, when the Bands split. After that, we were unable to access any of the documents for Community J because the other Bands (pre-split) were mentioned. This effectively halted three claims for Community J.

Communities “K”

In 2018, Regional ATIP officer could not locate a file because an identifying number was missing in her records, which meant the file was AWOL somewhere in INAC offsite storage.

Communities “J” through “P”

In the BC Regional office of INAC, Survey plans / maps are removed from their associated file and copied separately, often in black and white. We have been told that BC region will not copy maps because they are publicly available, yet we have demonstrated that original maps have marginalia on them and are an integral part of the file. We have also been told that colour copies are not available, when the correspondence tells us that they have been annotated in green or red to show changes. Materials available from the ILRS (Indian Lands Registry System) are still mainly black and white and of very poor quality.

Legal Review of Bill C-58

Prepared for the Union of B.C. Indian Chiefs,
National Claims Research Directors
& the Indigenous Bar Association

By Bruce McIvor & Kate Gunn
October 25, 2018



Contents

Executive Summary	2
Introduction	3
I. Background	3
a. Impacts on Indigenous Peoples.....	3
<i>i. Comprehensive & Specific Claims</i>	4
<i>iii. Aboriginal Title, Rights and Treaty Rights Litigation</i>	4
<i>iv. Status under the Indian Act</i>	4
<i>v. Governance Issues</i>	5
<i>vi. Commercial Interests</i>	5
b. Indigenous Peoples’ Right to Access Information.....	5
<i>i. Canadian Courts & Legislation</i>	5
<i>ii. The United Nations Declaration on the Rights of Indigenous Peoples</i>	6
c. Concerns with Accessing Information	6
II. Substantive Concerns with Bill C-58	7
a. Overview	7
b. Analysis.....	7
<i>i. Request for access to record</i>	8
<i>ii. Declining to Act on a Request</i>	8
<i>iii. Fees</i>	10
<i>vi. Proactive Disclosure</i>	11
<i>v. Indigenous Governments</i>	12
<i>vi. Powers of the Information Commissioner</i>	13
III. Consultation & Engagement	14
a. The Crown’s Consultation Obligations	14
<i>i. Section 35(1) & the Honour of the Crown</i>	14
<i>ii. United Nations Declaration on the Rights of Indigenous Peoples</i>	15
b. Consultation on Bill C-58.....	15
IV. Recommendations	18
1. Purpose of the Act	18
2. Definitions.....	18
3. Request for access to record.....	19
4. Reasons for declining to act on a request.....	20
5. Fees.....	20
6. Proactive Disclosure	20
7. Protections for Indigenous Governments	21
8. Powers of the Information Commissioner	21
9. Indigenous Review Officer.....	21
References	23

Executive Summary

Indigenous Peoples in Canada have a distinct interest in accessing federally-controlled information, including to pursue and resolve historic and current grievances and claims against the federal Crown, to protect and advance their Aboriginal Title, Rights and Treaty rights, and in relation to matters affecting their governance, policy, economic, social and cultural interests. The importance of ensuring Indigenous Peoples' access to information in the possession of the federal Crown has been recognized by Canadian courts and is reflected in federal legislation and international instruments. However, under the current access to information and privacy regime in Canada, Indigenous Peoples regularly face legal and bureaucratic challenges and delays in obtaining complete and timely access to information.

The proposed amendments to Canada's access to information and privacy regime as set out in *Bill C-58, An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts*¹ have the potential to impose significant additional barriers to Indigenous Peoples' ability to access federally-controlled legislation. If passed into law, the amendments in Bill C-58 will provide government institutions with additional legislative bases to deny access to information requests from Indigenous Peoples, reduce the oversight and authority of the Office of the Information Commissioner, and perpetuate the differential treatment of many Indigenous governments relative to federal, provincial and municipal governments and Indigenous groups who have entered into comprehensive claims agreements with the federal government. Importantly, Canada has largely failed to consult with Indigenous Peoples regarding Bill C-58, despite repeated requests for engagement by Indigenous organizations.

The provisions in the current version of Bill C-58 are contrary to the honour of the Crown and Canada's commitment to a renewed relationship with Indigenous Peoples including through the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*. If enacted, the amendments will affect Indigenous Peoples' rights under section 35(1) of the *Constitution Act, 1982* and hinder the resolution of longstanding claims against the federal Crown. Amendments are required to the Bill in order to address these concerns and ensure that Indigenous Peoples have timely access to the information they require to pursue claims against the Crown, protect and advance their Aboriginal Title, Rights and Treaty rights, and carry out governmental operations on behalf of their members.

Prepared on behalf of the Union of BC Indian Chiefs, National Claims Research Directors and the Indigenous Bar Association.

¹ *Bill C-58, An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2018, cl 6 (as passed by the House of Commons 6 December 2017). [Bill C-58]

Introduction

This report provides our review and proposed recommendations for Bill C-58 on behalf of the Union of BC Indian Chiefs, National Claims Research Directors and the Indigenous Bar Association.

Bill C-58 proposes changes to access to information and related privacy issues in respect of information in the possession of the federal government as set out in the current *Access to Information Act* and *Privacy Act*.² The Bill is currently before the Senate. Since being introduced into the House of Commons, Bill C-58 has been criticized by both Indigenous and non-Indigenous organizations for imposing additional barriers to accessing government-held information.³ This report is intended to build on existing critiques of Bill C-58 with a focus on impacts of the Bill on Indigenous Peoples, both as rights-holders under section 35(1) of the *Constitution Act, 1982* and as government organizations. Specifically, this report provides analysis and recommendations to address concerns regarding (1) substantive issues with Bill C-58 which will adversely impact Indigenous Peoples' right to access information; and (2) the federal Crown's failure to consult with Indigenous Peoples on the development of Bill C-58.

Part I sets out background information on the importance of accessing information for Indigenous Peoples, and Indigenous Peoples' right of access as recognized by Canadian courts and legislation. Part II provides an overview of Bill C-58 and an analysis of substantive issues of concern for Indigenous Peoples in the current version of the Bill. Part III sets out concerns regarding the federal Crown's failure to consult with Indigenous Peoples in relation to the Bill. Part IV provides a summary of recommendations to address concerns about Bill C-58 and Indigenous Peoples' access to information held by the federal government more broadly.

I. Background

The following is a brief overview of impacts on Indigenous Peoples as a result of existing information and privacy legislation, along with an overview Indigenous Peoples' legal right to access information as confirmed by the courts and legislation.

a. Impacts on Indigenous Peoples

As a consequence of the historic and ongoing process of colonialism in Canada, Indigenous Peoples are regularly required to access information in the possession of the federal government for a host of reasons related to claims, grievances and governance issues, including the following:

² *Access to Information Act*, RSC 1985, c A-1 [*Access to Information Act*]; *Privacy Act*, RSC 1985, c P-21 [*Privacy Act*]

³ See for example Canada, *Office of the Information Commissioner of Canada, Failing to Strike the Right Balance for Transparency – Recommendations to improve Bill C-58: An Act to Amend the Access to Information Act and the Privacy Act and to Make Consequential Amendments to Other Acts*, *Information Commissioner of Canada* (Ottawa: Office of the Information Commissioner of Canada), September 2017 [2017 OIC Report]; *Impaired Access* – Submission to the Standing Committee on Information, Privacy and Ethics. October 16, 2017. National Claims Research Directors [2017 NCRD Submission]; Joint Submission to the Standing Committee on Information, Privacy and Ethics and First Nations Experience with Access to Information. June 29, 2016. Directors from Claims Research Units Across Canada. [2016 Joint Submission]

i. Comprehensive & Specific Claims

Indigenous Peoples across Canada regularly pursue claims against Canada through Canada's comprehensive and specific claims processes regarding the resolution of issues related to Aboriginal Title and Rights, as protected pursuant to section 35(1) of the *Constitution Act* and historic grievances against the federal Crown's failure to fulfil its lawful obligations to Indigenous Peoples.⁴ In both cases, Indigenous Peoples are required to provide extensive documentation and historical evidence to develop, support and advance claims in negotiations with Canada or before the Specific Claims Tribunal. The majority of the records required to document the claims are in the possession of the federal government.

ii. Other Historical Grievances

Indigenous Peoples require access to pursue additional historic and present-day grievances against the Crown outside of the comprehensive and specific claims context, including in relation to residential schools, child welfare the appropriation of Indigenous Peoples' cultural and religious materials and artefacts by Canadian museums.⁵ In the vast majority of situations, information required to address these issues is possessed by the federal Crown.

iii. Aboriginal Title, Rights and Treaty Rights Litigation

Indigenous Peoples also require access to information in the possession of the federal government in order to advance their section 35 rights and enforce the Crown's constitutional obligations in respect of those rights. Indigenous Peoples are regularly required to use legal processes established by Canadian courts to protect and advance their section 35 rights. As with comprehensive claims, the processes established by Canadian courts for advancing claims in relation to Title, Rights and Treaty Rights or related litigation to protect those rights require significant amounts of historical information which is frequently held solely by the federal Crown.

iv. Status under the Indian Act

The *Indian Act* sets out the federal government's definition of who qualifies as an "Indian" and is entitled to corresponding benefits.⁶ In cases where an individual applies for status under the *Indian Act* or to appeal a decision in which he or she has been wrongly denied status, he or she requires historical information in the possession of the federal government, including genealogical records, to substantiate the claim. Without access to this information, individuals who would otherwise be entitled to status are unable to access the benefits as provided for under the *Indian Act*.

⁴ In June 2018 the federal government announced that it intended to renew its approach to comprehensive claims pursuant to its *Comprehensive Land Claims Policy* and released its interim policy, entitled *Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights*. For the purpose of this report, the term "comprehensive claims" is used to refer to the negotiation of land claims or modern treaties pursuant to either policy. The term "specific claims" refers to claims made by First Nations against Canada pursuant to Canada's *Specific Claims Policy* or before the Specific Claims Tribunal in relation to the administration of land and other First Nation assets and to the fulfilment of historic treaties and other agreements.

⁵ The importance of addressing these and other issues is recognized in the Truth and Reconciliation Commission's Calls to Action.

⁶ *Indian Act*, RSC 1985, c I-5 [*Indian Act*]

v. Governance Issues

Indigenous Peoples and their representative organizations require access to federal records for matters affecting their governance, policy, economic, social and cultural interests. Access to federal records is also critical in advancing Indigenous Peoples' self-determination, which has been repeatedly identified as a key issue by both the federal government and Indigenous Peoples.

vi. Commercial Interests

Indigenous Peoples are affected by information and privacy legislation in relation to commercial transactions, particularly where a First Nation or its nominee is a party. First Nations frequently engage in commercial transactions in which the federal government is a party (including, for example, contracts with the Department of National Defence or proponents under the federal Procurement Strategy for Aboriginal Business). Having access to federal records to inform the First Nation's negotiation strategy or due diligence process is critical to ensure a level playing field for First Nations relative to other companies in the commercial context.

In each of the cases outlined above the majority of relevant records is in the possession of the federal government. As a consequence of Canada's control over this information and its importance to Indigenous Peoples, modifications to the legislative basis for access to information or privacy rights will disproportionately affect Indigenous Peoples' ability to obtain the information necessary to substantiate and advance their claims pursuant to processes established by Canada, and to proceed with the process of reconciliation.

b. Indigenous Peoples' Right to Access Information

As a consequence of Canada's colonial past and Indigenous Peoples' unique relationship with the federal Crown the courts have confirmed that Indigenous Peoples have distinct rights to access information which are recognized by federal legislation and international instruments.

i. Canadian Courts & Legislation

The reconciliation of Indigenous Peoples and non-Indigenous Canadians and their respective claims, interests and ambitions in a mutually-respectful relationship is the fundamental objective of section 35(1).⁷ Ensuring that Indigenous Peoples have timely and transparent access to information required to advance and resolve outstanding claims against the Crown is necessary to further the process of reconciliation.

Canadian courts have recognized that the federal government is required to disclose records to First Nations conducting research to pursue claims against the Crown by virtue of section 35(1), the Crown's fiduciary obligations, and the honour of the Crown. According to the Federal Court, it would be inconsistent with the purpose of section 35 for the federal government to possess but be entitled to suppress the evidence necessary for Indigenous Peoples to pursue and resolve their

⁷ *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 SCR 103, 2010 SCC 53 (CanLII) at para 10 [*Beckman*]; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388, 2005 SCC 69 (CanLII) at para 1. [*Mikisew* 2005]

claims.⁸ Rather, the duty to negotiate in good faith, which is an implicit aspect of section 35(1), requires that the Crown disclose records in its possession which are relevant to the proof of section 35 claims.⁹

Similarly, the Federal Court of Appeal has confirmed that, where Indigenous Peoples require federally-controlled documents to support research in respect of land claims, access will take priority over protections for personal information.¹⁰ This priority is further reflected in the *Privacy Act* itself, which provides for the provision of information under the control of a government institution 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 peoples of Canada.”¹¹

ii. The United Nations Declaration on the Rights of Indigenous Peoples

Canada has committed to implementing the *United Nations Declaration on the Rights of Indigenous Peoples* (UN Declaration) through reviewing its laws and policies as guided by the UN Declaration and its *Principles respecting the Government of Canada's relationship with Indigenous peoples*.¹²

Article 40 of the UN Declaration provides that:

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Indigenous Peoples’ right to just and fair procedures and effective remedies for claims against the federal Crown as set out in the UN Declaration requires access to information necessary to support and develop those claims. As such, the UN Declaration supports Indigenous Peoples’ right to access federally-controlled information for the purpose of resolving claims against the Crown.

c. Concerns with Accessing Information

As set about above, Indigenous Peoples are directly and disproportionately affected by federal information and privacy legislation, and are recognized as holding rights to access that information. However, under the current legislation Indigenous Peoples regularly face legal and bureaucratic challenges and delays in obtaining complete and timely access to information necessary to pursue claims against the federal Crown.

⁸ *Canada (Information Commissioner) v. Canada (Minister of Industry)*, [2006] 4 FCR 241, 2006 FC 132 (CanLII) [*Canada (Information Commissioner) v. Canada* FC] at para 45-6.

⁹ *Canada (Information Commissioner) v. Canada (Minister of Industry)*, [2006] 4 FCR 241, 2006 FC 132 (CanLII) [*Canada (Information Commissioner) v. Canada* FC] at para 45-6.

¹⁰ *Canada (Information Commissioner) v. Canada (Minister of Industry)*, [2008] 1 FCR 231, 2007 FCA 212 (CanLII) [*Canada (Information Commissioner) v. Canada* FCA] at para 13.

¹¹ *Privacy Act*, s.8(2)(k)

¹² <http://www.justice.gc.ca/eng/csjsjc/principles-principes.html> [accessed September 24, 2018]

Indigenous Peoples' concerns about accessing federally-controlled information is particularly significant given the context in which many disclosure requests take place. As the Federal Court has noted, "[i]t would be absurd and wrong if the Crown had the evidence the Aboriginal people required to prove their land claim, but the Government was entitled to suppress it."¹³ However, in many cases this is the direct effect of the current federal access to information regime. For example, the federal Crown generally holds the majority of the evidence necessary to document specific claims and Aboriginal Title, Rights and Treaty Rights litigation, but is also the respondent/defendant in those proceedings. As a result, the current regime places Canada in a direct conflict of interest by virtue of the fact that it both possesses and controls access to the information required by Indigenous Peoples to pursue claims against the federal Crown.

II. Substantive Concerns with Bill C-58

The following section provides an overview of the current status of Bill C-58 and the key concerns identified by Indigenous Peoples with the current version of the Bill.

a. Overview

Bill C-58 was first introduced into the House of Commons by the Liberal government in June 2017. It has since passed through second and third readings at the House and has been reviewed and amended by the Standing Committee on Access to Information, Privacy and Ethics (Committee). The amended version of the Bill has received first and second readings in the Senate and is now before the Standing Senate Committee on Legal and Constitutional Affairs for review.

Bill C-58 has attracted significant criticism. For example, in 2017 Claims Research Units from across Canada submitted a report to the Committee with the endorsement of a number of First Nations, Tribal Councils and Indigenous organizations. The submission called for the withdrawal of the Bill and for the federal Crown to commence meaningful consultation with Indigenous Peoples regarding proposed legislative changes to access and privacy laws. Also in 2017, the Assembly of First Nations passed a resolution calling on the federal government to withdraw Bill C-58 and to consider, recognize and accommodate First Nations' rights of access to information in current and future legislative or administrative changes related to the access to information regime.

Despite these concerns, minimal substantive amendments have been made to Bill C-58 and Indigenous Peoples continue to raise concerns about the potential implications of the current version of the Bill now before the Senate. Key issues in the current text of the Bill, including the sufficiency of the amendments to date, are discussed in further detail in the following section.

b. Analysis

As discussed above, Indigenous Peoples have a distinct interest in accessing information in the possession of the federal Crown in order to pursue and resolve historic and current grievances and claims. Consequently, Indigenous Peoples stand to be disproportionately affected by any amendments to federal information and privacy legislation.

¹³ *Canada (Information Commissioner) v. Canada* FC at para. 46.

The following provisions in Bill C-58 have the potential to impose significant additional barriers to Indigenous Peoples' ability to access federally-controlled legislation:

i. Request for access to record

Section 6 of the *Access to Information Act* currently provides that a request for access to a record shall be made in writing and shall provide sufficient detail to enable an experienced employee of the institution, with reasonable effort, to identify the record.

By contrast, section 6 of Bill C-58 provides that a request for access to a record shall, in addition to the requirements set out in the current *Access to Information Act*, also provide (a) the specific subject matter of the request; (b) the type of record being requested; and (c) the period for which the record is being requested or the date of the record.¹⁴

If passed into law, section 6 of Bill C-58 would impose additional, unreasonable requirements on Indigenous Peoples seeking access to information regarding historical claims including specific and comprehensive claims, Aboriginal Title, Rights and Treaty rights litigation, documents pertaining to *Indian Act* status and documents required for the operation of First Nation governments. As the National Claims Research Directors noted in their 2017 submission to the Committee, the additional requirements to access information have the potential to act as deterrents to legitimate requests for information and to stifle the pursuit of claims brought by Indigenous Peoples against the Crown.¹⁵

Concerns with the proposed amendments in section 6 have been expressly recognized by the federal government. In testimony before the Standing Senate Committee on Legal and Constitutional Affairs (Senate Standing Committee) on October 3, 2018 Scott Brison, President of the Treasury Board and Minister of Digital Government, acknowledged that, based on discussions with Indigenous leaders, the new requirements for accessing information in section 6 were unnecessary and could potentially be misused, particularly in the context of land claims.¹⁶ Minister Brison recommended that the Senate Standing Committee eliminate the proposed requirements in section 6 that requests for information include the subject matter, time period and the type of record sought.¹⁷

ii. Declining to Act on a Request

The proposed amendments to the *Access to Information Act* include section 6.1(1), which provide that in certain circumstances a government institution may decline to act on an information request.

Section 6.1(1) as originally proposed provided the head of a government institution, acting on its own, with authority to deny a request for information if it determined that the person had already received prior access to the information, was requesting an unreasonably large number of records, or making a request that is vexatious or in bad faith. It has since been amended to include a requirement that the Information Commissioner approve a decision to decline to act on a request.

¹⁴ Bill C-58, s.6.

¹⁵ 2017 NRCDC Submission at p. 3.

¹⁶ Canada. Parliament. Senate. The Senate Standing Committee on Legal and Constitutional Affairs. *Evidence*. 1st sess, 42nd Parliament, Oct. 3, 2018. <https://sencanada.ca/en/Content/SEN/Committee/421/lcjc/54261-e> [Senate Standing Committee Evidence] [accessed October 18, 2018]

¹⁷ Senate Standing Committee Evidence.

The current draft provides that with the Information Commissioner's written approval the head of a government institution may decline to act on a person's request if he or she is of the opinion that:

- (a) the person has already been given access to the record or may access the record by other means;
- (b) the request is for such a large number of records or necessitates a search through such a large number of records that acting on the request would unreasonably interfere with the operations of the government institution, even with a reasonable extension of the time limit set out in section 7; or
- (c) the request is vexatious, is made in bad faith or is otherwise an abuse of the right to make a request for access to records.¹⁸

Section 6.1(1) continues to raise significant concerns for Indigenous Peoples for the following reasons:

- It provides the head of a government institution with new powers to decline to act on an information request with the approval of the Information Commissioner. This power, with or without approval of the Information Commissioner, is not available under the current *Access to Information Act*. The change therefore expands the head of government's powers to deny access.
- It provides legislative justification for federal representatives to deny a request for records on the basis that an applicant has already been given access by other means. For Indigenous Peoples pursuing research to support claims against the federal Crown, this provision increases the risk that formal access to information requests will be denied if they have already sought that information through informal requests and received a response which provides some of the requested information but is incomplete or otherwise unsatisfactory.
- It provides government institutions with the legislative basis to deny information requests where the information has been previously requested and lost, or where a change in circumstances could result in the disclosure of additional information. For Indigenous Peoples who pursue claims against the federal Crown over periods which often span decades, and often over the course of changes to leadership and administrative staff, the ability to re-request information where information has been lost or circumstances have changed is critical.
- It permits institutions to decline to act on a request where the requester is deemed to be able to access the records by other means, including information which may be publicly available online. This provision has the potential to disproportionately impact Indigenous Peoples based in remote communities without regular access to the internet or public libraries.
- The provision provides the head of the government institution in receipt of the request to decline to fulfil a request where the size of the disclosure would interfere with the operating of the institution without specifying what would constitute an unacceptably large volume of

¹⁸ Bill C-58, s.6.1(1).

documents. This provision provides the government with the discretion to decline access requests from Indigenous Peoples seeking to document claims against the Crown which have taken place over a significant period of time and which may entail the disclosure of large or unknown amounts of documents, particularly in the context of Aboriginal Title, Rights and Treaty rights litigation and for specific and comprehensive claims.

- Section 6.1(1)(c) does not define what constitutes a request that is vexatious or made in bad faith.¹⁹ Providing a government institution with discretion to determine a vexatious or bad faith request raises the possibility that legitimate requests from Indigenous Peoples could be denied based on an overly broad interpretation of the language in section 6.1(1)(c).

As a result, section 6.1(1) continues to provide additional legislative bases for federal institutions to suppress or withhold records which Indigenous Peoples require in order to document and advance claims against the Crown.

iii. Fees

Section 11 of the current *Access to Information Act* provides that individuals requesting access to information may be required to pay fees, including an application fee not exceeding \$25;²⁰ costs for the reproduction of documents;²¹ costs for the conversion of records into an alternative format;²² and additional fees for every hour in excess of five hours that is reasonably required to search for and prepare a record.²³

Section 7(1) of Bill C-58 would replace sections 11(1)-(3) of the *Access to Information Act* with the following:

11 (1) Subject to this section, a person who makes a request for access to a record under this Part shall pay, at the time the request is made, any application fee of not more than \$25, that may be prescribed by regulation.

Additional payment

(2) The head of the government institution to which the request is made may require, in addition to the fee payable under subsection (1), payment of an amount prescribed by regulation or calculated in the manner prescribed by regulation and may require that the payment be made before access to the record is given.²⁴

If passed into law, Bill C-58 would maintain an institution's ability to charge a \$25 application fee, but would also replace the list of additional potential fees set out in the current legislation with a general provision permitting the institution to impose additional fees in an amount prescribed by regulation. This change expands a government institution's discretion to impose additional fees,

¹⁹ Senate Standing Committee Evidence.

²⁰ *Access to Information Act*, s.11(1)(a).

²¹ *Access to Information Act*, s.11(1)(b).

²² *Access to Information Act*, s.11(1)(c).

²³ *Access to Information Act*, s.11(2).

²⁴ Bill C-58 s.7(1).

including for reasons beyond those enumerated in the current legislation, and raises the possibility that further fees will be required if additional regulations are enacted at a future date.

Section 7(1) has the potential to create further barriers to Indigenous Peoples seeking access to federally-controlled records by increasing government discretion to impose fees for accessing information beyond those set out in section 11 of the *Access to Information Act*. The Bill also fails to address the fact that requiring Indigenous Peoples to pay fees to access records to pursue grievances against the federal Crown or to conduct government operations is contrary to Indigenous Peoples' recognized right to access such information, and the Crown's corresponding duty to facilitate that access.

vi. Proactive Disclosure

Part 2 of Bill C-58 introduces proactive disclosure requirements for public office-holders, including ministers' officers, organizations that support Parliament, and bodies that provide administrative support to the courts.²⁵

The proactive disclosure requirements set out in Bill C-58 raise a number of concerns, including the following:

- The Bill prohibits the Information Commissioner from exercising any oversight function in respect of the proactive disclosure requirements.²⁶
- Contrary to campaign promises made by the Liberal government, the proactive disclosure requirements do not open ministers' offices to access to information requests under Part 1.
- Rather than subjecting the government to a public right of access, the regime effectively permits the federal government to determine what information it chooses to disclose.
- Timelines for proactive disclosure are significantly longer than the timelines for access to information under the current legislation. Increased delays associated with proactive disclosure requirements are particularly detrimental to Indigenous Peoples engaged in litigation and other time-sensitive proceedings.
- The disclosure of information under the proactive disclosure requirements, regardless of in what form that information is disclosed, could be used as basis for the head of a government institution to deny a request for information under section 6.1(1)(a) of Bill C-58 on the basis that the information has already been providing by other means.
- There is no mechanism in Bill C-58 to ensure compliance with the government's proactive disclosure obligations.

²⁵ Bill C-58, Part 2. For the purposes of this report, "proactive disclosure" refers to the release of federally-controlled information prior to that information being requested through an access to information request under the *Access to Information Act*.

²⁶ Bill C-58, s.91(1).

As with other aspects of Bill C-58, the concerns identified above have the potential to disproportionately affect Indigenous Peoples seeking access to records in the possession of the federal government in order to resolve grievances against the federal Crown, advance their Aboriginal Title, Rights and Treaty rights, and carry out operations related to First Nation governance.

v. Indigenous Governments

The *Access to Information Act* subjects most First Nation governments to differential treatment for the purpose of accessing federally-controlled information relative to federal, provincial and municipal governments, as well as relative to Indigenous groups which have negotiated modern land claims agreements with the federal government. Bill C-58 fails to address this issue, and in so doing perpetuates discriminatory treatment of Indigenous governments who are not party to comprehensive claim agreements.

Under section 13 of the current *Access to Information Act*, the head of a government institution may refuse to disclose requested information where the documents contain information that was obtained in confidence from another government, including an “aboriginal government.”²⁷ The term “aboriginal government” is limited to specific groups identified in the legislation which have negotiated comprehensive claims agreements with the federal government.²⁸ By contrast, Indigenous governments and other groups which do not meet the definition of an “aboriginal government” are generally treated as “third parties” under section 20 the *Access to Information Act*. Pursuant to section 20, the head of a government institution may refuse to disclose third party information, but only if it meets the specific criteria set out in that section.²⁹

As a result of the current provisions in the legislation, First Nations under the *Indian Act*, Nations operating under other forms of traditional governance, and other Indigenous representative organizations are excluded from the automatic protections extended to other governments in relation to confidential information. These provisions disadvantage Indigenous Peoples who choose not to engage in comprehensive claim negotiations relative to those that do. Importantly, it also poses a serious risk that confidential and sensitive information, including information relating to a First Nation’s governance matters as well as information prepared and disclosed as part of consultation processes with the Crown such as information pertaining to traditional knowledge, practices and land use, will be disclosed to outside parties.

Other Canadian jurisdictions have developed access to information requirements which extends protections for confidential information to Indigenous communities other than those who are parties to modern treaties.³⁰ However, Bill C-58 contains no provisions which would address this

²⁷ *Access to Information Act*, s.13(1)(e).

²⁸ *Access to Information Act*, s.13(3).

²⁹ *Access to Information Act*, s. 20(1).

³⁰ For example, s.15.1(1) of the Ontario *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31 provides that a head may refuse to disclose a record where the disclosure could (A) prejudice the conduct of relations between an Aboriginal community and the Government of Ontario or an institution; or (b) reveal information received in confidence from an Aboriginal community by an institution. S.15.1(2) defines an “Aboriginal community” as including (a) a band within the meaning of the *Indian Act*; (b) (b) an Aboriginal organization or community that is negotiating or has negotiated with the Government of Canada or the Government of Ontario on matters relating to, (i) Aboriginal or

issue or place Indigenous governments on a level playing field with other governments. If passed into law, the Bill would perpetuate the differential treatment of First Nations and other Indigenous governments in the current access to information regime.

vi. Powers of the Information Commissioner

Bill C-58 includes provisions which reduce the ability of the Information Commissioner to seek judicial review of a decision to deny an access request, including the ability to initiate a review on behalf of an Indigenous organization which requested the information.

Section 42(1) of the current *Access to Information Act* provides the Information Commissioner with authority to apply to the Court for a review of a refusal to disclose a requested record with the consent of the person who requested access and to appear before the Court on behalf of a person who has applied for a review.³¹ As a result, under the current regime the Information Commissioner is empowered to bring an application for judicial review of a decision to deny access to information on behalf of an Indigenous group.³² This provides Indigenous Peoples with an opportunity to challenge a decision to withhold information with the support of the Information Commissioner and without having to bear the full costs associated with legal proceedings.

By contrast, section 42(1) of Bill C-58 provides only that the Information Commissioner may (a) appear before the Court on behalf of a complainant; or (b) appear as a party to a review with leave of the Court.³³ The amended provision in Bill C-58 does not provide the Information Commissioner with authority to independently initiate a review of a decision to deny a request for access to information or to initiate a review on behalf of an Indigenous group who submitted an access request. The removal of this power places an additional limit on Indigenous Peoples' ability to challenge decisions to refuse information requests, and is particularly troubling in light of the other provisions in the Bill which extend the legislative bases on which a government would be allowed to refuse a request.

On October 3, members of the Senate Committee raised concerns about proposed changes to the order-making powers of the Information Commissioner under Bill C-58, including the fact that under Bill C-58 the Information Commissioner no longer has the power to initiate a juridical review in the name of a complainant.³⁴ For example, Senator Serge Joyal noted that:

At present the commissioner may initiate a court review with the complainant's consent when an institution refuses to follow a recommendation. But under Bill C-58, the commissioner would not be able to apply to a court review. In other words, you send the citizens back to its own in the court system, whereby at present the commissioner more or less takes upon himself, with the consensual of the complainant, to go to court. What is the rationale in the bill to make access easier in the context that you deprive the complainant from the support of the commissioner to go to court?³⁵

treaty rights under section 35 of the *Constitution Act, 1982*, or (ii) a treaty, land claim or self-government agreement, and (c) any other Aboriginal organization or community prescribed by the regulations.

³¹ *Access to Information Act*, s. 42(1).

³² See for example *Canada (Information Commissioner) v. Canada FC*.

³³ Bill C-58, s.19.

³⁴ Senate Standing Committee Evidence.

³⁵ Senate Standing Committee Evidence.

In response to this concern, Minister Brison confirmed that if a government institution failed to comply with an order to disclose information, the only available recourse for the Information Commissioner would be to seek recourse through mandamus proceedings in Federal Court.³⁶ The reduced powers of the Information Commissioner as set out in Bill C-58 could significantly affect Indigenous Peoples, both by removing the Information Commissioner's ability to initiate a review of a decision to deny an access request on its own behalf, as well as on behalf of the Indigenous group which requested the information.

III. Consultation & Engagement

In addition to the substantive concerns outlined in Part II, First Nations have raised concerns that Canada has failed to meaningfully consult and accommodate Indigenous Peoples regarding the potential impacts of Bill C-58 on their section 35 rights. The following provides a brief overview of the Crown's consultation obligations and concerns regarding its failure to properly engage with Indigenous Peoples in respect of Bill C-58.

a. The Crown's Consultation Obligations

i. Section 35(1) & the Honour of the Crown

The Crown has a duty to consult with Indigenous Peoples prior to decisions where it has knowledge, real or constructive, of the existence of an Aboriginal or Treaty right and contemplates conduct which might adversely affect that right.³⁷ The duty to consult is a constitutional imperative grounded in the honour of the Crown.³⁸ The obligation extends beyond decisions which have an immediate impact on lands and resources to strategic, higher-level decisions which have the potential to affect Indigenous Peoples' section 35 rights.³⁹

The issue of whether the duty to consult is triggered in the context of proposed legislative amendments was considered by the Supreme Court of Canada in 2018 in *Mikisew Cree First Nation v. Canada*.⁴⁰ In its decision, the majority of the court held that the duty to consult is not triggered in respect of proposed legislative amendments.⁴¹ However, the Court emphasized that the fact that the duty to consult doctrine does not apply directly to the legislative sphere does not absolve the Crown of its obligation to conduct itself honourably in its dealings with Indigenous Peoples.⁴² The Supreme Court's comment on this issue echo those of the Federal Court of Appeal in the same case, which confirmed that it is good policy for ministers to engage with Indigenous groups on legislative

³⁶ Senate Standing Committee Evidence.

³⁷ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511, 2004 SCC 73 (CanLII) [*Haida*] at para. 35.

³⁸ *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 SCR 650, 2010 SCC 43 (CanLII) [*Carrier Sekani*] at para. 32.

³⁹ *Carrier Sekani* at para. 44.

⁴⁰ *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 (CanLII) [*Mikisew* 2018].

⁴¹ *Mikisew* 2018. Although the majority of the Supreme Court determined that the duty to consult does not extend to the legislature, in a dissenting opinion Justices Abella and Martin held at para. 75 that the duty to consult "attaches itself to all exercises of Crown power, including legislative action."

⁴² *Mikisew* 2018 at para. 52.

initiatives which may affect their rights or interests regardless of whether the legislative process triggers the duty to consult.⁴³

ii. United Nations Declaration on the Rights of Indigenous Peoples

In addition to the honour of the Crown and the Crown's constitutional obligations to consult with Indigenous Peoples, the Crown has specific obligations flowing from the UN Declaration. In particular, Article 19 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.

As such, the UN Declaration expressly confirms the Crown's obligation to consult prior to enacting legislation which may affect Indigenous Peoples.

b. Consultation on Bill C-58

If passed into law Bill C-58 will affect Indigenous Peoples' section 35 rights and hinder the resolution of longstanding claims against the federal Crown. Given the significance of these impacts, there is a strong argument, notwithstanding the Supreme Court's recent decision in *Mikisew*, that Canada should engage in meaningful consultation with Indigenous organizations on Bill C-58 based both on the honour of the Crown, the UN Declaration and as a matter of sound public policy. Engaging in consultation prior to enacting the Bill is also critical to the federal Crown's commitment to engage in a renewed relationship based on recognition, partnership and respect, and to minimizing the potential for future litigation challenging aspects of the Bill on the basis that they infringe Indigenous Peoples' constitutionally-protected rights.

However, despite repeated requests for engagement Canada has largely failed to engage with Indigenous Peoples regarding Bill C-58, including for the following reasons:

- The Bill was drafted and introduced by the federal government without the direct involvement of Indigenous Peoples or their representative organizations at any stage of the process.
- Since its introduction, communications from Crown representatives to Indigenous Peoples regarding Bill C-58 has been limited to providing updates on decisions regarding the Bill which have already been made, rather than to engaging with Indigenous Peoples about how their concerns about the proposed legislative changes will be addressed.
- Canada has failed to provide adequate funding to enable Indigenous Peoples to meaningfully participate in engagement. In recent months the federal Crown has made some funding available to Indigenous Peoples, limited to a study of the Bill (including this legal analysis) and the current access to information regime. However, this support explicitly excluded

⁴³ *Canada (Governor General in Council) v. Mikisew Cree First Nation*, [2017] 3 FCR 298, 2016 FCA 311 (CanLII) at para. 61.

actual engagement in the legislative process. To date, funding has not been provided to meet with federal representatives or otherwise engage in the iterative dialogue which the consultation process requires.

- Indigenous organizations have been informed that their concerns may be addressed in a future phase of access to information reform after the Bill is passed into law. This approach is contrary to the recent decision of the Federal Court of Appeal affirming that consultation requires an iterative process of dialogue between parties, and that commitments to consult after-the-fact are insufficient to discharge the Crowns' constitutional obligations.⁴⁴ It also ignores the reality that the potential prejudice to Indigenous Peoples' interests will be much harder to address, mitigate and accommodate once the Bill is passed into law.

To fulfil the honour of the Crown, Canada's commitments to Indigenous Peoples, and the requirements set out in the UN Declaration, the federal Crown should at a minimum be prepared to engage in meaningful two-way dialogue with Indigenous Peoples and take steps to substantially address their concerns about Bill C-58. Although the precise requirements of any consultation process will vary with the circumstances, the federal Crown should at minimum:

- inform itself of the potential impacts of the proposed action or decision on Indigenous Peoples;⁴⁵
- listen carefully to Indigenous Peoples and attempt to minimize adverse effects;⁴⁶
- whenever possible, integrate responses to Indigenous Peoples' concerns into its plan of action.⁴⁷
- engage in a considered, two-way dialogue with the intention of substantially addressing Indigenous Peoples' concerns as identified in the consultation process;⁴⁸
- be prepared to amend proposals in light of information received during consultation;⁴⁹
- provide written reasons to Indigenous Peoples regarding its decisions in order to safeguard against other issues overshadowing or displacing the issue of impacts on Indigenous rights;⁵⁰
- do more than provide vague or generic responses that concerns can be addressed at a later date after decisions are made;⁵¹
- ensure the participation of a federal representative with a mandate to respond meaningfully to Indigenous Peoples concerns;⁵² and

⁴⁴ See for example *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 (CanLII) [*Tsleil-Waututh*].

⁴⁵ *Tsleil-Waututh* at para. 503, citing *Mikisew* 2005 at para. 55

⁴⁶ *Mikisew* 2005 at para. 64.

⁴⁷ *Mikisew* 2005 at para. 64.

⁴⁸ *Tsleil-Waututh* at para. 496, citing *Haida* at para. 42.

⁴⁹ *Tsleil-Waututh* at para. 501, citing *Haida* at para 46.

⁵⁰ *Tsleil-Waututh* at para. 502, citing *Gitscaala Nation v. Canada*, 2016 FCA 187 (CanLII) at para. 315.

⁵¹ *Tsleil-Waututh* at para. 653.

- provide access to adequate funding to enable Indigenous Peoples to participate on an informed basis on all aspects of the consultation process.⁵³

In the context of Bill C-58 specifically, the federal Crown should approach the consultation process prepared to listen and substantially address concerns raised by Indigenous Peoples, including by amending provisions in the Bill in response to their concerns. Where proposed changes are not made, the Crown should provide Indigenous Peoples with written reasons explaining why it cannot do so. Engagement must take place with properly-mandated federal representatives with authority to make decisions and address concerns.

Importantly, engagement should take place on an immediate basis rather than after the Bill has been passed into law or in the Phase II review period. This issue is particularly relevant to both Indigenous Peoples and the Crown in light of the recent *Mikisew* decision, which confirms Indigenous Peoples' right to challenge legislation on the basis that it infringes an Aboriginal or Treaty right. If the Crown wishes to avoid potential future challenges to the legislation, engagement prior to passing the Bill into law is essential. Finally, Canada should also make available adequate funding to Indigenous Peoples to participate in all aspects of engagement on the Bill, not on a limited or restricted basis.

While engaging in consultation now cannot address the Crown's initial failure to engage with Indigenous Peoples about Bill C-58, the implementation of a robust process of engagement at this point would nevertheless provide Indigenous Peoples with an opportunity to voice their concerns and for the Crown to ensure that those concerns are substantially addressed before the Bill becomes law.

⁵² *Tsleil-Waututh* at para. 599.

⁵³ *Saugeen First Nation v. Ontario (MNR)*, 2017 ONSC 3456 (CanLII) at para. 26; *Wabauskang First Nation v. Minister of Northern Development and Mines et al.*, 2014 ONSC 4424 (CanLII) at para. 232; *Clyde River* at para. 47. See also *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354 (CanLII) at para. 114.

IV. Recommendations

Collectively, the provisions in Bill C-58 are contrary to the Crown's constitutional obligation as confirmed by the courts to disclose information relevant to Indigenous Peoples' claims and grievances, and will impose additional barriers on the Crown's ability to fulfil its commitment to a renewed relationship with Indigenous Peoples including through the implementation of the UN Declaration. We recommend the following to address the concerns discussed above with both Bill C-58 and the access to information regime in Canada more broadly:

1. Purpose of the Act

i. Recommendation: The purpose of the *Access to Information Act* should be amended to acknowledge the importance of providing Indigenous Peoples with timely access to federally-controlled information.

ii. Proposed amendments: Amend section 2 of the *Information Act* by adding the following language at (2)(1)(b):

Purpose of the Act

2 (1) The purpose of this Act is to:

...

(b) consistent with Canada's obligations pursuant to section 35(1) of the *Constitution Act, 1982*; the *United Nations Declaration on the Rights of Indigenous Peoples*; the *Principles respecting the Government of Canada's relationship with Indigenous peoples* and the Calls to Action of the Truth and Reconciliation Commission of Canada, ensure that Indigenous Peoples are provided with timely access to federally-controlled information as necessary to advance the process of reconciliation between Indigenous Peoples and the Crown.

2. Definitions

i. Recommendation: Include a definition of "Indigenous Government" in the *Access to Information Act* which encompasses Indigenous communities and representative organizations beyond those who have negotiated comprehensive claims or self-government agreements with the federal Crown.

ii. Recommendation: Bill C-58 should include the following definition as an amendment to section 3 of the *Access to Information Act*:

Definitions

3 In this Act,

Indigenous Government means:

- (a) a band within the meaning of the *Indian Act* (Canada),
- (b) an Indigenous organization or community that is negotiating with the Government of Canada or a provincial or territorial government in Canada on matters relating to:
 - (i) Aboriginal or treaty rights under section 35 of the *Constitution Act, 1982*; or
 - (ii) a treaty, land claim or self-government agreement;
- (c) an individual or organization carrying out research on behalf of an Indigenous Government; or
- (d) any other Indigenous organization or community prescribed by the regulations.

3. Request for access to record

i. Recommendation: Section 6 of Bill C-58 should be revised to ensure it does not impose additional barriers to accessing information on Indigenous Peoples and their representative organizations and governments.

ii. Proposed amendments: Delete the proposed amendments in section of Bill C-58. In the alternative, if the amendments are not deleted, amend section of the Bill to read:

Request for Access to Record

6 (1) A request for access to a record under this Part, other than a request by an Indigenous Government, shall be made in writing to the government institution that has control of the record and shall set out the following information and provide sufficient detail to enable an experienced employee of the institution to identify the record with a reasonable effort:

- (a) the specific subject matter of the request;
- (b) the type of record being requested;
- (c) the period for which the record is being requested or the date of the record.

Request for Access to Record – Other

(2) A request for access to a record under this Part by:

- (a) an Indigenous Government; or
- (b) an individual, where the request for access relates to a record pertaining to the individual’s status as an “Indian” within the meaning of the *Indian Act*,

shall be made in writing to the government institution that has control of the record and shall provide sufficient detail to enable an experienced employee of the institution with a reasonable effort to identify the record.

4. Reasons for declining to act on a request

i. Recommendation: Section 6.1 of the Bill should be deleted or otherwise amended to protect Indigenous Peoples from being denied access to information as a result of new powers to decline a request proposed in the Bill.

ii. Proposed Amendments: Delete section 6.1(1) of Bill C-58. In the alternative, if section 6.1 is not deleted, amend sections 6.1 to include the following:

Exemption

6.1 (3) Section 6.1(1) of this Act does not apply to a request to access a record submitted by:

- (a) an Indigenous Government; or
- (b) an individual, where the request for access relates to a record pertaining to the individual's status as an "Indian" within the meaning of the *Indian Act*.

5. Fees

i. Recommendation: The power of a government institution to impose fees for requests to access pursuant to section 11 of the *Access to Information Act* should be rescinded.

ii. Proposed Amendments: Include a provision in Bill C-58 deleting section 11 of the *Access to Information Act*. In the alternative, if section 11 of the *Access to Information Act* is not deleted, amend section 7 of Bill C-58 to include:

Exemption

11 (3) Sections 11(1) and (2) of this Act do not apply to a request to access a record submitted by:

- (a) an Indigenous Government; or
- (b) an individual, where the request for access relates to a record pertaining to the individual's status as an "Indian" within the meaning of the *Indian Act*, RSC 1985, c I-5.

6. Proactive Disclosure

i. Recommendation: The proactive disclosure provisions in Part 2 of Bill C-58 should be amended to provide for appropriate oversight mechanisms to ensure timeliness and accountability in respect of proactive disclosure requirements.

ii. Proposed Amendments: Section 91(1) should be deleted from Bill C-58. Additional specific amendments to Part 2 should be developed based on further input from Indigenous Peoples.

7. Protections for Indigenous Governments

i. Recommendation: Indigenous Peoples' governments and their representative organizations should be included in the list of entities entitled to automatic protection from disclosure of information provided in confidence to the federal government.

ii. Proposed Amendments: Include the following amendments to the *Access to Information Act* in Bill C-58:

Information obtained in confidence

13 (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains information that was obtained in confidence from

...

(f) an Indigenous Government.

8. Powers of the Information Commissioner

i. Recommendation: Restore the Information Commissioner's authority to initiate a review of a decision to deny a request for access to information.

ii. Proposed Amendments: Delete section 42 of Bill C-58. In the alternative, if section 42 is not deleted, amend section 42 to include:

Information Commissioner may appear

42 The Information Commissioner may

...

(c) apply to the Court, within the time limits prescribed by section 41, for a review of any refusal to disclose a record requested under this Act or a part thereof by an Indigenous Government, if the Information Commissioner has the consent of the Indigenous Government that submitted the request.

9. Indigenous Review Officer

i. Recommendation: In consultation with Indigenous Peoples, establish an independent Indigenous Review Officer pursuant to the *Access to Information Act* with the authority to review decisions to deny access requests from Indigenous Governments, hear complaints from Indigenous Governments regarding access issues; make recommendations to improve the access to information regime in respect of Indigenous Peoples; and apply to the Court for a review of refusal to disclose a request to an Indigenous Government.

ii. Proposed Amendments:

Appointment

The Governor in Council shall, by commission under the Great Seal, appoint an Indigenous Review Officer after:

- (i) consultation with the leader of every recognized party in the Senate and House of Commons;
- (ii) consultation with any Indigenous Government which requests to be consulted in respect of the appointment of the Indigenous Review Officer; and
- (iii) approval of the appointment by resolution of the Senate and House of Commons and approval by any participating Indigenous Governments.

Powers of the Indigenous Review Officer

The Indigenous Review Officer may:

- (i) carry out an independent review of a decision of a head of government institution to deny an access request from an Indigenous Government;
- (ii) hear a complaint submitted by an Indigenous Government regarding the timeliness or adequacy of a head of government institution's response to an access request from an Indigenous Government;
- (iii) on completion of a review under (i) or the hearing of a complaint under (ii), prepare a report to the designated Minister, the Indigenous Government which submitted the access request and the head of the government institution which denied the access request setting out recommendations to address concerns identified in the course of the review or complaint process and to minimize the potential for those concerns to arise in respect of future access requests; and
- (iv) apply to the Court for a review of any refusal to disclose a record requested under this Act or a part thereof by an Indigenous Government, if the Indigenous Review Officer has the consent of the Indigenous Government that submitted the request.

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United Nations Declaration on the Rights of Indigenous Peoples

**Joint Submission to the Standing
Committee on Access to Information,
Privacy and Ethics and First Nations
Experience with Access to Information**

Presented on June 29, 2016

Prepared by Directors of Claims Research Units from Across Canada

Comments on Government Proposals to Revitalize Access to Information

Who We Are

This brief has been prepared by and on behalf of Claims Research Units (CRU's), Tribal Councils, individual First Nations and other First Nation associations from across Canada who are involved in accessing information from the federal government and its departments and agencies. We are mandated by First Nations to document and develop evidence related to their history, claims, disputes, and grievances.

What Are Our Interests?

Our interest in accessing federal records is at least two fold:

First, as provided for in paragraph 8(2)k of *The Privacy Act*, "researching or validating the claims, disputes or grievances of the aboriginal peoples of Canada," the federal government has treaty, fiduciary and legislative obligations to First Nations, including the administration of Reserve lands and assets. Past government conduct gives rise to these claims, disputes and grievances, some of which these fall under existing policy frameworks (ie., Specific and Comprehensive claims)¹ while others are the subject of litigation or other forms of dispute resolution.

The majority of the evidence related to these claims, disputes, and grievances is in the possession of the federal government, which is also a party to these disputes. This puts First Nations in a vulnerable situation *vis a vis* the release of federal records relating to their claims, disputes, and grievances; and it puts the federal government in a potential conflict of interest, based on its ability to control what information is made available - information that relates directly to Crown conduct which may have given rise to the claims, disputes and grievances. We often rely on the *Access to Information Act* and the Office of the Information Commissioner, to obtain access to materials that are necessary to document and to resolve our claims, disputes, and grievances.

Secondly, First Nations and their representative organizations also access federal government records for public policy purposes, and to obtain access to information on matters directly affecting their political, social, economic and cultural interests. The reason for this category of request is that, often, federal departments and agencies are reluctant to freely provide information on their activities as they relate to First Nation interests. Just with respect to specific claims policy and procedures, we have submitted over 37 Access to Information and

¹ Specific Claims relate to the Government of Canada's lawful obligations owed to First Nations with respect to its management of First Nations' lands, resources, assets, and entitlements. Comprehensive claims relate to First Nations' assertions of unextinguished Aboriginal title and rights within their traditional territories.

Privacy (ATIP) requests and 9 complaints to the Office of the Information Commissioner (OIC) in the past 16 months. Our involvement in the ATIP process has demonstrated to us that there are fundamental issues regarding the transparency of the federal government and the dissemination of information involving specific claims policies and procedures.

Taking the abovementioned into account, it can be seen that First Nations' interests in obtaining access to federal records are qualitatively different than for other sectors of the Canadian public. Our special circumstances are reflected in paragraph 8(2)k of the *Privacy Act*, which provides that:

[...] personal information under the control of a government institution 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 the aboriginal peoples of Canada.

Since 1982, various federal departments and agencies (in particular, Indigenous and Northern Affairs (INAC), and the Library and Archives Canada (LAC)) have put into place special measures to provide for ease of informal access to federal records which relate to First Nation claims, disputes or grievances. The rule of thumb has been, that informal requests should prevail, and formal requests are only required in special circumstances.

Rolling Back the Right of Access

Despite our particular rights and interests, and despite the legislative and policy measures that have been put into place to facilitate access to federal records for First Nations - particularly with respect to claims, disputes or grievances - over the years we have seen a gradual rolling back of access. The past ten years have seen the imposition of arbitrary measures, seemingly intended to prevent or needlessly restrict First Nations from obtaining information to which they have a right. What could once be done through informal requests now has to be done by way of formal ATIP requests. Rejected and delayed requests have increased significantly, leading to more complaints to the OIC, and more costs and delays for all parties.

Part of this was a result of across-the-board measures taken by the federal government to restrict access to information. Access staff at various departments was cut, and staff that remained seemed to operate in a manner that prevented the free flow of information. Wait times turned from weeks to months to years. Requests for information that clearly did exist were often met with the initial response that "no such records exist." But part of it was also directed squarely at First Nations and their representative organizations. The experience of the Truth and Reconciliation Commission and the challenges they faced in obtaining the release of federal records on the residential schools is a case in point.

In this regard, we have found that the OIC has been instrumental in ensuring that First Nations can continue to exercise their right of access to information, and to assist us when we face government obfuscation. This has been done by way of investigations, mediation, and judicial review. The OIC plays an essential role in ensuring that we can avail ourselves of our right of access.

Recent Moves to Improve Access

Given the experience of the past ten years, we are encouraged by the apparent change in direction that the current federal government has signalled. This can be seen in the mandate letters that went from Prime Minister Trudeau to members of cabinet, including to the Honourable Scott Brison, President of the Treasury Board, and Minister Carolyn Bennett, Minister of Indigenous & Northern Affairs, which included the following instructions:

No relationship is more important to me and to Canada than the one with Indigenous Peoples. It is time for a renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition of rights, respect, co-operation, and partnership.

We have also committed to set a higher bar for openness and transparency in government. It is time to shine more light on government to ensure it remains focused on the people it serves. Government and its information should be open by default.

We also take note of the Treasury Board Secretariat's Interim Directive on the Administration of the Access to Information Act, which was announced on May 5th, 2016, and which has the following objective and results at its core:

5.1 Objective

5.1.1 To establish, across all government institutions, consistent practices and procedures for the processing of access to information requests, including requirements to make every reasonable effort to assist applicants without regard to their identity.

5.2 Expected results

5.2.1 Effective, well-coordinated and proactive administration of the Act in government institutions.

5.2.2 Complete, accurate and timely responses to requests made under the Act.

These are good words, but they need to translate into tangible action if they are to mean anything. We still find that there are many challenges and barriers to obtaining access to

federal records. Some of these relate to the Act itself, but many of them relate to the policies and procedures established to administer the ATIP matrix. The next section of this brief will highlight some of these problems.

Continuing Barriers to Access

1. Informal vs Formal ATIP Requests

It should be stated at the outset that our general practise has been to first make an informal request for information to the department or agency holding the records in question. In the past, this was usually enough to ensure that timely and fulsome access would be provided. INAC did have a policy in place in the 1990s that almost all requests should be handled informally. However, over the past number of years, many departments (including INAC) appear to have moved away from that approach, and instead require that formal ATIP requests be made. This increases bureaucracy, cost, and potential delays. One notable exception to this rule has been LAC, which has recently worked closely with the research community to ensure that our right of access is facilitated.

Our preference is that the majority of requests should be dealt with informally at all departments, including at INAC.

2. Timeliness

Informal requests can take months to process. Formal requests do not seem to fare much better. Federal departments are legally required to fulfill a formal ATIP request within 30 days, but delays are so common that expectations of timely responses are very low. We have observed that some departments simply seek continuing delays possibly in the hope that requesters will lose interest and give up. At Parks Canada, for instance, delays have stretched from months into years. At INAC, delays are the norm, though not as lengthy. Delays are at least partly related to a lack of staffing, but also because of a lack of understanding on the part of departmental staff about our research requirements and the nature of our work. Significant time is often spent educating ATIP and departmental personnel to justify the basis of a request.

Although our preference is to try and obtain records by way of informal request, at least formal ATIP requests require notice of extension. The OIC and those submitting an ATIP request must be notified of an extension to fulfill a request if "a request involves a search for or through a large number of records and would unreasonably interfere with operations." The OIC states that generally, if the fulfilment of a request involves more than 1000 pages of information, an extension is warranted. In the case of formal ATIP requests, we regularly receive notices that INAC is extending its deadline to fulfill our requests. These extensions range in length from 30 days to 90 days beyond the original 30 day mandated deadline, and the vast majority of documents returned to us within the extension time line range between 10 and 300 pages.

3. Overly Broad Interpretation & Application of Exemptions

In many cases federal departments, including INAC, seem to rely on an extremely broad and arbitrary interpretation of the Act's exemptions, in order to prevent information from being released. This is the case with 8(2)k requests as well as with public policy requests. Some of the exemption categories which are particularly and increasingly common are:

- Section 14 - Federal provincial relations
- Section 19 - Personal information (notwithstanding paragraph 8(2)k of the *Privacy Act*)
- Section 20 - Third party information
- Section 21 - Advice/Recommendations
- Section 23 - Solicitor Client Privilege (even when the documents in question may be 50 or 100 years old)

In cases where the same records are requested more than once, there does not appear to be any consistency in the exemptions which are invoked, between departments, or even within the same department. Files which we were able to access fully 10 or 20 years ago are now sliced and diced, with many documents screened out, based on exemptions that were not relied on before. Part of the reason for increased reliance on these exemptions may be a lack of understanding about what is required for First Nations to document their claims, disputes or grievances. Significantly, there is growing mistrust among First Nations that the exemptions are being invoked to prevent or frustrate First Nations in their efforts to document their claims, disputes or grievances. This perception certainly undermines Prime Minister Trudeau's stated goals with respect to renewing his government's relationship with First Nations.

According to statistics provided by the OIC, many of the exemptions which are invoked will fail if the refusal is appealed to the OIC. This strongly suggests that departmental and ATIP staff are using the exemptions too broadly, costing all parties time, money and, ultimately, good will.

4. Consultations with Third Parties

There are two issues here. One is the delays that can result from the requirement to consult third parties. Quite often, formal and informal access requests are delayed because of the need to consult third parties (sometimes other First Nations, sometimes provinces or municipalities). The delays can stretch for quite some time, delaying response times.

Other times, there does not appear to be adequate reason to need to consult the third party, but nonetheless this is invoked by ATIP or departmental program staff, leading to delay.

5. Incomplete Response / No Access to Physical Files / Destruction of Information

In order to carry out proper research - especially for claims or litigation - one must review the entire file in question, in order to establish the context, and then make decisions about what is relevant. In some cases, when formal ATIP requests are made, departmental staff go through a

variety of files and decide for themselves what is relevant, then compile a response on CD ROM with documents that might come from a number of sources, re-ordered and re-paginated. The requester is often given no idea as to the origin or provenance of the materials provided, and whether, or how much, material has been excised, and is not given access to the physical files themselves. Key materials can be missing, or not provided. This kind of partial disclosure is an example of a process which may make things simpler for the bureaucracy, but which compromises the research process, and frustrates the ability of First Nations to properly document their claims, disputes or grievances.

Another related issue concerns the destruction of information, or efforts to avoid creating evidence of decision making. We have found, by way of ATIP requests and also by way of disclosure from federal civil servants, that records have in some cases been wilfully destroyed - either to reduce the responsibility of maintaining data, or in order to prevent information from being accessed through the ATIP process. We have also heard that some decision making is being done in the absence of written or electronic records - again, to avoid such decisions leaving a trail. This is of obvious concern, at a general level, but also when the decisions in question relate directly to the claims, disputes or grievances of First Nations, or the federal government's management of such claims, disputes and grievances. We point out that in all of these circumstances, the federal government is in a potential conflict of interest since it is often the cause of the claim, dispute, or grievance which is being documented.

6. Increased Bureaucracy and Centralization, Lack of Communication

As we understand it, the Treasury Board Secretariat sets policy with respect to ATIP across government. Over the past ten years we have noticed many changes to ATIP process and policy, in particular at INAC. In the past, requests for information were handled by staff who were familiar with what was required to document claims, disputes or grievances. There was personal contact and an ability to discuss, explain and problem solve. Now, procedures have become far more centralized and bureaucratic. There is a lack of personal contact, and the people who are often dealing with information requests do not have a clear understanding of the nature and scope of what is required when documenting First Nation claims, disputes or grievances. There are few, if any, opportunities to explain and problem solve. As already explained, this has led to delays, incomplete responses, complaints to the OIC, and ultimately, additional costs and delays for all parties.

One example involves the Quebec regional office of INAC. It used to be that requests for information held at the regional office would be dealt with by regional office staff directly, in communication with the requester. Sometime in the past year, procedures were changed unilaterally without any form of consultation. Now, regional office files must be ordered online, from INAC Headquarters in the National Capital Region. There is no opportunity to speak with someone, have personal contact, or clarify issues. This approach seems entirely focussed on solving the bureaucracies' problems, without actual consideration of the additional costs, needs, or right of access, of the requester.

In this context, we are alarmed at the suggestion, found on the Treasury Board Secretariat (TBS) website, which the federal government intends to migrate to “a simple, central website where Canadians can submit requests for information.” Our experience with respect to the nature and scope of the research that we carry out, and our right of access to federal records, is that centralization only benefits the bureaucracy, and works against us. A “one size fits all” portal cannot and will not respect our right of access.

7. Treasury Board Secretariat & Federal Departments: Lack of Consultation

Despite all of the changes that have been brought about by the TBS over the past decade regarding to the administration of the Act, and their impact on the work that we do, as far as we are aware, during this period there has been no effort to actually consult with First Nations, their associations, or the Claims Research Units - either by Treasury Board, or by INAC. No one has consulted us about the impacts of these changes, the increased costs and inefficiencies that they have created, or about what works and what does not work.

Considering the costs and inefficiencies brought about by these changes (some outlined above), this is of concern. Taking into account the commitments this government has made to a renewed relationship with First Nations and open government, it appears that there is now a chance to improve this dismal track record, and develop a meaningful and substantive approach to the matter of First Nation access to federal records.

We appreciate being able to intervene in this public consultation regarding modernization of the Act, but we feel that, going forward, TBS and federal departments need to do a lot more to consider and address, on an ongoing basis, the particular requirements associated with our right of access to information that relates to our communities, and their claims, disputes or grievances. This can begin by engaging with the organizations that have a mandate to document the claims, disputes and grievances of the First Nations.

Recommendations

We want to take this opportunity to provide some constructive recommendations - both with respect to legislative change, and with respect to administrative measures associated with implementation of the ATIA. Many of the following recommendations should be acted on regardless of whether or not amendments to the ATIA proceed.

1. Consult

In the preceding section we highlighted the arbitrary and unilateral measures which have been imposed across government with respect to ATIP, in the absence of meaningful consultation. This must change. In the early 1990s, INAC struck a working group on ATIP which proved very

helpful in identifying issues and cooperative problem solving. More recently, LAC has taken very positive moves to listen and act on our needs with respect to ATIP. We think that TBS and INAC should take similar measures. Consultation is needed to develop policies in applying existing regimes, and as new ones are developed.

2. Resources

Some (but by no means not all) of the problems encountered with ATIP relate to deficiencies in resourcing - too few staff to process requests.

3. Train Staff

Many of the people who process requests - even at INAC - have little or no knowledge of what is required to document the claims, disputes and grievances of First Nations. They also appear to be largely unaware of the potential for conflict of interest where files which are requested relate to federal acts of commission or omission that may have given rise to claims. This affects their treatment of requests, their screening of files etc., and it creates inefficiencies, delays and extra costs for all parties. With other departments, the lack of understanding is even more pervasive. This even relates to staff understanding of the purpose and scope of paragraph 8(2)k of the *Privacy Act*. Training should involve input from First Nation associations that are directly involved in the work of documenting claims, disputes and grievances.

4. Decentralize and Encourage Human Contact

We are very concerned at government's apparent attempts to increasingly centralize and de-humanize the ATIP process. In our experience this approach undermines the ability of First Nations to obtain timely and fulsome access to federal records. As far as we can see, TBS' suggestion that all ATIP requests be migrated to "a simple, central website where Canadians can submit requests for information" would be a disaster for us. Centralization and automation works against First Nation rights of access to federal records.

Information Commissioner's Recommendations

We have taken note of the recommendations made by Madame Suzanne Legault, Information Commissioner of Canada, with respect to modernizing the access to information regime.

We are aware that the federal government has floated the idea that there should be a ministerial veto over planned new powers for the information commissioner.² We protest this in the strongest terms. It defeats the purpose of having an arm's length arbiter and it leaves the system open to abuse for political ends. Over the past ten years we have had a lot of experience with what can happen when Ministers abuse their powers to the prejudice of First

² http://www.huffingtonpost.ca/2016/05/15/ministerial-veto-could-trump-information-czar-s-planned-new-powers_n_9982078.html

Nations. It is not in the interests of Canadians generally, or First Nations, for this kind of interference to be permitted; furthermore, we explicitly recommend that the OIC have the power to fully review Cabinet confidence complaints.

We support all of the recommendations of the Office of the Information Commissioner inasmuch as they affect our work and our right of access. In particular we would highlight the following as especially relevant to our right of access:

Recommendation 2.2

The Information Commissioner recommends establishing a duty to report to Library and Archives Canada the unauthorised destruction or loss of information, with a mandatory notification to the Information Commissioner and appropriate sanctions for failing to report.

Recommendation 3.1

The Information Commissioner recommends that extensions be limited to the extent strictly necessary, to a maximum of 60 days, and calculated with sufficient rigour, logic and support to meet a reasonableness review.

Recommendation 3.6

The Information Commissioner recommends that a third party is deemed to consent to disclosing its information when it fails to respond within appropriate timelines to a notice that an institution intends to disclose its information.

Recommendation 4.5

The Information Commissioner recommends that, where consultation has been undertaken, consent be deemed to have been given if the consulted government does not respond to a request for consent within 60 days.

Recommendation 4.6

The Information Commissioner recommends requiring institutions to disclose information when the originating government consents to disclosure, or where the originating government makes the information publicly available.

Recommendation 4.7

The Information Commissioner recommends replacing international and federal-provincial "affairs" with international and federal-provincial "negotiations" and "relations."

Recommendation 4.22

The Information Commissioner recommends explicitly removing factual materials, public opinion polls, statistical surveys, appraisals, economic forecasts, and instructions or guidelines for employees of a public institution from the scope of the exemption for advice and recommendations.

Recommendation 4.23

The Information Commissioner recommends reducing the time limit of the exemption for advice and recommendations to five years or once a decision has been made, whichever comes first.

Recommendation 4.24

The Information Commissioner recommends imposing a 12-year time limit from the last administrative action on a file on the exemption for solicitor-client privilege, but only as the exemption applies to legal advice privilege.

Recommendation 5.1

The Information Commissioner recommends strengthening oversight of the right of access by adopting an order-making model.

Recommendation 5.2

The Information Commissioner recommends providing the Information Commissioner with the discretion to adjudicate appeals.

Recommendation 5.3

The Information Commissioner recommends that the Act provide for the explicit authority to resolve appeals by mediation.

Recommendation 5.4

The Information Commissioner recommends that any order of the Information Commissioner can be certified as an order of the Federal Court.

Recommendation 7.1

The Information Commissioner recommends that obstructing the processing of an access request (or directing, proposing or causing anyone to do so) be added as an offence under the Act.

Recommendation 7.2

The Information Commissioner recommends that section 67.1 prohibit destroying, mutilating, altering, falsifying or concealing a record or part thereof or directing, proposing or causing anyone to do those actions.

Recommendation 7.3

The Information Commissioner recommends that failing to document or preserve a decision-making process with intent to deny the right of access (or directing, proposing or causing anyone to do so) be prohibited under the Act.

Recommendation 7.4

The Information Commissioner recommends that failing to report to Library and Archives Canada and/or notify the Information Commissioner of the unauthorised destruction or loss of information (or directing, proposing or causing anyone to do so) be prohibited under the Act.

Impaired Access

SUBMISSION TO THE

STANDING COMMITTEE ON ACCESS TO INFORMATION, PRIVACY AND ETHICS

REGARDING BILL C-58

**“An Act to Amend the Access to Information Act and the Privacy Act and to Make
Consequential Amendments to Other Acts”**

October 16, 2017

Submitted by National Claims Research Directors

Executive Summary:

The National Claims Research Directors is a national body of specialized technicians who manage over thirty centralized Claims Research Units mandated to research and develop specific claims on behalf of First Nations. Much of our work is focussed on the development of claims against the Government of Canada related to its breach of lawful obligations against First Nations, pursuant to the Specific Claims Policy and the *Specific Claims Tribunal Act*, as well as other disputes related to Treaties and Aboriginal title and rights. We work closely with First Nations communities, legal counsel, funding administrators, Canada's Specific Claims Branch of Indigenous and Northern Affairs (INAC), claims negotiators, and the Specific Claims Tribunal. The nature of our work requires us to routinely access thousands of records from federal government departments and agencies.

We wish to outline our grave concerns about the content of Bill C-58. We strongly oppose the bill as currently drafted and urgently call on the Committee to withdraw the bill and engage in full and meaningful consultation with First Nations regarding reforms to access to information legislation.

Bill C-58 will greatly impair the ability of First Nations to document their claims, grievances, and disputes with the Government of Canada and will significantly impede First Nations' access to justice in resolving their claims. As such, Bill C-58 contravenes the Government of Canada's commitment to reconciliation with First Nations, and violates the *Principles respecting the Government of Canada's relationship with Indigenous peoples* announced by Justice Minister and Attorney General of Canada Jody Wilson-Raybould in July 2017.

The Bill will hinder efforts by Canada to meet the standards of redress for historical wrongs articulated in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), as it represents a significant regression of First Nations' existing rights of access to information.

The Office of the Auditor General of Canada (OAG) recently conducted an audit of Canada's specific claims process. The OAG's report, released in November 2016, concluded that Canada's department of Indigenous and Northern Affairs introduced numerous barriers that hindered the resolution of claims, including restricting information.

If passed into law, Bill C-58 will impose substantive new barriers to the resolution of First Nations' claims. It will also provide legislative authority for the suppression of evidence which First Nations require to pursue and resolve their claims against Canada. It will exacerbate Canada's existing conflict of interest with respect to resolving First Nations' claims against itself. The bill will also create barriers to First Nations obtaining information which is integral to their operation as governments.

On June 29, 2016, we presented a submission to this Committee outlining our concerns regarding efforts then underway to reform the *Access to Information Act* and the *Privacy Act*. We recommended full, meaningful consultation with First Nations as equal partners. We note that

Bill C-58 has been developed unilaterally, without any effort to consult First Nations, contrary to Canada's commitment to a Nation-to-Nation relationship and to work in equal partnership with First Nations. This contradicts Canada's obligations under the UNDRIP, which requires States to consult and cooperate in good faith with Indigenous peoples to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Access to federal records is crucial to First Nations for the resolution of their claims since Canada – in particular, the Department of Indigenous and Northern Affairs - holds the vast majority of the evidence required to adequately and accurately document First Nations claims as required by the federal Specific Claims Policy. This puts Canada in a clear conflict of interest. Bill C-58 introduces new barriers to accessing information and thus provides ample new tools for Canada to further entrench this conflict of interest.

We have particular concerns about revisions to section 6 of the bill (*Request for access to record*). Bill C-58 introduces stringent criteria for accessing government records, requiring applicants to specify the subject matter, type and date of all records sought. We agree with the Information Commissioner that these requirements will act as deterrents and are inappropriate in instances where First Nations researchers must investigate broadly, and in the absence of departmental finding aids, or access to file organizational structures. To enshrine this kind of triple requirement into legislation is overly prescriptive and appears intended to stifle legitimate requests

Section 6.1 provides grounds for serious concern, in that it provides legislative grounds for government bodies to deny a request for records on the basis that the applicant has already been given access or may access the record by other means. First Nations are encouraged to make informal requests for information to the federal department in question. In many cases, this does not result in substantive disclosure. As a result, once the initially released information has been reviewed, a formal access to information request will be filed. Section 6.1 will prevent a First Nation from making a formal ATI request if their initial informal request was not satisfactory. INAC staff already employ this rationale in denying access to records; Bill C-58 will provide the legislative justification for doing so.

Taken together, the elements contained in section 6 will provide Canada with ample means to frustrate First Nations in their efforts to gather the evidence required to document their claims, grievances and disputes against Canada. They will also provide an easy way to suppress the release of such evidence.

Recommendation:

In keeping with Canada's commitments to reconciliation and to implement the UNDRIP, as well as ensuring access to justice for First Nations, we call on the committee to withdraw Bill C-58 and engage in full and meaningful consultation with First Nations regarding legislative reforms to access to information. We also fully endorse the recommendations to improve Bill C-58 made by the Information Commissioner of Canada in her September 2017 report.

Introduction:

This submission has been prepared by National Claims Research Directors. We are a national body of technicians who manage over thirty centralized Claims Research Units mandated to research and develop specific claims on behalf of First Nations. We work closely with Indigenous communities, legal counsel, funding administrators, Canada's Specific Claims Branch of Indigenous and Northern Affairs, claims negotiators, and the Specific Claims Tribunal, and are regularly involved in accessing information from federal government departments and agencies.

We are mandated by First Nations to document and develop evidence related to their histories, claims, disputes and grievances. Much of our work is focussed on the development of claims against the Government of Canada related to its breach of lawful obligations against First Nation communities, pursuant to the Specific Claims Policy and the *Specific Claims Tribunal Act*, as well as other disputes related to Treaties and Aboriginal title and rights.

We wish to express our grave concerns about the content of Bill C-58, and to alert you to the fact that, as currently drafted, the C-58 will greatly hinder the ability of First Nations to document their claims, grievances and disputes with the Government of Canada.

Bill C-58 will greatly impair the ability of First Nations to document their claims, grievances and disputes with the Government of Canada and will significantly impede First Nations' access to justice in resolving their claims.

The Office of the Auditor General of Canada (OAG) recently conducted an audit of Canada's specific claims process. The OAG's report, released in November 2016, concluded that Canada's department of Indigenous and Northern Affairs introduced numerous barriers that hindered the resolution of claims, including restricting information¹.

If Bill C-58 is passed into law, it will impose substantive new barriers to the resolution of First Nations claims and will provide legislative cover for the suppression of evidence which First Nations require to pursue and resolve their claims against Canada. It will exacerbate the federal government's existing conflict of interest with respect to claims by First Nations against Canada. Moreover, the legislation, as drafted, will add barriers to First Nations obtaining information which is integral to their operation as governments.

Moreover, Bill C-58 has been developed unilaterally, without any effort to consult First Nations in any substantive or meaningful way, or to consider their rights and interests.

The Bill will also hinder efforts by Canada to meet the standards of redress for historical wrongs articulated in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as it represents a significant regression of First Nations' existing rights of access to information.

¹ Office of the Auditor General of Canada, *Report 6—First Nations Specific Claims—Indigenous and Northern Affairs Canada*, November 2016.

For these reasons, Bill C-58 contravenes the Government of Canada's commitment to reconciliation with First Nations.

The Uniqueness of First Nations Interests:

When it comes to access to information, our interests and rights are of a different character than other constituencies such as the general public or the media. We work for First Nation governments which have a recognized right of access to federal records, in particular, to document their claims, disputes and grievances with the Crown. This right is articulated in section 8(2)(k) of the *Privacy Act* which states that personal information under the control of a government institution 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 peoples of Canada;

The Federal Court of Canada has also recognized and affirmed that Canada must disclose government records to First Nations conducting research to pursue claims against the Crown in accordance with section 35 of the *Constitution Act, 1982*, by virtue of its fiduciary duty, and to uphold the honour of the Crown².

In this context, the federal government, while owing a fiduciary duty to First Nations, is often the defendant in claims involving redress for illegal actions that have resulted in the widespread dispossession of First Nations regarding their lands and resources. In addition, Canada now controls access to the majority of documentary evidence necessary for supporting First Nations claims.

Any attempt to modify the legislative basis for access to information stands to have a disproportionate impact on First Nations and their ability to identify and gather the evidence required to substantiate and resolve their claims, disputes and grievances with Canada.

Since the federal government holds the vast majority of the evidence required to document First Nations claims, disputes and grievances against the Crown, it is in a conflict of interest. Bill C-58 ignores the Crown's duty to disclose records to First Nations, and instead provides ample new tools for officials and governments to further entrench this conflict of interest.

² 2006 FC 132.

Lack of Consultation on Bill C-58:

We note that section 2 of Bill C-58 states that the purpose of the Act is:

to enhance the accountability and transparency of federal institutions in order to promote an open and democratic society and to enable public debate on the conduct of those institutions.

With respect to the ability of First Nations to gather evidence required to document their claims, disputes and grievance against the Crown, Bill C-58 will set First Nations' efforts back decades, and provide Canada with substantive tools to suppress information regarding the conduct of federal departments and officials.

On June 29, 2016, we made a submission to this Committee outlining some of the issues and concerns we had identified with respect to efforts then underway to "modernize" the *Access to Information Act* and the *Privacy Act*³ (enclosed). Since the Committee has never contacted us regarding the submission, we are not certain if the brief ever came to the attention of Committee members.

Since making our submission in June 2016, we have made numerous attempts to engage directly with the Treasury Board Secretariat, and to seek meaningful consultation on the development of any legislative initiatives related to these matters. We have been unsuccessful in those efforts. Although Treasury Board Secretariat staff have been in communication with us, it has only been to inform us as to what the Government of Canada has decided, not to consult us in a meaningful way or discuss the issues we have raised. We find this deeply troubling, and in direct contradiction to this government's stated commitment to developing a new relationship with First Nations.

We are deeply disappointed that we have been largely disregarded in the process to date, despite being directly affected by the contents of the bill.

We heard in the spring of 2017 that the President of Treasury Board announced that changes to the access to information regime would slow down, because his government "wanted to get it right". We have conducted a thorough reading of Bill C-58, and have concluded that this government has instead got it woefully wrong. As it now stands, Bill C-58 will prejudice First Nations' existing right of access to information held by the federal government, and their ability to gather the evidence required to document their claims, grievances and disputes against the federal government.

We also refer you to a paper which was commissioned by the federal government and prepared by lawyer Mark Stevenson in 2001 during previous efforts at legislative reform. This document was commissioned by Canada during a previous effort at amending the access to information

³ National Claims Research Directors, *Joint Submission to the Standing Committee on Access to Information, Privacy and Ethics and First Nations Experience with Access to Information*, June 29, 2016.

legislative framework. Although it is 16 years old, it does identify many of the high-level issues affecting any consideration of changes to the access to information legislative regime. It does not appear to us that any of these issues have been considered or addressed in this government's development of Bill C-58, although we did provide a copy of this to Treasury Board Secretariat Staff some months ago.

This lack of consultation contravenes Canada's obligations under the UNDRIP, which requires States to consult and cooperate in good faith with Indigenous peoples to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them⁴.

It also contradicts the stated commitment of this government to a "Nation-to-Nation" relationship with First Nations, reconciliation, and decolonization. We have seen a very public commitment by the Minister of Justice to engage in a review of policy and legislation related to First Nations, while at the same time, the same government is adopting new legislation without consulting First Nations and without any apparent consideration of the damaging impact the proposed legislation will have on First Nations and their ability to resolve their claims, disputes and grievances with the federal Crown.

Bill C-58 and the unilateral process through which it has been developed clearly violates several of the *Principles respecting the Government of Canada's relationship with Indigenous peoples* announced by Justice Minister and Attorney General of Canada Jody Wilson-Raybould in July 2017, most notably, principles 3 and 6⁵:

3. The Government of Canada recognizes that it must uphold the honour of the Crown, which requires the federal government and its departments, agencies, and officials to act with honour, integrity, good faith, and fairness in all of its dealings with Indigenous peoples.

6. The Government of Canada recognizes that meaningful engagement with Indigenous peoples aims to secure their free, prior, and informed consent when Canada proposes to take actions which impact them and their rights, including their lands, territories and resources.

This contradiction should be extremely worrisome to government, including the members of this Committee.

We have been told by officials that our concerns may be addressed in "Phase 2" of access to information reform. Based on Canada's conduct to date, we have no confidence in this kind of assurance. The time for substantive engagement with First Nation is now, at the legislative

⁴ United Nations General Assembly, Article 19, *United Nations Declaration on the Rights of Indigenous Peoples*, September 13, 2007.

⁵ Canada, *Principles respecting the Government of Canada's relationship with Indigenous peoples*, July 14, 2017. Available at <http://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>

reform stage. Once the draft measures are enacted into law, they will become very difficult to challenge and First Nations' rights of access will be prejudiced and irreparably harmed.

Non-Disclosure at INAC:

Some specific background needs to be provided regarding the Department of Indigenous and Northern Affairs Canada (INAC). INAC holds a considerable amount of information on First Nations, treaties, and policy. This includes materials related to the claims, disputes and grievances of First Nations, as well as records which are integral to their operations as governments, such as membership files, survey and reserve files, and treaty annuity files.

There was a protocol on informal access requests which was put into place two decades ago - this was to serve as an alternative to formal ATI requests, and explicitly intended to facilitate ease of access of materials required to document First Nations' claims, disputes and grievances. But over successive governments it was eroded to the point where it is currently dysfunctional, and badly in need of repair and a renewed commitment.

In the meantime, we have been forced to rely more on the formal ATI route which, based on our day to day experience, is characterized by non-cooperation, non-disclosure and unreasonable delay. There is a culture of indifference, secrecy and non-disclosure at INAC which has yet to be dismantled or fully addressed.

Over the past twelve years, our ability to obtain access to information from INAC in a timely basis has been severely reduced by the actions of officials. It has worsened since the 2015 election of the current government. Given this context, Bill C-58 will only increase the ability of INAC officials to restrict or refuse access to information required to document First Nations' claims, grievances and disputes. This is an alarming prospect.

Section 6 Raises Significant Concerns:

Because of significant constraints related to time and resources, in this submission we will focus on section 6 of Bill C-58. This section, if passed into law, will have a prejudicial and devastating effect on First Nations' ability to gather the evidence to document their claims, grievances and disputes against Canada.

As previously discussed, in the case of First Nations' claims, the federal government is the defendant. It also holds the majority of the evidence necessary to support any claim. It also owes a fiduciary duty to the First Nation. However, section 6 seems tailor made to suppress First Nations' ability to document and pursue their claims:

Section 6 Request for access to record

6.0 A request for access to a record under this Part shall be made in writing to the government institution that has control of the record and shall set out the following information and provide sufficient detail to enable an experienced employee of the institution to identify the record with a reasonable effort:

- (a) the specific subject matter of the request;*
- (b) the type of record being requested;*
- (c) the period for which the record is being requested or the date of the record.*

The requirement that an applicant include specific subject matter, details as to type of record being requested, and the period for which the record being requested, is far too prescriptive, and will give officials license to stonewall and refuse legitimate requests.

In many cases, when starting out to gather evidence on a claim, the initial request for information is necessarily broad and general. Or, it may include a date range, or a type of record, or the subject matter, but not all three, or necessarily any of them. This is partly because - unlike the Library and Archives Canada - INAC does not provide finding aids, or access to its file organizational structure, or allow First Nation researchers to search for themselves. We are dependent on the discretion of department officials to provide the materials; there is scant oversight.

Currently, when we make ATI requests to INAC that contain all three of these criteria, we are still being refused access or meeting requests for unreasonably lengthy time extensions, forcing us to appeal to the Office of the Information Commissioner.

Again, to enshrine this kind of triple requirement into legislation is overly prescriptive and will stifle legitimate requests. It will provide department staff with an easy way to clear their desks and dispense with First Nations' requests for information relating to their claims, disputes and grievances against the Crown. Given the prevailing ATI culture at INAC, this would be a recipe for disaster.

Section 6.1 provides further grounds for serious concern:

Reasons for declining to act on request

6.1 (1) The head of a government institution may, before giving a person access to a record or refusing to do so, decline to act on the person's request if, in the opinion of the head of the institution,

- (a) the request does not meet the requirements set out in section 6;*
- (b) the person has already been given access to the record or may access the record by other means;*
- (c) the request is for such a large number of records or necessitates a search through such a large number of records that acting on the request would unreasonably interfere with the operations of the government institution, even with a reasonable extension of the time limit set out in section 7; or*

(d) the request is vexatious, is made in bad faith or is otherwise an abuse of the right to make a request for access to records.

We have already identified the problems posed by section 6.1(a). Tying refusal to these three prescriptive criteria is unreasonable and ignores First Nations' right of access to materials held by the federal government.

Section 6.1(b) is also ripe for abuse. Quite often, a First Nation will begin the search for evidence by making an informal request for information to the government department in question. In many cases, this does not result in substantive disclosure. As a result, once the initially released information has been reviewed, a formal access to information request will be filed. Section 6.1(1) (b) will prevent a First Nation from making a formal ATI request if their initial informal request was not satisfactory.

Rationales like the one given legitimacy in section 6.1(c) are already being used amply by INAC ATI staff to frustrate requests for records in connection with land claims. Quite often the evidence required to document First Nations' claims, grievances and disputes is substantial. Government controls the files, government has a duty to disclose. And yet Bill C-58 would use the volume of evidence as grounds for refusing access.

We urge the Committee to consider the fact that the government itself requires that First Nations collect and produce abundant evidence required to document their claims, disputes and grievances, whether for negotiation (specific and comprehensive claims) or litigation (the Specific Claims Tribunal or the regular courts). A First Nation cannot enter into a forum to resolve these claims, disputes and grievances unless they have first collected and presented the required evidence. Bill C-58 will provide Canada with the tools to frustrate and prevent First Nations obtaining access to these materials.

Taken together, the elements contained in section 6 will provide government staff and officials with expansive means to frustrate First Nations in their efforts to gather the evidence required to document their claims, grievances and disputes against Canada. They will also provide an easy way to suppress the release of such evidence.

Conclusion and Key Recommendation:

First Nations are disappointed and discouraged that the Government of Canada - which continues to make much in public regarding its commitment to Indigenous issues and reconciliation - would at this pivotal moment propose legislation which is tailor-made to prevent First Nations from gathering the evidence required to resolve their claims, disputes and grievances, and obtain true reconciliation.

We have articulated two key concerns regarding Bill C-58:

1. There has been virtually no consultation with First Nations on this bill, despite our

repeated efforts over the last 16 months to engage the Treasury Board Secretariat and the Committee.

2. The bill itself, in particular, section 6, is deeply flawed and, if passed into law, will have the effect of rolling back First Nations' existing rights of access to information; C-58 provides legislative justification for the suppression of evidence required to document First Nations' claims, disputes and grievances.

Recommendation:

In keeping with Canada's commitments to reconciliation and to implement the UNDRIP, as well as ensuring access to justice for First Nations, we call on the committee to withdraw Bill C-58 and engage in full and meaningful consultation with First Nations regarding legislative reforms to access to information. We also fully endorse the recommendations to improve Bill C-58 made by the Information Commissioner of Canada in her September 2017 report.

Despite Canada's commitment to creating an accessible and transparent government, Bill C-58 will impose significant additional barriers to First Nations in their efforts to obtain justice in resolving their claims.

We would be pleased to follow up with the Committee if you have additional questions. Please contact:

Peter DiGangi, Director, Policy & Research, Algonquin Nation Secretariat
Email: digangi@algonquinnation.ca Phone: 613-722-3268

Jody Woods, Director of Research, Union of British Columbia Indian Chiefs
Email: jwoods@ubcic.bc.ca Phone: 604-684-0231

Enclosures

1. National Claims Research Directors, *Joint Submission to the Standing Committee on Access to Information, Privacy and Ethics and First Nations Experience with Access to Information*, June 29, 2016.
2. Mark Stevenson, *A Report for the Access to Information Review Task Force on Selected Concerns of First Nations People*, 2001.
3. Letter from BC Regional Chief Terry Teegee to the Standing Committee on Access to Information, Privacy and Ethics, October 16, 2017 appending BCAFN Resolution 23/2017 Withdrawal of Bill C-58 (*an Act to Amend the Access to Information Act and the Privacy Act and to make Consequential Amendments to other Acts*)

ATTACHMENT 5

Government
of CanadaGouvernement
du Canada

[Home](#) → [Crown-Indigenous Relations and Northern Affairs Canada](#)

→ [Treaties, agreements and negotiations](#) → [Ongoing negotiations](#) → [Specific claims](#)

Minimum Standard For Filing a Specific Claim Submission with the Minister of Aboriginal Affairs and Northern Development Canada

Pursuant to Section 16(2)(a) of the *Specific Claims Tribunal Act*, the Minister of Aboriginal Affairs and Northern Development Canada has established the following minimum standard in relation to the kind of information required for a specific claim to be filed as well as the form and manner for presenting the information.

Minimum Standard for Kind of Information

1. Claim Document

The claim document must include:

- a list of allegations based on one or more of the grounds related to the validity of the claim, as set out in the specific claims policy;
- legal arguments supporting each allegation;
- a statement of the facts supporting the allegations;
- a statement that compensation is being claimed; and,
- a list of authorities with citations, including treaties, statutes, case law and law journal articles, that support the allegations (copies not required).

2. Historical Report

A historical report, including references to supporting documents, outlining the factual circumstances surrounding the allegations, must be provided.

3. Supporting Documents

Complete copies of primary documents and relevant excerpts of secondary documents relied upon to support the allegations included in the claim document and referred to in the historical report are also necessary. Further details related to supporting documents are included in the "Form and Manner" Minimum Standard.

Minimum Standard for Form and Manner

1. The documents provided in support of the claim submission must be clearly labelled with the document source and number. Supporting documents must be identified as referenced in the claim document and/or the historical report and/or the list of all allegations. A separate document index setting out, at a minimum, the document number, date and archival reference where applicable, must be provided with the claim submission.
2. Documents can be submitted as hard copies and/or on CD-Rom, DVD-ROM, or any other standard mass storage device.
3. The supporting documents must be legible and complete. This may require preparing transcripts of documents that are of poor quality or are difficult to read. Avoid writing on copies of documents included in the submission and ensure that document pages are not cut off, stapled through or added to binders in a manner that obscures the text. Minor technical errors, such as a missing page or illegible photocopy, will be brought to the attention of the claimant so that the error may be addressed by the claimant. This should not, however, affect compliance with the Minimum Standard.
4. Specific Claims submissions must be sent by mail or courier to the Director General for the Specific Claims Branch at Aboriginal Affairs and Northern Development Canada at the following address:

Director General
Specific Claims Branch
Aboriginal Affairs and Northern Development Canada
Les Terrasses de la Chaudière
10 Wellington Street, Room 1660
OTTAWA ON K1A 0H4

A claim submission cannot be submitted electronically by fax or e-mail.

5. The specific claim submission must include a clear statement indicating that the claim is being submitted on behalf of a "First Nation" as defined in the specific claims policy.
6. Where a specific claim is submitted on behalf of a First Nation as defined in the specific claims policy, the claim submission must include evidence, such as a Band Council Resolution, that the claim is being submitted with the express authority of that First Nation.

Date modified: 2010-09-15