

# Bill C-27: The Digital Charter Act, 2023 and First Nations Rights

Brief by the Assembly of First Nations  
to the Parliamentary Standing Committee  
on Industry and Technology

October 2023

## Introduction

The Assembly of First Nations (AFN) is the national advocacy organization for First Nations Chiefs in Canada. The AFN advocates First Nations interests for more than 600 First Nations from across the country, taking direction and fulfilling mandates as directed by First Nations-in-Assembly through resolutions. The AFN seeks to advance First Nations Inherent and Treaty Rights through the development of policy, public education and where applicable, the co-development of legislation to build First Nations capacity. The AFN was created out of a desire among First Nations leadership for a strong and effective collective advocacy organization. From this, values such as respect for human rights, diversity, justice, and the sovereignty of each rights-holding First Nation guide the work of the organization. Several resolutions of the AFN provide direction on First Nations' right to data sovereignty. This Brief has been prepared by the AFN to bring to the attention of the Parliamentary Standing Committee on Industry and Technology (the Committee) the deficiencies of the consultation process and specific problems with The Digital Charter Act (Bill C-27), and to record First Nations' objections.

First Nations share many of the same concerns as Canadians about potential abuses of personal information and artificial intelligence and data (AI). There is a legal obligation on Canada, however, to balance First Nations rights with the legitimate desires of the government to protect Canadian citizens from the worst of the digital age. First Nations hold a right to data sovereignty, which is essential to the realization of other rights including rights to self-determination and self-government. Bill C-27 infringes these and other rights in both the process of its development and its substance. The process is flawed because there was no Nation-to-Nation consultation between Canada and First Nations. As a result, the Minister did not hear First Nations, does not understand First Nations, and it shows in the legislation. The Consumer Privacy Protection Act, for example, does not consider collective harms to First Nations particularly regarding consent provisions and use of de-identified data. The Personal Information and Data Protection Tribunal Act impinges First Nations rights to self-government, and the Artificial Intelligence and Data Act and the Voluntary Code of Conduct Relating to Advanced Generative AI Systems (Voluntary Code) do little to assure First Nations that their individual and collective rights will be respected by commercial interests or governments.

Ultimately, it is up to each First Nation to exercise their data sovereignty in keeping with their own world views, and thus only they can speak definitively to required amendments. Such amendments might include fulfilling the legal and moral duties to consult and cooperate with First Nations, adding a non-derogation clause, removing the authority of the Tribunal and the Office of the Privacy Commissioner over First Nations, and constraining the authority of the Minister and various Departments to develop and use AI and enforce the law.

Litigation by First Nations is likely if the Crown fails to meet its obligations, which could result in the suspension of the legislation entirely. Litigation is expensive, and the Crown loses more

times than not. Better to get it right the first time and meet everyone's desires for a safe and secure digital future.

## Data Sovereignty

Before turning to the specifics of Bill C-27, it is important to understand First Nations data sovereignty. Data sovereignty is the right of nations to own and govern data about the nation, its citizens, and resources. Canada holds this right as do First Nations. First Nations generally describe data sovereignty to include the right to own, control, access, and possess their data. The First Nations Principles of OCAP<sup>®</sup>, trademarked by the First Nations Information Governance Centre for the benefit of all First Nations, are implemented by First Nations in keeping with their own world views. AFN Resolution 54/2016, *OCAP<sup>®</sup> Training Prerequisite for all Federal/Provincial/Territorial Government Employees and Researchers*, highlights Articles 15, 18, and 19 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) when it stipulates that:

First Nations people have the right to determine and make decisions regarding the circumstances in which information is collected about them and how this information is used and shared. Most importantly, First Nations people must be able to determine the ways in which external governments and researchers have access to such data, based upon appropriate mandates and protocols of First Nations communities themselves.

Data in this paper is defined to include data about First Nations, data from First Nations, and data about First Nations lands, waters, and resources. Data includes, among other things, information, knowledge, and statistics, as well as intellectual property, and creative expressions. AFN Resolution 42/2018, *Data Sovereignty* draws on UNDRIP Articles 4 and 34 to reassert that:

First Nations living in Canada maintain ownership and control over data that relates to their identity, their people, language, history, culture, communities and Nations, both historic and contemporary, and that each Nation will establish regulations to govern their data, determining how it will be managed, accessed, and shared with other governments, organizations, and individuals.

The Committee is encouraged to recall that Canada has adopted the *United Nations Declaration on the Rights of Indigenous Peoples Act* (UNDA), which requires the Government of Canada to, “in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration” (section 5). The United Nations Declaration on the Rights of Indigenous Peoples Act Action Plan (Action Plan) was adopted by the Federal Government in June 2023 to fulfill section 6 of the UNDA. This Action Plan lists priority activities to “ensure a Canada where, respect for Indigenous rights is systematically embedded in federal laws and policies developed in consultation and cooperation with Indigenous peoples affected by them” (Introduction to Shared Priorities,

Action Plan). The cross-cutting priority area of work in the Action Plan on self-determination, self-government and recognition of treaties (Articles 3, 4, 37 of UNDRIP) includes continued support to “Indigenous Data Sovereignty and Indigenous-led data strategies through legislative, regulatory and policy options” (Action #30, Action Plan). First Nations need to exercise their rights of data sovereignty and Canada has agreed to honour and facilitate the right. This legislation can help or hinder, and in its present form it is a hindrance.

## Process

The first problem with the legislation is the way it has come to stand before the Committee. The legislation was crafted without the due “consultation and cooperation” of First Nations as is the minimum requirement outlined in Article 19 of UNDRIP, which reads in full,

States shall consult and cooperate in good faith with the [I]ndigenous 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.

Canada has agreed many times internationally and domestically to honour its obligations in this regard, including its unqualified endorsement of UNDRIP and the proclamation of the UNDA. The broad public consultations employed by Innovation, Science, and Economic Development Canada (the Department) do not meet this standard. Consultation on Bill C-27 between June and September 2018 consisted of a series of meetings involving almost 600 peoples drawn from “a broad cross-section of society” (Innovation, Science, and Economic Development Canada, September 28, 2023, <https://rb.gy/w1s5k>). Consulting on the Voluntary Code consisted of “roundtables with stakeholders with expertise and experience in this area, including Canada's Advisory Council on Artificial Intelligence, and representatives from academia, civil society, Canada's AI research institutes, and industry” (Innovation, Science and Economic Development Canada, September 28, 2023, <https://rb.gy/ojtc2>). Stakeholders are not rights holders, no matter how expert or experienced and limited engagement with some Indigenous individuals or representatives does not meet the legal and moral duty to conduct Nation-to-Nation consultation. The recognition of First Nations rights requires an understanding of First Nations issues and concerns and the adaptation of the Bill as necessary to protect First Nations' rights. Without the benefit of consultation, claims by the Department to have heard First Nations concerns ring hollow, and it shows in a Bill that is frightening in its potential for abuse of First Nations rights.

There is likely much that First Nations would support in this legislation. There are, however, impediments to First Nations rights that must be reconciled before the legislation meets the standards of UNDRIP, the Constitution, and the UNDRIP Act. At the very least, before this legislation is proclaimed, time and effort must be made to consult and cooperate with First

Nations to obtain their free, prior, and informed consent to the legislation and administrative measures. In addition, while First Nations await possible amendments to the *Interpretation Act*, a non-derogation clause added to each Act under the Bill would provide some small comfort.

## Substantive elements

Had the Minister met his obligations to consult, the elements of the legislation that infringe First Nations rights could have been addressed. As it is, there are multiple problems. In fact, each Act contained in Bill C-27 has flaws. The Consumer Privacy Protection Act does not account for the risk of harm to First Nations collective rights from the de-identification of individual data, the aggregation of individual de-identified data, and research using First Nations data without First Nations consent. The Personal Information and Data Protection Tribunal Act (Tribunal Act) does not recognize First Nations rights to self-government and data sovereignty, and the Artificial Intelligence and Data Act and the recently produced Voluntary Code are sops to commercial interests, do not sufficiently limit the potential for abuse by governments, and has little regard for the potential risks to First Nations' collective rights and interests. It is not possible to explore each of the issues in detail. This is a Brief by name and nature, and thus the AFN refers the Committee to detailed studies of the *Personal Information and Electronic Documents Act* and the federal privacy regime as a whole undertaken by the First Nations Information Governance Centre, which are available on their website: [www.fnigc.ca](http://www.fnigc.ca). As will be seen below, some of the problems with existing legislation have been carried over into the new Bill.

### Consumer Privacy Protection Act

First Nations are affected by this legislation in four ways. First, as individuals; second, as commercial entities; third, as federal works, undertakings, or businesses; and fourth as Nations.

The legislation rightly addresses the data privacy concerns of individuals, which is essential in the digital age. This Brief focusses instead on the impacts on First Nations commercial entities, as a federal work, undertaking or business, and as a collective Nation.

The potential risks to First Nations collective rights that may arise in using our citizens' personal data are not addressed in this legislation. The risk comes when data taken from individuals is de-identified and/or aggregated. The risk is expected to be tempered with consent, but there are circumstances laid out in the Bill where consent is not required. When data is de-identified it may be used by commercial interests, organizations and federal works, businesses, and undertakings for internal research, analysis, and development (s. 21), prospective business transactions (s. 22) and "socially beneficial purposes" (s. 39). First Nations identifiers like postal codes or Indian status can be used with de-identified sensitive information like health records or banking information to gather data at a population-level. In these instances, the data could be used to enrich commercial interests and the Crown, profile individuals and communities, or

impose on First Nations foreign concepts of “socially beneficial purposes,” such as was the case with Residential Schools. First Nations adopted the OCAP® Principles to counter these types of threats, and the Minister would have known this had he consulted with First Nations as required. As it is, the legislation offends the OCAP® Principles because it moves control over and access to First Nations’ data out of the hands of the First Nations, and without their consent.

The legislation is confusing and costly in its application to First Nations as “commercial entities or federal works, undertakings, or businesses.” First Nations must determine in what capacity they are operating and must determine whether provincial or federal law applies to the circumstances at hand. In *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees’ Union* the First Nation was deemed to be operating a provincially regulated activity (a day care service) and not acting as a federal work, undertaking, or business and therefore the provincial privacy legislation applied. First Nations in Alberta, B.C., or Quebec must apply provincial laws in some instances and federal law in others. The implementation costs, ongoing compliance costs, and the potential liability for violations are another significant consideration for impoverished First Nations. Complying with the legislation can draw heavily on First Nations time and financial capacity, and take away from priorities like housing, clean drinking water, and education, thereby intruding on First Nations right to self-determination.

Possible solutions to amend the legislation might be found in the Province of BC’s *Anti-Racism Data Act* which requires consultation and collaboration with First Nations in certain circumstances thus curtailing the potential for abuse. In addition, or alternatively, Section 12 could be amended to instruct the courts to consider the First Nations Principles of OCAP®, First Nations rights, and the risk to First Nations when considering questions involving the process for gathering and the use of First Nations data. A non-derogation clause is another option, but this alone may engender more confusion than clarification with respect to the use of de-identified data. First Nations and the Minister can determine the best way forward in consultation and cooperation.

### [Tribunal Act](#)

This section of the Bill is a direct affront to First Nations rights to self-determination, self-government, and data sovereignty. PIPEDA was bad enough with the federal Privacy Commissioner holding authority over First Nations governments. This legislation compounds the issue with the creation of a new Tribunal which also has authority to direct First Nations governments. By right of self-determination and self-government, First Nations have sole decision-making authority over their data and how it may be used, shared, disposed, interpreted, accessed, etc. In many instances, a First Nations government may be operating a commercial interest, organization, or federal work, undertaking, or business; without recognition of their data sovereignty they will be treated as any other such entity. This is an overstep of federal authority and must be rolled back.

The ultimate solution is found in respect for First Nations rights. The federal government has committed to ongoing funding to First Nations to enhance their data sovereignty. In the short term, First Nations will need federal funding to come into compliance with the legislation, and in the long term, will require funding and other capacity building to develop and implement their own data governance regimes built on their own worldviews. For example, a First Nations Privacy Commissioner that reports to First Nations could be established to work in conjunction with federal and provincial counterparts, but that is for First Nations to determine.

### Artificial Intelligence (AI)

The implications of AI to First Nations, in fact to all humanity, are little studied and yet this legislation empowers the continued development of AI with little restriction. Canada's Voluntary Code announced September 27, 2023 provides little additional comfort to First Nations.

First Nations have legitimate concerns about the use of AI. This includes concerns about the growing trend of surveillance capitalism, past experiences with racial and ethnic profiling, and human rights abuses. First Nations have been treated as criminals when they try to open bank accounts and they have been subject to racial profiling in the health sector, by police, and government officials. Imagine the potential for such abuse to continue or even worsen when biased and prejudiced individuals and organizations are building AI systems that will implicate First Nations. This Bill and a Voluntary Code do little to reassure First Nations.

First, the delegated authority to an Artificial Intelligence and Data Commissioner to administer and enforce the Act is insufficiently independent from the Minister. Canada has a habit of putting commercial interests ahead of First Nations rights and putting this legislation in the hands of a Commissioner who reports to the Minister of Innovation, Science and Economic Development is cold comfort. An independent Commissioner who respects First Nations rights to self-government is required.

Second, the non-application of the legislation to certain departments is chilling. National Defence, the Canadian Security Intelligence Service, and the Chief of the Communications Security Establishment are all exempt from the legislation; so is "any other person who is responsible for a federal or provincial department or agency and who is prescribed by regulation" (section 2(2)). It is in the Crown's sole discretion to determine under regulations which persons, departments or agencies are exempt. Might it be the RCMP and provincial police forces? Might it be the Canadian Border Services Agency? Might it be Crown-Indigenous Relations and Northern Affairs Canada? First Nations are left to wonder and worry because it is precisely these tools of the colonial government that have been used to oppress First Nations in the past. If there is any doubt about this, reflect on the Kanyen'kehà:ka at Kanesatake who clearly remember the day the army moved in to suppress their legitimate complaints, the collective failure to protect Indigenous women and girls, the collection of Indigenous children by the RCMP to remove them to Residential Schools, and the chilling effect of Harper's

Government direction to Indigenous and Northern Affairs Canada to ramp up surveillance on First Nations individuals and communities. These are fresh in the minds of First Nations, who fully expect that future governments will be tempted to use the powers offered in this Bill to their detriment. These powers must be curtailed before the legislation is passed.

As with the rest of the Bill and in fact the entirety of Canada's privacy regime, the focus is on the individual. The definition of harm in this Act is focussed solely on harms to the individual (subsection 5 (1)). Certainly, individuals need to be protected, but so do First Nations in the exercise of their constitutionally protected collective rights. AI has the potential to destroy First Nations' cultures, threaten First Nations' security, and increase demand for our resources. Collective rights to be free from discrimination, to live in freedom, peace, and security, to protect our cultures, language, and intellectual property, etc. must be considered when regulating AI. This Bill fails to do that.

Again, consultation and cooperation with First Nations is the best way forward. This will ensure that First Nations are able to offer their free, prior, and informed consent in regulating the cutting edge of AI development and so the Minister can appropriately mitigate risks to First Nations rights.

## Conclusion

First Nations hold rights to data sovereignty—to own, control, access, and possess their data in keeping with the own worldviews. This legislation offends those rights. Canada has committed morally and legally to seek consultation and cooperation with First Nations to obtain First Nations' free, prior, and informed consent to adopt or implement legislation or administrative measures that impact First Nations' rights. There has been no such consultation, there has been no opportunity for cooperation, and First Nations do not have the capacity or inclination to extend their free, prior, and informed consent to this legislation. Without the necessary consultation and cooperation, the Minister is unaware of First Nations concerns and has thus failed to take them into account in this Bill. The result is a disturbing abuse of power to further impose colonial rule, disregard First Nations rights and interests, and expose First Nations to potential grievous harm.

This legislation cannot stand as it is. The best solution is for the Minister to meet his obligation to Nation-to-Nation consultations with First Nations and obtain their free, prior, and informed consent. Failing that, the Minister must clarify that the Act cannot be interpreted or applied in such a fashion as to derogate from First Nations rights.