Full Disclosure:

Canada's Conflict of Interest in Controlling First Nations' Access to Information

A Discussion Paper Respecting the One Year Review of the *Access to Information Act*, and the Modernization of the *Privacy Act*

National Claims Research Directors and Union of BC Indian Chiefs

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INTRODUCTION

Specific claims are historical grievances brought against the federal government by First Nations when Canada fails to fulfill its lawful obligations as set out in statutes, treaties, agreements, or the Crown's reserve creation policies. The historical actions illegally undertaken by colonial governments and successive governments of Canada have resulted in First Nations' widespread dispossession of their reserve lands, villages, fishing areas, burial and other sacred sites, as well as access to water and other resources. There are hundreds of unresolved claims in Canada that continue to impact First Nations economically, socially, and culturally.

In 2016, when the Office of the Auditor General was conducting its audit of Indigenous and Northern Affairs Canada's management of the resolution of First Nations' specific claims, the auditor conducted a series of interviews with directors of Claims Research Units across the country to ascertain their views on the fairness and effectiveness of the federal government's claims resolution policy and process. Research directors, responsible for advancing hundreds of claims on behalf of First Nations, were asked to explain to the auditor how specific claims are researched. When they outlined the research process and explained the need to go through formal and informal access to information processes[1] to obtain copies of the hundreds, sometimes thousands of government-held documents needed to support a First Nation's claim allegation, the auditor interjected, asking why First Nations specific claims researchers had to go through formal access to information processes to obtain historical records they needed to substantiate their claims against the federal government.

This discussion paper proceeds on the basis that Canada's information management regime – the *Access to Information Act*, the *Privacy Act*, and their respective regulatory and procedural mechanisms – is neither adequate nor appropriate to upholding and implementing First Nations' right of redress for historical grievances against the federal government and impedes their access to justice. This determination is made on the basis of foundational, legally supported human rights principles and Canada's public commitment to prioritize reconciliation with Indigenous peoples and uphold the honour of the Crown. Canada's conflict of interest in managing and assessing claims against itself extends to its control over access to information First Nations legally require in order to resolve their claims. Survey and interview responses by First Nations claims researchers across the country identify a myriad of systemic problems with Canada's processes for accessing information held by the federal government. Claims researchers repeatedly cite as barriers to justice Canada's conflict of interest in controlling access to records required by First Nations to provide evidence of Canada's historical wrongdoing, as well as longstanding and systemic issues with obtaining timely and complete

[1] "Access to information" describes a legal right of access to information held by government departments and other public bodies. In Canada, formal requests for government information may be made under the federal Access to Information Act. Indigenous researchers rely heavily on both formal and informal access to information procedures to access federal government records." National Claims Research Directors and Union of BC Indian Chiefs, *The Impacts of Bill C-58 on First Nations' Access to Information: A Discussion Paper Following the Review of Bill C-58 by the Senate Committee on Legal and Constitutional Affairs*, March 20, 2019.

access to information. According to claims researchers, legislative and administrative remedies are ineffective and indicate a need for independent oversight and dedicated staff who understand the reconciliatory imperative of resolving First Nations' historical claims in the short term. Overall, there must be a new system of information management developed in full partnership with First Nations so that their right of redress is upheld and full access to justice is ensured.

About the Authors

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

Union of British Columbia Indian Chiefs (UBCIC) is a not-for-profit organization that supports First Nations in asserting and implementing their inherent Title and Rights, Treaty Rights, and Right of Self-Determination as peoples. The UBCIC is also an NGO in Special Consultative Status with the Economic and Social Council of the United Nations. Through the **British Columbia Specific Claims Working Group (BCSCWG)**, we advocate for the fair and just resolution of specific claims arising in BC and advancing specific claims as a national political priority. Working in ongoing dialogue with First Nations, claims research units, legal counsel, and others, we hold Canada accountable for changes to policy and practices and advocate for systemic reform to uphold the rights of First Nations as articulated in the *United Nations Declaration on the Rights of Indigenous Peoples* (UN Declaration). The UBCIC's research staff rely upon federal access to information mechanisms to obtain necessary records from public bodies in the course of their work on behalf of First Nations in BC. The UBCIC advocates at the federal and provincial levels to ensure government transparency and accountability and to remove existing barriers to First Nations' access to information.

First Nations Claims Research Unit (CRU)-Canada Working Group on Access to Information was formed in 2016 to address barriers faced by First Nations specific claims researchers across Canada in obtaining records from government departments through formal and informal access to information mechanisms at Crown-Indigenous Relations and Northern Affairs Canada. The First Nations CRU side of this working group has provided guidance and technical support to this project.

Methodology

This discussion paper is the culmination of the results of a national user survey, legal reviews of the *Access to Information Act* since the passing of Bill C-58 and the *Privacy Act,* reviews of existing documents, submissions, and reports, and case studies via in-depth interviews related to First Nations requestors' experiences obtaining records for the purposes of substantiating historical claims against Canada. This discussion paper also considered existing reports, presentations and documents related to access to information. The overarching objective of these activities is to inform sustained and substantive engagement between First Nations claims practitioners and Canada to address information rights, privacy, and the regulatory regimes around the federal *Access to Information* and *Privacy Acts*.

About the Survey

The 2022 *National Survey for Claims Researchers on Access to Information and the Privacy Act* was launched in mid-July 2022 and closed on September 15, 2022 (see Appendix A). This survey sought to gather information from First Nations researchers and assess their experiences with access to information processes, as well as their information needs and challenges. The survey consisted of 51 questions pertaining to both formal access to information procedures (written requests for records made under the federal *Access to Information Act*) as well as informal access requests (requests for records made without going through the Act, usually as a first course of action to obtain records, occasionally in accordance with the terms of a prior agreement between the requester and a public body, such as between First Nations and CIRNAC). The survey also included questions related to the *Privacy Act*, communication and engagement.

Questions were structed both as multiple choice and to elicit narrative responses and provided respondents with opportunities to share their experiences beyond the narrow frame of the particular questions posed. These narrative answers garnered rich responses and case studies, demonstrating the extensive frustrations and barriers to access that claims researchers experience on a regular basis.

Survey Response and Participation

The survey was distributed in French and English, via flyer at in-person meetings, mass email and personalized emails, social media and UBCIC's website, by fax to remote First Nations, and by word-of-mouth between researchers and Research Directors. Participation was significant, with a total of 33 participants from across all regions of Canada representing work on hundreds of specific claims. Overall participation increased by 50 percent over our 2018 survey.

All respondents had familiarity with filing access to information requests and file an average of five formal or informal requests annually. Some individuals file only one per year, others up to 30 annually. Informal requests are most often made by phone or email. Requests are primarily made to Crown-Indigenous Relations and Northern Affairs, Library and Archives Canada, and

Indigenous Services Canada. Respondents are seeking files that cover a wide time range, from pre-1930 till the present day.

FOUNDATIONAL PRINCIPLES TO ENSURE FIRST NATIONS' ACCESS TO JUSTICE

Our discussion of Canada's information management regime and how access to information and privacy mechanisms impact First Nations claims researchers' full access to justice is founded upon the following principles:

1. First Nations' human rights must be fully upheld
2. Canada's reconciliatory mandate must be an actionable priority
3. First Nations have unique information rights
4. Full access to information is an integral component of the specific claims resolution process
5. Canada must uphold the honour of the Crown

Principle 1: First Nations' human rights must be fully upheld

On June 21, 2021, the *United Nations Declaration on the Rights of Indigenous Peoples Act* (UN Declaration Act) received royal assent and came into force in Canada and as such all necessary measures must be taken to ensure that the *UN Declaration on the Rights of Indigenous Peoples* (UN Declaration) is upheld and its objectives are met. The Prime Minister's December 16, 2021 mandate letters to ministers direct each of them to implement the UN Declaration and work in partnership with Indigenous peoples to advance their rights.

First Nations' right to redress for historical losses is articulated in article 28 of the UN Declaration:

> *1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.*
> *2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.*

Article 27 requires that processes of redress must be fair, independent, impartial, open, and transparent, and incorporate Indigenous laws and worldviews:

> *States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and*

> *adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.*

Article 40 articulates Indigenous peoples' right to effective and timely remedies:

> *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.*

Article 19 sets out the minimum standards states must meet in the development of all legislative, regulatory, and administrative regimes that affect First Nations:

> *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.*

Human rights principles such as self-determination, respect for First Nations rights and title holders, and obtaining First Nations' free, prior, and informed consent must be incorporated into and underpin all processes for developing, reviewing, and amending federal access to information and privacy legislation and associated regulatory and administrative processes.

Principle 2: Canada's reconciliatory mandate must be an actionable priority

Just and fair redress for historical losses is a legal right and a political imperative if Canada intends to move toward reconciliation with First Nations. Reconciliation has been deemed by the courts and all levels of government to be in the public interest and a political priority. The Department of Justice's 2018 *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples* recognizes that reconciliation is a fundamental purpose of section 35 of the Constitution Act, 1982, and should guide the transformation of the relationship between Indigenous peoples and the Crown, and guide the implementation of the UN Declaration.[2] The December 16, 2021 mandate letter from the Prime Minister to the Treasury Board President and the Minister of Justice underscores "the need to move faster on the path of reconciliation". Canada's access to information and privacy regimes, including all processes of review and reform, must align with Canada's explicit public reconciliatory objectives. Concrete actions to advance reconciliation must be taken in full partnership with First Nations, as per article 19 of the UN Declaration.

[2] Department of Justice Canada, *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*, 2018.

Principle 3: First Nations have unique information rights

First Nations have unique rights of data sovereignty that are supported by the UN Declaration and embedded within First Nations' laws, protocols, and governance structures. Rights of data sovereignty rest on principles of ownership, control, access, and possession,[3] and the decisions each Nation makes regarding their exercise and implementation.

While the full extent of First Nations' data sovereignty rights is beyond the scope of this discussion paper,[4] it is important to note that among the types of information included in the accepted definition of First Nations' data is information "[a]bout First Nations reserve and traditional lands, waters, resources, and the environment,"[5] much of which is held by federal government departments and essential for First Nations to substantiate historical grievances against Canada.

First Nations' right of data sovereignty conflicts with Canada's unilaterally controlled access to information and privacy regimes and the colonial systems they reinforce and perpetuate. The stated purpose of the *Access to Information 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."[6] Canada rationalizes public access to information in accordance with "the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently from government." The type of information that may be sought through access to information processes and is defined as "government information" under Canada's ownership, possession, and control.

Data sovereignty principles and the OCAP® principles highlight a gap in understanding between the *Access to Information Act's* stated purpose in assuming ownership over records pertaining to First Nations, and Canada's numerous and varied breaches of its legal obligations to First Nations. The vital importance of First Nations having access to historical records held by the federal government and their right to redress mean that First Nations have a unique interest and a unique right of access to information that is qualitatively different from that of a Canadian citizen.

A true Nation-to-Nation approach that upholds the rights of First Nations articulated in the UN Declaration demands that Canada recognize and respect First Nations' data sovereignty over their own records and facilitate full access to records held by the federal government and its agencies that First Nations are able to utilize as they deem necessary.

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[3] Defined by the FNIGC as OCAP® principles.

[4] Please see First Nations Information Governance Centre, *Exploration of the Impacts of Canada's Information Management Regime on First Nations' Data Sovereignty*, August 2022.

[5] Ibid, p. 8

[6] *Access to Information Act*, section 2.

Principle 4: Full access to information is an integral component of the specific claims resolution process

Full access to information is necessary for First Nations to participate in Canada's mechanisms of redress for the resolution of First Nations' historical claims. The federal specific claims process and Specific Claims Tribunal require First Nations to submit documentary evidence to support their claims.

Canada's *Specific Claims Policy and Process Guide* sets out strict requirements for filing a specific claim in "Annex A, Minimum Standard" (legislatively enforced through the *Specific Claims Tribunal Act*).[7] The "Minimum Standard for Kind of Information" requires a First Nation to submit an historical report and supporting documents (complete copies of primary documents and relevant excerpts of secondary documents) that substantiate a First Nation's allegations of Canada's wrongdoing laid out in the claim. A single claim often requires hundreds of evidentiary documents to substantiate an allegation. The "Minimum Standard for Form and Manner" requires supporting documents to be complete, as well as accurately and fully referenced. A claim will not be deemed officially filed by the Minister of Crown-Indigenous Relations unless the minimum standard is met, thereby excluding the claim from an assessment on its validity and acceptance for negotiation by Canada's Specific Claims Branch. Similarly, a claim that does not meet the minimum standard is excluded from adjudication at the Specific Claims Tribunal since to become eligible at the Tribunal, a claim must have first received an assessment from the Specific Claims Branch.

Since the majority of documents required to support First Nations' historical grievances are in the possession and control of federal government institutions, First Nations must have full access to this information in order to participate fully and fairly in processes to resolve specific claims.

Principle 5: Canada must uphold the honour of the Crown

The Supreme Court of Canada, in its 2004 decision in *Haida*, has stressed the Crown's obligation to act honourably in the resolution of claims:

> *In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve 'the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.*[8]

The notion that the Crown must act honourably in all its dealings with Indigenous peoples has been reiterated by the British Columbia Court of Appeal and the Specific Claims Tribunal.[9] Since

[7] The Minimum Standard is also set out as a requirement in section 16 of the federal *Specific Claims Tribunal Act*.
[8] 2004 SCC 73, cited in Alisa Lombard and Aubrey Charette, "Crown Honour and the SCT: Honourable Litigation?" prepared for the BC Specific Claims Working Group, September 13, 2018.
[9] Lombard and Charette, "Crown Honour and the SCT: Honourable Litigation?" prepared for the BC Specific Claims Working Group, September 13, 2018.

Crown honour extends to the resolution of claims, Canada must take all necessary steps to ensure that First Nations have complete and timely access to the information they require to resolve their claims. The Department of Justice's P*rinciples Respecting the Government of Canada's Relationship with Indigenous Peoples* acknowledges, "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."[10]

Specific claims rest on the whether Canada fulfilled its legal obligations to First Nations in the context of its fiduciary obligations, such as to protect First Nations' recognized interests in land, in the creation of Indian reserves, in seeking surrenders, or expropriating Indian reserve lands for a public purpose, in other words, preserving reserve lands and protect such lands and the First Nation from exploitation. The fiduciary nature of the historical relationship between First Nations and the Crown results in Canada's duty to fully disclose documents in its possession since they are in the interests of First Nations seeking resolution of their historical grievances.

CANADA'S CONFLICT OF INTEREST IN CONTROLLING ACCESS TO RECORDS IMPEDES FIRST NATIONS'ACCESS TO JUSTICE

Specific claims arise when Canada fails to fulfill its legal obligations to First Nations. Canada's specific claims policy requires First Nations to substantiate their historical claims with documentary evidence. The majority of the historical evidence First Nations require to support their claims is controlled by Canada in federal government institutions. Since Canada controls access to the evidence First Nations require to substantiate their historical claims against the Crown through the *Access to Information Act* and the *Privacy Act*, it is in an unfair and untenable conflict of interest.

Canada's conflict of interest in controlling access to records First Nations must obtain to support their claims against the Crown is an extension of the conflict of interest inherent in the specific claims process itself. For decades First Nations have advocated unequivocally for a fully independent specific claims resolution process that fully eliminates Canada's conflict of interest from all parts of the process. This includes its control of the funding, management and assessment of claims made against it, its control over access to the documentary evidence required to support claims, and its reliance solely on Canada's system of common and civil law used to assess and adjudicate claims.

In our 2019 discussion paper on the impacts on First Nations of Bill C-58, we highlighted Canada's conflict of interest in controlling access to information held by federal institutions that First Nations require to support the fair resolution of their claims. The First Nations Information Governance Centre recognizes that in reconceptualizing information management in Canada to

[10] Department of Justice, *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*, 2018

include data sovereignty, Canada must give "due regard to the Crown's position as potential adversary in First Nations claims against the Crown and facilitate free, liberal, and timely access to data for claims research."[11] Canada's conflict of interest is the overarching barrier to First Nations' full and equitable access to justice, violates the human rights principles articulated in the UN Declaration, obstructs reconciliation based on trust and mutual respect between sovereign, self-determining Nations, and renders the "honour of the Crown" a duplicitous trope.

In their survey responses and comments, First Nations researchers overwhelmingly identify Canada's conflict of interest as a significant barrier to receiving information through federal access to information mechanisms. Survey responses reveal acute concerns from the First Nations claims community that Canada is in an inherent conflict of interest in managing access to information requests and determining what information is disclosed to a requesting First Nation. Those concerns arise in part from Canada's overly zealous and inconsistent application of statutory exemptions, but also because Canada unilaterally determines the relevance of requested documents without the need to provide justification to the requestor on documents which are not disclosed because Canada deems them irrelevant. Relevance must be determined by the researcher investigating the nature of a First Nation's allegation of historical wrongdoing by Canada, rather than the party alleged to have committed the wrongdoing.

Claims researchers also cite the documented departmental practice whereby Crown-Indigenous Relations retains records deemed to have "business value to the department" instead of transferring them to Library and Archives Canada. What "business value" actually entails has never been explained by the department. Consequently, tens of thousands of boxes of records remain at department offices or warehouses, compromising the physical integrity of the materials and First Nations' access to a complete historical record.

A majority of respondents stated that they were not confident that the government had provided them with the full extent of the document package or existing information pertaining to their request and linked it directly to Canada's control of the process, stating that releasing all records "is not in the gov's best interest", that "[t]he more sensitive the topic, the less confident I am that I'll be seeing everything I should be seeing", or "[w]hen you submit a request that spans over several years, but you only get a few pages back, it just feels suspect". One respondent emphatically stated, "relying on the Crown to do the right thing [is] not wise in my experience." Since Canada decides what to release regarding records in legal claims made against itself, First Nations are systemically disadvantaged in terms of equality and fairness in accessing justice.

Overwhelmingly, survey respondents expressed frustration with Canada's control over the information needed to support claims. As one interviewee stated,

[11] First Nations Information Governance Centre, "Exploration of the impact of Canada's information management regime on First Nations Data," August 2022.

> *We don't even know the full extent of what they have. Even trying to discover that is a major problem. We have to completely rely on the government to disclose what records they have to begin with and they've proven time and again that they can't be trusted to disclose everything. The process is based on trust, which is ironic because specific claims are all about Canada's dishonourable conduct.*

Recent cases involving the Crown's disclosure of documents in a high value claim give no reason to be confident that the Canada will act honourably. In a case before the Canadian Human Rights Tribunal in *First Nations Child Caring Society v. Canada*, Canada knowingly failed to disclose over 90,000 relevant documents to the complainant, many of which were prejudicial to its case, causing significant costs and protracted delay.[12] Further, the Crown was found to have inappropriately interpreted the exemptions to disclosure under the *Access to Information Act*, resulting in the redaction of relevant information not subject to proper exemption. The disclosure regime largely relies on the Crown's honour to disclose fully and exempt lawfully.

Political and legal frameworks adopted by Canada now mandate fair, independent, transparent, and open mechanisms of redress for First Nations' historical land-related losses. Canada is presently engaged with the Assembly of First Nations and First Nations representatives to jointly develop a new independent institutional body to manage and assess claims in accordance with the human rights standards articulated in the UN Declaration. Access to information must be a key component of that initiative to ensure First Nations' full access to justice for the resolution of their specific claims.

SYSTEMIC PROBLEMS WITH ACCESS TO INFORMATION PROCESSES

In our survey, First Nations researchers cited significant systemic problems with federal access to information processes that create barriers to receiving the information they require to support their specific claims. These barriers are consistent with those identified by the NCRD in 2019 and include prolonged, unreasonable, and costly delays receiving records, as well as delays receiving clear communication regarding the status of filed requests. Survey respondents also highlighted the overly broad and inconsistently applied exemptions by Canada's access to information analysts, and excessively redacted documents compromising their ability to obtain the full extent of existing information to support First Nations' claims. Claims researchers also report a deterioration in the system overall since the beginning of the COVID pandemic. The systemic problems highlighted by claims researchers contravene the legally supported principles to ensure full access to justice for First Nations.

Prolonged and unreasonable delays receiving responses and records

The Treasury Board of Canada's website outlines relevant legislative timelines for government institutions to respond to information requests in both the *Access to Information Act* and the *Privacy Act*. The website also takes steps to manage public expectations about Canada's ability

[12] *First Nations Child and Family Caring Society of Canada et al v Canada*, 2019 CHRT 1.

to meet legislative timelines by highlighting the legislative grounds for an extension for the government to respond to requests:

> *Government institutions have 30 days to respond to an access to information request or a request for personal information. The institution may be able to process your request more quickly if your request is more specific and detailed.*
>
> *For a request made under the Access to Information Act, an extension beyond the original 30 days may be taken if the request involves a large number of records, or if consultations with other government institutions or third parties are necessary because the records include information provided by them. If an extension is required, you will be notified within the first 30 days and told the reason why more time is needed.*
>
> *For a request for personal information made under the Privacy Act, government institutions may take an extension of up to 30 additional days if meeting the 30-day deadline would unreasonably interfere with the operation of the government institution, or consultations with other government institutions or third parties are required. If an extension is required, you will be notified within the first 30 days and told the reason why more time is needed.*[13]

Extensive delays are, in fact, the norm for First Nations claims researchers, who are required, due to the complex and historical nature of specific claims, to make multiple requests for access to large volumes of records that span lengthy time periods – often decades, if not timeframes exceeding one hundred years or more. For example, a researcher may be seeking records that date from the 1910s or earlier due to the historical nature of the grievance being investigated. Many of these records are actively held by federal government departments, such as Crown-Indigenous Relations, rather than Library and Archives Canada, since they are deemed to have ongoing "business value to the department".[14] As a result, federal departments often have large volumes of records pertaining to requests for records and that must be reviewed. Faced with such large volumes of records, analysts routinely ask claims researchers to significantly narrow the scope of their requests to mitigate delay. However, it is antithetical to a claim researcher's purpose to require them to narrow the scope of their requests. Testifying before the Senate Committee regarding Bill C-58, former Chair of the Indian Specific Claims Commission Senator Renée Dupuis stated:

> *…the system does not work well. In terms of the access to information system or a preliminary request, people may have an idea what they are looking for, but do not know what the record actually contains. That is very difficult to predict, and the answer in some cases is that the record is too voluminous. This is not a satisfactory way for the*

[13] https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/how-access-information-personal-information-requests-wor. k.html, Accessed October 21, 2022.
[14] We raised this issue in our 2019 submission on Bill C-58. This message was communicated by Pierre Desroches, then Director, Corporate Information Management Directorate, CIRNAC and ISC (Indigenous Services Canada), in an email to Jody Woods, UBCIC Research Director, September 6, 2018.

> *government to fulfill its legal obligations. Moreover, it leaves the First Nation entirely at the government's mercy.*[15]

Meaning of the 30-day response time

Regarding the legislated 30-day response time set out in section 7 of the *Access to Information Act*, half of our survey respondents stated that they typically received a notice acknowledging their request beyond 30 days. Those respondents who received responses to their request within the 30-day legislated timeframe report that the responses received are often simple acknowledgements without any detailed information, that is, "confirmation emails, without any indication of a decision." Other respondents stated the norm is they receive no response unless they repeatedly follow up on requests, remarking, "Several times I've filed a request and not heard back at all until following up via e-mail over 45 days later."

Overwhelmingly, respondents reported that Canada interprets its legislated 30-day timeframe as a deadline to acknowledge receipt of an access to information request, rather than a deadline to produce the requested records. One researcher stated, "I've heard back within 30 days but then not heard back about the status of my request for over four months, at which point I was told that staff were beginning to process my request." Many respondents also commented on the slippery definition of the 30-day response time. As one survey respondent remarked:

> *30 day response time? I don't even know what that means. It can't mean the timeline within which Canada is supposed to provide records. Or else I would receive all my records within 30 days of my request. But that's what Canada's website states. What it seems to mean from my perspective is that departments send us an email within 30 days saying they received our request and usually tell us it's going take way longer than 30 days.*

Extensions are the norm due to structural shortcomings

Section 9 of the *Access to Information Act* allows government institutions to extend the 30-day time limit in some circumstances. A majority of researchers surveyed reported that extensions were the norm, with over one-third of respondents stating they failed to receive any notification pertaining to the extension at all. Many respondents state they must undertake significant follow-up to receive a response: "More than once I have received no response until I send multiple follow-up e-mails. I generally don't expect to hear back regarding an ATIP request for six months." Of those researchers who indicated that an extension had been taken to fulfill their request, nearly 60 percent reported that the extension was not met. When asked for details on notifications on further extensions, one researcher reported, "I have been told there will be an extension on the extension."

[15] Senator Renée Dupuis testimony to the Senate Committee on Legal and Constitutional Affairs, November 8, 2018.

A majority of researchers reported it routinely takes more than 90 days from the date of submitting a request to receive any records at all, while several researchers stated that it takes far longer to receive records. One survey respondent described their overall experience: “I have found that it generally takes 3-9 months to receive records after making a request. I have never received a request within 30 days.” Another commented that one request “was delayed 210 days. I made a note of when the date would be and made sure to email them back near that date. I then got a poorly copied pdf that was completely useless the day before my 210 days would have been up. This was later remedied but it should never have taken that long.” This is not an anomaly. As one claims researcher stated, “The time involved from start to finish for an ATI request can be years at the worst, certainly months waiting for processing, then months waiting for docs to be copied and mailed. Sometimes claims have to go ahead without this potentially corroborating information.” Several researchers have reported to us during interviews that they are still waiting on responses to access to information requests that they filed in 2019.

When claims researcher were asked to cite the reasons they were given by information analysts explaining the need for a time extension, the majority reported that time extensions were due to “departmental impacts because of COVID”, “understaffing resulting in an inability to deal with the large volume of requests”, “interference with government operations”, and that “the system is overwhelmed.” Several analysts blamed the broad nature of the access to information request itself, and said that without significantly narrowing the scope of the request, they didn’t know if or when it could be fulfilled. One-third of respondents were told by information analysts that delays were due to difficulty obtaining responses from government agencies involved, referencing the internal processes by which access to information analysts obtain records from departmental officials. According to one researcher, an information manager at one government department stated candidly that the access to information system was not designed to handle the volume of requests that are submitted now on a regular basis and protracted delays are unavoidable.

Costs associated with delays receiving records

Many claims researchers note that the extensive delays receiving responses to their access to information requests result in financial burdens for their organizations or individual First Nations. As one survey respondent stated, “Time consumed by constant back and forth with officials…squeezes time and resources from underfunded First Nation organizations.” Another referred to the impacts of delays on staffing costs: “Due to delays and roadblocks, we face additional delay-related costs to manage the processing of information requests regularly. We often have to "chase" departments for updates on our requests or remind them they exist!”

Other representatives of claim research units highlighted the potential punitive impacts on their annual funding allocations due to failures to meet projected work plan timelines as a result of delays receiving necessary records to develop claims. “We’re always asked by our funders to show that claim development is progressing and there is always a fear that if a claim is stalled because of long delays getting documents, they may curtail our funding.”

Prolonged systemic delays contravene principles that ensure First Nations' access to justice

The prolonged, unreasonable, and systemic delays receiving responses to access to information requests contravene the principles outlined above that must be upheld to ensure First Nations have full access to justice for historical grievances. Since access to information is an integral part of the specific claims process, the rampant delays described by claims researchers jeopardize First Nations' ability to access and participate in mechanisms of redress, as is their right under article 28 of the UN Declaration. The extent and nature of the delays receiving records contravenes First Nations' right to a timely remedy as set out in article 40. First Nations' right to a "fair, independent, impartial, open, and transparent" process of redress as articulated in article 27 is also breached since Canada's representatives at the Specific Claims Branch and Department of Justice are not subject to the same delays in obtaining federally held records they require to assess First Nations' claims and conduct their own research. The delays First Nations experience receiving records they require as evidence for their claims undermines data sovereignty principles. Finally, the lack of clear and timely communication by Canada's representatives around access processes and delays compromises both the honour of the Crown and reconciliation as First Nations' distrust that they are being treated fairly.

Overly broad and inconsistently applied exemptions

Under the *Access to Information Act* federal government institutions have legislative authority to refuse to disclose information to requestors based on a number of criteria. The various criteria include records obtained in confidence from other governments, records related to international affairs, law enforcement and investigations, audits and investigations, safety of individuals, national economic interests, as well as personal and third party information, and information pertaining to government operations, a wide category that includes advice and solicitor-client privilege.

As was the case when we conducted our first survey in 2018, First Nations claims researchers report that sections 13 (government confidences), 19 (personal information), 20 (third party information), and 23 (solicitor-client privilege) are routinely invoked by Canada, even in cases where disclosure would not prejudice a third party or constitute an unreasonable invasion of privacy under the Act. They also report that the disclosure provision given to government institutions under section 8(2)(k) of the *Privacy Act*, which implicitly recognizes the resolution of First Nations claims and grievances as a matter of justice, often fails to yield the necessary disclosure of records.

The majority of our survey respondents state that they regularly have files redacted under sections 13, 19, 20, and 23 of the Act. They also report that the discretionary application of the Act leads to vast inconsistencies, the effects of which were summarized by one respondent in the following way:

> *Often the redacted material has been done by junior staff or interns who don't know what documents are publicly available. Often such documents are so heavily redacted that they are unusable. This can impact research significantly. There is always a lack of*

consistency - one time hardly anything is redacted, other times the whole document is blacked out. Researching with such documents as these is like doing a jigsaw with no edges or picture - time consuming and error producing.

Claims researchers also report that the discretionary and inconsistent application of exemptions under the Act result in 'gaps in the historical records and makes it difficult to substantiate allegations." A researcher's detailed explanation highlights the impacts of inconsistently applied exemptions and excessive redactions on their ability to adequate prepare the historical report required for filing a specific claim:

I have inherited thousands of pages of ATI'd records from past researchers on my claims. Redaction of records is extremely inconsistent from analyst to analyst. In some cases, it has rendered records completely unusable. At best, it often obfuscates key information. For example, the names of people can be important for tracing the history of particular parcels of land or issues. This is one of the most redacted things in ATI packages, and can be quite pointless because those names are then fully visible in open, unredacted records from that exact same time period. In other cases, entire documents are removed from a response package with minimal explanation. This creates significant and unknowable gaps in correspondence that either need to be re-requested (and hope you find a more sympathetic analyst) or simply can't be properly covered in your report.

Another researcher pointed to receiving generalized summaries indicating redactions without any precision or specificity. This has a direct impact on the researcher's ability to gain a full understanding of the historical events that contextualize and ground specific claims:

Often redactions are generally noted with the release letter so we don't see what records were actually held back. It can create gaps in our chronology without a way to explain it in our research reports.

Survey respondents also observed that redactions signal a discrepancy in access between First Nations claims researchers and Canada's employees tasked with conducting research on a claim after it has been submitted to the Specific Claims Branch of Crown-Indigenous Relations for assessment. One respondent commented, "I often wonder if these are [the] records that Canada finds that we didn't include in our research after the Claim is submitted." Another made the following observation:

After SCB reviews our specific claim submissions, they often turn up "new" documents – versions of which we had obtained through ATI but they were too heavily redacted to be of use. In the end, this means Canada has better access than we do to records that can support our historical claims. How is that fair or appropriate?

Survey respondents also report having to file separate access to information requests to individual government departments likely to be holding the same set of records in the hope of piecing together a complete picture based on inconsistently applied exemptions and

redactions. One researcher stated, “What we received in terms of redactions from each department was vastly different. And, in comparing it…we discovered the redactions made little sense and did not seem relevant to the sections of the Act that were cited.”

Several respondents also tied the issue of inconsistently applied exemptions to frustrations with delay, commenting that the need to make repeated applications to different departments in the hopes of obtaining complete records. They reported that this compounds the delays they experience with access to information processes as a whole.

Several respondents noted that when formal complaints are filed under the Act and are eventually investigated by the Office of the Information Commissioner, in almost all cases additional records are released. Claims researchers highlighted their lack of trust in the ability of information analysts tasked with reviewing their requests. As one researcher commented, “It shows that they don’t always apply the Act correctly and who knows what other information we’re missing as a result of that.”

Canada’s use of exemptions contravenes principles that ensure First Nations’ access to justice

Since First Nations are compelled to produce evidence-based historical reports to participate in processes of redress for their historical land claims and grievances against Canada, the above-noted challenges obtaining complete records are a substantial barrier to First Nations’ access to justice. The right to redress cannot be upheld if First Nations are prevented from accessing the entirely of records they are required to produce under the specific claims policy and the *Specific Claims Tribunal Act*. As First Nations claims researchers’ information requests are subject to exemptions under the Act, Canada’s comparative access to the full extent of records held by federal institutions contravenes article 27 of the UN Declaration, which sets out as a minimum standard that redress processes must be “fair, independent, impartial, open and transparent”. The relationship between Canada’s use of exemptions and delay also undermines First Nations’ right to timely and effective remedies (article 40).

Importantly, Canada’s failure to provide complete records when First Nations require them to support their historical claims wholly undermines First Nations’ full access to justice. The discretionary system of reviewing records for disclosure and applying exemptions to providing complete records to First Nations claims researchers creates a legislatively sanctioned unfairness since Canada’s agents decide what is released, to the detriment of First Nations seeking justice for their claims. Canada’s conflict of interest here is incontrovertible. Rather than asking First Nations to assume the honour of the Crown guides the discretion given to Canada’s agents to perform their tasks under the Act and apply exemptions only when necessary, Canada should uphold the honour of the Crown by recognizing its inherent conflict of interest and First Nations’ right of data sovereignty by facilitating full access to records required for substantiating claims.

AVAILABLE LEGISLATIVE AND ADMINISTRATIVE REMEDIES ARE INEFECTIVE

The legislative and administrative remedies enacted to date to assist First Nations claims researchers continue to be ineffective in ensuring full access to justice for First Nations in resolving their historical claims against Canada. Legislative initiatives, such as including provisions allowing the disclosure of personal information under the *Privacy Act*, provisions to file formal complaints under the *Access to Information Act*, and amendments to the *Access to Information Act* introduced under Bill C-58 have done little to ensure First Nations have access to the evidence they require to support their claims. The Department of Indian and Northern Affairs Canada's introduction of an informal access to information policy in 1999 to alleviate First Nations' need to go through formal and time-consuming access procedures when obtaining records from that department is ineffective. This is due to understaffing, poor communication, and an adversarial approach to implementation, resulting in non-disclosure of records, lengthy delay, lack of communication, and a lack of accountability.

Provisions for disclosure under the *Privacy Act*

Under section 8(2)(k) of the federal *Privacy Act*, personal information controlled by government institutions 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"*[16]

Claims researchers needing to apply – formally or informally – for access to records held by federal institutions such as Crown-Indigenous Relations and Library and Archives Canada must complete "8(2)(k) forms"[17] to gain access to records containing information deemed personal information under the *Privacy Act* and exempt from disclosure under the *Access to Information Act*. A band council resolution or letter of authorization from a First Nation must be included along with the 8(2)(k) form. Both the form and authorizing document must receive a signature of approval from the department's Director of Access to Information and Privacy.

Over one-third of our survey respondents reported having their 8(2)(k) forms or other supporting documentation challenged. One respondent commented, "I have had many issues getting 8(2)(k)'s accepted and approved. Trying to have multiple names of researchers on the form has been an issue." Researchers also report "major delays" as a result of having to have 8(2)(k) forms approved. Claims researchers completing formal undertakings under the provisions of 8(2)(j) of the *Privacy Act* report similar problems. Claims researchers also cite

[16] Canada, Privacy Act, available at https://laws-lois.justice.gc.ca/eng/ACTS/P-21/page-1.html#h-397260
[17] "Request for Personal Information by Aboriginal Claims Researchers Under Paragraph 8(2)(k)".

numerous instances where information analysts have rejected the validity of band council resolutions on the basis of an electoral change of leadership or expiry dates. Although these reasons have been demonstrated to have no basis in law, and were formally denounced by former Minister of Crown-Indigenous Relations, Carolyn Bennett, in February 2016, such assertions by Canada's information analysts persist. A majority of survey respondents report that the submission of the requisite forms still fails to yield the records they need.

Provisions for filing complaints under the *Access to Information Act*

While there exist provisions in the *Privacy Act* to enable the release of personal information to claims researchers, the only recourse for researchers to obtain information withheld under exemptions in the *Access to Information Act* for other purposes, such as information related to third parties, or solicitor-client privilege, is to file a formal complaint with the Office of the Information Commissioner. Sections 30 to 37 of the *Access to Information Act* set out the provisions related to the Information Commissioner's investigation of complaints.

Claims researchers reported on their experiences with the legislated complaints process. Most survey respondents filed complaints due to excessive redactions, while others filed complaints related to records held without legislative rationales, excessive delays receiving records, as well as receiving poor quality copies. Only two respondents found that the complaint process was "somewhat effective." The majority of respondents assessed the complaint process as ineffective and cited the lengthy delays in having an investigation opened. Several respondents noted that it took over three years to receive communication from the Office of the Information Commissioner that a file was being opened and their complaint assigned to an investigator. As one respondent wrote, "The timelines to have complaints addressed is years, so often useless for claims."

Amendments to the *Access to Information Act* introduced by Bill C-58

Bill C-58 introduced a series of changes to the *Access to Information Act*, notably granting the Information Commissioner the power to make binding decisions associated with access to information requests. Resulting orders may focus on the release of government records, time extensions, the language of access, and the format of disclosed information.[18] Due to the delay associated with the complaint process identified above, this change has had little impact on the ability of claims researchers to obtain the necessary records to substantiate First Nations' claims in a timely or effective way. Even if delay was not a factor, there is no guarantee that First Nations' right to information they require as evidence would be upheld.

Claims researchers note that new provisions in section 6 pertaining to information requests deemed vexatious, made in bad faith, or otherwise abuse the right of access, as well as provisions for proactive disclosure contained in sections 71 to 91 have not significantly increased the records which are being made available to them.

[18] These changes are reflected in section 36(1) of the Act.

Protocols to access information informally

In 1999, Indian and Northern Affairs Canada (INAC) and the First Nations claims research community worked in partnership to develop initiatives to facilitate informal access to records held by the department. The informal access process was developed in response to First Nations claims researchers' frustrations gaining timely and fair access to departmental records through formal access to information processes. A June 17, 1999 internal memorandum circulated by INAC to the department's assistant deputy ministers, directors general at all levels, and information managers affirmed INAC's commitment in "assisting First Nations with their claims research". The memo also affirmed that "First Nations have a right to information held by the department to validate their claims, disputes, and grievances." The memo summarized the requirements of First Nations researchers pertaining to accessing records held by the department in the context of First Nations' right to information:

> *First Nations researchers request numerous DIAND records on an ongoing basis and these requests ought to be processed informally. Only in exceptional circumstances would First Nations researchers resort to the formal ATIP process to access records.*[19]

The memo proceeds to outline several initiatives to facilitate informal access to records held by INAC, including the implementation of new procedures for departmental records and program staff at all levels, the development of an explanatory guide pertaining to the review of "sensitive" material, the development and distribution of a pamphlet[20] to assist First Nations claims researchers, the creation of a joint working group comprised of First Nations claims researchers as well as departmental records, claims, library, and ATIP staff to identify access issues as they arise, and plans to hold information sessions for departmental staff and First Nations claims researchers "to promote a better understanding of everyone's role in accessing departmental records." The memo concludes:

> File review is a program responsibility and this letter is intended to be our delegated authority to all DIAND staff to respond in a timely fashion to all informal requests for information. Because of the many steps involved to provide access to DIAND records, we are seeking Program staff's cooperation in respecting the two to three week time period to review files and identify material to be removed by Records staff.

While still recognizing the systemic unfairness due to the continuation of Canada's conflict of interest in controlling access to federally held records, claims researchers engaged in research activity in the early 2000s reported improvements in obtaining access to records held by INAC through this process. Since the introduction of Justice At Last[21] in 2007, claims researchers

[19] Indian and Northern Affairs Canada, "Requests for Records and File Review," June 17, 1999.
[20] *Native Claims Research Guidelines for Formal Access to Records*
[21] Canada's revised specific claims policy.

emphatically state that the situation has deteriorated, reaching a low point in 2015 that continues to the present day.[22]

In 2017, frustrated by the adversarial approach and non-cooperation of Crown-Indigenous Relations staff, First Nations claims researchers renewed the joint working group to address issues with the informal access to information process. However, according to claims researchers involved in the working group, discussions were often contentious and combative, with CIRNAC's representatives taking a proprietary, gatekeeping approach to records held by the department. The First Nations claims researchers involved in the working group provided feedback on a revised policy statement that reaffirmed the principles underlying the informal access process at CIRNAC. The policy statement also reiterated the recommended two-to-three-week timeline to review files, as well as provided input on procedures newly drafted by CIRNAC. However, implementation of the policy remains mired in delay, non-disclosure, and poor communication. Survey respondents report that this situation has been exacerbated due to the COVID-19 pandemic to the point of rendering the informal access process completely dysfunctional.

Survey respondents and interviewees describe how the informal access process is no longer an effective remedy for gaining full and timely access to records from CIRNAC. Researchers cited lengthy delays that rival the formal access to information process, with one survey respondent noting, "I have requests going back to 2018." Claims researchers commented on the absence of accountability and inconsistent applications of the informal access policy across regions. One interviewee stated, "[E]veryone has different experiences with how this policy is (or is not) applied." Many researchers reported being unaware of changes to procedures around informal access or being told about new requirements to forward 8(2)(k) applications to headquarters for authorization, a process that survey respondents say takes months to complete. As one interviewee stated, "Doesn't this kind of defeat the purpose of an informal process, if we have to get a signature from an ATIP official to formalize things?" Another remarked, "Only when I followed up after waiting months to receive a response to my informal request for a file list did I learn that this signature was a requirement. I wasn't notified and I'd still be waiting if I hadn't followed up."

In the meantime, claims researchers have been forced to rely on formal access to information mechanisms to obtain records from CIRNAC, which they say reflects a culture of indifference, secrecy, and non-disclosure which has yet to be dismantled or fully addressed.[23]

Available remedies fail to uphold principles that ensure First Nations' access to justice

Available legislative and administrative remedies enacted to date to assist First Nations claims researchers do not ensure full access to justice for First Nations in resolving their historical

[22] See National Claims Research Directors, 2017, "Impaired Access: Submission to the Standing Committee on Access to Information, Privacy and Ethics Regarding Bill C-58"
[23] National Claims Research Directors, 2017, "Impaired Access: Submission to the Standing Committee on Access to Information, Privacy and Ethics Regarding Bill C-58"

claims against Canada. Again, First Nations cannot exercise their right to redress for historical grievances if they cannot obtain the supporting evidence the process requires. Neither the legislative remedies under the *Privacy Act* or the *Access to Information Act* since the passing of Bill C-58 provides claims researchers with full access to the records they need. That Canada retains control over the documents, has full access, and the discretion to decide what may be disclosed to First Nations claims researchers contravenes First Nations' right to "a fair, independent, impartial, open and transparent process" as articulated in article 40 of the UN Declaration. It also contravenes rights to information and data sovereignty. Canada's implementation of the informal access process similarly fails to uphold First Nations' rights as well as the honour of the Crown since it prioritizes its own proprietary interests over principles of access to justice and the need to advance reconciliation through the fair and timely resolution of First Nations' historical claims.

ENGAGEMENT ON REFORM

Changes to Canada's information management regime, including changes to legislation, regulatory frameworks, and administrative procedures, will have a unique impact on First Nations' abilities to access and achieve justice for their historical grievances against the Crown. As such, all legislative, regulatory, and administrative reviews must make meaningful, direct dialogue with First Nations a priority. This work must be guided by transparency, due process, and full enactment of the government-to-government approaches articulated in the UN Declaration, which sets out in article 19:

> *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.*

This legally supported principle must be built into all processes from the beginning and continue for the duration.

The process of reforming the *Access to Information Act* through Bill C-58 which began in 2015 and ended with the bill receiving royal assent in June 2019 fell far short of the minimum standard of good faith consultation and cooperation and obtaining First Nations' free, prior, and informed consent articulated in the UN Declaration. The bill was created unilaterally without consultation or meaningful engagement with First Nations or their representative organizations. After significant advocacy efforts by First Nations claims researchers, their representative organizations were provided with support from Treasury Board to prepare a discussion paper on Bill C-58's effects on First Nations' access to information while the bill was with the Senate Committee tasked with its review. Treasury Board also assured First Nations claims researchers that substantive engagement with them would occur during the one-year review of the legislation.

In 2019, Justice Canada invited the NCRD to participate in a preliminary technical engagement to bring forward First Nations' issues and concerns to inform Canada's approach to reforming the *Privacy Act*. The NCRD made a submission to the technical engagement in November 2019 to initiate a process of substantive engagement between the Department of Justice and the NCRD related legislative reform.

While the COVID-19 pandemic necessitated extending timelines for the mandatory one-year legislative review of the *Access to Information Act*, we note that the NCRD has been reaching out to Treasury Board since 2020 to obtain a firm commitment, supported by adequate resourcing, that substantive engagement with First Nations claims researchers *specifically* was a priority and would take place.

In the second half of 2020, Treasury Board indicated that five national Indigenous organizations would be invited to participate in some form of engagement and that other Indigenous organizations and groups would be contacted to discuss approaches and timelines for them to participate. While the NCRD continued to receive assurances at meetings that an engagement process would be established on the impacts of Canada's access to information regime on First Nations claims researchers similar in scope to previous engagement related to Bill C-58, claims researchers continued to stress the need for adequate time for such a process to take place, rather than being subject to narrow timeframes that falls short of the minimum standard for engagement set out in the UN Declaration. Communications throughout 2021 to the spring of 2022 did little to advance this engagement; rather, they pointed research directors to existing public consultation processes and deadlines.

The majority of respondents to our survey indicated that their organizations had not been contacted by Treasury Board or the Department of Justice, or they were not sure if engagement had occurred. Approximately one-third of respondents indicated they had attended NCRD meetings at which Treasury Board and Department of Justice representatives presented information on their respective legislative reviews, but that the presentations "did not appear to be productive," largely because these were viewed as information-sharing sessions rather than substantive engagement.

In late spring 2022, Treasury Board and Department of Justice worked together to streamline funding to support the NCRD's proposal to prepare and carry out a national survey, conduct a legal review, and conduct further research, culminating in a discussion paper to be completed by the end of October 2022. The need to accommodate Treasury Board's timelines regarding preparing its own report to parliament, and evasive and inconsistent communications regarding the exact nature and timeframe of departmental processes, curtailed any prospect of meaningful engagement in the years since Bill C-58's passing. It is imperative that such engagement take place with both Treasury Board and the Department of Justice without delay to address the concerns highlighted in this paper and adhere to Canada's reconciliatory mandate and uphold First Nations' human rights.

RECOMMENDATIONS

The NCRD makes the following recommendations to ensure First Nations' full and fair access to justice for resolving their historical claims against the Crown. These recommendations are informed by the foundational principles of upholding First Nations right to fair, independent, impartial, open, transparent, and timely processes of redress for historical grievances that respect Indigenous laws, their right of data sovereignty, and engage with them in good faith to obtain their free, prior, and informed consent. Our recommendations also rely on Canada upholding the honour of the Crown and acting on its reconciliatory mandate by recognizing its conflict of interest in controlling information held by government institutions that First Nations require to proceed with historical claims against the Crown, and taking immediate steps to eliminate it.

1. Human rights principles such as self-determination, respect for First Nations rights and title holders, and obtaining First Nations' free, prior, and informed consent must be incorporated into and underpin all processes for developing, reviewing, and amending federal access to information and privacy legislation and associated regulatory and administrative processes.
2. Canada's conflict of interest in controlling First Nations' access to records they require to substantiate their claims against the Crown must be fully eliminated. Since Canada's conflict of interest in managing and funding the specific claims process and assessing First Nations specific claims extends to its control of access to information held by federal institutions, Treasury Board and Department of Justice must work in full partnership with First Nations and their representative organizations to work toward developing a new information management regime as part of a new Independent Centre for the Resolution of Specific Claims. The new information management regime must uphold First Nations rights as articulated under the UN Declaration, including the right of First Nations' data sovereignty.
3. In the interim, Canada must recognize its duty of full disclosure and uphold the honour of the Crown by working in full partnership with First Nations to develop a mechanism of independent oversight that ensures First Nations' full and timely access to records held by federal government institutions for purposes of substantiating historical claims.
4. Canada must take immediate steps to make First Nations claims researchers' requests for access to information held by federal government institutions a priority by hiring additional dedicated staff to expedite existing and impending requests as soon as possible.
5. Canada's information analysts and staff must be informed about First Nations specific claims and First Nations' rights of redress and information rights, as well as the imperative of Crown-Indigenous reconciliation. They must also be instructed that they too are required to uphold the honour of the Crown.
6. Canada must remove the $5 application fee for First Nations claims researchers making requests for records under the *Access to Information Act*.
7. Canada must uphold First Nations' right of data sovereignty and remove any provisions that restrict First Nations' use of their own information obtained by federal institutions.

8. Canada must take immediate steps to make meaningful, direct dialogue with First Nations and their representative organizations a priority from the outset of all future policy work. Engagement that occurs as an afterthought with unrealistic time constraints or is under-resourced fails to uphold the transparency, due process, and full enactment of the government-to-government approaches articulated within the UN Declaration.