

**Submission to the Senate Committee on Legal and Constitutional Affairs
Regarding the Review of Bill C-58
Submitted by the British Columbia Specific Claims Working Group
November 30, 2018**

About the British Columbia Specific Claims Working Group/Union of BC Indian Chiefs

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 Union of BC Indian Chiefs (UBCIC) is a not-for-profit organization that supports Indigenous Nations in asserting and implementing their Indigenous title, rights, treaty rights, and right of self-determination as peoples. We are directed by the resolutions from our Chiefs Council meetings and Annual General Assemblies, at which representatives of our approximately 120 member Nations gather.

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. Throughout our work, we emphasize the historical uniqueness of colonization in BC and the need for a process that addresses the distinctive challenges of claims resolution in this province.

Finding a process that works for the claims of BC Nations is essential, as unresolved claims have real, ongoing impacts on communities. The BCSCWG is committed to working with Indigenous Nations, partner organizations, and government to advance the just and timely resolution of specific claims, particularly in BC.

Policy advisors, analysts, and research staff working on behalf of Indigenous communities in BC to resolve specific claims regularly rely upon Canada's *Access to Information Act* and associated regulations and procedures to obtain necessary records from Canadian public bodies in the course of their work. As such, the BCSCWG advocates at the federal and provincial levels to ensure government transparency and accountability and to remove existing barriers to Indigenous peoples' access to information.

The Unique Impacts of Access to Information on Indigenous Peoples

The right to knowledge via access to information is integral to Indigenous peoples' pursuit of justice – to seeking justice for Indigenous women, children, and families; securing safe drinking water and housing in our communities; and exercising our jurisdiction over our lands and natural resources.

The right to know and access to information are also fundamental components of Indigenous peoples' efforts to resolve historical land rights grievances, such as specific claims. 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 related to Canada's failure to reserve village sites or protect reserve lands, fishing sites, gravesites and other sacred lands, and water rights. Indigenous people's right to redress for these historical wrongs is articulated in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).¹

Because Indigenous Nations are required to produce a wide range of government records to substantiate their land claims and historical land-related grievances against the federal Crown, access to information has direct impacts on the ability of Nations to seek justice through government mechanisms for redress for the

¹ United Nations General Assembly, Article 8.2(b), *United Nations Declaration on the Rights of Indigenous Peoples*, September 13, 2007.

dispossession of lands and resources. Fair and equal access to information is an essential part of any effective mechanism for redress. The importance of disclosing records to Indigenous communities for legitimating these grievances 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.²

However, Canada also controls access to the majority of documentary evidence necessary for substantiating Indigenous peoples' claims which is in the possession of federal departments, such as Crown-Indigenous Relations and Northern Affairs (CIRNA). Canada is in a clear conflict of interest since it is able to control what information is available in claims against it.³ 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.

Current Barriers to Access to Information Faced by Indigenous Peoples

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 (see Appendix 1 for examples):

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. A recent survey of Indigenous users of federal Access to Information procedures showed the following⁴:
 - 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

² 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>

³ 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.

⁴ Online survey conducted by the Union of BC Indian Chiefs, Help Protect Indigenous Information Rights, launched in September and October 2018:

(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 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.
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.
5. **Inadequate resourcing and training of information management analysts,** leading to inappropriate and inconsistent applications of the exemptions under the Act and delay.

New Barriers Introduced Through Bill C-58

The BCSCWG has reviewed the legal analysis of Bill C-58 conducted by First Peoples Law (FPL) in October 2018. We note that this analysis 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 and will hinder efforts by Canada to meet the minimum standards for redress for historical wrongs articulated in the UNDRIP, contrary to its international obligations and domestic commitments.

The FPL 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)⁵. 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 concerns⁶.

The FPL 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 future⁷.

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 this⁸.

Lack of Consultation on Access to Information Reform

Article 19 of the UNDRIP 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,

⁵ First Peoples Law, *Legal Review of Bill C-58*, October 25, 2018, p. 8.

⁶ Ibid, pp. 8-10.

⁷ Ibid, pp. 10-11.

⁸ Ibid, pp. 11-12.

prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”⁹

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 UNDRIP.

Any attempt to change Access to Information legislation will have a unique impact on Indigenous Nations. 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 UNDRIP. These guiding principles are not just future outcomes of some consultative process but must be built into these processes from the start.

Recommendations:

1. That the Senate Committee does not pass Bill C-58 as currently drafted and that the Government of Canada 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 enhanced and Indigenous Nations’ rights (especially the rights to joint oversight, access to justice and redress for past wrongs) are implemented, as per the UNDRIP and the federal government’s commitments to Crown-Indigenous reconciliation.
2. If the complete withdrawal of Bill C-58 is not possible, then the BCSCWG fully endorses and insists that your government act upon the concrete recommendations of Indigenous Nations and organizations on matters of fundamental concern to our communities as articulated in the following (see Appendix 2):
 - a. Legal Review of Bill C-58 conducted by First Peoples Law, October 25, 2018
 - b. Indigenous Bar Association’s Submission to the Senate Committee on Legal and Constitutional Affairs (SCLCA), November 1, 2018
 - c. National Claims Research Directors’ Submission to the SCLCA, November 1, 2018

⁹ United Nations General Assembly, Article 19, *United Nations Declaration on the Rights of Indigenous Peoples*, September 13, 2007.