

Legal Review of Bill C-58

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

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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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