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.

<u>Recommendation</u>:

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 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 information[1].

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.

<u>The Uniqueness of First Nations Interests</u>:

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 Crown[2].

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 them[4].

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 6[5]:

> *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*)