

The Right of Redress

Bill C-58 and Barriers to Access for Information for Resolution of First Nations' Claims, Disputes, and Grievances

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About the National Claims Research Directors

- The National Claims Research Directors represent a group of Claims Research Units (CRUs), Tribal Councils, individual First Nations, and other First Nations organizations from across Canada.
- We are mandated by First Nations to document and develop evidence related to their history, claims, disputes, and grievances for the purpose of Specific claims, Aboriginal title & rights, and other matters.
- We submit hundreds of ATIP requests (as well as dozens of follow-up complaints to the Office of the Information Commissioner) each year. We know from experience what will facilitate—or hinder—access to information.

Our interests in accessing federal records

1. The majority of evidence related to land claims, historical claims, and disputes with Canada is in the possession of the federal government. First Nations are in a vulnerable position, and the government is in a potential conflict of interest (being able to control what information is made available in claims against Canada).
 - Paragraph 8(2)k of the Privacy Act: [Subject to any other Act of Parliament, 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.”
2. First Nations also access federal records for public policy purposes, to obtain access to information directly affecting their political, social, economic, and cultural interest.
 - FOR EXAMPLE: Between February 2015 and June 2016, Claims research directors submitted 37 ATIP requests and 9 complaints to the Office of the Information Commissioner—*just with respect to specific claims policies and procedures*.

NCRD concerns re: Bill C-58

- We are opposed to Bill C-58, which will install significant new barriers for First Nations and organizations trying to access information for land claims and other purposes.
- The bill will hinder efforts by Canada to meet the standards of redress for historical wrongs articulated in the United Nations Declaration of the Rights of Indigenous Peoples and it violates principles 3 and 10 of the “Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples” announced by Minister Wilson-Raybould in July 2017—these are the principles of good faith dealings and engagement with First Nations.
- Some of the biggest problems we face with access to information stem from the lack of effective systems within departments, and the behaviour of the officials who review our informal and formal requests. Bill C-58 will provide officials with more tools to frustrate our efforts to obtain evidence. It’s not clear to us that the Bill will do anything to really change their behaviour, or fix the systemic problems with ATI within departments.

About this presentation

- In this presentation, I outline a bit of the history of our engagement with this process and make clear our concerns and our recommendations for this bill and for ATIP legislation going forward.

Background: Rolling Back the Rights of Access

From informal to formal requests

- Since 1982, various agencies have installed special measures to facilitate ease of access to federal records for First Nations’ claims.
- The rule of thumb is that the majority of requests should be informal; formal requests are needed only in special circumstances.
- However, over the years we have seen a gradual rolling back of access through arbitrary measures that restrict First Nations from obtaining information to which they have a right.

June 2016 submission to the Committee

- In this submission, we expressed hopefulness at (a) the mandate letters that went to ministers regarding the prioritization of Indigenous-Crown relations, and (b) the Treasury Board’s Interim Directive on the Administration of the Access to Information Act, announced on May 5, 2016.
- We identified current barriers, including the movement toward requiring formal requests, inefficiencies and lengthy timelines, overly broad interpretation and

application of exemptions, incomplete responses, increased bureaucracy, and lack of consultation.

- **Recommendations:**
 1. Consult: We called for an end to the arbitrary and unilateral measures imposed across government.
 2. Provide adequate resources: Some access to information problems arose from the fact that there were too few staff to process requests.
 3. Train staff: Many people who process requests have little or no knowledge of what is required to document First Nations' claims.
 4. Decentralize and encourage human contact: Centralization would install many new barriers. We wrote that the TBS suggestion to create a simple, central website for all ATIP requests would "be a disaster for us."
 5. Disallow ministerial veto for the powers of the Information Commissioner: This defeats the purpose of having a commissioner and allows Ministers to potentially abuse their powers, with prejudice to First Nations.
 6. Implement the other recommendations of the Information Commissioner regarding legislative reform.
- We were not contacted about our submission, and none of these recommendations was addressed by Bill C-58
- We understand that this 2016 submission has been formally taken as evidence by the committee. It is an important reference point.

October 2017 submission to the Committee

- Our October 2017 submission reflects the view of 22 claims research units representing hundreds of claims across Canada and has been endorsed by over seventy First Nations and Tribal Councils, as well as Indigenous National and regional organisations and by like-minded organizations and representatives.
- We restated the uniqueness of First Nations' interests in relation to access to information and the deep concern about Canada's conflict of interest.
- We have not had the time or resources to do a complete assessment of Bill C-58 – we have only focussed on Section 6 because it appeared to be the most egregious. As for the rest of the Bill, we have endorsed the recommendations made by the Information Commissioner in her September 2017 report.

Concerns with Bill C-58

- Bill C-58 was created unilaterally, without any effort to consult First Nations. The TBS was in communication with us only to inform us of what Canada had singlehandedly decided.
- Bill C-58 ignores the Crown's duty to disclose records to First Nations and instead provides many new ways for officials to delay or deny information access – not just for claims, but for matters that are integral to First Nation governance

- Bill C-58 will create many new challenges to information access for First Nations and the claims research community that work on behalf of First Nations.
- Section 6 of Bill C-58:
 - provides legislative justification for suppression of evidence required to document First Nations' claims, disputes and grievances.
 - is far too prescriptive regarding subject matter, type of record, and the time period of request, and will give officials license to delay or deny legitimate requests.
 - When researchers are starting a claim, initial requests for information will often need to be broad and general.
 - INAC does not provide finding aids or access to its file organizational structure or allow First Nations to search for themselves. We are dependent on the discretion of officials.
 - provides too many reasons for officials to decline to act on ATIP requests. Particularly problematic is the idea that officials could decline a secondary request if an initial one was unsatisfactory.
 - does nothing to address the conflict of interest whereby federal officials are in a position to deny access to the evidence needed to prove claims against the federal government

RECOMMENDATIONS

Recommendations on Bill C-58

1. Immediate withdrawal of Bill C-58
2. Proper consideration of the unique position of First Nations with respect to rights of access, and the Crown's duty to disclose
3. Full and meaningful consultation with First Nations and Claims Research Units across Canada

Recommendations for ATIP reform

1. Adopt the Information Commissioner's recommendations of September 2017
2. Establish ongoing mechanisms of consultation and engagement with First Nations and the claims research community.
3. Prioritize removing barriers to informal access of records – i.e. systematically roll back the “creeping stonewall” that has been triggering more and more formal requests
4. Adequate training and resourcing to process formal and informal ATI requests
5. Behavioural change within Departments and federal agencies: Apply principles of good faith, and the spirit of redress and reconciliation, to facilitate First Nations' access to records for the purposes of documenting claims, disputes, and grievances.