

The Impacts of Bill C-58 on First Nations' Access to Information

A Discussion Paper Following the Review of Bill C-58 by the Senate Committee on Legal and Constitutional Affairs

National Claims Research Directors and Union of BC Indian Chiefs
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Introduction

This paper is intended to further a discussion regarding how Canada's proposed changes to federal access to information legislation will affect Indigenous peoples' right of information access, specifically, First Nations' ability to conduct necessary research to substantiate their land claims and longstanding historical grievances against the Crown. It is our expectation that this paper will serve as a belated beginning of meaningful, sustained engagement to ensure complete and timely access to information for Indigenous researchers and organizations working on behalf of Indigenous communities.

"Access to information" describes a legal right of access to information held by government departments and other public bodies. In Canada, formal requests for government information may be made under the federal *Access to Information Act*. Indigenous researchers rely heavily on both formal and informal access to information procedures to access federal government records.¹

Prime Minister Trudeau's public commitment to open government, transparency, and accountability prompted a government review of Canada's access to information and privacy legislation. Then Treasury Board President Scott Brison, tasked with the review, introduced a revised *Access to Information Act* – Bill C-58 – in June 2017. The National Claims Research Directors, representing approximately 400 First Nations, made repeated attempts to engage with the Treasury Board Secretariat (TBS) concerning First Nations' information rights and the potential impacts of new legislation on Indigenous peoples in Canada. Despite these efforts, legislative development and drafting proceeded unilaterally, without any consultation with First Nations or their representative organizations.

This paper considers the proposed legislation in light of Indigenous peoples' unique needs regarding access to information held by the federal government, the importance of guaranteeing access to information to advance Indigenous-Crown reconciliation in Canada, the legal basis supporting First Nations' rights of access, as well as whether Bill C-58 provides full and timely access to information and addresses Canada's longstanding conflict of interest in retaining control of the majority of records required by First Nations to support their claims.

Our findings show that despite this government's public commitments, there continue to be numerous barriers and delays in obtaining access to records held at federal government departments which will be exacerbated by the changes proposed in Bill C-58. Despite a clear right of access affirmed by Canadian courts and articulated in international human rights instruments, Indigenous peoples' access to information is impeded by Canada's overarching conflict of interest whereby federal government departments retain the majority of records necessary to substantiate First Nations claims. The proposed changes to the *Access to Information Act* articulated in Bill C-58 will further entrench Canada's conflict of interest.

¹ Provinces, territories, municipalities and some First Nations governments also have access to information laws and procedures; however, the focus of this paper is on federal laws and processes.

Our principal recommendation is twofold:

1. Withdraw the current bill and initiate meaningful engagement with First Nations and their representative organizations, consistent with the honour of the Crown and the aim of Indigenous-Crown reconciliation.
2. Jointly develop a new legislative initiative or independent oversight mechanism that removes federal departmental bureaucrats from their current roles as information gatekeepers in order to guarantee Indigenous peoples' right of complete and timely access to information.

About the Authors

National Claims Research Directors (NCRD) is a national body of specialized technicians who manage over thirty centralized Claims Research Units mandated to research and develop evidence related to the claims, grievances, and disputes between First Nations and the Crown. Much of the NCRD's work is focused on the development of specific claims against the federal government related to its breach of lawful obligations against First Nations, pursuant to the Specific Claims Policy and the *Specific Claims Tribunal Act*. The NCRD is also involved in the development of claims related to Aboriginal title and rights and treaty entitlements, and in litigation support on a range of issues related to the claims, disputes and grievances of First Nations. In the course of this work NCRD members routinely access thousands of records from federal government departments and agencies.

Union of BC Indian Chiefs (UBCIC) is a not-for-profit organization that supports Indigenous Nations in asserting and implementing their Aboriginal title, rights, treaty rights, and right of self-determination as peoples. The UBCIC is also an NGO in Special Consultative Status with the Economic and Social Council of the United Nations. The UBCIC's policy advisors, analysts, and research staff regularly rely upon the federal Access to Information regime to obtain necessary records from public bodies in the course of their work on behalf of Indigenous Nations and communities in BC. The UBCIC advocates at the federal and provincial levels to ensure government transparency and accountability and to remove existing barriers to Indigenous peoples' access to information.

Sources

Our discussion is informed primarily by a national survey of First Nations claims researchers on their experiences with formal and informal access to information at federal government departments and agencies, a legal review of Bill C-58 conducted by First Peoples Law, as well as testimony and written submissions delivered to the Standing Senate Committee on Legal and Constitutional Affairs (CLCA), designated to study the bill.

National Digital Survey of Indigenous Researchers, Organizations and Staff

We undertook a national survey of First Nations researchers to gather and assess their experiences with access to information processes, as well as their information needs and challenges. The survey asked questions pertaining to both formal ATI procedures (written requests for records made under the federal *Access to Information Act*) as well as informal access requests (requests for records made without going through the ATIA, usually as a first course of action to obtain records, occasionally in accordance with the terms of a prior agreement between the requester and a public body, such as between First Nations and CIRNAC).

We launched the survey in mid-October 2018 for one month. The 20-minute survey contained 46 questions related to users' experience with making formal and informal requests for records (frequency, familiarity

with procedures and associated requirements for submitting requests), common research subjects and public bodies typically contacted for records, legislated timeframes for responding to requests for records, delays, experiences with exemptions and redacted information, quality of records, and communication (see appendix one)

Eighteen researchers completed the survey, representing 12 First Nations Claims Research Units (CRUs) in Quebec, Ontario, Manitoba, Alberta, and British Columbia. The CRUs conduct historical land rights research for approximately 225 First Nations related to breaches of legal obligations under treaties, the Indian Act and other statutes, as well as conduct research related to title and rights.

Case studies submitted by the NCRD

In October 2018, in preparation for a submission to the Standing Senate Committee on Legal and Constitutional Affairs (CLCA) tasked with reviewing Bill C-58, research directors submitted written case studies documenting examples of barriers accessing necessary government records through both formal and informal access to information procedures. Twelve case studies were appended to the NCRD's submission.

Legal review of Bill C-58 and Related Legal Issues

The Indigenous Bar Association in conjunction with the UBCIC and NCRD contracted First Peoples Law to conduct a legal review of Bill C-58 and proposed amendments from the perspective of Indigenous peoples' rights as articulated in the *United Nations Declaration on the Rights of Indigenous Peoples* (UN Declaration), case law, and the requirements of Indigenous-Crown reconciliation. This review was carried out in consultation with the NCRD and UBCIC.

Review of Selected Transcripts of Senate Committee Hearings and Submissions

We reviewed relevant testimony given by witnesses who appeared before the Senate Committee during the 2018 fall hearings, and reviewed relevant formal written submissions related to the Senate Committee's review of Bill C-58.

Legislative Background

Prior to winning the federal election in October 2015, the Liberal party articulated its commitment to open and transparent government. To fulfill this commitment, the mandate letter from the Prime Minister Trudeau to Treasury Board President Scott Brison included the review of federal access to information legislation as one of government's top priorities:

Work with the Minister of Justice to enhance the openness of government, including leading a review of the Access to Information Act to ensure that Canadians have easier access to their own personal information, that the Information Commissioner is empowered to order government information to be released and that the Act applies appropriately to the Prime Minister's and Ministers' Offices, as well as administrative institutions that support Parliament and the courts.²

Bill C-58 *An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts* was drafted by Treasury Board and introduced at first reading in the House of Commons on June 19, 2017. After passing second reading it was referred to the House Standing Committee on Access to Information, Privacy and Ethics on September 27, 2017. The NCRD made written submissions

² Letter from Prime Minister Trudeau to TBS President Scott Brison, November 16, 2015.

to the legislative Committee in June 2016 and October 2017, and was also invited to provide evidence at the hearings in October 2017. The NCRD interventions voiced opposition to the bill on the grounds that there was no consultation with First Nations regarding the legislation, and that it would adversely affect First Nations' rights of access to information.

The bill was sent to the Senate in December 2017 and referred to the Senate Committee on Legal and Constitutional Affairs (CLCA) in June 2018. The CLCA held hearings in fall. The NCRD, represented by Peter Di Gangi (Algonquin Nation Secretariat) and the Indigenous Bar Association (IBA), represented by Bruce McIvor, appeared in person before the CLCA on November 1, 2018, as did Regional Chief Marlene Poitras, representing the Assembly of First Nations (AFN). All answered questions related to their testimony. The NCRD and IBA, as well as the BC Specific Claims Working Group³ provided written submissions to the CLCA for its consideration of C-58.

Indigenous Peoples' Unique Interests in Accessing Information

The right to access information is integral to Indigenous peoples' pursuit of justice for centuries of wrongs committed by colonial and successive federal governments and is fundamental to Indigenous peoples' efforts to resolve a range of historical grievances rooted in past and ongoing colonial policies and processes⁴. The legal review of Bill C-58 conducted by First Peoples Law identifies several reasons why Indigenous peoples are regularly required to access information in possession of the federal government, including specific claims (historical breaches of the Crown's legal obligations), comprehensive claims (modern treaty agreements), Aboriginal title, rights, and treaty rights litigation, and other historical grievances, such as those pertaining to residential schools or child welfare⁵.

The specific claims process exemplifies First Nations' necessary reliance on access to information processes to participate in state mechanisms developed to resolve claims against the Crown. The specific claims process is the federal government's approach to dealing with historical wrongs related to illegal alienations of Indigenous lands, mismanagement of Indigenous assets held "in trust" by the government, and the non-fulfilment of treaties. These are historical breaches of the *Indian Act* that relate to Canada's failure to reserve village sites or protect reserve lands, fishing sites, gravesites and other sacred lands, and water rights.

Researchers must review thousands of historical records of both federal and provincial government departments to gather the extensive documentation and historical evidence required to develop and ground a First Nation's claim and submit it for adjudication to the Specific Claims Branch of CIRNAC or file it with the Specific Claims Tribunal. Currently there are hundreds of specific claims being researched in British Columbia alone.⁶ Our national survey shows that 94 percent of respondents rely on both formal and

³ The BC Specific Claims Working Group (BCSCWG) is a group of Indigenous leaders and specific claims technicians, created via resolution by the Union of BC Indian Chiefs in 2013. The BCSCWG is tasked with advocating for the fair and just resolution of BC specific claims and advancing specific claims resolution as a key component of reconciliation between Indigenous peoples and Canada.

⁴ McIvor and Gunn, First Peoples Law, *Legal Review of Bill C-58*, October 25, 2018, p. 5.

⁵ *Ibid*, p. 5.

⁶ The UBCIC alone has 165 claims on its 2019 work plan. This number would increase if resources allowed. Currently Claims Research Units and individual First Nations submit annual funding proposals to the Specific Claims Branch of CIRNCA based on a projected work plan. In 2014, the Harper Government made drastic cuts to claims research funding (between 30 and 60 percent nationwide). Despite constant appeals from First Nations and CRUs, and commitments from the Minister, this funding has not been restored, leaving hundreds of claims on hold.

informal access to information processes to obtain government records necessary for substantiating their specific claims⁷.

The right to redress for the dispossession of lands and resources is articulated in the *United Nations Declaration on the Rights of Indigenous Peoples* (UN Declaration)⁸:

Article 8

2. States shall provide effective mechanisms for prevention of, and redress for:

(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

The resolution of Indigenous peoples' claims and historical grievances, articulated as a right under the UN Declaration, is also central to advancing reconciliation between Indigenous peoples and the Crown. The Government of Canada makes the following statement to this effect on its Specific Claims webpage:

Canada has embarked on a journey of reconciliation between Indigenous and non-Indigenous peoples. It is a necessary journey to address a long history of colonialism and the scars it has left.

...

Settling specific claims is one of the many steps on the journey to reconciliation with First Nations and helps create a better future for everyone. Specific claim settlements help to right past wrongs, renew relationships and advance reconciliation in a way that respects the rights of First Nations and all Canadians.⁹

The preamble to the *Specific Claims Resolution Act* also identifies First Nations-Crown reconciliation as its aim when it states that "resolving specific claims will promote reconciliation between First Nations and the Crown".¹⁰

Since complete and timely access to information is integral to preparing sound, well-documented claims against the Crown, Indigenous peoples' right of access to information and their ability to exercise this right has significant implications for fulfilling the federal government's lawful obligations to First Nations and for achieving reconciliation.

Indigenous Peoples' Right to Access Information

The relationship between Indigenous peoples' right to access information, the just and timely resolution of claims and reconciliation is reiterated in the legal review conducted by First Peoples Law:

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.¹¹

⁷ Fifty-five percent of respondents rely on ATI processes for land title and territory claims; and 44 percent for research related to treaties (see appendix X for complete breakdown of research topics).

⁸ United Nations General Assembly, Article 8.2(b), *United Nations Declaration on the Rights of Indigenous Peoples*, September 13, 2007.

⁹ Government of Canada, "Specific Claims" online: <https://www.rcaanc-cirnac.gc.ca/eng/1100100030291/1539617582343>, accessed March 5, 2019.

¹⁰ Canada, *Specific Claims Tribunal Act*, (SC 2008, C22). Available at <https://laws-lois.justice.gc.ca/eng/acts/S-15.36/page-1.html>

¹¹ McIvor and Gunn, p. 5.

Canada's colonial past and Indigenous peoples' unique relationship with the federal Crown have led the courts to confirm Indigenous peoples' distinct rights to access information:

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.¹²

The Federal Court of Canada has underscored the importance of the Crown disclosing records in its possession which are necessary to support section 35 claims, rather than suppressing evidence.

The legal review also notes that full access to information is supported by the Federal Court of Appeal:

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.¹³

The importance of disclosing records to Indigenous communities for legitimating land claims is underscored in section 8(2)(k) of the federal *Privacy Act* which allows public bodies to disclose personal information to Aboriginal peoples or people working on their behalf for the purposes of validating claims and grievances against the Crown.¹⁴ Indigenous researchers and organizations working on behalf of First Nations routinely file for access according to this provision. Survey results indicate that 66 percent of respondents regularly include 8(2)(k) forms with their requests for records, while only 11 percent have never done so.

The legal review also notes that Indigenous peoples' right to access information is supported by the *UN Declaration on the Rights of Indigenous Peoples*, citing Article 40, which stresses a right of access to justice through fair and timely procedures for dispute resolution with states.¹⁵ Former Chief Justice of the Supreme Court of Canada Beverley McLaughlin has emphasized the significance of Article 40, remarking that:

Article 40 of the *UN Declaration on the Rights of Indigenous Peoples*, endorsed by Canada, recognizes the right of indigenous peoples to have their disputes with states resolved promptly and to obtain effective remedies for the infringement of their individual and collective rights.¹⁶

Access to information is a fundamental component of just and fair processes for claims resolution:

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.¹⁷

¹² Ibid.

¹³ McIvor and Gunn, p. 6.

¹⁴ *Privacy Act* (R.S.C., 1985 c. P-21) accessed November 13, 2018 at <https://laws-lois.justice.gc.ca/eng/acts/P-21/index.html>

¹⁵ Ibid, p. 6.

¹⁶ McLaughlin, Beverley, "Remarks of the Right Honourable Beverley McLaughlin, PC, Chief Justice of Canada." Annual Conference of the Canadian Institute for the Administration of Justice, Saskatoon, Saskatchewan, October 16, 2015, p. 12.

¹⁷ McIvor and Gunn, p. 6.

Canada has committed to implementing the UN Declaration, and as such the instrument's provisions must guide Canada's conduct in providing full and timely access.

Canada's Conflict of Interest

Though the UN Declaration and Canadian courts instruct Canada to make information available to First Nations to support their claims and grievances, federal government departments are reluctant to provide First Nations with the information they require.

The majority of documentary evidence necessary for substantiating Indigenous peoples' claims and grievances against the Crown is currently controlled by Canada, in the possession of federal departments, such as Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC). Canada is in a clear conflict of interest since it is able to control what information is available in claims against it.¹⁸ Informal access protocols developed in 1999 to alleviate the need to go through formal access to information procedures, while initially constructive, have been rendered ineffective due to non-cooperation, non-disclosure, and unreasonable delay, a corollary of Canada's adversarial approach to specific claims resolution.¹⁹

One hundred percent of our survey respondents said they require records from CIRNAC on a regular basis and all expressed frustration with Canada's reluctance to grant full, timely access. Researchers complain of a dearth of find aids, inadequate technical and administrative support when making inquiries, time-consuming runarounds characterized by an adversarial approach by government staff, and perhaps most importantly, a failure to have confidence that they have received all the documents they need. Respondents repeatedly called for "more transparency" and a need to "change the culture of government secrecy (we have the right to access these records)."²⁰

Testifying before the CLCA on Bill C-58, Senator Renée Dupuis, Chair of the Indian Specific Claims Commission²¹ from 2003 until the creation of the Specific Claims Tribunal in 2009, discussed the dilemma of First Nations wanting to bring forward claims against the Crown:

We have put First Nations in the position of claimants without guaranteeing them full and direct access to the documents they need to meet the requirement we have imposed on them to prove their title.²²

Senator Dupuis addressed Canada's conflict of interest directly, stating:

¹⁸ Canada's conflict of interest extends to the entirety of the management and assessment of First Nations' claims filed for adjudication through the specific claims process, as it adjudicates all claims itself. The exception is those claims filed with the Specific Claims Tribunal under the terms articulated in the *federal Specific Claims Tribunal Act*. However, only those claims Canada has rejected for negotiation, whose negotiations are at an impasse, or whose assessments exceed a three-year legislated deadline are eligible for adjudication at the Tribunal. Claims whose value is estimated above \$150 million are also ineligible and must proceed through Cabinet without the participation of the First Nation or their legal counsel.

¹⁹ Submissions to the CLAC by the NCRD, IBA, and BCSCWG.

²⁰ 2018 National Survey. Researchers also note that many federal documents once available online via the Indian Lands Registry System have been removed due to more stringent applications of the *Privacy Act* within CIRNAC. Though CIRNAC provides web access to First Nations claims researchers upon request, researchers note the process is more cumbersome and yields fewer documents.

²¹ The Indian Specific Claims Commission (ISCC), which ran from 1991 until 2009, was an independent review body tasked with conducting impartial inquiries of First Nations specific claims rejected by Canada, or the compensation criteria Canada proposed in negotiating First Nations claims. The ISCC's decisions were non-binding on the federal government.

²² Senator Renée Dupuis testimony to CLAC, November 8, 2018.

In this case, the government has possession of the historical and documentary records, even though it is one of the parties in a potential dispute. As a result, if those files disappear, there is nothing left.

Responding to questions about why records of such historical importance are not transferred to Library and Archives Canada (LAC) “whose mandate is to preserve our heritage,” Senator Dupuis stated:

...the system does not work well. In terms of the access to information system or a preliminary request, people may have an idea what they are looking for, but do not know what the record actually contains. That is very difficult to predict, and the answer in some cases is that the record is too voluminous. This is not a satisfactory way for the government to fulfill its legal obligations. Moreover, it leaves the First Nation entirely at the government’s mercy.

Despite LAC’s mandate, which emphasizes preservation, advancement of knowledge, accessibility and cooperation, perhaps because of it, CIRNAC’s practice is to retain records – some dating from the 19th century – within the department, rather than transfer them to LAC. The Union of BC Indian Chiefs, which participates in a working group aimed at facilitating informal access to CIRNAC records, has been told by the department’s director of information management that CIRNAC retains all records “that still have business value to the department.” When asked what constitutes “business value,” how it is determined, who determines it and if there are departmental guidelines for making this determination, the UBCIC received no response.²³ Consequently, tens of thousands of boxes of documents remain at department offices or warehouses, compromising the physical integrity and completeness of the historical record.²⁴

This threat to the completeness of the historical record was discussed by Senator Dupuis who remarked that:

...the current system does not allow access to the records and does not guarantee that the records will be conserved.

...

Managing these documentary records is more an issue of preserving evidence and must be handled as such... They must not be managed like the department’s administrative files. Special rules must apply to their conservation.²⁵

The Union of BC Indian Chiefs has heard informally that staff at Library and Archives Canada (LAC) are deeply concerned about CIRNAC’s lack of expertise related to record preservation. They have expressed worries regarding the consequences for the long-term survival of records due to CIRNAC’s reluctance to transfer its files to the public institution set up for that purpose.²⁶ Such unwillingness to make records available and ensure that they are preserved according to professional archival standards severely compromises the ability of First Nations to document their claims and puts them at a tremendous disadvantage when Canada has complete access.

²³ Pierre Desroches, Director, Corporate Information Management Directorate, CIRNAC and ISC (Indigenous Services Canada), Email to Jody Woods, UBCIC Research Director, September 6, 2018.

²⁴ CIRNA officials have indicated that that CIRNA / ISC holds approximately 60 kilometres of physical records relating to its operations, as well as another 10km+ of documents awaiting transfer from the former Medical Services Branch of Health Canada.

²⁵ Dupuis, November 8, 2018.

²⁶ Informal conversation between UBCIC and LAC staff, December 2018.

Persisting in this unfair practice and attempting to justify it with vague rationales while simultaneously championing open government and stressing the importance of claims resolution for reconciliation constitutes dishonourable conduct on the part of the federal government. The Supreme Court of Canada, in its decision in *Haida*, has stressed the Crown’s obligation to act honourably in the resolution of claims:

In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve ‘the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.’²⁷

The notion that the Crown must act honourably in all its dealings with Indigenous peoples has been reiterated by the British Columbia Court of Appeal and the Specific Claims Tribunal.²⁸ Since Crown honour extends to the resolution of claims, Canada’s conflict of interest impedes the resolution of claims through systemic unfairness and inequality. It prevents the Crown from fulfilling its obligation to act honourably.

Current Barriers to Access to Information Faced by Indigenous Peoples

Our survey shows that under the current access to information and privacy regime, Indigenous peoples regularly face significant barriers in obtaining complete and timely access to records. Barriers to accessing federal government records significantly inhibit Indigenous peoples’ ability to achieve justice for past wrongs through the state mechanisms established for this purpose. The barriers faced by Indigenous Nations seeking information access must be specifically and systematically targeted, such that rights to redress are advanced and protected. Indigenous peoples routinely experience the following barriers when attempting to obtain federal government records through access to information:

1. *Prolonged, unacceptable delays in obtaining information.* Researchers are regularly asked to waive legislated timelines – often multiple times for a single request for records – resulting in serious delays meeting deadlines, jeopardizing relationships with funders and the Indigenous communities on whose behalf they carry out their work. Our survey showed the following:
 - 83 percent of respondents were notified by government bodies that time extensions beyond the 30-day legislated timeframe were needed to fulfill their access to information requests due to the high volume of records requested;
 - Over 50 percent of respondents reported that these time extensions were not met.
 - 40 percent of respondents reported waiting over 90 days to receive records.
 - 80 percent of respondents reported these delays were not warranted based on the volume of records they finally received.
 - 68 percent of respondents experienced prolonged delays without receiving any communication from the government body whatsoever.
2. *Unreasonably broad applications by public bodies of the exceptions to disclosure under the Act, resulting in excessive redactions or failures to release information.* Sections 13 (government confidences), 19 (personal information), 20 (third party information), and 23 (solicitor-client privilege) are routinely invoked, even in cases where disclosure would not prejudice a third party or constitute an unreasonable invasion of privacy under the Act. We note that the disclosure provision given to public bodies under section 8(2)(k) of the *Privacy Act*, which implicitly

²⁷ Cited in Alisa Lombard and Aubrey Charette, “Crown Honour and the SCT: Honourable Litigation?”, prepared for the BC Specific Claims Working Group, September 13, 2018. .

²⁸ Lombard and Charette, “Crown Honour and the SCT: Honourable Litigation?”, prepared for the BC Specific Claims Working Group, September 13, 2018.

recognizes the resolution of Indigenous claims and grievances as a matter of justice, often fails to yield the necessary disclosure of records. Since Nations are compelled to produce a wide range of government records to substantiate their land claims and grievances against the Crown, challenges obtaining these records are a substantial barrier to achieving justice for land-related grievances.

3. *Public bodies using extra-legislative rationales, such as “not relevant” as a basis for withholding information.* Redactions are routinely made, and disclosure is regularly refused without statutory justification, even if records are publicly available elsewhere. In some cases, release of records is refused outright when information analysts deem documentation which authorizes access – such as band council resolutions – invalid, contrary to law.²⁹
4. *Public bodies failing to transfer records to government archives, resulting in decades’ worth of missing information.* This is resulting in inexplicable gaps in the historical record upon which Indigenous Nations depend to substantiate their claims and grievances, as described above.
5. *Inadequate resourcing and training of information management analysts.* Insufficient resourcing and inadequate training has resulted in inappropriate and inconsistent applications of the exemptions under the Act and delay. One survey respondent stated, “It’s hit and miss with formal/informal requests to federal departments. Too much is left to the discretion of [the] individual or government of the day. Not enough training for staff so that they understand FN rights to access.” Another, in response to a question asking what would improve the current ATI system, stated, “Increase resources for ATI shops and program staff; legislative and policy reform that takes FN rights and interests into account; send all historical records from INAC to LAC where they belong; in the interim, INAC should make its finding aids and computerized databases of files available to researchers.”

New Barriers Introduced Through Bill C-58

The legal analysis of Bill C-58 conducted by First Peoples Law concludes that, as currently drafted, Bill C-58 will create significant new barriers for Indigenous Nations trying to access information for land claims and other purposes, exacerbate the problems outlined above, and will thereby hinder efforts by Canada to meet the minimum standards for redress for historical wrongs articulated in the UN Declaration, contrary to its international obligations and domestic commitments.

The legal analysis demonstrates that the bill ignores the Crown’s duty to disclose records to Indigenous Nations and provides many new ways for officials to delay or deny access to information (for example, the provisions set out in section 6, which is overly prescriptive and will suppress legitimate requests).³⁰ The bill will also exacerbate Canada’s conflict of interest and provide legislative authority for the suppression of evidence; recent amendments to section 6.1(1) do not allay these concerns.³¹

The legal review notes that Bill C-58 will expand a government body’s ability to impose additional fees both now and if additional regulations are enacted in conjunction with the legislation in the future.³²

²⁹ The issue of Band Council Resolution (BCR) validity came to a head when CIRNAC information analysts refused to release documentation to the UBCIC on the grounds that a First Nation’s BCR authorizing access was no longer valid due to a change in Chief and Council after an election. A legal review concluding that CIRNAC’s practice had no basis in law prompted Minister Bennett, in February 2016, to clarify in writing that all BCRs would be accepted as valid, regardless of changes in First Nations leadership.

³⁰ McIvor and Gunn, p. 8.

³¹ Ibid, pp. 8-10.

³² Ibid, pp. 10-11.

The proactive disclosure requirements set out in C-58 are also insufficient for ensuring the protection of Indigenous peoples' access to justice, as they prevent the Information Commissioner from exercising oversight in relation to the proactive disclosure requirement and errs too heavily on the discretion of government bodies to disclose; the lack of any compliance mechanism in the bill ensures this.³³

Proposed Amendments to Bill C-58

We have been monitoring developments in the Senate as the CLCA has continued its study of the bill. We note that the bill's sponsor in the Senate, Senator Pierrette Ringuette, has proposed amendments which would remove the most egregious elements of section 6 of the bill. This change is welcome but fails to address the lack of substantive consultation, the many other issues which have been identified with the bill, as well as the systemic problems that Indigenous Nations face with regard to access to federal records. For these matters to be addressed properly, sustained and meaningful engagement between the federal government and Indigenous Nations and their representative organizations is required. To uphold the honour of the Crown, it must be made a priority.

Need for Substantive Consultation on Access to Information Reform

Bill C-58 was created unilaterally, without consultation or meaningful engagement with Indigenous Nations or their representative organizations, contrary to Canada's commitment to a Nation-to-Nation relationship, to work in equal partnership with Indigenous Nations, to uphold the honour of the Crown, and implement the UN Declaration.³⁴

Article 19 of the UN Declaration 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.³⁵

Any attempt to change access to information legislation will have a unique impact on Indigenous Nations; if passed into law, Bill C-58 will hinder the just resolution of longstanding claims against the federal Crown.

Any legislative review must make meaningful, direct dialogue with Indigenous Nations a priority and reject cursory actions that only create the illusion of meaningful change. This work must be guided by transparency, due process, and full enactment of the government-to-government approaches articulated within the UN Declaration. These guiding principles are not just future outcomes of some consultative process but must be built into these processes from the start.

³³ Ibid, pp. 11-12.

³⁴ In September 2018, Treasury Board Secretariat agreed to a proposal to provide funding for the national survey and legal review referenced throughout this report; it also provided funding to draft the discussion paper. However, it would not fund any form of direct engagement between First Nations and Canada on the basis that engagement was beyond the scope of strict funding guidelines.

³⁵ United Nations General Assembly, Article 19, *United Nations Declaration on the Rights of Indigenous Peoples*, September 13, 2007.

Independent Oversight/Separate Legislation to Guarantee Timely and Complete Access

Given Indigenous peoples' right of access to information, articulated in Canadian law and supported by the UN Declaration, federal government records must be seen as evidence that needs to be preserved rather than proprietary holdings of CIRNAC released at their discretion. First Nations have long expressed what Senator Dupuis summed up in her testimony: "the current system does not work," and "the current access to information system cannot adequately address the context of specific claims."³⁶

The NCRD and the UBCIC through the submission of the BC Specific Claims Working Group endorsed the amendments recommended by First Peoples Law if withdrawal of Bill C-58 was not possible. However, due to the systemic nature of the issues outlined above, amendments will not address the fundamental problems which impede First Nations' rights of access to information. Senator Dupuis made a similar statement to the CLAC, remarking that "an amendment to a bill, as worded in the spirit of the current act, would not be a satisfactory solution to deal with the issue of land claims."³⁷

In her testimony, guided by her expertise dealing with First Nations claims, Senator Dupuis advanced the idea of an independent body to oversee First Nations' access to information:

I am certainly of the view that there needs to be an independent body of some sort that could become the depository of all this documentation, which would not put the First Nations in their current situation where the federal government has all the files and decides upon which criteria it will accept a specific claim. The federal government is, under its own criteria, financing some research. There's no guarantee that the First Nation has access to the totality of the file. ... There is a uniqueness in the process. Part of the file is under Indian Affairs...and the Justice Department because it is giving advice on the validity of that claim. So I think there is a need to take the conservation and access to the file somewhere else than where it is currently.³⁸

Substantive engagement is required to jointly develop an independent process that is guided by principles of fairness and equality. To fulfill its obligation to act honourably, Canada must commit to such a process of engagement with First Nations, rather than tenaciously protecting its own unfair advantage by refusing to remove its conflict of interest.

Recommendations

In accordance with the principles of justice, fairness, and equality, and in the interest of reconciliation, we make the following recommendations.

We recommend that the Government of Canada immediately work in full partnership with Indigenous Nations and their representative organizations to develop and enact mutually agreed-upon changes to policy and legislation regarding access to information and privacy, such that transparency, openness, and fairness are guaranteed and Indigenous Nations' rights (especially the rights to joint oversight, access to justice and redress for past wrongs) are implemented, as per the *UN Declaration of the Rights of Indigenous Peoples* and the federal government's commitments to Crown-Indigenous reconciliation.

³⁶ Dupuis testimony.

³⁷ Ibid.

³⁸ Dupuis testimony.

Canada will need to address with Indigenous peoples implications regarding the nature and scope of rights of access for “Aboriginal peoples” within the meaning of the *Constitution Act, 1982*, and between individual and collective rights of access.

Canada will also need to ensure that the particular needs of French-speaking First Nations are taken into account.

This could include the following actions, to be undertaken in cooperation between Indigenous Nations and Canada:

- The development of new legislation specifically addressing the custody and management of federal records which may constitute evidence in connection with Indigenous nations’ claims, disputes and grievances against the Crown.
- An immediate and ongoing process to address systemic problems with informal and formal access to federal records, with particular attention to CIRNAC/ISC, to make timely, concrete and meaningful changes to bring current practises up to the standards required by the UN Declaration and Canadian law. This would include more detailed definitions of the problems, identification of solutions, and action to implement measures.
- In conjunction with the above, the establishment of an oversight mechanism to ensure that federal departments comply with their legal obligations under international and Canadian law.

Next Steps

1. We recommend that the Government of Canada commit to the immediate establishment and resourcing of a joint committee, to include representatives of the Treasury Board Secretariat and in cooperation with Indigenous Nations and their representative organizations, which would include within its terms of reference:
 - To further document and define existing barriers to access, including measurement of existing regimes against international and Canadian legal standards and requirements;
 - Develop specific responses to address those barriers, which may include legislative, policy and regulatory measures;
 - Develop interim measures to address critical barriers in the short term;
 - This group would include, on the federal side, representatives of key federal departments and agencies on an as-needed basis (TBS, CIRNAC/ISC, LAC, DOJ)
 - This group would address issues specific to First Nations’ rights of access to information arising from their claims, disputes and grievances with Canada;
 - This group could also address more general issues arising from Indigenous peoples’ rights of access to government records.
2. We recommend that the Government of Canada provide resourcing to enable the NCRD to continue to study this issue and engage with TBS and relevant federal departments. This would include resources to:
 - Engage in internal discussion and consultation;
 - Commission a legal review of issues arising from CIRNAC/ISC’s control over evidence related to First Nations’ claims, disputes and grievances against the Crown;
 - Commission a legal review on the UN Declaration’s standards as they apply to First Nations’ access to federal records.

Appendix One National Online Survey

The purpose of this survey is to gather information about Indigenous people's experience using Canada's access to information (ATI) procedures to obtain records from government departments and public bodies (such as Crown corporations).

"Access to information" describes a legal right of access to information held by government departments and other public bodies. In Canada, requests for government information (other than personal information) may be made under the federal Access to Information Act. Informal access to information procedures are also used by Indigenous researchers to facilitate access to government records. Provinces, territories, municipalities and some First Nations governments also have access to information laws and procedures; the focus of this survey is on federal laws and processes.

We will use the information you provide to produce a publicly available user guide for Indigenous researchers to explain access to information procedures and help with accessing government records. The survey information will also be used to help us advocate for Indigenous peoples' information rights.

ABOUT THIS SURVEY

We estimate that the survey will take about 20 minutes to complete.

Please answer whatever questions you can; all information you can offer is very helpful. Feel free to skip any questions that are not relevant to your experience.

Confidentiality: All information you provide will be kept anonymous. No individuals, Nations, or organizations will be identified by name in any materials related to this survey.

1. Name:

2. Contact phone number or email address:

3. Nation or organization:

4. Job title or description:

5. Have you ever filed a federal access to information (ATI) request as part of your job?

- Yes
 No

6. Approximately how many times a year do you file access to information requests? Please indicate if these are formal or informal.

**7. Please indicate any non-federal access to information processes you have used in your work?
Select all that apply.**

- Provincial freedom of information processes
 Municipal freedom of information processes

- First Nation access to information framework
- I have not used any non-federal processes
- Other (please specify)

8. Before filing an access to information request, do you ever try to obtain records informally? If so, please explain how (select all that apply).

- Sending a letter
- Sending an email
- Talking to someone by phone
- Written agreement with a government agency to obtain records informally
- I do not try to obtain records informally
- Other (please specify)

9. How did you learn about about procedures for making access to information requests?

- Employer
- Workshop or seminar
- Academic institution
- Public library
- Government website
- Other (please specify)

10. Have you ever received instruction or training regarding access to information procedures?

- Yes
- No

If so, explain what kind of training and from where.

11. Have you ever submitted an 8(2)(k) form as part of your request for records? If so, is this a regular part of what you do when filing access to information requests?

(Section 8(2)(k) of Canada’s Privacy Act allows public bodies to disclose personal information: “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.”)

- Yes, I have submitted an 8(2)(k) form once or twice.
- Yes, I regularly submit 8(2)(k) forms.
- No, I have never submitted an 8(2)(k) form.

12. What area of research do the records support? Please select all that apply.

- Land title and territory claims
- Specific claims
- Children and families
- Citizenship
- Safety of Indigenous women and girls
- Education
- Residential schools
- Emergency management
- Environmental management
- Fiscal relationships
- Fisheries and aquaculture
- Forestry
- Health
- Housing
- Justice
- Languages
- Policing
- Treaties
- Water
- Other (please specify)

13. What best describes the time period of the records you request? Choose all that apply.

- Pre 1930
- 1930-1960
- 1960-1980
- 1980-2000
- 2000-present

14. To which government departments have you submitted access to information requests (select all that apply):

- Indigenous and Northern Affairs
- Agriculture
- Auditor General of Canada

- Canadian Heritage
 - Canadian Human Rights Commission
 - Employment and Social Development Canada
 - Environment Canada
 - Department of Finance
 - Fisheries and Oceans Canada
 - Health Canada
 - Department of Justice
 - Library and Archives Canada
 - Public Works and Government Services Canada
 - RCMP
 - Statistics Canada
 - Transport Canada
 - Treasury Board of Canada
- Other (please specify)

15. To which public bodies have you submitted access to information requests? Please select all that apply.

- Canadian Broadcasting Corporation (CBC)
- Canada Land Company Limited
- VIA Rail
- Canada Post
- Bank of Canada
- Other (please specify)

16. Have you ever filed an informal request for records released pursuant to a previous ATI request?

- Yes
- No

17. What method do you use to make access to information requests? (Please check all that apply.)

- Government website
- Written letter

18. Which of the following documentation have you been required to provide with your access to information request to support or authorize your request? Please select all that apply.

- Band council resolution
- Researcher authorization
- Employment authorization
- Other (please specify)

19. Have any of these supporting documents ever been challenged or refused?

- Yes
- No

If so, what was the reason?

20. There is a \$5 fee required to file each access to information request. Has this fee ever prevented you from filing a request for records?

- Yes
- No

21. Do you have any other costs associated with preparing, filing, receiving and processing access to information requests?

- Yes
- No

If yes, please describe these costs.

22. Does your operational budget cover the costs of preparing and filing access to information requests?

- Yes
- No

23. Section 7 of the federal Access to Information Act states that government institutions must respond to requests and release responsive records within 30 days of receiving a request. On average, approximately how long does it take you to receive records from the time you file an access to information request?

- 10 days
- 20 days
- 30 days
- 60 days
- 90 days
- More than 90 days

24. Section 9 of the Act allows government institutions to extend the 30-day time limit in some circumstances. Has a government institution ever notified you that it has extended the deadline to respond to your ATI request?

- Yes
- No
- Don't know

25. What reasons were given for requiring the extension? Please select all that apply.

- Government agency is understaffed
- High volume of records
- Delays obtaining responses from government agencies involved
- Other (please specify)

26. In your experience, is the deadline extension usually met?

- Yes
- No

27. Where deadlines were extended, do you feel the extensions were warranted based on the records you received?

- Yes
- No

28. Has a government institution ever failed to respond to your request on time without claiming a formal deadline extension or failed to meet an extended timeline?

- Yes
- No

29. While your request is in process, do you ever communicate with the analyst handling your request?

- Yes
- No

30. How would you rate your interactions with the information analyst handling your request?

- Extremely helpful
- Very helpful
- Somewhat helpful
- Not so helpful
- Not at all helpful

31. Have you ever had an access information request you filed yield no records?

- Yes
- No

32. How do you get copies of the records you requested?

- The department or public body makes the copies for me
- I make the copies
- Both
- It's different at different departments/public bodies

33. In what format do you usually receive documents? Select all that apply.

- Paper
 - Electronic transfer on secure site
 - CD
- Other (please specify)

34. If the copies are provided by the government department or public body, how would you rate your satisfaction with the legibility of the copies you receive?

- Very satisfied
- Satisfied
- Neither satisfied nor dissatisfied
- Dissatisfied
- Very dissatisfied

35. Have you ever had records redacted (removed) due to an exemption for releasing records under the Access to Information Act?

- Yes
- No

36. Please identify any exemptions that were used to withhold records (select all that apply):

- s. 13 (government confidences)
- s. 14 (federal-provincial affairs)
- s. 16 (law enforcement and investigations)
- s. 18 (economic interests of Canada)
- s. 19 personal information
- s. 20 (third party information)

- s. 21 (government advice)
- s. 23 (solicitor-client privilege)
- Can't remember
- Other (please specify)

37. Did you understand the meaning of the exemptions and why the records were not provided to you?

- Yes
- No

38. Have you ever filed a formal complaint as outlined in section 30 of the Access to Information Act? If yes, what was the nature of your complaint?

- I have never filed a complaint.
- Yes, due to excessive redactions
- Yes, due to portions of records withheld without explanation
- Yes, due to no records being released
- Yes, due to excessive delay receiving records
- Yes, due to poor copies
- Other (please specify)

39. Was your complaint handled in a timely way?

- Yes
- No

40. How would you rate the effectiveness of the complaint process?

- Extremely effective
- Very effective
- Somewhat effective
- Not so effective
- Not at all effective

41. How would you describe your interactions with the investigator handling your complaint?

- Extremely helpful
- Very helpful
- Somewhat helpful
- Not so helpful

Not at all helpful

42. The federal government has proposed changes to the Access to Information Act through Bill C-58, which is currently being reviewed by the Senate. Are you familiar with the bill?

Yes

No

43. Have you ever participated in discussions about or been involved in access to information reform?

Yes

No

If so, please describe your involvement.

44. What would you do to improve the current ATI system?

45. Please add anything that you feel is important or that we may have missed, including any thoughts about non-federal access to information processes.

46. Would you agree to being contacted with follow-up questions?

Yes

No